REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSIAH D. PULSIFER,
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. CHARLES W. WALTON.

HON. JONATHAN G. DICKERSON, LL. D.

HON. WILLIAM G. BARROWS.

HON. CHARLES DANFORTH.

HON. WILLIAM WIRT VIRGIN.

HON. JOHN A. PETERS.

HON. ARTEMAS LIBBEY.

ATTORNEY GENERAL,

HON. LUCILIUS A. EMERY.

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IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

AMASA HOWE *et al. vs.* GEORGE F. WHITNEY *et als.*

Aroostook, 1876.—August 5, 1876.

Equity.

Before a judgment creditor can resort to a court of equity to aid in the collection of an execution, he must show that all legal remedies have been exhausted.

To entitle him to maintain a bill, he must show that judgment has been rendered, execution issued, and that an officer has returned thereon *nulla bona.*

Where judgment was obtained in 1870, but no execution shown to have been placed in the hands of an officer; and the execution was renewed eight months after the death of the judgment debtor, and placed in the hands of an officer, who returned it unsatisfied, it was *held* that the plaintiff had not so exhausted all legal remedies as to entitle him to maintain a bill.

BILL IN EQUITY against these defendants to enforce the collection of a judgment against one Jeremiah Whitney, recovered February 7, 1871, for $349 debt, and $17.26 costs, and still in force, alleging sale by him to the defendants of real estate in fraud of creditors; that he died in March, 1873, intestate and without any property, and that November 28, 1873, an alias execution was issued, and returned December 3, 1873, with a certificate of the officer that he had made diligent search for property belonging to Jeremiah Whitney and found none, and returned the exe-

cution wholly unsatisfied. The bill prayed for a decree of the sale of the property or sufficient to pay, or other proper relief. The evidence tended to prove the foregoing facts, and others stated in the opinion.

A. W. Paine, for the plaintiffs.

J. Mulholland, for the defendants.

APPLETON, C. J. This is a bill in equity brought by the plaintiffs, creditors of Jeremiah Whitney, to enforce the collection of a judgment recovered against him by the sale of certain real estate conveyed by him to these respondents in fraud of his creditors.

At the February term, 1871, in Aroostook county, the plaintiffs recovered judgment against Jeremiah Whitney, and execution issued thereon for $349 debt, and $17.26 costs of suit. It does not appear, nor is it alleged, that this execution was ever placed in the hands of an officer.

In March, 1873, said Whitney died. On November 28th, 1873, an alias execution issued and was placed in the hands of an officer who made thereon the following return: "Aroostook, ss., December 3, 1873. I certify that I have made diligent search for property belonging to Jeremiah Whitney within named, to satisfy this execution and found none and return it wholly unsatisfied."

Courts of equity are not for the collection of debts, though resort may be had to them after all legal means have been exhausted. If the plaintiffs had brought their bill without instituting an action at law, it will not be pretended that they could maintain it, because it could not appear that legal means for enforcing the payment of the plaintiffs' claim might not have been efficacious.

Neither could a bill be maintained, if commenced during the pendency of a suit at law; for, until judgment, it could not be known that the plaintiffs would prevail. *Griffin* v. *Nitcher*, 57 Maine, 270.

But, judgment obtained, the plaintiffs in the suit at law must exhaust their legal remedies, before they can ask the aid of this court. The plaintiffs have offered no evidence to show that their execution was placed in an officer's hands for enforcement during the life of

the judgment debtor. "When an attempt is made by a process in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, the bill should state," observes Shepley, J., in *Webster* v. *Clark*, 25 Maine, 313, "that judgment has been obtained, and that execution has been issued, and that it has been returned by an officer without satisfaction." In *Webster* v. *Withey*, 25 Maine, 326, the same learned judge remarks: "His execution has not been placed in the hands of an officer who has made a return upon it that he could not obtain satisfaction. Such an allegation with proof was held to be necessary in the case of *Webster* v. *Clark*, decided at this term, to entitle a creditor to come into a court of equity for relief." This court affirmed these views in *Corey* v. *Greene*, 51 Maine, 114, and in *Griffin* v. *Nitcher*, 57 Maine, 270.

The judgment creditor could not enforce the execution against his deceased debtor. Nor can it be made to appear by the return of an officer eight months after the death of the judgment debtor that the execution could not have been collected of him while living, unless a return that no property of a deceased debtor could be found to satisfy an execution renewed eight months after his decease is to be deemed equivalent to a return of *nulla bona* in an execution against one in full life and vigor.

The plaintiffs, failing to show they have exhausted their legal remedy, cannot maintain this bill.

Bill dismissed with costs for defendants.

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

CATHARINE M. ADAMS *vs.* JAMES H. BLETHEN.

Aroostook, 1876.—February 7, 1877.

Promissory notes.

The liabilities implied by indorsing a note can be qualified or restricted only by express terms.

The payee of a negotiable note who signed his name on the back of it under the words: "I this day sold and delivered to Catharine M. Adams the within note," may be held as an indorser of the note in a suit thereon in the name of Catharine M. Adams.

On report.

Assumpsit against an indorser of a note of the following tenor: "Linneus, May 30, 1873. I promise to pay James H. Blethen or order $137.50, at 10 per cent. interest, on demand.

(Signed,) Ebenezer Tozier."

On the note was this indorsement: "I this day sold and delivered to Catharine M. Adams the with not.

(Signed,) James H. Blethen."

The plaintiff testified in her direct examination, in substance, that the maker refused to pay the note, and that immediately thereafter, and not more than four or five days from her first possession of it, she notified the defendant of the demand and refusal, and of her intention to hold him as indorser. On the cross-examination, among other things, she testified that she took the note from Blethen on the thirteenth of May, and as near as she recollects demanded it of Tozier about the eighteenth, that she did not remember the year, or whether it was 1872 or 1873.

The presiding judge ruled as matter of law, that under the indorsement upon the face of the paper the defendant was not liable as an indorser, and excluded evidence offered by the plaintiff that the agreement between the parties was that the defendant should be liable.

After the evidence was out, the action was withdrawn from the jury and submitted to the law court. If the action was maintainable, it was to stand for trial; if not, the plaintiff to be nonsuit.

J. C. Madigan & J. P. Donworth, with whom was *W. M. Robinson & J. B. Hutchinson*, for the plaintiff.

L. Powers, for the defendant, contended that the indorsement not being in blank, but in full, contained the whole contract and left nothing to implication; and also that the evidence of the plaintiff showing demand and notice before the note was due, and not after, was not sufficient to entitle her to maintain the action.

Peters, J. The defendant, payee of a negotiable note, signed his name on the back of it under these words: "I this day sold and delivered to Catharine M. Adams (plaintiff) the with not."

We think that the defendant thereby assumed all the liabilities of an ordinary indorsement of the note. No word in the writing indorsed upon the note negatives or qualifies such an idea. The liabilities implied by indorsing a note can be qualified or restricted only by express terms. Here the only restriction is, that the indorsement is made special to Catharine M. Adams. The defendant declares that he sold and delivered the note. Every indorser of a bill or note impliedly says the same thing by his indorsement. The defendant did sell and deliver the note, and by making that declaration over his name on the back of it, he also agreed to pay the note to the plaintiff according to its tenor, upon seasonable notice, if the maker did not pay it. His contract is in part expressed and in part implied. Any indorser of a note may be properly styled a seller of the note by him indorsed.

The counsel for the defendant contends that, inasmuch as a complete contract of mere sale is set out in express terms, no more than a sale can be implied. But implied undertakings are annexed to many written contracts, and especially to those declared in short and imperfect terms. The warranty of title to a thing sold is rarely expressed, but usually implied, in a written contract of sale. Many illustrations of the principle could be given.

There is evidently some error in the report or the testimony, about the date of the demand and notice claimed to be proved by the plaintiff, which can be corrected upon a new hearing.

The action to stand for trial.

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

ISAAC HACKER *vs.* LEWIS B. JOHNSON.

Aroostook, 1876.—February 7, 1877.

Replevin.

Replevin cannot be maintained by one copartner for copartnership goods, although they are in the hands of the officer under an attachment of another copartner's interest therein.

Where the interest of one of two partners in partnership property is attached upon a demand against him alone, and the other partner replevies, in his

own name, the property from the possession of the officer, and a nonsuit is ordered in the action of replevin, the defendant in such action is entitled to an order for the return of the articles replevied, although the plaintiff in the replevin suit offers to show the insolvency of the copartnership and the insufficiency of its assets to pay its own debts.

But such insolvency may be shown in an action on the replevin bond, if neither side has beforehand taken proceedings to have an account of the partnership affairs settled by a court of equity.

On exceptions.

Replevin for goods attached by the defendant as sheriff on a writ of mesne process in favor of Thomas W. Daniel *et al. v.* James A. Flint and Charles W. Johnson, January 29, 1874. The officer's return showed an attachment of the property of the "defendant Flint, his share and interest as partner, with Isaac Hacker." The case was made law on report; and it appearing that while the action was in the name of Hacker alone, the goods replevied were the partnership property of Hacker and one Charles W. Johnson, the full court at the law term 1875, ordered "plaintiff nonsuit." The defendant thereafter filed a motion for return of the goods replevied, waiving all claim to damages. The plaintiff objected to a return and offered to prove in substance the following facts: The goods replevied in the suit, Isaac Hacker *v.* Lewis B. Johnson, belonged to Isaac Hacker and James A. Flint, partners in trade, and were copartnership property; though valued by the attaching officer at $3670.70, their real value was not more than $3400. The aggregate amount of values of goods and money on hand, and demands and notes due the firm was $5929.83. The indebtedness of the firm to all other persons than Hacker & Son at the time of attachment and replevin was $5568.92. The firm was indebted to Hacker & Son $5891.75, besides a balance of interest of $866, making the total indebtedness of the firm $12,326.67. Flint owed the firm $1636.26. The plaintiff was solvent. The goods replevied were placed back in the store, and with the exception of a few remnants, sold for the benefit of creditors, and the proceeds have gone to pay the debts of the firm. The indebtedness of Flint is still unpaid.

The court, on the defendant's objection, excluded the testimony and ordered a return, and the plaintiff alleged exceptions.

A. W. Paine, for the plaintiff.

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

PETERS, J. The goods in question belonged to the copartnership of Hacker & Flint. The defendant, an officer, attached the interest of Flint in the goods upon a writ in which was sued a demand against Flint alone. Thereupon Hacker, the copartner, replevied the goods in his own name. The decision of this court has already been that the action of replevin cannot be maintained, and a nonsuit was ordered. The plaintiff now moves against a return of the goods to the officer, offering to show the firm of Hacker & Flint to be insolvent, and Flint's interest to be worth nothing, and claiming that on that account a return would be a useless ceremony and of no value to any party concerned.

There is no doubt that all the interest in the goods that could be taken by the officer was only the right and interest of the debtor Flint therein, after all the partnership liabilities, (including a settlement of the private accounts of the partners,) have been adjusted and paid out of the partnership property and fund. Formerly another mode of remedy prevailed. That is, the private creditor of one partner could take the undivided portion of the partnership goods that belonged to such partner by numerical division. This court, in early cases, has shown some inclination to favor the application of such a rule, though it has never been adopted, perhaps in any case, in its full extent. See remarks of Wells, J., in *Thompson* v. *Lewis*, 34 Maine, 167, 170. There are several decisions permitting a remedy that bears some affinity to it. Thus in the case cited and in several similar cases, it is held that where one summoned as trustee discloses that he is indebted to a firm of which the principal defendant is a partner, he will be charged unless some interposing claim be made to take precedence of the claim of the creditor of a single partner. Further than this, the court would not now be likely to go. The old doctrine of attaching moieties of interest in personal property, in cases of partnership, has been swept away. All the modern text writers, and almost all the courts, are against it. The cases bearing upon the subject are too numerous to be named. The modern author-

ities quite universally affirm the modern rule. And it results from adopting as a principle in law what was formerly only regarded as a rule in equity; namely, that each partner has a lien upon the partnership property for his own indemnity against the partnership debts, and for any amount due him over and above what may be due his copartners out of the joint effects. Therefore all the legal interest in partnership property now attachable on a debt of one of the partners is such partner's share subject to all such claims and liens. Nor do we understand that the counsel for the defendant claim more than this, upon their brief.

The manner in which an individual creditor may attach or levy on the property of a firm in which the debtor is a partner, so as to make the attachable interest available to him, has been a great deal discussed and variously determined by different tribunals. Difficulties beset almost any view of it. Our own court has taken somewhat of a middle ground in the matter. By some courts, it is held that an actual possession of the goods cannot be taken by the officer upon the writ or execution, so as to keep the copartners out of possession, but that a merely constructive possession is allowable, by means of which the officer can sell the indebted partner's interest in the whole partnership property or fund; and that, if an officer takes an actual and tangible possession of the goods, the partners (all joining) may replevy them. But in this state, in *Douglas* v. *Winslow*, 20 Maine, 89, it is distinctly decided, that an officer can make an actual attachment of the debtor's interest in the goods and hold the entire property in his hands on account of the interest so attached, subject to the paramount claims of the creditors of the firm. When a sale is made on execution, probably a constructive and partial, and not an exclusive, possession thereof would be given to the purchaser; such a possession as would not be incompatible with the right of possession belonging at the same time to all the members of the firm.

Taking this view of the relative rights of the parties, and the plaintiff offering to show that the firm is an insolvent one; still, there are reasons why a return should now be ordered without a hearing upon the plaintiff's petition, the defendant not assenting to a hearing of the kind proposed.

In the first place, the creditor is not presumed to be ready, in this litigation, to contest the question of the insolvency of the firm. The position of the plaintiff was, no doubt, a surprise to him, and he could not reasonably he expected to be prepared with the necessary proofs. In the next place, he may never have an occasion to do so. There is a contingency in the way. He may not recover judgment in his suit. And, if he obtains judgment, he may not desire to sell the debtor's interest. He may find other property of the debtor's to proceed against, and avoid the uncertainties and complications attending this. In the next place, the debtor's interest may sell at auction for something, whether the firm be insolvent or not. Other legitimate considerations besides the question of solvency or insolvency, may induce a person to buy. In the next place, the creditor who is interested in the present litigation, may not continue to be so. Some other person may be the purchaser at the sale and become the party having the only interest to investigate the standing of the firm. And above all, the creditor or purchaser has a right to have an opportunity of having an account of the partnership affairs settled by a court of equity. The decided balance of authority determines that the creditor is entitled to have this account taken after the sale, unless the debtor elects to have it before the sale, by application on his part to a court of equity therefor, which he would probably have the right to do. *Cropper* v. *Coburn*, 2 Curt. C. C. 465. See cases there cited. Story on Part. § 264, *et seq.* See also instructive note in 3 Kent's Com. 79, any of the later editions.

It is therefore clear that the return was properly ordered. The plaintiff had no right of possession at the time of the trial, nor has he had any such right since. The cases relied upon by the plaintiff do not strictly apply. *Ingraham* v. *Martin*, 15 Maine, 373.

But there can be no good reason why the present plaintiff cannot be heard upon the question now urged by him, when, if at all, he becomes sued upon the bond. The creditor will have had an opportunity of first seeking an account of the partnership affairs in a court of equity. It will then be unreasonable for the question to be longer postponed. Judge Story and other authors

thought a court of law to be inadequate to take such an account. Story Part., § 262. Kent's Com. before cited. But courts of law have now more practical power for such purposes than they once had. Formerly, in this state, auditors were appointable only by the consent of parties. R. S. 1841, c. 115, § 49. Now the court can appoint them in any case involving accounts. The authorities permit a defense of this kind, in analogous cases, to be set up in an action on the replevin bond. *Bartlett* v. *Kidder*, 14 Gray, 449. *Witham* v. *Witham*, 57 Maine, 447.

Exceptions overruled.

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

FREDERIC SPOFFORD, petitioner for certiorari, *vs.* BUCKSPORT & BANGOR RAILROAD COMPANY.

Hancock, 1875.—August 4, 1876.

Railroad. Railroad Commissioners. Certiorari.

Under R. S., c. 51, §§ 2 and 3, the purposes for which a railroad corporation has the power to take and hold lands as for public uses, for the location, construction and convenient use of its railroad, are for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight houses.

The statute gives the railroad commissioners jurisdiction only in case of disagreement between the parties as to the necessity and extent of the real estate to be taken for side-tracks, depots, wood sheds, repair shops and car, engine and freight houses; and they have power only to determine the necessity and extent of the real estate to be taken for these purposes, having in view the reasonable accommodation of the traffic and appropriate business of the corporation.

The jurisdiction of the railroad commissioners being given by statute, and the petition presented to them being the foundation of their action, they obtain jurisdiction only when the petition presents a case within the provisions of the statute.

To give them jurisdiction the petition should contain a description of the estate which the corporation claims to take, naming the persons interested therein, with averments that the corporation claims to take it for some one or more of the purposes specified in the statute and that the parties do not agree as to the necessity and extent of the estate, described, to be taken for the purpose or purposes named. The petition to the railroad commissioners in this case, not containing these averments either in form or substance; *held*, not sufficient to give them jurisdiction.

The railroad commissioners, in their adjudication, adjudged and determined that so much of said real estate, as is first described in their return, "is necessary for the use of said Bucksport and Bangor railroad company for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight houses, and for the reasonable accommodation of the traffic and appropriate business of said corporation." *Held*, that they exceeded their powers under the statute; that they had no power to adjudge the estate necessary, and condemn it, for tracks as distinguished from side tracks, nor for the general uses of the corporation in addition to the uses specified in the statute.

The land which the corporation claimed to take for a gravel pit was described, in its petition to the railroad commissioners, as comprised within a space or limit of fifteen rods square; the land condemned by the commissioners for that purpose was not comprised within that space or limit. *Held*, that they had no power to condemn land not described in the petition; that in so doing they exceeded their jurisdiction.

Where, in a petition for certiorari, it appeared that a substantial wrong had been done to the petitioner, that his estate had been taken by the respondents without a compliance with the requirements of law, and where the case as presented, showed no such laches on the part of the petitioner as to deprive him of his remedy; *held*, that the petition being addressed to the discretion of the court, to be exercised in accordance with the established rules of law, the writ of certiorari should be issued as prayed for.

ON REPORT.

PETITION FOR CERTIORARI as follows:

"Frederic Spofford, of Bucksport, in the county of Hancock and state of Maine, respectfully represents that the railroad commissioners of said state, under and by virtue of a written petition to them addressed by the Bucksport and Bangor railroad company, did undertake to set out, and did declare and determine, that a large tract of land owned and possessed by petitioner, consisting of eighteen acres or thereabouts, partly consisting of flats below high water mark, and partly of upland in said Bucksport, was necessary for the accommodation of said railroad, said parcel including a large and valuable wharf; and said railroad commissioners did act, and attempt to adjudge, in the premises, so as to condemn for the use of said railroad, and take from petitioner, this large tract of land, all which appears from the record of said petition and the doings of the said commissioners thereon, made by said commissioners, and in court to be produced or a copy thereof, and hereby made a part of this petition as if fully set forth herein.

And that said railroad commissioners had no lawful right or authority or jurisdiction in the premises, to determine and adjudge in the premises as they did, or attempted to do, and to deprive petitioner of his land, or the possession thereof, or use of the same, and that their proceedings were wholly illegal, insufficient, and without jurisdiction, and void, and ought to be quashed by due process of law, and for the reasons as are hereunto annexed and made a part of this petition.

Your petitioner prays this honorable court, to issue its writ of certiorari, directing said railroad commissioners to bring up and certify their said proceedings in full, including said petition, and their acts under it, said proceedings having taken place, and the records thereof, in the months of September, October and December, in the year of our Lord one thousand eight hundred and seventy-three, to the end that the same may be quashed and declared void by this honorable court, and for all suitable orders, decrees and judgments as may be necessary to fully quash and render nugatory and void, the proceedings and determinations and acts of said railroad commissioners, in the premises aforesaid. Dated March 10, 1875. (Signed,) *Frederic Spofford.*"

The following is the petition of the respondents to the railroad commissioners:

Petition of B. & B. R. R. Co., to the Railroad Commissioners. *To the honorable board of railroad commissioners of the state of Maine.*

"Respectfully represent the Bucksport and Bangor railroad company, a corporation duly established by law, that said corporation, and Frederic Spofford of Bucksport in the county of Hancock do not agree as to the necessity and extent of the real estate to be taken for side tracks and buildings for said road; and in order to determine the same, said railroad company request you, as provided in section three, chapter fifty-one of the revised statutes, to examine and determine how much, if any, of the real estate of Frederic Spofford, who is alone interested therein, hereinafter described, is necessary for the reasonable accommodation of the traffic and appropriate business of the corporation, to wit: beginning at the north-westerly corner of land of the Sherman steel com-

pany; thence, running north-easterly by the road leading from the county road, to the steel works, to said county road; thence, by the county road south-easterly, to the Kenny Snow lot, supposed to be owned by Mr. Ball; thence, southerly, easterly and northerly round said lot, to said county road; thence, south-easterly by said county road, to land of A. Colby; thence, by said Colby's land southerly, to the river; thence, westerly by the river, to the north-easterly corner of the Sherman steel company lot; and thence westerly or north-westerly by said lot, to the place of beginning.

Also, one other parcel in said Bucksport village, and which is situated between said county road and Penobscot river, and between the ferry way on the west, and land of Stephen Bennett on the east.

Said railroad company further represent, that a certain gravel pit, owned by said Frederic Spofford, and situated easterly of and adjoining their railroad track near where it crosses the county road near Smelt brook, so called, in Bucksport village, and northerly of said county road, and comprised within a space or limit of fifteen rods square, is necessary for the construction and repair of its road; the parties not agreeing in regard thereto, said company, therefore, in order that it may take and hold the same, request you to view the same, and take such action in regard thereto as the law provides.

Said company further represent; that, in order to the convenient working of said road, it is necessary that it should have access to, and the certain use of, a certain spring of water situated, on land of said Spofford, in the rear of William Beazley's land, near said Smelt brook, in said Bucksport. Said company therefore request you to view the same, and assign to them such portion of said Spofford's land, lying between said railroad track and said spring, and so as to include said spring, as you may adjudge to be necessary for said road.

Dated at Bucksport, this 22d day of September, A. D. 1873.

By order of the directors of the Bucksport and Bangor railroad company. Sewall B. Swazey, president."

The railroad commissioners ordered fourteen days personal notice on Frederic Spofford, and the service was proved.

The commissioners made the following report:

"Whereas, on the twenty-second day of September, A. D. 1873, the Bucksport & Bangor railroad company—a railroad corporation established by the laws of the state of Maine—made their application in writing to us, the undersigned railroad commissioners of said state, alleging in said application, that certain real estate, situate in Bucksport in the county of Hancock and state aforesaid, is necessary for the tracks, side tracks, depots, wood-sheds, repair shops and car, engine and freight houses for said corporation, and setting forth therein a definite description of said real estate, and the name of Frederic Spofford of said Bucksport, as the owner and only party interested therein, and asking us, (as provided in section three, chapter fifty-one of the revised statutes,) to examine and determine how much, if any, of the said real estate, in said application described, is necessary for the reasonable accommodation of the traffic and appropriate business of said corporation, which application is hereto annexed, and made a part of this our certificate; and said Bucksport and Bangor railroad company, in their said application in writing, further represented to us, that a certain gravel pit is situate in said Bucksport, and owned by said Spofford; and in said application said company set forth a definite description of said gravel pit, and alleged that it is necessary for the construction and repair of their road; and asked us, the parties not agreeing in regard thereto, to view the same, and take such action in regard thereto as the law provides, in order to the company's taking and holding the same, for the purposes for which they averred it to be necessary to them; all of which appears in said application aforesaid, and is adopted also as a part of this, our certificate, with said application.

And whereas, on the twenty-fifth day of September, A. D. 1873, we made our order, directing due notice of the time and place of hearing on said application to be given to said Frederic Spofford, the only person interested therein, or in said real estate, or in said gravel pit, which order, hereto annexed, is made part of this, our certificate.

Now, we hereby certify that on the fifteenth day of October, A. D. 1873, we met at the hotel, called the 'Robinson House,' in

said town of Bucksport, at ten o'clock, A. M., being the same time and place appointed in our said order. Said 'Robinson House' is near the premises named in said application; and at said time and place, so appointed by us, the president of the road, Sewall B. Swazey, esq., in behalf of said company, and Frederic Spofford, esq., for himself, appeared before us, and it was then proved to us that notice had been given as ordered, and in accordance with the statute in such case provided, and more than fourteen days before said fifteenth October, A. D. 1873. And at the same time, at said hearing, it further appeared, and was shown to us that the said railroad company and said Spofford did not then agree, and had not before agreed as to the necessity of said real estate, or of said gravel pit, being taken by said company for the purposes aforesaid, or as to the extent of either, necessary to be taken therefor. Said Spofford had been requested by said company to so agree, before their said application to us. And it further appeared by the evidence before us, that said Spofford did not then consent, and had at no time before consented, that said corporation might take and hold said real estate and said gravel pit for the purpose aforesaid, and did not then agree, and had not before agreed, upon the necessity and extent thereof, although applied to for that object by the said company before the said company made its application aforesaid to us.

We, therefore, went upon the real estate and gravel pit aforesaid and viewed them and all the several premises in Bucksport named in said application, so far as was necessary to a just decision of all matters prayed for in said application of said company; and at said time and place aforesaid when and where our order of notice was made returnable as aforesaid, we heard the several proofs, allegations and statements of the said railroad company, and of Frederic Spofford, the owner of and the only person interested in said premises prayed for and in the matters named in said application. And we do now, after such hearing and view of the premises, adjudge and determine that so much of said real estate, as is hereinafter by us first described, is necessary for the use of the said Bucksport and Bangor railroad company, for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight

houses, and for the reasonable accommodation of the traffic and appropriate business of said corporation; and the description and bounds of said real estate so found by us to be necessary for said corporation, for said purposes above named, are as follows, to wit: Beginning in the village of Bucksport, at a point where the dividing line between the property of Frederick Spofford and that of A. Colby intersects the westerly side line of Main street; thence, north-westerly along said westerly line of Main street, about fifteen hundred feet, to the southerly side line of a street leading to the steel works, so called, excepting and passing the line around the Kenney Snow lot, occupied by M. Ball, on said Main street; thence, southwesterly along the said southerly side line of the street leading to the steel works, two hundred and seventy feet, or to a point which shall be two hundred and fifty feet north-westerly of, and measured on a line at right angles to the centre line of the B. & B. Ry.; thence, south-westerly on a line curving to the left or easterly parallel to and two hundred and fifty feet distant from the said centre line of the B. & B. Ry., six hundred feet to a point on the flats a few feet south of the channel of Smelt brook; thence, westerly on a line parallel to the wharf now existing upon this enclosed area on a direct line laid on such a course that the point where in four hundred and forty-seven feet from the last named point near the Smelt brook it will intersect the line of low water (as marked upon a plan furnished by the chief engineer of the said Bucksport and Bangor railroad company and hereto attached,) at a point four hundred and fifty feet from the east side of the wharf of the before mentioned steel works, and eight hundred and fifty feet from the before named division line between said Frederic Spofford and the said A. Colby, measuring each of the two last named distances along said line of low water; thence, extending the last described direct line from near Smelt brook, through its point of intersection with said line of low water, to the channel of the Penobscot river, and in like manner extending the said division line between the said Frederic Spofford and the said A. Colby, from the described point of beginning on the said westerly side line of Main street, to the said channel of Penobscot river, for a south easterly bound, and the said channel of the

westerly bound, with the whole area contained within the described limits, inclusive of the said wharf, but exclusive of the said land occupied by M. Ball, on said Main street, and the building owned by said Frederic Spofford, and situated on said Main street, just south of the road crossing of the said Bucksport and Bangor railroad, and containing of upland, about 5 3-4 acres, and of flats about 10 1-4 acres more or less. And we annex hereto a plan of the water front of Bucksport, furnished us by Mr. Spofford, engineer of said B. & B. railroad, and marked 'B,' and which contains within the heavy black lines, that we have placed thereon, the area awarded by us to the road.

And at said hearing it was shown to us further, that said parties did not then agree, and had not at any time before agreed, as to the necessity and extent of the premises described in said application, in the third paragraph thereof, to be taken for a gravel pit by said corporation. And it was made further to appear to us, that the said Spofford did not then consent, and had not before consented, that said premises or any part thereof, might be taken by said company for the purposes by them alleged as aforesaid to be necessary, though he had been requested so to do by said company before their said application was made to us therefor. Wherefore, after viewing the premises and hearing the parties as aforesaid, we do now adjudge and determine that so much of the gravel pit prayed for in said application, as is hereinafter described by us is necessary for the construction and repair of said company's railroad. The bounds of said pit, so found by us to be necessary to said corporation for said purposes above named, are as follows:

Beginning at a point upon the northerly line of the county road, 103 feet (6 rods, 6 links) easterly upon said northerly line of county road from its intersection with the right-of-way of the Bucksport and Bangor railroad; thence, at a right angle to said county road upon a course bearing N. 54 deg. E., magnetic, a distance of 165 feet (10 rods); thence, by a course bearing N. 30 sec. W., a distance of 372 feet (22 rods, 13½ links), to a point upon the easterly line of the aforesaid right-of-way; thence, by easterly line of right-of-way, to the first mentioned point, containing 9-10 of an acre, or 144 rods. We annex hereto, as tending to explain

the above description, a skeleton plan of the premises embracing said pit, and by us awarded said railroad. And we fix three years as a reasonable time for said company to take and remove the gravel and other materials from said pit for their railroad. In case said company shall take gravel or other material from below the level of the little brook that passes along by said pit, then said company shall re-fill said pit with earth, so that it shall be restored to the owners with its surface about one foot above the average level of said little stream, that it may be nearly on a level with the present subgrade of the railroad; and they shall leave the same in the best condition practicable for the owner, consistent with the use for which it is taken in the meantime by the road; said pit shall at once be restored to the owner when the gravel is all removed therefrom, though the three years may not then have expired. Plan marked 'A.'

And we hereby make this our determination, adjudication, and this certificate of our adjudication on the matters aforesaid, according to the laws of this state.

In witness whereof, we said railroad commissioners, in our said capacity, have hereunto set our hands this sixth day of December, A. D. 1873.

S. H. Blake,
A. W. Wildes,
John F. Anderson, } Railroad Commissioners of Maine."

On the foregoing report was the following return:

"HANCOCK, ss. Clerk's office, S. J. Court, Ellsworth, Oct. 13, 1874. Received and filed.

Attest, H. B. Saunders, Clerk.

The petitioner presented with his petition the following statement:

"*Reasons for quashing and declaring void the proceedings in the case of Bucksport & Bangor Railroad* v. *Frederic Spofford.*

I. Because the allegations, in the petition of said railroad to the railroad commissioners, are not sufficient to give jurisdiction or authority to said commissioners to make the adjudications, determinations, appropriations and taking of land contained in

their record herewith submitted; and because they had no legal authority or jurisdiction in the premises.

II. Because it is not alleged in said petition that said railroad corporation had taken any land for necessary tracks, side tracks, depots, wood sheds, repair shops, car, engine and freight houses, or for any one or more of such tracks or buildings.

III. Because said petition does not allege that any land was necessary or required or desired by said corporation for said tracks or buildings.

IV. Because said petition does not describe any specific lot or parcel of land, and declare that the same parcel so described is necessary or required or taken or desired by said corporation for a track, side track, or for a depot or wood shed or repair shop, or for car, engine or freight house, or for one or more of each, or for any or all of such tracks or buildings.

V. Because said petition only describes a large tract of land, as owned by Frederic Spofford, and only asks and prays the railroad commissioners to examine and determine how much, if any, of said large lot of land, is necessary for the reasonable accommodation of the traffic and appropriate business of the corporation, without any reference to any particular or specific purposes or object described in the statute, except the general allegation above set forth.

VI. Because said petition only alleges that the said corporation and said Spofford do not agree as to the necessity and extent of the real estate to be taken for side tracks and buildings for said road; but does not state concerning whose or what real estate, or where situated, the difference of opinion arises, and does not set out or describe the side tracks or buildings, and does not allege any disagreement as to any particular lot or lots, or parcel or parcels of land, and as to the necessity and extent of the land for side tracks and buildings, and does not contain any allegation that said Spofford and said railroad do not or did not agree, as to the necessity and extent of the real estate to be taken for the reasonable accommodation of the traffic and appropriate business of the corporation.

VII. Because the said petition does not contain sufficient alle-

gations to sustain or authorize the only prayer therein, viz.: that said commissioners should examine and determine how much, if any, of the real estate of said Frederic Spofford thereinafter described, is necessary for the reasonable accommodation of the traffic and appropriate business of the corporation; and because said commissioners, under said petition and the statute, had no legal right or authority to set out or condemn any of said land for such general purposes of the corporation, without any determination as to the necessity and extent of the real estate to be taken for said side tracks and buildings.

VIII. Because said petition describes and asks for the condemnation for the use of said corporation, of land and flats below high water mark, and including a large and valuable wharf on such flats, which land and flats are not by law liable to be so taken for the use of a railroad.

IX. Because the petition does not set forth the taking of the gravel pit for the construction and repairs of the road; and the railroad commissioners had, under said petition, no jurisdiction or legal authority or right to condemn any of said parcel to the use of the corporation.

X. Because in these and other particulars, the said petition is informal and insufficient to give jurisdiction to said railroad commissioners in the premises, or to authorize and empower them to set out and determine as they attempted, as appears by their record, to determine that the land of the said Spofford, or any of it, was or could be necessary for the use of said corporation."

"*Objections to the record of the proceedings of the railroad commissioners and their doings.*

I. Because the said commissioners' jurisdiction in the premises rests entirely upon the petition, and could not be created or extended by any re-assertions or assumptions or declarations not contained in the petition; especially as the said petition is distinctly referred to and made a part of the record of said commissioners, and said petition as before shown gives no jurisdiction.

II. Because said railroad commissioners were not authorized and had no legal authority to determine generally that a parcel of the said land was necessary for the reasonable accommodation

of the traffic and appropriate business of the said corporation, their authority being limited to the determination of how much, if any, of the land specifically described in the petition, is necessary for such side tracks, depots, wood sheds, repair shops and car, engine, and freight houses, as are specified and individually named and designated with the land deemed necessary for each; the commissioners, in determining the matter as to the necessity and extent of the land to be taken for such tracks and buildings, are to regard the requirements of said road, having in mind what may be necessary for such tracks and buildings, for the reasonable accommodation of the traffic and appropriate business of the corporation.

III. Because it does not appear that due and legal notice had been given of the pendency and of the time and place of hearing on said petition.

IV. Because said commissioners, under the petition and the law, had no authority to determine and adjudge, that one large tract of flats and upland, containing seventeen or eighteen acres, was necessary for the use of said railroad for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight houses, without designation otherwise as to the land required for each of such specified tracks and buildings; and because said commissioners had no authority to determine that any land was necessary for tracks; and because no allegation or request was in the petition for land for such main track or side track or buildings.

V. Because said commissioners had no legal power to determine that in addition to land necessary for side tracks and buildings, other and more land might and should be taken and held by said corporation for the reasonable accommodation of the traffic and appropriate business of said corporation; and it is evident from the large extent described as taken and condemned by the said commissioners for the use of said road, that a large part of it must have been taken and condemned for the general purposes last described, and not for side tracks and buildings; and because no such disagreement between said Spofford and said corporation is alleged as would give jurisdiction to said railroad commissioners to condemn and set off, for the use of said corporation, land for general purposes.

VI. Because, under said petition, the said commissioners had no jurisdiction or authority to set off and condemn, to the use of said corporation, the lot described for a gravel pit for repairs, it not appearing that said corporation had taken it for that purpose; and because the said commissioners had no authority to determine as to the extent and necessity of real estate required or desired for construction or repairs, but only as to land for side tracks and buildings, after a disagreement as to the extent of land required for such side tracks and buildings.

VII. Because said railroad commissioners had no legal right to condemn and set off, for the use of said corporation, any land below high water mark, and particularly the wharf of your petitioner.

VIII. And, finally and generally, that the said proceedings, determinations and judgments of the said commissioners, as appears in said record of said petition and their doings thereafter, were made without legal jurisdiction, right or authority, either under said petition or by law or the constitution, and are void and of no effect and should be quashed.

(Signed,) *Frederic Spofford.*"

Upon the foregoing, the full court were to determine whether the writ prayed for should be granted or not, and make such orders and decrees as might be suitable in the premises.

E. Kent & H. D. Hadlock, for the petitioner.

E. Hale & L. A. Emery, for the respondents.

LIBBEY, J. This is a petition for a writ of certiorari to quash the proceedings of the railroad commissioners in condemning a tract of land, owned by the petitioner, situated in Bucksport, to the use of the Bucksport & Bangor railroad company.

The respondent, the railroad company, claims the right to take the land as for public uses by virtue of R. S., c. 51, §§ 2 and 3. Being unable to agree with the petitioner as to the necessity and extent of the real estate to be taken, it applied to the railroad commissioners under section three of that statute by petition, and they took jurisdiction and proceeded to act in the premises, and condemned portions of the lands described in the petition which are specifically described in their return.

The question for our determination is, whether these proceedings are sufficient in law to sustain the taking of this land.

The case involves the true construction of the statute before cited. For what uses may a railroad corporation take and hold land by virtue of that statute? Upon this question the parties are at issue. The petitioner claims that it can be taken only for the uses specifically enumerated in § 2; the respondent claims that it may be taken for any use "necessary for the reasonable accommodation of the traffic and appropriate business of the corporation."

The constitutional power of the legislature to authorize the taking of lands for the construction and operation of railroads is not questioned. It rests upon the proposition, now well established, that railroads are public highways, the great thoroughfares for public travel and commerce. But, in the exercise of the right of eminent domain, a grant by the legislature to a corporation to take private property as for public uses, being in derogation of the common law right of the citizen to hold and enjoy his property, is to be construed strictly; and, to justify its taking, it must be shown that all the provisions of the statute in that respect have been fully complied with. This rule of construction is so well settled as to need no citation of authorities.

Another rule of construction, applicable to this statute, is that in all grants, made by the government to individuals, of rights, privileges and franchises, the words are to be taken most strongly against the grantee, contrary to the rule applicable to a grant from one individual to another.

Another rule of construction is that in construing a statute all its parts are to be considered and such a construction adopted as will give force and effect to all its clauses, unless they are clearly repugnant to each other.

"But after all," says Shaw, C. J., in *Cleaveland* v. *Norton*, 6 Cush. 380, "the best ground of exposition is, to take the entire provisions of the act, and ascertain, if possible, what the legislature intended."

Applying these rules to the statute under consideration, what is its true construction? what power did the legislature intend to

grant to railroad corporations to take and hold lands as for public uses? The only grant of power to take and hold lands without the consent of the owner is contained in section two, which is as follows: "a railroad corporation, for the location, construction and convenient use of its road, for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight houses, may purchase or take and hold, as for public uses, land and all materials in and upon it; but the land so taken shall not exceed four rods in width for the main track of the road, unless necessary for excavation, embankment or materials; but shall not take, without consent of the owners, meeting-houses, dwelling-houses, or public or private burying grounds." There appears to be no doubt as to the meaning of this section. The purposes for which the corporation may take and hold lands, for the "location, construction and convenient use of its road," are specifically enumerated. They are "for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight houses." "The land so taken shall not exceed four rods in width for the main track of the road, unless necessary for excavation, embankment or materials." The only limitation to the power to take for side tracks and the buildings specified, is what is necessary for those purposes for the convenient use of the road. If this section stood alone the railroad corporation would have the right to determine the necessity and extent of the land to be taken for those purposes.

But the legislature was not willing to grant to railroad corporations this great right of eminent domain to be exercised at their discretion, but carefully guarded it by providing in section three, that, "if the parties do not agree as to the necessity and extent of the real estate to be taken for said side tracks and buildings, the corporation may make written application to the railroad commissioners, describing the estate, and naming the persons interested; the commissioners shall thereupon appoint a time for the hearing near the premises, require notice to be given to the persons interested as they direct, fourteen days at least before said time; and shall then view the premises, hear the parties, and determine how much, if any, of such real estate is necessary for the reasonable accommodation of the traffic and appropriate business of the cor-

poration. If they find that any of it is so necessary they shall furnish the corporation with a certificate containing a definite description thereof, and when it is filed with the clerk of the court in the county where the land lies, it shall be deemed and treated as taken."

What power did the legislature by this section intend to give to the railroad commissioners? Is it, as is contended by the respondent, the power to determine how much of the land, described in the application to them, "is necessary for the reasonable accommodation of the traffic and appropriate business of the corporation" for any use to which it may wish to put it? or is it the power to determine how much of it, if any, is necessary for the purpose for which the corporation claims to take it, and about which the parties have disagreed, "for the reasonable accommodation of the traffic and appropriate business of the corporation."

In construing this section, that part of it, giving the commissioners the power to determine, must be considered in connection with the first part, giving the corporation the right to apply to them, which limits the right to cases of disagreement of the parties "as to the necessity and extent of the real estate to be taken for said side tracks and buildings." Under this clause the commissioners get jurisdiction, and it is limited to the cases of disagreement between the parties which are specified. The power to determine cannot exceed the jurisdiction granted, nor can it exceed the right granted the corporation to take lands. If the commissioners have the general power claimed for them, then they may determine that the real estate which the corporation claims to take is necessary for main track, excavation, embankment or materials, when the corporation has no right to apply to them for that purpose; or that it is necessary for car or locomotive works, or for the purpose of taking fuel, when the legislature has not given the corporation the power to take lands for such purposes.

We think it clear that the statute gives the railroad commissioners jurisdiction only in cases of disagreement between the parties as to the necessity and extent of the real estate to be taken for side tracks, depots, wood sheds, repair shops and car, engine and freight houses; and that they have the power only to determine

the necessity and extent of the real estate to be taken for those purposes, having in view the reasonable accommodation of the traffic and appropriate business of the corporation.

If there is any doubt about the construction of this statute the history of the legislation in this state upon this subject supports the construction which we give it.

The first general statute concerning railroads was passed in 1836. Its provisions in regard to the right of the corporation to take lands were incorporated into the revised statutes of 1841, c. 81, § 2. "Any railroad corporation may take and hold, under the provisions contained in this chapter, so much real estate as may be necessary for the location, construction and convenient use of their road. Such corporation may also take, remove or use for the construction of such road and its appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken, provided that the land so taken, otherwise than by consent of the owners, shall not exceed four rods in width; unless when greater width is necessary for excavation or embankment or procuring stone, gravel or other materials. These provisions were substantially incorporated into the revised statutes of 1857, c. 51, § 2. Thus the statute limiting the right of the corporation to take lands, without the consent of the owner, for all purposes except for excavation, embankment or materials, to four rods in width, remained till 1865.

But the large increase of the business of the roads had demonstrated that, in order to accommodate the public traffic and business over the roads, it was necessary to locate and erect new depots and enlarge old ones; and to enable the corporation to do so, it was necessary that it should have lands more than four rods in width. To obtain it, the corporation must submit to the unreasonable and exorbitant remuneration which the owner, taking advantage of its necessities, might exact. If the price demanded should be so unreasonable that the corporation would not submit, the public would be deprived of reasonable accommodation for their traffic and business over the road. To obviate this difficulty the act of 1865, c. 321, was passed.

By section one, "a railroad corporation may take and hold real

estate necessary for depot purposes, and when the parties interested do not consent thereto and cannot agree upon other persons to determine the question of necessity and the extent thereof, the said corporation may make application to the railroad commissioners of this state, to view the premises, and determine whether, and how much of, such estate is necessary for the reasonable accommodation of the traffic and appropriate business of said corporation. By section three, "if said commissioners shall adjudge and determine, after such hearing, that the estate in question is necessary for the use of the corporation as aforesaid, they shall furnish to said corporation a certificate of their adjudication," &c.

Here we find used for the first time, the precise terms, contained in the present statute, which are relied upon as giving to the railroad commissioners the general power claimed by the respondent. But railroad corporations did not claim, and the legislature did not understand, that this act gave the railroad commissioners the power to condemn land for any other than depot purposes; hence, when it was shown that it was necessary that these corporations should have the right to take land of more than four rods in width for other purposes, the legislature, by act of 1868, c. 171, amended section one, of the act of 1865 so as to give a railroad corporation the right to "take and hold real estate for depot purposes, and for all necessary tracks or side tracks, wood sheds, repair shops and car, engine and freight houses, and when the parties interested do not consent thereto," &c. If the act of 1865 gave the general power claimed, then there was no occasion for the amendment.

The provisions of these statutes were incorporated into the revision of 1871; and still the legislature acting upon the construction we have given to that statute, that a railroad corporation had the power to take and hold, *in invitum*, real estate only for the particular uses specified in the statute, by act of 1872, c. 70, granted to such corporation the right to "take and hold, as for public uses, land and the materials thereon; for borrow or gravel pits, for the construction and repair of its road, in the manner and under the restrictions provided in c. 51, §§ 2 and 3 of the revised statutes." If section three gives the general power claimed,

there certainly was no occasion for this act. Carefully considering all the provisions of the statute and the history of the legislation on this subject, we feel clear that the construction which we have adopted expresses the intention of the legislature.

The next question that is presented is, had the railroad commissioners jurisdiction to act on the petition presented to them by the Bucksport & Bangor railroad company by virtue of which they acted in condemning the land of the petitioner? The railroad commissioners are a tribunal created by statute, and their jurisdiction is given by statute. The petition presented to them is the foundation for their action. They obtain jurisdiction only when the petition presents a case within the provisions of the statute. *Scarborough* v. *County Commissioners*, 41 Maine, 604. *Goodwin* v. *County Commissioners*, 60 Maine, 328. *Fairfield* v. *County Commissioners*, *post*.

The petition in this case does not present a case within the provisions of the statute. To give the commissioners jurisdiction, the petition should contain a description of the estate which the corporation claims to take, naming the persons interested in it, with averments that the corporation claims to take it for some one or more of the purposes specified in the statute and that the parties do not agree as to the necessity and extent of the estate, described, to be taken for the purpose or purposes named.

The petition does not contain these averments, neither in form nor substance. It starts out with the allegation "that said corporation and Frederic Spofford of Bucksport in the county of Hancock do not agree as to the necessity and extent of the real estate to be taken for side tracks and buildings for said road." This clause contains the only allegations of a claim by the corporation to take real estate, of the purpose for which it claims to take it, and of disagreement as to the necessity and extent of the real estate to be taken. It does not appear what estate the corporation claims to take, nor does it appear that it claims to take any estate for one or more of the purposes named in the statute, and that the parties disagree as to the necessity and extent of the estate to be taken for such purpose. The allegation is that they "do not agree as to the necessity and extent of the real estate to be taken

for side tracks and buildings for said road." What buildings? There is no building specified. It does not appear that the corporation claims to take it for any building named in the statute. The disagreement is alleged to be as to the necessity and extent of the estate to be taken for buildings, for said road. It may have been for a barn, store, dwelling house, foundery for making their castings, or car and locomotive works.

This allegation in regard to the disagreement between the parties is followed by this request: "and in order to determine the same, said railroad company request you, as provided in § 3, c. 51, of the revised statutes, to examine and determine how much, if any, of the real estate of Frederic Spofford, who is alone interested therein, hereinafter described, is necessary for the reasonable accommodation of the traffic and appropriate business of the corporation." Then follows a description of two parcels of real estate. But there is no allegation that the corporation claims to take the estate described for any of the purposes specified in the statute, or that the parties disagree as to the necessity and extent of the real estate described to be taken for any of the purposes named in the statute. Taking all the allegations in the petition together, they do not present such a case as to give the railroad commissioners jurisdiction under the statute.

If, however, the petition to the commissioners was sufficient to give them jurisdiction, they exceeded it in their adjudication which is as follows: "and we do now, after such hearing and view of the premises, adjudge and determine that so much of said real estate, as is hereinafter by us first described, is necessary for the use of said Bucksport & Bangor railroad company, for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight houses, and for the reasonable accommodation of the traffic and appropriate business of said corporation." They adjudge the estate described necessary for tracks.

Now the statute gives to the corporation no authority to apply to the commissioners in case of disagreement as to the necessity and extent of the real estate to be taken for main tracks, or tracks as distinguished from side tracks, and gives to the commissioners no jurisdiction to adjudicate upon this subject. And while the

statute expressly limits the corporation in its right to take land for its main track to four rods in width, except when necessary for excavation, embankment or material, if it can apply to the railroad commissioners to condemn lands generally for this purpose, the statute limitation, as to width, would be of no effect. This part of the adjudication of the commissioners is clearly without authority.

They also, after adjudging the estate described necessary for the use of the corporation for necessary tracks, side tracks, and the buildings named, add, "and for the reasonable accommodation of the traffic and appropriate business of the corporation." Here we find an express adjudication that the estate is necessary for the general uses of the corporation in addition to the specific uses named. We have already seen that under the statute the corporation has no power to take and hold land *in invitum* for general uses, that its power thus to take and hold lands is limited to the particular uses specified in section two. In this part of their adjudication, the commissioners exceeded their authority, and, as it is impossible to ascertain how much of the real estate described was adjudged necessary for tracks and the general uses of the corporation, the excess of authority in these respects invalidates the whole adjudication of the commissioners on this part of the case.

We come now to the proceedings in regard to taking the gravel pit. By Act of 1872, c. 70, "any railroad corporation may purchase, or take and hold, as for public uses, land and the materials thereon; for borrow or gravel pits, for the construction and repair of its road, in the manner and under the restrictions provided in chapter fifty one, sections two and three, of the revised statutes." To take and hold land under this Act the same proceedings must be had that are required to take and hold land for side tracks, &c. The objection made to the petition in this respect is that the description of the land to be taken is not sufficient. The description is as follows: "a certain gravel pit owned by said Frederic Spofford, and situated easterly of and adjoining their railroad track near where it crosses the county road near Smelt brook, so called, in Bucksport village, and northerly of said county road, and comprised within a space or limit of fifteen rods square." We think this description sufficient. It embraces a piece of land fifteen rods

square, bounded on one side by the east line of the railroad track and on another by the north line of the county road. The commissioners had no authority to condemn any of the petitioners land not embraced in the space or limit of fifteen rods square. By their description of the land taken it appears that they must have taken land not embraced in those limits. They begin "at a point upon the northerly line of the county road 103 feet (6 rods and 6 links) easterly upon said northerly line of county road from its intersection of the right-of-way of the Bucksport and Bangor railroad, thence at right angles to said county road upon a course N. 54 deg. E., magnetic, a distance of 165 feet (10 rods) thence, by a course bearing N. 30 sec. W. a distance of 372 feet (22 rods 13½ links), to a point upon the easterly line of the aforesaid right-of-way, thence, by the easterly line of right-of-way, to the first mentioned point." Now the longest straight line that can possibly be run on a piece of land fifteen rods square is only 21.213 rods in length; and a glance at the commissioners line, which commences in one side of the square and runs at right angles to it 10 rods, and thence by a change in its course of 54 deg. and 30 sec. 22 rods and 13½ links further, shows that they disregarded the description in the petition and took land not embraced in it. Therefore, their adjudication was unauthorized.

It is contended by the respondent, that this petition should not be granted, for the reason that the petitioner has been guilty of such laches as to deprive him of this remedy. It is said that the proceedings before the commissioners were closed in December, 1873, and that the petitioner had full knowledge of all the proceedings, and still he stood by and saw the respondent enter upon the land and expend large sums of money in erecting buildings and making side tracks, without interposing any objection till the filing of this petition, March 10, 1875, and that to quash these proceedings now, would work ruinous or very mischievous consequences to the corporation. But we must determine the case as presented in the record.

It is true that the adjudication by the railroad commissioners was in December, 1873; but the case finds that the certificate of the commissioners was not filed in the office of the clerk of the

courts till October 13, 1874. The taking by the corporation dates from the time of filing the certificate in the office of the clerk of the courts. There is nothing in the case showing that the corporation had entered upon the land taken. It could not do so, except to make surveys, till the damages were estimated and paid or secured as provided in the statute. The case does not show that the damages have been estimated. If the railroad company had legally caused the damages to be estimated, and had paid or secured them, and entered upon the land and expended large sums of money with the knowledge of the petitioner, and wished to invoke the doctrine of estoppel by reason of the laches of the petitioner, it should have set out the facts in an answer, and proved them. As the case is presented, there is nothing showing such laches on the part of the petitioner as to deprive him of this remedy.

Again, it is said that this petition is addressed to the discretion of the court; and the court, in the exercise of its discretion, is asked to dismiss the petition, though fatal defects may appear upon the face of the proceedings. True, the petition is addressed to the discretion of the court; but that discretion is a judicial discretion, to be exercised in accordance with the established rules of law; and, it appearing in this case that a substantial wrong has been done to the petitioner, that his estate has been taken without a compliance with the requirements of law, it is the manifest duty of the court to declare it, and to set aside the proceedings by which the wrong has been done.

Writ of certiorari to issue as prayed for.

APPLETON, C. J., DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

GEORGE N. BLACK *vs.* ISAAC MACE.

Hancock, 1876.—December 21, 1876.

Pleading. Trial.

The declaration alleging substantially in the language of the statute the doing by the defendant of the acts for which R. S., c. 95, § 11, gives the injured party the right to recover in an action of trespass a sum equal to three times the value of the property taken, and alleging that these acts were done against the form of the statute in such case made and provided; *held* sufficient, although the declaration did not set forth a claim for treble damages, and did not refer to the statute by which treble damages were given, nor claim statute damages for the acts complained of.

It is not necessary in an action brought under that section to aver or prove that the defendant knew that the plaintiff was the owner of the land and the property taken therefrom.

The jury having been instructed in an action under R. S., c. 95, § 11, giving triple damages for trespass, if they found for the plaintiff, to return a verdict for the actual value of the grass cut and taken away; *held*, that it was proper for the judge to order judgment for thrice the amount of the verdict.

ON EXCEPTIONS.

TRESPASS.

Writ dated September 21st, 1874. Ad damnum $300.

Declaration. In a plea of trespass, for that, at said Aurora, on the first day of June last past, and on divers other days and times between said first day of June and the day of the date of this writ, the said defendant entered on certain grass land of the said plaintiff, situated in said Aurora, to wit: on the north ninety-one acres of lottery lot No. 10, said north ninety-one acres being known as the Chatterly place, and did take from said grass land without the permission of the owner, a large quantity of grass, to wit: six tons of grass of great value, of the value of sixty dollars, and of the property of the said plaintiff, against the form of the statute in such case made and provided, whereby said plaintiff was greatly injured.

Plea, the general issue.

The defendant introduced evidence tending to show that the plaintiff had been disseised by the lessor of the defendant, and that the defendant entered on the premises described in the writ, and cut grass and carried away hay therefrom by permission of the disseisor, who claimed to have possession.

The judge instructed the jury, if they should find for the plaintiff, to render a verdict for the actual damages, the same being the actual value of the grass cut and taken away.

A verdict was rendered for the plaintiff, for $20. After the verdict, on motion of plaintiff's counsel, the court ordered judgment for $60, and full costs; and the defendant excepted.

A. Wiswell & A. P. Wiswell, for the defendant.

L. A. Emery, for the plaintiff.

BARROWS, J. The defendant complains of the order directing judgment to be entered up for treble the damages found by the jury, because he says the declaration sets forth no such claim, and does not refer to the statute by which treble damages are given, nor claim statute damages for the acts complained of. But the plaintiff did allege, substantially in the language of the statute, the doing by the defendant of the very acts for which R. S., c. 95, § 11, gives the injured party the right to recover in an action of trespass a sum equal to three times the value of the property taken; and he alleges that these acts were done "against the form of the statute in such case made and provided." This was abundantly sufficient to inform the defendant of the nature and extent of the claim.

It was not essential to conclude the declaration with the words, "against the form" &c. *Smith* v. *Montgomery*, 52 Maine, 178.

The action and statute are remedial and not penal. *Frohock* v. *Pattee*, 38 Maine, 103. *Mitchell* v. *Clapp*, 12 Cush. 278.

Nor is the plaintiff required specifically to allege that he is entitled to treble damages for the acts complained of. *Clark* v. *Worthington*, 12 Pick. 571. *Worster* v. *Proprietors of Canal Bridge*, 16 Pick. 541. The character of the acts charged sufficiently distinguishes the suit from one brought under § 9 of the same chapter.

Nor is it necessary under the statute to allege a *scienter* on the part of the defendant. He is bound at his peril to know that he has the consent of the owner before entering upon improved lands and taking property of this description.

The language of the statute is general and comprehensive, and

no reference is made to any particular class, such as the court thought sufficient in *Reed* v. *Davis et al.*, 8 Pick. 513, to relieve those differently situated from a liability to treble damages. If our legislature had designed to limit § 11 to cases of willful and malicious trespass, they would have said so. The jury having been directed to find single damages, the proper course was for the judge to order judgment for thrice the amount of the verdict. *Lobdell* v. *New Bedford*, 1 Mass. 153. *Quimby* v. *Carter*, 20 Maine, 218.

Exceptions overruled.

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

PETERS, J., being a relative of the plaintiff, did not sit.

FREDERICK SPOFFORD, in equity, *vs.* BANGOR & BUCKSPORT RAILROAD COMPANY.

Equity.

Where a party has a plain, adequate and complete remedy at law, equity will not lie.

The allegations in the bill presented a case of disseizin, the defendant having the actual possession, claiming to hold it by legal right, absolutely and against any rights of the plaintiff. *Held*, that the plaintiff having a plain, adequate and complete remedy at law, by writ of entry and injunction to stay waste, *pendente lite*, under which remedy all his rights could be determined, he could not substitute a bill in equity and dispossess the defendant by injunction.

This court will not take jurisdiction in equity to restrain acts of trespass, when the plaintiff is out of possession, except in strong or aggravated instances of trespass which go to the destruction of the inheritance or when the mischief is remediless.

When the defendant is in possession under a claim of right or title, as against the plaintiff, and in no way connected with him in estate, a court of equity will not enjoin him from making a lease or conveyance, on the ground that it would be a cloud upon the plaintiff's title.

ON REPORT.

BILL IN EQUITY, praying that the defendants may be enjoined from making a lease, &c. The substance of the bill appears in the opinion.

The case is sent to the full court upon bill and demurrer, with

an agreement of the parties, consented to by the court, that, if the demurrer is overruled, and the bill sustained, the respondents may rely upon their answer already filed, and the parties be allowed to take testimony, and be heard with the same effect as if no demurrer had been filed.

H. D. Hadlock, for the plaintiff.

E. Hale & L. A. Emery, for the defendants.

LIBBEY, J. This case comes before this court on general demurrer to the bill of complaint. The question presented is, whether the allegations in the bill present a proper case for granting the injunction prayed for. The material allegations in the bill are, that the plaintiff "is seized in his demesne as of fee of a parcel of real estate, situated in the village of Bucksport," which is specifically described, "and that said parcel of land has a valuable wharf situated upon it;" that the defendants have "unlawfully and without acquiring any title, right or easement, by legal proceedings, or otherwise, in, or to, or over said land, taken possession, and do now maintain possession of said parcel of real estate, claiming a legal right so to do, absolutely, and against any right of your orator and have dug and excavated the earth of said real estate, and are now digging and excavating and removing said earth, and have erected and are now erecting buildings upon said real estate;" that said defendants have "in like manner taken possession of the said wharf, situated on said real estate, as aforesaid, and are now meddling and interfering with the construction of said wharf, and are now proceeding to erect buildings thereon, and by reason of their unlawful possession of said property are now depriving your orator from enjoying the same;" "that he is informed and does believe that" the defendants "are about to enter into an agreement with the Sanford Independent Line of Steamers, to lease to said Line of Steamers the whole or a part of your orator's wharf, here-before described, for a term of years to the great damage of your orator." The prayer is in substance that the defendant be restrained and enjoined from going, or entering, upon the premises, and from doing any acts complained of in the bill.

The case presented by the bill is not within R. S., c. 51, § 10; nor is it within R. S., c. 95, § 7.

The allegations in the bill present a case of disseizin, the defendants having the actual possession, claiming to hold it by legal right, absolutely, and against any rights of the plaintiff. It does not appear by the allegations in the bill when the defendants took possession in the manner set forth. For aught that appears it may have been more than six years prior to filing the bill, so that the defendants may be entitled to betterments and have a right to have them appraised as provided by statute. The plaintiff has a plain, adequate and complete remedy at law by writ of entry, and injunction to stay waste, *pendente lite*. Under that remedy all the rights of the parties can be determined. He cannot substitute a bill in equity for a writ of entry and dispossess the defendants by injunction. Where a party has a plain, adequate and complete remedy at law, equity will not lie.

But it is contended on the part of the plaintiff that the acts complained of are acts of trespass, that the case is one of continuing trespass, and to prevent a multiplicity of suits and to stop the trespass, the defendants should be enjoined. It is true that courts of equity have jurisdiction to grant injunctions restraining the commission of acts of trespass in certain cases. But in cases like this where the plaintiff is out of possession, and the defendant in possession under a claim of right, Kerr's Injunctions, 290, after a careful examination of the authorities on the subject, lays down the rule as follows: "the result of these cases is, that where the plaintiff is out of possession, the court will refuse to interfere by granting an injunction, unless there be fraud or collusion, or unless the acts perpetrated or threatened are so injurious as to lead to the destruction of the estate," citing *Lancashire* v. *Lancashire*, 9 Beav. 120; "he must also, it would appear, be able to satisfy the court that there is an action pending at law between him and the defendant in possession, which will try the right between them."

In *Jerome* v. *Ross*, 7 Johns. 315, Kent, Ch., after considering the remedy for trespass by injunction and by action at law says: "In ordinary cases this latter remedy has been found amply suffi-

cient for the protection of property, and I do not think it advisable upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong or aggravated instances of tresspass, which go to the destruction of the inheritance, or where the mischief is remediless."

We think these authorities state the rule correctly and that it should be adhered to. The allegations in the bill do not bring the case within this rule.

It is further contended for the plaintiff that the defendants should be enjoined from making the proposed lease to the Sanford Independent Line of Steamers, that the lease would be a cloud upon the plaintiff's title which the defendants should not be permitted to cast over it. We cannot perceive that a lease or conveyance by the defendants would be a cloud upon plaintiff's title. There is no privity of estate between the parties. The plaintiff's title is in no way connected with the defendants', and a lease or conveyance by defendants can have no legal effect upon it, but as to plaintiff, would be void. When the defendant, is in possession under a claim of right or title, as against the plaintiff, and in no way connected with him in estate, a court of equity will not enjoin him from making a conveyance.

Bill dismissed with costs for defendants.

APPLETON, C. J., DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

PETERS, J., on account of relationship to a party, did not sit.

EPHRAIM OLIVER *vs.* RICHARD M. WOODMAN and certain logs.

Penobscot, 1875.—March 14, 1876.

Lien.

The statute lien on logs, etc., under R. S., c. 91, § 34, takes precedence of a prior mortgage. The action to enforce a log driver's lien, as it comes through a contract, though not a part of it, should be against his employer, whether owner or not; and not against an owner with whom there is no contract.

Where several owners separately employ the same person to drive their respective logs, the laborer's lien is not upon the whole mass collectively, but is to be apportioned to each, *pro rata.*

The plaintiff, under employment of the defendant, drove three lots of intermingled logs belonging to three different owners. In a suit where the employer was defaulted, and damages were $379.05, *held*, that the plaintiff was entitled to judgment against the defendant, for that sum and interest from date of writ, and a judgment *in rem* for that amount against all the logs, to be apportioned among the several parcels thereof, according to the quantity of each owner.

On report.

Assumpsit, on account annexed for labor on three lots of logs on Penobscot river, in the spring of 1874, $379.05. The plaintiff in his declaration, claimed the statute lien upon the logs.

The report shows that lots one and two were cut by the defendant, and lot three by S. N. Hodgdon. The three lots became intermingled in driving towards the Penobscot boom, their destination, in 1873; and a portion failed to reach the boom till the next year.

The defendant mortgaged lot two to Joseph L. Smith; and afterwards, in the spring of 1874, drove the residue of the three lots to the boom, Hodgdon agreeing to pay him $2.00 per M. for his lot; Smith, the mortgagee, knowing of the arrangement, and advancing money and supplies to Woodman, for the purpose of driving the logs to their destination.

Woodman was defaulted, and the action was defended by Smith, his mortgagee; and was made law upon facts agreed substantially as stated; "the court to render such judgment as to the mortgaged logs as the plaintiff, or said Smith, or said logs is entitled to."

C. A. Bailey & J. Varney, for the plaintiff, claimed a general judgment *in rem*, under R. S., c. 91, § 34, which is as follows:

"A person who labors at cutting, hauling, rafting or driving logs, or lumber, shall have a lien thereon for the amount due for his personal services, which shall take precedence of all other claims, except liens reserved to the states of Maine and Massachusetts; to continue for sixty days after the logs or lumber arrive at the place of destination for sale or manufacture; and be enforced by attachment."

G. P. Sewall & J. A. Blanchard, for the logs, and for Smith, contended that the plaintiff's lien must yield to Smith's mortgage, a prior incumbrance, and relied upon the first part of § 36, same

chapter, which provides that, "suits to enforce any of the liens before named in this chapter, shall have precedence of all attachments and incumbrances made after the lien attached," and argued, *expressio unius exclusio alterius est*, that this precluded a recovery against Smith's logs. They contended further that the lien, if any, was upon the several lots and could only be enforced by separate actions.

The plaintiff's counsel replied that there was no repugnance between §§ 34 and 36; that the apparent incongruity was removed by a further reading in the same sentence in § 36, "and may be maintained, although the employer or debtor is deceased, and his estate represented insolvent," and maintained that so long as the employer, Woodman, was not dead, and his estate not insolvent, § 36 had no application; that § 36, so far from restraining the right of the lienor, under § 34, enlarged his right, not, it is true, preventing the dissolution of the attachment in all cases of death and insolvency, but it did in some cases, and so far enlarged his right. It provides that the death and insolvency shall not dissolve his attachment on property mortgaged after the lien attached. If Woodman should die insolvent before the judgment, it would then be time for Smith to claim precedence for his mortgage. His claim now is premature.

VIRGIN, J. The common law conferred on certain classes of persons a lien—a right to detain the property of another upon which they had at the owners request expended money or bestowed labor, until they should be reimbursed therefor. This right was based on natural justice. Continued possession was essential; and when that was voluntarily surrendered by the lienor, the lien ceased. This right was not extended to all classes. The legislature, however, at an early day supplied it or one analogous to it, to mechanics and others furnishing labor and materials in the erection of buildings and the construction of vessels, avoiding, however, the impracticability of continued possession on the part of the lienor by substituting therefor an attachment within the time specified.

Laborers engaged in cutting, hauling and driving timber-trees from the land of another, were not numbered among those hav-

ing a common law lien on the property upon which they wrought; they could acquire a lien only by special contract therefor. *Oakes* v. *Moore*, 24 Maine, 214. But in 1848, the lumbering interests in this state already large, were rapidly increasing. Operations were extending back from the market to the upper waters of the principal rivers and their tributaries. Larger numbers of laborers became necessary. To their arduous labors was largely due the difference between the value of the logs at their place of destination for sale or manufacture, and the sum paid for stumpage. Operators without sufficient means for carrying on their business, commenced putting claims by mortgage or otherwise upon their logs when they began their operations. The result was that when their logs reached the market, their entire value was absorbed by these claims, while the laborers were discharged unpaid. These wrongs had become so flagrant and so frequent as to attract the attention of the legislature; when by "an act giving to laborers on lumber a lien thereon," it was provided that "any person who shall labor at cutting, hauling or driving logs, masts, spars or other lumber, shall have a lien on all logs and lumber he may aid in cutting, hauling or driving as aforesaid, for the amount stipulated to be paid for his personal services and actually due. And such lien shall take precedence of all other claims except liens reserved by the state of Maine or the commonwealth of Massachusetts for their own use; and the lien shall continue sixty days after the logs, masts, spars or other lumber subject thereto, shall have arrived at their place of destination, &c. Any person having a lien as aforesaid, may secure the same by attachment." Pub. Laws 1848, c. 72. This provision was incorporated into the revisions of 1857 and 1871, without material alteration except by inserting the word "rafting." R. S. of 1857, c. 91, § 19. R. S. of 1871, c. 91, § 34.

This statute was enacted to prevent the wrongs which owners had enabled contractors to practice upon laborers. The remedy was based on the ground, as indicated in the title, of considering the labor as having been performed on the credit of the logs regardless of their real ownership. The principle is just to both owner and laborer. To the former who can well afford to hold his property subject to the lien for what has so materially enhanced

its value; and to the latter, for having added to the logs, by the consent of the owner, a value equal at least to his claim. He ought to be entitled to retake it when they come to market, as against those who owned them in their original condition and those holding under them.

By the express language of the statute, the lien takes precedence of all claims except two, "and the statute will not admit of the construction that there is to be a still further exception." *Spofford* v. *True*, 33 Maine, 283.

The statute lien on vessels is analogous to the one before us; and although its language is not so sweeping as this, it gives the laborer's lien precedence of a prior mortgage. *Deering* v. *Lord*, 45 Maine, 293. *Perkins* v. *Pike*, 42 Maine, 141. So in Massachusetts, the court in *Donnell* v. *The Starlight*, 103 Mass. 227, p. 233, say: "the labor and materials furnished increase the mortgagee's security and inure to his benefit." So in the case of *The Granite State*, 1 Sprague, 278, it is held that a lien for repairs upon a vessel under mortgage and in possession of the mortgageor is valid and may be enforced after the possession is transferred to the mortgagee pursuant to a decree in admiralty.

Neither does § 36 modify the provisions of § 34 so as to add any further exception to those therein mentioned. The evident design of § 36 is to maintain the attachment notwithstanding the death and insolvency of the employer or debtor, and not to repeal by implication express and positive provisions applicable to some of the liens provided in the chapter. It was only in case of death and insolvency, that a subsequent incumbrance would interfere with a prior attachment in any case. To guard against that contingency alone they are mentioned in this section, and not to introduce any new or different rule when that contingency does not intervene. Our conclusion is that the lien on logs, &c., takes precedence of a prior mortgage.

The lien does not inure to a trespasser, but it comes through a contract express or implied with some person owning or rightfully possessing the property. *Spofford* v. *True*, 33 Maine, 283. *Doe* v. *Monson*, 33 Maine, 430. Still it is no part of the contract, and in no wise affects it, but it is a mode of enforcing payment,

deriving its validity from positive statute. *Hamilton* v. *Buck*, 36 Maine, 536. The action must be brought against the employer who hired the plaintiff and not against the owner when not the employer, and with whom there was no contract.

The fact of several ownership is no obstruction to the lien which attaches to all the logs which the laborer is employed to, and actually does, drive, but not necessarily to them all indiscriminately. For where the owners of different quantities severally employ sufficient laborers to drive their respective logs, the lien of each laborer is confined to the logs he is employed to drive notwithstanding all the logs became intermingled in driving and were collectively driven by all the laborers. *Doe* v. *Monson*, 33 Maine, 430. And where they separately employ the same person to drive their respective logs, the laborers' lien is not upon the whole mass collectively, but it is to be apportioned upon the logs of each owner *pro rata*. Otherwise one owner might be subjected to pay for labor expended on another's logs; and he might be deprived of the statute right of relieving his own property by a "tender of a sum sufficient to pay all that is justly due." R. S. c. 91, § 37. *Hamilton* v. *Buck*, *supra*. *Doyle* v. *True*, 36 Maine, 542.

The plaintiff's claim for services rendered upon the logs by contract with Woodman is entire and has been rightfully brought as such. But it does not follow that the judgment *in rem* must be against all the logs jointly. On the contrary it must be apportioned upon the logs of the several owners according to their respective interests. This will do exact justice to all parties as in cases of salvage. *Stratton* v. *Jarvis*, 8 Pet. (U. S.) 4.

Those lots of logs respectively bearing the four marks first mentioned in the writ were originally owned by Woodman, and the remainder by Hodgdon. Of the former those designated by the third and fourth marks Woodman had mortgaged to the claimant, Smith, prior to the services sued for in this action, but retained possession as mortgageor. While the mortgageor's title is good against all except the mortgagee, the latter's is paramount. Hence the logs attached are severally owned by three persons.

Woodman having been defaulted, the plaintiff will be entitled to judgment against him for $379.05 and interest from the date of

the writ, and a judgment *in rem* for that amount as against all the logs, to be apportioned among the several parcels thereof according to the quantity of each owner, which is to be ascertained by the judge at *nisi prius*, from the scale-bill to be furnished by the parties as per stipulation in the case; and costs to be apportioned in the same manner. Pub. Laws 1874, c. 191.

APPLETON, C. J., DICKERSON, DANFORTH, PETERS and LIBBEY, JJ., concurred.

INHABITANTS OF ORONO *vs.* DANIEL PEAVEY.

Penobscot, 1875.—March 25, 1876.

Contagious diseases.

A person infected with a disease or sickness, dangerous to the public health, who has been removed to a separate house by the municipal officers of the town, and provided by them with nurses and other attendants, and necessaries, by virtue of R. S., c. 14, § 1, is not chargeable for the expenses incurred by the town for the nurses and other attendants and necessaries, unless he is able to pay all the expenses thus incurred. If he is not so able, and the town where he belongs pays to the town which has provided nurses, attendants and other necessaries, the expenses thereof, it can maintain no action for the money so paid, against him, by virtue of the statute.

ON REPORT.

CASE, as stated in the opinion.

N. Wilson, for the plaintiffs.

A. Sanborn & A. J. Chapman, for the defendant.

LIBBEY, J. The case finds that in 1873 the defendant was, with his family, taken sick of the small pox in Oldtown. They were removed to a house by themselves by the town, and the town expended six hundred dollars for medical attendance, supplies, clothing, nurses and other necessaries for them. The defendant having his settlement in Orono, plaintiffs paid the bill to Oldtown and bring this action to recover the sum paid by them. The parties agree that the supplies, nursing and medical attendance were necessary supplies, and that the claim of the plaintiffs is only by virtue of R. S., c. 14, relating to contagious diseases. The ques-

tion of the ability of defendant to pay, as affecting his liability, was referred to the court, and the court found the sum which the defendant was able to pay, to be one hundred and fifty dollars.

Upon these facts can the action be maintained ? If it can be it must be by virtue of the statute. There is no liability at common law. There was no express promise to pay. The proceedings on the part of Oldtown were had by virtue of the provisions of the statute to provide for the safety of the inhabitants and prevent the spread of a contagious disease, and not by the request or consent of the defendant. The supplies were furnished while the defendant was removed from his house and under the control of the municipal officers of the town. In such case the law will not imply a promise by the defendant to pay for the supplies furnished. In support of their action the plaintiffs rely upon R. S., c. 14, § 1, which is as follows: "When any person is, or has recently been, infected with any disease or sickness dangerous to the public health, the municipal officers of the town where he is, shall provide for the safety of the inhabitants, as they think best, by removing him to a separate house, if it can be done without great danger to his health, and by providing nurses and other assistants and necessaries; at his charge or that of his parents or master, if able, otherwise, that of the town to which he belongs."

By this statute the expenses of nurses and other assistants and necessaries were chargeable to the defendant if he was able to pay them. If not able to pay them the statute imposes no liability upon him. It does not make him chargeable for such portions of the expenses as he was able to pay, if not able to pay the whole amount. If not able to pay the whole amount, the expenses were chargeable to the plaintiff town where the defendant belonged. By the finding of the court he was not able to pay the whole amount of the expenses, which was six hundred dollars, but only one hundred and fifty dollars. Hence the defendant was not liable to pay to Oldtown. There is no express provision in the statute giving the plaintiffs a right of action against the defendant for the sum they paid Oldtown. If the defendant was not liable to an action by Oldtown, no construction of the statute can be adopted giving the plaintiffs a right of action against him for the sum which they paid.

It is unnecessary to consider the question of the liability of the defendant under R. S., c. 24, § 34. This action is not brought under that statute. The parties expressly agree that the claim of the plaintiffs is only by virtue of R. S., c. 14. The action is not maintainable by virtue of that statute. *Plaintiffs nonsuit.*

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

ALMON WING *vs.* DANIEL WING.

Penobscot, 1875.—April 11, 1876.

Slander.

The words, "A. B. stole windows from C. D.'s house," are not, of themselves, in their ordinary and popular sense, actionable, as imputing either a charge of larceny or an act of malicious mischief upon real estate.

ON EXCEPTIONS.

CASE FOR SLANDER. The declaration alleges in the usual form that the defendant uttered and published the following false, scandalous and malicious words of and concerning the plaintiff, to wit: "Almon Wing stole windows from Benjamin Jordan's house," by means of which false and scandalous words, the plaintiff has been exposed to a prosecution for stealing, and has suffered great anxiety of mind. The defendant demurred generally to the declaration. The presiding justice, the demurrer being joined, sustained it; and the plaintiff excepted.

I. W. Davis, for the plaintiff.

L. Barker & L. A. Barker, for the defendant.

PETERS, J. The words alleged to be actionable are: "Almon Wing stole windows from Benjamin Jordan's house." There being no special averments, it is to be presumed that the words were used in their ordinary and popular sense. The plaintiff impliedly so avers, there being no express averment to the contrary. That is one rule of construction. Another rule is, that all the words spoken, so far as necessary to ascertain the meaning of the

person who utters them, must be considered together. The sense of actionable words may be so far qualified by subsequent words spoken in the same connection, that the words taken together are not actionable. Therefore, if a person is charged with stealing, under such circumstances as show that a felony was not capable of being committed, the words are not to be regarded as actionable. Among the illustrations of this rule, is the familiar one found in the books, and stated in Bac. Abr., (Title Slander) in this way: "If J. S. say to J. N., 'thou art a thief, and hast stolen my trees,' no action lies; it appearing from the latter words, that the whole words only import a charge of a trespass." *Allen* v. *Hillman*, 12 Pick. 101. *Dunnell* v. *Fiske*, 11 Metc. 551. *Edgerly* v. *Swain*, 32 N. H. 478. See also numerous cases cited in note to the case of *Booker* v. *Coffin*, 1 Amer. Lead. Cases, 76.

Tested by these rules, our opinion is, that the words uttered by the defendant do not impute the crime of larceny, but amount to an accusation of only a trespass upon real estate. The meaning conveyed by the words is at least doubtful. They may be susceptible of different constructions, perhaps. But words cannot be regarded, upon demurrer to the declaration, as actionable, unless they can be interpreted as such, with at least a reasonable certainty. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the rule requires him to make the meaning certain by means of proper colloquium and averment. It is always within his power to do so. *Robinson* v. *Keyser*, 22 N. H. 323. *Emery* v. *Prescott*, 54 Maine, 389.

"Windows" are, strictly, a part of a house; and ordinarily affixed permanently thereto. If the defendant had intended to charge a theft of windows which were not a part of a house, the form of expression would more naturally have been, that the plaintiff "stole Benjamin Jordan's windows;" or, "windows from Benjamin Jordan." The fact that they were stolen at his house would seem to be rather an immaterial fact, to be so emphatically stated. If any other word implying violence or force is substituted for the word "stole," the words complained of could not be tortured into an interpretation such as the plaintiff con-

tends should be ascribed to them. *Haynes* v. *Haynes*, 29 Maine, 247.

But the plaintiff maintains that, if the words do not impute the crime of larceny, they do impute at least the charge of a criminal act of trespass upon real estate, such as is described in the malicious mischief act, found in R. S., c. 127, § 15; and that, in that view, the words are actionable. Whether it would be actionable in this state, to accuse a person of malicious trespass, we do not now decide. That might raise the question as to what offenses involve moral turpitude, social ostracism and disgrace. Upon that point the authorities disagree. There is a wilderness of cases upon the subject through which no beaten or well defined track can be traced. In Indiana, such a charge is actionable. *Wilcox* v. *Edwards*, 5 Blackf. 183. In Pennsylvania, under a similar statute, it is not actionable. *Stitzell* v. *Reynolds*, 67 Penn. St. 54. (See in this connection, the contradictory cases of *Buck* v. *Hersey*, 31 Maine, 558, and *Brown* v. *Nickerson*, 5 Gray, 1.) As to what words are actionable and what are not actionable, no marked rule has as yet been laid down, perhaps, in this state; and we do not feel called upon to pursue the discussion in the present case, because the words used here are not, in our judgment, appropriate, in their natural and popular sense, to convey the idea, that the plaintiff has "maliciously and willfully" injured any body's real estate. It is difficult for us, who know nothing of the subject matter more than is indicated by the words themselves, to understand what they do mean. It would rather seem that they were used in an exaggerated and rhetorical sense than in any other way, to express a forcible act done under some controverted claim of possession or ownership in the property alluded to. To constitute a "malicious and willful" injury to a building, it is not enough that the injury was willful and intentional; but, in order to create the criminal offense, it must have been done out of cruelty, hostility or revenge. 4 Bl. Com. 244. *Commonwealth* v. *Walden*, 3 Cush. 558. *Commonwealth* v. *Williams*, 110 Mass. 401. *State* v. *Hussey*, 60 Maine, 410. Here nothing more is clearly implied than that a forcible trespass was committed. The word "stole" would rather imply that the windows

were carried away for purposes of value and gain, and not that they were severed from the house, in order revengefully to inflict an injury upon the owner. *Commonwealth* v. *Gibney*, 2 Allen, 150. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

JOHN SHERIDAN *vs.* DANIEL E. IRELAND and logs.

Penobscot, 1875.—April 11, 1876.

Words.—The place of destination for sale. Lien.

"Penobscot boom" is ordinarily "the place of destination for sale or manufacture," (within the meaning of the statute,) of logs that are driven down the Penobscot river, into such boom.

The sixty days (after the arrival of logs within the boom) within which an attachment must be made, in order to effectuate a laborer's lien thereon, do not commence to run, as to any of the logs upon which the lien exists, until all the logs subject to the same lien have arrived within the boom; provided the logs have been driven together and the driving has not been suspended after a portion of them has reached the boom, but has been continuously kept up till all the logs have been driven in.

ON REPORT.

ASSUMPSIT, on account annexed (August 14, 1872, the date of the writ,) for cutting and hauling logs on No. 7, now in Penobscot river, in and below Penobscot boom, marked N X V I I X girdle at $1.00 per day, $76; "and the plaintiff claims to have a lien on said logs for personal services in cutting and hauling the same during the past winter, to the amount of $76, and this action is brought to enforce said lien according to the statute in such cases made and provided."

The firm of Shaw & Ayer, claimants as owners of the logs, were admitted to defend. The pleadings were the general issue, with brief statement, denying the lien alleged in the writ, for the reason that the logs were not attached within sixty days after their arrival at the place of destination for sale, and alleging that they were for sale, and that their place of destination for sale was Penobscot boom.

The parties agree upon the following facts as pertaining to the case:

"The Penobscot boom is owned by the Penobscot boom company, a corporation established by the laws of Maine. Any of the acts of the legislature, public or private, relating to it, may be used as a part of this case. The said general boom consists of various particular gaps and booms, extending from its lower limits in Argyle and Greenfield to a distance above, of ten miles or more. The boom company has the use of the river for its purposes, between its upper and lower limits. The nearest mills below the lower limits are at Oldtown, about four miles below; and the mills where the lumber, coming through the boom, is manufactured, are situated at Oldtown and in various places below as far down as Bangor, and Hampden inclusive. The boom company's works are maintained and managed by the Penobscot lumbering association, who are lessees of the boom company under the act of the legislature.

A great many millions feet of logs annually arrive into the Penobscot boom, from the waters above, of many different marks, and belonging to many different owners. While in the boom, no separation of them is made, according either to respective marks or ownership, but they are promiscuously intermixed.

Whenever the state of the water is suitable for it, the practice is for the lumbering association, to raft out and make a "boom scale" of the logs at the different gaps, upon which a toll for boomage and rafting is assessed. For this purpose each man's marks are rafted together in separate joints; these joints are dropped away by the boom company, and hitched upon buoys below the gaps where rafted, to remain there for a short time for the owners to take possession of them and take them away.

The practice is for the owners to take the logs away from the buoys and run them down on to shores situated in different places, all the way from the boom, nearly down to the mills at Oldtown. Some owners have shores of their own for this purpose, and sometimes the running is done by persons who make a business of running rafts of logs upon shores owned or rented by them for the purpose, who both run the logs upon their shores, and keep them there for a certain price per thousand feet therefor.

Upon these shores or places of deposit the general practice is for the logs to be scaled again, to ascertain the number of thousands of feet as between the buyer and seller; and the buyer takes the delivery of the logs at these places and carries them thence to places of manufacture below. The buyers sometimes bargain for the purchase of logs before they are in the boom, and sometimes while in the boom, and before any are rafted, and sometimes when upon the shores; but more often a purchaser bargains for a whole or a part of a mark, after a part of them, but not the whole, have been rafted, but the logs to be scaled on the shores below, and to be paid for at a scale there to be made from seller to buyer called a 'sale scale,' the bill being dated on the day of the scale, and interest reckoned thereafter.

In this way an owner's mark comes through the boom from time to time, and generally does not become wholly rafted out till the end of a season; and sometimes, when the boom is not cleared in a season, a portion of it may remain till the next season.

It is admitted that there is due the plaintiff, for his personal services, the amount claimed in the writ, $76; that the services were performed on these logs; that there were no other logs of this mark that came into the possession of the boom company, for lumbering purposes during 1872, and that these logs were sold by Shaw & Ayer, the claimants in this suit."

The logs were attached on the writ August 16, 1872. The evidence tended to show that most of the logs attached had arrived at the Penobscot boom more than sixty days before August 16, the date of the attachment; that small quantities of them continued to arrive from day to day thereafter and that the rear came in and the driving crew was discharged on the 25th or 26th of June.

L. Barker & L. A. Barker, for the plaintiff.

W. H. McCrillis & W. S. Clark, for the claimants.

PETERS, J. By R. S., c. 91, § 34, a person who labors at cutting or driving logs, has a lien thereon for his personal services; "to continue for sixty days after the logs or lumber arrive at the place of destination for sale or manufacture;" to be enforced

by suit. The case calls for a construction of this provision of the statute in two particulars.

One question is this: what is such "place of destination?" as applicable to logs driven into Penobscot boom on Penobscot river. It appears, that the logs annually coming down the Penobscot river are mostly driven into Penobscot boom, situated above the mills where the logs are to be manufactured, and they are there promiscuously intermixed without regard to their ownership. After this, from time to time, as the logs run through the gaps or outlets of the boom, they are rafted into "joints" by the boom company, according to the marks and ownership of the logs, and then the joints (small rafts) are by the company hitched upon buoys, below the boom, as a place of delivery from the company to the owners. The owners take their logs from the buoys where hitched and run them in joints or rafts still further below, upon the shores of the river at suitable places of deposit, where they may be safely kept until they are removed to the mills from time to time for manufacture. If the log owners do not manufacture them, the logs are usually sold while lying upon the shores, or, if they are contracted to be sold beforehand, are usually delivered there to the purchaser. In this way an owner may not receive all of his mark of logs through the boom before the end of a rafting season, and may not even then, a portion remaining within the boom till the next rafting season afterwards. The logs attached by the plaintiff, to enforce his lien for labor thereon, came into and through the boom in the manner thus described, and were not manufactured by the owners, but were by them sold.

We can have no doubt that the "place of destination" of these logs for "sale or manufacture," was the Penobscot boom. The idea of the legislature evidently was that a drive, (a word used by lumbermen,) or mark of logs, had ordinarily but a single destination. But if the construction contended for by the plaintiff is to prevail, then a lot of logs passing through the boom would have as many and different destinations as the number of persons to whom the aggregate lot in different detachments might be sold, or as the number of different mills where they might be manufactured. And the different destinations would be reached at differ-

ent times, varying through a whole season, and even longer, according to contingencies. By such a rule, the log owners and log purchasers would find it difficult to know when logs are exempted from liability to suit for enforcement of the lien, and the purpose of the statute in fixing a limit to such liability would be practically defeated. The language is, when the logs "arrive." The implication is that the logs have been driven; that they have been upon a passage; and that they have come to a rest. The words, "arrive" and "destination," in the statute, are used in a quasi commercial or maritime sense. "The port at which a ship is to end her voyage is called her port of destination." (Bou. Law. Dic.) In this case, the Penobscot boom is the end of the passage or voyage. There, the driving ends. After this the logs are not driven as before, but are propelled in joints or rafts. It is to be noticed, that it is the place of destination "for" sale or manufacture, and not the place "of" sale or the place "of" manufacture itself, that the logs are to arrive at. This construction is more obvious still, by a reinstatement of the words of the original act of 1848, which have been omitted in the revision of the statutes, for the purpose of condensation, or because the words would not be applicable to the mode of business in all places. That act reads thus: "place of destination 'previous to being rafted' for sale or manufacture."

The other question is this: when, for the purposes of attachment, may it be said that the logs have arrived within Penobscot boom? The plaintiff's position is, that the period of sixty days, (after the arrival of the logs within the boom) within which time an attachment must be made, in order to effectuate the lien, does not commence to run as to any of the logs upon which the lien exists, until all the logs subject to the same lien claims shall have arrived within the boom. On the other hand, the defendant contends that all logs which have remained unattached for sixty days after their arrival within the boom, become exonerated from the lien claim, whether all the logs upon which the lien existed have been there for that period of time or not. In this case, when the logs were attached, a portion of "the mark" of logs, upon which the plaintiff's labor was expended, had been in the boom more

than sixty days, and a portion had not then reached the boom, although the crews were still driving upon them. The probability is, that the logs attached were among those which had arrived in the boom more than sixty days before the attachment was made. Still, we think the attachment was made seasonably. It is well known, in all lumbering communities, that all the logs of "a drive" (so called) do not arrive at their destination at the same time. The head of the drive may be many days in advance of its rear. Detachments of the same driving crew may be at work many miles apart. Logs of the same mark may be running into the boom for many successive days. The laborer's lien is usually upon all of the mark of logs. The lien continues sixty days after "the logs" arrive within the boom, that being their place of destination. "The" logs are "all" of the logs, and not a part of them. Any other construction than this, would lessen the value of a laborer's lien (for driving) greatly. It would be generally impracticable for a laborer to distinguish the logs that come into the boom at different times during the same driving season. And if he was at work on the rear of a drive, in a case where the logs were running into the boom for a period exceeding sixty days, the time within which he is to commence a suit would expire (as to the bulk of the logs) before his contract for labor would be completed. In most cases of such a character the lien upon the logs would be totally lost.

But a question arises, in the arguments of counsel, as to the effect of such a rendering of the statute, in the event that the logs do not all arrive in the same season or upon a continued driving. We do not appreciate any practical difficulty in such a case, although the point is not involved in the facts before us. When a portion of the logs are driven to their place of destination, and the remainder are left behind, and the driving of them abandoned till another season, then it may be said that the driving, (so far as the logs then within the boom are concerned,) is so far completed that the sixty days, as to that portion of them, will thenceforth begin to run. In that case there would virtually be two drives from one lot of logs, each detachment having a time of its own in arriving at the place of destination. But where, as here,

there is an entirety and continuity of driving, the result is otherwise. *Judgment for the plaintiff against the personal defendant and against the logs.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

MARTIN J. HAVERTY *et ux. vs.* JOSEPH P. BASS.

Penobscot, 1875.—April 18, 1876.

Municipal officers.

The municipal officers of a city or town, in which any person is infected with a disease dangerous to the public health, are by statute empowered to remove such person to a separate house, without first obtaining from two justices of the peace a warrant, directed to an officer, requiring a removal to be made.

The issuing of such warrant is not a condition upon which, but a means by which, a removal may be effected by municipal officers, whenever a resort to the aid of a warrant becomes necessary.

The statute conferring such power upon municipal officers relates to a matter of police regulation, and is not amenable to the objection of unconstitutionality.

ON REPORT.

TRESPASS, for an alleged assault upon the female plaintiff, on April 15, 1873, by the defendant, who was then mayor of Bangor. The assault complained of consisted in the action of a police officer and a city physician, under the direction of the defendant, in taking out of the arms of the mother, her child which was believed to be sick with the small pox, for the purpose of removing it to the city hospital. In so doing, the defendant was executing an authority and directions committed to him by the mayor and aldermen of Bangor, at a special meeting previously called to provide for the exigency required by this case of sickness.

For the purposes of presenting the question of law involved in this case, it is not denied by the plaintiffs, that the child was sick of the small pox; and that the mayor and those concerned with him, in doing what they did, used no more force than was reason-

ably necessary to accomplish what they did; and that the mayor and aldermen, in ordering the removal, acted in good faith, and for what they thought best for the safety of the inhabitants of Bangor; and that the child could be, and was, removed without great danger to its health.

But inasmuch as the servants of the defendant, by force, after a reasonable demand for entrance, broke and entered the husband's house (which was fastened against the officers,) and took the child away from the mother, by virtue of the provisions of R. S., c. 14, § 1, and without any warrant as provided in § 5, of said chapter, the plaintiffs contend that the defendant was a trespasser, and therefore liable for such entry and subsequent acts.

If the defendant was a trespasser, because not having such warrant, the action to stand for trial; if he was not, then the plaintiffs to be nonsuit.

T. W. Vose, for the plaintiffs.

W. H. McCrillis & C. P. Stetson, for the defendant.

PETERS, J. By R. S., c. 14, § 1, the municipal officers of a town, in which any person is infected with a disease dangerous to the public health, are required, if they think it best for the safety of the inhabitants, to remove such person to a separate house, provided it can be done without great danger to his health. By § 5, it is provided that "any two justices of the peace may issue a warrant, directed to a proper officer, requiring him to remove any person infected with contagious sickness, under the direction of the municipal officers of the town where he is."

The plaintiffs contend that the power of removal granted by § 1, can be legally exercised only by the use of the warrant described in § 5, and that municipal officers who without such warrant remove a sick person against his will, are trespassers. We do not think this construction of the statute the correct one.

The power committed to municipal officers by § 1, is, in the terms of the statute, unconditional. It is not qualified by any other section. On the contrary, enlarged powers are given to such officers by other provisions in chapter fourteen. Thus, by § 29, when the small pox breaks out in a town, they are to provide hos-

pitals for the sick and infected; they shall cause the sick and infected "to be removed" thereto, unless their condition will not admit of it without imminent danger; they may make a hospital of any man's house, where a sick or infected person is found (if deemed best,) subject to hospital regulations; and the municipal officers must act "immediately," and with "all possible care" for the public safety. And so, in our opinion, § 5 was designed, not to cripple and impair the powers conferred upon town officers under § 1, but to make such powers more effectual. It gives municipal officers extra means wherewith to execute the authority entrusted to them. It enables them to command the services of others. It might be difficult to obtain the necessary assistance, in an undertaking so hazardous to health. But, by means of a warrant, they can compel executive officers to act. They can remove a sick person without the aid of a warrant, or they can use that instrumentality to enforce obedience to their commands, if a resort to such means of assistance becomes necessary. We do not perceive how it could be of importance to the sick man, whether a warrant was obtained or not. It would be the merest form in the world, as far as he is concerned. There is no provision for any examination by the justices, nor for notice to any parties to be heard, nor could any appeal be had. Our view of the meaning of the statute, is confirmed somewhat by a reference to the earlier acts of Massachusetts and of Maine on the subject, from which our present statutes came. The language of the act of 1821 was: "If need be," any two justices of the peace may make out a warrant. The same thing is implied in the present statute. Here the warrant was not needed. The municipal officers were able to do, what the law positively required them to do, without a warrant. The case of *Boom* v. *The City of Utica*, 2 Barb. 104, cited by the plaintiff, does not apply. It merely decides that the power of personal removal did not at the time of the act there complained of exist in New York, where there was no statute like ours. See *Seavey* v. *Preble*, 64 Maine, 120.

It is very clear and well settled that the statutes are not obnoxious to the objection of unconstitutionality, which is the other point argued by the plaintiffs. It is unquestionable, that the legislature can confer police powers upon public officers, for the pro-

tection of the public health. The maxim *salus populi suprema lex* is the law of all courts and countries. The individual right sinks in the necessity to provide for the public good. The only question has been, as to the extent of the powers that should be conferred for such purposes. We do not think that personal injuries need be apprehended from the action of officers in cases of this kind. Experience probably shows that communities and individuals are not promptly enough aroused to the dangers that beset them in such emergencies. If an injury is inflicted upon a person by the malice of the public servants, he has a remedy for it. And the petition for *habeas corpus* is always open to him. Further words, however, upon a policy, so universally regarded as a just one, are unnecessary. *Preston* v. *Drew*, 33 Maine, 558. *Gray* v. *Kimball*, 42 Maine, 299. *Lord* v. *Chadbourne*, id. 429. *Watertown* v. *Mayo*, 109 Mass. 315, 318, 319. *Taunton* v. *Taylor*, 116 Mass. 254. Cooley's Con. Lim. 584, *et seq.*

Plaintiffs nonsuit.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

MARY S. STEVENS *vs.* E. & N. A. RAILWAY.

Penobscot, 1875.—May 9, 1876.

Railroad.

Although the burden of proof falls upon a plaintiff to establish the negligence of a railroad company sued for an injury caused by their cars running off the track; still, where the plaintiff is guilty of no negligence, and the cause of the accident is not disclosed by the attending circumstances, the burden of explanation falls upon the company to show that there was no fault upon their part; and a jury would be authorized to presume them guilty of negligence if they fail to do so.

ON MOTION.

CASE brought to recover damages for personal injuries received on the defendants' railway, August 28, 1873.

It appeared in evidence that the plaintiff was a passenger on the car of the defendant company, getting on at Bangor, that the car

being about three-fourths full proceeded about twenty-five rods from the depot at a rate of speed from five to ten miles an hour; and then went off the track, producing a slight shock. It did not appear that the car was damaged, or that any of the passengers, except this plaintiff, received any injury. The passengers left the car, the plaintiff, among others; and she walked to her house some four-fifths of a mile.

She testified that she was fifty-four years of age and in good health when she entered the car, that the train commenced slatting soon after the cars started, slat her from right to left, then stopped, jerked back, and then pitched forward, that her back was thrown against the back of her seat, that she was also pitched on to the back of the seat in front; that she at first fainted and then recovered somewhat and was assisted out of the car; that by resting frequently on the way and receiving some support, she succeeded in reaching her home, took her lounge, had severe pain in the back, hip and head, sent for the doctor, took and kept her bed entirely for five days; that she got up very poorly, found she had received severe internal injuries from which she had not recovered.

She introduced no evidence to show negligence on the part of the company.

On the part of the defense, evidence was introduced tending to show that the car was comparatively new, the wheels and axle had been little used, were purchased of a company having a high reputation, were constructed of the best known materials and combining all the appliances which men skilled in the art of car construction employ; that the car and wheels and axle were duly and carefully inspected the night before and the morning when the train started; that the cause of the running of the car from the track was the loosening of the wheel; that this could not have been detected by the most careful examination; that the loosening of the wheel may take place when the wheel and axle have been manufactured with the highest degree of skill and of the best materials, and cannot be detected by the most careful inspection; cannot be detected either by the ear or eye; that it may be a latent defect not discoverable by the most careful examination and not possibly to be prevented by the highest skill in manufacturing.

There was evidence that, before the suit was brought, the defendants paid the plaintiff $275, and employed and paid a physician to attend her $250.

The verdict was for the plaintiff, $1,625, which the defendants moved to have set aside as against law, evidence, its weight, and on the ground of excessive damages.

C. P. Stetson, for the defendants.

A. Sanborn, for the plaintiff.

PETERS, J. The defendants move to have the verdict set aside. There is a single ground upon which the verdict may stand. The accident occurred within a moment after the cars left the depot in Bangor, destined for St. John. It happened by a wheel being loose upon the axle under one of the cars, the train being thrown from the track thereby. The questions at the trial were: first, whether the defect existed at the moment of starting, or whether it might have been produced while the cars were running afterwards; and if it existed before starting, whether it could have been discovered by the employees of the defendants by the use of proper and sufficient care. The latter question was a close one. The burden of explanation, however, that falls upon a company in a case like this, helps the plaintiff upon this point. Undoubtedly the general burden of proof is upon the plaintiff to show that her injury was caused by the negligence of the defendants. She avers it, and must prove it. Nor, in a strict sense, does the burden of proof change. *Small* v. *Clewley*, 62 Maine, 155. But it may be aided and sustained by a presumption that arises upon the facts.

Where a passenger is in the use of proper care when an injury happens to him by the cars running off the track, the cause of the accident not appearing from the attending circumstances, it has been frequently decided, that negligence upon the part of the railroad company may be presumed against them, unless the imputation is removed by some satisfactory explanation upon their part. As the cars and the track are within the exclusive possession and control of the company, it is incumbent upon them to explain the cause of an accident, it not being ordinarily in the power of the passenger to do so. Cars can ordinarily be run with safety, and

when they are not, that fact itself is evidence of fault or defect somewhere, requiring explanation. The maxim, *res ipsa loquitur*, applies in such a case. *Feital* v. *Middlesex Railroad Co.*, 109 Mass. 398; and cases there cited. *Stokes* v. *Saltonstall*, 13 Pet. 181. *Railroad Co.* v. *Pollard*, 22 Wall. 341.

The question then comes, whether the explanation set up in this case is made out. If the defect existed at the depot before the train was put in motion, of which we think there was quite satisfactory evidence, were the jury justified in believing that it could have been there remedied by such caution and watchfulness on the part of the agents of the defendants as under the circumstances were required by common care? We are not convinced that the jury committed an error in this respect, giving the defendants the benefit of the interpretation of the rule as to common care, invoked by them and supported by the authorities by them cited. The defendants' witnesses do not swear positively that it was not within the limits of practicability to have discovered the defect before leaving the depot, if it existed then. The judgments of the experts are based upon the statement that a proper and sufficient examination had been made by the employees, the correctness of which statement may well be doubted. If there are no means of discovering such a defect, it is, certainly, a deplorable risk for travelers. The truth is, that men who have routine work to perform often become careless. Undoubtedly, defects may exist in the running gear of railroads, not discoverable by any of the ordinary tests applied for their detection; but we are not satisfied that the jury erred in coming to the conclusion that such was not the case here.

Upon the question of the amount of damages, we are by no means free of doubt, whether the verdict should be sustained. There is much reason to believe that the injury may be grossly exaggerated, and there is some question whether the plaintiff had previous good health enough to warrant her traveling upon the road. But as the testimony is very conflicting, as bearing upon this branch of the issues tried, we are disposed to allow the verdict to stand. *Motion overruled.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

Inhabitants of Lowell *vs.* Inhabitants of Newport.

Penobscot, 1875.—July 24, 1876.

Emancipation.

Emancipation may be established by contract between the parent and child, as well as otherwise. It must be by consent, express or implied, of the parent if living, and is an entire surrender of all right to the care, custody and earnings of the child, as well as a renunciation of parental duties.

An emancipated minor does not follow the settlement gained by the parent after such emancipation.

Where the father, after acquiring a settlement in Newport, went with his son to Corinna, and resided there himself ever after, and before acquiring a settlement there emancipated his son who returned to Newport and resided more than five years during his minority; *held*, that the son's settlement after emancipation was all the while in Newport and not in Corinna, not on the ground of his own residence there, but that he followed the previously acquired settlement of his father; *held* also, that the derived settlement of an emancipated minor is that of his father at the time of emancipation, and not that acquired by his father at any time thereafter.

An emancipation of a minor is not to be presumed, but must always be proved. It need not be in writing.

Where the jury found an emancipation in fact under correct instructions as to the law, and had at least the testimony of the father and son upon which to rest it, the full court refused to set it aside.

On exceptions and motion.

Assumpsit, for supplies furnished from April, 1872, to August, 1873, to one Mary F. Lawrence, a pauper, about seventeen years of age, whose alleged settlement was in the defendant town, $91. The necessity of the supplies and all proper notices and replies were admitted; the only question being one of her settlement, which was that of Haskell Lawrence, her father, who it was admitted had a settlement derived from his father, Abel Lawrence, in Newport, in 1837. Abel in that year removed to Corinna, where he ever after resided, his son, born February 28, 1827, being then ten years old.

To fix the settlement of Haskell in Newport, and prevent his acquiring a new settlement in Corinna with his father, the plaintiffs alleged that in the winter of 1840–'41, the son being then thirteen or fourteen years of age, his father emancipated him; and evidence tending to prove and also to disprove that fact was introduced by the respective parties.

Evidence was introduced by the defendants, tending to prove that at the age of twenty-five years, Haskell was married on September 3, 1852, and that he then, at the time of the marriage, went to live with his wife at her father's, in Stetson, and that he subsequently lived there with her as his home; also at other places in Stetson, long enough in all, as the defendant contended, to gain a new settlement in that town; they were divorced in 1860; between these years her residence was in Stetson. The defendants' counsel asked the presiding justice to rule as follows to the jury:

I. That a legitimate child under the age of twenty-one years, follows the settlement acquired by his father before the child arrives at that age, notwithstanding the father and child had previously agreed on the part of the father to release the child's time until twenty-one years of age, and on the part of the child to support himself and hold him harmless from all charges.

II. No emancipation by a father of his son, thirteen or fourteen years of age, can be effectual to prevent the son from following a new settlement acquired by the father after his emancipation and before he is of age.

III. If emancipation can be effected by a contract and acts between father and son, as above supposed, the contract must be in writing.

IV. If the emancipation was produced by reason of the poverty of the father, it is not effectual to prevent the child's following the father's new settlement.

V. If the facts are as testified by Abel Lawrence, there was no emancipation.

VI. If the pauper's father established his residence in Stetson with his wife, living there with her two or three years, her continued residence there is *prima facie* evidence of his.

These several requests were denied.

The presiding justice instructed the jury, that the plaintiffs, claiming that there was an emancipation of the son by the father, the burden of proof was on them to show it; he must prove that he gave the son his time; that the age of the son at the time was immaterial, nor was it necessary that it should be made public, nor in writing; and no prescribed form of words is required, but

it must be express and positive, must be proved and not presumed, may be proved by the testimony of the parties, or inferred from the acts and declarations of the parties; but once emancipated, the father cannot resume his rights. The age of the boy is a matter for consideration as to the probability of the story.

As to the father receiving his son's wages at any time, did the father claim them as matter of right, and did the son claim them because he earned them; did the father claim them in violation of agreement, or because there was no agreement, as matter of right or equity; all these considerations were proper to be taken into account by the jury in judging of the fact, whether or not there was an emancipation.

On the point of his alleged settlement in Stetson, the judge instructed, that five years' continuous residence in that town, without receiving supplies as a pauper, would give him such settlement; that if he abandoned his wife, and left with the intention of abandoning her and his home, that would cease to be his home; but that an abandonment of the wife was not necessarily an abandonment of his residence, the will of the husband determines his residence; the fact of the wife remaining and having her home is a fact, the effect or weight of which is for the jury; the departure must be with an intention to abandon.

In submitting the case, the court by assent of both parties submitted to the jury to find and make answer to two interrogatories:

I. Was there an emancipation of the son by the father?

II. Did Haskell have his residence five successive years in Stetson?

The jury returned a verdict for the plaintiff, and answered the first question in the affirmative, but made no reply to the second.

The counsel objected to affirmation of verdict because of this default in answering the last question, but the court allowed the verdict to be affirmed and recorded.

The defendants excepted to the above rulings and refusals, and to the acceptance of the verdict.

A. W. Paine, with whom was *E. Walker*, for the defendants, recapitulated his points as follows:

I. The plain and unequivocal language of the statute that "legit-

imate children have and follow the settlement of their father until they gain a settlement of their own," originally enacted in 1794, adopted by our state in 1821, subsequently re-enacted in the same or substantially the same words in each of the three subsequent revisions and now a part of our pauper law, leaves no room for judicial construction or legal doubt.

II. Any attempt to avoid this explicit and unmistakable enactment by any arrangement or agreement secretly made between a father and his infant child, whereby the parental duties and obligations are surrendered and avoided, is a violation of the first principles of natural law, opposed to good morals, conscience and religion, rebuked by the plainest provisions of the common law, and, if, by parol, directly in violation of the positive enactment of the statute of frauds; for each and all which objections, such arrangement is absolutely void, leaving each party at liberty at its pleasure to ignore its effect and disregard its requirements, and thus render it wholly nugatory and ineffectual.

III. No emancipation, productive of the result here claimed, can be effected, which is based upon any volition of the infant as one of its necessary factors; but only such emancipation can produce that result as is forced upon the infant by misfortune in the death (or perhaps insanity,) of his parents, or second marriage of his widowed mother. And only such emancipation is thus effective as enables the infant, in the language of the statute, to "gain a settlement of his own," in some of the modes provided by law. The right to gain a derivative settlement continues so long as the party lives through whom the derivation is derived; the derivation is not subject to be defeated by any voluntary act of the party, nor by any act save that of nature or the law, which casts upon the infant the involuntary results of misfortune.

IV. The doctrine advanced, that an infant may be emancipated by agreement with its father so as to prevent its taking any new settlement of its father acquired during its minority, in violation of the express language of the statute, is believed to be wholly without authority in either of the states of Maine or Massachusetts or any where else; the cases in which expressions used to convey any such idea are relied upon, not being authority as decisions but

only *dicta*, sayings, and not decisions, and having their sole application to emancipation forced upon the infant by misfortune and independent of his volition. If, however, in all this we are mistaken and a father can by agreement with his infant child effectually repeal the words of an unambiguous statute and change all the relations of towns and municipalities with each other, then we contend further.

V. That to produce that result the court should require the strongest proof of the fact, that no mere inference drawn from doubtful facts should avail, but that it should be done in as careful manner as is provided for the transfer of parental duties in the statute relating to "masters, apprentices and servants."

VI. The testimony of Abel Lawrence, the father, does not make proof of such emancipation as the plaintiffs' case requires, and the requested instruction should have been given to that effect; inasmuch as with other things it does not appear from his testimony that he released his son's time during his entire minority, nor absolutely at all, but simply for the time and on condition that he should live with his grandfather, which time and condition were both violated.

VII. As matter of fact, the evidence fails to prove by a preponderance of testimony that there was any emancipation such as set up, the two witnesses who alone testify to the arrangement differing from each other on most material points, thus in a great measure neutralizing each other; both, too, having told very different stories, deliberately and seriously, varying widely from their testimony, thus falsifying their own evidence, [&c., &c.]

VIII. As to his settlement in Stetson; the requested instruction as to the *prima facie* force of the wife's residence in settling that of her husband should have been given.

IX. And finally the neglect to pass upon the fact of his new settlement in Stetson shows such a misconception of the case on the part of the jury as to render their verdict under all the circumstances of the case not worth saving.

D. D. Stewart, and with him *F. A. Wilson & C. F. Woodard*, for the plaintiffs.

DANFORTH, J. This is an action under the pauper law; and the question at issue is the settlement of the pauper.

The supplies sued for were furnished Mary F. Lawrence, who has the settlement of her father, Haskell Lawrence, who had a settlement in the defendant town in 1837, derived from his father Abel Lawrence. It appears that subsequent to 1837 and while Haskell, the son, was yet a minor, the father gained a settlement in Corinna. The principal question arising under the exceptions, is whether the son followed this newly acquired settlement of the father.

The plaintiffs contend that he did not, on the ground that he had been previously emancipated. The defendants, denying the fact of emancipation, claim that if it were so, he would still go with and have the settlement of the father in Corinna. This presents the question whether a minor can, under the law, be emancipated by the act of his father so as to prevent his following and having any subsequent settlement gained by the father while he is a minor.

This involves the construction of the second mode of gaining a settlement under R. S. of 1841, c. 32, § 1, that being the law applicable to this case. It reads as follows: "legitimate children shall follow and have the settlement of their father, if he have any within the state, until they gain a settlement of their own: but if he have none, they shall in like manner follow and have the settlement of their mother, if she have any."

It is contended by counsel that this provision is so plain that it cannot be misunderstood and needs no interpretation, and that its literal reading and meaning is its true one. We might readily admit this, were we to take it alone, unconnected with other parts of the same section, and without the light thrown upon it by the ever varying facts and conditions of life to which it must be applied. If taken literally, the children would follow the father even after becoming of age, unless they have gained a settlement of their own. But this cannot be the meaning of the legislature. This statute as well as others must be construed by the subject matter to which it is applicable. For the purposes of business and the ordinary affairs of life, children are not, in law, always regarded as members of the father's family. There must ordinarily be

a time when the child may act for himself and independent of his parents. For this reason it seems eminently proper and even necessary to insert into the law a qualification which is not therein expressed, but is there by implication only.

The same result will be reached by a construction of this clause in connection with other parts of the section. We find other modes provided by which settlements may be gained. Any person resident in a town March 21, 1821, under certain circumstances, gains a settlement. The same thing happens to all persons having their home in any unincorporated place when it shall be incorporated into a town. But "any and all persons" literally applied would include minors as well as those of age; and if thus applied a child might have one settlement derived from his father and at the same time another in a different town gained for himself by virtue of other provisions of the law; as this is not allowable, it is clear that the law cannot be literally rendered. We must find some explanation of its meaning which will give due force and effect to all its parts; as all must stand together, no one portion repealing another. What then must have been the intention of the legislature as gathered from the whole section and applied to the subject matter referred to?

The reason of the first provision may lend us material aid; and what reason can be given why the child should follow the father, except the policy of keeping families together? When there is no longer occasion for that, or when for any reason the child has ceased to be a member of the family and is no longer dependent upon the parent, then the reason for the law has ceased and ordinarily in such cases the law ceases.

Then, applying the same test to the other provisions referred to, if persons are to include children dependent upon their parents, the provision is, or may be, not only inconsistent in its operation with the first in the respect already referred to, but it may violate that fundamental principle of public policy on which that is founded, by often separating parents from their children.

Following out this view, we shall find no difficulty in adopting a principle of construction which will harmonize all these different provisions and at the same time give effect to the evident inten-

tion of the legislature. This principle is found in the doctrine of emancipation. If the emancipated child no longer follows his parents, and none but the emancipated can gain a settlement independent of his parent, all the difficulty vanishes. We then have a statute harmonious as a whole, which violates no policy by separating families, and which provides for all individuals as such.

In harmony with this view, we find all the decisions to which our attention has been directed, and they are quite numerous. Even the child who has arrived at twenty-one years of age, is subjected to the same test; for that fact is held not conclusive proof of an emancipation. *Monroe* v. *Jackson*, 55 Maine, 55, and cases cited.

This same statute has been in force in Massachusetts and in this state since 1793; and there appears to be no conflict in the decisions or dicta.

In *Springfield* v. *Wilbraham*, 4 Mass. 493, it was held that the words of the statute could not be taken literally. Parsons, C. J., says: "But when the father ceases to have any control over his children, or any right to their service, it is not easy to devise any good reason why they should not be considered emancipated, and as no longer having a derivative settlement with the father on his acquiring a new settlement." In this case the emancipation was on his becoming of age.

In *Charlestown* v. *Boston*, 13 Mass. 469, it was held that a minor daughter emancipated by marriage, did not follow a subsequently acquired settlement of her widowed mother.

In *Great Barrington* v. *Tyringham*, 18 Pick. 264, the court fully recognizing the principle contended for, found that the facts relied upon to show an emancipation did not constitute one, and therefore the minor followed the settlement of his mother.

The same principle is recognized and acted upon in *Upton* v. *Northbridge*, 15 Mass. 237; *Taunton* v. *Middleborough*, 12 Met. 35, and *Shirley* v. *Lancaster*, 6 Allen, 31.

In New Hampshire, the same interpretation has been given to a similar statute as fully appears by the cases from that state cited by the plaintiffs' counsel.

In our own state, the doctrine, that a minor emancipated may

gain a settlement independent of the parent and from the time of emancipation ceases to follow that of the parent, has been recognized and settled by a long and unbroken series of cases. *Lubec* v. *Eastport*, 3 Maine, 220. *Portland* v. *New Gloucester*, 16 Maine, 427. *Garland* v. *Dover*, 19 Maine, 441. *Tremont* v. *Mt. Desert*, 36 Maine, 390. *Oldtown* v. *Falmouth*, 40 Maine, 106. *Monroe* v. *Jackson*, 55 Maine, 55. *Bucksport* v. *Rockland*, 56 Maine, 22. *Hampden* v. *Brewer*, 24 Maine, 281. *Dennysville* v. *Trescott*, 30 Maine, 470; and many others.

This last case is decisive of the point we are now considering, in every respect; and so far as we know its soundness has never been called in question either here or elsewhere. On the other hand, in all the cases the point is treated as settled doctrine, and not even a doubt raised as to the effect of emancipation in taking the child from any subsequently acquired settlement of the father.

But, without seriously contesting the authority of these cases, it is earnestly contended that it is only an emancipation by the death of the parent, or by misfortune, that can have the effect claimed for it here, and not one that is the result of a contract between the parties. But the cases make no such distinction, and in many of them the emancipation in question rested upon a supposed contract. In *Portland* v. *New Gloucester*, above cited, it was directly founded upon a contract, and the decision turned upon that fact. In *Wells* v. *Kennebunk*, 8 Maine, 200, the contract was deemed sufficiently proved by the conduct of the parties. In *Oldtown* v. *Falmouth*, cited above, Rice, J., says, "emancipation is ordinarily a matter of contract. When the parents are living, there must be consent proved on their part, or acts from which such consent may be inferred, to constitute emancipation;" and simply because the contract was not proved the child followed the settlement of the father. In *Dennysville* v. *Trescott*, the emancipation was founded upon the consent of the mother, and was effectual in its influence upon the settlement of the child.

Where the emancipation is by marriage, the effect of which is not doubted, it is still by contract, for in such case the marriage to be effectual must be by consent of the parent, and consent is virtually a contract. *White* v. *Henry*, 24 Maine, 531. *Bucksport* v. *Rockland*, 56 Maine, 22.

It would seem that these cases are something more than "mere dicta, sayings and not decisions."

But as a matter of principle, why should there be any distinction between emancipation by misfortune and by contract? If there is an emancipation, of what consequence is it from what source it comes? If it is an emancipation, if the child is taken from the custody of the parent, and the parent relieved from the care of the child, there is as much a surrendering of the family tie if this is done by contract, as if accomplished by misfortune. But it is said that such contracts are against the policy of the law. It is undoubtedly against the policy of the law to force a separation of families against the wishes of those interested. But to permit the parties to do it, is entirely another thing. Such separations are not unfrequently useful to all concerned. In *Whiting* v. *Earle & tr.*, 3 Pick. 201, Parker, C. J., says in substance that though a father is entitled to the earnings of his son, "the court thought it equally clear that he might transfer to the son a right to receive them. This is necessary for the encouragement of young men; and it is often convenient for a father." Many cases might be cited where such a separation might promote the best interest of the child, if not of the parent. It may be that as a general rule the family circle is the best place in which to train and fit children to perform well the duties of life; but unfortunately there are exceptions to this rule, which may arise from misfortune or inability on the part of the parents. In such cases the law places no impediment in the way to prevent the parties from improving their condition and permits them within reasonable limits to exercise their own judgment as to the method of doing it.

All authorities agree that it is a voluntary matter on the part of the parents if living. If the minor voluntarily leaves his father's house without fault on the part of the latter, the father is under no legal obligation to pay for his support or education. *Angel* v. *McLellan*, 16 Mass. 28. *Weeks* v. *Merrow*, 40 Maine, 151.

If the father forces his child to leave his house, or deserts or abandons him, the child is released from all filial duties which the law will enforce and may seek his own welfare in his own way. Thus an emancipation may be accomplished by wrong and violence

and be sustained by the law, if the injured party chooses to accept the situation. It would be singular indeed if the same thing could not be accomplished by a contract between the same parties, without subjecting themselves to a charge of violating the policy of the law.

But it is further said that though a contract of this nature may be valid for many purposes, yet it cannot be made instrumental in setting aside the plain provisions of the statute, that the rights and liabilities of towns as fixed by the law cannot be varied by the contracts of parties. This proposition as stated is undoubtedly true; whatever the parties may do, the law remains the same. It is however not to be forgotten that while the acts or agreements of individuals are not to change or abrogate the law, the law is to be applied to these acts and agreements. It is the act of the person in fixing his abode that renders one town or another liable for his support if he becomes a pauper. Emancipation or want of it, does not change any law; but it is often an important element to be taken into consideration, in applying existing laws. It is the people who make the facts; and to those facts the court are to apply the laws. When a pauper is found in the community he must be relieved; and his condition, the circumstances by which he is surrounded, determine what town shall be liable for his support, whether those circumstances were brought about by his own acts or otherwise.

It is further claimed that emancipation by contract to be effectual must be in writing, as one not to be executed within the year. This, however, is an erroneous view of the nature of this contract. It is not one, as seems to be supposed, the execution of which is to be completed only when the minor becomes of age. On the other hand, it may be, and usually is, executed at once. The destruction of the parental and filial ties which it contemplates, take place when the contract is completed, and each party at once goes free from the restraints which bound him to the other.

In accordance with this view, we find the authorities. In *Abbott* v. *Converse*, 4 Allen, 533, emancipation was considered as a gift by the father to the son. A promise to give is revocable, but executed, irrevocable. In *Dennysville* v. *Trescott*, it was

proved by the acts of the parties, and not by writing, and so in most or all of the cases cited.

But a question arises here, whether the testimony in the case sustains the fact of emancipation. There have been many cases in which this question has been considered; but like all questions of fact, the result of each case must depend very much upon its own circumstances. There are, however, certain fixed principles of law applicable to cases of this kind. What is emancipation may be considered a question of law; whether it has taken place, a question of fact.

The instructions of the presiding justice to the jury upon this point were clear, distinct, and fully sustained by the authorities. In the language of Shepley, C. J., in *Sanford* v. *Lebanon*, 31 Maine, 124, the test to be applied is that of the "preservation or destruction of the parental and filial relations." In *Clinton* v. *York*, 26 Maine, 167, it was proved that the daughter had lived in a good many places; that her father had said he would not have her at his house; that his wife was quarreling with her; that he was not able to take care of her in the circumstances she was then in; and the brother took her home; this was held not to prove emancipation. In *Great Barrington* v. *Tyringham*, before cited, it was held that a minor, living in another state away from the parents, as an apprentice, was not thereby emancipated.

A minor bound to service by the overseers until he becomes of age, is not emancipated. The father's consent to a surrender of his rights is wanting, and without that, either express or implied, there can be no emancipation. *Oldtown* v. *Falmouth*, before cited. *Frankfort* v. *New Vineyard*, 48 Maine, 565. In *Monroe* v. *Jackson*, 55 Maine, p. 59, Barrows, J., says: "It occurs by the act of God in depriving the child of his natural protector by death, or by the voluntary act of the parent surrendering the rights and renouncing the duties of his position, or, in some way, conducting in relation thereto, in a manner which is inconsistent with any further performance of them. Poverty, even culminating in absolute pauperism of the parent, and resulting in a binding out to service of the child by the selectmen, until he is twenty-one years of age, does not effect it."

In *Portland* v. *New Gloucester*, there was an absolute surrender on the part of the parent of the custody of the child, and all his rights and duties in relation to it; an entire conveyance of all these rights to another person. Such a renunciation was held to be emancipation.

From these cases, as well as from others in harmony with them, the principle to be deduced is, that emancipation such as will affect a settlement under the pauper law, however it may be in other cases, must be an absolute and entire surrender on the part of the parent, of all right to the care and custody of the child, as well as to its earnings, with a renunciation of all duties arising from such a position. It leaves the child, so far as the parent is concerned, free to act upon its own responsibility, and in accordance with its own will and pleasure, with the same independence as though it were twenty-one years of age. Indeed, the best test which can be applied is the separation and resulting freedom from parental and filial ties and duties, which the law ordinarily bestows at the age of majority.

The jury, by their verdict, have found such an emancipation. To sustain the verdict, we have at least the testimony of the father and son, who may be presumed to know the facts better than others. Their credibility was peculiarly a question for the jury; and although we might have come to a different conclusion, we do not see sufficient reason for disturbing theirs.

Motion and exceptions overruled.

APPLETON, C. J., DICKERSON, VIRGIN and LIBBEY, JJ., concurred.

PETERS, J., having been consulted, did not sit.

STEPHEN D. MEADER *vs.* SULLIVAN S. WHITE.

Penobscot, 1876.—August 5, 1876.

Lord's day.

A loan of money made on the Lord's day is void.

Whether the promise to repay be in writing, verbal or implied, it cannot be enforced.

ON REPORT.

ASSUMPSIT on account annexed, originally tried before a trial justice and defended by an account in set-off, and plea of *non-assumpsit.* The trial justice gave judgment for the plaintiff for $9 and costs; and the defendant appealed.

By agreement of the parties the case is submitted to the law court on the statement that the matter of one item only shall be presented to the law court; that on one Sunday in April, 1872, at four o'clock in the afternoon, the defendant went to the house of his brother-in-law, the plaintiff, in Dexter, four miles from his own house, and said to the plaintiff that he wanted to borrow of him the sum of $9, and promised to repay it the next fall. Thereupon the plaintiff let the defendant have the sum of $9.

If the action is maintainable for the nine dollars, the defendant is to be defaulted for that sum and interest from the date of the writ and for costs; otherwise, the plaintiff is to be nonsuit and the defendant to have costs.

V. A. Sprague & M. Sprague, for the plaintiff, contended in substance, that one who loans money without interest, on Sunday, to relieve want, necessity, distress, violates no moral law, nor the statute which forbids traveling, or doing "any work, labor or business on that day, except works of necessity or charity;" that either the defendant represented truly that he was in want, or untruly; if truly, neither was violating the law; if untruly, he should not take advantage of his own wrong, not participated in by the plaintiff.

In the course of the argument under various views, the counsel cited and commented upon the following cases: *Cratty* v. *Bangor*, 57 Maine, 423. *Bailey* v. *Blanchard*, 62 Maine, 168. *McGatrick* v. *Wason*, 4 Ohio St. R. 566. *Whitcomb* v. *Gilman*, 35 Vt. 297. *State* v. *Goff*, 20 Ark. 289. *Jones* v. *Andover*, 10 Allen, 18. *Commonwealth* v. *Sampson*, 97 Mass. 407. *McGrath* v. *Merwin*, 112 Mass. 467. *Phil. R. R. Co.* v. *Phil. Towboat Co.*, 23 Howard, 209. *McClary* v. *Lowell*, 44 Vt. 116. *Hearne* v. *Nichols*, 1 Salk. 289. *Flagg* v. *Millbury*, 4 Cush. 243. *Adams* v. *Gay*, 19 Vt. 358.

The counsel closed with the appeal to the court, that if the points

noticed were of no avail, the wisdom of the court would discover a remedy which would combine law and justice, and give to the plaintiff the money which the defendant was so unjustly endeavoring to withhold.

J. Crosby, for the defendant.

The contract being made on Sunday is illegal. *Melior est conditio defendentis.*

APPLETON, C. J. The defendant borrowed of the plaintiff nine dollars on the Lord's day. Had he given his note for this sum, its collection could not have been enforced because of the statute forbidding secular business on that day. Whether the promise to repay is evidenced by a written memorandum or by a verbal promise, or rests upon an implied one, the same result must follow. The contract was illegal because made on a day when the making of contracts is forbidden, and the plaintiff cannot claim through an act prohibited by the statute. *Finn* v. *Donahue*, 35 Conn. 216. *Plaisted* v. *Palmer*, 63 Maine, 576.

The moral obligation to repay money loaned is the same, whether the loan be made on one day or on another. It is an unfortunate condition of the law when the violator of its commands is rewarded by it for such violation. The defendant and the plaintiff are alike guilty of a violation of law; the former in soliciting a loan, the latter in yielding to such solicitation. Both are liable to the penalty provided by the statute. But the defendant, while guilty with the plaintiff, and equally amenable to the penalties provided by the statute, is rewarded for his wrong doing by the refusal of the law to aid in the enforcement of a debt justly due. He is absolved from an indebtedness created at his own instance; while his associate in guilt, who yielded to his wishes is liable to a double penalty, that inflicted by law, and that arising from the non-payment of money loaned in addition to the sorrows of a regretful conscience.

Juvenal indignantly says:

"*Multi*
Committunt eadem, diverso crimina fato;
Ille crucem pretium sceleris tulit, hic diadema."

So, now, of two criminals guilty of the same offense, one is punished and the other rewarded by the law, which creates the offense.

Plaintiff nonsuit.

DICKERSON, VIRGIN and PETERS, JJ., concurred.

WALTON, J., concurred in the result.

HOLLIS M. HAYNES *vs.* MOSES JACKSON.

Penobscot, 1876.—August 8, 1876.

Amendment. Words,—parcel. Judgment.

In trespass *quare clausum* where the close is described as situated in the town of B., county of P., the writ is amendable by describing the close as situated in the town of M., an adjoining town in the same county.

Where a tract of land embraced both upland and meadow, and a deed of the whole tract reserved the meadow land on the westerly end of said tract extending to the highland on said tract, and recited that said excepted *parcel* was to be located and the boundaries fixed by appointees named, when in fact there were two meadows on the westerly end of the tract with a belt of high land between them; *held*, 1. That the reservation was of only one of the meadows and that the second one lying to the west of the belt of highland was not reserved; 2. That the appointees named had the power to locate and fix the boundary by the highland.

In a former action of trespass *quare clausum*, on the same close, in this court, in which the present plaintiff and another were plaintiffs and the present defendant and another were defendants, made law on report conditioned that if the line as agreed upon by appointees named was binding upon the parties a default was to be entered, if not, a nonsuit; the full court ordered a nonsuit. *Held*, to be no bar to this action.

ON EXCEPTIONS.

TRESPASS, *quare clausum*, from July 1, 1867, to the date of the writ, September 18, 1873; also a trespass September 1, 1873.

The verdict was for the plaintiff; and the defendant alleged exceptions.

The case and the questions raised are stated in the opinion.

A. Knowles & G. P. Sewall, for the defendant.

L. Barker & L. A. Barker, for the plaintiff.

LIBBEY, J. Trespass upon the Spencer meadow, so called in Milford. The writ at first described the close to be in Bradley.

Upon the opening of the case and before the pleadings, the plaintiff was allowed to amend by striking out Bradley and inserting Milford, being an adjoining town, and both towns being in the county of Penobscot. The defendant objected to the amendment on the ground that it changed a material part of the description and gave a new cause of action. If any part of the *locus* was misdescribed, an amendment describing it correctly was clearly allowable. It introduces no new cause of action, but only corrects an error in the description of the close on which the trespass is alleged to have been committed.

The principal question in this case was whether the plaintiff or defendant was the owner of Spencer Meadow. This meadow was a part of a tract of land in said Milford, known as the Southgate tract. S. H. Blake once owned the whole tract; and each party claims under him. One Wentworth Lord had the care of the tract, and was to be interested under Blake when the land was paid for.

In 1862, Blake conveyed the whole track to one Ritchie, with an exception in the words following, "excepting and reserving the meadow land on the westerly end of said tract, extending to the highland on said tract, said excepted parcel and not hereby conveyed, containing from two to three hundred acres more or less," said boundary by the highland to be located and fixed by said Ritchie and W. Lord. The plaintiff became the owner of Ritchie's title, one undivided half in September, 1868, and the other undivided half in May, 1870.

In 1864, said Blake conveyed to the defendant and another so much of the tract as was not conveyed to Ritchie as aforesaid. The description in this deed is as follows: "The meadow land on the west end of the Southgate tract, so called, extending to the highland on said tract; said meadow land containing two to three hundred acres more or less. The easterly part of said tract was deeded to E. C. Ritchie, 9th of June, 1862, and the intention of this deed is to release all my title and interest in the remaining portion of said tract. The boundary line between Ritchie and the present grantees to be established, if not already done, as provided in Ritchie's deed."

A question arose at the trial upon the construction of the deeds. The plaintiff contended that under the exception in Ritchie's deed, the defendant was entitled to a parcel of meadow on the immediate west end of the track known as a part of Sunkhaze meadow, so called, which he claimed was separated from Spencer meadow by a strip of highland some twenty rods wide; while the defendant contended that he was also entitled to the Spencer meadow on the west half of the tract, whether separated from Sunkhaze meadow by the strip of highland or not; and he also claimed that the strip of land claimed to be highland by plaintiff, was in fact meadow land, so that the two meadows formed one continuous parcel of meadow land. Upon this question much evidence was introduced by both sides, and it was submitted to the jury to determine as matter of fact whether the strip of land, between the two meadows, of about twenty rods in width, was or not, within the meaning of the deed, meadow land. The jury found it was not meadow land, and the verdict was for the plaintiff.

Upon the question of the construction of the deeds the presiding judge instructed the jury as follows: "A question arises upon the language of the two deeds, whether the defendant has the title to all the meadow land on the westerly end of the Southgate tract, provided there are two meadows thereon, or to only one of such meadows or one parcel, to use the phrase used in the deed. For the purposes of this trial I instruct you that the defendant's title is limited to one parcel or piece of land. 'His meadow land' must be virtually and really but one piece of territory. It may be irregular in its shape and proportions, still it cannot be made up of separate and distinct pieces, although upon the west end of the tract, but it must be in fact and reality but one parcel and not two parcels of meadow land."

It is contended on the part of defendant, that this construction of the deed is not correct; that by the true construction of the deed from Blake to Ritchie, all the meadow land on the westerly end of the tract, whether in one or more parcels, was excepted, and that the grantee took the highland only. Upon a careful examination and consideration of the language of the deed, we think the construction given by the presiding judge to the jury is

correct. The deed conveyed the above tract excepting "the meadow land on the westerly end of said tract, extending to the highland on said tract, said excepted parcel and not hereby conveyed, containing," &c. "The meadow land on the westerly end of said tract, extending to the highland on said tract," can embrace but one piece of territory. The boundary of the territory excepted is where the first piece of meadow land on the westerly end of the tract joins the highland. The first meadow land extending to the first highland on the westerly end of the tract is the part excepted. If there is any doubt about the meaning of the clause quoted, the clause following, "said excepted parcel and not hereby conveyed containing two to three hundred acres more or less," makes it clear and certain. If the grantor had intended to except more than one parcel of meadow land, he would have used more appropriate terms to accomplish that purpose.

The jury having found that the strip of land, some twenty rods in width, separating Spencer meadow from Sunkhaze meadow, is not meadow land, but highland, it follows that Sunkhaze meadow, extending to the highland between that and Spencer meadow, is the parcel excepted and owned by the defendant, and that he has no title to Spencer meadow.

By the deeds under which both parties claim, Ritchie and Lord had the power to locate and fix the boundary by the highland. The instructions of the presiding judge as to the legal effect of the action of Ritchie and Lord in locating and fixing the line were correct. *Haynes et al.* v. *Jackson et al.*, 59 Maine, 386. But the jury having found that the strip or belt of land connecting Sunkhaze and Spencer meadows was not meadow land, it follows, as we have seen, that the defendant had no title to Spencer meadow where the alleged trespass was committed ; and the line located and fixed by Ritchie and Lord became immaterial to the result of this suit, and the judgment will not establish it as the dividing line between the parties.

But the defendant contends that plaintiff is estopped from claiming title to Spencer meadow by the judgment in case *Haynes et al.* v. *Jackson et al.*, rendered at the April term of this court, 1872, reported in 59 Maine, above cited. That was an action of

trespass, and judgment was rendered on nonsuit. That judgment in no way determines the title. *Exceptions overruled.*

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

JOHN C. LADD *vs.* JOHN S. PATTEN *et al.*

Penobscot, 1875.—August 8, 1876.

Contract. Words,—to find help.

A contract to pay a stipulated price for removing pianos, by the piece, and "to find help" to aid in the removal, does not make the owner liable for the use of an apparatus, invented, made and used by the contractor to facilitate the work of removal; although the use of such apparatus may have saved the owner the necessity of a considerable portion of the help he agreed to find. An agreement to find help in such case, is an agreement to furnish manual labor, not to pay for the use of such an implement.

ON REPORT.

ASSUMPSIT, for removing pianos in the city of Bangor, under a contract by which the plaintiff was to move the pianos and the defendant to find help and to pay 75 cents each.

The account annexed contained about 1,200 items for moving pianos and organs covering a period from February 4, 1869, to June 13, 1873.

The case was sent to an auditor who reported that exclusive of two items there was due from the defendants to the plaintiff at the date of the writ the sum of $673.25. The defendants were defaulted for that amount, with leave on the part of the plaintiff to have the default taken off and the case stand for trial if in the opinion of the court upon the plaintiff's testimony he is entitled to more.

The plaintiff claimed pay for two items not covered by the auditor's report; 1st. Interest at 6 per cent to July 1, 1873, $121.74. 2nd. Use of piano rigging from August 13, 1870, in moving 451 pianos, 50 cents each, $225.50.

The plaintiff testified in substance, that he procured certain rigging, trucks, and a harness of his own invention, to be used by

men, by which the pianos could be moved more easily in and out of houses and up and down stairs; that he thereby saved to the defendants, the cost and labor of one or two men in moving each piano; that he had several conversations in regard to the adjustment of the account before the commencement of the action.

F. A. Wilson & C. F. Woodard, for the plaintiff.

F. M. Laughton, for the defendants.

DICKERSON, J. By agreement of counsel at the hearing before the auditor, the items in the plaintiff's account for use of piano rigging and for interest were reserved from the consideration of the auditor and to be reported for adjudication by the court.

The auditor found that, exclusive of these items, there was due from the defendants to the plaintiff $673.25, for which sum a default was entered, and the case was reported; the default to be taken off if upon the plaintiff's testimony, he is entitled to more in the opinion of the law court, and the case to stand for trial.

The plaintiff was a truckman and the defendants were dealers in pianos; and all the charges in the plaintiff's writ, except those reserved for the determination of the court, were for removing pianos and organs.

The auditor reported that the contract between the parties was that all the pianos within city limits should be moved for seventy-five cents a piece. The evidence shows that the defendants agreed to "find help" for removing the pianos, and that they did so in several instances. In such cases the defendants either paid the assistants directly, or they were paid by the plaintiff who charged the several sums to the defendants.

By the defendants' agreement "to find help" they were bound to furnish such manual labor on request as the plaintiff might reasonably need in addition to his own services in order to accomplish the work of removal. If they had refused to do so, the plaintiff had the alternative of abandoning the contract, or employing the necessary help for its fulfillment and charging the amount paid therefor to the defendant.

The evidence does not show that the defendants neglected or refused to find help when requested to do so; nor is there now

any controversy between the parties as to the amount paid for help by the plaintiff. The charge in the writ that we are called upon to consider is "for use of piano rigging." It appears in evidence that in order to facilitate the work of removal the plaintiff invented, made and used an apparatus which cost about $25. For the use of this apparatus he has charged fifty cents in each instance, amounting in all to $225.50. The testimony shows that the use of "the piano rigging" saved considerable manual labor—the witnesses differing somewhat in their estimate of the amount thus saved.

We do not think that the plaintiff is entitled to recover upon this item in his account. The agreement was to find help, that is, manual labor. There was no agreement express or implied to pay for the use of apparatus of any kind; no mention was made of the piano rigging. The testimony shows that the defendants had a contrivance of their own which they used to advantage for the same purpose. It is reasonable to suppose that they would have made provision for the use of their own implement, if they had contemplated that they would be liable for the use of any such gear. The damages for failing "to find help" are direct and easy to be ascertained; they are what it reasonably cost the plaintiff "to find the help" himself. On the contrary, the method of ascertaining the value of the use of the piano rigging is indirect and secondary; involving, in the first place, the cost of the help the defendants were required to furnish, and then the amount saved by the use of the apparatus. The use of the piano rigging was made at the plaintiff's own motion and risk, and entirely outside of the contract; the minds of the parties never met in any agreement express or implied, to pay for its use; and there is no implication of law arising from the facts in this case that renders the defendants liable therefor.

The elements necessary to entitle the plaintiff to interest on the items in his account are wanting. There was no agreement to pay interest, nor was there any demand of payment, or what would be equivalent thereto. *Default to stand.*

APPLETON, C. J., DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

JOSEPH F. NASON, executor, in equity, *vs.* FIRST BANGOR CHRISTIAN CHURCH, *et als.*

FIRST BANGOR CHRISTIAN CHURCH *vs.* JOSEPH F. NASON, executor.

Penobscot, 1876.—August 8, 1876.

Equity. Executors and Administrators.

A testator bequeathed property to aid in the erection of a house of worship for the first church of the Christian denomination in Bangor, subject to the conditions that the church be legally organized within ten years, and, before it avails itself of the appropriation, own a lot free from incumbrance on which to erect their house, within one mile of Kenduskeag bridge. Two churches of that denomination organized in some form within the time specified; the first, which was not recognized by the general conference, did not own a lot, nor claim the legacy. The organization of the claimant church was recognized by the general conference and they purchased the requisite lot, and demanded the legacy. In a bill in equity seeking a construction of the will, and direction in the disposition of the legacy, it was *held*, that the bequest was valid, and ordered that it be appropriated under the direction of a trustee to be appointed by the court at *nisi prius*, to aid in the erection of a house of worship upon the lot owned by the church.

The general doctrines of *Sewall* v. *Cargill*, 15 Maine, 414; *Preacher's Aid Society* v. *Rich*, 45 Maine, 552; *Tappan* v. *Deblois*, id., 122; and *Howard* v. *Am. Peace Society et als.*, 49 Maine, 288, are re-affirmed and applied to the facts here presented.

Extracts from the records of the Maine Eastern Conference of the Christian Church and those of the First Bangor Christian Church are legally proper to be considered by the court.

Where a testator made a bequest under certain conditions "to aid in the erection of a house of worship to be under the control of the First Christian Church in Bangor," *held*, that even if the conditions were performed, the action here brought would not lie in behalf of the church against the executor for the payment of the bequest.

ON REPORT.

Two cases, an action at law, and a suit in equity, are presented together to the law court.

The bill in equity asks the construction of the will and aid in the disposition of the assets of Samuel S. Nason, who died July 3, 1865, leaving brothers, but no widow or lineal heirs. The will, after making provision for the testator's wife in case she survived him, and valid legacies of $200 to his brother William H. Nason, and $100 to Mount Hope Cemetery Corporation, gave the residue

of his property, together with his wife's portion, in case she did not survive him, some $4,000 in all, at the date of the bill, January, 1876, to aid in the erection of a house of worship in the city of Bangor, to be under the control and used by the first Christian church, or the first church of the Christian denomination in Bangor, subject to the condition that the church within ten years be legally organized, and own a lot free from incumbrance on which to erect their house within one mile of Kenduskeag bridge.

Within the ten years, two societies of the denomination called "Christian" were organized in some form in Bangor, the first called the "First Christian Church in Bangor" March 2, 1871, not recognized by the conference, and not performing the conditions, or claiming the legacy; the other, the claimant church, adopted for their name the "First Bangor Christian Church," commenced their organization later in the same year, and completed it as indicated by their own records and the records of the Maine Christian Conference in that or the next year, and also attempted within the time a statute organization in which counsel pointed out certain informalities, as want of seal in the warrant, and want of requsite oaths of office.

Some of the foregoing, with other material facts, are stated in the opinion.

In the action at law the church sued the executor for the same legacy.

A. W. Paine, for the executor.

L. Barker & L. A. Barker, for the church.

BARROWS, J. In the first named process, the plaintiff in equity seeks under the seventh clause of § 5, c. 77, R. S., to obtain,

I. A construction of the will of Samuel S. Nason who died July 3, 1865, leaving a will which has been duly admitted to probate, and of which the plaintiff is the duly qualified executor; and

II. In case a valid trust is thereby created, directions from the court as to the mode of executing the same.

The item in the will under which the questions arise runs thus:

"I give and bequeath the balance of my property, be it more or less, to aid in the erection of a house of worship in the city of

Bangor, to be under the control and used by the first Christian church (or first church of the Christian denomination) in said Bangor.

This bequest is subject to the following conditions, viz: Said church must be legally organized and own a lot on which to erect their house; said lot must be within one mile of Kenduskeag bridge, and the society or church must own it free from incumbrances before it avails itself of this appropriation. Ten years from the time of my decease, I allow said church or society for its organization; during which time the amount bequeathed to it shall be at interest, and the interest as it accumulates be added to the principal for the benefit of said church or society.

* * * * * * *

In the event that no church or society of the Christian denomination shall be in existence in Bangor within the time specified by this section, or should said church or society fail to comply with the conditions of this bequest, then it is my will that the sum bequeathed to them, be it more or less, be given to the New England Christian Home and Foreign Missionary Society, to remain a permanent fund in the hands of said society forever, the interest to be expended annually to sustain a missionary of the Christian denomination in Aroostook county, Maine; said missionary employed must be a man who is not addicted to the use of tobacco in any form whatever and one who is denominationally a Christian."

The bill alleges that after the death of the testator, viz: on the second day of March, 1871, a church of the Christian denomination was organized and established at Bangor, and was known as the First Christian Church in Bangor, was located at Bangor though embracing citizens of Bangor and the adjoining town of Hampden; but that it has never purchased any lot of land for a house of worship according to the provisions of the will, does not propose so to do, and consequently does not claim any interest in the bequest. That subsequently, some time in the year 1871 or 1872, another body of persons in Bangor, residing principally in a locality known as West Bangor or Barkersville, met together and claim to have been organized as a church of the Christian denomination, adopting for their name the "First Ban-

gor Christian Church;" but the plaintiff has no means of determining whether their organization is or is not legal. But this church claims to be legally organized and to be the first church of the Christian denomination in Bangor; and he is informed that they have purchased a proper lot for a church building to meet the conditions in the will, and more than ten years after the decease of the testator they made a demand on him for the payment of the money. The plaintiff asks that they may be put to the proof of the legality of their organization, and that the court will determine, under these allegations, and evidence to be introduced by the parties whether the "First Bangor Christian Church" is entitled to receive the benefit of the residuary clause in the will, and if not, who is. And, whether, if it is so entitled, the money shall be paid to them at once and they be entrusted with its expenditure, or by whom it shall be expended for the object named in the will, and that the court will advise him generally as to the validity of the bequest and the proper and legal mode of executing the trust. The heirs of the testator and the three societies above mentioned are made parties respondent; and the case is submitted upon an agreed statement of facts and evidence, which admits the truth of the allegations in the bill except as they may be modified by the proof offered to establish the legal organization of the First Bangor Christian Church and its right to the bequest, consisting of copies from the records of the Maine Eastern Conference of Christian Churches and from the records of the claimant church and the further distinct admission "that a deed of a lot was made, delivered and recorded, as stated in the bill, and that the title still remains as made by the deed free of incumbrances; and that the claimant church was organized and admitted into the Maine Eastern Conference of Christian Churches, according to the established usages of the Christian denomination, said conference and the churches constituting the same (other than appears in this case) not being incorporated or organized under the laws of this state."

Hereupon it is objected against the right of the claimant church, 1, that the only church that could ever have fulfilled the conditions of the will was the one organized March 2, 1871, because that alone answers the description of the first Christian church in Ban-

gor; and 2, that this claimant church, though it has obtained a deed of a lot answering the calls in the will, fails in several particulars to show a legal organization.

The general principles and rules which will govern this court in determining the validity and construction of such bequests as the one before us are laid down in *Sewall* v. *Cargill*, 15 Maine, 414. *Preacher's Aid Society* v. *Rich*, 45 Maine, 552. *Tappan* v. *Deblois*, id. 122. *Howard* v. *American Peace Society et als.*, 49 Maine, 288. A reference to these cases will suffice without a re-statement of the doctrines there found.

I. Unmistakeably, the prime object of the testator in the residuary clause was to devote the remainder of his property to aid in the erection of a house of worship in a particular locality for the use of those belonging to a specified denomination of protestants there; provided that, within ten years from the time of his decease, there should be a legally organized church capable of holding and controlling property, and owning free of incumbrance a lot of land within the designated limits on which to place the building. Is this object to be defeated, and the limitation over to take effect, because there was an organization which was known as the First Christian Church in Bangor a few months prior in date to the claimant church, but which the case finds has never undertaken to fulfil the conditions of the bequest, and though made a party to this proceeding sets up no claim thereto?

It is suggested at the bar that the case is analogous to those which not unfrequently arose when this state was a part of the commonwealth of Massachusetts, under grants in which lots were reserved for the first settled minister, where it was held that the title vested when the first minister was settled; and to those in which the right of the first parish to the town's church property as against all subsequent organizations has been sustained.

The last mentioned class of cases turned mainly upon peculiar statute provisions, commencing with those of Mass. Statutes of 1786, c. 10, §§ 4 and 5; and in the others it will be noticed that the lots were unconditionally reserved for the first settled minister: so that these cases throw little light upon the question before us, which is whether the devise must necessarily be construed as

so far attaching to the church first organized, but taking no steps toward performing the conditions, as to defeat the claim of a church originating a few months later but otherwise meeting the calls of the will. The stricter construction will defeat the prime object of the testator's bounty: and under the circumstances here presented we think that the mere shadow of a name ought not to prevail so as to divert his gift from the use to which it was his first desire that it should be put.

It is to be borne in mind that this gift is not to the church itself, but to aid such church in the erection of a house of worship in a particular locality, for the advancement of the cause which the testator held dear, for the enlightenment of the ignorant and the reformation of the vicious in that vicinity.

We think it may be fairly held that he intended thus to aid the first church of the specified denomination, which within the prescribed time should take the steps which he required to secure the permanent ownership and control of the house for the use of the favored sect.

It is familiar doctrine that in the construction of wills "the court will place themselves, as far as practicable, in the position of the testator, and give effect to his leading purpose and intention, as indicated by the words of the will, construed with reference to all attending circumstances." Redfield on Wills, vol. 1, *436, 437.

If the general intent be clear the will must receive such a construction as will execute it, and if it is impracticable to give effect to all the language of the instrument expressive of some particular intent, the particular must yield to the general intent and purpose. *Hawley* v. *Northampton*, 8 Mass. 3.

The use of the descriptive phrase "first Christian church (or first church of the Christian denomination) in said Bangor" will not preclude the "First Bangor Christian Church," which alone meets the essential conditions of the bequest, from receiving the benefit of it, under the circumstances here disclosed.

Extracts from the records of the "Maine Eastern Conference of Christian Churches," and from the records of the claimant church are by the agreement of the parties, expressly "made a part of the case;" and this would suffice to make them "legally proper to

be considered by the court," even if they could not be so regarded, if offered and objected to. Made a part of the case as they are without objection, the authenticity and correctness of these records must be deemed to be conceded; and it cannot here and now be objected, if it could have been at any stage of the proceedings, that they are of "no more legal force, than those of a sewing circle or a ward caucus."

It is not to be assumed, that without this, upon an issue whether a certain church was or was not duly and regularly organized, and in good standing and fellowship with the churches of the denomination to which it claims to belong, the records of so important an ecclesiastical body as the "Maine Eastern Conference of Christian Churches" would be rejected.

Touching the church records, the remarks of Shaw, C. J., in *Sawyer* v. *Baldwin*, 11 Pick. 492, 494, seem to be appropriate, and they were made under statute provisions similar to our own. He says: "We must take notice of a usage so general as that of a church to keep a record. It is also to be considered, that the law recognizes the existence and organization of a church, as an aggregate body, takes notice of its acts and doings, and annexes thereto various civil rights and powers. It is in virtue of this organization and these proceedings, that deacons are elected; and being thus elected, they are empowered and qualified by the law to sue as a corporation. The law therefore does, by necessary implication, authorize and require a church, by a proper officer, to keep some record of its acts." He concludes, therefore, in the case he was considering, that a record of the proceedings of the church of B. was kept; "and as the book produced bears all the marks of being such a record, and as no other was kept, we are satisfied that the book in question is the record of that church." A bishop's register is evidence of the facts stated in it. *Arnold* v. *Bp. of Bath and Wells*, 5 Bing. 316; and so are vestry books; *Rex* v. *Martin*, 2 Camp. 100; and chapter house as well as parish registers, and other documents of a public nature, "notwithstanding," as Professor Greenleaf remarks, "their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the persons on

whose authority the truth of the documents depends." Confidence is reposed in them, partly because they have been made by authorized and accredited agents appointed for the purpose, and partly because of the publicity of their subject matter. Greenleaf's Ev., vol. I, §§ 483, 484, 1st ed.

We see no good reason why the records kept by a permanently organized ecclesiastical body having regular public sessions, like the Maine Eastern Conference should not be competent evidence of their acts and doings wherever such acts and transactions are relevant to the issue.

The proof is satisfactory that the church organized March 2, 1871, was not recognized by the Maine Eastern Conference of the denomination to which it claims to belong; that a committee of that conference, in September, 1871, after a hearing of parties interested, determined that there is no "First Christian Church in Bangor;" that thereupon the conference chose another committee to visit Bangor and organize a church, and this was done, and in pursuance of this action of the conference, it is both proved and admitted that the claimant church was organized and admitted into the Maine Eastern Conference of Christian Churches according to the established usages of that denomination. It is to all practical intents and purposes, as declared by the conference September 10, 1872, the first and only Christian church in Bangor, *i. e.*, the first and only church of that denomination there.

II. What did the testator intend by the requirement that it should be "legally organized?"

It is suggested at the bar that he meant a religious society or parish incorporated in the mode prescribed by R. S., c. 12, §§ 1–5. A movement seems to have been made by the claimant church to secure such an incorporation.

Various objections are suggested to the proceedings.

We do not think it necessary to determine their validity.

All that the testator seems to have had in mind as essential, was the organization of a church according to the established usages of the denomination, provided that such organization was sufficient to enable them to receive the conveyance of a lot and to protect the property.

Our laws like those of Massachusetts recognize the organization and existence of churches as aggregate bodies, distinct from parishes or religious societies; and they expressly declare the church wardens of episcopal churches, the stewards or trustees of the methodist episcopal church, and the deacons of all other protestant churches to be so far corporations as to take in succession; all grants and donations of real and personal estate, made either to their churches, or to them and their successors; and they provide all the necessary powers to enable them to hold, transfer and protect the property granted to their churches or for their use by suit or otherwise. R. S., c, 12, §§ 19, 20, 21.

By the regular organization of the church in conformity with the established usages of the denomination, the election of a deacon and the deed of the lot to the church, in connection with the other admitted facts in the case, we think all was accomplished which was necessary under our laws and the will of the testator to make good the right of the church to have the bequest appropriated to aid in the erection of a house of worship upon their lot.

III. The suit brought by the claimant church against the executor cannot be maintained.

Even if it were clear that the proceedings to secure an incorporation as a religious society were valid and complete so as to enable the plaintiffs to sue in the corporate name, the terms of the bequest are not such as would enable them to recover the money from the executor in such a suit.

It is not a direct bequest to the church or society, but the language used looks to the expenditure of the fund for the object designated through the intervention of a trustee. The fund is not to go into the possession of the church, but to be used to aid in the erection of a house of worship to be used and controlled by them. A nonsuit must be entered.

IV. Whenever any interest in the nature of a trust, or any power or duty implying a trust is created by a will and there is no special designation of the executor or any other person as trustee, nor any provision in the will for the appointment of a trustee it devolves upon the executor as such to administer the estate according to the provisions of the will. *Groton* v. *Ruggles*, 17 Maine, 137. *Pettingill* v. *Pettingill*, 60 Maine, 412.

But if it appears to be inconvenient or needlessly expensive for the executor to perform the duty the court on application will appoint a trustee.

It is suggested by the counsel for the executor that he resides in a distant part of the state and does not desire the appointment, but seeks, under the statute, directions from the court as to the discharge of his duty in the premises.

Upon consideration of the whole case before us, he is directed to settle his final account of administration in the probate court including therein the reasonable expenses and costs of the several parties in this litigation which he is to pay out of the estate; and make over the remainder to a trustee to be appointed by the court at *nisi prius*, such trustee to superintend the expenditure of the same in aid of the erection of a house of worship upon the lot owned by the First Bangor Christian Church, and to render his accounts of such expenditure to the court.

Decree accordingly.

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

MAINE MUTUAL MARINE INSURANCE COMPANY *vs.* JOSEPH M. HODGKINS *et al.*

Penobscot, 1876.—November 16, 1876.

Fraud.

The defendant signed this agreement: "We the undersigned agree to advance our notes for premiums in advance, to the insurance company, to the amount set against our names in accordance with the charter of the company," which provides that such notes are for the better security of those concerned. The defendant signed such a note and contested the action brought upon it, on the ground, that the plaintiffs' agent procured his signature to the agreement, without a reading of it on his part, by falsely representing that the note was to be given for an open policy to be surrendered when payable on payment of premiums earned. *Held*: that it was not error for the presiding justice to instruct the jury that the signing without reading was his own folly and not the fraud of the agent.

ON EXCEPTIONS AND MOTION.

ASSUMPSIT on a promisory note, set out in the opinion.

Defense:—a conditional note, fraud in its inception, and failure of consideration.

The plaintiff company in whose name the action was prosecuted by receivers for the benefit of the insured, was incorporated by an act of the legislature, March 16, 1870. Section 9, of their charter provides that "the company for the better security of those concerned may receive notes for premiums in advance of persons intending to receive policies, and may negotiate such notes for the purpose of paying claims or otherwise in the course of its business; and a compensation to the signers thereof may be allowed and paid at a rate to be determined by the trustees, but not exceeding six per cent per annum." It was decided in *Howard* v. *Palmer*, 64 Maine, 86, that the notes given under this 9th section were valid. In the case at bar the jury found specially that the note in suit was given under the 9th section; that the signature of the defendants to the agreement to advance notes for premiums in advance was not obtained by fraud, and returned a general verdict for the plaintiff for $1,075.07.

The defendants claim that these findings were under erroneous instructions; that they gave the note because they signed the agreement marked "A," set out in the opinion; and that they were induced to sign the agreement without reading it, by the false statements of Howard, who was appointed by the company to obtain signatures to it, and who represented that the note to be given was for an open policy to be surrendered when payable, on payment of premiums earned upon the open policy.

Upon this point the presiding justice said to the jury: "Now, it is claimed, that it is procured by fraud. The charge is a grave one, when made against a gentleman of standing; and the burden is upon him who makes it to prove it. The defendant is a gentleman of standing; he says he did not read this paper. If so, that is his folly and is not fraud. He says that Mr. Howard asked him to sign, saying, if I have his exact words, 'I have so many persons to get, and I want to know who they are; so I took my pen and signed it.' It would be fraud to misread a paper to a blind man, or to one who could not read; but signing a paper without reading is not fraud. Neither is it fraud if one misapprehends, and

misapprehending, misstates the legal effect of an instrument. It is a matter of every-day occurrence that questions arise as to what is the proper construction to be given to an instrument; and a construction given in good faith is not fraud."

To this and other rulings which appear in the opinion, the defendants alleged exceptions.

W. H. McCrillis, for the defendants.

The language of the court to the jury implied that a fraudulent intention was necessary, Judge Story, Eq. § 193, says that such intent is not necessary and wholly immaterial. It is immaterial whether Howard knew his assertions were false, or made them without knowing them to be true or false.

Apparent sincerity, affected piety, cunning, duplicity and falsehood, frequently, all play a part in the drama of fraud, and all combined would often fail of success without extreme folly and credulity on the part of the victim of the fraud. Want of vigilance does not purge fraud in civil cases. Other points taken by counsel appear in the opinion.

C. P. Stetson with *A. W. Paine*, for the plaintiff.

APPLETON, C. J. The defendants with fifty others signed the following agreement marked A.:

"We the undersigned agree to advance our notes for premiums in advance to the Maine Mutual Insurance Company to the amount set against our names respectively, in accordance with the charter and by-laws of the company."

The defendants signed for $1,000.

At a meeting of the plaintiff corporation on the 11th April, 1870, the defendant Hodgkins was voted in as a member of the corporation.

On 24th April, 1870, he gave the following note upon which this action is brought:

$1,001. "Bangor, 26 April, 1870.

Eight months after date, we promise to pay to the order of the Maine Mutual Insurance Company, one thousand and one dollars, payable in Bangor, Maine, value received.

J. M. Hodgkins & Co."

Across the end of the note is stamped "Given for open policy, No. 25, duly stamped."

The defendant Hodgkins testified that he gave the note because he had signed the agreement marked A.

This brings the case within that of *Howard* v. *Palmer*, 64 Maine, 86, the jury having specially found that the note was given under § 9, of the charter of the plaintiff corporation.

But it is claimed that paper A, was fraudulently obtained and material evidence to show it was excluded.

The defendant testified that he signed it without reading it, but claimed to show it fraudulently obtained. The presiding justice ruled that if Howard, who procured his signature, falsely represented its contents or what the paper was, it might be shown. The defendant then testified that this Howard called at their office and asked them to take a policy for eight months; this was the last of April he thought, and after talking a few minutes he explained the whole to us, that is, he said if we had any insurance we paid at the end of eight months and our notes were to be given up to us. We consented to take an open policy. Before he left the counting room he put that paper down. Witness was in a hurry and said, "why, do you want us to sign the paper," and he said, "I have got a good many policies to get and I want to know who they are when I get through," so witness took his pen and signed it, and that, he said, is all of it.

The whole evidence, therefore, in relation to procuring the defendants' signature to the contract A, was ultimately received.

The note in suit, as one of the defendants testified, was given subsequently to the signature of paper A, and because these defendants had signed it.

The defendants offered to show what was said when the note was given, and the open policy for which it was given, was received.

The defendants were permitted to show that it was given for an open policy, and the open policy which is in the usual form, was received in evidence.

The defendants wanted to prove what was said at the time the note was given and the open policy received by them, but the court excluded this evidence. The note was given for the policy.

The note purports to be given for an open policy. The policy obtained is an open policy. The conversations of parties which ripen into a written contract are not to be received to affect or control that contract. The rights of the parties are to be determined by the contract. Nor is the contract to be avoided because one party or the other may err in their construction of its legal effect. If so, no contract, the meaning of which becomes a matter of construction, could be upheld.

The issue to the jury was whether the note in suit was given for "premiums in advance" under § 9 of the charter and for the better security of the dealers with the company or not. The jury found it was so given.

In regard to the question of fraud, the court said: "the defendant says he did not read this paper A. If so, that is his folly and is not fraud. He says Mr. Howard asked him to sign, saying, I have so many persons to get and I want to know who they are, so I took my pen and signed it. It would be fraud to mis-read to a blind man or to one who could not read; but signing a paper without reading it is not fraud. Neither is it fraud if one misapprehends and, misapprehending, misstates the legal effect of an instrument. It is a matter of every day occurrence that questions arise as to what is the proper construction to be given to an instrument; and a construction given in good faith is not fraud."

This is unquestionably sound law, and if further instructions were deemed important they should have been requested.

The jury were instructed fully that the note was, as it purports to be, given for an open policy, and what were the general principles of law governing such policies. Indeed, the law as requested by the counsel for the defendants was given substantially as requested, with the qualification added, that though given for an open policy, if it was given under § 9, for the "better security of the dealers" with the company, that the plaintiffs were entitled to recover, in the absence of fraud on their part. This was in accordance with the previous decisions of this court in reference to notes given the plaintiff corporation.

It is objected that the presiding justice did not state accurately the testimony of Howard. If so, the attention of the court should

have been called to the alleged error, and the correction could then have been made, if there was any error. But it is too late now.

The verdict was in strict accordance with the evidence.

Motion and exceptions overruled.

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

PETERS, J., did not sit.

STATE *vs.* GEORGE HYNES.

Penobscot, 1876.—November 25, 1876.

Intoxicating liquors.

On the trial of an indictment against a person as a common seller of intoxicating liquors, the instruction to the jury that, "while there must be proof of a plurality of actual sales, and sufficient of them to satisfy the jury of the offense alleged, the government were not required to prove a plurality of sales by witnesses who have purchased liquor of the defendant, or by persons who have seen liquors sold by him, or by his clerks or agents; that the jury could infer the fact of sales from circumstances, and the situation of the defendant, if they were satisfied to do so," states the law correctly.

Where a young girl testified to the fact of purchasing liquors of the defendant, *held*, that the mother's testimony that the girl had been sent to the defendant's shop, within the time covered by the indictment, for liquor; that she was furnished with a bottle and money, and returned with liquor, was competent; that while the mother's evidence alone of itself, proved nothing, it was important in connection with the other testimony, and the government had a right thereby to strengthen the testimony of the daughter.

ON EXCEPTIONS.

INDICTMENT against the defendant for being a common seller of intoxicating liquors.

Upon the trial Mary Kelty and Michael Kelty, aged respectively ten and twelve, were produced as witnesses for the government, and testified to the fact of purchasing liquors of the defendant; Margaret Kelty, mother of the two witnesses above named, was introduced, and testified, subject to objection, that she knew they had been sent to the defendant's shop, within the time covered by the indictment, for liquors; that they were furnished with a bottle and money, and returned with liquors; did not know they got it of the defendant.

The verdict was guilty; and the defendant alleged exceptions which appear in the opinion.

A. Knowles & J. F. Rawson, for the defendant.

L. A. Emery, attorney general, for the state.

APPLETON, C. J. The defendant was indicted as a common seller of intoxicating liquors, and found guilty.

The presiding justice instructed the jury: "That there must be proof of a plurality of actual sales, and sufficient of them to satisfy the jury of the offense alleged; but that the government were not required to prove a plurality of sales by witnesses who purchased liquor of the respondent, or by persons who have seen liquors sold by the respondent, or by his clerks and agents; that the jury could infer the fact of sales from circumstances, and the situation of the respondent, if they were satisfied to do so."

Exception is taken to the latter clause of the instruction. But all crimes may be proved by circumstantial evidence. The situation of the respondent, his conduct, his acts, may become of the utmost importance in determining the question of his criminality. Circumstances and the situation of the accused may be of so criminative a character, as not merely to justify, but imperatively to require a verdict of guilty of even the highest crimes known to the law. The common seller of intoxicating liquors has no peculiar grounds for exemption from the general principles of law adopted in the investigation of crime. *State* v. *O'Conner*, 49 Maine, 594.

The evidence shows that Mrs. Kelty supplied her two children with a bottle and money to purchase liquor and that they returned with it. The children sent on this errand testified that they received the money and purchased the liquor of the respondent. True, the children testified they received the money and returned with the liquor, but the government had an unquestionable right to strengthen their testimony as to these facts. The evidence of Mrs. Kelty of itself proved nothing, but in connection with the other testimony it was of importance.

No other exceptions to the rulings of the presiding justice are relied upon. *Exceptions overruled.*

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

STATE *vs.* GEORGE CARSON.

Penobscot, 1875.—December 20, 1876.

Evidence.

When the prisoner was on trial for the murder of one Brawn and a witness in his own behalf; *held*, that on cross-examination it was not competent for the attorney for the state to ask him against objection: "Did you assault Mr. Farrar on the Calais road, while drunk?" and similar questions as to assaults upon other parties while drunk, the subject not having been opened on the examination in chief, and the prisoner having offered no evidence of good character in defense.

ON EXCEPTIONS.

INDICTMENT. The prisoner was tried for the alleged murder of Brawn on board a boat at Milford on the Penobscot river, on the 19th day of July, 1874; and upon the trial the counsel for the defense contended that the parties Carson and Brawn were intoxicated at the time.

The prisoner was put upon the stand as a witness; and in the course of the cross-examination the following questions, against the objection of the prisoner's counsel, were allowed to be asked upon matters not inquired of in chief, and answers given:

Q. Did you assault Mr. Farrar on the Calais road, while drunk?

A. I do not remember making any assault on anybody only in self-defense.

Q. Did you stab your brother William, while drunk?

A. I don't remember.

Q. Don't you remember whether you stabbed your brother William three or four times, while drunk?

A. No, sir.

Q. Will you say that you did not?

A. I do, sir.

Q. Did you assault Mr. Fiske, of Exeter, the hotel keeper, while drunk?

A. No, sir, not that I remember of, till he assaulted me once.

Q. Did you assault an old man, there in Exeter, while drunk?

A. No, sir; never.

Q. Did you assault Thomas Jordan and Andrew Phnifer, with a pistol, while drunk?

A. I presume that they assaulted me, and I took their pistol away, and gave them what folks in Oldtown and Milford said they deserved.

Q. Did you assault Henry Wadleigh, in Oldtown, while drunk?

A. I never assaulted him any further than an agreement was made between us.

The verdict was guilty; and the prisoner's counsel alleged exceptions.

A. Knowles, for the prisoner.

H. M. Plaisted, attorney general, for the state.

LIBBEY, J. The prisoner was on trial for the murder of one Brawn. He was a witness in his own behalf. In his defense he had not put in evidence his previous good character. On cross-examination the counsel for the government was permitted, against objection duly taken, to ask him the following questions: "Did you assault Mr. Farrar on the Calais road, while drunk." Similar questions were allowed to be put to the witness, against objection, as to assaults on several other persons, at different times and places, while drunk. These matters had not been gone into, in the examination in chief. Was this line of examination legally permissible? It must have been admitted for one of two purposes: either as affecting the credibility of the witness, or as tending to prove the crime alleged. A party to a suit may be a witness. If a witness, his examination must be conducted under the same rules that are applicable to the examination of any other witness. To impeach his credibility, it is not competent to prove by other witnesses that he has committed other crimes than the one with which he is charged; nor is it competent to do the same thing by cross-examination. The proper line of cross-examination does not extend so far as to authorize, in that way, the introduction of incompetent evidence. The witness must be prepared to vindicate his general character for truth, and to meet the proper evidence of a prior conviction of an infamous crime. These are matters properly in issue. But he cannot be required to be prepared to vindicate himself against any alleged crime that may be insinuated in the form of cross-examination, and of which he has no previous notice.

We think these principles well settled by the authorities. The evidence was incompetent for the purpose of impeaching the credibility of the witness. The subject is carefully considered and determined in *Holbrook* v. *Dow*, 12 Gray, 357.

Nor was the evidence competent as tending to prove the crime for which the prisoner was on trial. The fact that he had made a violent assault on another person, at a different time and under different circumstances, could have no legitimate effect to prove him guilty of the fatal assault upon Brawn. In *Commonwealth* v. *Thrasher*, 11 Gray, 450, the court states the rule as follows: "as a general rule in criminal trials, it is not competent for the prosecutor to give evidence of facts tending to prove another distinct offense, for the purpose of raising an inference of the prisoner's guilt of the particular act charged. The exceptions are cases where such evidence of other acts has some connection with the fact to be found by the jury, where such other fact is essential to the chain of facts necessary to make out the case, or where it tends to establish the identity of the party, or proximity of the person at the time of the alleged act, or the more familiar case, where guilty knowledge is to be shown or some particular criminal intent. Unless it be made material for some such reasons as we have stated, evidence of the substantive offenses of the like kind ought not to go to the jury." The case at bar does not fall within any exception to the general rule. We think the court erred in allowing the questions to be put to the witness.

Exceptions sustained.

DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

HINKLEY & EGERY IRON COMPANY, petitioners, *vs.* MAINE MUTUAL MARINE INSURANCE COMPANY.

Penobscot, 1876.—December 21, 1876.

The petitioners gave their note of $1001, to a mutual insurance company having no capital stock, "for the better security of those concerned," and received at the same time an open policy agreeing to furnish and provide insurance for the petitioners to the amount of $1000, in premiums. The insurance

company, without furnishing such insurance or being requested so to do became insolvent, and turned over to receivers their effects including the note which was paid by the petitioners in accordance with the judgment of this court after an unsuccessful defense on the ground of failure of consideration. *Held*, that the petitioners had no claim against the insurance company for reimbursement on account of the note or of failure to provide insurance.

On report.

Petition for extension of time within which to present and prove claims before the receivers of the defendant company, containing a statement in substance as follows: the petitioners represent that January 2, 1871 they gave a promissory note for $1001, payable in twelve months from date to the order of the Maine Mutual Marine Insurance Company; that the company having become insolvent and receivers appointed, the note, payment having been refused, was placed in suit by the receivers; that the receivers claimed that the note was given under section 9 of the charter of the Maine Mutual Marine Insurance Company, "for the better security of those concerned," while your petitioners contended that it was given for an open policy in the ordinary course of business, and hence that they could only be held to pay upon the note, the premiums actually due for insurance effected under the policy; that the opinion of the court in the case as reported in 64 Maine, 93, sustained the position taken by the receivers, and the petitioners were defaulted for the amount of the note, and have since satisfied the execution issued upon the judgment recovered.

Your petitioners now claim that when they gave the note they received therefor an open policy from the insurance company, and that by the policy the company agreed to furnish and provide insurance for the petitioners to the amount of one thousand dollars in premiums, but that on account of insolvency, they have become unable to perform their agreement, so that your petitioners have now a just claim against the company for the amount paid on the judgment.

The counsel agreed that if the court should be of opinion that the claim of the petitioners should be allowed, the time for presenting claims should be extended so that the claim might be presented to the receivers. The charter of the company, the note

given by the petitioners, and the open policy issued to them by the insurance company, and any records of the insurance company made part of the case.

The questions arising under the petition and the agreement of counsel were submitted to the full court for determination.

W. H. McCrillis, with whom were *F. A. Wilson* and *C. F. Woodard*, for the petitioners, in the course of his argument interpreted the contract as follows:

This contract, composed of the advance premium note and open policy, with the ninth section, constitute one contract, and the parts are to be interpreted together as one contract, and together with the meaning of an advance premium note would read: "Bangor, January 2, 1871. Twelve months from date the Hinckley & Egery Iron Company, promise to pay to the Maine Mutual Marine Insurance Company, one thousand and one dollars, payable at Bangor, Maine, value received." It is agreed between the iron company and the insurance company, that this is a "premium note in advance" given for "better security of those concerned," and the note is conditional, and nothing is due or to be paid on the note but earned premiums; but the insurance company, in the course of its business, may negotiate the note to obtain money to pay claims or otherwise; and the iron company will pay the note to the indorsee; and a compensation may be allowed the iron company not exceeding six per cent per annum; and the insurance company agree, if the iron company so elect, that they will earn premiums for them to the amount of the note; and in case the insurance company sell and transfer the note, the insurance company will reimburse the iron company by earned premiums.

C. P. Stetson, with whom was *A. W. Paine*, for the defendants.

Dickerson, J. The petitioners pray for leave to prove their claim against the defendant company, arising from a judgment rendered against them in behalf of said company upon a note of $1001, dated January 2, 1871. They allege that they have paid said judgment, and thus state their ground for reimbursement: "when they gave said note they received therefor an open policy from the Maine Mutual Marine Insurance Company, and by said

policy said company agreed to furnish and provide insurance for the petitioners to the amount of one thousand dollars in premiums, but that on account of the insolvency of said company it has become unable to perform its agreement, so that your petitioners now have a just claim against said company for the amount paid by them as aforesaid on said judgment."

The petitioners occupy the somewhat anomalous position of an unsuccessful litigant seeking to recover back of the successful one the amount he has paid upon the judgment recovered against him. The parties having agreed that, if the court shall be of opinion that the claim should be allowed, the time for presenting claims may be extended, the only question to be determined by the court is whether the claim is allowable.

This question was substantially and definitively settled in the action upon the very note on which the judgment sought to be allowed was rendered, viz: *Howard et als., receivers,* v. *The Hinkley & Egery Iron Co.*, 64 Maine, 93, and in *same* v. *Palmer et al.*, 64 Maine, 89, which is made a part of that case.

It was decided in those cases:

I. That the notes of that class were given under § 9 of the charter of the defendant company.

II. That they were founded on sufficient consideration.

III. That they constitute or stand for the capital stock of the company.

IV. That they are enforceable in the hands of the receivers to pay losses. And,

V. That it is no defense to such notes that no insurance has been effected under the open policies for which the notes in question were given, nor that the company has become insolvent.

The claim of the petitioners is not materially distinguishable from that set up in defense of these actions. The exhaustive arguments of the learned counsel for the petitioners in this case are in fact but re-arguments of those cases. If the principles of these decisions are to be maintained, it is clear that the prayer of the petitioners must be denied; that prayer is irreconcilable with them. If these notes constitute the capital stock of the insurance company, or are a substitute therefor, "for the better security of those concerned," it is not competent for the promisors to withdraw them,

or, if paid, the amount so paid, from the common fund, and thus deprive the holders of unpaid policies, upon which losses have been incurred, of the security the notes were designed to afford. If one promisor may do this, others may; until the imposing fund of "$50,000" required to be secured by the charter becomes a myth, vanishing at the wand of the sagacious and crafty operator, when the confiding holders of policies with incurred risks approach it for indemnity. In this respect they stand upon the same basis as the premium notes by persons actually insuring in the company under § 7, "which shall not be withdrawn from said company, but shall be liable to all the losses and expenses incurred by the company during the charter."

We do not perceive that the inability of the insurance company, by reason of insolvency, to perform its alleged agreement to insure for the petitioners, changes the legal status of their note or the judgment thereon one iota. If there was any such agreement, it was upon the condition that they should apply for insurance, which they never did. It was optional with them whether to do so or not. Their failure to insure was not the fault of the company, but their own voluntary choice. It is now too late for them to escape the consequences of that election. Nor was their promise to pay the note to the company conditioned upon the continuing solvency of the company. The insolvency of the insurance company was one of the possible, if not probable, contingencies attending the enterprise. The petitioners voluntarily assumed that risk and must abide the consequences. The insolvency of the insurance company is indeed but another reason for preserving its remaining assets from the contemplated spoliation; the admitted inadequacy of them to pay its indebtedness enhances their relative importance. In no view that we have been able to take of the case does the insolvency of the insurance company afford the petitioners legal ground for the allowance of their claim. To do so would be to overrule the cases cited, and thus to dissipate the common fund designated in the charter and relied upon by policy holders with underwritten risks as the guaranty for their indemnity.

Petition denied with costs for respondents.

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

WILLIAM MCPHETERS, petitioner for certiorari, *vs.* JOSIAH MORRILL.

Penobscot, 1876.—January 11, 1877.

Poor Debtor. Certiorari.

A debtor committed to jail without having given bond, and disclosing there under the provisions of R. S., c. 113, §§ 21 and 22, is not legally entitled to claim a discharge without paying the amount due the jailor for his support in jail. Such sum is part and parcel of the jailor's fees.

Whether under our present statutes regulating such proceedings, a petition for certiorari to quash the record of magistrates sitting to hear the disclosure of a poor debtor can ever be maintained, *quære.*

If it can, the magistrate whose record is in question, as well as the debtor whose liability to future arrest for the same debt is involved, should be made parties.

The record only can be brought up; and nothing *dehors* the record can be proved by the petitioner.

For the correction of a merely harmless error, a writ of certiorari will not be granted. *Thus,* where a creditor, on account of the erroneous decision of magistrates in discharging a poor debtor from jail without requiring him to first pay the jailor for his board, paid it voluntarily himself when not legally liable, or, even if liable, failed to show that the premature discharge was of any damage to him; the petition for certiorari to quash the record of the magistrates was denied.

ON REPORT.

PETITION for certiorari to quash the record of magistrates sitting to hear a poor debtor's disclosure.

C. A. Bailey, for the petitioner.

BARROWS, J. It is alleged in the petition that the person named as respondent was arrested on an execution in favor of the petitioner on the 15th day of October, 1874, and failing to give bond was committed to jail; that on the 27th of November he notified his creditor, the petitioner here, that he would submit himself to examination before two justices of the peace and quorum at the jail on the 30th of said November, when, after a disclosure before two justices duly selected he was permitted to take the poor debtor's oath, and was discharged, "although your petitioner then and there protested against such discharge, setting forth as his objection thereto the following: that before said debtor could lawfully be discharged, he must pay the expense of his keeping from the time of his arrest until his disclosure as pre-

scribed in R. S., c. 113, §§ 21, 22; but said justices overruled said objection, and permitted said debtor to go at large without paying the jailor for keeping him from the time of his commitment to the time of his disclosure, whereby your petitioner was obliged to pay the same and was thereby greatly damaged." The party named as respondent not appearing, though notified, the case is reported by the judge sitting at *nisi prius* to be determined by this court upon the facts stated in the petition.

We think the position which the petitioner took before the magistrates was legally correct. The date of the notice shows that the proceedings must have been under and by virtue of §§ 21 and 22, c. 113; and § 22 peremptorily requires that the debtor "besides the other fees, shall pay the jailor's fees before he can be discharged." There can be no doubt that this includes compensation for the support of the prisoner while he is in the custody of the jailor. R. S., c. 116, § 9, expressly includes the sum to be received "for the entire support of each prisoner of every description" among the fees which he may lawfully tax. This section comes in part from § 1, c. 284, Laws of 1865, which runs thus: the jailor's fees in the different counties of the state for the entire support of each prisoner . . . . shall be," &c. The word "fees" in these sections is used as synonymous with, and signifies the same as, "charges" in c. 126, Laws of 1862. No change was intended in the revision.

If the debtor prefers to go to jail rather than give bond, or disclose while in the custody of the officer making the arrest, he must pay the sum to which the jailor is entitled for his support as well as other legal charges, before he can rightfully claim to be discharged. But it does not follow that the writ should issue, as prayed for, because of this irregularity in the proceedings of the magistrates. Several difficulties are obvious.

The query suggested by the court in *Pike* v. *Herriman*, 39 Maine, 52; and *Ross* v. *Ellsworth*, 49 Maine, 417; whether under existing statutes regulating their proceedings a writ of certiorari can ever issue in these cases has never been favorably answered in any case to which our attention has been called. *Furbush* v. *Cunningham*, 56 Maine, 184, 186.

Again supposing this doubt favorably solved; while we think

that the debtor, whose liability to future arrest for the same debts is involved, ought to be made a party, we think that the magistrates whose record is brought in question should also be made parties. *Worcester & Nashua Railroad* v. *Railroad Commissioners*, 118 Mass. 563. This has heretofore always been done. See cases above cited, and those therein referred to. Moreover it was expressly held in *Pike* v. *Herriman*, and *Ross* v. *Ellsworth*, *upi supra*, that the writ prayed for can present the record only and nothing *dehors* the record can be proved by the petitioner. The record is not before us; probably because the magistrates are not made parties respondent.

But, aside from all this, "the facts stated in the petition" give us no legal assurance that the petitioner was injured by the error into which the magistrates fell. It is true the petitioner asserts that he was thereby obliged to pay his debtor's board in jail; but that was not the legal consequence of any fact stated in the petition. The debtor is primarily as well as ultimately responsible for his own support in jail as elsewhere.

Prior to the statute of 1876, c. 139, the committing creditor was under no legal obligation to pay for his debtor's support in jail, except upon his own response to the request of the jailor made upon the written complaint of the debtor, provided for in R. S., c. 113, § 55, or in cases where the town in which the debtor had his settlement had been called upon and had paid for his support as a pauper. R. S., c. 24, § 26. This condition of the law is expressly recognized by the court in *Spring* v. *Davis*, 36 Maine, 399, where it is held, that, nevertheless, if without such complaint the jailor calls upon the creditor with the knowledge of the debtor, and the creditor assumes the burden of his support, the promise of the debtor to reimburse him may be implied. The same view of the law was taken in *Howes* v. *Tolman*, 63 Maine, 258. When, in 1831, our legislature passed the act, chap. DXX, entitled "an act for the abolition of imprisonment of honest debtors for debt," which was the substratum of our subsequent acts for the relief of poor debtors, they provided in § 14 of said act "that the keeper of the prison shall be entitled to receive the same that is allowed by law for the support of other criminals, for the support of each debtor committed to prison by virtue of the provi-

sions of this act, to be allowed and paid from the treasury of the county where he stands committed, under the direction of the county commissioners."

In 1835, c. 195, § 15, came the provision for the discharge of pauper debtors, if the creditor, after eight day's notice and request, declined to become responsible and pay or furnish security for their support, and this provision has been substantially renewed in the subsequent revisions of the statutes. But, as before remarked, prior to the statute of 1876, the committing creditor was under no legal liability for the support of his debtor in jail; unless he agreed to be responsible for it on the jailor's request, or the debtor had been supported as a pauper by the town where he had his settlement.

Neither of these facts is stated in the petition; and the assertion that the creditor was obliged to pay the debtor's board by reason of the omission of the justices to require the debtor to pay it is a legal *non sequitur*.

Prima facie the jailor or the county would be the party to suffer by the justice's error; but they do not complain.

Even if we were at liberty to assume that the creditor was in some way under a legal liability to pay his debtor's board while he remained in jail, it would not necessarily follow that he was injured by the mistake of the justices.

The actual fact may have been quite the reverse. It is not alleged in the petition that the debtor had sufficient means to procure his discharge if the statute requirement had been insisted on; and the only result of different action on the part of the magistrates might have been, his further unavailing detention at an additional expense to the petitioner. The petitioner seems to have had the benefit of the disclosure of his debtor's affairs, which the law contemplates. In no view can it be said that the facts stated in this petition show that the petitioner was injured by the mistake of the justices. The application is to the legal discretion of the court; and the writ will not be granted for the correction of harmless errors. *Furbush* v. *Cunningham*, 56 Maine, 184.

Petition dismissed without costs.

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

STATE *vs.* THOMAS BURKE, appellant.

Penobscot, 1876.—January 11, 1877.

Intoxicating liquors. Words.—Appurtenances.

The designation, in the warrant, of a certain dwelling-house and appurtenances occupied by the respondent, is sufficient to authorize the officer to search an out-building on the same lot with the house, and near to it, but separate from it by an open space or passage way, when such out-building is occupied by the respondent mainly as a wood shed for the use of the house; and the respondent may be convicted of keeping the liquors seized in such out-building with intent to sell the same in violation of law.

It is not essential that the warrant should contain a command to this officer to arrest the respondent, if he shall have reason to believe said respondent has concealed said liquors about his person; provided the officer is therein commanded to arrest the respondent, if he shall find said liquors, and he does find the liquors.

ON EXCEPTIONS.

SEARCH AND SEIZURE complaint and warrant for violation of the liquor law.

The premises to be searched were designated as "a certain dwelling-house and appurtenances." The mandatory clause in the warrant did not contain the latter part of the alternative condition in c. 63, § 35, of the Laws of 1872, "if he shall find liquors, or have reason to believe such person has concealed them about his person," to arrest, etc.; but did contain the direction to arrest, if he found the liquors. Liquors were found both in the dwelling-house and in the wood-house near by. The points were raised by the defendant's counsel, that "appurtenances" did not cover the wood house, and that the warrant was informal. The verdict was guilty; and the defendant alleged exceptions, which appear in the opinion.

W. S. Clark, for the defendant, contended that there was not a sufficient designation of place as required by the constitutions of the state and nation, and by the statute, to warrant a search of the out-building. To the point that "appurtenances," where used in a conveyance, would not convey a wood-house, he cited *State* v. *Robinson*, 33 Maine, 564; *State* v. *Bartlett*, 47 Maine, 388; Washb. on Real Property, vol. II, 664; *Johnson* v. *Rayner*,

6 Gray, 107; *Wolley* v. *Groton*, 2 Cush. 305; *Whitney* v. *Olney*, 3 Mason, 282; Co. Lit. 5; Shep. Touch. 94; *Woodman* v. *Smith*, 53 Maine, 79; *Blake* v. *Clark*, 6 Maine, 436; *Leonard* v. *White*, 7 Mass. 6; *Jackson* v. *Hathaway*, 15 Johns. 447; *Harris* v. *Elliott*, 10 Pet. 25; Bou. Law Dict.; *Grant* v. *Chase*, 17 Mass. 443.

The extent to which appurtenances will convey land with a building, is a small amount around the building actually necessary for the use and occupation of the building. *Maddox* v. *Goddard*, 15 Maine, 218. *Ammidown* v. *Ball*, 8 Allen, 293. *Same* v. *Granite Bank*, id. 285.

L. A. Emery, attorney general, for the state.

Barrows, J. In the complaint and warrant, the premises to be searched were designated as a certain dwelling-house and appurtenances occupied by the defendant.

It is stated in the exceptions that "the evidence showed that an outbuilding where two jugs, one rum, and one whiskey, of the liquors which were seized upon the warrant were concealed, was distinct and separate from the dwelling-house, but upon the same lot and near to it and used by the respondent mainly as a woodshed for said dwelling-house. One jug of gin was found in the dwelling-house." Hereupon the defendant requested the judge to instruct the jury that the building where the two jugs of liquor were found, is not covered or included by the description of the place to be searched; and that the respondent cannot be convicted by reasons of his having any possession, ownership, control or knowledge of the jugs found in the outbuilding, except so far as the same may have a tendency to show that the liquor found in the house was for illegal sale; and that the defendant can be convicted only as to the gin found in the house.

The presiding judge declined so to instruct; and told the jury in substance that if the outbuilding was on the same lot with the respondent's house and was occupied by him, and by him used as a barn for his hay and shed for his wood to be consumed in his house, that the outbuilding would properly come into the designation of the respondent's dwelling house and appurtenances, though

not annexed to the house proper, but separated from it by an open space or passage-way.

The defendant excepts, and cites *State* v. *Robinson*, 33 Maine, 564, 570. *State* v. *Bartlett*, 47 Maine, 388, 393, in which it is rightly held that the special designation of the place to be searched required by the constitution must be such as would, if used in a deed, be sufficient to describe and convey it.

But it is law as ancient as the days of Keble and Saunders that even a garden may be said to be parcel of a house and by that name will pass in a conveyance; and accordingly, in *Smith* v. *Martin*, 2 Saund. 400, the defendant in error held his judgment and recovered for an injury done to his garden, house and wall which he had declared were "parcel of a dwelling-house with the appurtenances" of which he was seized. And the learned Serjeant Williams, in a note appended to this case, says "if a man makes a feoffment of a house with the appurtenances, nothing passes by the words, 'with the appurtenances,' but the garden, curtilage and close adjoining to the house and on which the house is built, and no other land, although other land has been occupied with the house." And he quotes Lord Coke as confirming Lord Hale and saying that "by the grant of a messuage or house, the orchard, garden and curtilage, do pass without the word appurtenances."

An examination of the cases cited by the defendant's counsel to support the very restricted construction for which he contends, shows that there was in them all, something in the language of the grant, or in the facts as to occupation and use which showed an intent to limit the effect of the conveyance.

In the absence of any such limitation, there can be no doubt that the grant of a house, occupied by a certain person, with its appurtenances, would carry with it what is commonly termed the house lot and the outbuildings thereon standing used by the occupant of the house for its convenience, whether connected with the house proper, or, as in the case at bar, separated from it by an open space or passage-way.

The ruling here complained of was correct when tested by the requirements of the constitution as they are stated in *State* v. *Robinson*, and *State* v. *Bartlett*, *ubi supra*. 1 Bishop on Crim.

Law, § 170. The defendant moved in arrest of judgment, because the warrant did not command the officer to arrest the respondent if he shall have reason to believe said respondent has concealed said liquors about his person; and he excepts to the overruling of his motion.

Section 35, of chap. 27, R. S., as amended by § 5, chap. 63, of the Laws of 1872, provides that the officer shall be commanded by said warrant if he shall find said liquors, or shall have reason to believe such person has concealed them about his or her person, to arrest, &c.

The warrant did command the officer to arrest, if he should find such liquors; and the officer found them.

The warrant did authorize and require the arrest of the defendant then; and it is not for him to complain that it did not also authorize his arrest in a contingency which did not occur.

Exceptions overruled.

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

MAINE MUTUAL MARINE INSURANCE COMPANY *vs.* GEORGE C. PICKERING.

Penobscot, 1876.—January 11, 1877.

Promissory notes.

It is not competent for the trustees of a mutual insurance company, which by virtue of a provision in its charter, has received the promissory notes of individuals for the security of those concerned in lieu of a capital stock, to surrender such notes at the request of the promisors, upon no consideration except the agreement of such promisors to claim nothing of the company for their use, when they are needed for the payment of the debts of the company.

Such a transaction would be a violation of the plain intent of the legislature in the grant of the charter, and a fraud upon the creditors of the company; and until the accumulated net profits of the company are equal to the amount of such notes, that is required by the charter before the company is allowed to commence business, it is not valid under a by-law of the company which allows the surrender of such notes, when the interest of the company requires it, and the safety of the company allows it.

On report.

Assumpsit. The defendant signed the agreement head-noted in the case of the same plaintiffs against Hodgkins, *ante* p. 109, and also the same note on which this action is brought. After the evidence was out, the case was reported to the full court for such judgment as the legal rights of the parties require. The facts appear in the opinion.

C. P. Stetson, for the plaintiffs.

The note in suit is of same character as the one in *Howard* v. *Palmer*, 64 Maine, 86.

The only difference in the cases is, that the trustees voted to surrender Pickering's note to him, but rescinded the vote before its surrender.

This does not relieve Pickering from his liability to pay the note. *Brown* v. *Appleby*, 1 Sandf. (N. Y.) 170. *Brown* v. *Hill*, 1 Sandf. (N. Y.) 629. *Tuckerman* a. *Brown*, 33 N. Y. 308.

F. A. Wilson & C. F. Woodard, for the defendant.

Barrows, J. The defendant was one of the signers of the original agreement, which resulted in the formation of the plaintiff corporation; he was one of the original trustees named in the charter, and one of the directors, until the close of the year 1871.

He gave the note in suit, and took out an open policy in January, 1871, in place of a similar note and policy made and issued in the previous year, under § 9, of the charter, "for the better security of those concerned." The liability thereby incurred has been fully considered by this court, and discussed at large in *Howard* v. *Palmer*, 64 Maine, 86; *Same* v. *Hinkley & Egery Iron Co.*, id. 93; and *M. M. Ins. Co.* v. *Blunt*, id. 95. The defendant claims that his case is to be distinguished from these; because at a meeting held January 26, 1872, the trustees of the insurance company, upon a communication from himself and two others relative to the surrender of their notes for $1000 each, given for open policies, on which they had done no business, "Voted, that the aforesaid notes be delivered to the respective parties by the secretary, provided no claim is made by them on this company for their use."

The note was never in fact surrendered; but has always remained in the same package with the other notes belonging to the insurance company in the custody of its secretary; and shortly after this vote was passed, at a meeting of the directors, April 5, 1872, it was formally rescinded; and the vote of rescission was unanimously reiterated by the trustees in February, 1873, when the defendant made a demand upon them for the note.

If this transaction could be regarded as one which the parties to it might lawfully accomplish, it might well be doubted whether it would be complete so as to have the effect which the defendant claims for it, without an actual surrender of the note; although such surrender was delayed by mere accident, until after the directors had rescinded the vote. But we cannot regard such a disposition of the assets of the company, as one which it was competent for the trustees to make, to the injury of its creditors. The notes given as this was, by the projectors of the enterprise, were in lieu of capital stock for the company; and must be regarded as a trust fund in the hands of the company, "for the better security of those concerned." That such was the design of the legislature is evident from an examination of the act of incorporation.

It is well said in *Howard* v. *Palmer*, *ubi supra*: "It would be in direct violation of the legislative intention, and a gross fraud upon the dealers, creditors of the company, to hold that the notes and securities, upon the basis of which the public were induced to give it credit and transact business with it, were utterly void, or available only to the extent of the actual insurances indorsed on the open policies of the company." It would be equally so to hold that the managers of the company might consent to the withdrawal of all or any portion of its capital, which is necessary for the payment of its debts, upon the futile consideration that no claim should be made upon the company for its use. By § 15, of the act of incorporation; it appears that it was not until the net profits of the company should exceed fifty thousand dollars, that any portion of them could be applied to the redemption of the yearly certificates issued under § 12, to those who embarked their capital, or more properly speaking their credit, in the risk; and until that time those certificates were to be subject to any future

losses of the company. If the net annual profits were thus to be withheld until the happening of a contingency which apparently never occurred during the brief business existence of this corporation, surely the legislature did not contemplate the diminution of its assets and capital in the mode which the defendant proposes.

Counsel for defendant urge that the case differs from the New York cases cited for plaintiff by reason of the existence of § 7, of the by-laws adopted by the corporation.

Again we quote the apt and forcible language of the opinion in *Howard* v. *Palmer*: "The notes, by the seventh by-law, are not to be given up; unless the interest of the company requires it, and the safety of the company allows it. The interest of the company requires integrity. The safety of the company consists in its solvency. The surrender of its assets is alike at variance with its integrity and its solvency. If, by its misfortunes, it has ceased to be solvent; it can still remain honest."

In the condition of things here disclosed, the trustees of the corporation could not lawfully surrender the defendant's note, to the detriment of its creditors. *Defendant defaulted.*

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

MAINE MUTUAL MARINE INSURANCE COMPANY *vs.* EDWIN S. FARRAR.

Penobscot, 1876.—December 22, 1876.

Promissory notes. Trial.

Premium notes for an open policy given under § 9, of the plaintiff's charter, "for the better security of those concerned," are upon good consideration, and if needed for the purpose of paying claims are enforceable against the signers.

When a premium note is given for an ordinary open policy, and not under § 9, the maker is not liable beyond the earned premium, while the note remains in the possession of the corporation to which it was given.

When a note was given after the organization of the plaintiff corporation, and after the amount required by § 10, of the charter to authorize the issuing of policies, it is for the jury to determine whether the note was given under § 9, and as a part of the security of dealers or as an advance premium in the usual course of business.

ON EXCEPTIONS AND MOTION.

ASSUMPSIT on a note set out in the opinion.

The defense was that the note was given, not under § 9 of the charter of the company for "the security of dealers," but for an open policy for premiums in advance to be earned by the company; that the defendant had paid for all earned premiums, leaving nothing due on the note.

The relation of the company to the signers of notes of similar form, appears more or less fully in several reported cases. *Howard* v. *Palmer*, 64 Maine, 86. *Same* v. *Hinckley Co.*, id. 93. *Maine Ins. Co.* v. *Blunt*, id. 95. *Insurance Co.* v. *Hodgkins*, *ante*, 109. *Iron Co.* v. *Insurance Co.*, *ante*, 118. *Insurance Co.* v. *Pickering*, *ante*, 130.

The verdict was for the defendant; the plaintiffs moved to set it aside, and also alleged exceptions.

Other facts and the points raised in this case, appear in the opinion.

C. P. Stetson, for the plaintiffs.

This is an action on a note of $1,001; and the only difference between the case at bar, and the cases, *Howard* v. *Palmer*, *Same* v. *Hinckley & Egery Iron Co.*, *Maine Mutual Marine Ins. Co.* v. *Blunt*, reported in 64 Maine, 86, 93, 95, is, that Farrar did not sign the original agreement, as did the parties in those cases. This is of no consequence. *Bouvier* v. *Appleby*, 1 Sandf. 170.

The agreement of the secretary with Farrar, when the note was given, that the note should be given up at the end of the season, was void, should not have been received as evidence, and canno affect the note. *Same case*, 170, 174.

The whole testimony in the case shows that this note was an advance premium note, and as such, in case the losses of company required, the maker was liable to pay it. The original $500 note was dated April 26th, 1870, on eight months, in the same manner as the notes given under the agreement, for the better security of those dealing with the company. Its renewal was dated January, 1871, same as the other notes given under the ninth section of the charter, and the note in suit given in renewal of that. The president, Mr. Ladd, says that the note in suit was represented as part

of the assets of the company—the same as the other notes included in the annual reports, and sent forth to the public as the capital upon which those insuring could rely in case of loss—and treated in every respect as the notes given in the cases v. *Palmer*, *Hinckley & Egery Iron Co.*, and *Blunt.*

We contend that the verdict was against law and evidence.

Because the testimony shows that this was an advance premium note, and as such for the security of those dealing with the company, could be negotiated to pay losses, and could be enforced so far as required, to pay the losses of the company.

The plaintiff having given the note to the Maine Mutual Marine Insurance Company, and having taken an open policy from said company, was bound to know that it was given under the provisions of the charter, and bound to know what liabilities he incurred; he cannot plead ignorance of the law; he sent forth his note to the public to constitute with other notes a fund, upon which they could rely in case they insured in this company, and met with losses.

The charter contemplates that all notes shall be paid to the full amount, if the liabilities of the company require.

There were only two classes of notes given or recognized by the company; 1st, notes given for special policies, notes for the amount actually insured.

2d, advance premium notes—notes given for open policies; and all these notes were the assets of the company, on which the makers were liable,—on notes given for special policies absolutely, —on notes for open policies, or advance premium notes, so far as the liabilities of the company required.

It was not a question of fact for the jury to determine whether the note was given under § 9, of the charter; but the construction of the contract was for the court. *Smith* v. *Faulkner*, 12 Gray, 255.

F. A. Wilson & C. F. Woodard, for the defendants.

APPLETON, C. J. This is an action of assumpsit upon the following described note:

"BANGOR, January 1, 1872.

Twelve months after date, I promise to pay to the order of the Maine Mutual Marine Company one thousand and one dollars, payable at Bangor, Maine, value received. EDWIN S. FARRAR."

On the margin is written: "Given for special policy No. 115." The policy referred to is an ordinary open policy.

By the Special Act of 1870, c. 470, § 9, the plaintiff company, "for the better security of those concerned," was authorized to "receive notes for premiums in advance, of persons intending to receive policies," with a power to negotiate them, "for the purpose of paying claims or otherwise, in the course of its business;" and a compensation might be allowed to the signers thereof, at a rate not "exceeding six per cent. per annum."

By § 10, no policy was to be issued until applications should be made for insurance to the amount of fifty thousand dollars.

Before the company went into operation and commenced business, signatures were obtained to an agreement by parties to give their notes for premiums in advance in accordance with the charter and by-laws of the company. The amount of fifty thousand dollars was obtained; and in April 26, 1870, the company was duly organized and ready to issue policies.

The notes given in pursuance of the agreement, were for a sufficient and valuable consideration. The signers by the 7th by-law, and by a vote of the company, were allowed a compensation from the profits of the company for their signatures. The notes or their renewals are held by the plaintiffs, for the security of its dealers; and if needed for the purpose of paying claims, are enforceable against the signers, whether the plaintiffs are solvent or insolvent. *Howard* v. *Palmer*, 64 Maine, 86.

The policies for which notes under § 9 are given, are open policies. The makers of the notes have a right to have the amount paid for premiums indorsed on their notes; but their liability continues for the balance. *Merchants M. M. Co.* v. *Leeds*, 1 Sandf. S. C. 188. *Maine M. M. Ins. Co.* v. *Blunt*, 64 Maine, 95. So in case of renewals, they in like manner may be held liable for the security of the company, as on the notes originally given, and of which they are the renewals, when given under § 9. *Howard* v. *Hinckley & Egery Co.*, 64 Maine, 93.

The plaintiff corporation having organized, and having obtained the requisite amount of notes proceeded to the transaction of business. It might transact any business legitimate to the pur-

poses of its charter which is usual and customary for insurance companies. It might issue valued or open policies. If it issued to its customers open policies for which the insured gave their notes for the premiums, the makers would not be liable beyond the earned premiums. Nor indeed would they be bound to insure, but they might rescind at any time on paying the premiums written upon the policy and earned. *Brouwer* v. *Hill*, 1 Sandf. S. C. 629. *Merchants Mutual Ins. Co.* v. *De Puga*, 1 Sandf. S. C. 186. *Elwell* v. *Crocker*, 4 Bosw. 22. *Lawrence* v. *McCready*, 6 Bosw. 329.

The plaintiff might increase the number of its notes given for the security of its dealers, under § 9, and for which the makers would be entitled to the compensation provided under that section.

The note in suit was given after the organization of the plaintiff corporation, and after they had obtained notes under § 9, for the amount required by § 10, to authorize their issuing policies of insurance.

Under the New York charters referred to in the cases cited from the 1st Sandford's Reports, the twelfth section mentioned therein, corresponds to the ninth section of the plaintiff's charter.

The presiding justice instructed the jury that if the note was given under the provisions of § 9, of the charter of the plaintiff corporation, the verdict should be for the plaintiff; but if the jury should find it was not given under said section, then their verdict should be for the defendant.

This instruction is the only one to which exception has been taken; but it is in strict accordance with the authorities on the subject. In *Merchants' Mutual Marine Co.* v. *Rey*, 1 Sandf. S. C. 185, Oakley, C. J., states the law as follows: "When premium notes are taken subsequent to the organization of the company, it is a matter of fact, to be determined by the character of the note and the evidence, whether it was given as a subscription note under the twelfth section, to form a part of the fund for the security of dealers, or was given for premiums in advance in the usual course of business of the company."

The distinction between notes under § 9, which may properly be termed "subscription notes" and "premium notes," on ordinary

open policies issued by insurance companies, is fully recognized in *Elwell* v. *Crocker*, 4 Bosw. 22. The ruling of the court is fully sustained by a reference to the authorities cited.

The question whether the note in suit was given under § 9, or was given as a premium note for an open policy merely, was submitted to the jury for their determination and their verdict is not so at variance with the testimony as to require us to set it aside.

Exceptions and motion overruled.

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

PETERS, J., did not sit.

JOHN SHERIDAN *vs.* DANIEL E. IRELAND and logs.

Penobscot, 1876.—July 1, 1876.

Costs.

In an action to secure a lien on logs, no more than one day's attendance can be taxed for the plaintiff, at any one term, until notice of the suit, such as the court orders, is given.

ON REPORT.

ASSUMPSIT on account annexed, brought to enforce plaintiff's lien on the logs attached.

The personal defendant did not appear, and was defaulted at the first term of the court, (October term, 1872,) but Shaw & Ayer, log owners, voluntarily appeared by attorney, and the action was continued until the April term, 1873, when it was made law, on report of agreed facts as to logs. At the January term, 1874, the "agreed statement was discharged" by the full court, and "the case remanded for notice to log owners."

At the said January term, appears the following entry:

"Plaintiff moves notice on log owners, by publication in Bangor Courier.

W. S. Clark, for Shaw & Ayer, claimants of logs as owners, objects to order of notice, unless costs as to travel and attendance are disallowed to plaintiff, prior to this term.

Motion allowed, notice ordered, costs to be settled by the court on the final disposition of the suit."

Notice was proved at the next April term, and the case continued to the following October term, when it was made law on report.

The final adjudication having been in favor of the plaintiff, against the personal defendant, and against the logs, the case comes up this term, (April, 1876,) for judgment and taxation of costs.

The counsel for the log owners, objected to more than travel and one day's attendance for plaintiff, for the October term, 1872, January and April terms, 1873, and the January and April terms, 1874, and invoked the clause in the schedule of fees established by the court as follows:

"Attendance, thirty-three cents for each day as noted on the docket, not exceeding ten days, (but actions under reference; under advisement in the law court; where a party has deceased and his administrator has not come in; and where the defendant is out of the state, and the case is waiting service or notice, only one day's attendance shall be taxed.)"

The plaintiff claimed ten days' attendance for each of the above named terms; or until the day the action was disposed of, which the clerk taxed and allowed, from which taxation Shaw & Ayer appealed. Upon a hearing before the judge, he ruled as matter of law, that plaintiff was entitled to only one day's attendance, until notice was proved; and the plaintiff alleged exceptions.

L. Barker & L. A. Barker, for the plaintiff.

W. S. Clark, for the claimants.

WALTON, J. In an action to secure a lien on logs no more than one day's attendance can be taxed for the plaintiff at any one term until notice of the suit, such as the court orders, is given. The action is a proceeding *in rem* as well as *in personam;* and it is a rule, familiar to the profession, that in such a suit judgment cannot be rendered for the plaintiff until notice of its pendency is given, such, as in contemplation of law, is notice to all the world. Notice to the personal defendant (the debtor) is not sufficient. Nor is an appearance by him, or by persons claiming to be the owners of the logs, sufficient. It cannot be known that there are not others still, who have an interest in the property,

and a right to be heard. Hence, as already stated, such notice of the pendency of the suit must be given as, in contemplation of law, is notice to all the world. The statute requires the notice to be such as the court orders. R. S., c. 91, § 35. Such an order of notice it is the duty of the plaintiff to obtain. It is also his duty to see that it is complied with. And until this is done, the action is not in a condition to be tried or otherwise disposed of adversely to the defendants; and there is no occasion for the plaintiff or his counsel to remain in attendance upon the court, and they should not be allowed to do so at the expense of parties who are in no way responsible for the delay.

Exceptions overruled.

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

NATHANIEL H. DILLINGHAM *vs.* HORATIO W. BLOOD *et al.*

Penobscot, 1876.—February 7, 1877.

Promissory notes.

A note given for intoxicating liquors sold in violation of law, and discounted by a party in good faith without notice of the illegality, may be collected by a holder who purchased the note of such party; although the holder at the time he purchased the note knew of the illegality.

R. S., c. 27, § 50, construed.

ON EXCEPTIONS.

ASSUMPSIT, upon a promissory note for $2,397.12, dated January 14th, 1875, payable to the order of J. C. Godfrey & Co., six months after date, given by defendants, for intoxicating liquors sold in violation of law.

The note was discounted by the payee, at the Mercantile Bank, in Bangor, January 15th, 1875, and became the property of the bank. Subsequently, on the day the note became due it was purchased of the bank by the plaintiff for its full amount.

At the trial, the defendant Blood, upon the ground that the note was given for intoxicating liquors, offered testimony to show that the plaintiff, at the time of his purchase, had notice of the illegal consideration for which the note was given.

The court ruled thereupon that the plaintiff took the note with all the rights of the bank, and excluded the testimony offered, the plaintiff not relying upon his own want of notice, but on the rights of the bank, his grantor entirely.

The verdict was for the plaintiff; the defendant, Blood, alleged exceptions.

W. S. Clark, for the defendant, cited *Field* v. *Tibbetts*, 57 Maine, 358; and contended in substance that though true it was that an action could be maintained by the bank, a purchaser of the note without knowledge of the illegal consideration; and by the common law, could also be maintained by the party who purchased of the bank even with such knowledge; yet by the statute the common law was so modified as to preclude any party who purchased the note, even before its maturity with such knowledge from recovering; that the defendant did not, to use a common phrase, step into the shoes of the bank, an innocent holder.

F. A. Wilson & C. F. Woodard, for the plaintiff.

PETERS, J. The note sued in this case was given for intoxicating liquors sold in violation of law.

By R. S., c. 27, § 50, in the hands of the payee, no action could be maintained upon it. But it was discounted by a bank, in good faith, before its maturity, for a valuable consideration and without notice of any illegality. By such a party an action could be maintained upon it. The bank afterwards sold the note on the day it became due, to the plaintiff, who had been notified of the illegality before that time. One of the defendants took an exception at the trial to the ruling, that the plaintiff succeeded to all the rights of the bank in the paper when he purchased of them notwithstanding he had notice of the illegality at the time.

The ruling was right. The section cited declares that its provisions shall not "extend to" negotiable paper in the hands of a party situated as the bank was. Such a provision certainly should not affect the paper after it has passed beyond such hands. The inhibition of the statute would in some degree extend to and injuriously affect an innocent holder, if he could not enjoy the same privileges respecting the use or collection of the note as he would

have as owner of any ordinary piece of negotiable paper. The defendants are not injured by the transfer. It is immaterial to them whether the note is enforced in the name of A. or B. The holder of the note in this case must stand upon the same footing as a purchaser of paper does who has notice that a note was fraudulently obtained by a payee, but who buys it of a prior holder against whom no such defense can be set up; as in the case of *Roberts* v. *Lane*, 64 Maine, 108, and in cases cited in that case. See *Field* v. *Tibbetts*, 57 Maine, 358.

It is contended that, if this construction is a correct one, the original payee, who has fraudulently put the note upon the market, could himself buy and sue it in his own name. But that is not so. He is, however, the only person who could not by purchase succeed to the rights of the first innocent holder. And he would be excluded, not upon the ground of notice, but entirely upon another principle applying to his case; and that is, because he was privy to the original illegality and fraud. He could purchase the note, but would be estopped by his own fraud and wrong from enforcing it. See on this point the discussion in *Bailey* v. *Bailey*, 61 Maine, 361. *Exceptions overruled.*

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

STATE *vs.* THOMAS E. FLEMMING.

Penobscot, 1876.—February 15, 1877.

Jurors. Abatement.

An indictment found by a grand jury drawn by virtue of venires not having the seal of the court upon them, is illegal and void; and the defect is one which cannot be cured by amendment, or by special act of the legislature.

In a criminal case a plea in abatement is sufficient, if it is free from duplicity and states a valid ground of defense to an indictment in language sufficiently clear not to be misunderstood: the strictest technical accuracy, such as is sometimes required in purely dilatory pleas in civil suits, will not be exacted.

ON EXCEPTIONS.

INDICTMENT charging the defendant with being a common seller of intoxicating liquors at Bangor, in the county of Penobscot, on

the first day of September, A. D. 1875, and to the time of finding the indictment at the February term, A. D. 1876.

(Signed.) A true bill. Emore C. Smart, Foreman.

The defendant seasonably filed the following plea in abatement:

"STATE OF MAINE.

Penobscot Scilicet: Supreme Judicial Court, for the State of Maine, and at the February term thereof, in the year of our Lord one thousand eight hundred and seventy-six, for the transaction of criminal business.

State of Maine, by indictment against Thomas E. Flemming.

And on the sixth day of March in the year of our Lord one thousand eight hundred and seventy-six.

And now the said Thomas E. Flemming, in his own proper person, cometh into said court, and having heard the said indictment against him read saith, that the said State of Maine ought not to further prosecute the said indictment against him, the said Thomas E. Flemming, because, he saith, that Emore C. Smart, of Bangor, in said county of Penobscot, who at said February term of said court, did serve and act in finding and returning said indictment into said court, at said February term thereof, as one of the grand jurors by whom said indictment at the said term of said court was found and returned into said court, at said term thereof, which said indictment so as aforesaid found, was returned into said court as aforesaid, on the eleventh day of February, in the year of our Lord one thousand eight hundred and seventy-six, was not, at the time he so served and acted as aforesaid, and at the time said indictment was found and returned as aforesaid, duly and legally qualified to serve as said grand juror, in this: that said Emore C. Smart was drawn as said grand juror, pursuant to and in obedience to a supposed writ of venire facias, which said supposed writ of venire facias, was issued from said court, by Ezra C. Brett, clerk thereof, on the second day of August, in the year of our Lord one thousand eight hundred and seventy-five, and was not at the time it was so issued, nor at the time said Smart was so drawn as said grand juror, under the seal of said court, which said supposed writ of venire facias, with the return thereon, said Thomas E. Flemming, here produces now in court, which said sup-

posed writ of venire facias is in words and figures as follows, viz: [Here follows the venire signed by E. C. Brett, clerk.] with return upon said supposed writ of venire facias, in words and figures as follows, to wit: [Here follows the return signed George A. Bolton, constable of Bangor.]

Without this that said Smart was drawn as said grand juror, pursuant to any venire, except said supposed writ of venire facias, hereinbefore set forth in this plea.

And this the said Thomas E. Flemming is ready to verify.

Wherefore the said Thomas E. Flemming prays judgment of said indictment, and that the same may be quashed.

(Signed.) *Thomas E. Flemming.*

STATE OF MAINE, PENOBSCOT, ss., SUPREME JUDICIAL COURT, February term, in the year of our Lord one thousand eight hundred and seventy six, and for the transaction of criminal business.

State of Maine by indictment against Thomas E. Flemming.

Personally appeared this sixth day of March in the year of our Lord one thousand eight hundred and seventy-six, the beforenamed said Thomas E. Flemming, respondent, in said indictment, and made oath that the foregoing plea by him subscribed is true in substance and in fact.

Before me, *James F. Rawson*, Justice of Peace and Quo."

To the plea in abatement, the county attorney demurred generally; the defendant joined. The court sustained the demurrer, adjudged the plea in abatement bad, and ordered judgment for the state, ruling that the defendant could not plead over. The defendant alleged exceptions.

At the same February term, the grand jury returned a large number of other indictments for violations of the liquor law; and when it was discovered that the venires for the grand jury had been issued without the seal of the court upon them, it was claimed that this defect was fatal to the validity of the indictments; on application, the legislature then in session, passed an act declaring the indictments valid. A motion was also made to have the venires amended by affixing a seal to them. These questions were also submitted to the law court.

J. Varney, for the defendant, argued the unconstitutionality of the healing act, and *F. H. Appleton*, on the same side, the sufficiency of the plea in abatement.

Mr. Varney, *inter alia*, said the indictment against the respondent was found February 11, 1876, and on February 22, the legislature on the morning hour of the last day of its session, under a suspension of its rules, after the respondent had been brought to the bar, and without notice to him, and for the purpose of affecting and deciding his case, passed the following act, entitled "an act to make valid the drawing of grand jurors for the county of Penobscot."

"SEC. 1. The venires issued for draft of grand jurors to serve at the supreme judicial court, within and for the county of Penobscot, for the year of our Lord eighteen hundred seventy-five and eighteen hundred and seventy-six, are hereby made valid and lawful venires, notwithstanding the same were issued without the seal of the court thereon; and no act or presentment of said grand jurors shall in any wise be invalidated in law by reason of any such defect in issuing said venires.

SEC. 2. This act shall take effect when approved."

This is the act and its title, passed to affect this case and decide it.

A great man of New England in the discussion of a constitutional question, which has been accounted in all its bearings, the most important one ever mooted in any forum in this country, said, "words are things, and things of mighty influence in the discussion of legal and political questions, because a just conclusion is often avoided or a false one reached, by the adroit substitution of one phrase or one word for another."

And we suggest that instead of the title which the legislature gave to this act, many other titles, much more significant of its intended scope and effect, and much more suggestive of its vicious character might be given it.

For example would it not be as well to entitle it, an act:

"To make good a void indictment."

"To make that a grand jury which was not when it acted."

"To hold and punish a man criminally arraigned who otherwise could not be held."

"To deprive a respondent, in a pending criminal case, of a plea."

"To make good a void writ, because the court which issued it will not."

"To modify and change, in a particular pending case, the general and standing law of the state."

"To suspend as to Penobscot county, in the years 1875 and 1876, the law applicable in those years to all other counties, and applicable to that county in all other years."

"To, by retrospective action, invade the judicial province, and decide a pending case."

All these things, if the act is applicable to this case, it must do.

Mr. Appleton, in support of the various points of his argument on the plea in abatement, cited: 2 Lil. Ent. 675. 2 Tidd Pr. 714. 5 Bac. Abr. pp. 377 and 380. 2 Hale's P. C. 260-1, 471. 2 Hawk, P. C. 277, 347, 371, 571-2. *State* v. *Lightbody*, 38 Maine, 200. R. S., c. 106, § 7, 9, &c.; c. 134, § 1, &c., § 18; c. 77, § 4. *Bailey* v. *Smith*, 12 Maine, 196. *Tibbetts* v. *Shaw*, 19 Maine, 204. *Hall* v. *Jones*, 9 Pick. 446. *Smith* v. *Alston*, 1 Rep. Con. Ct. 104. *Governor* v. *McRhea*, Hawkes, 226. *Filkins* v. *Brockway*, 19 Johns. 170. *Brewer* v. *Sibley*, 13 Met. 175. *State* v. *McElroy*, 3 Strobh. S. C. 33. *Garland* v. *Britton*, 12 Ill. 232. *State* v. *Drake*, 36 Maine, 366. *McQuillen* v. *State*, 8 S. & M. 587. *Rawls* v. *State*. 8 S. & M. 1 Tidd. Pr. 583, 584, 589, 661. 1 Ld. Raym. 593. Willes, 479. *Colburn* v. *Tolles*, 13 Conn. 527. 1 Chitty Pl. 366, 454-6, 460, 466. *State* v. *Middleton*, 5 Port. 491. 2 Saund. 209, a. (note 1.) 10 East. 87, (note.) Stephen Pl. 161, 423, 437. 1 Saund. Pl. 4. Gould Pl. 271, 397, and c. 5, § 142. 1. Bac. Abr. 37 and 38, 223-227, (§) 237. *Baker v. State*, 23 Miss. 244. *State* v. *Williams*, 5 Port. 130. *Lynes* v. *State*, 5 Port. 236. 2 Wharton's Indictments, § 1158. *State* v. *Ward*, 63 Maine, 225. 2 Saund. Pl. 297. 2 Salk. 497. *Findley* v. *People*, 1 Mich. 234. 3 Bla. Com. 303. 1 Lil. Ent. 1. 3 Chitty Pl. 896. 3 M. & S. 154. 1 Sellon's Pr. 273. *Eichorn* v. *LeMaitre*, 2 Wils. 366. 2 Bl. R. 368. *Tompson* v. *Colin*, Yelv. 112. *Hazzard* v. *Haskell*, 27 Maine, 549. *Fogg* v. *Fogg*,. 31 Maine, 302. *Burnham* v. *Howard*, 31 Maine, 569. *Southard* v. *Hill*, 44 Maine, 92, 95. *Severy* v. *Nye*, 58 Maine, 246. *McKeen* v. *Par-*

ker, 51 Maine, 389. *Lovell* v. *Sabin*, 15 N. H. 29. *Dearborn* v. *Twist*, 6 N. H. 44. *Ritler* v. *Hamilton*, 4 Texas, 325! *Kendrick* v. *Davis*, 3 Coldw. Tenn. 524. 4 Maine, 439, (Low's case.) *State* v. *Burlingham*, 15 Maine, 104. *State* v. *Symonds*, 36 Maine, 128. *State* v. *Clough*, 49 Maine, 573. *U. S.* v. *Coolidge*, 2 Gall. 363. 2 Ld. Raym. 1307. 5 Saund. 376. Yelv. 204.

J. Hutchings, county attorney, for the state, argued that the healing act was constitutional and cited largely from the text and the cases collected in Cooley's Constitutional Limitations.

L. A. Emery, attorney general, on the same side, argued that the defective omission of the seal was amendable, and that the plea in abatement was insufficient; he said:

The allegation in the plea is not that the grand juror was not properly summoned, but is simply that the person did not possess the requisite qualifications. The words of the plea are, "was not duly and legally qualified to serve as grand juror." These words have reference to the qualifications of the individual, not to correctness of the procedure in summoning.

A person is qualified to testify as a witness, not by virtue of a *subpœna*, but by possessing a sound mind, and being of age and of knowledge.

A person is qualified to vote not by the warrant summoning him to the polls, but by being invested with the qualities prescribed by the constitution.

A person is qualified for military service by possessing sufficient soundness of body and being between certain years of age, and this even in time of peace.

A person is "duly and legally qualified to serve as grand juror, not by virtue of an indented paper, passing between two other persons, but by reason of having been selected by his town, and his name placed upon the jury list or in the jury box, and being a citizen."

The plea in abatement therefore is *bad*, because it does not show the court what personal qualification is wanting; bad for want of sufficient allegation.

The specification following the general allegation, does not conform to it. The general allegation is non-qualification, in the

sense I have named; the specification is of an omission not in any qualities to be possessed by a grand juror, but of an omission in a paper issued by the clerk to a constable.

The general allegation is one of law, an assumption of a legal conclusion from data not disclosed. In other words, there is not in the plea any direct allegation of matters of fact, such as is required in such a plea.

The facts contained in the specification are not alleged directly, but only parenthetically, as a sort of rider to the main allegation.

Pleas in abatement must be single. Two causes of abatement cannot be joined. The respondent is not allowed to allege want of qualification, and also irregularity in process. In this respect the plea is bad for duplicity.

The respondent should have alleged that Smart was not duly selected or summoned; then this specification would perhaps have supported the allegation. As it is, the facts incidentally named do not support his legal proposition. He prays the abatement of the indictment because Smart was not a qualified person. He makes no prayer because of the want of a seal. He recites the want of a seal, but does not base his prayer on that.

Mr. Appleton, in reply.

I. Venire not a part of the record, and need not be pleaded as such. *State* v. *Carver*, 49 Maine, 588, 592.

II. Venire not being under seal, profert is unnecessary and will be regarded as surplusage. 1 Chitty Pl. 365-6, and other authorities cited in argument in chief.

III. If profert is not properly made, the state should have pleaded *non est factum*, craved oyer or demurred specially. 1 Chitty Pl. 365-6.

WALTON, J. The defendant is indicted for being a common seller of intoxicating liquors without a license. The indictment was found by a grand jury drawn by virtue of venires not having the seal of the court upon them. He pleads this fact in abatement, and prays that the indictment may be quashed.

I. *Was a seal necessary.* Undoubtedly. The question is *res judicata* in this state. It was decided in *State* v. *Lightbody*, 38

Maine, 200. The court there held, not only that a seal was necessary, but that the doings of a grand jury drawn by virtue of venires not having the seal of the court upon them, were illegal and void, and liable to be quashed on motion. That a seal is necessary upon venires for grand jurors, is not, therefore, an open question in this state.

II. *Is the defect amendable.* We think not. Every indictment, to be valid, must be found by a grand jury legally selected, and competent to act at the time the indictment is found. So decided in *State* v. *Symonds*, 36 Maine, 128.

To put a seal upon these venires now, would not make sealed instruments of them at the time they were served. They have performed their office and are *functi officio.* To seal them now, and then hold that they were legal instruments when served, and when they had no seals upon them, would seem more like trifling, than the performance of a grave and important duty.

Besides, this court has three times decided that the seal upon a writ is matter of substance and not amendable. *Bailey* v. *Smith*, 12 Maine, 196. *Tibbetts* v. *Shaw*, 19 Maine, 204. *Witherel* v. *Randall*, 30 Maine, 168.

And the same point has been decided the same way in Massachusetts. *Hall* v. *Jones*, 9 Pick. 446.

In one case in this state, where the clerk omitted to affix the seal of the court to an execution, he was allowed to do so after it had been levied upon real estate. *Sawyer* v. *Baker*, 3 Maine, 29. But the court afterwards refused to allow a justice of the peace to make a like amendment; and referred to the above decision as having been made upon an *ex parte* motion; from which we infer that the court did not regard it as a reliable authority. *Porter* v. *Haskell*, 11 Maine, 177.

"So long as a seal is required to be affixed to writs and executions," said Mellen, C. J., in the case last cited, "though we may not be able to discover its real use, yet we must not dispense with what the law requires."

And in an early case in Massachusetts, the court said that, while a strict adherence to technical forms might be inconvenient in particular cases, and might even appear at times to be beneath

the dignity of the law, still, it is essential to the correct administration of justice that some forms and methods of proceeding be observed; that if the court felt at liberty to depart from the existing forms, still, there would be a point at which it must stop at last; and then it would be found no easier to comply with the new forms than with those which have been so long known and settled; and the inconvenience would not be less than is now experienced when indictments and other proceedings should be quashed for a departure from such new forms. *Commonwealth* v. *Stockbridge*, 11 Mass. 279.

A distinction has sometimes been made between original and judicial writs, using the latter term to distinguish such writs as issue during the progress of a suit from those by which suits are commenced. And it has been said that while executions and other strictly judicial writs may be amended by having the seal of the court affixed to them, original writs cannot be thus amended. Such a distinction is referred to in *Bailey* v. *Smith*, 12 Maine, 196.

But this distinction, if it exists, is not favorable to the proposed amendment in this case. Writs of *venire facias* for grand jurors are not judicial writs, in that technical sense in which the term is used to distinguish such writs as issue during the progress of a suit from those by which suits are commenced. They more nearly resemble original writs, which, it has been held, cannot be thus amended.

But we think the distinction is a very shadowy one, and we attach no importance to it in this case. We rest our decision upon the broad principle that in criminal prosecutions all the proceedings should be strictly according to law; and that when the law requires a writ to be sealed before it is served, sealing it after it has been served, is not a compliance with the law.

III. *Is the plea in abatement sufficient in form.* We think it is. It states the ground of objection to the indictment in language too clear to be misunderstood by any one. Nothing more should be required in criminal cases. The strictest technical accuracy, such as has sometimes been required in purely dilatory pleas in civil suits, should not be exacted in criminal cases. If the plea

states a valid ground of defense in language too clear to be misunderstood, and is free from duplicity, nothing more should be required. In such cases the maxim, *aucupia verborum sunt judice indigna*—a twisting of language is unworthy of the court—is particularly applicable. To require a degree of exactness which it is practically impossible to comply with, would be, in effect, a denial of the right to file such a plea at all. We think the plea is sufficient in form.

IV. We now come to the last and perhaps the most important question in the case. Pending this indictment, and in advance of the judgment of the court upon its sufficiency, the legislature passed an act declaring the venires for the grand jurors, by whom it was found, valid, notwithstanding they were issued without the seal of the court upon them; and declaring further that no act or presentment of said grand jurors should be in any wise invalidated by reason of such defect. *Special Laws* 1876, c. 307.

Can such legislation be sustained? Is it within the constitutional authority of the legislature to enact that indictments already pending shall be valid, notwithstanding they have been found by a grand jury not legally drawn? Clearly not. This question was fully considered in *State* v. *Doherty*, 60 Maine, 504.

The court there held that an act of the legislature that should attempt to validate indictments found by a grand jury not legally selected, would violate both the state and the United States constitutions. That case was not decided upon any narrow ground. It was decided upon the broad principle that an indictment is not valid, and cannot be made valid by the legislature, unless it is found by a grand jury legally selected, organized and qualified, "in accordance with some pre-existing law." Such is the very language of the court; and the authorities there cited fully sustain the position.

And in an earlier case in this state the court decided that the legislature cannot, by act or resolve, dispense with a general law for particular cases. *Lewis* v. *Webb*, 3 Maine, 326.

And Judge Cooley, in his work on constitutional law, lays it down as the result of all the authorities, that when the legislature undertakes to suspend the operation of the general laws of the

state, the supension must be general ; that it cannot be made for individual cases, or for particular localities. Cooley's Con. Lim. 391.

The act in question is objectionable upon both of these grounds. It does not purport to change the general law of the state. It does not declare that in no case shall the seal of the court be essential to the validity of venires for grand jurors. It does not declare that in no case shall an indictment be invalidated by such an omission. Nor is it to have effect in any other county than the county of Penobscot. It goes no further than to declare that the venires for this particular grand jury shall be valid, notwithstanding they were issued without the seal of the court upon them ; and that no act or presentment of this particular grand jury shall be invalidated by reason of such defect ; leaving the law with respect to all other counties, and all other grand juries in the county of Penobscot, and all other indictments, precisely as it was before. In other words, it was a direct attempt to dispense with the general law of the state, for a particular locality and for a particular class of cases, leaving it still in force for all other localities and all other cases. This, as we have already seen, cannot be done. Such an act is, in principle, as objectionable as a bill of attainder or an *ex post facto* law.

The escape of criminals through defects in mere matters of form, is always cause for regret. But it would be cause for much deeper regret if the court should disregard any well settled rule of law in order to prevent such a result. We must not do evil that good may come. We must not ourselves become violators of the law in order to punish others. The remedy is the use of more care.

Exceptions sustained.
Indictment quashed.

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

BARROWS, J., added the following supplementary concurring opinion : If the question, whether the want of a seal upon the venires by means of which they were summoned vitiated the doings of a grand jury, were *res nova*, I should say that when grand jurors competent to serve had been drawn by the proper town officers in the manner prescribed by law, by virtue of a venire thus defective, and attended court in pursuance of the summons, and the

court recognized the venire as its own writ, and caused the jurors thus attending to be duly impaneled and sworn, their acts in the position into which they had been thus inducted ought to be held good. In other words that the directions in the statute with regard to the issuing of venires were designed to enable the court to secure the attendance of a sufficient number of good and lawful men to serve as grand jurors, and that a question as to the sufficiency of the venire could arise only between the court and the municipal officers or the juror summoned, who would be competent to waive any such defect in the process by which he was brought into court.

I do not see how it is possible that any substantial right of a person charged with crime could be prejudiced by such a defect, or how it concerns him, any more than it would to know whether the grand juror came to court on foot or on horseback. If a person competent to serve as a grand juror, selected by the right men in the manner prescribed by the statute, presents himself in obedience to the call of the court, I do not see that it makes any difference whether that call is loud or low, or in all respects formal. If he did not come, the court would not be able to compel him if there was a defect in the writ by virtue of which he was summoned; but where the writ issues from the proper authority I should say that those who were directly affected by it alone could be heard to assert defects in it, and might waive them if they saw fit; and if they did waive them no other parties could complain.

But in the case of the *State* v. *Lightbody*, 38 Maine, 200, the court decided this precise question contrary to the view which I have taken.

Since then, I think it has rested with the legislature to declare it by positive enactment, if they did not deem a seal upon the venires essential to the validity of the doings of the grand jury. A venire means, of course, "a venire in due form." My attention has not been called to any change in the revisions or legislation since the decision in *State* v. *Lightbody*, which indicates a change of legislative intention respecting the statutes which there received a judicial construction. There is no indication of it even in Special Laws of 1876, c. 307.

Hence I concur in the result reached in the foregoing opinion.

Horatio W. Blood *et al. vs.* City of Bangor.

Penobscot, 1876.—February 19, 1877.

Town.

The plaintiffs' lessor paid the city of Bangor, for the privilege of connecting with the public drain. Afterwards, the city through the joint action of its common council and board of aldermen caused other public sewers to be connected with it, by which the flow of water during severe showers was so increased that the drain could not carry it off, and the plaintiffs' cellar was thereby flowed. *Held*, 1. That under R. S., c. 16, § 9, which declares that "after a public drain is constructed, and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it," it became the duty of the city so to maintain and keep the drain in repair that it should at all times afford sufficient and suitable flow for all water entitled to pass through it. 2. That under the provisions in the same section that "if such town does not so maintain and keep it in repair, any person entitled to drainage through it, may have an action against the town for his damages thereby sustained," the city was liable to the plaintiff for the damages caused him by the overflow. 3. That under the statute the liability of the city was equivalent to that of insurers, and that it was no legal defense that the rains which caused the overflow were extraordinarily severe.

R. S., c. 16, § 9, construed.

On report.

Trespass on the case, declaring in different counts on a common law and on a statute liability for the flowage of the cellar of their store on the corner of Exchange and York streets, Bangor, in May and June, 1874, setting out among other things that the plaintiffs were lessees of the owners in fee of the premises, the building in 1870 of a public drain, by the city through Exchange street, the payment by the plaintiffs' lessors of $100 assessed for the privilege of entering it with their private cellar drain, the obligation of the city to keep it in repair, and constantly to maintain it as the statute requires, their neglect so to do, the flowage of the plaintiffs' cellar thereby and the consequent damage.

The case finds in substance these facts, and that two other sewers, one in York street and another in State street were in 1873 laid out and built by the city so as to connect as their outlet with the Exchange street sewer, which previous to this connection had

never overflowed. In May and June, 1874, the cellar of the plaintiffs' store was flowed from Exchange street sewer, substantially as alleged in the writ. There was evidence that the rains which caused the overflow were extraordinarily severe. Soon after the last overflowing of the Exchange street sewer into the plaintiffs' store, the York street sewer was extended through York street slip above the store into the Kenduskeag; and the extension received the contents of that part of Exchange street which was above York street. Since that time, there has been no overflowing of the Exchange street sewer.

The case was made law on report, the full court to draw such inferences as a jury might, and to render such judgment as the law requires, with an agreement that, if the plaintiffs are entitled to recover, the damages are $330.60.

F. A. Wilson & C. F. Woodard, for the plaintiffs, contended there was, under the facts, both a common law and a statute liability.

T. W. Vose, city solicitor, for the defendants.

WALTON, J. We do not find it necessary to inquire what the common law liability of towns and cities may be with respect to drains and sewers, for the statute law makes the city liable in this case.

The R. S., c. 16, § 9, declares that "after a public drain is constructed and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it." And the same section further declares that if the town does not so maintain and keep it in repair, any person entitled to drainage through it, may have an action against the town for the damage thereby sustained. And the word town includes cities. R. S., c. 1, § 4, cl. 17. It will be noticed that the duty here imposed is imperative, and the liability for its nonperformance equivalent to that of an insurer. The statute admits of no excuse. The drain must not only be constantly maintained and kept in repair, but it must be so maintained and kept in repair, that it will at all times afford a sufficient flow for all drain-

age entitled to pass through it, or the town or city must pay the damage. To this extent the statute makes the town or city an insurer.

The Exchange street sewer was a public drain. The plaintiffs' lessor had paid the city of Bangor a hundred dollars for the privilege of connecting with it. It then became the duty of the city, not only to maintain and keep the sewer in repair, but to so maintain it and keep it in repair, that it should at all times afford sufficient and suitable flow to carry off all water entitled to pass through it. That the city did not so maintain it and keep it in repair is admitted. On the contrary, the city itself, through the joint action of its common council and board of aldermen, caused two other public sewers to be connected with it, by which the flow of water during severe showers was so increased that the drain could not carry it off, and the plaintiffs' cellar was three times flooded within a month. A drain can be as effectually choked by an excess of water as by any other material. If more water is turned into a drain than it can carry off, the excess is as sure to flow back, as if the drain was choked with stones or sand. The showers which overcharged the drain, and caused the water to flow back into the plaintiffs' cellar were undoubtedly severe; but sooner or later, such showers are sure to come, and must be provided for. The fault was not in the showers, but in requiring more work of the sewer than it was capable of performing; and for this the city was responsible, made so, not by the principles of the common law, but by our statute law.

Judgment for plaintiffs for the amount agreed upon, $330.60.

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

REBECCA N. BRAGG *vs.* JOSEPH C. WHITE.

Penobscot, January.—March 5, 1877.

Demurrer. Pleading.

A general demurrer to the declaration in a writ of entry will not be sustained for uncertainty of description, unless the declaration is so defective that the court can perceive that it fails to describe any premises whatsoever.

A reference to the registry of deeds in the declaration is immaterial, when the description of the premises to be recovered is sufficient without such reference.

ON EXCEPTIONS.

DEMURRER to a declaration in a writ of entry in which the demanded premises are described as follows: "A certain parcel or lot of land with the buildings thereon, situated in said Bangor, on the easterly side Ohio street, being the former homestead of said Carleton S. Bragg," with a further statement of its being a part of the premises conveyed to certain parties and recorded in the registry with various references to the books and pages of the registry, and the further statement that they were the same premises conveyed by mortgage of a given date by the defendant to the plaintiff.

The presiding justice overruled the demurrer, which was general; and the defendant alleged exceptions.

L. Barker, T. W. Vose & L. A. Barker, for the defendant.

The demandant's declaration is bad.

I. There is no sufficient description of the demanded premises in the writ and declaration; the reference in the same "to all said deeds to be had for a more full description of said premises, is an admission that there is an insufficient description to be found therein." *Miller* v. *Miller*, 16 Pick. 215. *Atwood* v. *Atwood*, 22 Pick. 283.

II. The declaration alleges no disseizin by the defendant.

F. A. Wilson & C. F. Woodard, for the plaintiff.

The description in the declaration is sufficient, and reference to a record or deeds can do no harm. *Willey* v. *Nichols*, 59 Maine, 253.

The principle of the cases cited by defendant's counsel is, at most, this: that "when lands are demanded, the description of them must be so certain that seizin may be delivered by the sheriff without reference to any description *dehors* the writ." Our court in *Willey* v. *Nichols*, *supra*, say: "This is true only in a limited sense. Neither a parcel of land nor a person can be so described as to preclude inquiry."

The true test is: "Can a reasonably intelligent officer find and deliver seizin of the premises without going to the county records for aid." *Willey* v. *Nichols*.

The description is certainly as good as, and we claim even better than, that sustained by this court in *Willey* v. *Nichols*, and by the court of Massachusetts in *Riley* v. *Smith*, 9 Allen, 370, and in *Silloway* v. *Hale*, 8 Allen, 61. See also *Proprietors of Kennebec Purchase* v. *Lowell*, 2 Maine, 149.

In *Chase* v. *McLellan*, 49 Maine, 375, this court said: "The description should be such that those entitled to redeem should know with reasonable certainty what premises are intended."

In this case the party defending is the mortgageor himself, the description of which he complains is the very same description of the premises furnished by him to the plaintiff in his mortgage deed; so that the premises are intelligently described to him.

Reply. The point decided in *Proprietors of Ken. Purchase* v. *Lowell*, is that the general issue admitted possession by the tenant (page 154); he should have demurred. 2 Maine, 149. *Willey* v. *Nichols*, 59 Maine, 253, is not applicable. There is just difference enough between *Chase* v. *McLellan*, 49 Maine, 375, and this case to make the illustration complete.

"Now occupied," "being the former homestead of said Carleton S. Bragg." To illustrate.—A certain lot or parcel of land, &c., situate in Stetson on the easterly side of Main street, being the former homestead of Lewis Barker. As matter of fact Lewis Barker has had four former homesteads in Stetson on the easterly side of Main street. *Non constat* but Carleton S. Bragg has had two or more homesteads on the easterly side of Ohio street. Which shall the officer deliver seizin of? Inquiry would not avail him. If the adjective "late" instead of "former" had been used, *possibly* it might have been sufficient.

APPLETON, C. J. This is a writ of entry to which the tenant has demurred. The demurrer was overruled and the declaration adjudged good, to which ruling the tenant has filed exceptions.

The demandant claims to recover "the possession of a certain lot or parcel of land with the buildings thereon, situated in said Bangor, on the easterly side of Ohio street, being the former homestead of Carleton S. Bragg, and being part of the premises conveyed by said Carleton S. Bragg to the Bangor Savings Bank, by deed dated July 14, 1869, and recorded in Penobscot registry of deeds, book 391, p. 32; and is the part first described in said deed, and being the same premises conveyed by said Bank to the said Rebecca N. Bragg by deed dated October 5, 1870, and recorded in book 412, page 443 of said registry, and the same conveyed to said White by said Rebecca N. Bragg, by deed dated June 5, 1872," &c.

Eliminating the references to the registry of deeds, the description is sufficient. The town in which, and the street, and the side of the street on which the lot of land in controversy is situated, are clearly stated. It is further described as "the former homestead of said Carleton S. Bragg," of which "the demandant ought now to be in quiet possession," but into which "the said White hath since unjustly entered, and holds the plaintiff out."

The objection taken is, that the description is not sufficiently definite, that the officer could not find the premises, and that the declaration should be so clear, that the officer need not be obliged to consult the records. But if there was no reference to the records, we cannot say that the description is so fatally defective that the officer could not deliver seizin. *Riley* v. *Smith*, 9 Allen, 370. The "former homestead of Carleton S. Bragg," with a description of the street, and the side of the street, gives as much description as is necessary. If the pleader had given monuments and distances, the officer must find the monuments at his peril, as here he must find "the former homestead of Bragg;" which the officer could find with as much readiness as he could stake and stones. No indefiniteness as to the former homestead appears; for nothing discloses that Bragg had but one; and the court cannot, as the counsel for the tenant have done, presume without

evidence ; that he had an indefinite number of former residences, thereby to render the writ defective for its indefiniteness.

"The property sued for may be described as a 'tract of land containing so many acres,' or 'so many acres of land,' or 'a certain messuage,' called by a particular name, by which it is known, or with the abuttals." Stearns on Real Actions, 151. Here, the homestead of Bragg is one part of the description, to which more is added to prevent mistakes.

After all, the demurrer seems rather for, and on account of the officer, rather than of the tenant. But the tenant is not the protecting guardian of the officer. If the officer cannot find the land, it will be the misfortune of the demandant, not of the tenant. If he can find it, then the declaration is sufficient. *Silloway* v. *Hale*, 8 Allen, 61.

Whatever the description may be, however precise and definite, the officer must find the land to which it applies—the messuage, if it be one ; the monuments of the lot ; the homestead ; and if he errs, he becomes a trespasser. But inquiry will enable him to solve the difficulty as readily in the present case, as in any other. The land is in possession of the tenant ; it is the former homestead of Bragg, situated on the east side of Ohio street, in Bangor. If the officer fails to find it, the tenant will receive no harm. We apprehend the fear is, that he may find it. *Willey* v. *Nichols*, 59 Maine, 253. *The Proprietors of Kennebec Purchase* v. *Lowell*, 2 Maine, 149.

The allegation of disseisin is sufficient. Oliver's Precedents, 628.

Exceptions overruled.

Judgment for the demandant.

DICKERSON, BARROWS, VIRGIN, PETERS and LIBBEY, JJ., concurred.

THEOPHILUS COTA *vs.* JOHN ROSS *et al.*

Penobscot, 1876.—April 3, 1877.

Trustee process.

A writ of *scire facias* cannot issue against a trustee before his default is shown by the return of an officer on the execution against him.

The return on the execution before the return day will not authorize the issuing of such writ.

It is immaterial to show that the judgment debtor had no property during the life of the execution, if the return by the officer is made before the return day.

The re-enactment of the statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed.

A trustee on *scire facias* may defend by showing that no legal service was made on the principal defendant.

ON REPORT.

SCIRE FACIAS, against trustees.

In the original action, *Cota* v. *Mishoe*, and trustees, reported 62 Maine, 124, the principal defendant was defaulted and these defendants after a jury trial, charged as trustees for $150 less their legal costs taxed at $62.50; but declining to pay the balance to the plaintiff, this action was brought which they defended on two grounds. 1. Of insufficient service of the execution issued on the original judgment, and 2d, That, back of that, there was no proper service on the original suit against the principal defendant.

The evidence on the first ground was that the execution on the original judgment was issued November 2, 1874, and immediately placed in the hands of a deputy sheriff of the county, who in a few days thereafter made his return thereon as stated in the opinion: and shortly after November 10, 1874, and before the expiration of thirty days after rendition of judgment, this execution was delivered to N. Wilson, the plaintiff's attorney, in the expectation that said trustees would pay the amount for which they were adjudged liable, over to him. But such payment was not made; and the execution was again put into the hands of the same officer, who made further returns as follows, viz:

Penobscot, ss., February 4, 1875. I hereby certify that the within named defendant is not and has not been within my pre-

cinct within three months last past, nor within one year, to my knowledge. H. Lancaster, deputy sheriff.

The evidence on the second ground was, on the part of the plaintiff, the return of the officer on the original writ. This service the defendants sought to impeach, first, by the foregoing certificate of the deputy sheriff on the execution, introduced in evidence by the plaintiff; and secondly, by oral evidence introduced, against the plaintiff's objection, which tended to show that, before the service of the writ, the defendant had absconded beyond the limits of the state and had never returned, and that he left no wife or family in this state. A witness for the plaintiff testified that he had heard the defendant, Mishoe, call the woman with whom he boarded, his wife, and that there was then a young man that he called his son and the young man called him father, that the young man lived there some six months after Mishoe left; that he did not know whether the woman was his wife or not.

The plaintiff filed a written motion, that, if in the opinion of the full court, it was a material fact to further appear in the return of the officer, on the execution, that the principal debtor had no attachable property in the state, during the whole life of the execution, and he therefore returned it wholly unsatisfied, the court allow the amendment to be made by the officer who is now living. This motion was objected to by the defendants, but the granting of the motion, it being made at the April term, was submitted with the whole case, to the judgment of the court.

The plaintiff admitted that no bond was given to the principal defendant by him, after the rendition of judgment and before the issuing of the execution, and that no order of notice was ever issued by the court in the original suit upon the defendant Mishoe.

The defendants admitted that Mishoe was not at any time after the date of the judgment within the jurisdiction of this state, and that he had no attachable property in this state during the life of the execution, and that it remains wholly unsatisfied.

Upon these and other facts stated in the opinion, and upon so much of the evidence as was legally admissible, the case was reported to the full court for such decision as the law requires.

N. Wilson, for the plaintiff.

The return of the officer on the original writ was sufficient. R. S., c. 86, § 3. "The officer serving it shall attach the goods and estate of the principal, and read it to him or leave a copy of it at his last and usual place of abode; which shall be a sufficient service on the principal, whether any trustee is held or not."

If such defense could be made to the original action it is now too late. *Smith* v. *Eaton*, 36 Maine, 298.

The return of the officer is conclusive on the parties in the suit; and cannot be contradicted except in an action against the officer for a false return. *Stinson et al.* v. *Snow*, 10 Maine, 263. *Harkness* v. *Farley*, 11 Maine, 491. *Chase* v. *Gilman*, 15 Maine, 64. *Craig et al.* v. *Fessenden*, 21 Maine, 34. *Ruggles et al.* v. *Ives*, 6 Mass., 494.

The service of the execution was sufficient. Practically it was all the while in the custody of the officer, though out of his hands for a short time and with the counsel for the convenience of negotiation with the defendant; which proving useless, it was returned.

It being admitted that the principal defendant was out of the state and had no attachable property in it; it was a useless ceremony for the officer to retain possession of the execution and make search for person and property. The law requires no impossibilities nor any useless service. *Taggard* v. *Buckmore*, 42 Maine, 77. *Woods* v. *Cooke*, 61 Maine, 215, 219. *Craig* v. *Fessenden*, 21 Maine, 34.

The amendment may be allowable. *Woods* v. *Cooke*, 61 Maine, 215.

S. F. Humphrey & F. H. Appleton, for the defendant, admitted the general rule that in such *scire facias* nothing can be pleaded which might have been pleaded in the original suit, but made a distinction. At the time the defendants were adjudged trustees, the plaintiff might have procured further continuance and a sufficient service; judgment having been improperly taken after the defendants were adjudged trustees, the defendants had no opportunity or day in court until this proceeding in *scire facias* to make objection. They were guilty of no laches. Citations same as in the opinion.

The defect of want of proper return on the execution cannot be cured by the defendants' admission that Mishoe had no property; for the writ of *scire facias* against a trustee is issued by virtue of a statute; and there must be a conformity to statute requirements.

APPLETON, C. J. This is an action of *scire facias* against the defendants as trustees of John Mishoe.

The plaintiff recovered judgment at the October term, 1874, of this court against Mishoe, and the defendants as trustees. Execution was issued thereon November 2, 1874, and immediately placed in the hands of an officer, who made thereon the following return: "Penobscot, ss., Nov. 5 and 10, 1874. By virtue of this precept, I have demanded of the within L. Gilbert and John Ross, trustees, the goods, effects and credits of the within named debtor, in the hands and possession of said trustees, which they then and there neglected and refused to discover and expose to me, and being unable to find the goods, estate or body of said debtor, wherewith to satisfy the same, I return this execution in no part satisfied.

H. Lancaster, deputy sheriff."

Shortly after, this execution was returned to the plaintiff's attorney.

The execution was subsequently placed in the same officer's hands, who made thereon the following return: "Penobscot, ss., Feb. 4, 1875. I hereby certify that the within named defendant is not and has not been within my precinct within three months past nor within one year to my knowledge.

H. Lancaster, deputy sheriff."

I. This certificate subsequently made cannot aid the plaintiff. Besides it shows, by this return of the officer who served the original writ, that there was no valid service on the principal defendant in that suit.

The provisions of R. S., c. 86, § 67, are precisely identical with those of R. S. 1857, c. 86, § 67.

It was held in *Austin* v. *Goodale*, 58 Maine, 109, in a case precisely like the one at bar that the return of "unsatisfied" made before the return day upon an execution against the principal defendant, would not authorize the issuing of a writ of *scire facias*

after the return day against the person adjudged trustee. This was in accordance with the views of this court in *Roberts* v. *Knight*, 48 Maine, 171. So, it was held in Massachusetts under a similar statute in *Adams* v. *Cummiskey*, 4 Cush. 420, that a writ of *scire facias* could not be lawfully issued against a trustee, before his default is shown by the officer's return on the execution against him, but that a return before the return day would not authorize the issuing of such writ.

When the revision of the statutes was made in 1871, the construction given by this court to c. 86, § 67, was well known. Had there been any intention to change the law, it would have then been done. When the legislature adopt or re-enact a statute, its previous construction as settled by the courts is adopted. After the repeated construction of a statute, its re-enactment upon the revision of the statutes is always regarded as a legislative affirmance of the statute as previously construed by the judiciary. *Mooers* v. *Bunker*, 29 N. H. 420. *Frink* v. *Pond*, 46 N. H. 125. *Osgood* v. *Holyoke*, 48 Maine, 410. *Hughes* v. *Farrar*, 45 Maine, 72.

The decisions of our highest tribunals are the only authority for the greatest part of our law. Nothing can more tend to shake public confidence in its stability than a disregard by the court of its previous adjudications. "It is of less importance," observes Ashurst, J., in *Goodtitle* v. *Otway*, 7 T. R. 395, "how the law is determined, than that it should be determined and certain; and such determination should be adhered to, for then every man may know how the law is." In Nixon's estate, 9 Irish, L. T. R., 32, Christian, L. J., declared: "It is better that the law should be certain, than that it should be abstractly correct." Unless we adhere to previous adjudications, we have nothing but oscillations in our decisions; and litigants can have no certainty that the law of yesterday will be the law of to-morrow.

If the doctrine of *stare decisis* is ever to have force, it is when the repeated adjudications of the courts have received the legislative sanction upon a general revision of preceding statutes. If it be deemed expedient, the legislature can change the law; but it is not for the court to usurp legislative authority.

The amendment proposed does not cure the defect in the plaintiff's case. It is not a proposition to amend by showing that the officer had the execution in his hands on the return thereof and that he could truly make a return of "unsatisfied" as of that date. It is simply a proposition to add to his return the fact that after its date the debtor had no attachable property in the state during the life of the execution—a fact of no importance in the decision of the case.

II. But the trustees should be discharged on the ground that there has been no legal service on the principal defendant.

The only service made or claimed to have been made on Mishoe, the principal defendant, was by leaving at his last usual place of abode an attested copy of the writ in the original suit. This was done on the December 20, 1872. But the evidence is conclusive that on or about October 8, 1872, Mishoe had absconded and left the state and has never since returned, and that the plaintiff was fully aware of those facts. He had no house and it appears that he was not married. No service has since been made upon him, nor has any bond been filed in accordance with R. S., c. 82, § 4. The execution issued in two days after judgment. The judgment therefore was invalid and voidable, and of this the trustees on *scire facias* can legally avail themselves by way of defense. Such is the view of the law held by the court of Massachusetts in repeated decisions. In *Pratt* v. *Cunliff*, 9 Allen, 90, it was held when one had been summoned as trustee of a firm and had appeared and been charged upon his answer, that *scire facias*, would not lie against him, if the judgment against the principal defendants was invalid for the want of service upon one of them. In *Thayer* v. *Tyler*, 10 Gray, 164, it was decided that a trustee in foreign attachment might object on *scire facias*, that judgment was rendered in the original action at the first term against the principal defendant, who was not in the state at the time of service, without giving the further notice required by statute in such case. A judgment without notice will be reversed by writ of error. *Packard* v. *Matthews*, 9 Gray, 311. The trustee would not have the protection to which he is entitled, if he were to be charged as trustee on a judgment which could be reversed on error or on review.

Hence the trustee on *scire facias*, has been permitted to show that there has been no service on the principal in the original writ or that the service was voidable ; and those facts shown, he is entitled to his discharge. *Judgment for the defendants.*

WALTON, DICKERSON and VIRGIN, JJ., concurred.

DANFORTH, J., concurred with them on the first point ; and with BARROWS and PETERS, JJ., in the result, on the second point.

ISAIAH L. RYDER *vs.* WILLIAM H. MANSELL,
and
SAME, complainant, *vs.* SAME.

Piscataquis, 1876.—January 30, 1877.

Estoppel. Misnomer.

The principle of estoppel which prevents a tenant from denying his landlord's title, applies to the relation that exists between the hirer and letter of a house, standing upon the land of a third person as personal estate.

A tenant is not estopped to deny his landlord's title, after that title, under which his own tenancy began, has ended and the estate has become vested in the tenant himself.

A foreclosure by a mortgagee, describing himself as William Mansell, may be valid, although his whole name is William H. Mansell, he being known to be the same person by either name, and it being evident that no misapprehension or mistake was caused on that account.

ON REPORT.

FORCIBLE ENTRY AND DETAINER
and

ASSUMPSIT ; two actions tried together and made law on report of the same evidence. The premises, the possession and the rent of which the plaintiff sought to recover, was a house built on land leased of the Highland Slate Company.

The plaintiff, a mortgageor in possession, about November 1, 1873, let, in writing, the house to the defendant, at a rent of three dollars per month for six months. After certain sundry monthly payments of rent, the evidence introduced against the plaintiff's objection, tended to show that the defendant purchased of the

mortgagee his interest and notified the plaintiff of his intention to foreclose. The plaintiff assented thereto, stating, as the evidence tended to show, that he rather submit to the foreclosure, than continue to pay twelve per cent. on the mortgage note of $100, the rate agreed, with the probable understanding as the counsel argued, that he would have three years to redeem, and could collect rent all the while. The defendant foreclosed in sixty days, as for personal property, serving the notice on the plaintiff's grantor, and not upon the plaintiff, and stating his own name in the notice as William H. Mansell, and not as William Mansell, the name in the deed. The certificate of the justice showed that William Mansell made oath to the certificate of William H. Mansell. The foreclosure, if the proceedings were valid, expired March 3, 1874.

W. P. Young, for the plaintiff.

The defendant having entered into possession under a lease from the plaintiff, and having neither been evicted by paramount title, nor surrendered possession, is estopped to deny his landlord's title, and therefore any testimony to show title in the defendant is inadmissible. *Longfellow* v. *Longfellow*, 54 Maine, 240. *Same* v. *Same*, 61 Maine, 590.

The relation of landlord and tenant existed between the lessor and lessee of the house standing on land of a third party by permission. *Smith* v. *Grant*, 56 Maine, 255. R. S., c. 94, § 2, last sentence.

By this foreclosure the defendant, under the forms of law, undertook a fraud upon the plaintiff, and should be held to follow strictly and technically the forms. There is no evidence that William Mansell and William H. Mansell are the same person.

In any event, the plaintiff is entitled to two months' rent ending with the foreclosure.

C. A. Everett, for the defendant.

The house built upon the land of a third party, was personal property. *Osgood* v. *Howard*, 6 Maine, 452. *Russell* v. *Richards*, 10 Maine, 429. *Hilborne* v. *Brown*, 12 Maine, 162. *Davis* v. *Emery*, 61 Maine, 140.

In such case the relation of landlord and tenant does not apply.

If the relation does apply, still the tenant can show that the landlord's title has been put an end to. 1 Hill. Mort. 183.

Other points taken by counsel, appear in the opinion.

PETERS, J. The facts material to this controversy are these: The plaintiff was the owner of a house, situated on the land of a third person, upon which house was an outstanding mortgage. The plaintiff let the house to the defendant, by parol agreement, for a rent to be paid monthly. After this, the defendant purchased the mortgage upon his own account, and foreclosed it as one upon personal property. Before the foreclosure was commenced, the defendant notified the plaintiff of his purchase, but never surrendered the possession of the house to him, nor offered to.

The suit is for rent which accrued both before and after the foreclosure was perfected, and the complaint for possession was instituted after it was perfected.

The plaintiff contends that the defendant is liable for rent of the house until he shall surrender possession of the same to him, and that, until that is done, he is estopped, by the relation of landlord and tenant, to set up any claim of title of his own thereto. On the other hand, the defendant contends that he cannot be ousted from the possession by the plaintiff, and that he is not liable for any rent accruing subsequently to his purchase of the mortgage, whether foreclosed or not.

Our opinion is, that the plaintiff can recover for the rent of the house up to the time when the defendant's title thereto became absolute and completed by foreclosure, and that he cannot recover for any rent after that time; and that the complaint for forcible detainer cannot be maintained.

The defendant contends that the doctrine of estoppel, such as exists by the relation of landlord and tenant, does not apply to a building that is merely personal property. We think it does apply to a house which is personal estate, situated as this house appears to be. Although, perhaps, not distinctly disclosed by the evidence, it is inferable that the rightful possessor of the building would be entitled to the use of the soil. By hiring the house, the defendant became entitled to use and enjoy the possession of the

land upon which the house stands. The reason of the rule of estoppel applies to this property with as much force as to any other. Many landlords have themselves only the estate of lessees. And the doctrine of estoppel as between principal and agent, and bailor and bailee, is not widely different from that which applies between hirers and letters of real estate. *Coburn* v. *Palmer*, 8 Cush. 124. *Hilbourn* v. *Fogg*, 99 Mass. 11. *Smith* v. *Grant*, 56 Maine, 255. As to bailments, see collection of cases in Abbott's U. S. D., vol. 2, p. 476.

But the defendant was not bound to the plaintiff as his landlord after the mortgage was finally foreclosed. Although a tenant, without a surrender or eviction, or something equivalent thereto, cannot show that the title of his landlord was not a valid one when he entered under him, he can show that such valid title has been legally extinguished or determined, so that it no longer exists. He does nothing thereby inconsistent with the lessor's right to grant the original lease. The tenant cannot be allowed to plead to his landlord's action *nil habuit in tenementis*, but he can plead *nil habet*, &c. A tenant does not deny that the landlord had a title at the beginning of the lease, by showing that the same title has expired. This exception to the general rule is well established by numerous authorities, and is entirely consistent with the reasons for maintaining the rule itself. We do not perceive why the facts of this case do not bring these parties within the application of this principle. See cases cited *supra*. Also cases collected in note under title of Estoppel, in Chitty on Plead., 16th Am. Ed.; Wash. on Real Prop., vol. 1, book 1, c. 10, § 8. *Lamson* v. *Clarkson*, 113 Mass. 348, and *O'Brien* v. *Ball*, 119 Mass. 28, and *Whitney* v. *Dinsmore*, 6 Cush. 124, are cases directly in point.

The plaintiff makes a point that the mortgage is not well foreclosed, because the defendant in the papers is sometimes described as William H. Mansell, and sometimes as William Mansell, with the middle initial omitted. But we are satisfied that by both names he was known to be the same person, and that no misapprehension or mistake has occurred on that account. *Collins* v. *Douglass*, 1 Gray, 167. *Hubbard* v. *Smith*, 4 Gray, 72. *State*

v. *Taggart*, 38 Maine, 298. *Dutton* v. *Simmons*, 65 Maine, 583, 585.

The result is that, *In the complaint of forcible entry and detainer the complainant is nonsuit; and in the action at law the defendant is to be defaulted.*

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

AMBROSE H. WYMAN *vs.* ELLIOT H. BANTON.

Waldo, 1875.—July 19, 1875.

Action. New trial.

Where A. manufactured at his mills logs for B., and retained the slabs made therefrom, claiming them as his own by a usage existing in the place where manufactured, the log owner cannot recover for the value of such slabs in assumpsit upon an account annexed, in the absence of any promise of the manufacturer to pay for them.

A winning party may take advantage in this court, of a point raised by the evidence reported, to retain a verdict, although not taken at the trial; when it is manifest that the action, for a fundamental reason, cannot be maintained, if a new trial was granted.

ON MOTION AND EXCEPTIONS.

ASSUMPSIT, on account annexed for seventy-five cords of slabs, sawed from logs belonging to the plaintiff, at different times, from 1868 to 1872, at $2.00 per cord. $150.

Plea, general issue. Verdict for the defendant. The plaintiff filed exceptions and motion to set aside the verdict.

J. W. Knowlton, for the plaintiff.

W. H. McLellan, for the defendant, submitted without brief.

PETERS, J. The case shows that the defendant manufactured into boards, at his mills, certain logs for the defendant, at an agreed compensation therefor. The boards were taken away by the plaintiff, as the same were produced, and the slabs, made in manufacturing the boards, were left at the mills. The business

between the parties was carried on in this mode for several years, the defendant all the while in one form and another converting the slabs to his own use. Finally, the plaintiff sued the defendant for the slabs, in an action of assumpsit upon an account annexed. At the trial, the defendant set up that, by a usage of the community where the logs were sawed, the slabs belonged to the manufacturer as a part of his compensation for manufacturing. The court ruled as a matter of law, that such usage, if established, was a reasonable and lawful one. This ruling is complained of by the plaintiff. But as there is no evidence in the report of the testimony of the case, that there ever was any promise by the defendant to purchase or pay for the slabs, and inasmuch, on the contrary, as the evidence conclusively shows, that he retained them to his own use upon a ground of ownership and right thereto, totally inconsistent with any such promise express or implied, we are of the opinion, that for that reason, the ruling becomes entirely immaterial, and that this action of assumpsit cannot be maintained.

The plaintiff contends, however, that this point was not taken at the trial, and that the defendant is for that reason debarred from asserting such a defense at this stage of the case. A losing party would not have a right to take advantage of a point to obtain a new trial which was not taken when the cause was tried; but a winning party may, to retain a verdict, when it is manifest that, if a new trial was granted, the action for a fundamental reason cannot be maintained. *Motion and exceptions overruled.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

INHABITANTS OF FREEDOM *vs.* COUNTY COMMISSIONERS OF WALDO COUNTY.

Waldo, 1875.—January 1, 1876.

Certiorari.

The three assessors of the town of Freedom, where Flye resided, met at the time and place duly notified, under R. S., c. 6, § 65, to receive the lists of the polls and estates. Flye did not appear at the time and place; but after the assessors had finished their session for the day, two of their number called

at Flye's store and received his list under oath. At a subsequent day the three assessors called upon Flye for a further statement, when he made answers in writing to their questions, but refused to subscribe and make oath thereto. *Held*, that such refusal barred his right to have an adjudication by the commissioners.

ON REPORT.

PETITION for certiorari, dated April 3, 1875, praying that the county commissioners of Waldo county be commanded to certify and return their records of proceedings upon the application of George H. Flye of Freedom, for an abatement of his tax for the year 1874. The assessors met April 1, 1874, at R. Elliot's store in Freedom, after sufficient notice, for the purpose of receiving lists of polls and estates as provided in R. S., c. 6, § 65. Flye did not bring in his list on the first day of April as required by the notification; but in the forenoon of that day, between 11 and 12 o'clock, he started to go to the place of meeting for the purpose of handing in the list, but, seeing two of the assessors going down the street, he did not go. In the afternoon of the same day, he again went out of his store for the same purpose; but saw two of the assessors on the street and again gave up going.

After they had got through what they called their day's work, two of their number called on Flye at his store and received from him the following paper:

"To the assessors of the town of Freedom for the year A. D. 1874.

Messrs: As the law requires I inform you that my taxable property is as follows: One poll.

The above is all the taxable property I have on the first day of April, A. D. 1874. I have no money on hand or at interest over and above what I am paying interest for.

(Signed,) Geo. H. Flye.

Freedom, April 1, 1874."

This statement he then and there swore to before them, and afterwards answered their questions concerning his real and personal estate. The three assessors met again April 4, and proposed a further examination of Flye, who was called before them and made written answers to their questions, which he however refused to subscribe and swear to.

They thereupon assessed Flye on one poll and $8000, money on hand and at interest; the cash and highway tax on $8000 being $188. They also assessed him as administrator of his deceased wife's estate on $600, stock in trade, the tax on which amounted to $14.10. Flye subsequently presented a written petition to the assessors for an abatement; but they made none, and in December, 1874, he applied to the county commissioners, who after due notice and hearing made a decree as follows:

"It is ordered by the court that there be abated from the tax of said G. H. Flye for the year 1874, the sum of one hundred and eighty-eight dollars, one hundred dollars of which being the amount of his highway personal estate tax, and eighty-eight dollars being the amount of his cash personal estate tax for said year, and that he be reimbursed out of the treasury of the town of Freedom said amount and to be further reimbursed out of said town treasury the amount of $29.92 for incidental charges, being in the whole the sum of $217.92. The above includes no abatement of the tax against said Flye as administrator, we holding that he made no sufficient application to the assessor for such abatement to warrant us in adjudicating upon that tax."

The petitioners prayed for writ of certiorari for the reasons, among others.

I. That Flye did not make and bring in to the assessors at the time and place appointed therefor a true and perfect list of his polls and all his estate real and personal not by law exempt from taxation which he was possessed of on the 1st day of April, 1874.

II. That Flye, when requested by the assessors to subscribe and make oath to his answers to their inquiries as to the nature and situation of his property, refused to subscribe and make oath thereto.

W. H. Fogler, for the petitioners.

W. H. MeLellan, for the respondents.

I. Flye did substantially make and bring in to the assessors true and perfect lists. The assessors took the lists and administered the oath after he brought the lists in. They asked him questions. He answered. He did everything required by them. If he had not done all this the county commissioners might have excused him

under R. S., c. 6, § 66, he having tried twice, during the day, to find them in their office. The commissioners are to judge whether the lists are true.

II. He did make proper and complete answers on the 4th of April, but did not make oath to them. He was not obliged to answer on the 4th of April. If he was obliged to answer on the 4th, why not on the 5th, 6th and so on? He had done each and everything required by the assessors on the 1st of April the only day fixed by the assessors.

III. The statute seems to contemplate only one examination and that on the day notified.

IV. He made proper application to the assessors, as soon as he could find them all together.

V. The county commissioners had jurisdiction. In *Lambord* v. *County Commissioners*, 53 Maine, 505, the commissioners did not abate, because Lambord refused to be examined under oath at the time he gave in his lists. The court sustained this refusal to abate and dismissed the petition. In this case, the commissioners made a part of the abatement asked for; they having jurisdiction of the subject matter, found of course that Flye did everything asked of him on the 1st of April. They refused to abate a part because not legally asked for. In *Bangor* v. *County Commissioners*, 30 Maine, 270, the writ was granted because the commissioners had no jurisdiction of the subject matter.

VI. The writ will be refused where no substantial injustice has been done. This application is addressed to the sound discretion of the court. *Boston & Maine* v. *Folsom*, 46 N. H. 64. *West Bath* v. *Co. Com.*, 36 Maine, 74. *Waterville* v. *Co. Com.*, 31 Maine, 506. *Hopkins* v. *Fogler*, 60 Maine, 266. *Lewiston* v. *Co. Com.*, 30 Maine, 19. *Cushing* v. *Gay*, 23 Maine, 9. *No. Berwick* v. *Co. Com.*, 25 Maine, 69. *Mendon* v. *Co. Com.*, 5 Allen, 13. *Gleason* v. *Sloper*, 24 Pick., 181. *Rutland* v. *Co. Com.*, 20 Pick. 71. *Holden* v. *Co. Com.*, 7 Met. 561.

VII. The county commissioners decided that Flye did not have the $8000 to be taxed for.

VIRGIN, J. Before a tax-payer can exercise the statute right of making "application to the county commissioners for any abate-

ment of his taxes," he must not only "make and bring in" to the assessors a "true and perfect list of his poll, and all his estates real and personal, not by law exempt from taxation," but, if required by "the assessors or either of them," "make oath to its truth," and also "answer all proper inquiries in writing, as to the nature and situation of his property, and if required, subscribe and make oath thereto." R. S., c. 6, §§ 66 and 67; *Lambord* v. *Co. Com. Ken. Co.*, 53 Maine, 505.

In the case at bar, it is neither alleged, in the application to the commissioners nor proved, that he performed these conditions precedent; but, on the contrary, it affirmatively appears that he did not perform them all, at least.

One, at least, of the assessors, was present at the time and place designated in their notice during the day; and the petitioner could have filed his list and made oath thereto before him if required. § 67.

But if it be contended that he substantially complied with the provisions of the statute so far as then required by the assessors after their session had closed, still he absolutely and very emphatically refused to "subscribe and make oath to" his written answers made April 4; and this refusal barred any right he might otherwise have had to an adjudication by the commissioners. To be sure this requirement was not made upon him at the time and place designated in the notice of the assessors. Nor was their authority to make it limited to that day. It might become impracticable to make all the examinations in one day; but if made within a reasonable time thereafter, and the inquiries were predicated upon the possession and ownership of property on April 1, it could operate no detriment to the petitioner and would be a reasonable construction of the statute.

This case not being one of mere formal irregularity, in which the court may in its discretion grant or refuse the writ, as substantial justice may dictate, but one of substance, wherein the commissioners acted without authority and their proceedings therefore void, the entry must be *Writ granted.*

APPLETON, C. J., DICKERSON, DANFORTH, PETERS and LIBBEY, JJ., concurred.

GEORGE E. M. T. WEBBER *vs.* FRANCIS B. OVERLOCK *et al.*

FRANCIS B. OVERLOCK *et al. vs.* GEORGE E. M. T. WEBBER.

SAME *vs.* SAME.

Waldo, 1875.—April 27, 1876.

Deed.

A deed bounding the grantee by a highway conveys the fee to the center of the highway, when the title of the grantor extends so far.

Thus: where plaintiff's land was north of and adjoining the defendants'; and the defendant's deed, which was the earlier, described his land as being the south part of the west half of lot number 23, and bounded on the north by a line parallel with the north line of said half lot, and so far south of the north line as to leave forty acres and no more north of the first mentioned line; on the east by a line dividing lot number 23 in the centre from north to south; on the south by lot number 26; and on the west by the county road; *held,* that the divisional line between the lands of the parties is one drawn from east to west over the west half of lot number 23 to the centre of the highway parallel with, and so far south of, the north line of the lot as to leave forty acres in the west half of the lot north of it.

ON REPORT.

TRESPASS and WRIT OF ENTRY; three cases tried together between the same parties upon the same evidence, in which the question was: where upon the face of the earth was the east and west divisional line between their farms. Webber's land lay north and Overlock's south of that line; and each charged the other in trespass, with cutting and carrying away grass over their line, in the season of 1874. Overlock also brought a writ of entry. Webber claimed a prescriptive line indicated by a fence; wherein the evidence was conflicting. Overlock claimed a line north of that, to be determined by the deeds only. Webber's title by deed was to a southern line which taken with the other boundaries would leave forty acres of lot No. 23 in Brooks west of a north and south divisional line of the lot.

The whole of lot No. 23, was originally owned by David Sears et als, who before conveying any part of it divided it into equal parts by a line running through it from north to south. The first conveyance of any part of the west half was to Stephen Stantial by deed of October 19, 1839, described as follows: being the south

Bearing of this line, N. 1½ ° E.

West line of Lot No. 23.
Length 26 chains, 50 links.

Stake

County Road.

County Road.

West part of Lot No. 23.
Length 21 chains, 65 links.

This line bears S. 88½ ° E.

Length 21 chains, 50 links.

North line of Lot No. 23.
Whole length 43 chains, 35 links.

East part of Lot. No. 23.
Length 21 chains, 85 links.

Divisional Line Fence, N. 86¼ ° W.

Divisional Line Fence.

This line bears S. 1¼ ° W.

40 acres excluding the road.

40 acres including 1-2 the road.

40 acres including the road.

South line, whole length, 43 chains, 65 links.

REMARKS.—I find the average width of the west part of this lot, as divided and fenced, to be 21 chains, 57 links; therefore if we begin at the stake acknowledged by the parties to be the N. W. corner of the lot, we must go down towards the south line 18 chains, 55 links, to get 40 acres. If we begin in the middle of the road or two rods from the stake we must measure down towards the south 19 chains to get that amount; and if we begin four rods from the stake and exclude the whole road, we must measure southward 19 chains, 55 links to get the 40 acres; and this will bring our line within 1 chain, 25 links, at the east, and 50 links at the west end of the old divisional fence. I find the west half of the whole lot as divided to contain 57 acres, 1 rood, and 27 rods, and the east part 58 acres, 3 roods, and 16 rods, making a difference in the two parts of 1 acre, 1 rood, and 29 rods.

PETER MOULTON, Surveyor.

East part of Lot 23.
Length 22 chains.

North 1 ° E.

East line of Lot. No. 23. Length 27 chains.

part of the west half of lot No. 23, and bounded as follows: on the north by a line parallel with the north line of said half lot and so far south of said north line as to leave forty acres and no more, north of the first mentioned line on said lot; on the east, by a line dividing said lot No. 23, in the center from north to south; on the south by lot No. 26, and on the west by the county road leading from Brooks to Thorndike.

Other deeds were introduced by both parties in which were the descriptive phrases: "to the county road" and "by the county road."

The north and east lines of the forty acre parcel being given; in order to find the southern line, it became necessary first to determine whether the forty acre parcel included the whole or half the road or neither, because the less of the road that was included, the father south would be the southern boundary. Other facts appear by the surveyor's plan and in the opinion.

W. H. Fogler, for Webber.

W. P. Harriman and *N. H. Hubbard*, for Overlock *et al.*

WEBBER *vs.* OVERLOCK *et al.*

DICKERSON, J. TRESPASS *quare clausum*. It appears from the evidence that the land of the plaintiff adjoins the land of the defendants on the south. The defendants' north line is thus identical with the plaintiff's south line. The defendants hold by the elder title. The determination of the defendants' north line, therefore, fixes the location of the plaintiff's south line.

All the deeds from the original proprietors under whom both parties claim title, through several mesne conveyances, bound the grantees on the west "by the county road;" and the deed of the defendants' immediate grantor makes that road the western boundary of the land conveyed under it. The defendants' north line, as substantially described in the deeds they introduced, is a line drawn from a point in the line dividing lot 23 in the centre from north to south, extending westerly to the county road, and parallel with the north line of said lot, so as to leave forty acres in the west half of the same, north of it. It is obvious that the location of this line upon the face of the earth depends upon the construc-

tion that is to be put upon the words, "to" or" by the county road." If the whole or half of the road is to be included in the quantity of land remaining in the west half of the lot north of this line, it would be farther north than it would, if the whole road or half of it is to be excluded from the computation, and *vice versa*.

It is a familiar rule in the construction of deeds, that a deed bounding the grantee by a highway conveys the fee to the centre of the highway, when the title of the grantor extends so far. *Palmer* v. *Dougherty*, 33 Maine, 502. *Hunt* v. *Rich*, 38 Maine, 195.

The original grantors under whom the parties claim, not only owned the fee in the land covered by the highway, which is made the western boundary of the several parcels conveyed by them, but they also reserved an easement of any road legally laid over the same for public use. The north line of the defendants' land, therefore, is a line drawn from east to west on the west half of lot No. 23, to the center of the highway, parallel with, and so far south of the north line of said lot as to leave forty acres in said west half of said lot north of it; and the south line of the plaintiff's land is identical with that line. According to the plan of Peter Moulton, the court surveyor, which is made a part of the case, that line is indicated by the middle red [dotted] line, which is one rod and twenty links south of the red [dotted] line, drawn to indicate the defendants' north line, if it extended to the western line of the road, and thus included the whole of the road in the forty acre parcel.

The plaintiff testifies that the trespass was committed four feet north of the last mentioned line; and the defendant, Overlock, testifies that he cut up to within two feet of the Hersey stake, so called, which the plaintiff locates four feet north of the line run by Moulton, to include the whole of the road in the reserve of forty acres. There can be no doubt but the defendants committed a trespass upon the land of the plaintiff by cutting and carrying away, at least, a part of the grass sued for. How much they took, north of their line, does not exactly appear. The plaintiff claims to own the land to what is called, on Moulton's plan, "the divisional line fence," and estimates the amount cut north of that line at

one ton, worth $12. We think $6 is a fair estimate of the value of the grass cut on the plaintiff's land.

The evidence does not sustain the plaintiff's claim of title by disseisin. *Judgment for plaintiff for six dollars.*

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

OVERLOCK *et al. vs.* WEBBER.

DICKERSON, J. TRESPASS *quare clausum.* A part of the hay sued for belonged to the plaintiffs, and a part of it belongs to the defendant. We estimate the value of the plaintiffs' part at $3. *Webber* v. *Overlock et al*, 66 Maine, 177, 181.

Judgment for plaintiff for $3.

APPLETON, C. J., DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

OVERLOCK *et al. vs.* WEBBER.

DICKERSON, J. WRIT OF ENTRY. By the decision in *Webber* v. *Overlock et al*, *ante*, 177, 181, the north line of plaintiffs' land is a line drawn from east to west across the west half of lot No. 23 to the centre of the highway, parallel with, and so far south of the north line of said lot as to leave forty acres in said half of said lot north of it. The evidence shows the defendant was in possession of some of the plaintiff's land south of that line. There must therefore be, *Judgment for the plaintiffs*, for the land lying south of the line between the parties, as decided in *Webber* v. *Overlock et al.*

APPLETON, C. J., DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

OSCAR H. SAMPSON *et al.*, in equity, *vs.* HANNAH ALEXANDER *et al.*

Waldo, 1875.—April 27, 1876.

Married woman.

Real estate purchased by the wife, so far as paid for by money or means of her own, cannot be taken to pay her husband's debts; but is, in equity, liable therefor, so far as it may be proved to have been paid for by money earned through her personal services jointly with his, while living in the marital relation, upon such real estate, carrying on a farm, and keeping a public house thereon.

BILL IN EQUITY, inserted in a writ of attachment, dated December 26, 1872, returnable at the April term, 1873.

The bill alleges, that at the supreme judicial court, Waldo county, October term, 1857, the plaintiffs recovered judgment against Robie F. Alexander, one of the defendants, for $1,255.97, debt, and $15.01, costs; that the cause of action on which the judgment was based was goods and merchandise sold by the plaintiffs in 1855, to him and one Crawford, then in life, since deceased; that on the eleventh of April, 1860, said Robie F., having given a bond on the execution which issued on said judgment, was admitted to the poor debtors' oath; that action accrued on said judgment, in which, judgment was duly rendered at the May term, 1867; that the execution which issued thereon was duly returned *nulla bona*, by the proper officer; that Hannah Alexander, one of the defendants, was married to Robie F., April 3, 1856, not being then possessed of any property or means, and that she has not since acquired or attained any except from or through her husband; that by deed dated June 24, 1862, duly executed and recorded, one Harriet Boynton conveyed to said Hannah Alexander, a certain parcel of land, in Belmont, in said county, for an alleged consideration of $100; that by deed dated January 16, 1864, one John Alexander conveyed to said Hannah, another certain parcel of land, in Belmont, for an alleged consideration of $500; that by deed dated September 6, 1865, John Alexander conveyed to said Hannah, another certain parcel of land, in Belmont, for an alleged consideration of $135; that each and all of said conveyances were paid for by the money of Robie F., who,

with the intention of defrauding the plaintiffs, and for the purpose of keeping said real estate out of their reach, procured the conveyances to his wife; that the legal title of record to the same still remains in her, and that Robie F. continues in the possession and occupation of the same as of his own property, and that said Hannah was well knowing of said fraudulent intention.

The bill prays for a decree for a conveyance of said real estate to the plaintiffs, or for payment of the debt, or for such other relief as they may be entitled to.

A general demurrer and also a replication were duly filed.

In their answers, both defendants admitted all the allegations of the bill, except that said Hannah was not at the time of her marriage possessed of any property, and has not since acquired or attained any except from or through her husband; except, also, that said conveyances were paid for by the money of the said Robie F., and that he procured them to be made to her to keep said real estate out of the reach of the plaintiffs, and except, also, that he has continued in possession and occupation of the same as of his own property. There is a general denial of all fraud and fraudulent intent.

J. Williamson, for the plaintiffs.

G. E. Wallace, for the defendants.

PETERS, J. In 1855, the complainants recovered a judgment against one of the respondents, Robie F. Alexander, for about $1300, still remaining unpaid. In 1856, Robie F. was married to the other respondent, Hannah Alexander. Since their intermarriage, she has acquired the title of certain real estate. She contributed towards the consideration paid for it the proceeds of what property she had of her own when she was married, amounting now to the sum of two hundred and seventy-five dollars, as near as may be. The balance of the money paid for the real estate was acquired by both respondents, living in the relation of husband and wife, from other sources; such as, "keeping boarders," "entertaining travelers," "putting up horses," "rent of hall for dances," "sales of stock," and sales of agricultural products raised upon their place, and the like.

The complainants seek to recover payment of their judgment out of this real estate, upon the ground that it was paid for by the husband; and this claim is resisted by the respondents, upon the ground that it was paid for out of the property and earnings of the wife.

Undoubtedly an interest in the land, amounting in value to the sum of $275, is hers. This sum includes the amount by her paid from her own property and interest thereon. We think it reasonable to allow her interest upon the sums advanced by her, for the reason that a considerable amount of rent seems to have been indirectly received from the property, besides its enjoyment for mere family use. As the law now stands, since a married woman can make any contracts of her own without creating any liability upon the part of her husband, she would be entitled to any profits that might arise from her purchases of property. *Colby* v. *Lamson*, 39 Maine, 119. *Oxnard* v. *Swanton*, id. 125. *Blake* v. *Blake*, 64 Maine, 177. But as it does not appear whether the property in question is worth more than was given for it or not, and as no such claim is presented by the respondents, we do not find it practicable to make such an inquiry or set up such a distinction in the present case. Beyond the sum before named, therefore, we do not see why the complainants are not entitled to a satisfaction of their judgment out of the balance of the controverted estate. It was paid for, (save the $275,) from the earnings of the husband and wife. Her earnings belonged to him. She was acting as his agent, and under his legal control, in conducting the premises occupied by them. The provision in R. S., c. 61, § 3, would not make such earnings as these were, the property of the wife; and the rights of the parties must depend upon the well settled rules of the common law. *Bradbury* v. *Andrews*, 37 Maine, 199. *Merrill* v. *Smith*, id. 394. *Gould* v. *Carlton*, 55 Maine, 511.

The bill may be sustained, although the parties are guilty of no actual or intentional fraud. *Low* v. *Marco*, 53 Maine, 45. *Brisay* v. *Hogan*, id. 554. *Hamlen* v. *McGillicuddy*, 62 Maine, 268. And it is the proper remedy, even if guilty of fraud, inasmuch as the title of the real estate was never in him. *Gray* v. *Chase*, 57 Maine, 558. *Webster* v. *Folsom*, 58 Maine, 230.

The form of a decree is within the discretion of the court. None is prescribed by statute or the practice. *Low* v. *Marco*, *supra*. *Corey* v. *Greene*, 51 Maine, 114, 118.

The conclusion is, that the bill is sustained, with costs; a master to be appointed who shall assign and set off to Hannah Alexander a portion of the premises described in the bill, of the value of $275; the balance of the estate, or so much of it as will be equal in value to the sum due upon the judgment, to be by the master appraised and set off to the complainants; a suitable conveyance from the respondents to the complainants to be made, unless an amount equivalent to the amount of the appraisal shall be paid to the complainants, or secured to them, by the respondents, upon such terms as a single judge may settle, when the master's report comes in.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

BELFAST & MOOSEHEAD LAKE RAILROAD COMPANY *vs.* GEORGE W. COTTRELL.

Waldo, 1875.—July 11, 1876.

Railroad.

The defendant subscribed an agreement to take the amount of shares set against his name in the capital stock of the plaintiff railroad company agreeably to foregoing conditions, one of which was that no assessment except for a preliminary survey and location should be made nor any work upon the road commenced until the full amount was secured for its completion to (or as far as to) Newport. The subscriptions were less in amount than the actual cost; and, if a deduction be made of invalid conditional subscriptions, were much less than the cost estimated by the engineer. *Held*, that the defendant's subscription was invalid.

ON REPORT.

CASE. The count relied upon was as follows:

"For that, at said Belfast, heretofore, to wit: on the first day of August, 1867, the plaintiffs duly organized and authorized and having opened subscription books for the sale of shares of preferred stock of said company, the defendant subscribed in said

books and agreed and bound himself to take two shares of said stock and to pay for the same at the rate of one hundred dollars per share; and the plaintiffs aver, that from time to time calls have been made on said defendant and all other subscribers for shares aforesaid, until the amount of said calls was to the full amount agreed by the defendant to be paid as aforesaid; that the defendant, although requested, utterly neglects to pay the amount due from him under either of said calls, and that their treasurer, by order of their directors, duly notified a sale of said shares for the non-payment of said calls, and duly sold the same at public auction, to the highest bidder therefor, on the second day of April, inst., for the sum of one hundred and two dollars, being less than the amount due under said calls in the sum of ninety-eight dollars, which said sum of ninety-eight dollars said defendant is by law obliged and bound to pay the plaintiffs," yet, etc.

Plea, never promised; with brief statement.

I. That if he made any promise or promises, they were made upon conditions, which have not been performed by the plaintiffs.

II. That the promise, if any was made, was to take shares and not to pay for them.

III. That the assessments were illegal.

IV. That the railroad, by the terms of the defendant's subscription, by the charter and by the by-laws, was to be built from Belfast to Newport, and that it was not built to Newport, but to Burnham.

V. That the number of shares which composed the capital stock of the railroad corporation was not definitely fixed by the charter, or by the directors or stockholders, before the assessments were made.

VI. That the plaintiffs first broke their contract, if any existed with him.

VII. That the plaintiffs in building the railroad did not comply with the charter, by-laws, or the conditions of the subscription, or with the laws of the state.

The plaintiffs put in the subscription book admitted to have been signed by the defendant, and containing among other things a recital of a meeting of the directors, held July 6, 1867, and of several resolutions passed by them of which the fourth reads thus:

"No assessment whatever, except for a preliminary survey and location of said road, shall be made upon any share or shares, so as above subscribed: nor shall any work upon said road be commenced until the full amount be secured for its completion to Newport, thereby avoiding the necessity of any mortgage or incumbrance being ever contracted by the corporation."

The subscription book closed as follows:

"We the undersigned do hereby agree and bind ourselves to take the amount of shares set against our respective names in the stock of the 'Belfast & Moosehead Lake Railway Company,' agreeably to the foregoing conditions. The shares to be of the preferred stock of said company.

NAMES.	SHARES.	VALUE.	TOTAL.
G. W. Cottrell.	2.	$200.	$200."

The opinion of the court stating the facts bearing on the single ground of defense upon which the decision was based renders a further statement of the evidence immaterial.

W. H. McLellan, for the plaintiffs.

N. Abbott and *J. Williamson*, for the defendant.

VIRGIN, J. The count relied on is so defective in several particulars that the plaintiffs cannot recover under it as it now stands; but inasmuch as the case comes before us on report and the evidence was admitted without objection, the declaration can be amended if necessary; therefore, we shall consider the case as if the declaration were sufficient.

The plaintiff corporation seeks to recover of a subscriber for two shares of its capital stock, an alleged balance between the net sum realized from a sale thereof, for non-payment of sundry assessments laid thereon, and the amount of such assessments equal in the whole to their original par value.

The defendant's subscription-agreement "to take" the shares of stock imports no promise on his part to pay for them directly. *B. & M. L. R. R.* v. *Moore*, 60 Maine, 561. If the agreement had been absolute, its utmost effect could only constitute him a stockholder—owner of so many shares, entitling him to the rights, and

rendering him liable to the obligations imposed by law upon a stockholder. His subscription was to take the stock "agreeably to the conditions" therein expressed: one of which was "no assessment whatever, . . . shall be made upon any shares so as above subscribed, . . . until the full amount be secured for its completion to Newport." This is a condition precedent; and hence before the plaintiffs can recover, it must be satisfactorily shown that it has been performed. *Belfast & Moosehead L. R. R.* v. *Moore*, *sup.*; *Penob. & Ken. R. R. Co.* v. *Dunn*, 39 Maine, 588.

From the phraseology adopted there, it would seem that the defendant's subscription was made with the understanding that the road was to be located *via* Newport, although the language literally construed does not specifically so declare. Whether or not such a construction was really intended by the parties and should now be given, we will not now decide. The most favorable construction for the corporation, and the one which its counsel contends for, is that it has reference to the amount of subscription rather than to the route; and should be construed to mean, that no assessment should be made, until the full amount were secured for the completion of the road "as far as Newport is from Belfast" —but to some point of intersection with the "Maine Central Railroad." Some of the town-subscriptions contained the additional words, "or to any junction of the Maine Central."

As seen, the contract, independent of the charter, contains no express or implied promise to pay any sum whatever. The defendant can be holden only under his contract taken in connection with the charter. Section 5 of the charter authorizes "equal assessments from time to time on all the shares;" on non-payment after the prescribed notice, a sale of the shares at auction; and if the shares sell for less than the assessments due thereon, "the delinquent subscriber or stockholder shall be held accountable to the corporation for the balance, with the interest and cost of sale."

Before the defendant can "be held accountable" under this provision of the charter, a legal assessment, notice, sale, and an ascertained balance must be proved. But by the express terms of the subscription as above construed, no assessment can be made against this defendant, "until the full amount be secured for the

completion of the road as far as Newport is from Belfast." Has such an amount been subscribed even? The burden of establishing this very material fact is upon the plaintiffs. The case discloses no evidence to sustain it. On the contrary the evidence is full and undisputed that the road was not built to Newport, but to Burnham, and "$150,000 to $200,000 were saved by building to Burnham instead of Newport;" that the road to Burnham actually cost §950,000—more than the aggregate of all the subscriptions, valid, invalid and conditional, the latter sum being $935,700.

Moreover, taking the estimate of the engineer, (who located and under whose direction and supervision the road was built; and which is the most favorable view in behalf of the plaintiffs that can be reasonably urged,) made and submitted to the board of directors before any assessments were voted, and rejecting the invalid and conditional subscriptions by the towns of Unity, Newport, Troy, and Detroit, and the plaintiffs signally fail.

[Engineer's estimate, (p. 7,)			$906,500
Whole subscription, (p. 22,)		$935,700	
Less Unity,	$30,000		
" Newport,	25,000		
" Troy,	10,000		
" Detroit,	5,000		
		70,000	
			865,700
Less than estimate,			$40,800.]

The plaintiffs' further proposition that the directors were the judges whether or not a sufficient sum had been subscribed, is not a reasonable one, especially if by that is meant that they decided the estimate of their engineer was too high. It is the special province of the engineer to ascertain by preliminary surveys and otherwise the approximate cost; and his report, although generally too low, is the foundation of ulterior proceedings. But no such absurdity is urged. Moreover, the proposition that the directors could bind the subscribers by deciding that the sum estimated by the engineer has been subscribed, is equally untenable. In the first place, there is no evidence in this case that any such decision was made, except the inference deduced from their vote to lay

assessments. There was nothing to exercise their judgment upon, except figures. To decide upon the pecuniary "responsibility" of individual subscribers, as used in the seventeenth by-law of this corporation, (as in *B. & M. L. R. R. Co.* v. *Brooks*, 60 Maine, 577,) the board of directors would be an appropriate tribunal, and as good as any; and good faith on their part in passing upon such a question, which is always one of much uncertainty, will bridge over any degree of *ignorantia facti*, or bad judgment short of actual fraud. But whether the aggregate amount of sundry subscription lists equals the sum estimated by the engineer is a simple mathematical question of easy solution, and not a matter requiring the judgment of a board of directors. The clerk testifies: "I footed up the amount of the subscriptions and reported the sum total to the directors. . . . I laid the sum total of the subscriptions before the directors before they acted." If this was all that was done in the premises, (and the evidence stops here on this point,) the directors took no note of the particulars, such as the names whether of individuals or towns, or whether conditional or absolute, hence did not profess to decide.

This "sum total" included the subscriptions of towns to the amount of $70,000. That these subscriptions were invalid is so free from doubt that the fact is admitted. Being invalid they could not be considered in the aggregate.

This being fatal to the maintenance of this action, we have no occasion to consider the numerous questions raised by the defendant. *Judgment for the defendant.*

APPLETON, C. J., DANFORTH, PETERS and LIBBEY, JJ., concurred.

GEORGE E. WALLACE, in equity, *vs.* ALFRED W. STEVENS *et als.*

Waldo, 1876.—October 5, 1876.

Mortgage.

The plaintiff made a demand on the mortgagee at a store two miles from his residence to render an account, under R. S., c. 90, § 13, to which the reply was that about eleven hundred dollars was due on the mortgage; and when

requested to render a more particular account, he replied that he would not until obliged. No objection was taken to the place where the demand was made. The parties were acquainted with each other. The mortgagee shortly after left the state and did not return. Four years intervened between the demand and the suit. *Held*, that under the circumstances the demand was sufficient.

BILL IN EQUITY inserted in a writ of attachment, dated December 13, 1875, brought to redeem certain lands from a mortgage thereon. Most of the allegations of the bill are identical with those in the suit *Wallace et als.* v. *Stevens et als.*, 64 Maine, 225.

G. E. Wallace, pro se.

J. Williamson, for the defendants.

To constitute a demand and refusal sufficient to support a bill of this nature, such demand must be made in respect to time and place that the mortgagee may have an opportunity to render his account. *Willard* v. *Fisk*, 2 Pick. 540. *Putnam et al.* v. *Putnam*, 13 Pick. 129. *Roby* v. *Skinner*, 34 Maine, 270.

In the case at bar, the alleged demand was made on the mortgagee, in a store, two miles from his residence, late in the afternoon of almost the shortest winter's day. No time or place was fixed for receiving the account, by mail or otherwise. It hardly seems the duty of a mortgagee to follow up a mortgageor under such circumstances. Why should not the common law requirement concerning rent, that a demand must be made upon the premises, obtain?

APPLETON, C. J. This is a suit brought to redeem a mortgage given to the defendant Stevens by one Harrison Stevens. The plaintiff's title to the equity of redemption is not controverted.

The only objection taken to the maintenance of the plaintiff's bill is that no sufficient demand was made on the mortgagee to render an account.

The evidence shows that the plaintiff made a demand on the mortgagee at a store two miles distant from his residence to render an account, to which the reply was that about eleven hundred dollars was due on the mortgage, and when requested to render a more particular account he replied that he would not until obliged. No objection was taken to the place where the demand was made.

No further time was asked. The parties were acquainted with each other. The mortgagee has never since rendered any account, but shortly after left the state and has not since returned.

The demand for an account was made December 26, 1871. The bill was commenced December 13, 1875, so that the mortgagee had ample time to render an account had he chosen to do it.

The bill is sustained, the demand being sufficient under the circumstances. *Bill sustained with costs.*

DICKERSON, BARROWS, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

WILLIAM HUSSEY *vs.* WILLIAM G. SIBLEY.

Waldo, 1876.—December 22, 1876.

Payment.

A town order, passed by a debtor to his creditor for the purpose of paying his debt and received for that purpose, both parties acting in good faith, will not operate as a payment if, at the time, it was utterly worthless for the reason that the drawers and acceptor had no authority to make or accept it.

ON REPORT.

ASSUMPSIT on a promissory note of $2400, signed by the defendant, November 22, 1869, on which were twelve indorsements in the aggregate of $2260, one of which was December 7, 1874, $375, another December 26, 1874, for a gross sum in which was included $18, omitted by mistake when the December 7th indorsement was made. These two sums of $375 and $18 were the amounts estimated due on a town order passed by the defendant to the plaintiff of the following tenor:

"$300. May 14, 1869.

To Nehemiah Smart, town treasurer, or his successor. Pay to Charles Plaisted or order, three hundred dollars, it being for money paid the United States for the year 1863.

No. 58. (Signed,) James Fuller, Alex Woodman, I. A. Marriner, } Selectmen of Searsmont.

[INDORSEMENTS.]

Accepted, May 14, 1869, N. Smart, treasurer. Without recourse to me. Charles Plaisted."

This order was given to Plaisted, a drafted man who paid a commutation of $300 in consideration thereof.

The contention was in reference to this order, and whether it operated as a part payment of the note. The defendant received it of one Dr. Whitney in payment of a note. There was evidence tending to show that before he received it from the doctor in payment of his own note, he had negotiations with the plaintiff in regard to taking it in part payment of the note in suit, and stated to the plaintiff that he would take it of the doctor if the plaintiff would take it of him, and that the plaintiff consented. There was also evidence tending to show that the defendant represented the order to be as good as cash and that both parties at the time thought it was a good and valid order.

W. H. McLellan and *J. W. Knowlton*, for the plaintiff.

The counsel each argued upon the law and the facts; and to the point that the town order was worthless, cited *Thompson* v. *Pittston*, 59 Maine, 545.

As directly in point on the defendant's hypothesis deciding that a note [or order] of no value, accepted in payment of a debt is no payment of a debt, the plaintiff and defendant both being ignorant of the worthlessness of the note, counsel cited *Roberts aplt.* v. *Fisher*, 43 N. Y. 159, or 3 American, 680.

W. H. Fogler, for the defendant.

I. The defendant bought and received the order of his debtor, Whitney, surrendering a secured debt of more than $300 and paying $83 in money and sold and delivered it to the plaintiff, in good faith.

II. If the defendant made the remark testified by the plaintiff (which is denied) that "the town order is just as good as money in hand when you get it to the town treasurer," it would be a mere expression of opinion, and not a warranty. *Baxter* v. *Duren*, 29 Maine, 434, 442. *Holbrook* v. *Connor*, 60 Maine, 578. *Bishop* v. *Small*, 63 Maine, 12. *Cooper* v. *Lovering*, 106 Mass. 77.

III. Nor was there any implied warranty. The seller of a written instrument, at the most, impliedly warrants but two things, —that he has the right to dispose of it and that the signatures are genuine. As to all other matters the rule *caveat emptor* applies. 2 Parsons on Notes, 41, 187. Story on Notes, § 118. *Baxter* v. *Duren*, 29 Maine, 434, 440. *Burgess* v. *Chapin*, 5 R. I. 225. *Ellis* v. *Wild*, 6 Mass. 321.

An implied warranty does not extend to visible defects which are alike within the knowledge of vendor and vendee. Chitty on Contracts, 483, 484.

IV. Money paid under a mistake of law cannot be recovered back; nor when voluntarily paid with knowledge, or means of knowledge in hand, of the facts. *Norton* v. *Marden*, 15 Maine, 45, and cases. *Norris* v. *Blethen*, 19 Maine, 348. *Jenks* v. *Mathews*, 31 Maine, 318, and cases. *Mowatt* v. *Wright*, 1 Wend. 355.

The order was what it purported to be, a town order given "for money paid the United States in 1863." If the plaintiff made a mistake it was *ignorantia legis*, and he cannot recover by alleging it.

V. The defendant was induced to purchase the order by the plaintiff's promise to take it of him.

DANFORTH, J. This is an action to recover the balance due upon a promissory note upon which there are quite a number of indorsements. The indorsement of December 7, 1874, for $375, and a part of that of December 26, 1874, it is agreed were made in consideration of an order drawn by the selectmen upon the town treasurer of Searsmont, and accepted by him. It is claimed by the plaintiff that the amount so indorsed should not be allowed in payment, as the order proved invalid and worthless. Whether it should be so allowed is the only question presented. Certain facts are undisputed. It is agreed that the order was given by the defendant, and received by the plaintiff as a payment upon the note, and that at its inception it was utterly void, and for that reason of no value when passed. That the plaintiff supposed it to be valid when he took it, the testimony leaves no room to doubt; and the most favorable view of the testimony for the defendant, is that he

was of the same opinion. The order was returned to the defendant within a reasonable time after it was received, and its want of value discovered. Under such a state of facts, both parties being equally innocent, no payment was made; there was no value received for the indorsement. The defendant parted with nothing of value to him; the plaintiff received that which yielded him no benefit.

In such cases there may have been some conflict of authority as to how far a party selling such paper as personal property is a warrantor of its genuineness or value; but it is believed there is none whatever, as to its effect as a payment.

In *Baxter* v. *Duren*, 29 Maine, 434, it was held that one who sells a promissory note as personal property, in the absence of an express agreement would not be liable upon an implied warranty of the genuineness of the signatures if they should prove a forgery. The same doctrine was held in *Ellis* v. *Wild*, 6 Mass. 321. But in both of these cases a distinction was made between a sale of such paper, and a transfer of it in payment of an existing debt; and it was conceded as a well established rule of law that under the same circumstances the transfer would not operate as a payment of a prior debt, though made for that purpose.

In *Frontier Bank* v. *Morse*, 22 Maine, 88, the plaintiff having received the bills of a broken bank, both parties being ignorant of that fact, in exchange for good ones, in a very elaborate opinion it was held that the loss should fall upon the payer, and that the plaintiff was entitled to recover the amount.

In *Young* v. *Adams*, 6 Mass. 182, a promissory note payable in foreign bills, was taken up by such bills, one of which proved to be a counterfeit. It was held that the plaintiff might recover the amount for which that bill was taken, the note so far not having been paid.

In *Cabot Bank* v. *Morton*, 4 Gray, 156, it was held that a person who procures notes to be discounted by a bank impliedly warrants the genuineness of the signatures.

Merriam v. *Wolcott*, 3 Allen, 258, recognizing the doctrine that an attempted payment in worthless paper is no payment, extends the same principle to sales, holding that the distinction raised in

Ellis v. *Wild*, and *Baxter* v. *Duren*, is unsound and virtually overrules them. *Ellis* v. *Wild* has also been denied in *Bartsch* v. *Atwater*, 1 Conn. 419; see also Story on notes, §§ 118, 119, 389, and Bigelow's Estopple, 446–7; Redfield & Bigelow's L. & S. Cases, 669, and cases cited; 1 Chitty on Con., 11 Am. Ed. 625, note; *Roberts* v. *Fisher*, 43 N. Y. 159.

Thus from the weight of authority it would appear that the distinction noticed in *Ellis* v. *Wild* and *Baxter* v. *Duren*, is, to say the least, somewhat shadowy, and that whether the plaintiff took the order as payment or as purchaser, the defendant must be held to some responsibility as to its validity; in short, that he as seller, warrants the order to be what it purports, a genuine order; and whether that want of genuineness results from forgery or an absence of authority on the part of the drawers or acceptor or, as in this case, both, must be immaterial. It was a town order the parties talked about; it was that, which the defendant undertook to transfer, and that, which the plaintiff agreed to receive. It turned out to be another thing, a mere form without the substance. It is not the responsibility of the parties which the seller guarantees, but their liability.

But it is claimed that the order was not commercial paper, and that different principles of law must be applied to it. It is not strictly commercial, but only *quasi* negotiable. *Emery* v. *Mariaville*, 56 Maine, 315. But how does this help the defendant. It was still received in payment of an existing debt. If it was negotiable, the presumption would be that it was received in payment, and the burden would be upon the plaintiff to show some reason why it should not be allowed. On the other hand, not being negotiable, no such presumption prevails; and the burden is upon the defendant to show a special agreement to that effect. *Jose* v. *Baker*, 37 Maine, 465. But so far as the agreement in this respect is concerned, the burden of proof is of no consequence. The facts are not in dispute, except as to the condition on which it was received; and we put the decision upon the ground that the order, having been delivered as an order in payment of an existing debt, and received in good faith as such, and subsequently proved to be invalid and worthless for any purpose whatever, fails to operate as a payment.

Upon the testimony as reported, we find no occasion to consider the question of estoppel raised by the defendant. Whether the defendant purchased the order relying upon the plaintiff's promise to take it involves a conflict of testimony. The defendant's wife testifies to such a promise. She is to some extent corroborated by other testimony in the case. This is as clearly denied by the plaintiff, and the case shows many circumstances which sustain him. The acts and declarations of the parties at the time the transfer was made, as proved by a decided preponderance of evidence, are so inconsistent with a prior agreement to take the order that we must consider the weight of evidence against it. The defendant was under a legal obligation to pay the money; and it is clear that the plaintiff did not want the order, but did want the money. The burden of proof upon this point is upon the defendant, and he fails to satisfy us that the plaintiff agreed to take the order except upon the condition that it would produce the money.

Judgment for the plaintiff for the amount due upon the note striking off the indorsement of Dec. 7, 1874, for $375, *and* $18 *from that of Dec.* 26, 1874.

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

INHABITANTS OF STOCKTON *vs.* IRA B. STAPLES.

Waldo, 1876.—January 11, 1877.

Domicile.

The domicile of a party in any particular locality is acquired by a union of intent and of presence.

Thus: The defendant, a shipmaster, left his home in Stockton, in September, 1871, on a voyage, intending to abandon Stockton as his home and, on his return from sea, to go to Searsport and make it his home thereafter. On his return in June, 1872, he married a resident of Searsport, and remained there a few days, then went to sea with his wife, returned to Searsport in May, 1874, and left his family there, not having been in Stockton except on a visit since 1871. *Held,* in an action by Stockton, for taxes for the years

1872-3-4, that from and after June, 1872, when there was a union of intent and of presence in Searsport, his domicile was in Searsport, and not in Stockton.

ON REPORT.

DEBT for taxes on poll and personal property, for the years 1872-3-4.

W. T. C. Runnells & W. H. McLellan, for the plaintiffs.

J. Williamson, for the defendant.

APPLETON, C. J. This is an action brought under the provisions of c. 232, of the Public Acts of 1874, to recover of the defendant, taxes assessed against him in the plaintiff town, for the years 1872, 1873 and 1874.

The defendant is the master of a vessel. Previous to 1871, his home had been in Stockton. In September of that year, he left on a voyage, intending to abandon Stockton and, on his return, to go to Searsport. On his return from sea in June, 1872, he married a resident of Searsport, in that town, and remained there ten or eleven days. He then went to sea with his wife, and returned to Searsport in May, 1874, and then left his family there. He further testified that he had not been in the plaintiff town, except on a visit, since 1871, and that he claimed his home to be in Searsport.

The domicile of a party in any particular locality is acquired by the union of intent and of presence—the being there with the then present intent to remain for an unlimited time, and that the place where the individual may be, is to be, and then is his domicile. It is solely for the determination of the individual whose domicile is the subject matter of investigation. One may acquire a domicile by the residence of a day, if to the fact of residence be superadded the requisite intention. *Littlefield* v. *Brooks*, 50 Maine, 475. *Parsons* v. *Bangor*, 61 Maine, 457.

The defendant having left the plaintiff town in 1871, with the intention of not returning, and of going to Searsport with the intention of making that place thereafter his home, (and having married his wife there,) must be regarded as an inhabitant having his domicile there. The fact of bodily presence, with an intention there to remain for an indefinite time, co-existed.

The defendant left the plaintiff town in the fall of 1871, but there is no evidence he was in Searsport until the following June, when he was there married. Thenceforth he must be deemed as an inhabitant of that place. He was there with his wife with the intention of remaining.

The defendant positively testifies that he paid the tax of 1872. The collector of the plaintiff town does not unequivocally deny it. If it were a matter of memory, it would be more likely to be remembered by the defendant, who was interested in only one tax, than by the collector, to whom was committed the collection of all the taxes assessed upon the inhabitants of the town. The preponderant probability upon the question of payment, though slight, is, we think, with the defendant. *Plaintiff nonsuit.*

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

GUSTAVUS BELLOWS, appellant, *vs.* JOHN Q. MURRAY.

Waldo, 1876.—January 11, 1877.

Abatement.

On a plea in abatement, alleging the interest of the magistrate, before whom an action is returnable, and a traverse by the plaintiff, the burden is upon the defendant to show the existence of the alleged interest.

Thus: where an action was returnable before a trial justice, and there was a plea in abatement to the jurisdiction on account of the interest of the magistrate, a traverse joined, a judgment for the defendant and an appeal to this court, where at the trial neither party offered any proof and the presiding justice reversed the judgment of the trial justice, adjudged the plea bad, overruled it, and the defendant alleged exceptions; *held,* that, in the absence of proof, it was not for the court to presume the existence of the alleged interest and that the burden of showing it was upon the defendant who alleged it.

ON EXCEPTIONS.

ASSUMPSIT, upon an account for labor. The action was commenced before James D. Lamson, esq., one of the trial justices for the county of Waldo. Upon the return day of the writ the defendant appeared and filed the following plea in abatement.

"And now the defendant comes and defends, &c., when, &c., and prays judgment of the said writ because he says that J. D. Lamson, esq., before whom said action was commenced and before whom said writ is returnable is interested in said suit; that the plaintiff was employed by the Freedom Cheese Manufacturing Company, a corporation having its place of business at said Freedom, and not by the defendant during the time named in the account annexed to said writ; that the said Freedom Cheese Manufacturing Company, and not the defendant, is liable and ought to pay the sum demanded and declared on in said writ, or such part thereof as may be due to the plaintiff; that said J. D. Lamson, esq., is and was at the date of said writ a share owner, part owner, and director in said Freedom Cheese Manufacturing Company; that said writ ought to have been made returnable before some other trial justice for said county of Waldo who is disinterested, and not before the said J. D. Lamson, esq., who is interested in this suit; and this he is ready to verify. Wherefore because said action was commenced and said writ is made returnable before the said J. D. Lamson, esq., the said defendant prays judgment of the said writ that the same may be quashed and for his costs.

John Q. Murray.

WALDO, ss, Sept. 26, 1874.

Then personally appeared the above named John Q. Murray and made oath that the allegations stated in the foregoing plea are true. Before me, Wm. H. Fogler, justice of the peace.

To which plea the plaintiff then replied as follows:

And the plaintiff says his writ ought not to be quashed and that the defendant is not entitled to costs for he says he was not employed by the Freedom Cheese Manufacturing Company, but by the defendant, during the time mentioned in his writ; and denies that said company employed him, or are in any way liable to pay him for the seven days' work charged in the plaintiff's writ; and that the said company styled the Freedom Cheese Manufacturing Company, nor said justice before whom said suit is pending are any ways interested in said suit, and ought to be tried before said trial justice. And this he prays may be inquired of by the said trial justice.

Gustavus Bellows.

By O. H. Keen, his attorney.

This replication was joined by the defendant.

Wherefore said trial justice adjudged the plea to be good and ordered the writ to be quashed and that the defendant recover his costs.

From which judgment the plaintiff appealed to this court, where no testimony being offered by either party, the presiding judge reversed the judgment of said trial justice, adjudged the said plea bad and overruled the same; and the defendant alleged exceptions.

W. H. Fogler, for the defendant.

The defendant pleaded to the jurisdiction of the trial justice, alleging that the justice was interested. The plaintiff traversed the plea and issue was joined. By adjudging the plea good, the justice adjudged that he was interested. Being interested he had no jurisdiction. He should have proceeded no further in the case. Any judgment rendered by him would have been merely void. *Lovejoy* v. *Albee*, 33 Maine, 414.

The justice having no jurisdiction, this court can obtain none by virtue of an appeal; and the action should be dismissed. *Hatch* v. *Allen*, 27 Maine, 85.

Or all further proceedings should be stayed. *Lawrence* v. *Smith, et al.*, 5 Mass. 362.

J. Williamson, for the plaintiff.

Every plea should be so pleaded as to be capable of trial, and therefore must consist of matter of fact, the existence of which may be tried by a jury on an issue, or the sufficiency of which as a defense may be determined by the court upon demurrer; or of matter of record which is triable by the record itself. 1 Ch. Pl. 540.

When issue is taken on plea in abatement, the proof of the affirmative lies on the defendant. 1 Stark. Ev. 385.

The burden of proof of the affirmative lies on the party who avers it. 1 Met. 204.

APPLETON, C. J. This case comes before us on appeal. The defendant pleaded in abatement the interest of the magistrate before whom the writ was returnable, which was traversed by the plaintiff in his replication. Judgment was rendered for the defendant from which the plaintiff appealed.

At *nisi prius*, on appeal, no evidence was offered. The defendant had alleged by his plea, the interest of the magistrate, before whom the writ was returned. The burden was on him to show the existence of this alleged interest. In the entire absence of proof on the subject, it was not for the court to presume its existence. It was not proved by the mere fact of the defendants having filed a plea alleging it did exist. *Exceptions overruled.*

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

WILLARD W. PULLEN *vs.* JAMES S. GLIDDEN.

Waldo, 1875.—February 19, 1877.

Malicious prosecution.

Though malice in fact, as distinguished from malice in law, is essential to the maintenance of an action for malicious prosecution, yet such "malice in fact" is not restricted to its popular meaning of ill-will, resentment, personal hatred, or the like; any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, in a legal sense, malicious, and is also in fact malicious; but malice in fact is found by the jury, while malice in law is found by the court.

ON EXCEPTIONS.

CASE for malicious prosecution.

The defendant made complaint for forgery against the plaintiff before a magistrate, on which the plaintiff was arrested, and after examination acquitted and discharged from arrest. The plaintiff thereupon brought this action, on the trial of which the presiding justice, upon request of the plaintiff's counsel, instructed the jury that there was no probable cause for the prosecution. He further charged as appears in the opinion. The verdict was for the defendant; and the plaintiff alleged exceptions.

J. W. Knowlton, for the plaintiff.

I. The charge requires malice in its popular sense of hatred or resentment; and is in conflict with numerous decisions. *Ulmer* v. *Leland*, 1 Maine, 135, 137. *True* v. *Plumly*, 36 Maine, 466, 484. *Page* v. *Cushing*, 38 Maine, 523, 526. 2 Greenl. Ev., §

432. *Wills* v. *Noyes*, 12 Pick. 324. *Commonwealth* v. *Snelling*, 15 Pick. 337, 340. *Merriam* v. *Mitchell*, 13 Maine, 439.

II. The law requires only malice in its legal sense, the phrasing of which as "legal malice," has sometimes caused it to be confounded with "malice in law," which is appropriately used to denote a legal inference of malice from certain facts proved. "Malice in law" is found by the court. "Malice in fact" is found by the jury. "Malice in a legal sense," has reference to definition, and not to the tribunal which finds it. An injurious act willfully done without lawful excuse is in a legal sense malicious, and is malicious in fact, though unmingled with spite or ill-will towards the party injured. For the use of these terms, see *Humphries* v. *Parker*, 52 Maine, 502.

L. M. Staples, for the defendant, submitted without argument.

LIBBEY, J. This is an action for malicious prosecution. The presiding judge instructed the jury that there was not probable cause for the prosecution. Upon the question of malice he instructed the jury as follows: "In regard to the other branch of the case necessary to be established by the plaintiff, it is that there was malice; that the prosecution was malicious; now what is malice? There are several kinds of malice; but the two kinds of malice that may perhaps be considered in this charge are malice in law and malice in fact. Now what is malice in law? Malice in law is such malice as is inferred from the commission of an act wrongful in itself, without justification or excuse. This is not the kind of malice required in this case. The malice required to be proved in this case is malice in fact. Malice in fact is where the wrongful act was committed with a bad intent from motives of ill-will, resentment, hatred, a desire to injure, or the like. Did such kind of malice exist in the mind of the defendant when he commenced the prosecution in question? Did he do it from bad intent, from evil motives, or did he not? Malice may be inferred from want of probable cause, or it may be inferred and proved by other evidence in the case." Again: "If you should find that there was no malice, such as I have described, the plaintiff could not maintain this action."

The plaintiff complains that this instruction required the jury to find malice in its more restricted, popular sense, when proof of malice in its enlarged, legal sense was all that the law requires.

To maintain his case it was necessary for the plaintiff to prove malice in fact as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts, as in action for libel, where the law presumes malice from proof of the publication of the libelous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove express malice in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill-will, resentment, or hatred towards the plaintiff. It is sufficient if he prove it in its enlarged legal sense. "In a legal sense any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Commonwealth* v. *Snelling*, 15 Pick. 337. "The malice necessary to be shown in order to maintain this action, is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation, malicious." *Wills* v. *Noyes*, 12 Pick. 324. See also, *Page* v. *Cushing*, 38 Maine, 523. *Humphries* v. *Parker*, 52 Maine, 502. *Mitchell* v. *Wall*, 111 Mass. 492.

We think from a fair construction of the instruction upon this point, the jury must have understood that, in order to find for the plaintiff, they must find that the defendant, in prosecuting the plaintiff, was actuated by express malice, in the popular sense of the term. In this respect it was erroneous.

Exceptions sustained.

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

WILLIAM H. FOGLER, guardian, *vs.* WILLIAM L. BUCK *et als.*, administrators.

Waldo, October, 1876.—February 22, 1877.

Trust.

Where a guardian receives a conveyance of the estate of his ward in his own name and includes it in the inventory as his ward's property, charging the estate of his ward with the expenses incurred in its management and accounting for its proceeds, he is to be regarded as holding the estate in trust.

On the decease of such guardian, the ward being still a minor, a bill in equity may be maintained against the administrator of the deceased guardian to enforce a conveyance of the property thus held in trust and to account for its earnings.

To such bill the ward should be a party, suing by his guardian.

BILL IN EQUITY. Submitted upon an agreed statement of facts, which sufficiently appear in the opinion.

W. H. Fogler, for the plaintiff.

J. Williamson, for the defendants, submitted without argument.

APPLETON, C. J. William McGilvery was duly appointed guardian of the complainant's ward, George W. Drinkwater, on the second Tuesday of January, 1872, and, as such, took possession and control of all his ward's estate including one-fourth of the bark "Anna Walsh" of New York. This quarter became the property of the ward as heir of his deceased father. On the 22d April, 1872, Isadora Ward, administratrix of the estate of the ward's father, conveyed this quarter by a bill of sale in usual form to said McGilvery. The purpose of the conveyance was to transfer the title from the estate of the ward's father to McGilvery as guardian of his said ward. McGilvery in his inventory of the estate of his ward has included the quarter of the bark; and, in his accounts with the estate of his ward, has charged the same with the expenses, such as insurance, &c., of the quarter and credited the same with its earnings.

The title to the quarter of the Anna Walsh was in McGilvery as guardian and in trust for his ward. The plaintiff, as guardian, may enforce his ward's rights by a bill in equity and compel a

conveyance from the administrator of W. McGilvery. *Brown* v. *Dunham*, 11 Gray, 42. Story Eq., § 317. *Atkinson* v. *Atkinson*, 8 Allen, 15.

The conveyance should be to the ward. The property is his. The trust of the guardian consists in the control and management of the estate of the ward while a minor. *Moore* v. *Hazelton*, 9 Allen, 102.

The ward is properly a party to the bill, and the conveyance should be to him.

The bill may be amended and upon its being amended, the complainant will be entitled to a decree of conveyance as prayed for, and that the defendants account for the earnings of the bark which have come into their hands since the decease of their intestate.

DICKERSON, BARROWS, DANFORTH, PETERS and LIBBEY, JJ., concurred.

HERBERT W. WOODS *vs.* BENJAMIN J. WOODS.

Waldo, 1876.—March 31, 1877.

Mortgage.

The mortgagee, by deed of warranty of the premises mortgaged, transfers to his grantee all his interest in the mortgage and mortgaged premises.

Neither the mortgageor nor his grantee can maintain a real action against the mortgagee nor his assignee after condition broken.

The remedy of the mortgageor or his grantee against the mortgagee or his assignee is by bill in equity.

ON REPORT.

WRIT OF ENTRY, by a representative of a mortgageor against a mortgagee.

W. H. Fogler, for the plaintiff.

W. H. McLellan, for the defendant.

APPLETON, C. J. On 10th July, 1851, Joseph Woods conveyed the demanded premises to his son Greenleaf F. Woods, who on the same day mortgaged the same to his father. The condition

of the mortgage was, "that if the said Greenleaf F. Woods, his heirs, executors, or administrators, shall well and truly pay to the said Joseph Woods, his executors, administrators or assigns, the sum of ten dollars annually, during his natural life, and shall maintain the said Joseph and his wife Lydia for and during their natural lives, or the life of the survivor of them, provide them suitable food and clothing, medicine and medical aid, and all things necessary for their convenience and comfort both in sickness and in health, at said homestead farm, and furnish them with suitable horses and carriages, whenever they wish to ride or journey, and separate rooms to live by themselves if they prefer them, and shall provide and suffer the said Joseph's three daughters, Annie C., Mehitable and Betsey C., to have a home with him, the said Greenleaf F., so long as they remain single and unmarried, and during said single state to maintain and support them when they are sick or unable to support themselves, then this deed shall be void, otherwise to remain in full force and virtue."

Greenleaf F. Woods died May 25, 1855, leaving the plaintiff, then an infant aged three years, as his only heir.

On 3d July, 1855, Joseph Woods, the mortgagee, being upon the mortgaged premises, his son having deceased, conveyed the same by deed of warranty to the tenant; and on the same day took from him a mortgage deed to secure a bond given by him for the support of the mortgagee and his wife.

On the same day, Louisa B. Woods, the widow of Greenleaf F. Woods, in consideration of five hundred dollars paid her by Joseph Woods, released to him all her right, title, and interest in the estate of her deceased husband, with certain exceptions not material to be considered in the decision of this case, and further obligated herself by writing under seal, that neither she nor her son, Herbert W. Woods, the present plaintiff, should ever claim or demand any portion of her late husband's estate, either real or personal, and that the said Joseph, and his heirs, administrators and assigns should enjoy the same free from all claims by her or her son.

On the same day the tenant, by contract under seal agreed to pay "all the just debts and outstanding liabilities of Greenleaf F.

Woods, deceased, and to save the estate of said Greenleaf F. Woods harmless from all liability on account of the same."

The testimony of the tenant is, that he paid for his father $500 to his brother's wife; that he paid the debts of his brother Greenleaf F. Woods, amounting to over $500, and supported his father and mother, who lived to an advanced age, at an expense estimated at $3,800.

It cannot be doubted that it was the intention of Joseph Woods, by his warranty deed of July 3, 1855, to the tenant, to convey a good title to the premises therein described to the tenant, nor that the tenant, when he assumed the various obligations and liabilities, and made the payments already stated, supposed he had a good title to what was the consideration of his contracts and payments.

The son of Greenleaf F. Woods, brings this action to oust the tenant. Can it be maintained?

The father, Joseph Woods, was upon the premises. Greenleaf F. Woods, the mortgageor, had deceased. No administrator upon his estate had been appointed. His son was a minor, of the age of three years. Two or three months had elapsed, and nothing had been done for the support of the mortgagee. The condition of the mortgage had been broken. Under these circumstances, the mortgagee being upon the premises, the arrangements of July 3, 1855, were entered into.

Joseph Woods, the mortgagee, by his deed of warranty of July 3, 1855, assigned the mortgage to the tenant. An assignment of a mortgage may be made by deed of quitclaim, such being the intent of the parties. *Crooker* v. *Jewell*, 31 Maine, 306. *Collamer* v. *Johnson*, 29 Vt. 32. *Hinds* v. *Ballou*, 44 N. H. 619. *Conner* v. *Whitmore*, 52 Maine, 185. Much more must the mortgage be regarded as assigned, when the mortgagee by deed of warranty conveys the mortgaged premises. *Ruggles* v. *Barton*, 13 Gray, 506.

The deed of warranty of the mortgagee, of the date of July 3, 1855, cannot be regarded as a release or discharge by him of his mortgage. Such a construction would be adverse to the manifest intent of all parties; for it was clearly their purpose that it should

be upheld in the hands of the assignee, who was substituted for the deceased mortgageor and has assumed and discharged his duties and liabilities and is equitably entitled to protection for his services and advances.

The tenant is in possession. No authorities need be cited to show that the mortgageor or his heir, or grantee cannot maintain a real action against the mortgagee or his assignee in possession. The remedy of the plaintiff, whatever it may be, is in equity.

Judgment for the tenant.

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

VIRGIN, J., concurred in the result.

ROBERT HICHBORN *vs.* CRAWFORD S. FLETCHER.

Waldo, 1876.—April 3, 1877.

Promissory notes.

It is the duty of the sureties on a note upon non-payment by the principal and notice thereof, at once, to pay the same.

When the sureties on a note, to which there may be an existing defense unknown to them, are sued; and one of them, in good faith and without negligence, pays the same after suit and before judgment, he can recover of his co-sureties their contributory share.

ON REPORT.

ASSUMPSIT.

J. Williamson, for the plaintiff.

W. H. McLellan, for the defendant.

APPLETON, C. J. The parties to this suit signed as sureties for Wilson Randall a note of which the following is a copy:

"$530. Searsport, Aug. 19, 1868.

One year from date for value received we promise to pay P. Simonton or order five hundred and thirty dollars with interest.

Wilson Randall,
Robert Hichborn,
C. S. Fletcher, security."

If the defendant, having signed as surety, were *prima facie* to be regarded as surety for those whose signatures precede his own, still parol evidence is undoubtedly admissible to show his true relation to the note. In the present case it satisfactorily appears that both plaintiff and defendant were sureties for Wilson Randall.

The note having been sued and the plaintiff having paid the same before judgment, he now claims contribution of the defendant.

It is in proof that the payee of the note for a valuable consideration had given time to the principal. The plaintiff was a witness and testifies that when he paid the note he was ignorant of any such agreement, that the defendant had never informed him of its existence, and that he settled the suit in good faith, believing he was legally liable. The defendant was not a witness.

The question presented is whether upon these facts he can recover his contributory share, of the defendant.

By becoming sureties, each impliedly promised the other that he would faithfully perform his part of the contract and pay his proportion of loss in case of the insolvency of the principal. *Crosby* v. *Wyatt*, 23 Maine, 156. *Dole* v. *Warren*, 32 Maine, 94. The surety is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and non-payment of the contract for which he is a surety. When one of two persons, who, as surety for a third, signed together with the principal a joint and several promissory note, which he paid on its becoming due, though no demand had been made on him; upon an action brought against the maker, it was held that such payment could not be considered as voluntarily made, and that he might sue his co-surety for contribution. *Pitt* v. *Purssord*, 8 M. & W. 538. Much more, then, is not a payment voluntary, when the surety pays upon suit, and to avoid further costs; for the general rule is that a surety, who defends an action brought for money deficient, cannot claim contribution of his co-sureties for costs, unless he was authorized by them to defend. DeColyar on Guaranty, 348. Here, there was no authorization nor direction to defend; and, so far as the plaintiff and defendant knew, there was no existing defense which could be made. One surety may be discharged from his principal obligation, without discharging his co-sureties. In such case he will not be reliev-

ed from his liability to them for contribution. *Clapp* v. *Rice*, 15 Gray, 557. *Boardman* v. *Paige*, 11 N. H. 431. If a surety, with a full knowledge of the facts under a mistaken belief of liability, makes a payment when he is under no legal obligation, it is to be regarded as a voluntary payment for which he cannot claim contribution. *Bancroft* v. *Abbott*, 3 Allen, 524. But if in ignorance of the facts and in good faith he makes payment, when if all the facts were known he would not be liable; he can compel contribution, if he is guilty of no neglect in such want of knowledge. Without knowledge of the facts constituting a defense he could not defend. The defendant, though sued, gave no notice of any existing defense nor did he know of any. Both plaintiff and defendant, so far as they know, when sued were liable upon the note. They were not required to wait for a judgment or the issuing of an execution. Either might make the payment and stop any additional expense. In *Warner* v. *Morrison*, 3 Allen, 566, it was held to be no defense to an action for contribution among co-sureties that the plaintiff, who paid the debt, did not avail himself of the defense of usury, if he was ignorant of the fact of such usury. It can, assuredly, make no difference in the legal rights of parties whether the defense is usury or delay given to the principal, if the surety is alike ignorant in either case of any existing defense, and without fault for such ignorance when the payment is made.

It is written of old, "be not surety above thy power; for if thou be surety, take care to pay it." The plaintiff testified that the defendant said "he wanted what was right in the premises." This is not contradicted. What is right is that the defendant should bear with the plaintiff his share of the burden they both assumed, and not that the plaintiff without fault should bear the whole.

Defendant defaulted.

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

ANN LINDSAY *vs.* ELIZABETH HILL.

Washington, 1876.—November 7, 1876.

Interest.

The *lex loci contractus* determines the nature, validity and construction of contracts; the *lex fori* determines the remedies for their enforcement.

In order to render a contract void for usury, it must be tainted with that offense in its inception.

The contracts and mortgage in this case not being usurious in their origin, did not become "illegal and void" under the usury law of New Brunswick, where they were executed, by the receipt of usurious interest thereon.

The forfeiture provided by the laws of New Brunswick, being in the nature of a remedy, can only be enforced in that jurisdiction.

The statute, in force in this state when the usurious interest was paid, was repealed by the act of 1870, which provides that "in the absence of any agreement in writing the legal rate of interest shall be six per cent." *Held*, that this act does not by necessary implication prohibit the taking of a higher rate of interest than six per cent under a parol agreement. *Held*, also, that it operated a change in the law as it then stood, wherein it allowed a reduction from the principal, and recovery back, of usurious interest by action.

A foreign usury statute provided in substance that the reception of extra interest for the forbearance of payment of money, after it became due, would make the contract itself for the loan of the money void. *Held*, 1. That such provision, not entering into the contract at the time it was made, and being in the nature of a forfeiture, was to be interpreted by our courts according to the *lex fori* and not according to the *lex loci contractus*. 2. That in an action on the contract, the defendant should not be allowed, by way of recoupment, for the extra interest paid; although such extra interest was by the foreign statute recoverable by action.

ON REPORT.

WRIT OF ENTRY on mortgages of land lying in Calais, Maine. Writ, dated December 4, 1874.

Plea, general issue with brief statement that the amount secured by the mortgages has been paid, and nothing is due on the same.

And further, "that the contract, to secure which the mortgage of the land described in the plaintiff's writ was given, was made at St. Stephen, New Brunswick, and by its terms there to be performed; that upon said contracts more than six per cent interest has been received by the plaintiff from the parties thereto, and their assignees, and that by the law of said province, at the time of said payments, the receiving of more than six per cent interest made said contracts utterly void."

The plaintiff put into the case the mortgages given to her, one, by one Bixby, dated May 12, 1846, to secure payment of $2000, in five years with interest, and one by Daniel Hill and Horatio N. Hill, co-partners, dated June 1, 1848, to secure payment of a note of $1000 in one year with interest. Indorsements of payments of interest, not specifying any sum, were made upon each mortgage annually, or nearly so, to June 1, 1872, in the handwriting of Daniel Hill.

It was admitted that the land described in the writ is the land described in the first mortgage and includes the land described in the second mortgage; and that the title of Bixby went to the Hills, co-partners, with the agreement that they should pay off the Bixby mortgage; and that their title afterwards passed to the defendant.

Daniel Hill testified, and there was no evidence to the contrary, that from and after the times the sums secured by the mortgages became due, there was annually, substantially, paid to the plaintiff, ten per cent interest thereon, on a gold basis, to the time of the last payment June 1, 1872; the extra interest, even without the gold premium, being more than sufficient, if deducted from the principal when paid, to pay off the entire sums secured by the mortgages.

The defendant put in, chapter 102 of the Revised Statutes of New Brunswick, revision of 1854, which is admitted to have been the existing statute at the time the contract was made.

"I. No person shall, directly or indirectly, receive on any contract to be made for the loan of any money, or goods, more than six pounds for the forbearance of one hundred pounds for one year, and after that rate for a greater or less sum, and longer or shorter time; and all deeds or contracts for the payment of any money to be lent, or for the performance of anything undertaken, upon or by which more than such rate of interest shall be reserved or received, shall be utterly void.

II. Whoever shall upon any such deed or contract receive, by means of any fraudulent loan, bargain, exchange or transfer of any money or goods, or by any deceitful means for the forbearing or giving day of payment beyond a year, of his money or goods,

more than six pounds for one hundred pounds for one year, and after that rate for a greater or less sum, and longer or shorter time, shall forfeit for every offense the value of the principal sum or goods, so loaned, bargained, exchanged or transferred, together with all interest and other profits accruing therefrom, one moiety to be paid to the Queen for the use of the province, and the other moiety to the person suing for the same, to be recovered by action in any court of record in the county where the offense may be committed, which action shall be brought within twelve months from the time of such offense."

It was "agreed that either party may cite from the New Brunswick reports, any decisions of the courts of that province applicable to the case, relating to the construction of the foregoing statute."

The full court are to render judgment according to the rights of the parties; and, if for the demandant, she is to have the conditional judgment provided by statute.

E. B. Harvey, for the plaintiff.

The payments made and indorsed as interest cannot be treated as payment of principal. No decided case justifies it. *Higly* v. *First National Bank of Beverly*, 24 Ohio, 76. 3 Parsons on Contracts, 115. *Houghton* v. *Page*, 2 N. H. 42.

The contracts, secured by the mortgages, were valid in their inception. To avoid a security as usurious you must show that the agreement was illegal from its origin. 3d Parsons, 115 and cases cited in note q, also at page 122. *Tate* v. *Wellings*, 3 Term R. 531, cited in *Bank of British N. A.* v. *Fisher*, 2 Allen, N. B. Rep. 1.

The contracts were between residents of New Brunswick, and made there. Their construction and validity depend on the foreign law. 3d Parsons on Con. 114. *Houghton* v. *Page*, 2 N. H. 42. *Dunscomb* v. *Bunker*, 2 Met. 8.

The statute in evidence is strictly a penal statute; and the courts of this state will not enforce or notice the penal provisions of the laws of a foreign country. *Ogden* v. *Folliot*, 3 Term R. 726, 733. *Wolf* v. *Oxholm*, 6 M. & S. 99, and other cases cited in

notes to Story on Conflict of Laws, 803. *Gale* v. *Eastman*, 7 Met. 14. 1 Hill. Mort. 373.

The taking the mortgages on property in Maine does not change the place of the contracts, as they are only accessorial to the originals which are none the less foreign. Story on Conflict of Laws, §§ 287 *a*, 293.

The alleged usurious payments were made after the debts were overdue and the contracts broken. There entered into them the considerations of the varying value of the currency, and the prices of goods received in part payment from a third party. Such payments are not usurious. *Bank of Orleans* v. *Curtis*, 11 Met. 359. *Fox* v. *Lipe*, 24 Wend. 164, cited in Hill. Mort. 18, § 17. 3 Parsons, 116, notes. *Cutler* v. *How*, 8 Mass. 257.

Defendant was not a party to the contracts secured by the mortgages. She did not make the payments charged to be usurious. Upon the Bixby mortgage the payments were not made by the original party contracting, nor by the defendant. She cannot recover here, to her own use, the penalty provided by the foreign statute, to be recovered by a local action, in the foreign jurisdiction, within a time limited and long since elapsed, half to the Queen.

It is not usury if a third person voluntarily pays a sum in excess of the legal interest. *McArthur* v. *Schenck*, 31 Wis. 673.

F. A. Pike and *A. McNichol*, for the defendant.

I. The excess of payment over six per cent should be deducted from the principal. Such was the statute law of our state not repealed till 1870, after nearly all the payments were made by Hill. The repealing act of 1870 provides "that in the absence of any agreement in writing, the legal rate of interest shall be six per cent." In the case at bar, there being no agreement in writing, the parties are thrown upon their rights at common law.

In *Peters* v. *Horton*, 2 Pugsley, 176, Ritchie, C. J., says "whatever doubts may once have been entertained as to the right of the party paying usurious interest to recover back any portion of the money so paid, they have long since been dissipated; and text books and cases now all agree that when a party has paid usurious interest he may recover back the excess beyond the legal rate in an action for money had and received. This is one of the exceptions to the

general rule that when money has been paid in pursuance of an illegal contract, it is generally irrecoverable; and the reason why it is so is because the law looks on both parties as being *in pari delicto.* But in the case of payment of usurious interest it is considered that the law prohibiting the taking of more than a certain rate of interest is for the protection of men in needy and necessitous circumstances and who from their situation and condition are liable to be oppressed and imposed upon; and so they and the parties taking advantage of their distress are not *in pari delicto.* The lender on usury being regarded by the law as the oppressor and the borrower as the oppressed and injured."

This case was in 1874. The statute did not provide for the recovery back of money in the manner allowed in the case, and the C. J. put it on the common law doctrine. The case was similar to the one at bar. The debt had been paid by the payment of extra interest and $165 in excess; and the court gave judgment for the $165.

After enumerating the English authorities the chief justice says: "With these authorities, all the text books English and American agree."

The specific ground on which we place this portion of the defense is, that whenever Mr. Hill paid $300, as he says he did, for the use of $3000 for one year, he paid $180 for interest and $120 on the principal; and the contract, not made in writing, by which the plaintiff claimed to put, and did put the whole $300 to the account of interest, was illegal by the statute then existing and by the present statute.

We need make no account of the fact that the 10 per cent was paid with a gold premium; because the over-payments in any event are sufficient to extinguish the principal.

II. The law of the place of contract and performance made the payment of more than six per cent vitiate the contract.

The contracts secured by the mortgages declared on were made in New Brunswick and to be executed there. Mr. Hill and Mr. Bixby and Mrs. Lindsay were all residents of New Brunswick at the time of the execution of the contracts. The payments were all made in Mrs. Lindsay's house in New Brunswick, where she ever continued to reside.

The security, although bargained for in New Brunswick, was necessarily executed in the state of Maine; but, of course, if the sum stipulated for has been paid, or if the note and bond have been discharged, the mortgages are of no validity.

The statute given in the case is explicit and the only question is whether this court is bound by it.

By the law of New Brunswick, where the contract was made and performed, the note and bond are in the language of the statute "utterly void." Can they be revived here?

DICKERSON, J. It is a rule of law, too well established to admit of controversy, that the nature, validity and construction of contracts are to be determined by the law of the place where the contract is made, and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued. In the one case, the *lex loci contractus*, and in the other, the *lex fori*, governs. Foreign statutes of limitation come within the latter clause of this rule; because they affect only the time within which a legal remedy must be pursued, and not the gist of the contract itself. In the terse language of the court in *Andrews* v. *Pond*, 13 Pet. 65. "The legal consequences of an agreement must be decided by the law of the place where the contract was made; if void there, it is void everywhere." *Bulger* v. *Roche*, 11 Pick. 36, 37. *Dunscomb et al.* v. *Bunker*, 2 Met. 8, 10. *Gale* v. *Eastman*, 7 Met. 14, 16.

The contracts secured by the mortgages were made in New Brunswick and to be executed there. The parties to the contracts, at the time they were made, resided there; and the payments were all made in that province. The security, though bargained for in New Brunswick, was necessarily executed in this state.

The statutes of New Brunswick, R. S., § 1, c. 102, in force when the mortgages and contracts in controversy were executed, contained the following provision: "No person shall, directly or indirectly, receive on any contract to be made for the loan of any money, or goods, more than six pounds for the forbearance of one hundred pounds for one year, and after that date for a greater or less sum, and longer or shorter time; and all deeds or contracts for the payment of any money to be lent, or for the performance

of any thing undertaken, upon or by which more than such rate of interest shall be reserved or received, shall be utterly void."

Section second of the same statute imposes a forfeiture of the principal sum lent and all the interest, upon the lender for every offense against its provisions.

In order to render a contract void for usury, it must be tainted with that offense in its inception. It is the reservation or receipt of usurious interest in pursuance of the terms of the contract itself that renders it void; the subsequent payment of such interest upon a contract free from the taint of usury in its origin will not have this effect. 3 Parsons on Contracts, 115. *Nichols* v. *Fearson*, 7 Pet. 103. *Rice* v. *Welling*, 5 Wend. 595, 597. *Gardner* v. *Flagg*, 8 Mass. 101.

But the law is otherwise in respect to incurring the penalty or forfeiture for a violation of the law against usury. In that case, the subsequent receipt of usurious interest by the lender, upon a contract originally untainted with usury, renders him liable to the penalty or forfeiture incurred. In *Floyer* v. *Edwards*, Camp. 112. Lord Mansfield said, "In case the agreement originally for the payment of principal be legal, and the interest does not exceed the legal rate; but afterwards upon payment being forborne illegal interest is demanded, there the agreement by retrospect is not void, but the parties are liable to the penalty of treble value." 3 Parsons on Contracts, 123. *Thompson* v. *Woodbridge*, 8 Mass. 256.

The instruments in controversy appear to have been given in the usual course of business, and upon their face are free from the taint of usury. The alleged usurious payments were made after the debts were over due and the contracts were broken. The contracts, therefore, were not void under § 1, chap. 102, R. S. of New Brunswick, but the forfeiture imposed by § 2, of the same chapter was incurred by the defendants. That forfeiture is in the nature of a remedy, which, as we have seen, can extend only to suits brought in New Brunswick, and can have no effect where a remedy is sought under our laws; in other words, the defendant, in this respect, cannot invoke the same defense in this state, that

he could make in New Brunswick. *Gale* v. *Eastman, supra. Dunscomb et al.* v. *Bunker, supra.*

The case is therefore to be determined by the law of the forum selected by the plaintiff for the enforcement of her rights. Can the defendant here avail herself by way of recoupment, set-off, or otherwise, of the excess paid over six per cent upon the contracts in controversy?

When the alleged usurious payments were made, our statute provided that in an action brought to recover the principal and interest, in such a case, the usurious interest might be deducted from the principal. But that statute was repealed in 1870, and, instead of it, the present statute was enacted, which simply provides that "in the absence of any agreement in writing, the legal rate of interest shall be six per cent per annum."

It is argued by the learned counsel for the defendant, that an action for money had and received lies to recover back the amount of usurious interest paid, and that to avoid circuity of action, that sum may be allowed the defendant, in extinguishment of her original indebtedness, as it exceeds that amount. The authorities indicate that where a usurious contract is declared illegal and void by statute, the money paid thereon is to be regarded as taken illegally, and as oppressively extorted from the borrower, and that, therefore, the equitable action for money had and received lies to recover it back. It is upon this ground that the authorities relied upon to support the defendant's theory, rest. This question is discussed by Shaw, C. J., in *Crosby* v. *Bennett*, 7 Met. 17, 18; and the distinction is expressly made between usurious contracts that are made illegal and void by statute, and those that are not, giving the equitable action for money had and received to recover back the usurious interest paid in the former case, and denying it in the latter. We think this distinction is well taken. Where the law does not prohibit usury, nor make usurious contracts illegal or void, it cannot regard the taking of a greater sum for the use of money than is fixed by law as illegal or oppressive, which is the gist of the right of recovery invoked by the defendant. It is only upon the ground that the payments made by her grantors were received in violation of law, that she claims the right to recoup; if no law has been violated, there is no right of recoupment.

While our statute fixes the legal rate of interest at six per cent. per annum, it does not in terms nor by necessary implication prohibit the taking of a greater sum, nor declare contracts for a greater rate illegal or void. Nor does it provide for the deduction of the amount of interest paid in excess of this rate from the principal upon action brought therefor, or for its recovery back where there is "no agreement in writing" in respect to interest. It simply declares what shall be the legal rate of interest when there is no agreement in writing for a different rate.

This construction of the statute harmonizes with the action of the legislature upon this subject. Contemporaneously with the enactment of the present statute, the legislature passed an act repealing the usury act of 1857, which contained the identical provisions for the deduction from the principal, and the recovery back, of usurious interest, where paid, that are now sought to be applied in this case. That act of repeal was a legislative construction of the existing statute. By its repeal of the act of 1857, and its omission to incorporate the provisions contended for by the defendants into the new statute, the legislature clearly intended to effect a radical change in the law of usury. It would be an alarming exercise of judicial power of construction to hold that the law is the same upon the subject under consideration as it was before the statute of 1857 was repealed. Such a construction would render the repealing act nugatory. Language could scarcely make the intention of the legislature to abolish the remedies provided in the statute of 1857 more intelligible. This court cannot undertake to revive by construction a doctrine which the legislature obviously intended to discard by positive enactment. Our conclusion is that the defendants are not entitled to have the amount of usurious interest, paid by them, deducted from the contracts secured by the mor gages in suit.

Conditional judgment for plaintiff as on mortgage.

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

HENRY F. EATON *vs.* CHARLES WAITE *et als.*

Washington, 1876.—January 11, 1877.

Promissory notes.

A verbal offer of a surety to give a bond to the creditor to save him harmless from all costs if he will sue the principal, unaccompanied by the tender of such bond, is not sufficient to discharge the surety if such action is not brought.

The payment of extra interest by the principal, followed by a mere forbearance to sue, is not, of itself, sufficient evidence to prove that such payment was the consideration for the forbearance, the burden being upon the surety to establish that fact in order to entitle him to discharge from his suretyship.

ON REPORT.

ASSUMPSIT, on note as follows: "$1,331.20. Calais, Dec. 1, 1870. Ten months after date, for value received, we promise to pay H. F. Eaton, or order, thirteen hundred and thirty-one dollars and twenty cents, at Calais National Bank. Principal, C. Waite & Co., surety, James S. Hall. [Indorsements.] Jan. 30, 1873, received on the within, two hundred ninety-five dollars and twenty cents. Jan. 30, 1873, received on the within, one hundred eight dollars and sixty-four cents."

Plea, never promised, with an account in set-off in behalf of C. Waite & Co.

In behalf of Hall, the brief statement was:

I. That the plaintiff extended the time of payment to the principals on the note for a valuable consideration.

II. That the plaintiff extended the time of payment on account of business transactions between the principal defendants and himself, without the knowledge or consent of the surety, Hall.

III. That the plaintiff extended and enlarged the time of payment on account of a running account between him and the principal defendants, or promisors, of the note.

IV. That the plaintiff was requested by the surety to commence an action against the promisors and the surety; the said surety, at the same time telling the plaintiff where the property of the Waites was, and offering to go with an officer and point out the same, and also offering to give the plaintiff a bond with sureties

to pay all costs and damages, and to hold him harmless in every matter if he would commence action.

V. That after the said request, offer and promise, the plaintiff had a settlement with the said Waites, in which account there was found to be due the Waites, on account, eleven hundred and forty-four dollars and ninety-four cents, and that the Waites have since paid the plaintiff, two hundred and thirty dollars.

It was admitted that there was due Waite & Co. on their account in set-off, $72.14. Also that the interest mentioned in the indorsement "to Jan. 30, 1873," is $262.48, and that amount was paid by C. Waite & Co. on settlement of the account of that date, as interest on the note to that date.

Hall testified that two years or more after the date of the note, the plaintiff told him that he had such a note; to which he replied he thought not; that the plaintiff afterwards showed him the note; that he requested the plaintiff to sue it; was willing himself to be sued with the principals; that the plaintiff was afraid if he sued that Waite & Co. would go into bankruptcy; that he told the plaintiff that he had examined the records and knew there was property enough that could be secured; that if the plaintiff would commence a suit, he would give the plaintiff a bond to hold him harmless of all costs in any way, on account of the suit because he knew there was property enough unincumbered to pay the note; did not know that he said anything about saving him harmless from damages; that he told the plaintiff that he would take the sheriff with him and show him the property.

The defendants put in, statement of account between C. Waite & Co. and the plaintiff as follows, dated 1872, May 11, and consisted of items of labor of men, and of lumber, etc., of $89 70

Note and interest,	587 26
Interest on note,	262 48
To amount indorsed on note to bank,	295 20
	$1234 64

CREDIT.

By amount of your bill,	$1128 73
Balance due on Whidden Bros. account,	105 91
	$1234 64

"Settled as above, St. Stephens, January 30, 1873, H. F. Eaton.

Waite and Sons are to drive all the old logs said Eaton now has in Hill brook and Jim Brown brook into the main river, free of charge, as the same has been settled for. Error in casting interest settled and indorsed on note."

The plaintiff put in, statement of account from July 3, 1871, to January 20, 1873, consisting mostly of charges in log driving operations with other charges for lumber, etc., amounting to $1234 64

CREDIT.

"By amount of account, ...	$939 44
By indorsed on note, ...	295 20
	$1234 64

Calais, January 30, 1873. E. E. Settled, C. Waite & Co."

After the evidence was out, the parties agreed that a default should be entered for the amount due on note, less $72.14 due to defendants on the account in set-off, and that the case should be reported to the law court; and if upon the evidence legally admissible the defendants, or either of them, have a defense to the note, the default is to be taken off and the action stand for trial, otherwise judgment on the default.

A. McNichol, for the defendant, Hall, contended that the plaintiff was obliged to commence an action when requested by Hall, under his offer of indemnity; and cited *Kennebec Bank* v. *Tuckerman*, 5 Maine, 130; *Adams Bank* v. *Anthony*, 18 Pick. 238.

Also, that the evidence showed that he postponed, an unreasonably long time, the collection of this note, which was secured by Hall's signature, in order to apply payments to other notes and indebtedness of C. Waite & Co. not thus secured; and farther contended that the reception of large extra interest on past indebtedness would justify the inference that it was in consideration of future forbearance; in any view, that it showed a change of contract, the making of a new contract with the plaintiff, whereby he received fifteen per cent interest, when the note on its face called for but six per cent.

E. B. Harvey, for the plaintiff, cited *Strafford Bank* v. *Crosby*, 8 Maine, 191; *Crosby* v. *Wyatt*, 23 Maine, 156; *Freeman's Bank* v. *Rollins*, 13 Maine, 202.

DICKERSON, J.

The request of a surety, to the creditor, to sue the principal, does not, in general, secure his release, at common law, if such suit is not brought. That effect, for such sole cause, follows only in cases where the statute makes provision for notice. There being no statute upon this subject in this state, the rights of the parties must be determined according to the rule of the common law. *Leavitt* v. *Savage*, 16 Maine, 72, 73. *Page* v. *Webster*, 15 Maine, 249, 256. *Frye* v. *Barker*, 4 Pick. 382. *Halsted* v. *Brown*, 17 Ind. 202.

We do not perceive sufficient ground to relieve the surety from liability, on the facts testified to by him. No bond was given or tendered by him to the principal to save him harmless for costs that might arise on compliance with the surety's request. At most, there was the mere verbal promise of the surety to furnish such bond. We do not think that this was sufficient to require the plaintiff to proceed against the principal at the peril of discharging the defendant. The promise and liability of the surety are co-extensive with those of the principal. The plaintiff's remedy attaches alike to both principal and surety. No mere verbal request, or offer to give a bond of indemnity, for the plaintiff to sue the principal, unaccompanied by the tender of such bond, is sufficient to discharge the defendant from his suretyship.

While it is undoubtedly true that additional time of payment given to the principal by the creditor, under a valid agreement, without the consent of the surety, discharges the surety; we do not think that the payment of extra interest by the principal to the creditor, followed by mere forbearance to sue, is, of itself, sufficient evidence to show that such payment was the consideration for the forbearance. The extra interest paid may, or may not, have been the consideration for the forbearance. The burden is upon the defendant to show that it was. Having failed to do that, he is not entitled to prevail upon this branch of the defense.

A default to be entered for the amount due on the notes less seventy-two dollars and fourteen cents.

BARROWS, J. There is no evidence of any contract for forbear-

ance between the payee and the principal promisor. The payee might have paid the note and sued the principal at any time. I concur.

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

CHARLES WAITE *et als. vs.* THE INHABITANTS OF PRINCETON.

Washington, 1875.—January 11, 1877.

Tax.

If one who is properly assessed for certain personal property in a town, is also assessed therein for certain other personal property alleged to be taxable therein, but which in fact is taxable in an adjoining town, and pays the tax upon the last mentioned property under protest, an action does not lie against the town therefor. His proper remedy is by application for abatement.

The same rule is applicable to the taxation of real estate.

ON EXCEPTIONS.

ASSUMPSIT for money had and received, and account annexed for $1,395.73, paid under protest, for taxes in the town of Princeton, assessed on a saw mill and stock of logs for the mill from 1864 to 1872, inclusive. Date of writ, August 19, 1873.

Plea, general issue and statute of limitations.

The plaintiffs, residents of Calais, were properly assessed for a store and lot and stock of goods in the defendant town.

There was evidence tending to show that the mill did not lie within the limits of Princeton, and that the logs were taxable in Calais.

After the evidence was out, a nonsuit, *pro forma*, was entered; and the plaintiffs alleged exceptions.

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

F. A. Pike & A. McNichol, for the defendants.

APPLETON, C. J. The plaintiffs reside in Calais, but have a store and transact business in Princeton. They bring this action to recover back moneys paid under protest for taxes assessed on real and personal property not legally taxable to them in the defendant town.

The point relied on in defense is, that assuming they were not liable to be taxed for the property, of the taxation of which they complain, their remedy is not by suit, but by application to the county commissioners.

The plaintiffs, having a store and a stock of goods in the defendant town, were liable to be there taxed. If they were improperly taxed for logs, their remedy is by appeal to the county commissioners. *Stickney* v. *Bangor*, 30 Maine, 404. *Hemingway* v. *Machias*, 33 Maine, 445. *Howe* v. *Boston*, 7 Cush. 273. The same rule applies to the erroneous taxation of real estate. *Salmond* v. *Hanover*, 13 Allen, 119. The questions here raised were fully determined in *Gilpatrick* v. *Saco*, 57 Maine, 277.

Exceptions overruled.
Nonsuit confirmed.

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

CHARLES MCLAUGHLIN *vs.* BENJAMIN RANDALL.

Washington, 1875.—January 30, 1877.

Deed.

Land in this state cannot be conveyed by a written instrument without a seal. Nor can a "scroll" upon such an instrument have the effect of a seal.

ON REPORT.

WRIT OF ENTRY.

Plea, general issue, with a brief statement alleging adverse possession for over twenty years in the tenants and claim for betterments.

The demandant put into the case a deed of quitclaim from Columbus Cooper to Patrick McLaughlin admitted, for the purpose of the trial, to embrace a part of the demanded premises.

The demandant offered in evidence, an instrument, not under seal, signed by Patrick McLaughlin, the genuineness of the signature to which, for the purpose of the trial, was admitted. The tenant objected to the admission of this instrument as evidence of

title, because it had no seal, nothing but a scroll in place of a seal. The presiding justice ruled the instrument insufficient to convey the legal title for want of a seal, and excluded it.

Whereupon the case was withdrawn from the jury and reported to the full court, with the agreement, that, if in their opinion the instrument was sufficient to convey the legal title to the land, a new trial should be granted, otherwise, a nonsuit to be entered.

A. McNichol, for the plaintiff, submitted without argument.

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

PETERS, J. Two questions may be regarded as presented here. First: Can land in this state be conveyed by a written instrument without a seal. Second: Has a "scroll" the effect of a seal.

There can be no doubt that land in this state cannot be conveyed by an instrument without a seal. By the common law, the earliest and the latest, a seal is regarded as an essential part of a deed. And such has been the common law of Massachusetts and Maine, ever since, and for a long period antedating, their existence as states.

In this state a scroll or scrawl is not a seal, nor does it have the effect of a seal. The old common law seal, in the time of Lord Coke, was wax, with an impression thereon. But the strictest requirement became relaxed by departures from it from time to time, until it was long ago held, that a seal by a wafer or other tenacious substance capable of being impressed, whether in fact impressed or not, was a sufficient seal. The annexing of a piece of paper by wafer or wax, or gum, or any adhesive substance, is now everywhere regarded as equivalent to the impression formerly required, and makes a valid seal. But in late decisions in Massachusetts and Maine, there has been a relaxation of the requirement beyond that. In *Hendee* v. *Pinkerton*, 14 Allen, 381, it was held that the impression of a seal of a corporation stamped upon and into the substance of the paper upon which the instrument is written which is designed to be sealed, was a good seal, although no wax, wafer, or other adhesive substance was used. Our own statutes allow the same mode of sealing official documents. R. S. c. 1, § 4, part 15. But in *Bates* v. *Boston & New*

York Central R. R. Co., 10 Allen, 251, the Massachusetts court refused to recognize as a seal a *fac simile* of the seal of a corporation, printed upon blank forms of obligations prepared to be executed by the corporation, and by the corporation executed, with a declaration in the instrument describing the same as by them signed and sealed. Such *fac simile* is denominated by the court as simply a scroll made with types, and as no better than one made with pen and ink. In our own state the decision has been of an opposite character in a case precisely like the one last quoted. In *Woodman* v. *York & Cumberland R. R. Co.*, 50 Maine, 549, it is decided that such an imprint upon a corporate bond is a valid seal.

It is to be confessed that there is not a very significant difference between such an indication of sealing, held to be sufficient in the latter case, and what is commonly called a scroll, such as is found upon the deed presented in the case at bar. How far the law requiring a seal upon deeds and other instruments, may be liberalized or otherwise, by future course of decision, or by legislative enactment, (as in many states,) we cannot now anticipate, and only decide that the common scroll made by the scrivener upon an instrument, in other respects a perfect deed, is not a seal such as is required by the usage, practice, and common or statute law of this state. See *Tasker* v. *Bartlett*, 5 Cush. 359; *Stebbins* v. *Merritt*, 10 Cush. 27, 34; *Bradford* v. *Randall*, 5 Pick. 496, 497; *Royal Bank of Liverpool* v. *Grand Junction R. & D. Co.*, 100 Mass. 444; Bou. Law Dic., Seal; 22 vol. Monthly Law Reporter, (Boston) 193; 1 Am. Law R., 638.

Plaintiff nonsuit.

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

WILLIAM FREEMAN, JR., *vs.* WILLIAM UNDERWOOD *et al.*

Washington, 1874.—January 30, 1877.

Trover. Lease.

The defendants, having purchased and received the possession of a quantity of wild berries from persons who picked them from the plaintiff's land as trespassers, thereby assumed an ownership and exercised a dominion over the property, that renders them liable in trover to the plaintiff without any demand therefor; although they purchased the same in good faith and in ignorance of the want of title in their vendors.

An instrument from the owner of the land to the plaintiff, granting him all the timber, grass, and berries that may be found or grown upon the land for a term of years and giving him possession for the purpose of managing and enjoying the property granted, is valid between the parties; and entitles the plaintiff to sue in his own name for any of the productions of the land unlawfully taken during his term by strangers therefrom.

ON EXCEPTIONS.

TROVER, for 1500 bushels of blueberries picked by trespassers in 1871, on wild lands leased to the plaintiff and by them sold to the defendants at their canning factory at Jonesport.

Plea, not guilty, with a brief statement that the plaintiff did not own the blueberries nor the land from which they were picked and never had possession of the same; that the blueberries did not come from the plaintiff's land.

The plaintiff put in a conveyance of certain lands to his wife, and then, subject to the defendant's objection, an instrument variously termed a "bill of sale," and a "lease" and operating as both, from her to himself, which he testified that his wife signed and which was of the following tenor:

"In consideration of ten dollars, to me in hand paid, by William Freeman, jr., of Cherryfield and for other good and valuable consideration, hereinafter mentioned, I hereby sell, transfer and make over to him all the wood and timber of every description now standing and growing upon all the wild lands which I have and hold in the county of Washington, together with the grass, cranberries, blueberries and all other fruit, if any, which may be found or grown thereon for the space of ten years from the date hereof. By these presents giving him and his assigns full power and authority to enter said lands for the purpose of enjoying the

property herein sold and conveyed, and to control and manage the same as he may see fit. And for the further consideration and upon condition that he shall pay the taxes assessed upon said lands, and use the net rents and profits of said property for our mutual benefit and for the benefit, comfort and happiness of his children. Witness my hand and seal, and dated at Cherryfield, the 12th day of April, A. D. 1871. Sophia T. Freeman." (Seal.)

A letter from the plaintiff to the defendants, of the following tenor, was in evidence.

"Cherryfield, Aug. 12, 1871.

Messrs. Wm. Underwood & Co.

Gents: I understand you are "packing" large quantities of blueberries taken from Deblois and township No. 18, chiefly. My object in writing is to inquire whether you will be accountable and pay a fair rent for the blueberries you now have on hand, or will purchase this season, picked upon said lands, viz: No. 18, M.D. 18,000 acres in Deblois; 14,000 acres in Cherryfield; about 9000 acres in No. 19; part of Columbia and township No. 24; in all about 70,000 acres of land; in all which I represent, and covers 99-100 of the blueberry ground in this part of the state.

The blueberry trade has got to be one of the staple articles of business in this section of the state, affording a livelihood to thousands of people a portion of the year, and has become a source of profit to you and others. In the town of Deblois and Cherryfield, which is the chief blueberry ground, I have lost $40,000 in the destruction of timber alone, since I have had control of that property by blueberry pickers annually setting fires in order to make new blueberry ground. Every year hundreds of teams go upon my land without liberty, build their huts, and camps and hotels, turn their horses upon my meadows, cut down tons of grass for their teams, fairly imposing upon my good nature and kindness, while I pay heavy taxes for their benefit, and they reap all the profit and I receive nothing. We are not able to put up with it any longer and must take that course which will accomplish the object in the speediest and most effectual manner. The berries you have are the property of those I represent, unless possibly a small portion of them which are picked elsewhere. If you will

agree on receipt of this to pay a trifling compensation for these berries, I will give you and your pickers liberty to pick upon these grounds. If you neglect or refuse to do so we shall be obliged to take the berries or hold you accountable for their value; and in order to save our rights, I now make a demand upon you for all the blueberries now in your possession belonging to the proprietors of the foregoing lands, and notify you that you must not hereafter purchase berries or other property belonging to said proprietors without liberty, or of those who have liberty to take them.

We are not disposed to exercise the rights we have to extort money from you, or take the slightest advantage of you.

If our rights are respected you can easily make some satisfactory arrangement with said proprietors through me, that will be to the mutual advantage of all concerned.

The public cannot complain, as within years they have been notified. A copy of the last notice I enclose you."

The plaintiff testified, subject to the defendants' objection, that he took possession of the property under the lease, and that he continued in possession, and, on cross-examination, that he took possession of the land and everything there was on it; that he had given people permission to go upon it and pick blueberries, and cut timber; that he took possession of the land as soon as he received that document; that he was at his home in Cherryfield when he received it; that he took no possession of the property other than to take that instrument; that the property that grew upon the land belonged to him; that the land stood as it was before; that he did not go up to the land on the 12th of April to take possession of any blueberries; that he never had any of the berries sued for after they were severed from the soil.

There was testimony tending to show that some 735 bushels of blueberries were taken from the lands covered by the conveyance of Mrs. S. T. Freeman to the plaintiff, by various persons without permission from the plaintiff, and sold to the defendants at their factory at Jonesport, at a price of from five and a half to seven cents per quart.

The presiding justice instructed the jury that the demand, in the plaintiff's letter of August 12, 1871, would cover not only

the blueberries that had been received up to that time, but others that might be received during that year; that if he took possession of the premises, he took possession of the berries whether they were grown or not; if he took possession of the land, he took possession of everything that grew on it, the leaves, and trees and berries, everything in the earth, and everything below it and everything above it.

The verdict was for the plaintiff for $1176; and the defendants alleged exceptions.

G. Walker, for the defendants, contended that the letter of August 12, was, on the part of the plaintiff, a virtual disclaimer of ownership on his part, either general or special, and that never having had possession he could not maintain trover; and that it was necessary for the plaintiff to show that, at the time of the demand, the defendants had the property in possession and ability to surrender that possession to the plaintiff; citing *Davis* v. *Buffum*, 51 Maine, 160; *Carleton* v. *Lovejoy*, 54 Maine, 445.

W. Freeman, jr., pro se, stated in explanation of his letter of August 12, that though it did claim that the plaintiff represented other owners as well as himself, yet that the ownership in fact was several and not joint; that he in fact represented one O. S. Tibbetts, owner of townships Nos. 18, 19 and 24, but that in this action the declaration and the evidence was confined to his own separate property.

He also contended, that there being a tortious taking and an actual conversion, no demand was necessary, and cited *Thurston* v. *Blanchard*, 22 Pick. 18; *Pierce* v. *Benjamin*, 14 Pick. 356.

This principle holds good where the action is against an innocent purchaser. *Carter* v. *Kingman*, 103 Mass. 517. *Riley* v. *Boston Water Power Co.*, 11 Cush. 11.

PETERS, J. A question raised by the defendants is, whether the demand made upon them by the plaintiff for the berries was sufficient. The answer is, that no demand was necessary. The persons who picked the berries from the land in plaintiff's possession, were trespassers. They sold the berries to the defendants. The defendants received them at their factory for the purpose of "can-

ning" them, as it is termed. The berries were of a rapidly decaying character, requiring immediate use, undoubtedly received from time to time, and it would have been quite impracticable to redeliver the property to the plaintiff, had he duly demanded the same. But the defendants, by their purchase and possession of the berries, although acting in good faith and in ignorance of the want of title in their vendors, assumed thereby an ownership and exercised a dominion over the property, which rendered them liable in trover to the true owner without any demand therefor. The following are some of the cases directly pertinent to this point. *Galvin* v. *Bacon*, 11 Maine, 28; *Porter* v. *Foster*, 20 Maine, 391; *Hotchkiss* v. *Hunt*, 49 Maine, 224; *Stanley* v. *Gaylord*, 1 Cush. 536; *Riley* v. *Boston Water Power Co.*, 11 Cush. 11; *Gilmore* v. *Newton*, 9 Allen, 171; *Bearce* v. *Bowker*, 115 Mass. 129.

The defendants also deny that the writing to the plaintiff from his wife conferred any right of action upon him, so that he could sue for the berries in his own name. But we think it clear that the writing amounts to an executory sale of the blueberries, which would make them his when picked from the bush, or perhaps when merely grown; the writing also combining with the sale a lease of the land, which gave to the plaintiff a sufficient estate for the growing and supporting of the successive annual yields of berries thereon. This transaction was valid between the parties thereto as against all strangers. When the berries were taken from the bush by unauthorized persons, they were the property of the plaintiff. As to this point, see the following authorities: *Cutler* v. *Pope*, 13 Maine, 377; *Trull* v. *Fuller*, 28 Maine, 545; *Farrar* v. *Smith*, 64 Maine, 74; *Stearns* v. *Washburn*, 7 Gray, 187; *Douglas* v. *Shumway*, 13 Gray, 498; *Claflin* v. *Carpenter*, 4 Met. 580; *Lamson* v. *Patch*, 5 Allen, 586; *Drake* v. *Wells*, 11 Allen, 141. See also Wash. Real Prop., vol. 1, book 1, c. 1, on the nature and classification of real property.

Exceptions overruled.

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

HARRIET WOODCOCK *vs.* CITY OF CALAIS.

Washington, 1876.—March 2, 1877.

Town.

Though the doctrine of *respondeat superior* does not apply to render a town or city liable for the trespasses of a street commissioner upon adjoining lands, when acting as a public officer merely; yet it does apply when he is not only a public officer, but also acts under express authority of the city government, while attempting to obey their directions.

Thus: The city government of Calais passed an order, "that the street commissioner be directed to cause all fences now on the public streets to be removed." The street commissioner employed a surveyor to run a line between the plaintiff's land and the street. The line, as run, proved to be outside of the street limits and upon the plaintiff's land. The commissioner, believing the line to be correctly ascertained, moved back the plaintiff's fence in accordance therewith, removed from the land of the plaintiff, earth and rocks, and built a sidewalk thereon. *Held,* that the principle of *rsepondeat superior* applied, and that the city was liable to the plaintiff in trespass for the damages.

ON REPORT.

TRESPASS *quare clausum fregit.* Writ dated September 4, 1875.

It was admitted that the plaintiff had been in possession under her deed ever since its date, January, 1865, and that Alvin Smith, by whose action the alleged trespass was committed in 1875, was then road [street] commissioner, chosen by the city under the statute, and a public officer duly elected and qualified.

The street commissioner removed the stone wall in front of the plaintiff's house, and the earth filling back of it, encroaching, as the evidence tended to show, some twelve feet over the true line.

A. McNichol & E. B. Harvey, for the plaintiff.

J. Granger & F. A. Pike, for the defendants.

VIRGIN, J. In 1871, the city government of Calais passed an order: "That the street commissioners be directed forthwith to cause all fences now on the public streets to be removed."

In the summer of 1875, the street commissioner caused a surveyor to run the line between the plaintiff's land and the street. The line as thus run proved to be in fact a little outside of the

limits of the street, and upon the land of the plaintiff. The commissioner, believing the line to be correctly ascertained and marked upon the face of the earth, moved back the plaintiff's fence in accordance therewith, removed the earth and rocks, and built a sidewalk there. If the city is liable for the trespass thus committed, this action is to stand for trial.

The two phases of character presented by municipal corporations, and the peculiar liabilities which attach to each, are fully recognized and established in this state as in several others. *Small* v. *Danville*, 51 Maine, 359. *Eastman* v. *Meredith*, 36 N. H. 284, 289. *Oliver* v. *Worcester*, 102 Mass. 489, 499, and cases cited in each.

These, with numerous other cases which it is needless to cite, maintain the general doctrine that municipal corporations, so far as their public character is concerned, being agencies of the government, are not liable to a private action for the unauthorized or wrongful acts of their officers, even while acting in the line of their official duties, unless made so by statute; that this non-responsibility results from the consideration that the officers are chosen by the corporations, in obedience to the statute, to perform a public service not particularly local or corporate, but because this mode is deemed expedient by the legislature in the distribution of the powers of government; that their powers and duties are prescribed and imposed by general statute alike on all such officers, and not by the cities and towns which choose them; that their official tenure, and the manner of performing their official duties do not depend upon the will of their immediate constituencies; and that in a word they are strictly public officers, and when in the discharge of their public duties, they in no legal sense sustain to their corporation the relation of servant or agent.

Surveyors of highways and street commissioners, when making, repairing, or otherwise performing their official duties upon highways and streets, come within this rule generally; for they are in the performance of their public duties, beyond the control of the corporation; and hence third persons injured thereby, cannot invoke against the corporation, the rule of *respondeat superior*. *Small* v. *Danville*, *supra*. *Barney* v. *Lowell*, 98 Mass. 570.

Haskell v. *New Bedford*, 108 Mass. 208. *Judge* v. *Meriden*, 38 Conn. 90. *Walcott* v. *Swampscott*, 1 Allen, 101.

These decisions would have been decisive of the case at bar had the commissioner acted solely in his public capacity, and upon his own responsibility. He was authorized by the statute to remove any fence actually standing within the limits of the street, as an obstacle which did, or was likely to obstruct the street, or to render its passage dangerous. R. S., c. 18, § 50. If he had performed this public duty simply as a public officer, and not as the servant or agent of the city, he alone would have been responsible for his misfeasance. The orders which he may have received from the mayor or city solicitor, (as the testimony intimates) could not affect his relative status to the city; for they were but public officers themselves, and could not bind the city in respect to the commissioner's acts. *Haskell* v. *New Bedford*, 108 Mass. 208. But the fact that he was expressly "directed" by the city government to cause all fences on the street to be removed, and that while attempting to follow these directions he committed the trespass which is the foundation of this action, withdraws this case from the application of the principle applicable to cases of public officers. For while he was a public officer, and had lawful authority to act in the premises without any directions from the city, still the city was responsible for the safe condition of the streets, and chose by positive, formal vote to direct the commissioner. Whether he was obliged to follow the direction or not, is immaterial. He did act; and in his action he became *quoad hoc* the city's agent; and we are of the opinion that the superior must respond. This doctrine is recognized in *Buttrick* v. *Lowell*, 1 Allen, 172, 174; *Perley* v. *Georgetown*, 7 Gray, 464; *Haskell* v. *New Bedford*, *sup.*; *Cumb. & O. Can. Corp.* v. *Portland*, 62 Maine, 504. The question was expressly decided in *Hawks* v. *Charlemont*, 107 Mass. 414. *Action to stand for trial.*

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

WARREN F. AVERILL AND WIFE *vs.* ABIEL LONGFELLOW.

Kennebec, 1876.—May 30, 1876.

Assignment. Attorney and client.

A claim for damages for assault and battery is not assignable.

An attorney, before judgment, has no lien to defeat a settlement made by the parties.

ON REPORT.

TRESPASS for assault and battery of the wife, plaintiff, charging a wrench, twist and sprain of her wrist and permanent injury.

At the March term 1875, there was a verdict for the plaintiff for $1500, and a motion filed by the defendant for a new trial.

At the October term 1875, the motion was withdrawn and the plaintiffs' counsel moved for judgment on the verdict, which was resisted by the defendant who filed the following:

$950.00. Received of Abiel Longfellow nine hundred and fifty dollars in full settlement of all demands, actions and causes of action, we, or either of us, have against Abiel Longfellow, and especially of an action now pending and unsettled in the Sup. Jud. Court, Kennebec county, wherein the undersigned are plaintiffs and said Longfellow defendant, which said action is to be entered "neither party, no other action for same cause," at the next term of said court.

Hattie Averill,
Warren Averill.

Witness, B. F. SMITH.
Wiscasset, June 30, 1875.

Lorenzo Clay, the plaintiffs' counsel, put in evidence tending to show that at the time of action brought, the plaintiffs were living apart, the wife at Gardner and the husband out of the state; that the husband was willing his name should be joined in the suit, but that he disclaimed any interest in the damages or any liabilities for costs; that he was willing his wife should make any arrangement she chose; that the parties were poor and unable to furnish means to prosecute, and made a verbal assignment to him of the claim in consideration of services and advances as security therefor; that after the verdict he caused the following notice to be served upon the defendant:

"To Abiel Longfellow:

You are hereby notified not to settle with, pay over to, or in any way compromise or settle the claim of Warren F. Averill and wife against you, now pending in the supreme judicial court, Kennebec county, with any other person except myself, as the claim has been legally assigned to me for a valuable consideration.

Gardiner, May 20, 1875. Lorenzo Clay."

The plaintiffs' counsel further put in evidence tending as he claimed to show that the defendant and the husband, plaintiff, in fraud of the wife and her counsel, procured her signature to the receipt; that she received but $550 of the money while the husband received the balance; that she was threatened and overawed into the settlement.

The case was submitted to the full court with jury powers for adjudication.

L. Clay, for the plaintiffs.

O. D. Baker, for the defendant.

APPLETON, C. J. This was an action to recover damages for an assault upon the female plaintiff. The plaintiffs obtained a verdict and the defendant filed a motion for a new trial, and the cause was continued. After the continuance, and before judgment, the parties settled; and the plaintiffs' claim was discharged.

The attorney, by whom the suit had been successfully prosecuted, claims that the demand had been assigned to him, and that this assignment was made before or at the commencement of the suit. But the demand was not assignable. It has been repeatedly held that a claim for damages for a personal assault cannot be assigned before final judgment. *McGlinchy* v. *Hall*, 58 Maine, 152. *Rice* v. *Stone*, 1 Allen, 566.

The lien of an attorney does not attach until the rendition of judgment. *Young* v. *Dearborn*, 27 N. H. 324, 331. Before that, the parties may settle and disregard the claims of the attorney. *Newbert* v. *Cunningham*, 50 Maine, 231. *Simmons* v. *Almy*, 103 Mass. 33. No lien in this case had attached. The court has no authority to set aside a settlement which the parties have delib-

erately made. In accordance with their agreement, the entry must be "neither party." *Neither party.*

WALTON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

JAMES S. LITTLE *et al. vs.* BOSTON & MAINE RAILROAD.

Kennebec, 1876.—June 24, 1876.

Carriers.

A common carrier is liable for the loss of a box or parcel however valuable, though ignorant of its contents, unless he make a special acceptance.

If the owner of goods to be carried is guilty of fraud in misrepresenting or concealing their value, he cannot hold the carrier liable.

Common carriers may by contract or notice, brought home to the knowledge of the owner and assented to by him, restrict their common law liability against accidental loss or injury, but not against negligence.

The carrier has a right to inquire as to the value of the articles received for carriage; and the owner will be bound by his answer.

But, fraud out of the question, he is not bound to state their value when no inquiry is made.

The delivery of goods to a carrier and their loss make out a *prima facia* case for the owner.

The measure of damages is the value of the goods lost, at their place of destination.

ON REPORT.

CASE against the defendants as common carriers, for the loss of a box containing jewelry goods of the alleged value of $1700, received by the defendants at Boston, November 28, 1871, marked H. A. Osgood, Lewiston, Maine.

Plea, general issue.

The evidence showed that the box declared on, in good order and plainly directed, was delivered in Boston to the plaintiffs, doing business under the name of the Kennebec & Boston Express, by the New York express company to whom the plaintiffs paid the expense of forty cents, the smallness of the charge indicating that it contained goods of ordinary value only; that the plaintiffs delivered it to the defendant company in Boston, to be carried with other freight at the rate of $5.00 per ton; that neither the plain-

tiffs nor the defendants knew what the box contained; that the custom of the plaintiffs was to send their valuable articles in a strong chest by an express messenger; that the charge on this box was thirty cents from Boston to Lewiston; that if the value had been known it would have been about $2.50; that before the freight car arrived at Lewiston the door of it was seen to be off and gone, and when it arrived there this box was missing. The plaintiff put into the case, the record of a judgment in Androscoggin county, rendered February 3, 1874, against them in behalf of Henry A. Osgood, on a verdict found at the September term in 1872 for $1695; cost taxed $63.77.

The case was submitted to the full court, to render such judgment as the law and facts require, and to assess the damages.

E. O. Bean, for the plaintiffs.

J. W. Bradbury, for the defendants.

APPLETON, C. J. The plaintiffs are express forwarders. They received in the course of business a box containing articles of value, and, in ignorance of its contents, delivered it to the defendants at Boston to be by them transported to Lewiston, the place of its destination, there to be delivered to H. A. Osgood. The defendants were under contract with the plaintiffs to carry their freight by the ton. They received the box for transportation. By their way-bill under date of November 28, 1871, such reception is acknowledged. Before the train reached Lewiston the door of the car containing the box in controversy was found to be off and gone, and on their arrival at Lewiston the box could not be found. Subsequently, the plaintiffs were sued and judgment was recovered against them for the value of the goods lost.

The question presented is whether under these facts the plaintiffs are entitled to recover.

The defendants are common carriers, and subject to the responsibility and liabilities imposed upon them as such. "The common carrier is responsible for the loss of a box or parcel, though he be ignorant of its contents, or though those contents be ever so valuable, unless he make a special acceptance." 2 Kent Com. 603. *Sager* v. *P. S. & P. Railroad*, 31 Maine, 228. Such is the gen-

eral rule; but if the owner is guilty of fraud or imposition, as by fraudulently concealing the value of the parcel, or in any way leading the carrier to regard it as of little value, he cannot hold him liable for the goods lost. These plaintiffs cannot be deemed guilty of fraud in concealing the value of the box in controversy, when its contents were unknown.

The freight may depend upon the value of the article to be carried. When the article is of extraordinary or unusual value, the carrier would well be entitled to a higher rate of compensation, inasmuch as he might be reasonably held to a greater degree of care. The carrier therefore has a right to inquire as to the value of the article entrusted to him for carriage, and the owner is bound to answer truly. If he answers falsely, he will be bound by such answer. But if no inquiries are made, he is not required, in the absence of fraud, to state the value of the goods delivered to the carrier. *Phillips* v. *Earle*, 8 Pick. 182. *Brook* v. *Pickwick*, 4 Bing. 218. The defendants, however, omitted the precaution to make any inquiry as to value; and it was for them to do it. *Walker* v. *Jackson*, 10 M. & W. 168. Angell on Carriers, § 264.

It seems that common carriers may limit their liability by notice brought home to the owner of goods, before, or at the time of their delivery, and expressly or impliedly assented to by him. *Fillebrown* v. *Grand Trunk Railway Co.*, 55 Maine, 462. But no such limitation is shown in the case before us.

The delivery of the box to the defendants and its loss are not denied. The burden is on them to show the facts exempting them from liability. The non-delivery of the box is *prima facie* evidence of negligence. Angell on Carriers, § 202. But loss of the door to a car containing freight, unexplained, would seem clearly to indicate negligence; and no notice or contract can exonerate a common carrier from a liability for loss occasioned by his own negligence or misconduct. *Sager* v. *P. S. & P. Railroad*, 31 Maine, 228. *Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 357. *Ohio & Mississippi Railway* v. *Silby*, 17 Am. Rep. 719.

The defendants' liability is fully established. The measure of damage is the value of the goods at the place of delivery. *Perkins* v. *P. S. & P. Railroad*, 47 Maine, 573. 2 Redfield on Rail-

roads, (5th ed.) 198. The plaintiffs show by the records of the court and, by other evidence, that judgments have been rendered against them in the courts of this state for the value of the goods in the box lost by the defendants. We must presume that the damages in those cases were assessed upon legal principles. They will, therefore, with interest, constitute the amount for which judgment must be rendered in favor of these plaintiffs.

Judgment for the plaintiffs.

WALTON, DANFORTH, VIRGIN and PETERS, JJ., concurred.
LIBBEY, J., having been of counsel, did not sit.

LEVI JONES, *et als.*, complainants in equity, *vs.* WINTHROP SAVINGS BANK.

Kennebec, 1876.—July 3, 1876.

Tax.

The charter of the defendant bank expired by operation of law when the decree of sequestration against it was passed.

The tax upon savings banks provided by the statute of 1872, c. 41, § 1, as finally amended by the laws of 1875, c. 47, § 1, is a tax upon the franchise of the bank, and first becomes a subsisting debt against the bank, when the return of the average deposits therein required, should be made.

Such tax cannot be recovered of a bank whose charter had previously expired by a decree of sequestration.

ON EXCEPTIONS.

BILL IN EQUITY, by the complainants, trustees of the Winthrop savings bank, praying for a sequestration and equitable distribution of their assets.

September 27, 1875, the decree of sequestration was passed, and commissioners were appointed to receive and decide upon all claims against the institution, and make report to the court, of the claims allowed and disallowed.

A receiver was appointed with direction to take possession of all the assets, and possession was taken by him, October 2, 1875.

The average amount of gross deposits "for the last preceding six months ending October 30, 1875," was $112,558.91, as appeared by the semi-annual return of the treasurer.

The state of Maine duly presented to the commissioners, its claim for a tax of one-half of one per cent. on the average deposits for that period, to wit: the sum of $562.79.

The commissioners made report to this court, from which it appears that the claim of the state for the tax was disallowed.

The state seasonably filed written objection to the acceptance of the report, by reason of the disallowance, and asked that the claim might be allowed.

The presiding justice affirmed the action of the commissioners in disallowing the claim; and the state alleged exceptions.

L. A. Emery, attorney general, for the state, claimed that the corporation still existed and had these deposits, though a receiver might be administering the assets; that the tax was on the deposits, and attached to them at once, as they were paid in; that the right of the state arose then, and not on the last Saturday, etc., and that the receiver should continue to pay this tax as long as the deposit remained exempt from local tax, and he held the assets of the bank.

E. O. Bean, for the bank.

DANFORTH, J. By the statute of 1872, c. 74, as finally amended in 1875, c. 47, § 1, savings banks are required to pay to the state treasurer one-half of one per centum on the average amount of its gross deposits as held on the first Saturday of each and every month, for the last six months prior to a return of such deposits, which is to be made by the bank "on the last Saturday preceding the first Monday of May and November of each year." In this case, the state claims the amount of a tax alleged to be due from the Winthrop savings bank for the six months prior to the last Saturday preceding the first Monday of November, 1875.

On the 27th day of September, 1875, upon complaint of the trustees of that bank, a decree of sequestration was passed and a receiver appointed, who subsequently, on the second day of October, 1875, took possession of all the assets of the bank.

The question now presented is, whether the tax claimed is a valid one.

If, under the statute, the tax first becomes a valid subsisting

claim against the bank when the return is made, it is clear that in this case it cannot be recovered. At that time the decree of sequestration had been passed, and, as was required by the statute, the receiver had taken possession of all the assets for the purposes therein specified. R. S., c. 47, §§ 99, 101.

No debt can accrue against the bank after the decree of sequestration. This is the end of its existence. No debts can be paid except such as the commissioners allow; and they can allow none except such as are outstanding at the date of the decree. After the payment of such debts, the balance is to be ratably distributed among the depositors. R. S., c. 47, § 101.

The effect of this decree upon the charter must be at least as decisive as a perpetual injunction upon the charter of a bank of discount, in which case it has been held as fatal to its further existence. *Wiswell et als.* v. *Starr et als.*, 48 Maine, 401. *Dane et al.* v. *Young et als.*, 61 Maine, 160.

Upon the supposition, then, that the tax accrues at the date of the return, the receiver cannot pay it; for the commissioners cannot allow it. The bank cannot pay; for all its assets have passed to other hands and for other purposes, and the bank as such has ceased to exist.

But it is claimed that the tax is upon the deposits, and therefore accrues as soon and as often as a deposit is made. We cannot consider this position as tenable, or if it were that the result claimed would follow. The statute provides that the return shall be made by the bank. Upon this return the tax is based, and under the law can rest upon no other foundation. If there is no return, there can be no tax. Besides, the only remedy provided in the statute for the recovery of the tax in case of non-payment, is by warrant of distress against the bank, "to enforce payment out of its estate." The statute must have contemplated a bank in existence at the time the return is required to be made. No provision is made for any other return, or for any satisfaction of the tax, except by a warrant against the bank to be satisfied out of its estate. At the same time, by the other statute under the decree of sequestration, all the assets are to be appropriated to other purposes. We are thus led to the conclusion, that it was

the intention of the legislature that the tax should take effect from the date of the return, and be levied only upon a bank whose charter had not previously expired.

The nature of the tax tends to the same conclusion. It is not a tax upon property, for no property is specified or referred to. Nor can it be a tax upon deposits; for no particular deposit pays the tax or any specific part of it. A deposit withdrawn before the return, pays no part of it, though it may materially affect the amount to be paid. It must then be a tax upon the bank, or what is the same thing, upon its franchise. It does not, and cannot attach to any other thing. Nor can it be sustained under the constitution as a tax upon property or deposits; for as such, it would not be uniform upon all property or all deposits. This question has been so fully argued and clearly settled in Massachusetts, under a statute similar to ours, in *Commonwealth* v. *The People's Five Cents Savings Bank*, 5 Allen, 428, that we need consider it no further.

As a tax upon the franchise, it cannot bear the date of any deposit; nor can it be conceded that "the legislature made the assessment once for all." It fixed the basis upon which it was to be made; but a tax can hardly be said to be assessed until the amount is made certain. In this case, the amount cannot be ascertained even by computation, until the return is made. The deposits constantly varying, the average also must vary. This case differs materially from *State* v. *Waldo Bank*, 20 Maine, 470. That was a tax upon the capital, and made definite and fixed by the act; and the bank, though it had surrendered its charter, still continued to exist as a bank.

The tax, as a tax upon the franchise, must bear the date of the return. It rests upon that as a means of ascertaining the amount at that particular time. The reference to the deposits, for the previous six months, is for no other purpose than simply to ascertain the amount of business done, as one method of ascertaining the value of the franchise and the amount of tax it should pay from time to time.

The result is, that the tax is one upon the franchise of the bank, and becomes a subsisting debt only when the return is, or by law

should be made. In this case, before that period had arrived, the charter had expired by force of the decree of sequestration, and consequently nothing was left upon which the tax can rest; and the state has no valid claim. *Exceptions overruled.*

APPLETON, C. J., WALTON, VIRGIN, PETERS and LIBBEY, JJ., concurred.

RUEL W. HANSCOM *vs.* JOHN W. BUFFUM and trustee.

Kennebec, 1876.—November 18, 1876.

Assignment.

An insolvent debtor gave preference to the firm of Whitehouse & Gould, paying half their account, and immediately assigned to Whitehouse the residue of his property for the benefit of his creditors. After the assignee settled his final account in probate, from which no appeal was taken, he was summoned as trustee of the insolvent debtor, by the plaintiff, who was not a party to the assignment. *Held:* 1. That Whitehouse was not chargeable as trustee; 2. That such preference was not fraudulent at common law; 3. That though such conveyance is declared void by the statute, it is only so in behalf of creditors who become parties to the assignment; 4. That the remedy for the creditors who have become parties to the assignment is in the probate court, to require the assignee to account for such property in the settlement of his account.

ON REPORT.

ASSUMPSIT, on account annexed, to which no defense was made. The contention was, as to the liability of the alleged trustee, on facts appearing in the opinion.

J. Baker, for the plaintiff.

W. P. Whitehouse, for the alleged trustee.

LIBBEY, J. This case comes before this court on report of the disclosure of the trustee and the evidence taken, to be considered as if allegations had been filed under the statute; and the court is to determine whether the trustee is chargeable, and if so, for how much. From the disclosure and the evidence it appears that on the 18th or 19th of July, 1870, Buffum, the principal defendant, was insolvent; that Whitehouse & Gould, a firm composed

of Whitehouse, the trustee, and Oliver Gould, were creditors of Buffum, to about $800; that Buffum contemplated making an assignment for the benefit of his creditors, under R. S. of 1857, c. 70, and act of 1859, c. 112, additional thereto; that he met Whitehouse and communicated to him his purpose; and it was then agreed between the parties, that Buffum should convey to Whitehouse and Gould a portion of his goods of the value of about $400, for the purpose of giving them a preference over his other creditors; and the conveyance was made by Buffum, and received by Whitehouse & Gould for that purpose, and applied in part payment of their debt; and afterwards, on the 19th of July, 1870, Buffum made an assignment of all his property not exempt from attachment, to Whitehouse, for the benefit of his creditors. Whitehouse accepted the trust; and it is not claimed that his subsequent proceedings in probate court were not in conformity to the provisions of the statute. He accounted for all the property that passed to him by virtue of the assignment, except the goods sold to Whitehouse & Gould as aforesaid; and made an equal distribution of the same, and paid over to the creditors who became parties to the assignment, prior to the service of the plaintiff's writ. The sale of the goods to Whitehouse & Gould was made as part payment of their debt; and was without fraud, except the design of giving a preference to them over other creditors.

Plaintiff claims that the trustee is chargeable on two grounds:

First. That the sale of the goods to Whitehouse & Gould was fraudulent as to the creditors of Buffum. R. S., 1857, c. 86, § 63.

Second. That by virtue of the assignment, the goods sold to Whitehouse & Gould passed to Whitehouse as assignee; and as he did not account for them in his settlement in the probate court, he is chargeable for the amount or excess of the estate remaining in his hands after the payment of the debts of the parties to the assignment and lawful expenses. Acts of 1859, c. 112, § 1.

The trustee is not chargeable on the first ground claimed by the plaintiff. The case is not within the provisions of R. S., 1857, c. 86, § 63. That statute is applicable only to conveyances fraudulent and void as to creditors at common law. At common law,

a payment, by an insolvent debtor, of the debt of one creditor for the purpose of giving him a preference over his other creditors, was not void as to them.

The act of 1859, c. 112, § 2, did not change the common law as to the right of an attaching creditor. By that statute a conveyance or transfer by the assignor, previous to making the assignment in contemplation thereof, to a pre-existing creditor in payment of his debt, with the design to give him a preference, is void; and the property so conveyed passes to the assignee by virtue of the assignment, to be held by him as assets for the benefit of creditors; and he is clothed with all necessary power to recover, receive and collect the same. The words of the statute avoiding conveyances made in contemplation of insolvency, to one creditor, with the design of giving him a preference over other creditors, are general; but they are to be construed in connection with, and are limited by, the subject to which they relate. The object of the statute is to secure an equal distribution of the estate of the insolvent debtor among all of his creditors. Such conveyance is void only as against the assignment. The statute does not affect the conveyance prior to making the assignment. It applies only to a conveyance or transfer made by the assignor; and the property passes to the assignee to be held by him in trust for the benefit of all the creditors who become parties to the assignment. The provisions of the statute are made for the benefit of those who come in under it to share the effects of the insolvent equally, and are not to be extended to him who refuses to come in under the assignment, and yet would avail himself of the terms of the act to secure his whole debt. If the statute affected the conveyance or transfer before the assignment, and rendered it void as to attaching creditors, then before the assignment, one creditor might attach and hold the property thus conveyed, and prevent its passing to the assignee by virtue of the assignment, as the assignment does not dissolve prior attachments, and thus defeat the main purpose of the act, the equal distribution of the estate of the insolvent debtor among his creditors. *Penniman* v. *Cole*, 8 Met. 496.

Nor is the trustee chargeable on the second ground claimed by plaintiff. He never, as assignee, recovered possession of the goods

conveyed by the debtor to Whitehouse & Gould, as part of the estate of the debtor; and those goods were not an excess of the estate of the debtor remaining in his hands after the payment of the debts of the parties to the assignment, and lawful expenses. As between Whitehouse & Gould, and any creditor not a party to the assignment, they had a right to hold the property conveyed to them by the debtor. No creditor, not a party to the assignment, had a right to impeach their title. When the assignee has taken from the assignor, before the assignment, a conveyance of property for the purpose of obtaining a preference, the remedy for the creditors who have become parties to the assignment, is in the probate court to require the assignee to account for such property in the settlement of his account. *Trustee discharged.*

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

CHARLES RICHARDSON *vs.* CHARLES H. RICH.

Kennebec, 1876.—December 6, 1876.

Writ. Abatement.

A writ of entry must be in form, an attachment and summons or an original summons, and must be served in the manner appropriate to the form used.

A defect in the form or service of a writ, which is amendable, or which may be waived by the party suffering, is matter of abatement and can be taken advantage of only under rule sixth of this court, and in accordance with its provisions.

Thus: where a writ of entry was a capias, and served by arrest instead of an attachment and summons, or original summons, as by statute required; *held,* that the error in the form of the writ or service could only be taken advantage of by a plea or motion in abatement, filed within the first two days of the term, as by rule of court provided, and not afterwards by motion to dismiss.

ON EXCEPTIONS.

WRIT OF ENTRY, in the form of a capias, and served by arrest.

The defendant filed, on the tenth day of the term, a motion to dismiss for error in form of writ and service. The presiding justice sustained the motion, and ordered the action dismissed; and the plaintiff alleged exceptions.

G. T. Stevens & E. F. Pillsbury, for the plaintiff.

O. D. Baker, for the defendant.

DANFORTH, J. This is a real action commenced by a capias writ, which was served by the arrest of the defendant.

At the return term, the defendant's attorney entered his appearance upon the docket "to object;" and on the tenth day of the term, filed a motion to dismiss the action, "because being a real action, the defendant was not liable to arrest, and yet said action was commenced by a capias, and the only service made, was by arresting the body of the defendant, and by taking from him a bail bond."

Under the statute of 1821, c. 59, as well as previous to it, a party was not limited to any particular form of writ in a real action; and a capias might legally have been used. *Maine Charity School* v. *Dinsmore*, 20 Maine, 278.

In the revision of 1841, a change was made in the language used, c. 145, § 3, providing that writs of entry "shall be served, not only in the usual manner by attachment and summons, or by copy of the writ, upon the defendant; but if the defendant be not in possession," by a copy upon the tenant, &c., thus recognizing the fact that the form of capias if lawful, was not often resorted to, and requiring in future the service upon the defendant to be by an attachment and summons, or by copy.

In the revisions of 1857 and 1871, c. 104, § 1, still more definite and peremptory language is used. The provision here is, that writs of entry "shall be served by attachment and summons, or copy of the writ, on the defendant;" but if he is not in possession a further service is to be made upon the tenant. The terms here used are so explicit as to leave no room for construction or doubt. So far as the defendant is concerned, the service must be in one of two ways; and as arrest is not one of them, that is necessarily excluded. As the service by arrest is illegal, a writ which commands it must also be illegal. "A writ which commands an unlawful act is bad in form." *Thayer* v. *Comstock*, 39 Maine, 140.

But it is claimed that this is not the proper construction of the

statute, that it regulates the mode of service only "when such service applies to the particular form of writ used." But, as the provision is, that one of these two modes of service must be made, it leaves no legal ground for the use of any writ which could properly be served in any other way. It is true, as contended, that R. S., c. 113, § 1, taken alone, gives the right in real actions, as well as in others, to a writ running against the body. But if we give it this effect, it renders the former statute, so far as it relates to the service of writs, a mere nullity; or we must understand when it says writs of entry must be served in one of two ways, that it means the same as if there were inserted the proviso, if the plaintiff selects such a form of writ as may legally be served in this manner and in no other. This method of interpretation is certainly inadmissible. It is adding material language not found in the statute. These two statutes were passed at the same time, and each is equally binding. They must therefore be construed so that each, so far as possible, shall have the force given it by the terms used. With this principle in view, c. 104, § 1, has the effect of relieving writs of entry from, or taking them out of the general provisions of c. 113, § 1. The same principle must be applied to the writ of replevin. The provisions of the statute last cited, are broad enough to authorize this writ to run against the body. But another law having prescribed its form, it will hardly be contended that it may be so far changed as to insert a capias.

R. S., c. 81, § 2, is also relied upon. But this proves too much for the plaintiff's case; for it provides that all writs may be framed so as to take the body. This would override even the exception contained in c. 113, § 1, which is contrary to the universal practice, and in violation of a well established rule for the construction of statutes. Applying this rule as above stated, and these three statutes will each remain in full force, and have the meaning and effect which the legislature intended, that all writs may be so framed as to run against the body, except in those cases where the law especially applicable, otherwise provides. In real actions the law applicable, as we have seen, provides that the service shall not be by arrest, and by necessary inference that the writ should not run against the body. Hence in this case the writ is illegal, and the service is defective.

Still it is claimed that the motion should not be allowed, because not made in season; and we think this objection is well founded.

The writ is in the alternative, directing the officer to attach property, and for want thereof to take the body. It might therefore have been legally served notwithstanding the illegal order found in it. This order is not necessary to the vitality of the writ; it is an unnecessary as well as an illegal addition to it, and may therefore be stricken out. Therefore the writ may be amended. *Matthews* v. *Blossom*, 15 Maine, 400.

The objection to the service is not that there was a total failure in that respect, but that it was defective and even illegal. There is no pretense that it was not by a competent officer, or that the defendant did not have due notice of the suit. In such a case the defect is one which the defendant might waive, or which would avail him only when the objection is made in the proper manner, and at the proper time. *Cook* v. *Lothrop & als.*, 18 Maine, 260. *Shaw* v. *Usher*, 41 Maine, 102. *Maine Bank* v. *Hervey*, 21 Maine, 38.

By the sixth rule of this court, "pleas or motions in *abatement*, as to the jurisdiction in actions originally brought in this court, must be filed within two days after the entry of the action," &c. As the defect in this case is one that should and could be taken advantage of only in abatement, it comes within the express terms of the rule; and therefore, the motion was too late. *Nickerson* v. *Nickerson*, 36 Maine, 417. *Shorey* v. *Hussey*, 32 Maine, 579. *Webb* v. *Goddard*, 46 Maine, 505. *Stetson* v. *Corinna*, 44 Maine, 29.

Nor does it change the effect by making the appearance special. If it is done solely to object to the defective service as in this case, still, if the time allowed for filing the motion is permitted to pass by without doing so, it is as much a waiver, as though the appearance had been general. It becomes a neglect to do that, without which the objection becomes of no avail, as the following cases clearly show. *Snell* v. *Snell*, 40 Maine, 307. *Mitchell* v. *Union L. Ins. Co.*, 45 Maine, 104. *Mace* v. *Woodward*, 38 Maine, 426. This last case is cited and relied upon by the defendant's counsel. It is true that after holding that the motion must be overruled as

having been filed too late, it also holds that "the judge had the power, *ex officio*, to dismiss the action," and an entry was made that further proceedings be stayed. This was on the ground that the service was not a defective one, but totally void, and such a deficiency as could not be waived by the defendant. Otherwise the decision would be inconsistent with itself and with many other decisions of this court besides those above cited. In *Carlisle* v. *Weston*, 21 Pick. 535, 536, the rule is said to be, that "irregularities and defects may be waived; but mere nullities cannot be cured or restored to life, inasmuch as they never possessed any legal vitality." So in *Nye* v. *Liscombe & tr.*, 21 Pick. 263, the action was dismissed after appearance, on the ground that the court had no jurisdiction, and of course a judgment would have been erroneous. To the same effect is *Lawrence* v. *Smith*, 5 Mass. 362, and *Tingley* v. *Bateman & tr.*, 10 Mass. 343, cited by defendant. In these cases the plea in abatement was held insufficient. It is undoubtedly true, as contended in the argument, that where the judgment would be erroneous the court will abate the action either with or without a motion ; and this it will do in any stage of the proceedings, if on inspection, it becomes apparent that there is a want of jurisdiction. This principle is recognized in *Maine Bank* v. *Hervey*, above cited, also in the several cases cited by defendant's counsel.

But these cases are in no respect inconsistent with those before cited, or with the rule of court. The rule applies to matters which can only avail in abatement. The cases relied upon, refer to such deficiencies as are vital to the action, and may be shown under any issue, or in any stage of the proceedings. If the court has jurisdiction of the subject matter and the parties, any defect in the process or service may be waived or amended ; and such defects must be taken advantage of, if at all, under the rule and in accordance with its provisions. But, where the court has no jurisdiction of the subject matter or of the parties or there is no process or service, such defect cannot be amended or waived ; and such deficiency will defeat the action whenever it may come to the knowledge of the court.

This distinction is clearly made in *Webb* v. *Goddard*, before

cited, in which it was held that where a transitory action is brought in the wrong county, the objection can only be raised in abatement; while the same objection could be raised in a local action, in any stage of the proceedings. *Blake* v. *Freeman*, 13 Maine, 130. *Exceptions sustained.*

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

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

CHARLES A. WHITE *et al. vs.* ABIUD BRADLEY.

Kennebec, 1875.—December 28, 1876.

Trial. Dedication.

If, by reason of uncontroverted facts and evidence, it is clear that a plaintiff ought not to prevail, it is competent for the presiding judge so to rule, and to direct a nonsuit or a verdict for the defendant; and the correctness of such ruling may be tested by exceptions, or on report with proper stipulations; although part of the evidence may have been put in by the defendant; as where the only evidence offered by the defendant, consisted of city records and deeds, the genuineness of which were admitted, and the force and effect of which alone were in dispute. The question before the court then is whether, upon the whole testimony, a verdict for the plaintiff would be sustained.

To establish a right of way in the public by dedication, there must be unequivocal and satisfactory proof of the intention of the party, whose dedication is claimed, to grant the easement to the public, and of an acceptance by the public.

If the declarations proved, apply as well to a temporary way, to be used for the benefit of the owner of the estate or his tenants, as a way of access to a mill, store, or the like, as to a public street; and if there be acts which indicate the intention of the owner of the soil to reserve the control to himself, like the erection of a fence and gate, it cannot be said that the intention is established.

A permissive use by the public, for any length of time, of such a way of access laid out by the owner, does not prove a dedication or an acceptance. It is but a license, which may be revoked at the pleasure of the owner.

Nor is the right of the public complete without an acceptance. Mere use by individual members of the community will not prove it, nor will unauthorized repairs by a street commissioner, whether sufficient to raise a statute estoppel against the city or not.

Ways of necessity over adjoining land of a grantor, do not include ways of convenience to all parts of the lot granted.

So also, if one sell a building, the light necessary to the reasonable enjoyment of it, coming across the grantor's adjoining land, goes with it as an incident to the grant; but not that which would be a convenience simply, without being a necessity.

Whether a right to the continued enjoyment of light coming across the grantors' adjoining lot to existing windows in a building conveyed, can ever be implied, or can exist without an express grant or covenant, *quœre.*

The deed of the trustees to these plaintiffs, expressly reserving the right to the grantors, and those claiming under them, to build upon the foundation wall, on that side of the plaintiffs' block, is conclusive against the existence of such right here.

On exceptions.

Case, for obstructing a public way.

The substance of the testimony bearing upon the legal points raised, appears in the opinion.

L. Clay, for the plaintiffs.

J. Baker & H. S. Webster, for the defendant.

Barrows, J. The plaintiffs claim damages in a special action on the case against the defendant, because they say he has excavated the soil and deposited a large quantity of stone and large blocks of granite upon a lot of land lying westerly of a brick block owned by them on Water street in Gardiner, over which lot they claim a right of way.

The defendant justifies the acts complained of as owner of the lot, denying the plaintiffs' alleged right.

The plaintiffs assert that their claim is maintained by the testimony, upon the ground that it proves, 1st, that the lot claimed and used by the defendant as his own, is a public way, or street established by Robert H. Gardiner, the former owner by dedication; or 2d, that they and others owning buildings on that side of Water street, there, have such right of way by necessity; or 3d, that the plaintiffs have an easement in the lot claimed by defendant for light and air, by grant and necessity, which was injuriously affected by the defendant's acts.

After the plaintiffs had produced the testimony on which they relied to maintain their action, the defendant produced and put in, subject to objection, the records of the city of Gardiner, showing that the city government in 1866, laid out a street over this

lot, discontinued it in 1867, again laid it out in 1871, and a second time discontinued it in 1872.

The defendant put in his deed of the lot in question from the trustees of the estate of the late R. H. Gardiner; and plaintiffs admitted their authority under Mr. Gardiner's will to convey. Hereupon the presiding judge ruled as matter of law, that the action could not be maintained; and the case is reported to this court with the stipulation that if this ruling is not correct, or if the jury would be authorized to find for the plaintiffs upon the evidence produced, the case is to stand for trial; otherwise a nonsuit is to be entered.

As the case is presented, a question sometimes raised as to the propriety of a peremptory ruling that the action cannot be maintained after evidence has been introduced in defense, seems to be waived.

The stipulation in the report seems designed to present rather the question whether a verdict for the plaintiff could be sustained upon the evidence reported, than any mere question as to the regularity of the proceeding, as a matter of practice. This is the question always presented where a nonsuit is ordered. *Fickett* v. *Swift*, 41 Maine, 65.

But were the case before us upon exceptions to the ordering of a nonsuit, we should not hesitate to declare that the later and better doctrine and practice are in favor of the course taken by the presiding judge viewed merely as a question of practice; *i. e.*, if, upon the unquestioned facts and the uncontroverted testimony introduced, by which party soever it is offered, it is apparent that the plaintiffs' action cannot be maintained, it is competent for the presiding judge so to declare in the form of a ruling, the correctness of which may be tested upon exceptions, or upon report in the present form. *Cooper* v. *Waldron*, 50 Maine, 80. Cutting, J., in *Bragdon* v. *Appleton Ins. Co.*, 42 Maine, 259, p. 267, *et seq.* And this, although there may be some evidence to support the plaintiffs' claim, if it is not sufficient to justify the jury in finding the issue in his favor. *Beaulieu* v. *Portland Co.*, 48 Maine, 291.

Some questions are made as to the sufficiency of the declaration in the writ to warrant the introduction of proof of the existence

of a public way by dedication over the lot, or of special damage suffered by reason of the obstruction of a public way, questions which would merit a careful examination, if there were not insuperable objections to the maintenance of the action on the evidence here reported, however accurate and appropriate the declaration might have been.

Assuming that the declaration well sets forth the grounds upon which the plaintiffs claim to recover, let us see whether that claim is maintained by the testimony.

Touching the right in the public by dedication and acceptance, which is the ground chiefly relied on, the case shows that across the lot in question, and across other land of the same proprietor, adjacent thereto, there was for a series of years, during the lifetime of the late R. H. Gardiner, a way leading to a mill owned by him and occupied by his tenants. Prior to 1850–51, this road to the mill, in place of leaving Water street where it now does, traversed that part of Mr. Gardiner's land, which is now covered by what is called by the witnesses the post office building. On the lot in question was what is called the "hay barn," a row of wooden stores on Water street, covering the site of the plaintiffs' store, and this passage way. There is no pretense that at this time the use of the passage way was anything but permissive.

The plaintiffs' position is, that a dedication took place, when in 1850–51, the course of the road to the mill was changed by Mr. Gardiner, and two stores erected at a distance of about forty feet from each other, the space between, (which includes the lot since conveyed by the trustees of his estate to the defendant,) being apparently appropriated to furnish a way to the mill in lieu of the more devious track formerly leading to it from Water street. These stores, which seem to have been intended by Mr. Gardiner, as gifts to two of his sons, were finished with doors and windows opening upon this lot, through which there has been a passage way to the mill and to the rear of the stores.

Other store lots on the same side of Water street in that vicinity, previously conveyed by Mr. Gardiner, were bounded in the rear, upon a fifteen foot passage way, to which there was access from this mill road. Many witnesses are called to declarations of

the elder Gardiner, about this time in relation to this road. It is worthy of note that nearly all of them speak of what he said of his expectations and of his intentions in certain contingencies. Some of the expressions seem to import an opinion on his part, that there would always be a way of access to the mill there; but there is very little, if anything, that could be construed as implying a present intention to give the public a right there, or to have the way used for anything except for the convenience of his own property and tenants.

One of the witnesses, an intelligent business man, at one time mayor of the city, at this time had bought the mill building, and hired the land and water privilege of Mr. Gardiner, under a lease. He testifies that when Mr. Gardiner told him of his intention to put up a building where the mill road then existed, he objected, and Mr. Gardiner said that he was going to open a new road farther down, which he thought would accommodate the witness, (his tenant,) equally well, and be of advantage to him by stopping parties from hauling logs out of the pond, so that the witness would get the use of the whole pond, to which it would seem that the old road gave access. Witness asked Mr. Gardiner why he did not build the buildings together, and let the road remain where it was; and Mr. Gardiner said he did not think that was a suitable place for a permanent road. Now this obviously relates to a road to the mill which Mr. Gardiner, as proprietor of the site and privilege had a right, except so far as he was under obligation to his lessees, to open or shut, or do away with altogether at his pleasure.

A proprietor of real estate has an unquestionable right to devote any portion of his property for such a series of years as seems good to himself, to some use which shall invite trade and custom from the community at large, and to permit them to use some portion of his land as a way of access during such period of time, but that use confers no right upon the public, or the individuals accustomed to use such way. It is permissive, merely, and for the benefit of the proprietor and his tenants; and does not amount to a dedication. The proprietor may when he pleases, devote his estate to some other use, or no use at all, and shut up the way in which he has permitted people to pass on his land, and nobody will have a

legal right to complain. A dedication to public use takes its effect from the intention of the person making it; and merely opening or widening a street, for the convenience, benefit or profit of the person doing it on his own land, will not constitute a dedication. *Gowen* v. *Philadelphia Exchange Co.*, 5 Watts & S. 141. *Morse* v. *Ranno*, 32 Vt. 600.

But a use which is simply permissive, however long continued, or the opening of a way as a private way, and subsequent use of it as such, whatever the length of such use by others, will not make it a public way, nor does it amount to proof of a dedication. *Mayberry* v. *Standish*, 56 Maine, 342. *Hall* v. *McLeod*, 2 Met. (Ky.) 98.

"A permissive use of a way by certain portions of the community, constitutes a license, and not a dedication, and is ordinarily something that may be revoked." Washburn on Easements, pp. 190, 191. Everything in such cases depends upon the intention of the party whose dedication is claimed, and upon the character of the permission given and the use allowed. *Stafford* v. *Coyney*, 7 Barn. & Cres. 257. *Barraclough* v. *Johnson*, 8 Ad. & E. 99.

And this intention must be unequivocally and satisfactorily proved. Washburn on Easements, p. 186, 3d ed.

It follows that declarations which apply as well to a way constructed by the proprietor for the profitable use of a portion of his estate, as to a way to be donated to the public, or which indicate rather an expectation of what will be done in the future, or upon some possible contingency, than a present absolute intention to make over the right to the public, have little or no value to prove a dedication. They are neither unequivocal nor satisfactory.

But it might perhaps be fairly argued that these declarations and acts of Mr. Gardiner, especially in relation to the mode of finishing the stores, and the evidence of user, to some extent if unexplained or uncontrolled by evidence to the contrary, and if an acceptance of the way by the public were proved, would be enough to entitle the plaintiffs to have the jury pass upon the question of his intention. But in the case before us there are other acts and facts proved, which effectually control and rebut what evidence of an intention to dedicate might be gathered from the language and acts of Mr. Gardiner.

Among these, the subsequent maintenance of a fence and gate for two or three years across this open space between the stores is especially noteworthy.

In Angell on Highways, § 153, where the learned writer is treating of what is sufficient evidence to rebut the presumption of dedication, the doctrine is laid down that when the intention to dedicate is negatived by circumstances, no presumption of dedication can be made, and the erection of a gate, bar or post is spoken of, as the most common method to effect this. "Nay, though the bar or gate have been knocked down, the fact of its having once been there will, at least for a considerable time, prevent the presumption of a dedication from arising." Smith's Leading Cases, vol. 2, p. 203, in note to *Dovaston* v. *Payne*, citing *Roberts* v. *Karr*, 1 Camp. 262.

"Of this *animus dedicandi*, the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment." Parke, B., in *Poole* v. *Huskinson*, 11 Mee. & W. 830.

Another act inconsistent with the idea that Mr. Gardiner had any intention to dedicate this way, or to recognize it as one upon the continued existence of which any person was at liberty to count, is the omission of all mention of it in the conveyance of the store, now owned by the plaintiffs, to his son.

But had there been sufficient evidence to warrant the jury in finding an intention to dedicate on the part of Mr. Gardiner, it would still have been necessary for the plaintiffs to show an acceptance by the city; and evidence to that effect is not only wanting, but the contrary seems to be established.

The repairs by the street commissioner, which are relied on, seem to have been confined to repairs of a city drain or culvert, which had long existed there, and which occasionally broke out to the detriment and inconvenience of those who had occasion to use the passage way to the mill. If done with the express authority of the city government they could not well be construed as repairs upon the street. But there is no evidence that what was done, if it had amounted to repairs of the way there for the purpose of

making it passable as a street, was anything more than the unauthorized act of a street commissioner which could not avail to constitute an acceptance. *State* v. *Bradbury*, 40 Maine, 154. *Gilpatrick* v. *Biddeford*, 54 Maine, 93, 94. The use of the way being apparently permissive, such use, however long continued, would not constitute an acceptance by the city. *Mayberry* v. *Standish*, 56 Maine, 342, 351, 353. *Commonwealth* v. *Newbury*, 2 Pick. 51.

The fact that the fence was allowed to remain so long in the passage way, and was indeed never removed by the city authorities, is inconsistent with the idea of an acceptance: and more than all, the repeated action of the city government, in twice laying out a street there, and subsequently twice discontinuing it, cannot be regarded otherwise than as conclusive against the idea of an accepted dedication.

By a formal relinquishment made and entered of record by the city government, it cannot be doubted that a street, whether originally created by dedication and acceptance or by location, would cease to exist. The right of the public to the easement is a unit, and when surrendered by the body which has the legal authority and control over it, there is an end of it; and upon such relinquishment, all the rights of the owner which have been suspended during its existence revive and the land is his, discharged of the public easement. *Angell on Highways*, 2nd Ed. chap. III, § 168. chap. VII, § 326.

The defendant contends that plaintiffs are estopped by their acceptance of the deed dated June 15, 1866, from the trustees of R. H. Gardiner's estate from asserting any such right as he here sets up.

It is a well settled doctrine of the law that the grantee, in a valid and operative deed poll under which he derives and enjoys a title by its acceptance, becomes bound by the restrictions, limitations, reservations and exceptions contained in it, and it does not lie in his mouth to impeach it, or reject the burden it imposes; and the deed may charge other lands with a servitude besides those which are the subject of conveyance. *Winthrop* v. *Fairbanks*, 41 Maine, 307. *Vickerie* v. *Buswell*, 13 Maine, 289. *Newell* v. *Hill*, 2 Met. 180.

The measurements show that the plaintiffs' store including the foundation wall occupies a lot wider than that conveyed by R. H. Gardiner to his son Frederick, from whom the plaintiffs bought.

To make their title good, they received and put on record with Mr. F. Gardiner's deed, a deed from the trustees, conveying the right of said estate in the whole of the land which the brick wall of said store (next to the lot in question) covers, "with the right for the stone wall or foundation under said brick wall to remain as it now is; but this is in no way to include the land on which the said stone wall or foundation projects over or covers, or to prevent ourselves or our successors or assigns from building on to said stone foundation if we or they should wish to do so."

We do not think it necessary to determine whether the acceptance of this deed from the trustees of the Gardiner estate raises the estoppel against the plaintiffs, which the defendant claims; because, in view of all the testimony, the plaintiffs fail to establish the right they assert, and it is not necessary to resort to the estoppel. It is clear, however, that the plaintiffs, receiving such a deed as this when they took their title, are in no condition to assert any equitable estoppel against the defendant or his grantors, by reason of any words or acts of the elder Gardiner looking to a dedication, or by reason of the appearance of the building, or the manner in which it was finished. With this clause before them the plaintiffs must have known that the trustees contemplated building upon the foundation wall of the store on that side, and designed to guard against having their right to do so called in question by future purchasers or occupants, while they were willing to grant the right of permanent support for the structure which the plaintiffs were purchasing.

Angell in his treatise on the law of highways, chap. III, § 156 pp. 172, 174, criticises quite forcibly the application of the doctrine of estoppels *in pais* to cases of dedication in certain American decisions, among which is *Cole* v. *Sprowl*, 35 Maine, 161.

It is certain that, carelessly applied in cases where all the elements necessary to create a binding estoppel do not exist, it is liable to be the means of much injustice, and to burden the ownership of real estate with consequences never anticipated by the pro-

prietors as likely to arise from the uses to which they have put portions of their property from time to time as temporary convenience might dictate.

But as before remarked, there is no room to argue that the plaintiffs' case can derive aid from any such estoppel. The correspondence between them and the trustees, shows conclusively, that they bought with the knowledge that no permanent appropriation of that land for a way, was made; and arranged with the agent of the trustees to have notice whenever the lot now belonging to defendant should be offered for sale, and received such notice.

We have thus examined, at much length, the principal ground upon which the plaintiffs assert a right in this lot of the defendant; and are of opinion that their claim is not maintained.

There is little force in the attempt to assert a right of way by necessity over this lot to this store situated on one of the principal streets in Gardiner. Mere convenience of access to all parts of a lot purchased will confer no such right in the adjoining land of the grantor. The defendant's lot is bounded in the rear by the same fifteen foot passage way which runs in the rear of the plaintiffs' store. There is no testimony tending to show that he has in any manner obstructed this passage way or prevented its legitimate use. It would be idle to assert as matter of necessity, a right to a forty foot opening to a fifteen foot passage way, even if the plaintiffs could establish their right to have a way from that passage way into Water street in the immediate vicinity of their store, a right which is not apparent from any thing in the conveyances introduced. The claim of an easement in the defendant's lot for light and air, has no better foundation.

That no such right arises by necessity, is apparent from the fact that plaintiffs' store faces upon a principal street, and has all the light which other stores in the same row can have, except those upon the corners. It is a singular commentary upon such a claim that the testimony shows that the plaintiffs, after going into the occupation of the premises for their own convenience, boarded or bricked up all but one of the windows opening upon this lot.

There is no occasion to question the doctrine laid down in Washburn on Easements, chap. IV, § 6, p. 26, that "if one sell a house,

the light necessary for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant lot, would pass as incident to the dwelling house, because necessary to the enjoyment thereof." Such is not this case; which falls rather under the remaining clause of the sentence, from which the above quotation is taken, "but the law would not carry the doctrine to the securing of such easement as a mere convenience to the granted premises."

That mere length of enjoyment will not create this easement, was held in this State in *Pierre* v. *Fernald*, 26 Maine, 436, a leading case, the doctrine and reasoning of which have often been quoted approvingly as showing wherein and why the common law doctrine as held in this country, differs from that of England.

In Massachusetts the law may be regarded as settled that no easement of light or air exists over adjoining lands, except by express grant or covenant. *Brooks* v. *Reynolds*, 106 Mass. 31. *Royce* v. *Guggenheim*, id. 205.

Nor is this because of existing statute provisions alone. *Rogers* v. *Sawin*, 10 Gray, 376, 378. *Collier* v. *Pierce*, 7 Gray, 18.

But with the deed of the trustees of the Gardiner estate to these plaintiffs before us, we do not feel called upon to decide whether under any circumstances, an easement of light over an adjoining lot beyond what is purely necessary is ever implied as against the grantor, by the conveyance of a building standing upon the line so as to prevent the grantor or his subsequent grantees from interfering with the enjoyment of windows actually existing in the building conveyed by him.

Upon this question we remark in passing, that the decisions in Iowa and Ohio are not altogether in harmony; for while in Ohio the existence of such a right by implication is denied altogether, in Iowa the court say that they will not hold that it can never exist, though as a general rule it will not be implied so as to prevent the owner of the adjoining land from building thereon.

Here, not only is there nothing in the description of the plaintiffs lot in any of the deeds, which could carry with it the idea of such a right, or of the existence of any passage way or open space on that side; but the trustees in their conveyance of the strip of

land covered by the wall of plaintiffs block, expressly reserve the right to build on the foundation there, and thus exclude the possibility of such an implication.

The ruling of the presiding judge was correct. A verdict for the plaintiffs could not be sustained on the testimony reported.

Plaintiffs nonsuit.

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

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

JOHN H. LORD *vs.* ELLEN LORD.

Kennebec, 1876.—March 5, 1877.

Pleading.

A petitioner alleges that his wife obtained jurisdiction in a cause of divorce against him by fraud practiced upon the court, and that she procured a decree of divorce without actual notice to him or knowledge on his part, and "prays for a review of the same, that said decree of divorce may be annulled." *Held*, upon demurrer by the respondent, that the petition is not amenable to the objection of duplicity. The petitioner does not seek for a re-trial of the cause on the merits, but asks that the decree be annulled.

But a decree *pro confesso*, does not follow, because the demurrer is overruled. Clear evidence is required to show a fraud upon the court in obtaining jurisdiction, before a decree of divorce can be annulled.

ON EXCEPTIONS.

ON PETITION, called by the petitioner's counsel a petition for annulling a decree of divorce, but by the respondent's counsel a petition for review. The contention was mainly on this distinction; the petition on which it arose was presented at the August term, 1875, and was of the form following:

"John H. Lord, of Newport, in the state of New Hampshire, respectfully represents, that he was lawfully married to Ellen A. Braun, of Saulsbury, in the state of Connecticut, on the 29th day of September, 1867, and has had by her two children, now living, Nellie B., aged three years, and Henrietta, aged two years; that he resided in said state of Connecticut, with his said wife, after their marriage, until July 10th, 1874, when his wife went to visit

her friends in Kennebec county, Maine, and spend the summer with them; it being understood between them that he was to remove their goods and effects to Newport, in New Hampshire, during her absence in Maine; she and the children to return to him at said Newport, where he had contracted to labor; that in August of that year, he did move to said Newport; that he received letters from his wife, at said Newport, during the months of October and November, and wrote to her from there, and on the 23d of November, he went to West Waterville, in said county of Kennebec, after his wife and children, and the next day started for his home at Newport with them; that while at said West Waterville, his wife said to him that she had obtained a divorce from him, but he supposed she was not in earnest, and did not credit it; that she made no objections to returning home with him; did return with him, and lived with him as his wife, at said Newport, until the 24th day of March, 1875, when she deserted him, and left in company with one Walter Chappell, taking with her one of their said children; that she had since married said Chappell, and is now living with him, as he learns, in New Britain, Connecticut.

Your petitioner further represents, that he has ascertained that his said wife, while in Maine, in said summer of 1874, to wit: on the 27th day of August, sued out a writ from the office of the clerk of the courts of said county of Kennebec, against your petitioner, in a plea of divorce, wherein she alleged, among other things, that she had lived with her said husband as his wife in said state, and made oath, before Rufus K. Stuart, a justice of the peace within and for said county of Kennebec, that she did not know where her said husband, John H. Lord, then resided; that she had used reasonable diligence to ascertain his residence, but had been unable to do so, and thereupon she had obtained from a justice of the supreme judicial court an order for the publication of notice of the pendency of said suit, in the Kennebec Journal, a newspaper published at said Augusta; that at the October term of the said court a decree of divorce was granted to his said wife, and a decree made granting to her the care and custody of said children, as prayed for in said writ; all of which proceedings will more fully

and particularly appear by the records of said suit now remaining in said court.

And your petitioner avers that the statements contained in said writ, that the said Ellen A. Lord had lived with her said husband in said state as his wife; that she did not know the residence of her said husband, as well as many other allegations in the same, were not true; and that said decree of divorce was fraudulently and wrongfully obtained. Therefore your petitioner prays for a review of the same, that said decree of divorce, and said decree granting to said Ellen A. Lord the care and custody of said children, may be annulled.

Dated this 15th day of June, A. D. 1875.

John H. Lord."

This petition was subscribed and sworn to before a justice of the peace in the state of New Hampshire.

To this petition the respondent demurred, the petitioner joined, the presiding justice overruled the demurrer; and the respondent alleged exceptions.

J. Baker, for the respondent.

The petition is insufficient in law, and the demurrer ought to have been sustained.

This is a petition for review in a divorce, and it asks specifically "for a review of the same," that is of the judgment or decree of divorce; and this is all the prayer there is in the petition. The following words are no part of the prayer, but only the result sought by the review. The petition prays for a new trial of the divorce suit "that," in order "that," to the end, "that" the decree may be annulled; and it is the same in purport, as if it had said that justice may be done, or that a fair trial may be had. The review is asked as the means by which these ends are to be accomplished. If the petition had ended with a double prayer "for a review of the same," *and* that said decree may be annulled, there would have been stronger ground for calling it a petition for annuling the judgment of divorce. It has only the prayer for a review; there is no "and" in the sentence. A petition for annulment strikes directly at the judgment of divorce in the former process, and if granted, at once annuls it, wipes out the record, as Judge Peters says in *Holmes* v. *Holmes*, 63 Maine, 420.

But a petition for review simply asks to open the old case for a new trial on the old papers, and if granted does not annul the former judgment, but after that comes the new trial, on the original papers. If the petitioner proposed to ask for an annulment, he would not have asked for a review, which is inconsistent with and repugnant to it. They cannot stand together; they do not travel in the same path. *Holmes* v. *Holmes*, 63 Maine, 420, 424.

Now this being a petition for a review, or a new trial of the old case, it is *felo de se*, because it alleges that the parties lived together as husband and wife from Nov. 1874 to March 1875, and because it also alleges that the wife had contracted a new marriage since the divorce.

But suppose this can be a petition for annulling the judgment of divorce, it is even then fatally insufficient in law.

All the allegations in this petition are admitted to be true by the demurrer, for the purposes of this hearing; and on these allegations, the judgment in the original suit is utterly void, not only in Connecticut where it would have to be used, but in this state. This petition alleges that these parties were married in Connecticut; that they never resided in this state or cohabited here after the marriage; that neither of them resided here at the time of divorce, and that a newspaper notice was ordered, but it does not allege that any notice had been given. What is not alleged, for the purposes of this hearing on demurrer, does not exist; and this court cannot travel out of the record to guess at facts. The petitioner who asks for the "arbitrary act to expunge a sentence of divorce with the stroke of a pen and bastardize after begotten children," must allege facts enough to show that the court rendering it, had at least apparent jurisdiction of the subject matter, and the parties as well as the process. But in this case the petition fails to show even an apparent jurisdiction of the court; because it alleges no kind of notice given to the respondent in the original process. So that according to this petition, here was a divorce granted when the court had no jurisdiction of the subject matter or the parties, and therefore on inspection, the court would pronounce the original judgment absolutely void, and there is no judgment or record to be annulled. *Penobscot Railroad* v. *Weeks*, 52 Maine, 456.

But suppose the court should conclude that there is in the petition, not only a prayer "for a review," which certainly is there, but also a prayer for the annulment of the decree specified. Then we contend that the petition is insufficient in law, is void for uncertainty, duplicity, and the demurrer ought to be sustained. The two prayers are inconsistent and repugnant. One asks for a new trial of the old case; and the other, the annulment of the judgment; and the court cannot know what judgment to render, whether to order a new trial or annul the record.

E. F. Pillsbury, for the petitioner.

A decree of divorce may be annulled and set aside where fraud is practiced upon the court, on the petition of the party injured by the fraud; although the respondent has contracted a new marriage since the first was dissolved, and before any proceedings were commenced to set the decree aside. *Holmes* v. *Holmes*, 63 Maine, 420.

The petition sets forth that the decree was fraudulently obtained; that her declarations in the libel as to having lived with her husband as his wife in this state were false; that the statement sworn to by her that she did not know where her said husband then was, whereby she got an order for notice in a paper was false, as well as other allegations. The divorce in *Holmes* v. *Holmes* was set aside for the same or similar reasons.

The word "review" in the prayer in the petition is not used in its technical sense, but as asking for a re-consideration or re-examination. The prayer is not that a *writ of review* may be issued as usual, when a review in a technical sense is asked for. Suppose the words "for a review of the same" had been omitted, so that the annulment of the decree had been asked for without qualification, would not the language imply a review, or re-consideration, or re-examination? It could not be expected that such decrees would be set aside without some review or examination. Merely circumstantial omissions in a libel for divorce will not sustain a demurrer. *Huston* v. *Huston*, 63 Maine, 184.

PETERS, J. The petitioner alleges that his wife obtained a divorce from him by fraud. He "prays for a review of the same,

that said decree of divorce . . . . may be annulled." These words are demurred to for duplicity. The demurrer cannot prevail. The petitioner does not ask for a re-trial of the original libel upon the merits, and also that the proceedings of divorce be annulled. He evidently does not use the word review in the technical sense of a new trial under the statutes pertaining to review, but in the sense of a re-hearing or re-examination, as incidental to his motion to set the decree wholly aside as having been obtained by fraud. The kind of review asked for is, that the proceedings be annulled.

The demurrer must be overruled, and the respondent answer further. A decree *pro confesso* cannot, ordinarily, be made in a matter of divorce. The immediate parties are not the only ones concerned. The public are interested. Much depends upon the discretion of the court whether such a petition shall be granted or not. Clear evidence is required to show a fraud upon the court in obtaining jurisdiction, before a decree of divorce can be annulled. *Holmes* v. *Holmes*, 63 Maine, 420. *Whiting* v. *Whiting*, 114 Mass. 494. *Holbrook* v. *Holbrook*, *Id.* 568.

Demurrer overruled.
Respondent to answer further.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

ELLEN F. MCFADDEN *vs.* WILLIAM BUBIER.

Kennebec, 1876.—May 26, 1877.

Bastardy.

The preliminary proceedings in a bastardy process may be instituted before a justice of the peace.

ON EXCEPTIONS.

Complaint in a bastardy process, made before a justice of the peace, who took the accusation and examination of the complainant and issued his warrant for the apprehension of the accused, whom he required to give bond for his appearance, etc., at this court.

Upon motion of respondent's counsel, the court ruled that the action could not be maintained, and ordered it dismissed; and the complainant alleged exceptions.

J. W. Spaulding, for the complainant.

G. C. Vose, for the respondent.

WALTON, J. The only question is whether the complaint in a bastardy process can legally be made before a justice of the peace. We think it can. Such is the express language of the statute. True, the court held in *Sidelinger* v. *Bucklin*, 64 Maine, 371, that the complaint might be made before a trial justice, because a trial justice is, *ex officio*, a justice of the peace. But the court did not decide that such a complaint must be made before a trial justice; nor do we think such a decision would be correct. We think the true construction of the statute is that such a complaint may be made, and the other preliminary proceedings had, before either a justice of the peace or a trial justice,—before a justice of the peace, because such is the express language of the statute, and before a trial justice, because a trial justice is, *ex officio*, a justice of the peace. R. S., c. 97, § 1. R. S., c. 83, § 30.

Exceptions sustained.

APPLETON, C. J., DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

ALMON S. CHASE *vs.* JOSEPH MARSTON.

Kennebec, 1876.—May 29, 1877.

Mortgage.

A mortgagee entering upon the mortgaged premises peaceably and openly in the presence of two witnesses and duly recording the certificate of such entry in the registry of deeds, must continue in the possession of the mortgaged premises for the three following years to effect a valid foreclosure.

BILL IN EQUITY, to redeem mortgaged premises, setting forth that one Nathaniel Mayo, October 17, 1849, owned a house and lot in Waterville, (described in the bill,) that he then mortgaged the premises to the defendant to secure the payment of a note for

$81.41 given by him to the defendant, payable in one year from date and interest; that by a warrantee deed from Mayo and other mesne conveyances all of warrantee and without reservation as to the mortgage, all of Mayo's interest in the premises came to the plaintiff March 5, 1863; that plaintiff ever since retained his title; that Mayo died December 29, 1866; that he paid Marston the full amount due upon the mortgage and neglected to take up the note and have the mortgage discharged; that Marston retained the note until after the death of Mayo, and then pretended to foreclose the mortgage and hold the property worth about $1,000 to pay the note and mortgage, and fraudulently claims title, etc., etc.

The defendant in his answer after making certain admissions and denials, averred in substance an entry for foreclosure in the manner provided, R. S., c. 90, § 3, under the third head in the presence of witnesses; that the certificate thereof was made and duly recorded, and that he never received any payment of the note otherwise than by the foreclosure under the mortgage.

The plaintiff on cross-examination testified, that he never had any actual possession, never received any rents.

E. F. Webb, for the plaintiff.

W. P. Whitehouse, for the defendant.

APPLETON, C. J. The complainant having the equity of redemption of a mortgage given by one Nathaniel Mayo to the respondent dated October 17, 1849, to secure the payment of a note of the mortgageor of the same date for the sum of eighty-one dollars and forty-one cents and payable to the respondent brings this bill to redeem the same.

The evidence shows a demand to render an account of the sum due on the mortgage in pursuance of the provisions of R. S., c. 90, § 13, and that the mortgagee refused or neglected to render such account.

The respondent in his answer relies on a foreclosure in the third mode provided in c. 90, § 3, by entry peaceably and openly in the presence of two witnesses and taking possession of the premises mortgaged and having the certificate of such entry duly recorded in the registry of deeds.

The case shows the entry was merely formal and that Mayo and those claiming title by deed of warranty under him have been in the continued occupation of the premises mortgaged up to the time of filing this bill, and that their possession from the time of the defendant's entry hitherto has been, not as his tenants, and not in subordination to his title, but in opposition to it.

By § 4, it is provided that possession obtained in either of the three modes specified in § 3, and "continued for the three following years, shall forever foreclose the right of redemption."

A mortgage must be foreclosed by pursuing one of the modes provided by the statute for that purpose. *Ireland* v. *Abbott*, 24 Maine, 155. There was no continued possession, as required, by the mortgagee. The foreclosure was, therefore, ineffectual for want of this continued possession. *Chamberlain* v. *Gardiner*, 38 Maine, 548. *Thayer* v. *Smith*, 17 Mass. 429.

In *Davis* v. *Rodgers*, 64 Maine, 159, the mortgagee was in actual possession of the mortgaged premises when he entered to foreclose and continued in such possession of the same until the foreclosure was perfected. The certificate of the entry as required by the statute was duly recorded.

The amount due is to be ascertained by a master unless the parties agree.

The respondent neglecting to render an account is liable for costs.

The complainant is entitled to redeem upon payment of the amount due and to costs.

WALTON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

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

ELEANOR W. GILMAN *vs.* JOHN WILLS *et al.*

Kennebec, 1876.—May 31, 1877.

Mortgage.

A mortgagee of land has the right of immediate possession of the mortgaged premises, unless it is otherwise agreed between him and the mortgageor, and

may enter and harvest the crops growing upon the land; and an action of trespass cannot be maintained against him by the mortgageor for so doing.

An action will not lie by a mortgageor against his mortgagee for entering and harvesting the crops, unless the mortgageor is occupying, under an agreement, as tenant of the mortgagee.

On exceptions.

Trespass *quare clausum.*

Plea, general issue, with brief statement alleging license, and soil and freehold. The writ dated April 7th, 1874, alleged a breaking and entering by the defendants, August 27, 1873, and September 22, 1873, and a taking and carrying away of certain growing crops.

The plaintiff claimed title to the *locus*, under deed of warranty from the defendants to her, August 25, 1873, for the consideration of six hundred dollars. On the same day, and as a part of the same transaction, the plaintiff re-conveyed the premises to the defendants, by mortgage, with the usual covenants, to secure the payment of five hundred dollars of the purchase money, in one, two, three, four and five years from date; the mortgage deed containing no provision that the plaintiff should have possession until condition broken.

The farm had been occupied and carried on the season before the sale to the plaintiff, by Albert L. Wills, one of the defendants, and the growing crops alleged to have been taken, were planted and cultivated by him; but the plaintiff had taken possession of the farm before the alleged breaking and entering. There was no evidence that defendants entered under their mortgage; but the evidence tended to show that they entered under a claim of title to the crops, and to take and carry them away.

The defendants' counsel requested the presiding judge to instruct the jury that if the premises upon which the alleged trespasses were committed, were conveyed by the defendants to the plaintiff, and at the same time, and as a part of the same transaction, they were conveyed in mortgage to the defendants without any provision in the mortgage deed that the plaintiff should have the right to possession until condition broken, the defendants would have the right to possession; and an action of trespass *quare clausum* could not be maintained against them by the mortgageor, for an entry upon the mortgaged premises.

For the purpose of having the damages assessed by the jury, the judge declined to give the instruction requested, and instructed the jury, that the action could be maintained for breaking and entering. The jury assessed damages in the sum of $26.10; and the defendants alleged exceptions.

E. O. Bean, for the defendants.

G. C. Vose & L. T. Carleton, for the plaintiff.

VIRGIN, J. A mortgage of land, as usually drawn, is in form a deed of warranty with a condition subsequent defining the means by which the grantor may defeat the conveyance. The legal title, therefore, passes immediately upon the delivery of the mortgage; and the mortgagee is regarded as having all the rights of a grantee in fee, subject to the defeasance. Consequently he has the right of immediate possession of the premises, before condition broken as well as after, unless it otherwise appears, either expressly or impliedly, from the terms of the condition of the mortgage or other writing between the parties. *Blaney* v. *Bearce*, 2 Maine, 132. *Brown* v. *Leach*, 35 Maine, 39. *Norton* v. *Webb*, 35 Maine, 218. This doctrine, so well settled by repeated decisions, has been incorporated into the statutes of the state. R. S., c. 90, § 2.

The relation between mortgageor and mortgagee is not that of landlord and tenant. *Reed* v. *Elwell*, 46 Maine, 270, 279; *Hastings* v. *Pratt*, 8 Cush. 121; although they may by agreement create that relation. *Marden* v. *Jordan*, 65 Maine, 9. So long as the mortgageor, without the entry of the mortgagee, continues in possession, his possession is rightful, but in the absence of any agreement to the contrary he is not liable for rent. *Butler* v. *Page*, 7 Met. 40, 42. Neither, upon the entry of the mortgagee, is the mortgageor like a tenant entitled to emblements. 1 Wash. R. Prop. 124, § 21, and notes.

The case finds that the crops in question were planted by the mortgagee prior to his conveyance to the plaintiff. There being no reservation of them in the deed, and they not being severed from the soil at the time of the delivery of the deed, they with the soil became vested in the plaintiff (*Brown* v. *Thurston*, 56 Maine, 126;) and by the mortgage they became revested in the

defendants. Being the defendants' they could enter and take them, but would be accountable therefor in case of redemption of the mortgage. R. S., c. 90, § 2.

The gist of the action is unlawful entry. But in this case, the entry was lawful and covers the whole case. *Lackey* v. *Holbrook*, 11 Met. 458. *Chellis* v. *Stearns*, 22 N. H. 312. If the mortgagcor would have the result otherwise, he could do so by a stipulation in the mortgage that he should remain in possession until default in the condition. *Exceptions sustained.*

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

ANDREW J. ERSKINE *vs.* OLIVER MOULTON.

Kennebec, 1876.—May 31, 1877.

Deed.

If there are conflicting descriptions in a deed, which cannot be reconciled that construction should be adopted which best comports with the intent of the parties, and the circumstances of the case.

One of the boundaries of the land conveyed was first described in the deed as "to a monument upon the bank of the stream, thence westerly by the stream to the road." The deed closed with reference to a plan in which the same boundary in its whole length falls short of the stream. *Held*, that this was not a case for the application of the rule that the first clause in a grant prevails, and that the plaintiff's title was restricted to the line indicated by the plan.

ON EXCEPTIONS.

TRESPASS, *quare clausum.*

The contention was as to the plaintiff's north divisional line. Both parties claimed under the same grantor, the plaintiff by the earlier title. The Worromontogus river was a monument on the north of the plaintiff's lot, who claimed to low water mark, it being a stream where the tide ebbed and flowed. The defendant contended for a more southerly line on the bank of the river indicated by a plan, which was by reference made part of the deed. The plaintiff claimed the more northerly line, on the ground that it was certain without reference to the plan; and because it was the first clause in the grant; the defendant, the more southerly

line, on the ground that the whole instrument should be taken together and that the plan best showed the intention of the parties.

The plaintiff's deed ran thus: "a certain piece of land in Pittston, beginning on the road leading from Pittston village to Windsor at the south-west corner of land now owned by said Erskine; thence running north 15° west, 50½ rods to a stake at the south-east corner of the Neal lot, so called; thence north 63° west, 8 rods to a cedar post on the bank of Worromontogus at the south-west corner of the Neal lot, so called; thence westerly by said stream to the above named road leading from Pittston village to Windsor; thence by said road to the bounds first named, containing 11 acres more or less, reserving the right of flowing great Worromontogus cove so called.

For a more full description reference is had to a plan made by Asbury Young, November, 1865.

The presiding justice, among other things instructed the jury as follows:

"The deed in evidence is perfectly clear, definite and distinct, independent of the plan used in connection with it. Under this deed there is only one line in dispute (and I am thus particular in order to give the parties their right of exception), and that is the northerly line claimed by the plaintiff, and the southerly, claimed by the defendant. One claims it to be the centre of the stream, and the other, southerly of the stream. The deed reads, 'to a monument upon the bank of the stream, thence westerly by said stream to the above named road leading,' etc.

Now this language, almost precisely, has been before the courts of this state and other states many times, and the decisions have been uniform. Clearly and distinctly this stream is a natural boundary. The court say when it goes to a monument on the bank, and thence down the stream, that in the case where the stream is navigable water, that is, where the tide ebbs and flows, it would go to low water mark. In fresh water streams where the tide does not ebb and flow, it would go to the centre of the stream. Because being natural boundaries, they always go to the centre of them, while to artificial boundaries they only go to the outside.

Now there can be no doubt then, when we ascertain whether the tide ebbs and flows in this stream, about the construction to be given to that deed, so far as this is concerned. And the proof seems to be clear, definite, and I believe undisputed, that this is a stream where the tide ebbs and flows from the Kennebec, from shore to shore. I have instructed you that that language would carry this plaintiff to low water mark on that stream. The plan which has been put in, and which was put in with the deed in reality, because it is a part of the deed, referring to it, becomes as much a part of the deed as though it was incorporated in the deed. That plan, the parties seem to treat as describing a line falling short of the stream, not going to that.

That presents, then, a simple question. In the first place, these premises are described distinctly in the deed, and defined upon every side by monuments fixed upon the earth, which are not disputed and not disputable, and cannot be, because the stream is a natural monument. Then comes another description in the deed which to a certain extent is inconsistent with the first. It is a principle of law, when there are two descriptions in a deed, definite and distinct, and the second one to some extent modifies or counteracts or limits the first, unless there is language which shows it was intended so to limit, that the first one prevails. The first clause in a grant, and the last clause in a will is always a rule of law. Therefore I instruct you in this case, taking the whole deed together, including the plan as a part of it, that it gives this plaintiff the right to that land to low water mark upon that stream, and what I mean by low water mark is when the tide is out, to the edge of the water at that time when it is low tide. That is a question of law; but of course the parties understand their remedy, if I am mistaken in the law."

The verdict was for the plaintiff; and the defendant alleged exceptions.

E. F. Pillsbury & W. P. Whitehouse, for the defendant.

J. Baker & H. S. Webster, for the plaintiff.

VIRGIN, J. In the construction or interpretation of written instruments, the intention of the parties as therein expressed is

the great object of search. If while standing in the shoes of the parties when a deed was executed and reading it in the light of the then existing facts and circumstances, such as the nature, condition, occupation, etc., etc. of the thing granted, the intention is not apparent, then resort may be had to the rules of construction. Many of these rules are intended to aid in ascertaining the intention of the parties by pointing out and giving effect to those things about which the law presumes the parties are least liable to make mistakes. *Treat* v. *Strickland*, 23 Maine, 234, 244. Some are arbitrary, resorted to "for want of a better reason," and to be invoked therefore if at all only when all other means fail. If, however, the intention is apparent it must govern. *Abbott* v. *Abbott*, 51 Maine, 575, 581.

One of the general rules to be observed, and to which it is said there is no exception, is, "taking the whole instrument together, what does it mean?" Thomas, J., in *Ide* v. *Pearce*, 9 Gray, 350, 354.

The case discloses the following facts: The Worromontogus stream flowing westerly is a tributary of the Kennebec river flowing southerly. About twenty rods above the confluence, the stream leaving the upland reaches a parcel of flat land elliptical in form, three to four acres in extent, and known as the Worromontogus cove. At the upper end of the cove, the stream divides, one channel flowing along the northern and the other the southern border to the lower end where they unite, flow under a bridge (constituting a part of the highway along the bank of the river,) and thence into the river. The cove is flowed by the tide backing up from the river and by freshets. At other times the land between the channels is bare, a small portion of it being more or less covered with small bushes. Logs can be so easily floated in there from the river, that the cove has been used for many years as a safe and convenient place for securing and booming them for rafting as well as for holding them to supply the mills at the head of the cove ever since their erection.

In the fall of 1865, Joseph Bradstreet, owning the land all about the cove, agreed to convey certain land on the south side to the plaintiff. In November following, the parties procured a

surveyor "to run out the land" who in their presence surveyed the premises and subsequently made a plan thereof which is referred to in the deed and was put into the case. By the survey and plan the north line *i. e.*, the line next to the stream or cove, commences where the third call in the plaintiff's deed begins, to wit: at a cedar post on the bank of the stream at the south-west corner of the Neal lot, between which and the stream is a rod of upland; and thence by seven specific courses and distances through as many monuments to the highway, thus running along "on the borders of high water, to where the water sometimes flows in a freshet."

In the first clause of the deed, the third call commences at the same cedar post and describes the north line as "thence westerly by said stream to the above named road." A bank, margin or side of a stream may be monuments limiting the land thereto when the language clearly shows such to be the intention of the grantor. *Bradford* v. *Cressey*, 45 Maine, 9, and cases there cited. It is familiar law, however, that when land is described as bounded by a monument standing on the bank of a stream where, as in this case, the tide ebbs and flows, and thence by the stream, etc., the effect is to convey the grantor's title to the land and flats to low water mark; and the construction may be the same if the monument do not stand exactly on the bank but a short distance back from it—the monument then being referred to only as giving the direction of the line to the stream and not as restricting the boundary on the stream. *Pike* v. *Munroe*, 36 Maine, 309. This clause however, is not the whole description. The plan is a part of the deed and to have the same effect as if its details of courses, distances and monuments were incorporated into the deed. *Lincoln* v. *Wilder*, 29 Maine, 169.

The instruction to the jury was, that the first description in the deed should prevail, and that the plaintiff's land extended to low water mark. We think this was erroneous. We are aware of the old maxims, that the first deed and the last will shall operate, Shep. Touch. 88; and that of two contradictory clauses in a deed, the former shall stand. 2 Cru. Dig. (Greenl. ed.) 591. "These, however, are technical rules of construction, adopted as declared by Lord Mansfield, 'for want of a better reason,' and are

not entitled to much consideration, and should never be resorted to unless difficulties are presented which cannot be resolved by more satisfactory rules. In modern times, they have given way to the more sensible rule, which is in all cases to give effect to the intention of the parties if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties." *Pike* v. *Munroe*, 36 Maine, 309, 315. To the same purport are 2 Cru. Dig. (Greenl. ed.) 468, note 1, and 23 Am. Jur. 277.

If there be conflicting descriptions in a deed, which cannot be reconciled, that construction should be adopted which best comports with the intent of the parties, and the circumstances of the case. *Loring* v. *Norton*, 8 Maine, 61. *Bell* v. *Sawyer*, 32 N. H. 72.

Placing ourselves in the situation of the parties to the deed, reading the whole instrument and seeking for their intent by the light of the subject matter, and the then existing circumstances, we can entertain no doubt that the plaintiff's title does not extend to low water mark, but is restricted to the north line indicated by the plan. *Lincoln* v. *Wilder*, 29 Maine, 169.

The plaintiff contends that the intention of the parties to bound the land at low water mark, is settled "by the provision in the deed that the grantor reserves the right to flow these very flats by a dam below them on the stream, for if they were not conveyed, there was no need of such a right." The answer is: The reservation does not apply to "flats," for the tide flowed them twice a day; but to the "Great Worromontogus cove," so called, and flowing the cove might flow the land above the line indicated on the plan, and hence the reservation. *Exceptions sustained.*

WALTON, BARROWS and PETERS, JJ., concurred.

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

AMOS M. CAPEN *vs.* AUGUSTUS CROWELL.

Kennebec, 1876.—May 31, 1877.

Interest.

On a promissory note payable on time, stipulating for a higher rate of interest than six per cent. after due until paid, interest is recoverable according to its terms.

ON EXCEPTIONS.

ASSUMPSIT.

E. F. Webb, for the defendant.

R. Foster, for the plaintiff.

APPLETON, C. J. This is an action upon a promissory note of the following tenor:

"$557.78. Waterville, June 14, 1870.

Four months from date, I promise to pay to the order of A. M. Capen five hundred and fifty-seven 78-100 dollars, at Ticonic National Bank, value received, with interest at rate of two and one-half per cent. each month after due until paid.

A. Crowell."

The presiding justice instructed the jury to compute interest on this note at the rate of two and one-half per cent. each month after due, until paid; and the jury rendered a verdict in accordance with such instruction. To this ruling the defendant excepted.

This exception is the only one taken to the rulings of the presiding justice. The correctness of this ruling has been controverted in an argument of unusual elaborateness and of great research and ability.

Interest is the compensation for the use or detention of money. The right to recover it rests on an express or an implied contract. Interest is given by way of damages; but when so given, it rests upon different principles than when it is a matter of contract.

By the common law, and in accordance with the doctrines of the Romish Church all interest was regarded as usury and as sinful. The old Jewish and Roman Catholic notions of the sinfulness of usury have long since ceased to control or influence the

intelligence of the present day. Whether capital is in the form of money, or of real or personal estate, the compensation for its use, whether called interest, rent or hire, is determined upon the same principles. The rate of compensation, whatever may be the subject of desire, depends upon the relation between supply and demand. In accordance with the enlightened teachings of political economy, the barbarous laws in relation to interest have been either modified or abolished.

It is enacted by R. S., c. 45, § 1, that "in the absence of any agreement in writing, the legal rate of interest shall be six per cent. by the year."

The object of the statute is apparent. It was to give unrestricted liberty of contracting as to the rate of interest. No limitations whatever are imposed. The parties to a loan fix the rate of compensation as they may agree. The loan may be for a longer or a shorter term. The rate of interest may be made to vary according to the length of time for which money may be loaned. There is no prohibition upon an increased rate of compensation in case the payment is not made in accordance with the terms of the loan. The power of the parties is absolute over the subject matter, provided their agreement is reduced to writing.

Interest is as justly due for the use of money after the maturity of a loan as during its continuance, and before the contract for its repayment has been broken. Had the note been to pay two and one-half per cent. per month from the date until paid, the contract would have been in strict conformity with the statute. It is none the less so, though the rate of interest should be increased by the agreement of parties in case of non-payment. If the note had been on demand with a specified interest until paid, the payee would have been obliged to pay interest according to the contract. But the rate of interest according to the agreement of the parties must control, whether it be a rate specified to be paid from the giving of the note, or from its maturity.

It is urged that after the maturity of a note the law fixes the rate of interest, and that the parties cannot. But there is no statutory inhibition of the parties fixing the rate of interest after a note has become due, any more than before it is due. In case of

their neglect to do so, the law intervenes, otherwise, not. In *Brewster* v. *Wakefield*, 22 How. 127, Taney, C. J., says, that according to the description of the notes as set forth in the bill, "the written stipulation as to interest, is interest from the date to the day specified for the payment. There is no stipulation in relation to interest, after the notes become due, in case the debtor should fail to pay them; and if the right to interest depended altogether upon contract, and was not given by law in a case of this kind, the appellee would be entitled to no interest whatever, after the day of payment."

"The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract." In *Pierce* v. *Proprietors of Swanpoint Cemetery*, 10 R. I. 227, in a case similar to the one at bar, and under a like statute, Durfee, J., says: "If the parties to the note or other contract for the payment of money, intend that it shall carry interest at the stipulated rate until paid, they can easily entitle themselves to have their intention carried into effect, in entire accordance with both the letter and the spirit of the statute by stipulation, and in so many words, that the note or contract shall carry interest at the reserved rate until paid." That has been done in the present case by the most clear and explicit language. The agreement is not in violation of any statute. It was voluntarily entered into, and no sufficient reason is perceived why it should not be performed. *Hubbard* v. *Callahan*, 42 Conn. 524.

Our attention has been called to the very elaborate opinion of the supreme court of Minnesota, in *Kent* v. *Brown*, 3 Minn. 347, and in *Craig* v. *Callender*, 2 Minn. 350, upon the question in issue. Those decisions proceed upon the ground, that after breach of a contract, interest is given by way of damages and not as interest. But this principle, if regarded as the true rule of law, applies only when the contract is silent as to the rate of interest after its breach. In *Cook* v. *Fowler*, L. R., 7 H. L. 27, the question was raised, what rate of interest was to be allowed for money after the day when it had become payable, under a contract for its payment at a fixed time with interest at a certain rate. The

rate of interest fixed by the contract was five per cent. a month, which the plaintiff claimed, but which was denied. Lord Selborne, upon this subject, uses the following language: "Unless it can be laid down as a general rule of law, that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day until actual payment, is to be implied, the decision of the vice chancellor in this case is not erroneous. I entirely agree with those of your lordships who have preceded me, that no such contract is to be implied, unless there is something to justify it, upon the construction of the words of the particular instrument; and that, although in cases of that sort, interest ought to be given for the delay of payment *post diem*, it is on the principle not of implied contract, but of damages for a breach of contract." Here "the words of the particular instrument" leave no room for doubt as to the intention of the parties. We can perceive no sufficient reason for nullifying the deliberate contract of the parties, when that contract is in accordance with the statute, and in violation of no rule of law. *Exceptions overruled.*

DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

WINTHROP SAVINGS BANK *vs.* CHARLES P. BLAKE *et als.*

Kennebec, May 30, 1877.—May 31, 1877.

Exceptions.

Exceptions will not lie to a refusal to allow a defendant to plead anew, who, after the first term, has filed a general demurrer to the plaintiff's declaration.

ON EXCEPTIONS.

The facts sufficiently appear in the opinion of the court.

J. Baker, for the defendants.

E. O. Bean, for the plaintiffs.

WALTON, J. This action was entered at the March term, 1876. At the March term, 1877, the defendants filed a general demurrer

to the plaintiff's declaration. The demurrer was overruled, and the defendants thereupon moved for leave to plead anew. The motion was refused, and to this refusal the defendants filed exceptions. The court is of opinion that the exceptions must be overruled. The demurrer not having been filed at the first term, leave to plead anew could not be claimed as a legal right. R. S., c. 82, § 19. The motion was addressed to the discretion of the presiding justice; and to the exercise of a discretionary power, exceptions do not lie. *Exceptions overruled.*

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

HARVEY BARNES, appel't from the decree of the judge of probate,

vs.

SARAH R. BARNES, executrix of the will of Amos Barnes.

Knox, 1874.—January 8, 1876.

Will.

The burden of proof is upon the proponent to show that the will in controversy has been duly signed, executed and published by the party whose will it purports to be, and that he was of a sound and disposing mind.

A proper attestation clause showing that all the statute formalities have been complied with, is presumptive evidence of the valid execution of a will, and in the absence of proof to the contrary is conclusive.

It is admissible for an attesting witness to a will to state what was his usual course of business in such a case, when the particulars of the transaction are not distinctly remembered.

To prove a testator to have been of sound mind, it is sufficient to prove that he was in the possession of mental faculties sufficient for the transaction of ordinary business, and with an intelligent understanding of his own acts.

To render a will invalid, as having been executed under undue influence, it must be shown that the influence amounted either to deception, or to force and coercion, destroying free agency.

The influence of kindness and affection is not undue.

When a case is heard on appeal, the appellant is limited to the reasons of appeal assigned by him.

One of the reasons of appeal was: "Because in the making and execution of said instrument, the said Amos Barnes was influenced by an unfounded and unreasonable prejudice against his own children and heirs-at-law." *Held*, that under this "reason of appeal," the question of insane delusion of the testator in regard to his children, was not open to the appellant; that prejudice was not insane delusion.

On exceptions.

An appeal from the decree of the judge of probate, approving a will of the following tenor:

"I, Amos Barnes, of Camden, in the county of Knox, and state of Maine, knowing the uncertainty of life, and being desirous of controlling the distribution of my property, do make, publish and declare the following, as my last will and testament:

First. I give and bequeath to my wife, Sarah R. Barnes, and to Fanny Thompson, daughter of Marcus Thompson, to hold undivided and jointly, all my real estate, consisting of my homestead in said Camden, containing three acres more or less, with all the buildings thereon; also a wood lot situated in said Camden, containing fifty acres more or less.

Secondly. I give and bequeath to my said wife and Fanny Thompson, jointly and undivided, all my personal estate of every name, description, and nature, consisting of household furniture, horse, horse wagons, sleigh, sled, and all the implements of farming and husbandry; also all my goods remaining in my store, and all notes and accounts due me, to have and to hold, to them, and their heirs and assigns forever; they paying to my children hereafter named, in one year after my decease, the sums following, to wit: To my daughter, Abigail Tolman, the sum of two dollars; to my son, Amos Barnes, jr., the sum of two dollars; to my daughter, Chloe Thorndike, the sum of two dollars; to my daughter, Mary Oxton, the sum of two dollars; to my daughter, Harriet Lowy, the sum of two dollars; and to my son, Harvey Barnes, the sum of two dollars; and they, the said Sarah R. Barnes and Fanny Thompson, pay all my just debts, funeral charges, and expenses of the probate of this my last will and testament.

Lastly. I do constitute and appoint my said wife, Sarah R. Barnes, sole executor of this my last will and testament.

In testimony whereof, I have hereunto set my hand and seal, this 27th day of April, in the year of our Lord one thousand eight hundred and sixty. Amos Barnes." (Seal.)

Signed and sealed by the said Amos Barnes, and by him declared to be his last will and testament, in our presence; and we each

of us in his presence, and the presence of each other, and the same time subscribed our names as witnesses. Nathaniel Meservey,
T. W. Chadbourn,
Charles A. Miller.

On due notice and hearing had before the probate court, held at Rockland, at its October term, 1868, it was "ordered by said court, that said instrument, proved as aforesaid, be approved, allowed, and recorded, as the last will and testament of said deceased."

From this decree an appeal was taken to this court, where on the hearing at *nisi prius*, several pleas were filed by the appellant, and joined by the appellee, the last of which was in the form following :

And for further plea the said appellant comes and says, that at the time of the signing of said instrument, and the supposed making and execution thereof, the said Amos Barnes was influenced thereto by insane delusion respecting his children, and their conduct towards him, and a groundless belief that they had done him some harm, and behaved undutifully towards him. And of this puts himself on the country.

After a long trial, the report of which is voluminous, the jury returned affirmative findings to the following questions :

I. Was the said supposed writing or will signed by said Amos Barnes, or by some person for him at his request, and in his presence, and was it subsequently subscribed in his presence by three credible attesting witnesses.

II. Was the said instrument duly executed and published by said Amos Barnes, as his will.

III. Was the said Amos Barnes of sound mind, at the time of the supposed execution of said instrument.

IV. Was the execution of said instrument the free, voluntary and unrestrained act and will of said Barnes, uncontrolled by other persons or influences.

The jury returned negative findings to the following questions :

V. Was the said Amos Barnes at the time of signing said instrument, and the supposed making and execution thereof, unduly influenced thereto by Sarah R. Barnes or any other person.

VI. Was the said Amos Barnes at the time of the signing and supposed execution of said instrument, influenced thereto by an unfounded and unreasonable prejudice against his own children and heirs-at-law.

VII. Was the said Amos Barnes at the time of the signing of said instrument, and the supposed making and execution thereof, influenced thereto by insane delusion respecting his children and their conduct towards him, and a groundless belief that they had done him some harm, and behaved undutifully towards him.

The appellant filed exceptions, among others, to the refusal of the presiding justice to give the following requested instructions:

III. That the mind of said Barnes was not sound, if he was under the influence of a delusion in respect to the character and conduct of his children, which influenced and controlled him in the disposition of his property by his will.

IV. That a delusion is a diseased state of the mind or affections, in which persons believe things to exist, which exist only, or in the degree they are conceived of, only, in their own imagination, with a persuasion so fixed and firm, that they act upon such delusion as though it were a fact.

V. That even if said Barnes at the time of the execution of said instrument had sufficient capacity, memory and sense to know and comprehend, and transact ordinary business transactions, yet in regard to his children, was subject to the delusion that they had unnecessarily and unjustly caused him to be put under guardianship, and taken the control of his property from him, when such was not the fact, and the guardianship was necessary, and if proper, and the children behaved in a dutiful or proper manner, in causing it to be imposed upon him, and the provisions of his will were affected by this delusion, he is not to be considered as of sound mind, when he signed or executed it.

And if such delusion existed as to any one of his daughters, who favored his discharge from guardianship at his request, and he acted upon it, the will is equally void as if the delusion existed as to all his children.

VI. That the burden of proof is upon the appellee, to show that said Barnes was at the time of the execution of said instru-

ment of sound mind; and that the burden does not shift in the progress of the trial, but continues upon her to the end; and that if upon the whole evidence it is left uncertain whether said Barnes was of sound mind, and free from delusion affecting the provisions of his will, the instrument is not to be considered his will.

IX. That if the jury consider the provisions of the will to be unjust and unnatural, and that there is no sufficient reason shown why he should give the whole of his property to his wife and her grand-daughter, (except the nominal sums mentioned in the will,) to the exclusion of his own children, and especially his daughter, Mary, they are at liberty to infer from these facts, that the said Barnes labored under some unsoundness of mind, or was under some undue influence in making his will.

X. That if the jury are satisfied that the mind of said Barnes, at the time of the execution of said instrument, was in a weak and enfeebled condition, and the provisions of said instrument were induced partially by the weakness of his mind, partially by the improper influence of his wife, and partially by a groundless prejudice against his children, and that these combined influences induced him to make the instrument as he did, it cannot be considered his will.

Other exceptions, with a statement of the case, appear in the opinion.

A. P. Gould & J. E. Moore, for the appellant, contended, 1. That there was no sufficient proof of the due execution of the will. 2. That the presiding justice mistook the law in respect to the burden of proof on the subject of mental unsoundness. 3. That the ninth requested instruction should have been given. 4. That legal testimony was rejected, and illegal testimony admitted. 5. Expert testimony was improperly rejected. 6. Illegal testimony was admitted for the appellee. 7. There was error in the admission of portions of depositions.

On the second point, the counsel argued as follows:

The fourth reason of appeal was, that the testator was not of sound mind at the time of the execution of this instrument.

In this state the burden of proof is on the party seeking to set up a will, to prove the mental competency of the testator; and this burden continues on him throughout the trial.

It is only "a person of sound mind" who can make a will in this state. To set up a will, the supposed testator must be proved to have been such a person. R. S., c. 74, § 1. *Cilley* v. *Cilley*, 34 Maine, 162. *Gerrish* v. *Nason*, 22 Maine, 438.

In *Crowninshield* v. *Crowninshield*, 2 Gray, 524, 534, it is said: "The burden does not shift during the progress of the trial, but continues throughout upon the appellee; and if, upon the whole evidence, it is left uncertain whether the testator was of sound mind or not, the will cannot be proved."

The particular form of mental unsoundness which existed in this case, was the delusion of the testator in respect to the character and conduct of his children; under the influence of which he disinherited them, and gave one-half his property to his second wife, and the other half to the child of one of her illegitimate children.

Delusion is insanity. If the testator acted under such delusion in respect to his children, his mind was not "sound," in the sense of the statute.

For definitions of insanity and unsoundness of mind, see Bouv. Law Dict.; Delusion; 1 Red. on Wills, c. 3, pp. 71, 72, 78, and notes; *Drew* v. *Clark*, 1 Add. 279; 2 id. 102; 3 id. 79; where it is said "that the true criterion, or test of the presence of insanity, is delusion." *Commonwealth* v. *Rogers*, 7 Met. 500, 502. Elwell on Malpractice & Med. Ev., pp. 389, 390. See especially, 1 Red. on Wills, pp. 76–77, where it is said, "the true criterion is where there is delusion of mind there is insanity; that is, when persons believe things to exist, which only exist, or at least, in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them that they are of unsound mind."

A very common form of delusion is in respect to the character and conduct, and fidelity of one's own children and relatives.

Numerous reported cases illustrate this. See 1 Red., p. 82.

If the provisions of a will are influenced by such delusion, and children are disinherited in consequence of it, the will should be set aside. *Seaman's Friend Society*, v. *Hopper*, 33 N. Y. 619. *Townsend* v. *Townsend*, 17 Gill, 10. *Jenks* v. *Smithfield*, 2

R. I. 255. *Morris* v. *Stokes*, 21 Geo. 552. *Potts* v. *House*, 6 Geo. 324. *Lucas* v. *Parsons*, 24 Geo. 640. *Seaman's Friend Society* v. *Hopper*, 43 Barb. 625. Taylor's Med. Juris, (6 Amer. ed.) pp. 631, 673. *Florey* v. *Florey*, 24 Ala. 241. Shelford on Insanity, p. 41.

All these cases are illustrations of a diseased state of the mind, respecting one's children and relatives; and it is invariably pronounced, that when the testator is unduly influenced by prejudice, delusion, or an unnatural and untrue conviction of the character and conduct of his children, to disinherit them, the will should be set aside.

The burden was upon the appellee to prove that the mind of this testator was free from such delusions, otherwise his mind was not sound in the sense of the statute. His mental soundness was put in issue by the reasons of appeal and by the pleadings.

When it was suggested by the appellant that he labored under this particular form of insanity, or unsoundness of mind, this delusion in respect to his children, and unfounded prejudice against them, and that this was the reason of their being disinherited, and of the giving of his property to a stranger; it was the duty of the appellee to overcome this suggestion, and the evidence introduced to support it; the burden still being upon him to prove that no such delusion existed.

The presiding judge seemed to labor under the impression, that when the appellee had made out a *prima facie* case of mental soundness, if the appellant contended that there was unsoundness in a particular form, such as delusion or topical insanity, relating to the character and conduct of his children, the burden was upon the appellant to establish this proposition. This was clearly a mistake.

To present his views more definitely on this subject. The appellant presented the 5th and 6th requests.

The 5th request was given, but the 6th request which was that the burden was still upon the appellee, was denied, and the judge instructed the jury in respect to the 5th, thus:—"Gentlemen, I give you this instruction as a matter of law, leaving you to consider whether or not there was any delusion. And I also instruct you that those who assert the delusion are bound to establish it."

This was the vital question in the case; and the instruction was therefore of the greatest importance. It cast the burden upon the appellant to prove that the mind of the testator was unsound. And we have shown that this is not the rule of law in this state.

The requests for instructions upon the question of mental soundness should all have been given. They are the third, fourth, fifth, sixth, and tenth of the first series.

They were not given in the general charge, and the charge is, in many respects inconsistent with them.

The judge correctly instructed the jury, that if the testator labored under any undue influence or prejudice against his relatives, and "if he labored under an insane delusion which operated against those near and dear to him, . . . the will should be discarded;" but he subsequently committed the error of instructing the jury, that the burden was upon the appellant, who asserted the existence of such a delusion to prove it.

A. S. Rice & O. G. Hall, for the appellee.

APPLETON, C. J. This is an appeal from the decree of the judge of probate approving and allowing the will of Amos Barnes, and ordering the same to be recorded.

The case comes before us on a motion for a new trial, and on exceptions.

It appears from the evidence that the testator, prior to 1842, had become somewhat intemperate in his habits, and upon application duly made, was placed under guardianship, and his son Amos appointed his guardian; that he was indignant at this, as well as dissatisfied with the management of his estate by his guardian; that in 1845 at the request of most of his children, he was discharged from guardianship, and became temperate in his habits; that on July 24, 1848, his wife, the mother of the appellant and of his other children, six in all, died; that within a short time after her death and with discreditable haste, he married the appellee; that this marriage gave great offense to his children; that his will was made and signed April 27, 1860; that he died January 10, 1868, leaving some small parcels of real and his personal property to the appellee, and to her grand-daughter, the child of her illegitimate

daughter, and equal and nominal sums to his other children; that the whole estate would amount to some $1700, and that at the time of making his will, his children were all in comfortable circumstances, save perhaps one.

An appeal was taken by Harvey Barnes, and the following reasons asigned therefor:

I. "Because the said Amos Barnes did not sign or legally execute said instrument." On the trial it was not denied that the will was signed by him.

II. "Because said instrument was not executed in the presence of three disinterested witnesses." The disinterestedness of the witnesses was not denied.

III. "Because the persons who subscribed said instrument as witnesses, did not subscribe the same at the request of the said Amos Barnes, nor in his presence, nor in the presence of each other."

That the requirements of the statute in all these respects were fully complied with, was satisfactorily proved, and the facts were so found by the jury.

IV. "Because the said Amos Barnes at the time of the said supposed execution of said instrument, was not of sound mind."

The evidence shew the testator to be an eccentric man, addicted to talking to himself, making odd gestures, moody, of a quick temper, passionate; but from 1845 to 1860 he kept a small store, bought goods in Boston and Rockland, supported his family, and managed his own affairs without any interference from the appellant, who lived near, or from any of his children who lived in the neighborhood, and that his habits were temperate.

V. "Because the said Amos Barnes was unduly influenced by the said Sarah R. Barnes, and other persons, in the making and execution of said instrument."

Nothing is found in the evidence tending in the remotest decree, to show undue influence on the part of the appellee or any one else. So far as the evidence discloses, Mrs. Barnes did her duty to her husband, notwithstanding the ill omened auspices of the marriage, and was entitled to the influence, which kindness and attention to the wants of her husband, and care for her household, would naturally give. Nothing more is shown.

VI. "Because in the making and execution of said instrument, the said Amos Barnes was influenced by an unfounded and unreasonable prejudice against his own children and heirs-at-law."

From the time of the marriage of his father in 1848, to his death in 1868, though living near, the appellant never entered his father's house, until after his death to attend his funeral. One of his daughters on the eve of his death, visited her dying father. Another daughter was at his house three times during this period of twenty years, and all were most unfilially infrequent in their visits. Under such circumstances, the testator might have conceived a prejudice, but it is difficult to imagine it either unreasonable or unfounded.

The verdict, it is apparent, is in conformity with the evidence, and could not have been otherwise, without entirely disregarding its force and effect.

The case being heard upon appeal, the only questions open for consideration are those assigned in the reasons for appeal. The appellant is limited to those. *Gilman* v. *Gilman*, 53 Maine, 184. *Patrick* v. *Cowles*, 45 N. H. 553.

Numerous exceptions have been alleged to the rulings of the presiding justice, which will be considered in the order in which they were discussed by the learned counsel for the appellant in his able and exhaustive argument.

Exception is taken as to the ruling in relation to the due execution of the will.

The signature of the testator was not denied. That of the attesting witnesses was proved. One of the witnesses had deceased, the other two, one of whom was a lawyer, were residents of other states. The testator went to have his will made, and returned with it. His signature appears first on the will. Underneath is written "signed and sealed by the said Amos Barnes and by him declared to be his last will and testament in our presence, and we each of us in his presence, and in the presence of each other, and at the same time subscribed our names as witnesses." Then follow the signatures of the attesting witnesses.

T. W. Chadbourne, one of the attesting witnesses, testifies that he never signed a will unless it was in the presence of other subscrib-

ing witnesses, and of the testator, and at his request, and that he was satisfied this was no exception to his usual course, though he had no distinct recollection of the matter.

Upon this evidence, the presiding judge after stating the precise requirements of the statute, left it to the jury to determine from all the facts and circumstances, whether or not the will had been executed in accordance therewith.

Proof of the due execution of a will may be shown by direct evidence, or inferred from circumstances. *Gerrish* v. *Nason*, 22 Maine, 438. The attesting witnesses were dead or out of the state. When that is the case, proof of their handwriting is sufficient. *Nickerson* v. *Buck*, 12 Cush. 332, 344. *Ela* v. *Edwards*, 16 Gray, 91, 93. Every person making a will is presumed to have knowledge of its contents, and if it is alleged that he had not such knowledge, or that he was induced to execute it by misrepresentation, the *onus probandi* is with those who make the objection. *Pettes* v. *Bingham*, 10 N.H. 514. The will being duly executed the law presumes he did it understandingly. *Sechrest* v. *Edwards*, 4 Met. (Ky) 163. That the testator signed the will first is indicated by the will, and as is well remarked by Dewey, J., in *Dewey* v. *Dewey*, 1 Met. 349, 354. "It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz: the signature by himself."

Indeed a will may be admitted to probate though neither of the surviving attesting witnesses recollect the circumstances of its execution. *Eliot* v. *Eliot*, 10 Allen, 357.

It would be monstrous if a will was to be defeated because after a great lapse of time the witnesses may have forgotten the facts attending its execution. A proper attestation clause showing that all the statute formalities have been complied with, will, in the absence of proof to the contrary, be presumptive evidence of the fact, after the death of the attesting witnesses or their failure to recollect what took place at the execution of the will. *Chaffee* v. *Baptist Missionary Society*, 10 Paige, 85.

Here the attestation clause shew a full compliance with the requirements of the statute.

So far as the requests were in accordance with law, they were given in the charge. Those not given, it will be seen, were adverse to authorities cited, and the general principles of law. The facts disclosed abundantly justified the findings of the jury; and their force and effect were left to be determined by them in accordance with their good judgment.

Complaint is made that the charge in relation to the burden of proof was erroneous. On this branch of the case, the judge instructed the jury that a person of sound mind of the age of twenty-one years might dispose of his real and personal estate, by will, in writing signed by him, or by some person for him at his request, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under the will; that the burden of proof was upon the party claiming that the will had been duly signed, executed and published by the party whose will it purports to be, and that the burden of proof was upon Mrs. Barnes to bring her case within the provisions of the statute of this state; and that the degree of intellectual vigor necessary to render a will valid, was the possession of mental capacity sufficient to transact business, and with an intelligent understanding of what he is doing.

It needs no citation of authorities to show that these instructions were sufficiently favorable to the appellant.

One of the reasons of appeal was that the will was the result of undue influence on the part of the wife. In reference to this, the instruction was that the influence must be of such a degree as to take away from the testator his free agency—such as he is too weak to resist—such as to render the act no longer that of a capable testator. A wife may influence her husband by kindness and affection, but the influence of kindness and affection will not defeat a will. If the wife by neatness, prudence and economy makes home more comfortable and her husband more happy, that is not such influence as will defeat a will.

These views are in strict accordance with the law as stated by Mellen, C. J., in *Small* v. *Small*, 4 Maine, 220. The influence must amount either to deception or else to force and coercion, in either case destroying free agency. *Gardner* v. *Gardner*, 22 Wend. 526. The party alleging fraud or undue influence has the

burden of proof upon him to show it. *Baldwin* v. *Parker*, 99 Mass., 79.

Great stress has been laid by the counsel for the appellant upon the ruling of the presiding judge as to the law in relation to an insane delusion on the part of the testator in reference to his children; but this question is not open to him. The sixth reason of appeal contains only the allegation that the testator "was influenced by an unfounded and unreasonable prejudice against his own children and heirs-at-law." Here is no assertion of the existence of any insane delusion on the part of the testator. But prejudice is not insane delusion. *Stackhouse* v. *Horton*, 15 N. J. Chancery Rep. 202. When there are not only some plausible grounds for the opinion entertained by the testator, but much reason to doubt whether they are not entirely just and sound it would be absurd to pronounce them insane delusions. Ib. It hardly lies in the mouth of a son, who for twenty-three years, though living opposite, never entered his father's house, to allege prejudice on his part. But whether there was prejudice or not, that is not insane delusion; and the issue of such delusion cannot be raised under the sixth reason. In probate appeals "the appellants," observes Morton, J., in *Boynton* v. *Dyer*, 18 Pick. 1, "are restricted to such points as are specified in their reasons of appeal." To the same effect is the case of *Bean* v. *Burleigh*, 4 N. H. 550. If then the question of insane delusion was raised by the counsel for the appellant without right or law, he cannot be permitted to take advantage of his own wrong nor can exceptions be sustained, even if the court, in its rulings as to a matter not legally before it, may have erred.

On the subject of delusion the court instructed the jury that the existence of a delusion does not necessarilly vitiate a will unless the delusion form the ground work of it, or unless decisive evidence be given that at the time of making the will the testator's mind was influenced by it. The insane delusion must be one forming the ground work of his will and at the time he made it he must be acting under it. These propositions are fully supported by all the authorities on the subject.

The counsel for the appellant requested the following instruc-

tion, "that even if said Barnes at the time of the execution of said instrument had sufficient capacity, memory and sense to know and comprehend and transact ordinary business transactions, yet in regard to his children was subject to the delusion that they had unnecessarily and unjustly caused him to be put under guardianship and taken the control of his property from him, when such was not the fact and the children behaved in a dutiful and proper manner in causing it to be imposed upon him, and the provision of his will was affected by this delusion, he is not to be considered as of sound mind when he signed and executed it, and if such delusion existed as to any one of his daughters who favored his discharge from guardianship at his request and he acted upon it, the will is equally void as if the delusion existed as to all his children."

The court gave this instruction leaving the jury to consider whether or not there was any delusion and instructing them that those who assert the delusion are bound to establish it.

It has already been shown that the question of delusion was not and could not be open to the appellant.

It may further be remarked that if there is no evidence upon which to base a request there can be no occasion for complaint for not giving it. A request must be good in its totality. Now it is difficult to see upon reading carefully the testimony that there is evidence of any delusion as to any one of his daughters or as to the other children in reference to their unfilial treatment.

Further, assuming the facts as stated in the request it would then be for the jury to determine whether he was to be considered of sound mind or not. The request is that the judge should rule peremptorily, thus withdrawing the decision from the tribunal to which it of right belonged.

It is apparent, therefore, that the request was one not pertinent to the questions involved in the reasons of appeal, that it was one which the appellant had no right to ask, nor no cause of complaint if not given; still less can he complain of it as given.

It must be borne in mind that the presiding judge had already instructed the jury that the burden of proof was upon the proponent to show the sanity of the testator. That instruction was neither modified nor withdrawn. It still remained in full force. The burden still remained upon the proponent. But was she

bound to go further? While she was bound to prove sanity, was she bound to negative insanity before and without proof of its existence? Assuredly not. "Every person is presumed to be of perfect mind and memory, unless the contrary be proved. . . . because where the contrary appeareth not, the law presumeth it—It need not be proved." Swinburn on Wills, 45 pt. 2, § 3, pl. 4. "It must be admitted, we think, upon careful examination of all the cases, that the burden of the proof of insanity, in the case of a will, equally with that of a deed or other contract, is upon the party alleging it, and who claims the benefit of the fact, when established." 1 Redfield on Wills, 16, (3 ed.,) 31. "It is, therefore, proper to say," observes Bell, C. J., in *Perkins* v. *Perkins*, 39 N. H. 163, that the burden of proving the sanity of the testator and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him till the close of the trial, though he need introduce no proof upon this point until something appears to the contrary."

"It is not improper to say that the burden of proving the insanity of the testator is on the party opposing the will. If he relies on that fact, he must, of course, lay evidence before the jury sufficient to out weigh the presumption of law and the proof on the other side and to convince the jury, or he must have a verdict against him. . . . But it is after all a question merely verbal; a question of the propriety of certain forms of expression; for we apprehend that whatever be the terms used, the course of practice is everywhere the same." In this case the general rule imposing the burden on the plaintiff was left unqualified.

Where life is involved, it was held to establish a defense on the ground of insanity, the burden is on the defendant to prove by a preponderance of evidence, that at the time of committing the act he was laboring under such defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing; or if he did, that he did not know he was doing what was wrong. While such is the law in a case of murder, it would seem that in the case of a will, the party alleging insanity should offer evidence tending to show that fact before the proponent should be called upon to negative its existence.

The ninth requested instruction was "that if the jury consider

the provisions of the will to be unjust and unnatural and there is no sufficient reason shown why he should give the whole of his property to his wife and her granddaughter (except the nominal sums mentioned in the will,) to the exclusion of his own children and especially his daughter Mary, they are at liberty to infer from the facts that the said Barnes labored under some unsoundness of mind or was under some undue influence in making the will."

This requested instruction was not given. This could not properly have been done. The jury were not to judge of the sufficiency of the reasons which induced the bequests in the will. Their sufficiency was for the testator. If of sane mind, it was for him to determine what he would do with his own, not for any jury. He was not to show the reasons why, among possible objects of his bounty, being sane, he preferred one rather than another and to give reasons for his so doing, nor was it incumbent upon the appellee so to do. There may be some unsoundness of mind on some subjects, that do not relate either to his property or to those who are the proper objects of his bounty, while as to other matters, his sanity is unquestioned. *Robinson* v. *Adams*, 62 Maine, 369. There may be some undue influence attempted, yet not sufficient to control the testator.

Henry Elwell was asked the question "State whether you have ever observed in Mr. Barnes any indications of any unsoundness of mind?" to which he answered "I have not." It is objected that he was not an expert. But the materiality of the question vanishes when knowledge of the subject matter of inquiry is negatived by the witness.

Objections are taken to the exclusion of the following questions put to Jason Davis: "State whether he (Barnes) appeared to be rational at that time? State about his appearance at that time? State what acts you saw, if any, indicating "his mind was not sound?"

But subsequently he was asked by the counsel for the appellant "if he saw any peculiar and unusual acts in him," and was directed to state what they were, which he did very fully. He was further directed to state any thing he saw him do or heard him say that struck him as peculiar or different from other people. The appellant has in this respect no cause of exception.

He was asked whether a great change came over him in his latter days. As the will was in 1860 and as the testator died in 1868 the change, whatever it was, occurring in his latter days could not be received to defeat a will made long before.

The witness was asked whether he observed him between 1854 and 1860 and if he observed any change in his appearance and conduct from what it was prior to his being put under guardianship? To this question an objection was interposed and it was excluded. The testator was put under guardianship in 1842 for intemperance. The witness had been fully inquired about as to the testator's conduct before that time and up to 1860. It was immaterial whether there was a change or not. The question was his mental soundness in 1860. All that was necessary to a full understanding of the case had been elicited, and there must be some limits to the examination of witnesses.

There was an offer made to prove that the testator made unusual noises in his store. The court ruled that he might answer the question if he knew he (Barnes) was there or if it was his voice; but as the witness did not know he was there and could not state that it was his voice, his account of the usual or unusual noises made by somebody, if made, were not admitted upon the question of the testator's sanity, nor should they have been.

The answer of Harvey that the testator "was incapable of doing business," whether admissible or not, was not stricken out and the appellant had the benefit of his testimony.

Otis Tolman, jr., was asked by the appellant after having stated that the testator was accustomed to talk to himself and to animals, the following question, "state whether or not his talk was incoherent?" This was excluded, but the court said "he may state, if he heard what was said, and any thing about it, and whether it had any meaning in it, if he heard it." To the question of the appellant's attorney "can you state whether it had any meaning or not?" the witness answered, "I would if I could recollect what he said."

In the examination of E. C. Long the presiding judge excluded an answer to this question "whether his condition attracted the general attention of the people." Whether it did or did not is immaterial, nor was the question proper.

The inquiry made of W. N. Thorndike whether he "appeared

to be capable of managing business during the last few years of his life" was not answered. The ruling on that subject was correct. It was not whether he appeared capable or not, but whether he was so capable. Besides, whether capable or not the last few years of his life is immaterial. He might have been incapable when he died in 1868 and capable in 1860 when the will was made.

The counsel for the appellant, to show the influence of the appellee over the testator, offered to prove that he had been with this woman (Mrs. Barnes,) at the time of the mother's death in the room below and he would inquire "Is she not dead yet? I never saw a person so long dying," and on the next day he went away with this woman. This was excluded. It related to events in 1845 and neither shew nor tended to show the influence of the appellee fifteen years after, nor indeed at the time.

Joseph H. Estabrook, a physician, was called as an expert. He was asked what opinion he formed upon his examination of the testator. The court ruled that he might "be inquired of as to the circumstances and the symptoms that he observed and then state his inference from them." This is objected to as too restricted. The witness then proceeded to state all the facts within his recollection tending to show insanity. He was then asked to state whether he judged him sane or insane, to which he replied, "I thought him of unsound mind." After a further examination in relation to his means of knowledge in answer to the following question proposed by the appellant: "From these observations what was your opinion as to his mental soundness?" the answer was, "I should pronounce him to be of unsound mind as I looked at him at the time." To other questions he said, "I saw no change that would give any better opinion of his condition," and that "he appeared worse at subsequent periods which might be attributed to increased age."

The examination of this expert by the counsel for the appellant will show that there was no restriction which prevented his telling all he knew in relation to the insanity of the testator as well as all he thought upon the subject. The appellant has no ground of complaint.

It is objected that witnesses were allowed to give their opinion

as to the business capacity of the testator. Evidence was received showing that he kept store, bought and sold goods, and supported his family. This was proper on the question of intellectual capacity to make his will.

But the learned counsel says, "the question at issue was one of topical insanity; whether the testator was not under the influence of an insane delusion respecting the character and conduct of his children," If so, the evidence could have done no harm. If his business capacity was shown to be good, proving what was not denied, might have taken time, but it could not have been productive of injury to the appellant..

There was no objection to the legatees stating that they had received their legacies. Whether the fact was shown by their receipts, the signatures not being questioned, or from their own lips, was entirely immaterial.

The condition of the testator's house was entirely immaterial to the issue and could not have any effect upon the result. A new trial will not be had in consequence of the introduction of irrelevant testimony, which could not influence the decision of the jury.

It is objected that Herbert T. Hewitt testified that he delivered a message from the appellee to the appellant that his father had fallen and injured himself. As the appellant had previously stated the fact of receiving the message, the confirmation of his testimony could not have harmed him.

The children of the testator had testified in the case in relation to the habits and mental condition of their father. The petition signed by them for his discharge from guardianship was received and was admissible to contradict their testimony on these subjects. It was admitted for no other purpose.

The statements of Chadbourn as to what was his usual course of business, he not remembering the circumstances attendant upon the execution of the will was properly received.

Motion and exceptions overruled.
Costs for the appellee.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred in the result.

SILAS HAWES *et al.*, county commissioners, petitioners for mandamus, *vs.* GEORGE W. WHITE.

Knox, 1876.—May 30, 1876.

County commissioners. Mandamus.

The county commissioners have a right of access to the records of the register of deeds and to the use of a portion of the office for the purpose of making the ledger index authorized by c. 227, of the Acts of 1874.

In case the register resists this right, the writ of mandamus is the proper remedy.

ON EXCEPTIONS.

PETITION FOR WRIT OF MANDAMUS, commanding the respondent, register of deeds, to permit the petitioners to have access to the volumes of index and of records, and the use of a part of the office, for the purpose of changing all such volumes of index to the form known as the ledger index, etc.

The respondent filed a motion to dismiss the petition:

I. Because the aforesaid petitioners had no lawful authority to demand of said White the use of a portion of the office of register of deeds, and access to the volumes of records of deeds, and the index thereof, for the purposes mentioned in said petition.

II. Because if the petitioners had lawful authority to change all the volumes of index now in the registry of deeds for said county of Knox, and to make new indexes of said volumes of records, as mentioned in said petition, and to employ the said Daniel P. Rose to perform said work, and the said petitioners and the said Rose were by the said White refused "access to the records, and the volumes of index, and refused to allow said work to be performed in said office of registry of deeds, and with violence and threats directed said Rose to leave said office," and did resist and prevent the performance of said work, as is more fully set forth in said petition, they have a remedy at law and mandamus will not lie.

The presiding justice ruled that mandamus was a proper process upon the facts set forth, and that the motion and reasons

thereon, furnished no sufficient answer, and ruled that the writ should issue; and the respondent alleged exceptions.

D. N. Mortland, for the respondent.

A. P. Gould & J. E. Moore, for the petitioners.

LIBBEY, J. By virtue of act of 1874, c. 227, the county commissioners of each county are authorized, if they deem it expedient, to change all volumes of index "now in the registry of deeds," to the form known as the ledger index, so that the same surnames shall be recorded together in each volume.

The petitioners, the county commissioners of Knox county, determined that it was expedient to change the indexes in the registry of deeds in that county to that form. They had legal authority to do so. They may perform the work personally, or employ some proper person to do it; and for that purpose have a right of access to, and of the use of the records of the registry of deeds, and a right to use a portion of the office of the register of deeds, where the records are kept, if not inconsistent with a proper discharge of the duties of his office by the register.

This right was resisted by the respondent, the register, on the ground that the petitioners had no such right under said act, and not because the exercise of that right as claimed, would be inconsistent with a proper discharge of the duties of his office by him.

The writ of mandamus is the proper remedy to require the respondent to permit the petitioners to exercise the rights aforesaid. The petitioners have sufficient interest in the subject matter to authorize them to petition for the writ.

Exceptions overruled.
The writ of mandamus to be issued as prayed for.

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

STATE *vs.* DEXTER HAYNES.

Knox, 1876.—November 27, 1876.

Arson.

The owner of a dwelling house who burns it in the night time, is not therefor liable to an indictment for arson, either by the common law, or by R. S., c. 119, § 1.

Nor, when the house is insured, is the servant of such owner, who sets fire to it at the instance of, and for the benefit of such owner, for the purpose of defrauding an insurance company, liable to an indictment under R. S., c. 119, § 1.

R. S., c. 119, § 1, provides: "Whoever willfully and maliciously sets fire to the dwelling house of another, or to any building adjoining thereto, or to any building owned by himself or another, with intent to burn such dwelling house, and it is thereby burnt in the night time, shall be punished with death." *Held*, that while this section in terms excludes only the owner of the dwelling house, it does also, by reasonable construction, exclude the servant of such owner.

ON EXCEPTIONS.

INDICTMENT for arson, under R. S., c. 119, § 1.

The evidence tended to show that the defendant, October 20, 1875, at Rockland, in the night time, set fire to the dwelling house of one Eleanor R. Ingraham, at her instance, and for her benefit, for the purpose of defrauding an insurance company; and that no person was in the house at the time. The presiding justice instructed the jury in substance that if they believed this evidence, it was sufficient to prove the defendant guilty of the crime charged in the indictment. The verdict was guilty; and the defendant alleged exceptions.

D. N. Mortland, for the defendant.

L. A. Emery, attorney general, for the state.

APPLETON, C. J. This is an indictment for arson, under R. S., c. 119, § 1, for feloniously, willfully and maliciously burning in the night time, the dwelling house of Eleanor R. Ingraham.

The evidence tended to prove, and the jury must have found, that the dwelling house of Mrs. Ingraham was burned in the night, under the following circumstances: The house was insured by

Mrs. Ingraham. Being insured, Mrs. Ingraham, her daughter, and the defendant conspired together to burn the house, for the purpose of obtaining the insurance. In pursuance of that object, Mrs. Ingraham left her house on a visit. The daughter was away and out at service. The house was prepared for burning by the removal of the furniture, and the defendant was left to set the fire. All these facts were admitted by the parties implicated, with a praiseworthy candor, and an apparent unconsciousness of any great moral turpitude in defrauding an insurance company, except the fact of burning by the defendant, which he denied, but which it is apparent by their verdict the jury must have found.

The question presented for determination is, whether upon the facts, the indictment can be sustained under R. S., c. 119, § 1, which is in these words: "Whoever willfully and maliciously sets fire to the dwelling house of another, or to any building adjoining thereto, or to any building owned by himself or another, with the intent to burn such dwelling house, and it is thereby burnt, in the night time, shall be punished with death."

Arson, by the common law, is an offense against the security of the dwelling house. The felony of arson or willful burning of houses, is described by my Lord Coke, cap. 15. p. 66, to be, "the malicious and voluntary burning the house of another, by night or by day." 1 Hale's P. C. 566. Our statute in § 1, makes the offense capital only when the burning is in the night, and there is some person lawfully in the dwelling house at the time. But the dwelling house burned must be the dwelling house of another.

In some states the common law has been modified, as in New York, where the willfully setting fire to, or burning any inhabited dwelling in the night time, is made arson, so that the offense may be committed by one's burning his own dwelling house. So in England the British parliament has so modified the law in relation to arson, as to render it immaterial whether the house burned be that of the offender himself, or of a third person. *Shepherd* v. *The People*, 19 N. Y. 537. Stat. 1 Vic., c. 89, § 3. *Reg.* v. *Ball*, 1 Moo. C. C. 30.

The house burned by the defendant, was the house of another. If Mrs. Ingraham had burnt her own dwelling, she would not

have been amenable to the penalties prescribed by § 1. The fire was set at her instance, and for her supposed benefit. The servant obeying, cannot be more guilty than the master commanding. The precise question before us arose in Tennessee, in *Roberts* v. *State*, 7 Cold. 359, and it was there held, that it was not arson to procure one's own house to be burned, and that the guilt of the agent was only co-extensive with the guilt of the principal. It is not arson for a man to burn his own house, or to procure it to be done, for the purpose of defrauding an insurance company. Nor is the agent by whom it is done, guilty of a greater offense than his principal. "An agent," says Hawkins, J., in the case last cited, "who commits an act, can, upon general principles, be guilty of no higher nor greater offense, than the principal would have been had he committed the act himself."

The ruling of the presiding justice was adverse to the views above expressed, and was erroneous.

It becomes, therefore, unnecessary to consider the other questions raised by the exceptions. *Exceptions sustained.*

WALTON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

GEORGE A. LYNDE *vs.* CITY OF ROCKLAND.

Knox, 1876.—December 13, 1876.

Town.

No action can be maintained against a city or town for the unlawful acts of its health committee or other officers in taking possession of a house and using it for a small pox hospital without the consent of the owner and without legal authority.

If the acts and facts specifically alleged in a declaration in case against a city or town show that the ground of action is a tort by its officers in the performance of a public duty imposed by the laws of the state, for a failure or misfeasance in which no statute gives a right of action against the corporation the declaration will be bad on demurrer.

For the use of a building as a small-pox hospital under a contract between the municipal officers and the owner, or where it is impressed under a warrant from two justices of the peace in accordance with R. S., c. 14, the owner should sue the corporation in assumpsit.

On report.

Case, set out in the declaration as follows:

"For that on the twenty-eighth day of May, 1872, the plaintiff was the owner and proprietor of a new, spacious and commodious hotel, situated in Rockland, in the county of Knox, called the Lynde hotel, and was doing therein a large, lucrative and increasing business with great profit to himself in accommodating a large traveling public from all parts of the country as guests, and on said twenty-eighth day of May, aforesaid, the said defendants by their health committee, and their agents and officers of the said city of Rockland duly authorized therefor, took possession of said hotel against the wishes and remonstrance of the said plaintiff and maintained the control of said Lynde hotel for the space of thirty days, through and during said time used it for a pest house and hospital for divers persons sick and infected and believed by them to be sick and infected with the infectious and terrible disease, called small pox, and maintained and kept said persons so infected and sick with the small pox in the rooms of said hotel thereby endangering the lives and health of the said plaintiff, his wife and family, and inmates of said hotel, and put them in imminent and immediate peril and great terror and destroyed the business, reputation and character of said hotel for all time to come.

And the plaintiff further says that at no time was there any person in his said hotel so sick with said disease but could have been removed therefrom without any danger to his or their health, and that the defendants had due and proper notice of the existence of said small pox in his hotel as soon as it came to the knowledge of him the said plaintiff and he urged the defendants to remove said persons if sick with said disease without delay, and that said defendants refuse so to do; and at the time the defendants took charge of said persons in said hotel for the purposes aforesaid, the said defendant put up a red flag at the corner of said hotel and warned the public in the most public and extensive manner that said hotel contained persons in it sick with said disease and placed a guard around said hotel to prevent people from entering the same; and that said defendants used and destroyed a large amount of personal property in and around said hotel, and to the furniture and

rooms of said hotel. And the plaintiff avers that he was put to great expense in cleaning and placing said hotel in suitable condition to receive guests, from the effects of said small pox. The said defendants wholly neglected to do so, nor did they in any manner leave said hotel safe for the plaintiff, his family or future guests.

And the plaintiff further says that the damage to his business from that time to the present, and in the future, to said hotel, and for the use of the same by the said defendants as a pest house, and for the injury, suffering and expense of himself and family amounts to thirty thousand dollars, to the damage of the said George A. Lynde (as he saith) the sum of thirty thousand dollars."

Upon the reading of the writ, a question arose whether the action could be maintained, even if all the facts alleged were proved to be true; whereupon the case was taken from the jury by consent and submitted to the full court to determine the question of law. If the action can be maintained upon proof of all the facts contained in the declaration, then it is to stand for trial; otherwise a nonsuit is to be entered.

J. Baker, for the plaintiff.

The only question for the court to decide is, "whether the action is maintainable, if all the facts alleged were proved."

I. The title of the plaintiff to the hotel property, his business and the nature of the damages he has sustained are all set out in full in the writ; and we presume no question will be made on these points.

II. The only other question is, whether the defendants are liable under the circumstances set forth in the writ. These allegations are that "the defendants by their health committee and their officers and agents duly authorized therefor, took possession of said hotel and held it thirty days, and used it as a pest house and hospital."

The words, "health committee and the officers and agents of the city," would include the health committee, the municipal officers, or a board of health, either and all of them. They were "duly authorized therefor." Then the question is reduced to this, can any officers of the city, acting within the scope of their official duties, as defined by the laws of the state, bind the city to pay rent or

damages or both, by taking possession of private buildings for a hospital for small pox patients.

We maintain that they can, under R. S., c. 14, §§ 1, 24, 29 and 30.

All the cases that have been decided in this state involving rights in cases of small pox, are grounded on the principle that such liability exists; and the reason why such suits against cities and towns have not prevailed, was because the officers of the cities and towns exceeded their authority. *Mitchell* v. *Rockland*, 41 Maine, 363. *Same* v. *Same*, 45 Maine, 496. *Same* v. *Same*, 52 Maine, 118. *Pinkham* v. *Dorothy*, 55 Maine, 135, 138. *Kellogg* v. *St. George*, 28 Maine, 255. *Kennebunk* v. *Alfred*, 19 Maine, 221.

The allegations in this writ, if proved would show that the city authorities and officers found persons too sick to be removed and so kept them where they were in the hotel thirty days, as a hospital.

If there is any inconsistency in the declaration, it is amendable, and the case should be sent back to the trial court that the amendment may be made and the case tried.

It will be very remarkable if city authorities, acting within the scope of their official duties as defined by law, can take private property for public uses without any compensation, in direct violation of the constitution; for it is very certain, officers of the city, if they keep within the law, are not personally liable.

A. P. Gould & J. E. Moore with *T. P. Pierce*, city solicitor, for the defendants.

This is an action of tort. There is no allegation of a promise. If maintained at all, it must be *secundum allegata*. It is presented upon a parol demurrer; the presiding justice considering that the action could not be maintained if all the allegations in the writ were proved, and that therefore it was not worth while to put it to trial.

The action is based upon charges of tortious, or wrongful acts of the health committee of the city; and the question is, whether if these allegations are true, the city can be held accountable in an action for damages.

The action is based in a misconception of the character of a health committee of a city. They are not the agents or servants of the city, but of the state at large, or the public.

Though chosen by the city, it is not for the special benefit of that particular municipality; but their office is public, and their duties are to the community at large. They are elected by the city in obedience to a statute of the state to perform a public service, in which the town or city has no peculiar interest, and from which it derives no special benefit in its corporate capacity. Such an officer cannot be regarded as the servant or agent of the city; and the defendants cannot, therefore, be held liable, either for the misconduct of the committee, whether willful or otherwise, or for their negligence or want of skill in the performance of their duty. *Mitchell* v. *Rockland*, 41 Maine, 363. *Same* v. *Same*, 45 Maine, 496. *Same* v. *Same*, 52 Maine, 118.

The law on the precise question now to be decided, is fully and clearly stated in the last report, (52 Maine, 118) commencing on p. 121.

The reasoning and authorities cited on pp. 121, 122, 123 and 124, are a complete answer to the declaration in the writ in this case.

It is there held that neither the relation of master and servant, nor that of principal and agent, exists between the health committee or police officers chosen by a town or city in pursuance of the requirements of the statute, and the municipal corporation to which they owe their election; that the duties of a health committee are public, and not to the inhabitants of that city alone, and not to the city in any respect in its municipal capacity; and that no action can be maintained against the city for any injuries caused by the negligence, or the tortious or unlawful acts of the committee. The committee may be individually liable for such acts, but where there has been a neglect of a public duty by such a public officer, for which no right of action has been provided by statute, the party aggrieved can maintain no action against the municipal corporation by which the officer is appointed. *Walcott* v. *Swampscott*, 1 Allen, 101. *Hafford* v. *New Bedford*, 16 Gray, 297. *Buttrick* v. *Lowell*, 1 Allen, 172.

Municipal corporations created by the legislature for purposes

of public policy, are subject by the common law to an indictment for the neglect of duties enjoined upon them, but are not liable to an action for such neglect unless the action is given by some statute. *Mower* v. *Leicester*, 9 Mass., 247. *Adams* v. *Wiscasset Bank*, 1 Maine, 361. *Farnum* v. *Concord*, 2 N. H., 392. *Bigelow* v. *Randolph*, 14 Gray, 541. *Eastman* v. *Meredith*, 36 N. H. 284. *Brown* v. *South Kennebec Agricultural Society*, 47 Maine, 275.

No words are used to signify that the defendants promised, or in any manner undertook to pay for the use of the hotel after having first been taken possession of by lawful authority.

BARROWS, J. The case is presented upon a report with this stipulation: "if the action can be maintained upon proof of all the facts contained in the declaration, then it may stand for trial; otherwise, a nonsuit is to be entered." The plaintiff insists that the action is maintainable upon the strength of the allegation that "the said defendants by their health committee, and their agents and officers of the said city of Rockland, duly authorized therefor, took possession of said hotel against the wishes and remonstrance of the said plaintiff, . . . and used it for a pest house and hospital" for small pox patients; that the question is whether any of the officers of a city, acting within the scope of their official duties as defined by the laws of the state, can bind the city to pay rent or damages by taking possession of a house and using it for a hospital for small pox patients; and that under various provisions of R. S., c. 14, they have that power.

But in order to reach his position the plaintiff's counsel ignores the specific allegation in the writ, of facts which preclude us from considering the case as one of contract between the plaintiff and the city acting through its lawfully authorized agents and officers, or as one in which the plaintiff's house was lawfully impressed for use as a hospital by application to two justices, so as to give the owner a right to the "just compensation to be paid by the city or town," under the provisions of the chapter to which he refers.

If the plaintiff had a case which would authorize a recovery from the city upon either of these grounds, he should have sued in

assumpsit with the proper averments to establish the legal liability of the city to pay the rent or just compensation.

But it is impossible to construe the declaration before us except as one of trespass on the case in which the plaintiff seeks to hold the city responsible for alleged wrongful acts of the officers elected by it to perform certain duties imposed by the laws of the state. That no action against the city can be maintained upon such facts as are here alleged must be regarded as settled law in this state. The reasons and authorities are so fully set forth in *Mitchell* v. *Rockland*, 52 Maine, 118, 121, 125, that further discussion would be superfluous. See also Dillon on Municipal Corporations, § 772.

The allegation that the acts of the health committee and officers of the city were "against the wishes and remonstrance" of the plaintiff puts an end to any pretense of a contract between the parties.

The averments "that at no time was there any person in his said hotel so sick with said disease but could have been removed therefrom without any danger to his health," and that the plaintiff "urged the defendants to remove said persons if sick with said disease without delay," if established, would show that the officers were acting in excess of any authority conferred upon them by chapter 14; because no power is given by that chapter to the officers of a town or city to impress any building for a hospital—that power being conferred only upon two justices of the peace.

Section twenty-nine relates only to a provision to be made by the municipal officers, in the ordinary mode, by contract. The declaration in the plaintiff's writ precludes the idea of any act or contract of the officers of the city for or upon which the city could be liable.

Herein the case differs from *C. & O. Canal Corp.* v. *Portland*, 62 Maine, 504, in which the defendants were charged with doing, by their servants and agents, acts which for aught that appears in that declaration might have been done in the assertion of some supposed corporate right, and for the doing of which, under the direction of the municipal officers, the corporation might properly be held responsible according to the doctrines laid down by Judge Dillon, *ubi supra*, and by Shaw, C. J., in the case of *Thayer* v. *Boston*, 19 Pick, 511.

The distinction between this latter case, where the city claimed to be owners in fee of the land upon which the acts were done of which the plaintiff complained, and such cases as *Mitchell* v. *Rockland*, and the case at bar, is too well marked to require further discussion here.

Plaintiff's counsel suggests an amendment eliminating certain averments incompatible with the maintenance of the action against the city. To allow it would be contrary to the stipulation upon which the case is reported. The proposition comes too late. If such an amendment were consistent with the actual facts, it should have been proposed when the case was before the court at *nisi prius*. *Plaintiff nonsuit.*

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

OLIVER D. BROWN *et al. vs.* ALDEN U. BROWN.

Knox, 1876.—December 23, 1876.

Deed.

To constitute a delivery of a deed, the grantor must, by act, or word, or both, part with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed, and pass to his grantee.

The commitment of a deed to a third person, with the reservation of the right on the part of the grantor to withdraw it at any time before his death, and in case it was not so withdrawn, to be retained until the death of the grantor, and then to be delivered to the grantee, is no legal delivery, and will pass no title to the grantee.

ON REPORT.

WRIT OF ENTRY, to recover two-thirds part of a lime rock quarry, and damages for rock taken out by the defendant, dated February 23, 1875.

Plea, general issue.

The plaintiffs and the defendant, are brothers, and only surviving children of Oliver B. Brown, who was the owner of the premises for more than twenty years, and until he died, November 15, 1873, unless they were conveyed by the deed to the defendant, hereinafter mentioned.

Oliver B. Brown made four separate deeds of real estate, one to each of his three living children, and one to the two sons of his deceased daughter, each nominally for a similar consideration. He then made a will which provided, after the payment of his debts and funeral expenses, and a legacy of $100, to each of his two grand-daughters, and one dollar to each of his two grand-sons, that his three sons should be residuary legatees, and that the defendant should be his executor.

The will was probated the third Tuesday of December, 1873, and the legacies mentioned therein were paid in January, 1874; and it was admitted that the defendant had taken lime rock from the quarries, as alleged in the writ.

The defendant offered in evidence, deed from Oliver B. Brown to the defendant, Alden U. Brown, dated December 21, 1869, and recorded November 29, 1873. Plaintiffs objected to the deed, and denied that it was legally delivered; they admitted that it was duly signed and acknowledged. Defendant also put in deed, Oliver B. Brown to John Brown, dated January 31, 1866, and recorded November 26, 1873. Also deed from Oliver B. Brown to Oliver D. Brown, dated December 13, 1861, and recorded November 24, 1873.

It was admitted that these three deeds were delivered by Oliver B. Brown to Charles C. Lovejoy, December 31, 1869, together with the will referred to, with written instructions in respect to their delivery, as follows:

"To Charles C. Lovejoy:

Admonished by the infirmities of age and the events transpiring around me that this is not my home, or continuing city, I have thought proper to make arrangements for the final distribution of my estate to and among my family and heirs-at-law, while I have strength and capacity so to do, and with your consent herewith commit to you for safe keeping and delivery, four deeds of certain real estate, one to and for each of my sons, Alden U. Brown, John Brown, and Oliver D. Brown, and one to and for my grandsons, Oliver H. Whitney, and Charles G. Whitney, and also my last will and testament. In doing this I am not unmindful that in this world of change, a state of things may arise to make some

alteration in my arrangements both desirable and proper, and therefore expressly reserve the right at any time to withdraw said papers, any or all of them for that purpose from your care and keeping. But in the event of their being permitted to remain in your possession uncalled for by me during my life, you are hereby requested and directed without further advice from me, immediately upon my decease in your life time, to deliver said deeds to my said sons, to each one the deed for him intended, and to my said grandsons the deed for them made and designed, and also to place in the hands of my said son, Alden U. Brown, my last will and testament aforesaid, that the same may be proceeded with according to law. Oliver B. Brown.

Rockland, December 31, 1869.

Witness: William Thompson."

It was admitted that no other delivery of either of the deeds was made by the grantor in his life time, and that Lovejoy, December 31, 1869, took possession of the deeds and will, and the paper containing the written instructions, and retained them until after the decease of the grantor, whereupon he delivered the deeds to the several grantees who received them, and caused them to be recorded, they not having been recorded in the life time of the grantor; and that he delivered the will to the executor, who caused the same to be duly probated.

The deed to the defendant covers the premises described in the writ.

"By consent of parties the case was withdrawn from the jury, and is submitted to the full court to determine whether there was a legal delivery of the deed from Oliver B. Brown to the defendant, so that the title passed to him; if there was not, the defendant is to be defaulted; and if the court decides that there was a legal delivery, the construction of the deed is to be determined, and the question decided whether the plaintiffs have any interest in the premises, and if so, what, and such judgment to be rendered as the law upon the facts reported, requires, and the parties agree that the amount and value of the lime rock taken by the defendant, and the damages shall be assessed by Francis Cobb, or some other party to be agreed upon by them, and that the case shall be remanded for that purpose.

A. P. Gould & J. E. Moore, for the plaintiffs, contended that the deed of December 21, 1869, was not duly delivered to the defendant, nor to any person for him.

T. P. Pierce, for the defendant, contended that the delivery was sufficient; and even if it were not, that as between the parties, the plaintiffs having accepted and placed upon record their deeds delivered to the same depositary, at the same time, under the same circumstances, before the defendant caused his deed to be recorded, and having suffered him to take possession of the quarry, and operate it without objection for a long time, were estopped to deny the validity of the defendant's title. *Smith* v. *Gould*, 34 Maine, 443. *Hyde* v. *Baldwin*, 17 Pick. 303. *Dewey* v. *Bordwell*, 9 Cow. (N. Y.) 66.

VIRGIN, J. It is admitted that the deed from Oliver B. Brown to the defendant was signed and acknowledged, but the delivery is denied. All the facts pertaining to the delivery are also admitted; and the question submitted is whether they amount in law to delivery. If they do not, "the defendant is to be defaulted."

The deed in question (with three others to as many named grantees, together with his last will and testament) was committed by the grantor to one Lovejoy "for safe keeping and delivery" with written instructions in which is found the following language. "I am not unmindful that in this world of change, a state of things may arise to make some alteration in my arrangements both desirable and proper, and therefore expressly reserve the right at any time to withdraw said papers, any or all of them for that purpose from your care and keeping. But in the event of their being permitted to remain in your possession uncalled for by me during my life, you are hereby requested and directed without further advice from me, immediately upon my decease in your life time, to deliver said deeds" to the respective grantees, &c.

The real original design and intention of the father in sealing the deeds to his children and grand-children, and committing them to the depositary, are so clearly expressed as to exclude all cavil. Generally the law lays great stress upon the intention of parties as expressed in deeds and wills; and when it has once ascer-

tained from the terms used, the intention, it will lend its aid in executing the expressed will of the parties. But the intention of an owner of property in his attempted act of transferring it is not necessarily and always supreme. The law has prescribed certain plain rules to be observed in the execution of such important instruments as those by which the title to real property is transferred; and whatever courts may sometimes have done in their zeal to carry into effect the intention of parties, the law itself does not permit its salutary rules to be broken or bent to meet the exigencies of ignorance or negligence; deeming it better on the whole, that the intention of a party in disposing of his property should occasionally fail, than that its important and firmly established rules made and applied for the benefit of all be overridden.

It is elementary law that the delivery of a deed is as indispensable as the seal or signature of the grantor. Without this act on the part of the grantor, by which he makes known his final determination to consummate the conveyance, all the preceding formalities are impotent to impart vitality to it as a solemn instrument of title. No formulary of words or acts is prescribed as essential to render an instrument the deed of a person sealing it. It may be done by acts, or words, or by both, by the grantor himself, or by another by the grantor's authority precedent or assent subsequent, with the intent thereby to give it effect as his deed; to the grantee personally, to another authorized by the grantee to accept it, or to a stranger with a subsequent ratification, although it do not reach the grantee until after the death of the grantor. Shep. Touch. 57, 58. *Porter* v. *Cole*, 4 Maine, 20, 25, 26. *Chadwick* v. *Webber*, *id.* 141, 142. *Woodman* v. *Coolbroth*, 7 Maine, 181. *Turner* v. *Whidden*, 22 Maine, 121. *Dwinal* v. *Holmes*, 33 Maine, 172. *Hatch* v. *Bates*, 54 Maine, 136, 139.

The defendant has cited some of that numerous class of cases holding it a sufficient act of delivery on the part of the grantor to place his deed in the hands of a stranger for the use of the grantee without reserving any right to recall it, to be delivered to the grantee on the decease of the grantor. The cases which are most frequently cited, perhaps, are *Wheelright* v. *Wheelright*, 2 Mass. 447, and *Foster* v. *Mansfield*, 3 Met. 412; which have frequently

been approved by various courts in this country, and by the same court, and in the late case of *Mather* v. *Corliss*, 103 Mass. 568.

But we have no present occasion either to admit or deny the soundness of the proposition, on account of one element contained therein, and not found in the question before us, which we deem essential, and the turning point in this case. For we consider it indispensable to the delivery of a deed, that it shall pass beyond the control or dominion of the grantor. Otherwise it cannot come rightfully within the power and control of the grantee. Their interests are adverse, and both cannot lawfully have control over the deed at the same time. The grantee does not necessarily acquire the right the moment it leaves the possession and control of the grantor, but he cannot have it before. Neither can the grantor transfer his property after his decease by deed. The statute of wills or of descent then govern all property not disposed of during the lifetime of the owner. To be sure a freehold estate may be conveyed to commence *in futuro*, when it is so declared in the deed. *Wyman* v. *Brown*, 50 Maine, 139. And the grantor may "reserve full power and control over the land thus conveyed during his natural life." *Drown* v. *Smith*, 52 Maine, 141; but not over the deed.

Leaving out all question of acceptance by the grantee, we think that so far as the grantor is concerned, any acts or words, either or both, whereby he in his life time parts with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed and pass to the grantee, constitute a delivery of a deed of conveyance; and that nothing less will suffice. Among the numerous authorities holding that the parting with the dominion over the deed is essential, is the often cited case of *Doe, &c.* v. *Knight*, 5 Barn. & Cress. 671, (11 E. C. L. 351,) which is cited, with approbation, to this especial point by the U. S. supreme court in *Tompkins* v. *Wheeler*, 16 Pet. 106, 119. The application of the principle to the facts in the insurance case of *Xenos* v. *Wickham*, 14 C. B., N. S. 435, 470, (108 E. C. L. 861) does not modify the law. So Mr. Justice Field, in *Younge* v. *Guilbeau*, 3 Wall. 636, says, "To constitute delivery the grantor must part with the possession of the deed or the right to retain it."

Passing over the earlier cases in Massachusetts, the court of that commonwealth, in *Hawkes* v. *Pike*, 105 Mass. 560, 562, say: "It must appear that the grantor parts with the control and possession of the instrument," &c. And in the very late case of *Shurtleff* v. *Francis*, 118 Mass. 154, where the assignments of certain mortgages were handed by a father to his son, at the date of their respective acknowledgments, with instructions "in case he died before the son, to put them on record at once," they being deposited by the son in a safe, to which the father had access equally with the son, and the father continuing to collect the interest on the unindorsed notes secured thereby, the court say: "It is clear that as to the mortgages in question, the testator regarded and treated them as his property as much after as before the assignments, and that the son claimed no control or dominion over them before his father's death. Upon the whole evidence we are satisfied the purpose of the transaction was that the transfer of the property should not take effect until after his (father's) death. As this purpose cannot be carried into effect consistently with our statute of wills, it follows that the assignments were to be treated as nullities, and the property covered by them is to be disposed of under the residuary clause of the will."

The same result is reached in New Hampshire. In *Shed* v. *Shed*, 3 N. H., 432, a father placed his deed in the hands of a depositary to be delivered to his sons upon his decease, in case he should not otherwise direct; and died without any further directions. The court held the delivery good. But in *Cook* v. *Brown*, 34 N. H., 460, after a very elaborate discussion and thorough examination of authorities, *Shed* v. *Shed*, was expressly overruled, and the court held, that where a deed is placed in the hands of a depositary to be delivered to the grantee upon the death of the grantor, provided it is not previously recalled (which the grantor expressly reserves the right and power to do, at any time,) it is not a good delivery. The court say: "To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing; it is merely ambulatory and gives no title. It is nothing more than a will defectively executed, and is void under the statute. . . So long as it is in the

hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it." The same court have re-affirmed this decision in *Johnson* v. *Farley*, 45 N. H. 505, 510; *Bank* v. *Webster*, 44 N. H. 264, 269; *Baker* v. *Haskell*, 47 N. H. 479.

In Wisconsin, in *Prutsman* v. *Baker*, 30 Wis. 644, Dixon, C. J., after reviewing the authorities, says: "To constitute delivery, the grantor must devest himself of all power and dominion over the deed;" and that in that case, there was in law no delivery of the deed during the life time of the grantor, for the reason that the grantor intended to, and did reserve complete dominion and control over it during his life." See also authorities cited in these cases, and also in 3 Wash. Real Prop. (4th ed.) 282; Greenl. Ev., § 297, and notes; also note 2, by Greenleaf, in 2 Greenl. Cru. 334.

We are aware that *Belden* v. *Carter*, 4 Day, (Conn.) 66, *Morse* v. *Slason*, 13 Vt. 296, 307, have come to a different conclusion. We do not find them expressly overruled by the respective courts which decided them. Perhaps *Ruggles* v. *Lawson*, 13 Johns. (N. Y.) 285, may be considered another authority upon the same side, although the precise question involved here was not raised there. We feel certain, however, that they are opposed to the large current of authority; and our opinion is, that they cannot be defended on principle.

In the case at bar, the ancestor having expressly reserved the right, at any time, to recall the deed, there was no moment of time during his life when he had parted with the right of dominion over it; and it was therefore never delivered. The result is, the property covered by the deed is, as in *Shurtleff* v. *Francis*, *sup.*, to be disposed of under the residuary clause of the will; and in accordance with the terms of the report, the entry must be

Defendant defaulted.
Damages to be assessed as stipulated in report.

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

STATE v. LEVI M. ROBBINS and OLIVER OTIS.

Knox, 1876.—January 10, 1877.

Indictment.

When the statute makes two or more distinct acts connected with the same transaction, indictable, each of which represents a stage in the offense, they may be coupled in one count.

Thus: An indictment which avers that the defendant did compose and publish, and procure to be composed and published, is not bad for duplicity.

The insertion of the word "unlawfully," in an indictment, though not part of the statute description of the offense, does not vitiate it. It is to be regarded as surplusage.

In describing a statute offense in an indictment, it is sufficient, if words equivalent in meaning to those in the statute, or words of more general signification are used.

Thus: Where the word "willfully" is used in the statute, it will be sufficient if the word "maliciously" is employed in the indictment.

Malice implies willfulness.

ON EXCEPTIONS.

INDICTMENT, for libel.

The defendants demurred; the demurrer was overruled by the court; and the defendants alleged exceptions.

By consent of the county attorney, the defendants, in the event that the demurrer is overruled by the full court, shall have the right to plead anew.

The alleged errors in the indictment are stated in the arguments and in the opinion.

A. S. Rice & O. G. Hall, for the defendants.

I. No count in the indictment sufficiently describes a libel.

The statute sets out specially what acts constitute the offense, and covers the whole ground of the common law, which is therefore, by necessary implication repealed, and the offense becomes purely statutory. R. S., c. 129, § 1. *Com.* v. *Clap*, 4 Mass. 163, 167. *Bartlet* v. *King*, 12 Mass. 537, 545. *Towle* v. *Marrett*, 3 Maine, 22, 26. Bishop Stat. Crimes, § 389, *et seq.* *Com.* v. *Cooley*, 10 Pick. 37, 39.

An indictment upon a statute must state all the circumstances which constitute the definition of the offense in the act, so as to

bring the defendant precisely within it; and the description must be in the substantial words of the statute, or their equivalents in meaning. *State* v. *McKenzie*, 42 Maine, 392, 393. Bishop on Crim. Pro., § 360. Wharton's Crim. Law, § 364.

The statute defines a libel to be "the malicious defamation of a living person, made public by any printing, writing, sign, picture, representation, effigy, tending," etc.

The indictment alleges that the defendants "did compose and publish, and cause and procure to be composed and published in a certain public newspaper called the Rockland Opinion," which phrase is not the equivalent in meaning of any of the words set forth in the statute. *State* v. *Taylor*, 45 Maine, 322.

The statute further provides, in section two, for the "willful" publication of a "malicious" libel. Both words, therefore, are descriptive of the offense. But the indictment in each count, charges the offense to have been committed "unlawfully and maliciously," which are not equivalent in meaning. *State* v. *Hussey*, 60 Maine, 410.

The indictment is evidently drawn under the well known common law precedents, the county attorney not reflecting that they might be inapplicable to a statutory offense.

II. If the offense is sufficiently described, the indictment is bad for duplicity.

It charges in each count, that the defendants "did compose and publish, and cause and procure to be composed and published" the various libels recited.

At the common law it is not perfectly clear that the writer of libelous matter could be indicted, if he was not concerned in the publication. The familiar form of indictments of which this is a copy, was not open to the objection of duplicity, because but one offense was charged, which was proved by the publication alone, which was of the essence of the offense. 3 Greenl. on Ev., § 169.

But under the second section of our libel act, there are two offenses created: 1. The making, composing, dictating, writing or printing a libel, or directing or procuring it to be done. 2. The willfully publishing or circulating it, or knowingly and willfully aiding in doing either.

It is impossible to give any force or meaning to the first clause of the section without applying it expressly to one who has composed a libel, but has not been concerned in the publication; while the second clause applies to the publisher, who may or may not have been the composer.

The statute thus in express terms, creates two distinct and substantive offenses, where it is very doubtful if more than one existed before.

Under this statute the formal allegation in the common law precedent "composed, written and printed," which it was absolutely unnecessary to prove, becomes descriptive of an offense entirely distinct from the misdemeanor described in the second clause, and applicable only to a different class of offenders; thus the old precedent, supposed to set forth a single crime, now describes two.

The offenses created by this statute are of the same grade as well as nature. One cannot be included or merged in the other. They were intended for different people, and while one person may be convicted, on a proper indictment for both, he may also be convicted of either, although he may not have committed the other.

Take the case at bar as an illustration. There are two defendants, one the editor, the other the publisher of the paper. Is it not clearly competent for the jury, under this statute, to convict Mr. Otis, the editor, of the composition of the libels, and acquit him of the publication, if it should appear that he was not concerned in that; and also convict Mr. Robbins, the publisher, of the publication, and acquit him of the composition, if the testimony should so warrant?

The result would be conviction for two independent offenses joined in the same count. Such joinder is bad for duplicity. *State* v. *Smith*, 61 Maine, 386, 389.

L. A. Emery, attorney general for the state, after arguing the points raised by the exceptions, closed thus:

"Formerly the rule was, that on overruling a demurrer to an indictment for felony, the judgment should be to answer over,

while to an indictment for a misdemeanor, the judgment was final, more recently the latter rule has been adopted in all cases.

In this case the county attorney has agreed that if the 'demurrer is overruled by the full court,' the defendants shall have the right to plead over; apparently this was done without the consent of the court; it is doubted whether the county attorney had the power so to agree, and whether the judgment should not be final."

APPLETON, C. J. This is an indictment for a libel to which the defendants have demurred.

The indictment is upon R. S. 1871, c. 129, § 2, which is in these words: "Whoever makes, composes, dictates, writes or prints a libel; directs or procures it to be done; willfully publishes or circulates it, or knowingly and willfully aids in doing either, shall be punished by imprisonment less than one year, and by fine not exceeding one thousand dollars."

The allegation in the indictment in each of the numerous counts is, that the defendants "unlawfully and maliciously did compose and publish, and cause and procure to be composed and published in a certain public newspaper, called the Rockland Opinion, a certain false, scandalous, and malicious and defamatory libel of and concerning," &c.

I. The objection is taken that the count is double and bad on demurrer. The true rule is thus stated by Wharton in his American Crim. Law, § 390: "When a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count." Here but one offense is charged. "An indictment," says Metcalf, J., in *Commonwealth* v. *Twitchell*, 4 Cush. 74, "which avers that the defendant 'did write and publish, and cause to be written and published,' a malicious libel, is not bad for duplicity. 2 Gabbett Crim. Law, 234. 3 Ch. Crim. L. (4th Am. ed.) 877, *et seq.*"

II. The word "unlawfully" is not in the statute, but its insertion in the indictment does not vitiate it. If the fact as stated be illegal, it is unnecessary to say it is unlawful. If it be legal, the stating it to be unlawful, will not make it so. The only case

when it may be necessary to use it, is where it is a part of a description of a statute offense; but it is not so here. It may be rejected as surplusage.

III. It is undoubtedly the safer course to follow the language of the statute in describing the offense charged in the indictment. But it has been repeatedly held that words equivalent in their meaning to those in the statute may be used. So, the use of words of more general signification, but clearly including in their meaning all that is embraced in the language of the statute has received in repeated instances, judicial sanction. But wherever there is a change of phraseology, and a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than, and includes it, the indictment will be sufficient. Thus, if the word knowingly be in the statute, and the word advisedly be substituted for it in the indictment, or the word willfully in the statute, and maliciously in the indictment, the words "advisedly" and "maliciously" not being in the statutes respectively, the indictment would be sufficient. 1 Wharton Am. Crim. Law, § 376. *Rex* v. *Fuller*, 1 B. & P. 180.

The words of the statute are not used. The indictment is under that portion of the section which prohibits the willfully publishing or circulating a libel. The indictment alleges a malicious publishing, not a willful publishing of the libel in question. A man may do an act willfully, and yet be free of malice. But he cannot do an act maliciously, without at the same time doing it willfully. The malicious doing of an act includes the willful doing of it. Malice includes intent and will.

This indictment, it should be borne in mind, is not for knowingly and willfully aiding in publishing a libel, but for willfully publishing or circulating it. *Demurrer overruled.*

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

JOHN O. TEELE *vs.* EBENEZER OTIS.

Knox, 1874.—March 3, 1877.

Principal and agent.

When an agent duly authorized acts for another, who is named, in a matter in which he has no personal interest, he is not liable.

The remedy against one who falsely represents himself as agent for and who contracts in the name of and for another, is by an action on the case for deceit.

ON REPORT.

ASSUMPSIT for attorney's fees in the defense of four actions against the defendant's son, Ebenezer Otis, jr., in the superior court for suffolk county, Massachusetts, continued four terms and defaulted. $120.

The plaintiff put in evidence the following letter from the defendant:

"Rockland, December 10, 1870.

J. O. Teele, Esq.,

Dear Sir: Having just returned from an absence of a few days, yours of the 3rd inst. is this moment received, and in reply will say, please attend to the suits against my son and prevent, if possible, judgment being taken on any of them at this term. To the suit of Potter he has a perfect defense, but needs a continuance as his witnesses are now at sea. In the suit Samuel C. Loud for owners of Schooner Grace Clifton, 'In action of contract,' I have to say there is no cause of action as the owners owe my son on ship's account some four hundred dollars, a part of which sum Samuel Watts acting agent for owners proposed to pay him in final settlement, which my son could not in justice to himself accept. In regard to the suit of Hillham, Loud & Co. *vs.* my son, he informed me that they were claiming more than was due them as his bills and receipts would show; and on leaving he desired me to settle with them. The parties in the other suit have the funds in hand and a continuance will not prejudice their interest.

Our December term of court commences here on Tuesday next and will probably continue some two or three weeks, and I cannot

leave until it closes, when I am going to Boston to settle the demands of all persons there having claims against my son. On my son leaving home for the winter, he wished me to attend to those suits and I wrote L. W. Howes, esq., attorney at law, at Boston, to attend to them and supposed that he would do so; but from some cause he has been prevented, and but for the kind suggestion of Messrs. Allison & Mason to you and your kind interposition in the matter, much loss and damage might have occurred.

Please let me hear from you on receipt of this and very much oblige, Very truly yours, etc.,

Ebenezer Otis."

Further evidence tended to show that the plaintiff charged the services to the defendant on his account book; that he wrote other letters to the defendant which were unanswered, and for that reason the four actions were defaulted without trial; that in one of the actions a default was taken for a less sum than the declaration called for.

After the death of Capt. Otis, at sea, insolvent, this action was commenced against his father, this defendant.

A. P. Gould & J. E. Moore, for the plaintiff.

D. N. Mortland & G. M. Hicks, for the defendant.

APPLETON, C. J. Ebenezer Otis, jr., the son of the defendant was sued in Boston in divers suits. Messrs. Allison & Mason, who were summoned as his trustees, advised the plaintiff of these suits who at once wrote to the defendant informing him of their pendency.

The defendant, December 10, 1870, answered the plaintiff's letter and after acknowledging its receipt, wrote as follows: "Please attend to the suits against my son and prevent, if possible, judgment being taken on any of them at this term." In a subsequent portion of the letter he says, "on my son leaving home for the winter, he wished me to attend to those suits and I wrote to L. W. Howes, esq., attorney at law, at Boston, to attend to them and supposed he would do so; but from some cause he has been prevented and but for the kind suggestion of Messrs. Allison & Mason to you and your kind interposition in the matter, much

loss and damage might have occurred. Please let me hear from you on receipt of this."

The parties never met. The above letter is the only one from the defendant.

The plaintiff was aware that the defendant was acting for his son. The son has since deceased. Is the defendant liable as principal?

When the principal is known and the agent is acting for such principal and not for himself and has full authority so to act, he does not become personally responsible. When the agent names his principal, the principal is bound, not the agent. "It is also a rule that he who acts on account of a friend, or for a person to be named, is not bound personally and acquires nothing for himself, when he names the person for whom he has acted or whom he has pointed out." Such is the rule of the civil law as stated by Story in his work on Agency, § 262, n. 2. And such we regard the common law.

The defendant never promised to pay. He was an attorney at law and requested the plaintiff to attend to certain business for another in which he had no interest. He no where intimates that his rights were involved. The evidence shows they were not. He testifies that he was authorized to act for his son, who would in such case be bound by his action. This suit must rest upon a special or implied promise. There is no special promise on the part of the defendant to pay and no sufficient proof of an implied one.

If the defendant was not authorized to act for his son but falsely represented himself as having authority to act for him, the remedy for the plaintiff would be by an action on the case for deceit. *Noyes* v. *Loring*, 55 Maine, 408. *Plaintiff nonsuit.*

WALTON, BARROWS, DANFORTH, PETERS and LIBBEY, JJ., concurred.

OSCAR E. BLACKINGTON *vs.* CITY OF ROCKLAND.

Knox, 1876.—March 5, 1877.

Town. Evidence.

The notice required by the act of 1874, to be given to a town by a person receiving an injury by reason of a defect in a highway, may be "by letter, or otherwise, setting forth his claim for damages, and specifying the nature of his injuries."

In such case, a notice is sufficient, which describes the fact substantially, and in general terms, so that thereby a town may have statements and intimations that would be likely to lead them, acting reasonably, into such inquiry and investigation as would result in their acquiring a full knowledge of the facts of the case; and a demand for damages for an injury to plaintiff's horse is a sufficient statement of "the nature of the (plaintiff's) injuries."

A notice of the injury served upon the mayor of a city, is notice to the city.

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The municipal records showing that a written notice had been received, are admissible in evidence against the city, although the notice itself is not produced, or its absence accounted for; such written admissions of a party to the suit being regarded as original, and not secondary evidence.

ON MOTION AND EXCEPTIONS.

CASE, for injury to horse on defendants' highway, May 17, 1875. The verdict was for the plaintiff for $700, which the defendants moved to set aside as against law and evidence; and alleged exceptions, because, among other things, the presiding justice refused to instruct the jury that there had been no such evidence introduced by the plaintiff, of notice to the defendants as was required by the laws of 1874, c. 215, § 1.

The evidence on this point was that the plaintiff gave to the mayor, notice of the injury, on the day of its occurrence. The mayor testified that he stated he should hold somebody responsible for it. There was evidence tending to show that the plaintiff presented to the defendants a written bill of $1000 against them for the damage; the city clerk testified that he was unable to find the original bill; and the record was put in as follows:

City of Rockland. In city council, June 1, 1875.

The bill of O. E. Blackington, for damage of $1000 to horse, from defect in streets, was presented and referred to committee on new streets, &c., in concurrence.

A true copy of record.

Attest: Chas. A. Davis, city clerk.

In city council, July 6, 1875.

The report of committee on new streets, &c., to whom was referred the bill of O. E. Blackington for $1000 damage to horse, was read and accepted in concurrence.

A true copy of record.

Attest: Charles A. Davis, city clerk.

A. P. Gould & J. E. Moore, for the defendants.

D. N. Mortland & G. M. Hicks, for the plaintiff.

PETERS, J. The controlling question in this case, both upon the motion and the exceptions, is whether a proper notice was given to the defendants, of the injury alleged to have been received, within sixty days thereafter, as required by the statutes of 1874.

By that act, the notice by the plaintiff may be "by letter or otherwise, setting forth his claim for damages and specifying the nature of his injuries."

To prove the notice required, the plaintiff relied upon the following evidence. The accident occurred on the 17th of May, 1875. The corporate records of the defendants were introduced, showing that within sixty days therefrom "the bill of O. E. Blackington (plaintiff) for damages of $1000 to horse, from defect in streets, was presented and referred to committee on new streets, &c.," by the two boards of their city council in concurrence; and that such committee subsequently reported thereon, and that the report was also acted upon in concurrence by the two boards. The mayor of the city testified that, upon verbal notification of the accident from the plaintiff, he went with another person to "the place;" and that the person with him "put a barrel in it;" and it appears that afterwards, and before the report of the committee before named, there was an examination of the place by the mayor in behalf of the city, in the presence of the plaintiff and other persons. The mayor at once caused a survey of the place to be made, and an investigation was had, and the city solicitor co-operated with him in so doing. This was all within the sixty days. It was not shown what the terms of the notice to the mayor were, but they were such as induced him to act upon it.

Notices, in this class of cases, are not to be very strictly con-

strued. They will often be given directly by the persons concerned, and without the aid and intervention of counsel; and the statute should not be so narrowly interpreted that they cannot ordinarily be given by such persons with safety to themselves, and at the same time be sufficient to protect the interests of the town. In many cases, too, the persons injured will not be able, at so early a date as required by the statute, to define the precise nature or estimate accurately the probable extent of the injury received.

The main object of a notice is, that the town may have an early opportunity of investigating the cause of an injury and the condition of the person injured, before changes may occur essentially affecting such proof of the facts as may be desirable for the town to possess; and a minor purpose of a notice would be, perhaps, that the town should have a favorable chance to settle a claim before being sued for it, should they see fit to do so. In this view, we think a notice is sufficient, which describes the facts substantially and in general terms, so that thereby a town may have statements and intimations that would be likely to lead them, acting reasonably, into such inquiry and investigation as would result in their acquiring a full knowledge of the facts of the case.

By such a test, we are satisfied that as to a notice of the injury to the horse, and the court excluded from the case the question of injury to the person, there was evidence enough. The defendants contend that the kind of injury to the horse should have been stated. Anything more than a general statement would oftentimes be difficult if not impossible. Men differ very much in opinion about the diseases and ailments of horses. The demand for damages is for an injury to the plaintiff's horse. That is a statement of the "nature of his (plaintiff's) injuries," for all practical purposes precise enough. The defendants, evidently, were not at all prejudiced at the trial for the want of a more definite notice.

But the learned counsel urges other points of objection. It is claimed that a notification to the mayor was not a notice to the city. The objection cannot stand. We think the mayor was the very person upon whom notice could be best served. He is the chief executive official of the municipality, entrusted with a general care over all its interests and with the faithful execution of its laws. *Nichols* v. *City of Boston*, 98 Mass. 39.

And another objection is, that the records of the city were not competent evidence, to show that a bill of damages was presented, without the production of the bill itself. The order passed contains a clear and express admission by the defendants that the plaintiff claimed $1000 for injury to his horse by a defective street, and that he had presented a bill to the city therefor. It has been decided that oral admissions of a party are admissible evidence of facts, though the facts are established by some writing. The records here would in effect be equivalent to the oral admission of an individual party, or more than that.

In *Slatterie* v. *Pooley*, 6 Mee. & W. 664, it is held that a parol admission by a party to a suit is receivable in evidence against him, although it relate to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause. The decision is grounded upon the idea that an admission of the kind is of the nature of original and not secondary evidence. Parke, B. says:—"The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, when better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to circumstances." The Baron adds: "And any one experienced in the conduct of causes at *nisi prius* must know how constant the practice is. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable." There are many reported English decisions to the same effect. Among them, see *Earle* v. *Picken*, 5 C. & P. 542. *Newhall* v. *Holt*, Mee. & W. 662. *Pritchard* v. *Bagshawe*, 11 C. B. 459. In the other country the Irish courts, and in this country the New York courts, take a different view of the proposition. *Welland Canal* v. *Hathaway*, 8 Wend. 480. And see cases in note to § 97, vol. 1. Green. Ev., edition by May. But the doctrine of the English cases is

fully adopted and approved in several cases in Massachusetts. *Smith* v. *Palmer*, 6 Cush. 513, 520. *Loomis* v. *Wadhams*, 8 Gray, 557.

The rule is generally approved by writers on evidence. It applies to admissions ordinarily that are voluntarily made, and is not extended so far as to allow admissions of the kind to be elicited from a party upon the stand as a witness in his own behalf, where objection is made thereto. *Kelly* v. *Cunningham*, 1 Allen, 473. *Sheldon* v. *Frink*, 12 Pick. 568, 569. Among the illustrations in the cases of instances where oral admissions of a party are receivable to prove facts that are established by some writing or record, are, that an estate had been conveyed; that a case had been entered neither party; that a certain person filled the character of assignee; that judgment was entered up in an action, in connection with an execution produced; that there were incumbrances upon land; and the like. In our own state, the case of *Phinney* v. *Holt*, 50 Maine, 570, allows a witness upon the stand to testify about the contents of papers and conveyances, where the evidence is merely of a collateral character; and every practitioner knows how convenient and valuable the privilege is to the one side, and how harmless to the other.

Perhaps the doctrine of the above cases should be cautiously received in applying it to particular facts. Our adoption of it in this case amounts only to this: that the written admissions of a party to a suit are receivable in evidence against him, to prove facts directly in issue, although such facts are established by a writing not produced, and its absence not accounted for. To that extent, at least, we have no hesitation in adopting such a policy.

We are not convinced that the verdict was wrong, upon the evidence. *Motion and exceptions overruled.*

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

JOHN BIRD *et al. vs.* HALSEY H. MUNROE.

Knox, 1876.—May 29, 1877.

Frauds,—statute of.

Where the defendant verbally contracted with the plaintiffs for the purchase of a quantity of ice to be afterwards delivered and, after the breach of the contract by the defendant, the parties put the contract into writing, in the terms as before agreed upon verbally, antedating it as an original contract of the date of the verbal contract first made; in an action upon the contract commenced after, but declaring upon a breach which occurred before the writing was made, the writing is sufficient evidence of the prior verbal contract to satisfy the statute of frauds.

In such case, in view of the statute of frauds, the writing is not to be regarded as constituting the contract itself, but as merely the necessary evidence by which the contract may be proved.

The written evidence of a contract, necessary to satisfy the statute of frauds, must be in existence at the time of action brought on such contract.

Parol evidence is admissible, to show that the date of the writing was not an erroneous, but an intentional one, and that the parties intended thereby to create written evidence of the unwritten contract before made.

ON REPORT.

ASSUMPSIT, declaring on a contract substantially as stated in the following writing signed by the parties, and read in evidence by the plaintiffs.

"Rockland, March 2, 1874.

Memorandum contract by and between H. H. Munroe, of Thomaston, of the first part, and John Bird & Co., of Rockland, of the second part. The party of the first part agrees to pay the party of the second part four dollars per ton gross (2,240 lbs.) for five thousand tons of ice, weighed on board, price to include ice and freight to New York. The said party of the second part, agrees to deliver said ice on following conditions: Shipments to begin immediately, and to continue until full amount is shipped, cash to be paid on delivery of each cargo. Vessels to be discharged with despatch; demurrage, if any, to be paid by party of first part, and no commissions to be paid on sales.

H. H. Munroe.
John Bird & Co.

Attest: Edmund A. Smith."

The declaration averred a breach of the contract by the defendant, in ordering a stoppage of shipments after one-half of the quantity contracted for had been shipped; and the plaintiffs claimed for extra expenses by reason thereof itemized in the following account annexed to the writ:

April 7, 1874.	To expense housing 2500 tons ice @ 25c.	$625.00
	" " breaking out & loading same,	625.00
	" " building houses for same,	600.00
	" expense in hauling same,	250.00
	" shrinkage and waste, (500 tons)	375.00
	" expenses at New York and telegrams,	125.00
		$2600.00

The defendant pleaded the general issue with a brief statement, "that the said supposed contract set forth and declared upon in the plaintiffs' writ, as having been made between the plaintiffs and defendant, on the said 2d day of March, A. D. 1874, was not in writing, nor was there any written memorandum thereof ever made by either of the parties to this action, or by their agents, nor was there ever any delivery of the said ice, or any part thereof by the plaintiffs to defendant, nor any acceptance or reception of the same or any part thereof by the defendant; nor did the defendant ever pay to the plaintiffs anything in earnest to bind the bargain, or in part payment for said ice, and that said contract, if any such contract was ever made, was void by force of the statute of frauds.

And that the said supposed contract in the declaration set forth, if any such was ever legally made, was on the 24th day of March, 1874, abandoned and canceled by the mutual consent of the parties, and all breaches thereof waived and satisfied, by the said cancellation and abandonment, and that the plaintiffs did not deliver the said ice to the defendant, but sold and delivered it to the Knickerbocker Ice Co., of New York, and received payment therefor, from said Ice Co."

The evidence tended to show that after one-half of the ice had been shipped, the defendant ordered further shipments on his account to cease; that none of the ice was in fact received by him; that March 24, 1874, the parties met in New York, and

then and there reduced to writing, the memorandum in evidence dated March 2, 1874; that the plaintiffs contracted on the same day to sell all the ice to the Knickerbocker Ice Co., the twenty-five hundred tons afloat at $4.00 per ton, and the twenty-five hundred tons in house at $4.25, including freights, the twenty-five cents per ton added, to be paid to S. H. Allen.

On this contract was the following indorsement signed by the defendant and witnessed :

"It is understood that the within five thousand tons (5000) of ice is the same that was contracted for on March 2, 1874, with H. H. Munroe, and I, H. H. Munroe, hereby consent to the assignment of the same to the Knickerbocker Ice Company.

New York, March 24, 1874."

After the foregoing and other evidence, which in the opinion sufficiently appears, was introduced, the action was made law on report, to stand for trial if maintainable upon so much of the evidence as was legally admissible, otherwise the plaintiffs to be nonsuit.

A. S. Rice & O. G. Hall, for the plaintiffs.

A. P. Gould & J. E. Moore, for the defendant, contended that the allegation based upon the written contract was not supported by proof; that the evidence of the verbal contract, such as it was, even if legally admissible, did not support the declaration, and that it was not legally admissible, because of the statute of frauds; that the memorandum in evidence was a written contract in itself, and not intended as a memorandum of a previous verbal contract; that a verbal offer subsequently reduced to writing in the form of a contract, and signed by the parties, or even by the party making it could not be treated as a memorandum of a verbal offer or agreement; *Washington Ice Co.* v. *Webster*, 62 Maine, 341; that the verbal contract, if any existed, covered only one or two of the many elements of the written contract; that the contract dated March 2, and written, executed and delivered March 24, could have no validity before the latter date; that the written contract took its force and effect from the day of its execution and delivery, and not from the day of its date; *Hall* v. *Cazenove*, 4 East, 477; *Joseph* v. *Bigelow*, 4 Cush. 82; *Jackson* v.

Shoonmaker, 2 Johns. 230; that if the instrument had no validity as a sale prior to March 24, it had validity for no purpose prior to that time; *Egery* v. *Woodard*, 56 Maine, 45.

PETERS, J. On March 2, 1874, at Rockland, in this state, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered, (by immediate shipments,) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, ante-dating it as an original contract made at Rockland on March 2, 1874. On the same day, (March 24,) by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and ante-dated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the

24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the *res gestæ*. Benjamin on Sales, § 213. *Stoops* v. *Smith*, 100 Mass., 63, 66; and cases there cited.

Then, the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date, (March 2,) although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "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 gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this state, the consideration for the promise is not required to be expressed in writing. *Gilligan* v. *Boardman*, 29 Maine, 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties

thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J., (3 Gray, 331,) "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 agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The *locus penitentiæ* remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps, most instances such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is *per se* the contract of the parties. In many cases, as for instance, like the ante-dating of the deed in *Egery* v. *Woodard*, 56 Maine, 45, cited by the defendant, the contract, (by deed,) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S., c. 111, § 4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is

aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4,) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised in 1857, without any legislative intent to make an alteration in the sense of the section. (R. S. 1841, c. 136, § 4.) The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Brown St. Frauds, §§ 115, 136, and notes to the sections. Benjamin's Sales, § 114. *Townsend* v. *Hargraves*, 118 Mass. 325; and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of *Townsend* v. *Hargraves*, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. *Vincent* v. *Germond*, 11 Johns. 283, is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. *Webster* v. *Zielly*, 52 Barb. (N. Y.) 482, in the argument of the court, directly admits the same principle. The case of *Leather Cloth Co.* v. *Hieronimus*, L. R., 10 Q. B. 140, seems also to be an authority directly in point. *Thompson* v. *Alger*, 12 Met. 428, 435 and *Marsh* v. *Hyde*, 3 Gray, 331,

relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expressions in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication: Such as; that the statute does not apply where the contract has been executed on both sides; *Bucknam* v. *Nash*, 12 Maine, 474;—that no person can take advantage of the statute but the parties to the contract, and their privies; *Cowan* v. *Adams*, 10 Maine, 374;—that the memorandum may be made by a broker; *Hinckley* v. *Arey*, 27 Maine, 362; or by an auctioneer; *Cleaves* v. *Foss*, 4 Maine, 1;—that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale; *Davis* v. *Moore*, 13 Maine, 424; or several days after; *Bush* v. *Holmes*, 53 Maine, 417; or ever so long after; Browne St. Frauds, § 337, and cases there noted;—that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained; *Haynes* v. *Nice*, 100 Mass. 327;—that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract; *Leroux* v. *Brown*, 12 C. B. 801; but this case has been questioned somewhat;—that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received; *Howard* v. *Sexton*, 4 Comstock, 157;—that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards; *Maclean* v. *Dunn*, 4 Bing. 722;—that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed; *Gale* v. *Nixon*, 6 Cow. 445;—that the recognition of the contract may be contained in a letter;

or in several letters, if so connected by "written links" as to form sufficient evidence of the contract;—that the letters may be addressed to a third person; Browne St. Frauds, § 346; *Fyson* v. *Kitton*, 30 E. L. & Eq. 374; *Gibson* v. *Holland*, L. R. 1 C. P. 1;—that an agent may write his own name instead of that of his principal if intending to bind his principal by it; *Williams* v. *Bacon*, 2 Gray, 387, 393, and citations there;—that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum; *Reuss* v. *Picksley*, L. R., 1 Exc. 342;—that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed; *Dobelle* v. *Hutchinson*, 3 A. & E. 355;—that the written contract may be rescinded by parol, although many decisions are opposed to this proposition; *Richardson* v. *Cooper*, 25 Maine, 450;—that equity will interfere to prevent a party making the statute an instrument of fraud; *Ryan* v. *Dox*, 34 N. Y. 307; *Hassam* v. *Barrett*, 115 Mass. 256, 258;—that a contract verbally made may be maintained for certain purposes, notwithstanding the statute;—that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused; *Chapman* v. *Rich*, 63 Maine, 588, and cases cited;—that a respondent in equity waives the statute as a defense unless set up in plea or answer; *Adams* v. *Patrick*, 30 Vt. 516;—that it must be specially pleaded in an action at law; *Middlesex Co.* v. *Osgood*, 4 Gray, 447; *Lawrence* v. *Chase*, 54 Maine, 196;—that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it; Browne St. Frauds, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defense of the statute under the general issue. The different rule in Massachusetts and Maine, grew out of the practice act in the one state and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in *Thornton* v. *Kempster*, 5 Taunt. 786, 788, "the

statute of frauds throws a difficulty in the way of the evidence." In a case already cited, Jervis, C. J., said, "the effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of *McLellan* v. *McLellan*, 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. Willes, J., perhaps correctly describes it in *Gibson* v. *Holland*, *supra*, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." Browne St. Frauds, § 338. Benjamin's Sales, § 159. *Fricker* v. *Thomlinson*, 1 Man. & Gr. 772. *Bradford* v. *Spyker*, 32 Ala. 134. *Bill* v. *Bament*, 9 M. & W. 36. *Philbrook* v. *Belknap*, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

JOHN DOYLE AND WIFE *vs.* INHABITANTS OF VINALHAVEN.

Knox, 1874.—May 31, 1877.

Way.

A town is not liable for injuries occurring without the limits of a road legally located or legally existing by virtue of a long continued user.

If road commissioners of their own authority extend the limits of the road, the town is not liable therefor.

If individuals build a sidewalk of their own motion outside of the limits of the road, they do not thereby render the town liable for its defects.

If they build it upon land illegally taken by the road commissioners outside of the limits of the road, the town is not responsible for the defects of the sidewalk so built without its authority and which they would be trespassers in attempting to repair.

ON EXCEPTIONS to the exclusion of evidence.

CASE for injuries to plaintiff wife from defective sidewalk. How the legal point was raised appears in the opinion.

D. N. Mortland & G. M. Hicks, for the defendants.

A. S. Rice & O. G. Hall, for the plaintiffs.

If the line of a highway is not indicated by any visible objects and the defect is within the limits of the general course and direction of travel, and where travelers are accustomed to pass, and there is nothing which gives notice to a traveler injured by such defect that he is not within the way intended for public travel, the other statute requisites being proved, the town is liable, although its officers may be trespassers upon adjoining owners. *Hayden* v. *Attleborough*, 7 Gray, 338. *Coggswell* v. *Lexington*, 4 Cush. 307.

The case of *Gilpatrick* v. *Biddeford*, 51 Me. 182 and 54 Maine, 93, involves a different principle, and is not applicable to this case.

APPLETON, C. J. The general rule is well settled that a town is not liable for injuries occurring without the limits of the road legally located or legally existing by virtue of a long continued user. *Willey* v. *Ellsworth*, 64 Maine, 57.

The injury in the case at bar arose from a defect in a sidewalk built a month or so previous to its occurrence by private indivi-

duals without precedent direction or authority from the town or its officers or subsequent assent to or acceptance of what had been done either by work or labor on the same or in any other way.

A town is liable for damages resulting from a defective sidewalk of its own erection within the limits of the road or on which it has made repairs within six years before the injury. R. S., c. 18, § 66. The evidence negatives all action on the part of the town or its officers in relation to the same.

The defendants claimed that the sidewalk was without the limits of the road, however established, and that land had been taken by the road commissioners that never had been occupied for a highway before, without authority and as trespassers on the owners of the adjoining land, the sidewalk being built on the land so taken; but the court excluded the answers to inquiries put for the purpose of eliciting these facts.

Widening a road is one thing; repairing a road is another and very different thing. The former, the road commissioners cannot legally do. It is their duty to do the latter. They have no right at their own motion to enlarge the limits of a highway. The town is not responsible for their unauthorized acts. If the road commissioners, of their own authority, extended the limits of the road, the town would not be liable therefor. *Gilpatrick* v. *Biddeford*, 54 Maine, 93. If individuals build the sidewalk of their own motion outside the limits of the road, they could not thereby render the town liable for its defect, though they might render themselves liable. If they built it upon land illegally taken by the road commissioners outside the limits of the road, the town would not be responsible for the defects of a sidewalk built without its authority and which they would be trespassers in attempting to repair. *Exceptions sustained.*

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

MOSES CALL *vs.* NATHANIEL M. PIKE.

Lincoln, 1876.—November 17, 1876.

Trespass.

A justice of the peace related within the sixth degree to one of the parties to a cause, is disqualified to take a deposition therein; and is liable in trespass for committing a witness for refusing to testify in such case.

ON EXCEPTIONS.

TRESPASS against a justice of the peace for illegal arrest and imprisonment. The presiding justice ruled that the relationship between the defendant, a justice of the peace, and one of the parties to a cause, which was that of first cousins, did not disqualify the justice from taking a deposition in the cause, and that an action could not be maintained against him for committing the plaintiff, because he refused to testify therein; and the plaintiff alleged exceptions.

B. F. Smith, for the plaintiff.

A. P. Gould & J. E. Moore, for the defendant.

LIBBEY, J. This is an action of trespass for the alleged illegal arrest and imprisonment of the plaintiff by defendant. The arrest and imprisonment of the plaintiff by warrant issued by the defendant was proved.

The defendant justifies the acts complained of on the ground that they were lawfully done in his capacity as justice of the peace for the county of Lincoln. He alleges that the plaintiff was duly summoned to appear before him on the 21st day of October, 1874, to give his deposition in the case of *Henry P. Cotton* v. *Charles C. Smithwick*, then pending in the supreme judicial court in said county; that the plaintiff refused to appear before him and testify; that he adjourned the taking of his deposition to four o'clock in the afternoon of the same day, and issued a capias and caused him to be arrested and brought before him at the time of adjournment, when he refused to be sworn and testify in the case; that he therefore adjudged him guilty of contempt in refusing to be sworn and to testify, and sentenced him to pay a fine of twenty

dollars therefor, and ordered him committed to jail until he paid said fine and costs of commitment, or should otherwise be discharged according to law; that the plaintiff refused to pay said fine, and he issued his warrant and caused him to be committed to jail in execution of said sentence. These facts were admitted; and it was also admitted that defendant was then a justice of the peace, and that he and Henry P. Cotton, the plaintiff in the suit in which the deposition was to be taken, and at whose request the defendant acted, were cousins, their mothers being sisters.

The facts being admitted, the presiding judge ruled that the relationship between the defendant and said Cotton did not disqualify the defendant from taking the deposition and acting in the premises as alleged, and that the action could not be maintained. The case comes before this court on exceptions to this ruling.

Having caused the arrest and imprisonment of the plaintiff, it is incumbent on the defendant to establish his justification. His counsel maintain that he has done so on two grounds:

I. That the duties of the defendant in taking the deposition, and in doing the acts complained of, are ministerial, and that the relationship of the defendant to the plaintiff in that suit did not disqualify him to act in the premises.

II. That if the relationship did disqualify him, the parties to the suit are the only parties who can raise the objection; that the witness has no right to raise it, and no right to refuse to testify on that ground.

Had the defendant jurisdiction to take the plaintiff's deposition in the case, and to adjudge him guilty of contempt in refusing to be sworn and to testify, and to sentence him to pay a fine therefor, and cause him to be imprisoned in execution of the sentence?

Whether a justice of the peace, in taking a deposition, acts ministerially or judicially, the authorities do not agree. In this state, in *Cooper* v. *Bakeman*, 33 Maine, 376, 379, there is a dictum of Shepley, C. J., that "justices of the peace in taking depositions, act in a ministerial, and not in a judicial capacity." The question was before the court in Massachusetts, in *Chandler* v. *Brainard*, 14 Pick. 285, but was not decided. It was passed with the fol-

lowing remark: "On the one side it is said, that the act of the magistrate, in taking a deposition, is of a judicial character; on the other, that it is ministerial. However this may be, it is certain that he exercises a great deal of discretion, particularly where the witness is illiterate and uninformed." In a well considered case, *Whicher* v. *Whicher*, 11 N. H. 348, it is decided that a justice of the peace, in taking a deposition, acts in a judicial capacity. We think it clear that many of the duties of a justice of the peace in taking depositions, under R. S., c. 107, are judicial in their character, involving a determination of both law and fact; such as determining whether the adverse party has been duly notified; whether the alleged cause for taking the deposition exists; what shall be written as the evidence of the witness, especially if the witness is illiterate and gives his evidence incoherently; whether the witness shall be compelled to answer a question which he claims to be exempted from answering, on the ground that the answer would criminate himself; and if the deposition is written by a person other than the justice or deponent, whether such person is disinterested within the meaning of the law; and especially if the witness does not appear, or refuses to be sworn and testify, to determine whether he has been legally summoned, and had his fees paid or tendered, and to issue a capias and cause the witness to be brought before him, and punish him for contempt by fine, and commit him to jail in default of payment. But whether the defendant acted in a judicial or ministerial capacity, his jurisdiction must be determined by the statutes applicable to the subject.

R. S., c. 107, § 2, is as follows: "a justice of the peace or notary public may take depositions to be used in a pending cause, in which he is not interested, nor then nor previously counsel." Is a relationship within the sixth degree, to one of the parties, an interest in the cause, within the meaning of this statute? We think it is. R. S., c. 1, § 4, clause xxii, provides that "when a person is required to be disinterested in a matter in which other persons are interested, a relationship to either of such persons by consanguinity or affinity within the sixth degree according to the rules of the civil law, or within the degree of second cousins inclusive, except by the written consent of the parties, will disqualify." The justice

is required to be disinterested in the cause in which the deposition is to be used. The cause is "a matter in which other persons are interested." The case is within the letter or spirit of the rule. If there can be any doubt about the meaning of the statute, the construction which we have given it, is supported by § 13, c. 107, which provides that "the deposition shall be written by the justice or notary, or by the deponent or some disinterested person, in the presence and under the direction of such justice or notary." By this section, if the deposition is written by a person other than the justice or notary, or deponent, he must be a disinterested person, not disinterested in the cause, but disinterested generally. If related to one of the parties within the sixth degree he is not disinterested, and would not he qualified to write the disposition. But it cannot be supposed that the legislature intended to disqualify a justice to write a deposition if taken before another justice or notary, and make him competent to take the deposition himself under the same state of facts.

The counsel for the defendant cites and relies on *Chandler* v. *Brainard*, 14 Pick. 285, before cited. In that case the court decided that the justice, who was a son-in-law of one of the plaintiffs, was not disqualified to take the deposition under statute of 1797, c. 35, § 1, which provided that a deposition "may be taken before any justice of the peace, not being of counsel or attorney to either party, or interested in the event of the cause." Massachusetts had no statute rule of construction applicable to the case; and the court held that, at common law, "interested in the event of the cause" meant a pecuniary interest which would disqualify one from being a witness. The same question, whether relationship disqualified, was before the court, in that state, again in *Culver* v. *Benedict*, 13 Gray, 7, but not decided, the court holding that as the defend ant to whom the justice was related was not a party in interest, but made a party in a bill in equity as a stake-holder only, the justice was not disqualified.

In *Bean* v. *Quimby*, 5 N. H. 94, it was held that an uncle to one of the parties to the suit was disqualified to act as a justice in taking a deposition.

We could not give to the statute a construction which would

authorize the father to take a deposition at the request of the son, in a suit in which the son was a party, or the husband to take a deposition at the request of the wife, in a suit in which she was a party, unless the language was so clear as to admit of no other meaning. The language of the statute requires no such construction.

Failing in his first ground of justification, can the defendant justify on the second ground relied upon, that the plaintiff had no right to raise the question of relationship as a disqualification of the defendant to act in the premises? The real question is not whether the plaintiff has a right to raise the objection of relationship, but whether the defendant makes out his justification. He attempts to justify the arrest and imprisonment of the plaintiff. The burden is on him to show his jurisdiction. If he was disqualified to take the deposition he had no jurisdiction over the plaintiff and had no authority to determine that he had been legally summoned to appear before him to give his deposition in the cause, and to issue a capias and cause him to be arrested and brought before him to testify. He had no jurisdiction to adjudge the plaintiff guilty of contempt, and to sentence him to pay a fine therefor. There cannot be in law a contempt of the authority of a magistrate in a case in which he has no jurisdiction to act. The defendant, being disqualified to act in taking the deposition, was acting illegally and has no justification for the arrest and imprisonment of the plaintiff. *Clarke* v. *May*, 2 Gray, 410. *Piper* v. *Pearson*, 2 Gray, 120. *Exceptions sustained.*

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

INHABITANTS OF BREMEN *vs.* INHABITANTS OF BRISTOL.

Lincoln, 1876.—December 22, 1876.

Town.

Where two termini of a line between towns are established, and no intermediate conflicting point is indicated in the description, the line will be deemed to be a straight one.

This rule was held to apply where natural boundaries were disregarded, and a point of land was cut off and made part of a town on the other side of a cove.

In the absence of evidence on the face of the earth, showing the original actual location of the town of Bremen, the last call in the act of incorporation is a line starting from the point of departure named, and running in such a course as to include Long island and Hog island down to low water mark. "Crossing the bar," &c., means passing clear across the entire width of the bar on the line of low water; and when the western limit of the bar is reached, then a straight line from that point "to the first mentioned bound" is the true line.

ON REPORT.

PETITION under R. S., c. 3, § 43, for the appointment of commissioners to determine a disputed line between the petitioning town of Bremen on the north, and the respondent town of Bristol on the south, commencing at Muscongus harbor, and extending to Biscay pond; and also from the bar between Hog island and Loud's island to the point where the dividing line between said towns strikes the westerly shore of Muscongus harbor.

The commissioners appointed under the petition, having in part performed the trust, reported that they found it necessary to settle a question of law which arose upon the construction of the statutes establishing the boundaries between the two towns before they could make a final satisfactory report, and reported specially that a case be made up for the law court for their advice and direction. The commissioners referred to a plan showing the configuration of the land and sea; and to the original act incorporating the town of Bristol, also the act to divide Bristol and incorporate Bremen, approved February 19, 1828, and the act establishing the line between Bristol and Bremen, approved March 6, 1830, and closed their special report as follows:

"The question arises upon the construction of the language used in the act of 1828, in describing the last part of the boundary line, which is in these words, viz.: 'crossing the bar between Hog island and Loud's island, thence to the first mentioned bound.' No question is made as to the location upon the face of the earth, of the 'first mentioned bound.' It is indicated upon the plan by the letter B. in Muscongus harbor.

"Bremen contends that this line should be run on a straight

course from a point on the bar midway between Hog and Loud's islands, or at low water mark on Hog island, to the point B. This would leave a piece of the headland marked D. surrounded by water or land, conceded to be in Bristol, in Bremen. On the other hand, Bristol contends that this line, if to be run at all as part of the line between the two towns, should be so run after crossing the bar, either by following the line of low water upon the one side of the harbor or the other, or by following the channel of the harbor, that it may reach the point B. and leave the headland wholly in Bristol.

"Being apprehensive that our decision of this question might be final, we deem it expedient to submit it to the court, asking that the matter may be recommitted to us with such instructions as the court may see fit to give."

The respondents offered to prove that the point of land in dispute had been taxed by Bristol since the division of the town. For the purpose of determining the effect of such taxation, the fact may be regarded as proved, but was not admitted by the petitioners to affect any future proceedings.

The parties agreed that the case be reported to the law court for the determination of the legal questions raised.

J. Baker, for the petitioners.

A. P. Gould & J. E. Moore, for the respondents.

VIRGIN, J. In creating and prescribing the territorial limits of towns, existing topographical facts such (as in the case at bar) as rivers and large bodies of water are adopted by the legislature as the best defined and most permanent monuments of boundaries. Considering the conformation of the territory about Muscongus harbor, it seems very evident that the legislature did not intend to include in the town of Bremen, any part of the point of land on the south side of the harbor. To call such a line simply unreasonable would be so complimentary as to justly render us obnoxious to the charge of flattery.

This fact togther with the language of the act of March 6, 1830, "establishing the town line between Bristol and Bremen," would

seem to make it equally certain that the legislature supposed and believed that the limits defined in the act of incorporation did not include any portion of the point of land mentioned.

But whatever may have been the real intention of the legislature, it cannot be upheld at the expense of long established rules of law. The expressed intention is the one that must govern. If the commissioners cannot find on the face of the earth, sufficient evidence to enable them to "ascertain and determine the line" as formerly laid out, (*Wells* v. *Jackson I. M. Co.*, 48 N. H. 491,) then resort must be had to rules of construction; and the line run accordingly as if it were projected now for the first time. If the line thus ascertained cuts off a small part of the point contrary to the understanding and belief of the legislature, that department of the government which alone has jurisdiction of town boundaries, will undoubtedly on proper presentation thereof make the proper correction.

The town of Bristol is bounded on the east by the sea; and Bremen was constructed out of the north-east corner of Bristol, together with certain islands. After defining the southern, western and northern boundaries of the new town, the act of incorporation takes its next departure from the sea shore in the following language: "Thence easterly so as to include Long island and Hog island crossing the bar between Hog island and Loud's island, thence to the first mentioned bound."

It is immaterial whether this language be viewed as one roving call or two, the result must be the same. It is evident by reference to the plan, that the course "easterly" would not "include" the islands named. The inaccuracy of the course must therefore give way to the certainty of the island monuments; and to "include" the islands means the whole of the islands, (*Cate* v. *Thayer*, 3 Maine, 71,) *i. e.*, to low water. "Crossing the bar" equi-distant between Hog island and Loud's island, would "include" more than the whole of the islands, if such point be beyond low water mark. "Crossing the bar," &c., means passing clear across the entire width of the bar on the line of low water, and when the western edge or limit of the bar on the line of low water is reached, then a straight line from that point "to the first mentioned bound"

is the true line. *Grant* v. *Black*, 53 Maine, 373, 377. *Hovey* v. *Sawyer*, 5 Allen, 554. *Bethel* v. *Albany*, 65 Maine, 200.

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

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

STATE *vs.* SAMUEL B. ERSKINE, Ap't.
SAME *vs.* SAME.
SAME *vs.* SAME.

Lincoln, 1876.—March 6, 1877.

Search warrant. Intoxicating Liquors.

It is legally competent for a magistrate in making a search warrant to adopt the complaint as a part of it, and issue both together as one instrument. In so doing the complaint does not lose its identity; but the place and property described in the one is described in both.

An allegation in the complaint that intoxicating liquors were kept and deposited in the place designated, and intended for sale by the person named in violation of law within this state, is an allegation that such keeping and deposit are unlawful.

In the case of a seizure of liquors without a warrant, an allegation in the complaint, that at the time and place of seizure the place being described as within a specified county, the person making the seizure was a sheriff, duly qualified to serve a warrant in such cases, is a sufficient allegation of his competency to make the seizure.

ON EXCEPTIONS to the overruling of demurrers and motions of the defendant.

ON COMPLAINTS AND WARRANTS, in three cases presented together and sufficiently stated in the opinion.

A. P. Gould & J. E. Moore, for the defendant.

L. A. Emery, attorney general, for the state.

DANFORTH, J. In each of these three cases the respondent was arrested for having in his possession intoxicating liquors with intent to sell the same in violation of law. Two of them are warrants of search and seizure, the other a warrant of seizure alone. They come before the court upon a demurrer to the complaints

and a motion to dismiss the warrants. Several objections are made to both warrants and complaints.

It is claimed that the warrants for search contain no description of the premises to be searched. If the warrants were to be taken independent of the complaint, this objection would have a foundation in fact and might perhaps be fatal to their validity. But no suggestion is made that the premises to be searched are not sufficiently described in the complaint, nor do we perceive any deficiency in this respect. In the warrant are these words, viz: "you are commanded to enter the premises named in the foregoing complaint of said James E. Morse, which is expressly referred to as a part of this warrant and therein search," etc.

By well settled law the complaint is thus made a part of the warrant and has precisely the same effect as though written out in full therein. The description in the complaint is therefore the description in the warrant. Nor is it by such process taken out of the complaint. It still remains in that and is therefore in both complaint and warrant. It is true as contended that the complaint is the authority upon which the justice issues his warrant; but we are aware of no principle of law requiring him to keep it in his possession. The practice of making the complaint a part of the warrant and issuing both to the officer, has been a practice so long sanctioned by the courts, and no inconvenience or illegality found in it, that there can be no reason for changing it.

It is also objected that there is no designation of the thing to be seized. But in the complaint we find all the description which can be given, or which the law requires; and in this respect as well as in the other the complaint is made a part of the warrant. The adoption is limited to no particular part; and where the officer is commanded "to enter said premises and search for said liquors," it means, and can mean no other than such as are described in this complaint.

The several complaints are objected to because they do not allege "that the liquors were unlawfully kept and deposited." The same objection was raised on demurrer and overruled in *State* v. *Connelly*, 63 Maine, 212.

In the second case in the order named which is a complaint for

keeping liquors seized before warrant issued, the objection raised is that the complaint does not sufficiently set out the authority of the person making the seizure, as it does not state that he was at the time a sheriff in any particular county or "where he has jurisdiction to seize liquors on a warrant." On examination we find in the complaint an allegation "that he the said James E. Morse, at said Wiscasset, on the twenty-eighth day of August, A. D. 1875, being then and there an officer, to wit: sheriff duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale," etc. Previous to this the complaint alleges that on the same day, "at said Wiscasset," the liquors in question "were kept and deposited," and Wiscasset had been stated to be in the county of Lincoln. This seems to be about as clear a statement as possible that at the time and place of the seizure James E. Morse was a sheriff duly qualified, and as the place was in the county of Lincoln, he must necessarily have been a sheriff in that county and have had jurisdiction to seize the liquors where they were seized.

The entry in all the cases must be

Exceptions overruled.
Judgment for the state.

APPLETON, C. J., WALTON, VIRGIN, PETERS and LIBBEY, JJ., concurred.

HENRY P. COTTON *vs.* CHARLES C. SMITHWICK.

Lincoln, 1875.—April 26, 1877.

Will.

While in the construction of a will, the general rule is, that the intention of the testator is to govern, it is the intention expressed by the will and not otherwise.

Declarations of a testator after the making of his will are admissible only in case of latent ambiguity, and then only from necessity, for the purpose of preventing the devise from being declared void for uncertainty.

If the terms of the devise can be applied to the subject matter with legal certainty, without the aid of the declarations of the testator, such evidence is not admissible.

To get at the intention expressed by the will, every clause and word are to be taken into consideration.

Where parties, acting upon an erroneous construction of a will, adopt a monument not intended by the testator without possession according to it of such a character, and for sufficient length of time to give title by adverse possession, they are not thereby estopped from showing the true monument.

Where the devise was of "a lot of land in Newcastle, known as the back field *west of the top of the hill*, it being the west end of my farm in Newcastle, adjoining Deer meadow brook; the eastern line of said lot to be a line run from the north line of my said farm, at right angles with said north line, striking over the *top of the hill so called;*" and there were two hills on the farm, the one claimed by the plaintiff being the more easterly, harmonizing with all the calls in the will, and the one claimed by the defendant, with a part only; *held*, that this was not a case of latent ambiguity, and that the hill claimed by the plaintiff was the monument intended, and that parol evidence of the declarations of the testator made after the execution of the will was properly excluded.

ON EXCEPTIONS AND MOTION.

TRESPASS for breaking and entering the plaintiff's close and cutting and carrying away wood and timber.

The contention was one of boundaries. Both parties derive title under a devise in the will of the former owner, Henry Clark. The defendant's counsel, claiming that there was a latent ambiguity, as in the opinion stated, offered to show:

"The declarations of the testator two or three days after the making of the will, as to what disposition he had made of his homestead lot.

That immediately after the will was established, the two devisees went and located the boundary line between them on the top of the back field hill.

That they and their grantees under them, down to this plaintiff, cut and occupied up to this line on the one side and the other and never over it.

That by authority of Nathaniel Bryant, then owner of the plaintiff side, a surveyor was employed to run the line between the two lots, that Bryant said he would agree to whatever line they fixed, and that in the presence of B. F. Clark, Lishman Clark and Ephraim Clark, a line was then and there run by the surveyor over the top of the back field hill, and marked by spotted trees.

That Nathaniel Bryant dying without will, an administrator

and appraisers were appointed, and the latter went on to view this land as part of the estate, and that the boundary line was then and there pointed out by Nathaniel Bryant's heir and administrator, and that this land as pointed out to them, and as appraised by them, extended only to the top of the back field hill.

That soon after the plaintiff purchased, he went across his lot from north to south, with Edward H. Clark, on the back field hill, and pointing out this same line, declared it to be the boundary line between the two lots.

That when Nathaniel Bryant owned the plaintiff side, and Ephraim Clark the defendant, Bryant took a mortgage from Clark of the defendant lot, which described it as extending west 284 rods, which carries it precisely to the back field hill, and the line claimed by the defendant, contending that the acceptance of this deed would operate by estoppel."

The presiding justice excluded the testimony, and instructed the jury that if the line claimed by the plaintiff answered substantially to the calls in the will, that should be held to be the line so far as this case is concerned.

A further statement of the case appears in the opinion.

The verdict was for the plaintiff for $645.84; and the defendant alleged exceptions.

O. D. Baker, with whom was *J. Baker*, for the defendant.

The words "known as the back field," standing where they now do, and limiting and describing the "lot of land in said Newcastle," are insensible and repugnant.

I. Because the back field lies almost entirely outside the testator's farm, and if he, familiar as he was with the locality, had meant to apply the words "known," &c., to the land devised, he would have said, "known as part of the back field."

II. Because if it is the "lot of land" which was to be "known as the back field," that is not the "west end of the testator's farm," or any end, but a small piece in the middle.

III. It does not "adjoin Deer Meadow brook," but in its nearest point is more than one-half mile from it.

IV. Its eastern line cannot be "a line striking over the top of" either "hill," for it lies between the two, and does not touch either.

The words "known as the back field," then, being insensible and repugnant where they stand, must be rejected, unless they can be transposed so as to harmonize all the calls of the will. If they can, it will be the duty of the court so to do.

Applying the words "known as the back field," then, to the hill, instead of to the land, we should read "a lot of land in said Newcastle, and west of the top of the hill known as the back field" (hill,) thus simply transposing the two clauses. . . . . Thus by the simple transposition suggested, all the words of the will have effect and meaning, all its calls are answered, all inconsistency harmonized, and all ambiguity made clear.

The counsel also elaborated with citations the proposition, that parol evidence of the acts and the occupation of the parties, was admissible to explain the latent ambiguity of the plaintiff's deeds. And contended it was error to instruct the jury that "if the line claimed by the plaintiff answered substantially to the calls in the will, that should be held to be the line;" because if the line claimed by the defendant answered as substantially or more substantially to those calls, the plaintiff should not recover.

A. P. Gould & J. E. Moore, for the plaintiff.

LIBBEY, J. The question involved in this case was the title to the land on which the alleged trespass was committed.

Both parties claim title to the *locus in quo*, under the will of Henry Clark, dated May 4, 1854, proved, approved and allowed, in probate, July 3, 1854.

At the time of making his will and at his decease, Henry Clark owned a large lot of land containing three hundred acres, situated in Newcastle, conveyed to him by his father, Ebenezer Clark, August 31, 1829. The evidence tended to show that he occupied the north half of the lot as his homestead farm, and that the south half was occupied by his brother, Ephraim Clark, for many years prior to his death, which occurred several years before the will was made, and that after the death of Ephraim, the south half was occupied by his son, Lishman Clark, till the decease of Henry. The land in controversy is a part of the north half of said lot.

By the first item in his will, Henry Clark devised to his nephew,

Benjamin F. Clark, "a lot of land in said Newcastle, and known as the back field west of the top of the hill, it being the west end of my farm in Newcastle, adjoining Deer Meadow brook; the eastern line of said lot to be a line run from the north line of my said farm at right angles with said north line, striking over the top of the hill so called."

By the second item in his will, he devised "unto Lishman Clark, and Ephraim Clark, 2d, his brother, my nephews, to them and their heirs and assigns, all the remainder of my homestead farm in Newcastle, occupied by me, and also the farm occupied by the said Lishman Clark, intending to devise unto the said Lishman and Ephraim, all the land contained in the deed of my father, Ebenezer Clark, to me, except the parcel before devised to Benjamin F. Clark, my nephew."

The plaintiff claims, through mesne conveyances, the land devised to Benjamin F. Clark; and the defendant claims, through mesne conveyances, under Lishman Clark and Ephraim Clark, 2d. The title to the land in controversy depends upon the construction of the first clause in the will. The point in dispute between the parties, is the true location of the east line of the lot of land devised to Benjamin F. Clark.

For the purpose of showing the intention of the testator, and applying the calls of the will to the land, evidence was introduced giving a description of Henry Clark's homestead farm at the time he made his will, from which it appears that the following facts were not controverted. The eastern boundary of the farm was Damariscotta pond, and the western boundary was Deer Meadow brook. The whole length was about 505 rods. There was a hill on the farm about 100 rods west of Henry Clark's dwelling house, which is described as conical in form, sloping on all sides to the flat land. It is 146.58 feet higher than the low land or swamp to the west of, and adjoining it, and 134 feet higher than the sills of the house. A line drawn at right angles with the north line of the farm over the top of it, is 366 rods east of the west line of the farm. There was another hill or ridge of land 206 rods west of this hill, and 160 rods east of the west line of the farm, which at the north line was 64.44 feet higher than the swamp land afore-

said, extending across the farm, and descending gradually from the north to the south line. The descent between these two points is 31.32 feet. The sides of the hill descend gradually east and west for about 600 feet to the low land. The piece of land known as the back field was cleared before the conveyance from Ebenezer Clark to Henry Clark, and was used as a pasture after 1830. In 1854, it was mostly covered by a young growth of fir, pine and hemlock, so it was difficult to determine its original bounds. The remains of an old fence on one side were traceable. It contained from ten to fifteen acres; a part of it was on the north half, but the most of it was on the south half of the 300 acre lot. It is admitted that it lies wholly between the two hills; the west end being six to eight rods east of the top of the last named hill, and the east end about 150 rods west of the top of the first named hill. It is the only portion of Henry Clark's farm west of the first named hill which had been cleared, excepting a small piece of meadow on Deer Meadow brook.

The defendant introduced evidence tending to prove that the hill first described, before and at the time the will was made, was called "Oak hill," and that the other hill was called "Back Field hill." The plaintiff introduced evidence tending to prove that the first named hill was called" Harry Clark's hill," and "the hill;" and he claimed that by the true construction of the will, the east line of the lot of land devised by the first clause, is a line run at right angles with the north line of the farm striking over the top of this hill.

The defendant claims that the east line should be so located as to strike over the top of Back Field hill; that upon the introduction of the extrinsic evidence for the purpose of applying the calls of the will to the land, a latent ambiguity arises; that it is competent to introduce parol evidence to show the intention of the testator; and for that purpose offered evidence of the declaration of the testator, made after making the will, to the devisees. This evidence was excluded. Was it admissible? In construing a will, such evidence is admissible only in case of latent ambiguity, and then from necessity for the purpose of preventing the devise from being declared void for uncertainty. If the terms of the devise

can be applied to the person or subject matter intended, with legal certainty, without the aid of such evidence, then it is not admissible. Greenl. Ev., §§ 289 and 290. *Miller* v. *Travers*, 8 Bing. 244. *Hiscocks* v. *Hiscocks*, 5 M. & W., 363. *Brown* v. *Saltonstall*, 3 Met. 423. *Tucker* v. *Seaman's Aid Society*, 7 Met. 188. *Howard* v. *The American Peace Society*, 49 Maine, 288. *Madden* v. *Tucker*, 46 Maine, 367.

In discussing this question in *Miller* v. *Travers*, the learned Chief Justice Tindall declares the rule as follows: "It may be admitted, that in all cases in which a difficulty arises in applying the words of the will to the thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, *ambiguitas verborum latens, verificatione suppletur*. But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will, but upon the death of the testator it is found, that there are more than one estate or subject matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (Bac. Max. 23; Hob. R. 32. Edward Atham's case, 8 Rep. 155.) The other class of cases is that in which the description contained in the will, of the thing intended to be devised, or of the person who is intended to take, is true in part but not true in every particular. As where an estate is devised called A, and is described as in the occupation of

B, and it is found, that though there is an estate called A, yet the whole is not in B's occupation; or where an estate is devised to a person whose surname, or christian name is mistaken; or whose description is imperfect, or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

This extract is quoted by this court, in *Howard* v. *The American Peace Society*, above cited, as containing a clear and accurate statement of the rules of law applicable to this subject. Mr. Greenleaf lays down the rules to be, "that, where the description in the will, of the person or thing intended, is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator." Greenl. Ev., § 290.

Applying these rules to the case at bar, is there a latent ambiguity arising from the introduction of the extrinsic evidence? Does the description of each hill follow out and fill the words used in the will? Does the description in the will apply with legal certainty to each of the hills? or does it apply with as much certainty to one as to the other? we think not.

In construing a will, the general rule is that the intent of the testator is to govern; but it is the intention expressed by the will and not otherwise. To get at the intention expressed by the will, every clause and word are to be taken into consideration, because one clause is often modified and explained by another. Every implication, as well as every direct provision, is to be regarded. No clause, or material matter of description should be rejected unless clearly repugnant to and inconsistent with the other clause, or matters of description in the will. The first part of the description of the land devised, is, "a lot of land in said Newcastle, and known as the back field west of the top of the hill." The land known as the back field is devised. It is west of the top of the hill. The land known as the back field at the time the will was made is shown to be east of the hill claimed by defendant, called the back field hill. So it is clear that the description of that hill does not

follow out and fill the words used in the will. The description in the will does not apply with legal certainty to that hill. To hold that that hill is the one referred to in the will, it is necessary to reject entirely the material matter of description "known as the back field." If there was no other hill on the farm which follows out and fills the words used in the will, this part of the description might be rejected as misdescription; but it can only be rejected when shown to be necessarily repugnant to the rest of the description. .

The hill claimed by the plaintiff as the one intended by the testator, follows out and fills all the words used in the will. The description in the will applies to it with legal certainty. To hold that to be the hill intended by the testator, it is not necessary to reject any part of the description in the will. None of the other calls of the will are repugnant to it. True, a line run at right angles with the north line of the farm, striking over the top of that hill, might embrace more land than the lot known as the back field, or the west end of testator's farm adjoining Deer meadow brook; but it includes all the land thus described. We think that the introduction of the extrinsic evidence, to apply the description of the estate devised to the face of the earth, raises no latent ambiguity as to which hill was intended by the testator as the monument in the east line, and that the evidence offered of the declarations of testator, made after the execution of the will, to show that he intended the back field hill, was inadmissible.

The defendant also offered to prove, that, after the decease of Henry Clark and after the will was established, Benj. F. Clark and Lishman Clark went on to the premises and established the line between the part of the farm devised to Benj. F. Clark, and the remaining part devised to Lishman Clark and Ephraim Clark 2nd, as they understood the will, adopting the back field hill as the monument intended by the testator. And he offered evidence tending to prove that that line was recognized as the dividing line by them and their grantees under whom the parties claim down to the time plaintiff purchased in 1869; and that the plaintiff recognized that line as the east line of his land soon after he purchased. This evidence was excluded. It was not admissible to explain a

latent ambiguity in the description in the devise; for we have seen that there is no latent ambiguity. The case does not fall within the class of cases where the deed or devise describes a monument not in existence, but to be erected and established by the parties, and the parties afterwards fairly erect such monument intending it to conform to the deed or devise, and by which they are bound in the same manner as if the monument had existed at the time the deed or devise was made, though the monument be so located as not entirely to coincide with the line described. The monument described in the devise was in existence at the time the will was executed.

The case, as presented by the evidence offered, is one in which the parties, acting upon an erroneous construction of the will, adopt a monument not intended by the testator, without possession according to it, of such a character, and for sufficient length of time, to give title by adverse possession. They are not thereby estopped from showing the true monument. *Tolman* v. *Sparhawk et als.*, 5 Met. 469. *Bradbury* v. *Cony*, 59 Maine, 494.

The evidence, if admitted, could have no legal effect upon the result of the suit. It was properly excluded.

The defendant offered a mortgage deed from Ephraim Clark, 2d, to Nathaniel Bryant, dated September 26, 1859, while Bryant owned the land devised to Benjamin F. Clark, in which the north line of the land conveyed by the mortgage is described thus:

"Beginning in the middle of the highway, at the south line of land of Stephen Barrett, thence north sixty-four degrees west by said Barrett lot two hundred and eighty-four rods to land of Nathaniel Bryant." He claims that two hundred and eighty-four rods from the highway extends to the back field hill, and that by taking that mortgage, Nathaniel Bryant and all persons claiming under him, are estopped from denying the back field hill to be the monument described in the devise. It is a sufficient answer to this proposition that that line extends to Nathaniel Bryant's land as a boundary, and wherever the true line of Bryant's land was, there the north line must stop, whether one hundred rods, or two hundred and eighty-four rods in length. No estoppel was created by taking that mortgage. It was properly excluded.

Under the construction which we have given to the devise, the charge of the presiding judge to the jury was favorable to the defendant, and he has no ground for exceptions.

Exceptions overruled.

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

INHABITANTS OF SCHOOL DISTRICT NO. 6 IN DRESDEN *vs.* ÆTNA INSURANCE COMPANY.

Lincoln, 1876.—May 31, 1877.

Abatement. Trial.

It is the settled law of this state that the non-existence of a plaintiff corporation can only be taken advantage of by plea in abatement; it cannot be set up as a ground of defense by a brief statement filed with a plea in bar, nor can it be given in evidence under the general issue.

In this state a petition for the removal of a cause from the supreme judicial court to the circuit court of the United States, for any of the causes mentioned in the act of congress of March 3, 1875, must be filed at the first term, or it will be too late, and must be rejected.

ON EXCEPTIONS, at the October term, 1875.

DEBT, on a judgment. The writ is dated March 23, 1875. The action was entered at the April term, thereafter, at which term the defendant company, on the second day thereof, filed a plea in abatement, to which the plaintiffs on the thirteenth day of the term filed a demurrer, which the defendants joined. The court sustained the demurrer and the defendants alleged exceptions. The law court subsequently overruled the exceptions and awarded *respondeas ouster*.

On the first day of the present October term, 1875 and on the first call of the docket, the defendants filed their petition for the removal of the case to the circuit court of the United States, and also at the same time filed their bond with sureties.

The presiding justice was of the opinion that this is not the first term at which the action could have been tried, and therefore denied the petition and required the defendants to plead further in this

court; and the defendant on the third day of the term alleged exceptions, and thereafter pleaded the general issue, with a brief statement of the non-existence of the corporation.

The counsel prosecuting the case against the defendants, having filed a replication of plaintiffs to the defendants' plea of general issue, moved that the court order the brief statement of the defendants be stricken out and disregarded; and the court so ordered. He then offered in evidence the record of the judgment declared on in the writ.

The defendants' counsel offered to produce evidence to support the allegations and matter contained in the defendants' brief statement; but the court ruled that the evidence was inadmissible, the brief statement having been stricken out by order of the court, and excluded the evidence offered.

The parties consenting that the presiding judge might pass upon the case without the intervention of the jury, reserving to either party the right of exceptions, the judge on the third day of the term ordered an entry of judgment for the plaintiffs for the amount of the judgment sued on, with legal interest and costs of court. And the defendants alleged exceptions.

W. Hubbard, for the defendants.

A. P. Gould & J. E. Moore, for the plaintiffs.

WALTON, J. It is the settled law of this state that the non-existence of a plaintiff corporation can only be taken advantage of by plea in abatement. It cannot be set up as a ground of defense by a brief statement filed with a plea in bar, nor can it be given in evidence under the general issue. We are aware that a different rule prevails in some of the states, but that is no reason for disregarding our own rule. Such a defense, if made at all, should be made promptly. By holding that it can only be made by plea in abatement, and within the time allowed for filing such pleas, (which is the first two days of the first term,) this promptitude is secured. The rule is therefore a good one, and should not be departed from. *Trustees* v. *Kendrick*, 12 Maine, 381. *Penobscot Boom Corporation* v. *Lamson*, 16 Maine, 224. *Savage Man. Co.* v. *Armstrong*, 17 Maine, 34. *Brown* v. *Nourse*, 55 Maine, 230.

A petition for the removal of a cause from the supreme judicial court of this state to the circuit court of the United States, for any of the causes mentioned in the act of Congress of March 3, 1875, must be filed "before or at the term at which said cause could be first tried, and before the trial thereof," or it will be too late and must be rejected. Such is the express language of the statute. In this state an action can be tried in the supreme judicial court at the first term, provided the writ has then been fully served and all the parties to the suit are legally before the court. True, it is not usual to try actions at the first term, but there is no law or rule of court now in force to prevent it. They can be then tried and that is sufficient under the act of congress above cited, to render a petition, filed at a subsequent term, too late to be effectual.

Our attention has been called to a recent decision of Judge Ballard of the circuit court of the United States for the district of Kentucky, published in the Chicago Legal News of May 19, 1877, in which he holds that the act of Congress of March 3, 1875, does not repeal sub-division 3 of section 639 of the Revised Statutes of the United States, and that, by virtue of said sub-division 3, a cause may still be removed to the circuit court of the United States at any time before a final trial is had, provided the petitioner makes affidavit of "prejudice or local influence." This may be true. But the petition for removal in this case is not based upon sub-division 3 of section 639 of the Revised Statutes of the United States, and the petitioner did not make the affidavit therein provided for. The petition was in substance and in terms based upon the provisions of the act of March 3, 1875, and, as such, was, as already stated, filed too late to be effectual.

We discover no error in the rulings excepted to. The brief statement setting up the alleged non-existence of school district No. 6, in Dresden, was properly struck out and disregarded, for the reason that such a defense can only be made by plea in abatement. The petition for the removal of the cause was properly denied for the reason that it was not seasonably filed.

Exceptions overruled.

APPLETON, C. J., VIRGIN, PETERS and LIBBEY, JJ., concurred.

INHABITANTS OF RICHMOND *vs.* SAMUEL BROWN and trustee.

Sagadahoc, 1876.—November 27, 1876.

Bankruptcy. Tax. Payment.

A debt from a collector of taxes for a town or city for its taxes collected by him and not paid over, is a fiduciary debt within the bankrupt law, and is not barred by such collector's obtaining a discharge in bankruptcy.

Such collector is a public officer and when guilty of official defalcation, the debt created by such defalcation is not barred by a discharge in bankruptcy.

An action for money had and received may be maintained by a town against its collector of taxes for moneys collected by him and not accounted for in his annual settlement with the town.

When a fiduciary debt is proved in bankruptcy, the creditor must account on his debt both for the dividends received and for those which he was entitled to receive and did not receive but might have received had it not been for his neglect.

If a collector of taxes has been credited for his per centage for collections before bankruptcy and proceeds to collect after his discharge, he is not entitled to a per centage for collections after such discharge, upon which he has been allowed a per centage.

When money is appropriated to the discharge of a tax of a particular year at the time of its payment, such appropriation cannot be changed to the injury of the collector.

ON REPORT.

ASSUMPSIT, for money had and received by the defendant as collector of taxes.

J. W. Spaulding, for the plaintiffs.

W. T. Hall, for the defendant.

APPLETON, C. J. This is an action for money had and received by the defendant, a collector of taxes of the plaintiff town for the year 1872.

It appears that the defendant collected large sums of money upon the tax bills of 1872 in his hands for collection, and that on February 20, 1873, he looked over the collections made and his payments therefrom with the selectmen and there was then found due from him to the town for money in his hands the sum of $2,341.04, for which he gave a note, not negotiable, of the following tenor :

"$2,341.04. Richmond, Me., Feb. 20, 1873.

For value received I promise to pay the treasurer of the town of Richmond, the sum of twenty-three hundred forty-one dollars and four cents on demand with interest. The same being the amount due the town for its portion of taxes of 1872 committed to me for collection as per settlement with the selectmen this day.

No interest claimed to May 1, 1873.

Samuel Brown, collector.
Samuel Toothaker, surety.
J. M. Hagar, surety."

In addition to the above sum, the plaintiffs claim $655.89, which has been since collected or which was not included in the settlement of Feb. 20, 1873.

On May 14, 1873, upon the petition of one of his creditors, the defendant was adjudged a bankrupt and, after due proceedings had, on Dec. 7, 1874, received his final discharge.

Such is the claim as made by the plaintiffs. It remains to consider the various grounds upon which this demand is resisted and upon which the defendants rely.

I. The action is maintainable. The defendant has appropriated the town's money to his own use. He should account for what he has received. It is no answer that his sureties are not sued with him. The objection, if available, could only be taken advantage of by plea in abatement.

The defendant is equally liable for moneys received since the settlement made with the town, which may be recovered in an action for money had and received. *Adams* v. *Farnsworth*, 15 Gray, 423.

II. The warrant given the defendant exempts from distress, property not exempted by statute. The defendant was not liable for not proceeding to collect, the warrant not being in accordance with the statute. He can be held to account only for the money collected by him. *Orneville* v. *Pearson*, 61 Maine, 552. *Adams* v. *Farnsworth*, 15 Gray, 423.

III. Reliance is placed upon the defendant's discharge in bankruptcy. But the plaintiffs' suit is for money received by him in a fiduciary capacity and for which he has not accounted. A debt

due from a collector of taxes for a municipal corporation for taxes received is a fiduciary debt. *Morse* v. *Lowell*, 7 Met. 152.

The defendant received the money as a public officer, and by neglect to pay is guilty of defalcation as such public officer; and his debt thus created is not barred by his discharge in bankruptcy. By R. S. of U. S., § 5117, "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

The plaintiffs, therefore, are obviously entitled to recover; but the dividend received is to go in reduction of the plaintiffs' debt.

IV. The plaintiffs presented their debt on March 10, 1874, and on March 18, received a dividend, which apparently was the last. But the plaintiffs were equally entitled to the first dividend. By R. S. 5097, "no dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to dividends equal to those already received by the other creditors, before any further payment is made to the latter."

The plaintiffs had it in their power to receive both dividends. It was their own neglect that both were not received. They were under no obligation to prove their claim for a dividend; for it would not be discharged by the defendant's discharge in bankruptcy, but having proved their claim, they should be held to account for all dividends to which they were entitled and might have received. It was their own neglect that it was not received.

The plaintiffs then are to allow the defendant for the dividend received, and the dividend which they might have obtained, and to which they were entitled, had they used due diligence in enforcing their legal rights.

V. In relation to the sum of $655.89, it is not satisfactorily clear how that sum is made up. The defendant, in addition to his note or memorandum, should be held to account for all moneys in his hands, collected since Feb. 20, 1873. He should be credited for his reasonable charges for his collections since that date, unless he has already been allowed for the costs of collection. In other words, he should not be paid twice for the same service.

VI. All taxes should be credited to the account of the year for which they were paid. The appropriation of the money should be to the tax the parties intended at the time to discharge and for which it was paid. The payments made to cancel taxes should be applied according to the intention of the parties as expressed at the time of such payment. Both parties must be bound by an appropriation deliberately made.

Whether there has been any change of credits or debits to the injury of the defendant, as he claims, can be ascertained at the hearing, at *nisi prius* where the amount for which judgment is to rendered, is to be determined.

Judgment for the plaintiffs.
Damages to be assessed at nisi prius.

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

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

AMOS A. LARRABEE AND WIFE *vs.* EDWARD SEWALL.

Sagadahoc, 1876.—May 31, 1877.

Trial. Negligence. Fraud.

The question of ordinary care, depending on answers to other questions, some of law and some of fact, and therefore sometimes called a mixed question, is properly left to the jury with appropriate instructions.

Where two alternatives are presented to a traveler upon the highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence for taking either.

Where a traveler selects one of two alternatives of escape from such collision, it is not a question of law, unless in extreme cases and where the facts are undisputed, which alternative he should select; but a question for the jury, whether in making his selection he acts with ordinary care.

A requested instruction should be good in its totality.

If a requested instruction is composed of two propositions, one of which is correct in law and the other erroneous, it is not error to refuse it.

A written discharge of a trespass action procured from the defendant by the plaintiff or those acting for him through fraud, intimidation, or misrepresentation of material facts, for a sum less than he would have been induced to settle for, but for such practices, is not valid.

Whether fraud was practiced, is a question for the jury.

On exceptions and motion.

Trespass for collision on the highway, in substance, that on March 14, 1875, the plaintiff, wife, was carefully driving on the right side of Washington street, Bath, and the defendant, approaching to meet her, so carelessly drove as to induce a collision of carriages, by which she was thrown out; that the main trunk of the right sciatic nerve was thereby injured, resulting in great pain and introversion of her foot and permanent lameness.

The plea was not guilty, with brief statement that since the commencement of the action, and pending the same, August 1, 1875, the defendant paid the plaintiffs the sum of $1500, and that the plaintiffs received the same in full satisfaction of the action, and by their writing released the defendant from all liability; and further, that the collision was on the part of the defendant, an inevitable accident, and that the carelessness of the plaintiff contributed thereto.

The testimony on the part of the plaintiff, wife, was in substance, this: "I left my home in Phippsburg, twelve miles off with my eight year old son, shortly before sunset, with horse and wagon, to meet my husband at the house of Frank O. Moses, on Washington street, Bath, whose wife was my husband's sister; arrived in Washington street about eight o'clock, when crossing North street saw defendant's horse and chaise some rods away, pass Pearl street light, and did not lose sight of them till the collision on the east side of Washington street, just past the north corner of Grove; was driving very slowly, kept reining my horse toward the sidewalk; just as I passed Grove street, the left fore wheel of his carriage struck the left hind wheel of mine. I had the rein in my right hand, I went right out over the dasher on to the hard frozen ground, struck upon my right side in the gutter, very near the curbstone, was hurt upon my right arm, my right hip and whole right side." The plaintiff stated her injuries more at length, how she was taken up by Mr. Litchfield, how she was assisted to the house of her brother-in-law, Moses, by Mr. Sewall, the defendant; how Dr. Briry was called in, examined her, treated; her how much pain she suffered; how after eight days she returned to Phippsburg by wagon; how within a few weeks she

returned to Bath for medical advice, was examined by Dr. Payne and prescribed for, after which had better feelings, but no permanent benefit, and rather grew worse; afterward found the seat of her injury to be the sciatic nerve in the main branch; that this nerve suffered a concussion, a shock, the effect of which had spread by sympathy to other parts; the loss of nervous power had so affected the muscles of her lower limb, that her foot turned in, so that she walked upon its side; that the callouses of the foot produced by walking, were found upon the side, and not as is usual, upon the bottom; that she has been continually lame, growing no better, and scarcely ever free from pain; that she received the fifteen hundred dollars, and gave a receipt in full. Her testimony tended to show that it was obtained through undue influence, over-persuasion, and fraud on the part of Moses and Marr, agents of the defendant; that she had tendered the money back, and on the defendant's refusal to accept it, she deposited it in court.

Other testimony on the part of the plaintiff, tended to show, that at the time of the collision, the plaintiff's horse was close to the sidewalk, on the right side of the road; and the street was lighted from lamp posts, stores, and dwelling houses.

The testimony of the defendant was in substance, that it was very dark, that he was driving slowly, endeavoring to keep to his right; that a light just manifested itself from a window, as he saw and heard this carriage coming, that he immediately pulled up his horse, and found there had been a collision.

At the trial, which lasted nine days, the defendant's counsel requested fourteen specific instructions, of which Nos. 4, 6, and 12, were given in substance in the charge, Nos. 11, 13, 15, 16, and 17, not given except as in the charge, and the following not given:

"I. If Mr. Gould acting for the defendant, told Moses that if he would get such a discharge from the plaintiffs, as Mr. Charles Larrabee should write, he would be responsible to him, (Moses) for the sum of $1500, and Moses thereupon received from Mr. Larrabee the form of the discharge, ready for execution, which has been proved in this case, and carried it to the plaintiffs, and they executed it and delivered it to Moses, and Moses gave them $1500, the defendant thereupon became responsible to Moses for the

$1500, and Moses from that time held the discharge as the agent for the defendant; and the plaintiffs could not withdraw it from his hands without the defendant's consent, or the consent of Moses.

III. That there is no evidence in the case which will justify the jury in finding that Moses was the agent for the defendant, until after his interview with the plaintiffs on Friday, the day before the settlement; and that defendant cannot be held responsible for anything which was said by Moses or Marr at the time of that interview.

V. That there is no such evidence of fraud in this case, as will authorize the jury to find that the discharge was procured by fraud.

VIII. That if the representation was made to the plaintiffs by Moses or Marr, that the defendant was using his money to hire witnesses to testify, such a representation, if made as a matter of fact, was not sufficient to authorize the jury to set the discharge aside.

X. That the advice or persuasion of Moses or Marr, if given to plaintiffs at the time of the settlement, not to consult their counsel, was not a fraud, and furnishes no ground for setting the discharge aside.

XIV. That even if defendant was on the wrong side of the street, and the plaintiff saw his carriage in season to avoid the collision, and had an opportunity to do so before it took place, by the exercise of ordinary skill and care, and neglected to do so, she was guilty of negligence and cannot prevail in this case; and if she saw defendant's carriage in season to turn her horse and carriage into the head of Grove street, or to stop her carriage before the collision, it was her duty to do so."

The verdict was for the plaintiffs for $3000.

To the foregoing, with other rulings, the defendant alleged exceptions.

A. P. Gould & J. E. Moore, for the defendant.

W. Gilbert, for the plaintiffs, submitted without brief.

DICKERSON, J. Exceptions are taken by the defendant to the refusal of the court to give certain requested instructions, the want of fulness in giving others, and the rulings upon the admis-

sion and exclusion of testimony. We shall consider only the exceptions relied upon in the argument, regarding the others as waived.

Great importance is attached in the argument to the alleged refusal of the court to give the fourteenth requested instruction which was as follows: "that even if the defendant was on the wrong side of the street, and the plaintiff saw his carriage in season to avoid the collision, and had an opportunity to do so before it took place, by the exercise of ordinary skill and care, and neglected to do so, she was guilty of negligence and cannot prevail in this case; and if she saw defendant's carriage in season to turn her horse into the head of Grove street, or to stop him before the collision, it was her duty to do so."

This request contains two propositions; and if either of them is erroneous in law, the court properly refused to give the instruction requested. The second proposition is obviously incorrect. Whether it was the plaintiff's duty to turn his horse and carriage into Grove street, or to stop there depended upon the demand of ordinary care, under all the circumstances of the case; that is a mixed question of law and fact for the jury under appropriate instructions by the court. The court will not, except in very extreme cases, even where the facts are admitted or undisputed, determine the question of ordinary care as matter of law. It will never do so when men of equal intelligence and impartiality might honestly draw different inferences and deduce different conclusions from such facts. In such cases the law invokes the average judgment of twelve men as safer and wiser than that of a single judge. In this very case persons of equal sense and prudence might have accepted different alternatives; one might have turned down Grove street, another might have crossed over to the western side of Washington street, while a third might have kept close to the sidewalk as the plaintiff did, and a fourth perhaps might have stopped the team opposite Albert Moses' house. Where so much depended upon the degree of darkness, the effect of the light from the street lamps and private residences, the rate at which the parties were driving at the time, the plaintiff's estimate of the distance between them, her position upon the lawful side of the street,

her expectations as to the duty and probable course of the defendant, arising from this fact, and her presence of mind under circumstances of suddenly impending personal peril, the law will not declare that ordinary care required her to choose any particular one of the alternatives presented, and hold her guilty of contributory negligence for not doing so. The second paragraph of this requested instruction in substance, called upon the court to withdraw the question of ordinary care from the jury, and to decide it as matter of law. For this reason, at least, the court properly refused to give the requested instruction. *Webb* v. *P. & K. R. R. Co.*, 57 Maine, 117, 132. *Mangam* v. *Brooklyn R. R.*, 38 N. Y. 455. *Detroit* v. *W. R. R. Co. Van Steinberg*, 17 Mich. 99. *Railroad* v. *Stout*, 17 Wall. 659. *Railroad* v. *McElwell*, 67 Pa. St. 315. 2 Redfield on Railways, 231.

The defendant also complains that the twelfth and thirteenth requested instructions were not given in terms, but with qualifications that impaired their force and effect. The substance of these requests is, that negligence is not necessarily to be imputed to the defendant for being upon the wrong side of the way at the time of the collision, and that if the darkness prevented him from distinguishing the right from the wrong side of the way, the jury might take that fact into consideration upon the question of negligence. The instruction upon this point was that if the defendant was at the left of the centre of the road at the time of the collision, the jury might consider it strong evidence of the defendant's carelessness, but that that evidence might be controlled, and should be considered with the other evidence in the case in deciding the question of negligence.

The principal criticism upon this instruction is to the use of the words, "strong evidence of carelesness." We think this language is unobjectionable. The fact that the defendant, at the instant of the collision, was driving in violation of the law of the road is, indeed, very "strong evidence of carelessness." Unexplained and uncontrolled this fact would not only be "strong" but conclusive "evidence of carelessness." The instruction, however, states the proposition in a form more favorable to the defendant by simply declaring in substance that it is "strong evidence" that a party is in the wrong when he is doing that which the law forbids him to do.

The instruction upon the suitableness of the plaintiff's horse, complained of by the defendant, was more favorable to him than the request. The omission to give the words, "and that unsuitableness contributed to the accident," did not damage the defendant, but rather tended to his advantage. The court explicitly instructed the jury that it was the duty of the plaintiff to have a suitable horse, carriage and harness, without restricting this duty by the qualifying words of the request. The defendant cannot complain that the instruction imposed upon the plaintiff a more comprehensive and onerous duty than the request contemplated.

The objections to the admission and exclusion of evidence do not appear to be well founded. Some of the evidence admitted might perhaps have been excluded, as immaterial, but it could not have damaged the defendant; and the other evidence admitted was competent in some one of the various aspects of the case. We do not perceive that any evidence offered by the defendant was improperly excluded.

There remain to be considered the exceptions to the instructions and refusals to instruct in relation to the alleged discharge of the action of the plaintiffs, dated Aug. 21, 1875. There was evidence to show that the wife, plaintiff, on August 23, 1875, tendered back to Moses the $1500 received in discharge of the plaintiffs' claim, for the purpose of rescinding the contract of settlement; and it was admitted that such tender was made to the defendant on the 25th day of the same month. The defendant sought to avoid the effect of the alleged tender to Moses, upon the ground that Moses had previously delivered the discharge to him, but as the evidence of such delivery did not fix the time definitely, the plaintiffs contended that the tender was seasonably made to Moses. The instructions were full and explicit, and we think, unobjectionable, upon this aspect of the case. They were substantially, that if Moses was not acting as the agent of the defendant in effecting the settlement, the plaintiffs had a right to recall the discharge any time before its delivery to the defendant or some one authorized by him to receive it, but if he was the agent of the defendant in that transaction, delivery to him was delivery to the defendant.

The third requested instruction was properly refused. If it were

true, as the defendants' counsel assumes in that request, that there is no evidence in the case to justify the jury in finding that Moses was the agent of the defendant, until after his first interview with the plaintiffs in company with Marr, it was competent for him to ratify their doings. And when we consider that Moses immediately informed the defendant's counsel of that interview, and thereupon became the defendant's agent in the subsequent negotiations, and that the efforts of Moses and Marr, in reducing the plaintiff's claim against the defendant at their first interview, enured to the benefit of the defendant, the interview on Saturday might properly be regarded as a continuation of the previous interview on Friday, and part and parcel of the same. There was thus good cause for submitting the question of ratification to the jury. The defendant cannot appropriate the advantages, and escape the burdens of Moses and Marr's first interview with the plaintiffs; these are inseparable from each other, and must be accepted or rejected together.

The plaintiffs sought to invalidate the discharge for fraud; and the counsel for the defendant requested the court to instruct the jury that the evidence was not sufficient to set aside the discharge for that cause. The plaintiffs were the principal witnesses of the fraud charged; and Moses and Marr were the persons upon whose statements, representations and doings the allegations of fraud were predicated. The circumstances relied upon to show fraud in obtaining the discharge from the plaintiffs were numerous, covering extended interviews between the plaintiffs and Moses and Marr, for a considerable portion of two days. There was evidence that Moses, a brother-in-law of the husband, plaintiff, while pretending to be laboring for the interests of the plaintiffs, concealed from them his capacity as agent of the defendant, that he represented that the defendant would use money to corrupt the jury, that he was hiring witnesses, that he had seen the defendant and a large number of his witnesses in a most unseemly place, that he, Moses, had consulted the plaintiffs' friends, and that they desired a settlement of the affair, that Marr pretended to the plaintiffs that he had had experience in law suits, was familiar with the law, and came to explain it to them, that he expatiated upon the uncertain-

ties, delays, vexation and expense of a jury trial, told what strange things he knew to have happened among jurors, and that, in general, he corroborated and fortified the statements and representations of Moses. Although this account of their statements and representations is denied by Moses and Marr, it does no violence to their own testimony, to say that they labored as assiduously to affect a settlement of the plaintiffs' claim, as if they had been parties to the suit and desirous of obtaining a discharge from the plaintiffs.

Fraud must be proved, and it is the province of the jury to determine questions of fraud under appropriate instructions from the court in matters of law. Such instructions were given. The jury were instructed that to authorize the setting aside of the discharge for fraud, the plaintiffs must prove that the defendant or his agent intentionally misrepresented some material fact, or produced a false impression in regard to some material fact to mislead the plaintiffs, or to obtain an undue advantage of them, and did thereby obtain the settlement and discharge, and that the misrepresentation or false impression may be as well by deeds or acts as by words; by artifice to mislead as well as by positive assertion. The legal distinction between the expression of an opinion and the representation or assertion of a fact, was pointed out in the charge, and the attention of the jury was called to the most important testimony, relied upon to show fraud, with appropriate instructions upon each alleged element of fraud.

The jury were at liberty to credit the plaintiffs' testimony. They saw and heard the witnesses, and observed their appearance on the stand, and it was their province to judge of their credibility, and the weight of the whole testimony; they must have found that the discharge was obtained by fraud, and we think that the evidence is sufficient in law to warrant that finding. There was therefore no error in refusing to give the fifth requested instruction.

It is apparent from the whole evidence, upon the question of fraud, that the plaintiffs did not sign the discharge until after Moses and Marr had put forth very extraordinary efforts to induce them to do so, and that even then, they consented to the settlement, and signed the discharge with great hesitation and reluc-

tance. Moses' protestations of friendship, if made, and his concealment of his capacity of agent of the defendant, his efforts to dissuade the plaintiffs from consulting their counsel before settlement of their suit, his pretense that he was acting under the advice of their mutual friends, his representations that the defendant would dismiss men from his employment who should testify against him, that he would corrupt jurors, was hiring witnesses, and that he had seen a large number of witnesses with the plaintiff in an unseemly place, confirmed by Marr's pretended knowledge and experience in matters of law and law suits, and his avowals of disinterestedness, were well calculated to win the confidence of the plaintiffs, throw them off their guard, intimidate, mislead, and deceive them, in respect to material facts, and induce them to sign a discharge of their action for a sum much less than they would have insisted upon but for these doings. Our conclusion is, that the verdict is not against law, nor so manifestly against the weight of evidence, as to authorize us to set it aside for that cause.

The other requested instructions are either sufficiently given in the charge, or rendered unnecessary by the accuracy and completeness of the charge upon all the points of law legitimately arising in the case, or have been disposed of in connection with the other questions that have been considered and determined.

Motion and exceptions overruled.
Judgment on the verdict.

APPLETON, C. J., BARROWS, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

INHABITANTS OF FAIRFIELD, petitioners, *vs.* COUNTY COMMISSIONERS.

Somerset, 1876.—May 30, 1876.

Certiorari.

A writ of certiorari will not be granted on account of mere technical objections to the record when substantial justice does not require it.

But in a case which showed that the county commissioners ordered the abatement of a tax; where they had no jurisdiction, because there was no allega-

tion or pretense that the petitioner brought in a list, etc., to the assessors or was unable to do so, the court ordered the writ of certiorari to issue.

ON REPORT.

PETITION for certiorari, to quash the proceedings of the county commissioners, had on petition of Daniel Bunker of Fairfield, where he represented in substance; that he owned a quantity of real estate in Fairfield; that the assessors of Fairfield, during the years 1873 and 1874, overrated his property, and assessed more tax against him than was just; that he had made application to them for an abatement for both years, and they refused to make it, wherefore he asked relief.

The commissioners after notice, hearing and examination, adjudged that the valuation of the real estate of Bunker, for the years 1873 and 1874 be reduced from the sum of four thousand dollars to the sum of twenty-five hundred dollars, and ordered that the costs accruing upon the petition, taxed at $21.08 be paid into the treasury of the county by the town of Fairfield, within six months from date.

The petitioners in the case at bar after setting out the proceedings of the commissioners, prayed for the writ of certiorari to issue, on account of errors assigned, among others that the commissioners had no jurisdiction, because "it is not alleged in said petition that the petitioner did 'make and bring in true and perfect lists of his poll and estate real and personal, not by law exempt from taxation,' which he was possessed of on the first days of April, in the years complained of, to the assessors of said Fairfield, as he in fact did not, although said assessors gave the proper notices therefor."

It was admitted that the assessors posted the notices for persons liable to be taxed to bring in lists of their polls and estates as required by law, and that Bunker did not bring in or present to them any such list, and further that they went on to, viewed and appraised the premises of Bunker, named in his petition, before making their assessment.

S. S. Brown, for the petitioners.

S. J. Walton & L. L. Walton, for the respondents.

VIRGIN, J. Whether or not a writ of certiorari shall issue to bring up and quash the irregular proceedings of county commissioners in matters within their jurisdiction, rests wholly in the discretion of this court.

In such cases the writ will not be granted on account of mere technical objections to the record, when substantial justice does not require it. If, however, the case shows that the commissioners had no jurisdiction of the particular matter, their adjudication thereon would be without the authority of law; and the party affected thereby has the right to have the record quashed on proper proceedings.

No person is entitled to apply to the county commissioners for an abatement of his tax, unless, after due notice, he brought into the assessors a true and perfect list of his taxable estate, or makes it appear to the commissioners that he was unable to do so. R. S., c. 6, §§ 65, 66. *Lambard* v. *Co. Commissioners*, 53 Maine, 505, 507.

In the case at bar, the application of the tax-payer contained no allegation of these jurisdictional facts; and there is no pretense that he did "bring in" his list or that he was unable to do so. If they had existed, but were omitted from the record, the commissioners could have amended the record. *Dresden* v. *Co. Com.*, 62 Maine, 365. Then it would appear that no defect in fact existed, and therefore that no injustice by reason thereof was suffered. *Writ of certiorari to issue.*

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

LEVI T. BOOTHBY *vs.* REUEL W. WOODMAN.

Somerset, 1876.—June 24, 1876.

Exceptions.

Exceptions will not be sustained, unless it affirmatively appear that the party excepting is aggrieved by the ruling of which he complains.

On exceptions.

Assumpsit, originally brought at the September term, 1875, on account annexed alone, which was as follows:

"R. W. Woodman to L. T. Boothby,	Dr.
To balance of account,	$24.33
To interest on same,	2.92
	$27.25

At the September term, 1875, the plaintiff was allowed by the presiding judge to amend the declaration by adding an omnibus count.

At the trial no evidence of any account between the parties was offered. The verdict was for the plaintiff; and the defendant excepted to the ruling allowing the amendment.

S. S. Brown, for the defendant.

The second count is not admissible, because it enlarges the claim presented by the plaintiff, and introduces new causes of action. *Butler* v. *Millett*, 47 Maine, 492.

S. S. Chapman, for the plaintiff.

The defendant's proper course was either to move the court to order a bill of particulars to be filed, or to demur to the first count before the amendment was granted. He neglected to do either, but went to trial upon the general issue; and the presumption is, that he had no need of any information as to what particular claims, or demands, in assumpsit, were sought to be recovered. *Harrington* v. *Tuttle*, 64 Maine, 474. *Bennett* v. *Davis*, 62 Maine, 544.

The specification in the new count clearly indicates that the subject matter of the new count is the same as that of the old, and that the new count is only a variation of the form of demanding and declaring, which is allowable. See Parker, C. J.'s, rule as to amendments, in *Ball* v. *Claflin*, 5 Pick. 303, 306.

Appleton, C. J. The writ in this case originally contained but one count, in which the plaintiff sought to recover a balance of account. The writ was amended at the plaintiff's instance by the insertion of a general count, for work and labor, goods sold,

materials furnished, money had and received, &c., with the following specification: "The plaintiff claims to recover, under this general count, the amount specified in the first count with legal costs." The defendant neither demurred to the original, nor to the amended count, nor did he call for a bill of particulars as he might have done, but proceeded to trial. He was not surprised; for if he had been, he should have asked for delay. It would seem that he was at no loss to understand what was the claim sought to be recovered; for he asked for no specification of what it might be. Indeed, it is impossible to perceive wherein the defendant has been aggrieved.

Exceptions will not be sustained, unless it affirmatively appear that the party excepting, has in some way suffered by the ruling of which he complains. *Exceptions overruled.*

WALTON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

FREDERICK S. WOODMAN *vs.* LEVI T. BOOTHBY and trustees.

Somerset, 1876.—November 27, 1876.

Promissory notes.

R, for his debt to R & Co., of which firm he was a member, made his note payable to the firm, upon which the defendant before its delivery, put his name. *Held*, 1. That he was to be regarded as a co-promisor and not as an indorser. 2. That though the note could not be enforced by the payees, it could by their indorsee.

The note having been negotiated by the payees at a bank, and having been taken up by them upon its dishonor by the makers; it was *held* that the note was not thereby paid, and that a suit could be maintained upon it by the plaintiff to whom it had been delivered by the payees.

ON REPORT.

ASSUMPSIT on this note:

"$275. Fairfield, Me., April 30, 1873.

Four months after date, I promise to pay to the order of William W. Rideout & Co, two hundred seventy-five dollars, at either bank in Waterville, with interest. Value received.

No. 4,907. William W. Rideout.

[INDORSEMENT.]

L. T. Boothby. Holden without demand or notice. Wm. W. Rideout & Co."

Plea : never promised, with a brief statement of want of notice, payment and that the note was indorsed without consideration.

The books of the firm of Rideout & Co. and other evidence tended to show that the note was made by Rideout in payment of that amount of personal indebtedness to the firm and so applied.

It was procured to be discounted at the People's National Bank of Waterville, by R. Woodman, a member of the firm of William W. Rideout & Co. It was subsequently dishonored, and paid by Woodman ; and for a time after payment left at the bank and then taken and delivered to the plaintiff. The case is stated in the opinion sufficiently to raise the legal points decided.

S. S. Brown, for the plaintiff.

This is a valid form of note. *Heywood* v. *Wingate*, 14 N. H. 73.

The plaintiff claims that the note was given to the firm of Rideout & Co. to pay debt owed by Rideout to the firm.

The defendant's claim, that the note was signed by him to accommodate the firm, is not supported by the evidence.

Want of consideration between the defendant and the firm is no defense, if proved; even if plaintiff bought the note over due with knowledge of the fact that it was an accommodation note, as between the defendant and the firm. Story on Promissory Notes, § 194. *Thompson* v. *Shepherd*, 12 Met. 311. 1 Daniels on Negotiable Securities, 592, 540.

When the firm redeemed the note of the bank they became the lawful holders as much as if they had never parted with it. 3 Kent's Com. 89, and authorities cited in note.

The defendant can not change the legal effect and character of note by parol proof of any agreement between him and Rideout made at date of note. *Warren Academy* v. *Starrett*, 15 Maine, 443. *Porter* v. *Porter*, 51 Maine, 376.

F. A. Waldron, for the defendants, contended that the note was not given for Rideout's private indebtedness ; that it was in-

dorsed for the accommodation of the firm at the request of one of its members, and without consideration, that he was liable only as indorser; and that when the bank received its money, his liability was at an end.

APPLETON, C. J. This is an action upon a promissory note payable to W. W. Rideout & Co. or order on four months, signed by W. W. Rideout and given for the sum of two hundred seventy-five dollars. Upon the back of this note, the defendant, before its delivery to the payees, placed his name; and by so doing became a joint promisor with said Rideout. The law is well settled that when one not otherwise a party to a note puts his name upon the back at the request of the maker and before its delivery to the payee, he thereby becomes promisor. *Malbon* v. *Southard*, 36 Maine, 147. *Lowell* v. *Gage*, 38 Maine, 35. *Martin* v. *Boyd*, 11 N. H. 385. *Austin* v. *Boyd*, 24 Pick. 64.

The note being delivered to the payees was negotiated by them at a bank in Waterville; it not having been paid at maturity, they, as indorsers, were obliged to take it up, which they did and then passed it by delivery to the present plaintiff.

The bank at which the note was negotiated before its maturity acquired a good title and could have enforced its collection. It mattered not that the defendant was an accommodation signer. Can the present plaintiff maintain this suit?

It is objected that the note was given to a firm of which the maker Rideout was a member. It is obvious that an action could not be maintained upon the note by the payees; for the promisees could not sue one of their number as a maker. But this affects the remedy, not the right; and when the note is duly indorsed to a third person, he acquires a legal title and may sue upon it in his own name. *Davis* v. *Briggs*, 39 Maine, 304. *Pitcher* v. *Barrows*, 17 Pick. 361. *Thayer* v. *Buffum*, 11 Met. 398.

A firm is to be regarded as a distinct personality. The firm has its estates and its liabilities separate from that of its several members. The firm may give notes to the members composing it. The members may give their notes to the firm of which they are constituent parts.

The defendant being a co-promisor and not an indorser, his lia-

bility was original and not dependent upon demand and notice as an indorser. The payees having taken up the note after its dishonor were holders for value and could transfer a good title. It is immaterial to the defendant to whom he pays what he has promised to pay. It is sufficient for him that the payment will discharge his liability.

But it is further urged that the note was given for the accommodation of the firm to which it was made payable and that the defendant having signed it for their benefit, the moment it was paid with their money it had performed the purpose for which it was given and that it could not be enforced against the maker who was a mere surety. But we think the facts were otherwise—that the maker Rideout was indebted to the firm; that the note was given to discharge such indebtedness; that the defendant signed for the accommodation of Rideout and not for the accommodation of the firm, and, consequently, that his liability is not discharged. *Defendant defaulted.*

WALTON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

THOMAS M. PARKER *vs.*
WILLIAM W. WRIGHT and A. & P. COBURN, trustees.

Somerset, 1876.—January 9, 1877.

Trustee process.

The plaintiff brought his action to recover a debt due from the principal defendant alone, and trusteed a debt due to the partnership of which the defendant was a member. It appeared by the disclosure, that the firm was indebted to an amount larger than that disclosed. *Held*, 1. That the alleged trustees should be charged only for the interest which the principal defendant would be entitled to, after a settlement of the partnership affairs. 2. That the other partner should be permitted to become a party to the suit as claimant, to show what that interest is.

ON EXCEPTIONS, arising under a trustee disclosure.

Abner Coburn, in behalf of the trustees, disclosed that they employed the firm of Wright & Blackwell, in a logging operation

amounting to $6,519.23; that before the service they had advanced $4,306.68, leaving a balance of $2,212.55 to be paid to Blackwell & Wright; that he was informed and believed at that time there were company debts due and outstanding against Blackwell & Wright, growing out of the operations, amounting to $2,250; that since the service he sent to Blackwell & Wright by mail, to pay help, $300, and that he had paid Blackwell $1500 to pay partnership creditors, and believed the sum had been so appropriated.

Harmon Blackwell, partner of Wright, asked to be permitted to file allegations, claiming the proceeds of the demand disclosed by the trustees, as necessary to pay partnership debts for which he is liable. The presiding justice refused to allow the allegations to be filed, and charged the trustees in the sum of $750, to both of which rulings, the trustees alleged exceptions.

S. Coburn, for the trustees.

B. E. Pratt, for the plaintiff.

The remedy of the creditors, if any there were, against the copartnership, if any there was, was by suits against both its members, summoning the same trustees. The court would then have been called upon to determine who had the better title to the fund. *Whitney* v. *Munroe & trs.*, 19 Maine, 42. *Thompson* v. *Lewis & tr.*, 34 Maine, 167. *Smith* v. *Cahoon & tr.*, 37 Maine, 281. *Burnell* v. *Weld & trs.*, 59 Maine, 423.

DANFORTH, J. The disclosure of the alleged trustees in this case, shows that the principal defendant is a member of the firm of Blackwell & Wright, and the only property which they had in their hands was a debt due to the firm. It also shows that the indebtedness of the firm was somewhat larger than the claim against the trustees. These facts are stated partly from the personal knowledge of the alleged trustee who makes the disclosure, and partly from information and belief. The belief in the truth of the information, is stated under oath; it therefore becomes a part of the disclosure, and must be taken as such. *Chase* v. *Bradley*, 17 Maine, 89. *Willard* v. *Sturtevant*, 7 Pick. 194–7. *Kelly* v. *Bowman*, 12 Pick. 383. It thus appears from the dis-

closure, that the other partner, Blackwell, has an interest in the funds disclosed. If not so, the plaintiff or defendant under proper allegations, could have shown the facts. R. S., c. 86, § 29.

In this state of the case, Blackwell appeared voluntarily claiming the proceeds of the demand disclosed as necessary to pay the partnership debts, and asked to be permitted to file allegations, and, though not so stated we must presume, for the purpose of showing his claim well founded. He was not permitted to do so, and the trustees were charged. To both of which rulings, exceptions were filed. If the first ruling was wrong, the second was, also. If Blackwell had a right to be heard, being excluded, the judgment would not be binding upon him; and the trustees should have been discharged. *Burnell* v. *Weld*, 59 Maine, 423.

Ought Blackwell to have been admitted a party to the suit? By R. S., c. 86, § 32, "when it appears by the answers of a trustee, that any effects, goods or credits in his hands are claimed by a third person in virtue of an assignment from the principal debtor, or in some other way, the court may permit such claimant, if he sees cause, to appear. If he does not appear voluntarily," he may be cited, &c. On appearing, he may become a party to the suit so far as his title may be in question, and "allege and prove any facts not stated or denied in the disclosure of the trustee."

It will be seen that the words of the statute, "or in some other way," are sufficiently broad to include any way in which the claimant can show a title, no matter how it may have arisen, or in what form it may be presented, provided it is such as the law will uphold.

This case, then, involves the question, as to how far one partner may claim a debt due the firm, as against a creditor of the other partner, who has attached the debt in a trustee process.

That the interest of one partner in the tangible property of the partnership may be attached and sold in payment of his private debt, must be considered as well settled, perhaps wherever the common law prevails. In this state it seems now to be well settled, that his interest may be attached for the same purpose in a trustee process, though in other states a different doctrine prevails, on the ground that a joint debt cannot thus be severed.

Formerly, in the case of tangible property, where the partnership consisted of two persons, under an attachment and seizure, the creditor would hold one-half the property, not because the debtor necessarily owned that amount, but rather on account of the difficulty and delay in ascertaining the separate partner's interest; as that could be done without the consent of the parties interested, only by a process in equity. But as wiser counsels prevailed, it was considered that difficulties and delays were no excuse for injustice, a different doctrine was adopted, and it is now well settled that a creditor of one partner can take only the actual legal interest of that partner to pay his private debt. The purchaser at the execution sale takes the place of the debtor and, his interest, whatever it may be, after the affairs of the partnership are settled, with all the liabilities and uncertainties attendant upon that settlement. This avoids the injustice of taking the property of one to pay the debt of another; while the creditor, though he may complain of the difficulties and delays, in reaching the desired end, must submit, as the remedies are such as, and the best that the law has provided for him, in common with all citizens, to protect their rights, as well as enforce their claims. This matter has been fully and sufficiently discussed in Collyer on Part., 4th Am. ed. 735, and notes; Story on Part., 6th ed., §§ 261–264, and notes; 1 Am. Lead. Cases, 470; 2 Lead. Cases in Eq., 3d ed. 336. To ascertain this interest of one partner, the priority of joint creditors and the rights of the other partners are fully recognized and respected. *Smith* v. *Barker*, 10 Maine, 458. *Douglas* v. *Winslow*, 20 Maine, 89. *Pierce* v. *Jackson*, 6 Mass. 242. *Tobey* v. *McFarlin*, 115 Mass. 98, 101.

Such being the rule in relation to attachment and sale on execution, founded, as it is, upon well recognized principles of law and justice, and enforced by such process as is common to all, we see no good reason why it should not be applied to that kind of property which can only be reached by a trustee process. There is nothing in the form of this process which should give it in this respect an advantage over the other. A debt due the firm is as much a part of its assets as any other property, and in its disposition is subject to the same laws; and the interest of each partner

in it is to be ascertained in the same way, and depends upon the same principles; with this exception, that as the court must determine the amount for which the trustee shall be chargeable, the extent of the debtor's interest must necessarily be ascertained before judgment, while under an attachment and sale, it may be ascertained before or after, usually after.

The plaintiff relies upon *Whitney* v. *Munroe*, 19 Maine, 42; *Thompson* v. *Lewis*, 34 Maine, 167; and *Smith* v. *Cahoon*, 37 Maine, 281, confirmed by *Burnell* v. *Weld*, before cited, to sustain his position. These cases hold that a debt due the partnership may be trusteed by a creditor of one of the partners, and, perhaps, in the absence of all proof to the contrary, that the interest of one of two partners will be presumed to be one-half, but nothing more. Neither of them decides that proof will not be received to show the debtor partner's interest, or that the trustee should be charged for more than that interest. On the other hand, in *Whitney* v. *Munroe*, the prior right of partnership creditors is distinctly recognized, as well as their claim to assert such right by a similar process. In *Thompson* v. *Lewis*, one of the partners having deceased, it is said: "Or the administrator may claim the credits for the estate; and when it so appears by the disclosure, the court may permit him to become a party to the suit, and have his claim investigated and determined." This case clearly recognizes the right of the creditor to no more than the actual interest of his debtor. The same may be said of *Smith* v. *Cahoon*.

But it is claimed that the remedy of the joint creditors is only by suit against both the partners and summoning the same trustees. This may indeed be one remedy, but we think not the only one; and this might often fail from a want of notice of the prior suit, or some of the joint debts may not have become payable. Then, why the necessity of a suit with its attendant delays and costs, when the parties, as in this case, are willing to pay without. It seems by the disclosure that, since the service of the writ, the trustees have paid eighteen hundred dollars to relieve their property, of liens and the company, of debts which have the precedence of that in suit. May not this fact be alleged and proved in this suit, as well as to commence others? and who so proper a person to file these allegations as the other partner?

The joint creditors, if they were in a condition to do so, may have no occasion to bring a suit; for while the partnership may be insolvent one of the partners may be solvent. In such case, the solvent partner is the only one interested, and his interest would extend to the whole amount of the partnership property. He "has a specific lien on the present and future property of the partnership, not only for the debts and liabilities due to third persons, but also for his own amount or share of the capital stock, and funds, and for all moneys advanced by him for the use of the firm, and also for all debts to the firm for moneys abstracted by any other partner from such stock and funds beyond his share." Story on Part., § 97. In Massachusetts it has been held that, "before either party can claim to his own use, or for the payment of his own debts, any of the partnership effects, the partnership must be solvent, and he must not be a debtor to it." *Fisk* v. *Herrick*, 6 Mass. 271.

The solvent partner thus becomes the representative of all the partnership interests and effects. If the creditors choose to secure their debts upon outstanding debts or liabilities, the same remedies which are provided for others are open to them. If they do not choose to do so, then the solvent partner has his rights and interests to protect and which he must protect by bill in equity or in a case like this by becoming a party to the suit. In *Fisk* v. *Herrick*, it was held that the trustee should be discharged unless one of the partners were summoned as trustee, that the interest of the principal defendant might be shown by his disclosure. But under our practice the liability of the trustee could not be thus shown, while under the statute, by permitting the partner to become a party to the suit, it might be.

This lien of the partner is not only an equitable one, but one which is recognized at law. In *Pierce* v. *Jackson*, Parsons, C. J., called it a common law interest.

In *Bank* v. *Wilkins*, 9 Maine, 28, it was held that "the mere insolvency of a copartnership is sufficient to defeat an attachment made by a creditor of one of the firm; although the partnership creditors have commenced no action for the recovery of their debts." The same doctrine is laid down in *Rice* v. *Austin*, 17 Mass. 197, 206-7. The same doctrine would seem to apply equally well to an attachment under a trustee process.

It is claimed here that there is no proof of any existing joint debts. But the complaint in the exceptions is, that the party most interested was not permitted to offer such proof. It may be that the defendant or trustees might have filed allegations and offered such proof. But that would have been only a partial remedy; a part of the interests of Blackwell might still have been left unprotected.

Besides, the principal defendant had no pecuniary interest in so doing and the trustees none, except to be protected from twice paying their debt; and this protection should be afforded them at the expense of the partnership rather than at their own, more especially when they have in their disclosure given such proof as they have and all that is presumed to be within their control.

The interest in partnership property may be regulated by contract between the partners as well as by the indebtedness of the firm and its individuals. Hence the necessary facts are peculiarly within the knowledge of the members of the firm; and when it becomes necessary to protect the rights of any one of them under the trustee process, it is because he has a valid claim to all or a part of the property attached. He is in a position to present this claim better than either of the other parties interested; and for that purpose he comes within the terms of the statute and should have been admitted a party to the suit.

Exceptions sustained.

APPLETON, C. J., WALTON, VIRGIN, PETERS and LIBBEY, JJ., concurred.

PROPRIETORS OF BAPTIST MEETING-HOUSE IN ST. ALBANS *vs.* NATHAN M. WEBB *et al.*

Somerset, 1876.—March 3, 1877.

Evidence. Corporations.

When the records of a corporation are shown to have been burned, parol evidence of their contents is admissible.

A corporation is not dissolved by merely neglecting to exercise its corporate powers.

ON REPORT, on so much of the evidence as is legally admissible.

WRIT OF ENTRY, for a lot of land in that part of Hartland which was formerly a portion of St. Albans.

The defendants pleaded in abatement that there was no such corporation. The issue was on the plaintiffs' rejoinder traversing the plea.

The evidence tended to show, that a meeting-house was built on the lot in 1842; that the proprietors were organized under the statute as a corporation in 1844; and that their records were burned in 1849.

The presiding justice, after the preliminary proof of loss of records, allowed evidence to be received of their contents.

A deed of the lot of a half acre more or less, in St. Albans, from Henry Warren to the plaintiffs, dated December 25, 1841, was in the case.

There was evidence that the corporation discontinued regular business meetings soon after the pews were conveyed by deeds dated November 9, 1842, signed Peleg C. Haskell and Alonzo Stewart, committee of the proprietors of the Baptist meeting-house, with the "seal of corporation."

A majority of the pew-holders with others, organized in 1870, and voted "that the following name be adopted by which this corporation should be known, viz: the 'Proprietors of the Union meeting-house in Hartland.'" They afterwards chose an allotment committee, and "allotted the house to certain denominations according to the number of pews handed in by each expressing their preference."

F. A. Wilson and *C. F. Woodard* with *E. Kent*, for the plaintiffs.

S. D. Lindsey, for the defendants.

APPLETON, C. J. This is a writ of entry brought by the plaintiffs to recover a lot of land upon which a meeting-house is erected.

The plea is that there is no such corporation.

The records of the corporation are shown to a reasonable certainty to have been burnt.

The records having been lost, parol evidence is admissible to

show the organization of the plaintiff corporation and action under it. This original organization was under c. 377, incorporated in the revision of 1841, c. 19, § 1. It appears that there was an application to call a meeting, that a meeting was had, that a clerk, treasurer and committee were duly chosen, that the lot of land on which the meeting-house was erected was deeded to the plaintiffs by their corporate name, that the meeting-house was built by their committee, and that the pews were deeded to the several pew-holders by deed of their committee, to which the seal of the corporation was affixed, or what was claimed to be such seal. These proceedings took place more than forty years ago. It is not to be expected that after such a lapse of time the particular votes of each meeting should be accurately remembered, especially, when they were committed to writing in the records of the corporation.

It is alleged that for a time the plaintiff corporation omitted to have corporate meetings; but a corporation is not dissolved by merely ceasing to exercise its powers. *Rollins* v. *Clay*, 33 Maine, 132. There was no dissolution of the corporation. *Hodsdon* v. *Copeland*, 16 Maine, 314.

It is immaterial in this suit to consider whether the "Proprietors of the Union meeting-house in Hartland" is a legal corporation or not. If it be one, it does not disprove the existence of the plaintiff corporation. If it be not one, its non-existence is as immaterial to the rights of the plaintiff as would be its existence.

The evidence satisfactorily shows the corporate existence of the plaintiffs; and according to the agreement of the parties, they are entitled to judgment. *Judgment for the plaintiffs.*

WALTON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

PROPRIETORS OF UNION MEETING-HOUSE IN HARTLAND *vs.* CHARLES ROWELL *et al.*

Corporation.

The owners of pews in a meeting-house owned by a corporation, have simply an easement in the freehold.

The case of *First Baptist Society, in Leeds*, v. *Grant*, 59 Maine, 245, re-affirmed.

ON REPORT, on so much of the evidence as is legally admissible, and so much of the testimony in the case of *Proprietors of Baptist meeting-house* v. *Webb et al. ante*, 398, as is applicable.

TRESPASS, for breaking and entering the plaintiffs' meeting-house in St. Albans, and damaging and spoiling the locks and staples belonging to the doors.

Plea not guilty, with a brief statement, that "in the performance of the acts constituting the alleged trespass, they were acting as a committee and agents of the proprietors of the Baptist meeting-house at St. Albans, a corporation organized according to law, under the statutes of this state, and owning the meeting-house described in the plaintiffs' writ, and having a right to the possession and control thereof, and that having demanded the key from a person in temporary charge, and being refused, they entered the meeting-house as they had a right to, as being the property of the said corporation."

The defendants admitted a forcible entry of the door by them, and introduced evidence tending to prove their brief statement.

The evidence on behalf of the plaintiffs, to the point of their organization, ownership and possession of the church, was introduced in the case next preceding this, in this volume, and tended to prove that a majority of the pew owners were acting as members of their organization which had taken, and, for some time held, actual possession of the meeting-house.

S. D. Lindsey, for the plaintiffs.

F. A. Wilson & C. F. Woodard, for the defendants.

APPLETON, C. J. This is an action of trespass *quare clausum fregit.*

Assuming the valid existence of the plaintiff organization, still this action cannot be maintained. The legal title to the premises in controversy is in the "Proprietors of the Baptist meeting-house in St. Albans" by virtue of a deed of the premises to them in their corporate name from Henry Warren, dated December 25, 1841, and by their building the meeting-house. The defendants justify under that corporation.

The plaintiffs claim an organization under R. S., c. 12, § 27,

which provides that "any persons, for the purpose of erecting a meeting-house, or the majority in interest of the owners of a meeting-house, not a parish, may incorporate themselves the same as parishes may; and choose all officers and do all other acts that a parish may lawfully do."

The meeting-house in controversy having been erected long ago, there could be no incorporation of persons, "for the purpose of erecting a meeting-house."

Neither were those claiming to have effected an organization "the majority in interest of the owners of the meeting-house." They were only pew owners. But the pew owners were not owners of the fee. They only had an easement. The "Proprietors of the Baptist meeting-house in St. Albans" were the legal owners of the land and the house thereon. They have never parted with their title. *First Baptist Society in Leeds* v. *Grant*, 59 Maine, 245. *Plaintiffs nonsuit.*

WALTON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

EPHRAIM S. NICHOLS *vs.* INHABITANTS OF ATHENS.

SAME *et ux. vs.* SAME.

Somerset, 1876.—March 5, 1877.

Way.

The body of a common riding wagon left on the side of the road, and laid up edgewise against some bushes, within the limits of the road, but entirely outside of the traveled track, which frightened a horse and thereby caused an injury, is not such an incumbrance as would render the town liable in damages for a defective highway; the question decided being referred to the court, as one of both fact and law.

The town could not reasonably have expected that such an object would naturally have the effect to frighten an ordinarily kind, gentle and safe animal, well broken for traveling upon our public roads.

ON REPORT of evidence in two cases, tried together.

CASE for injury from defective highway. The alleged defect is stated in the first sentence of the opinion.

The plea was the general issue.

There was evidence that John D. Whittemore, a teamster, was traveling along a back road, in Athens, in August, 1873, with a loaded wagon. About sunset his wagon broke down, and he put his load out of the road on the west side, and the wagon body on the east, leaving no part of the load or wagon within the limits of the wrought or traveled part of the road. The road was about twenty feet wide from ditch to ditch, and in good condition. Early the next morning a tax payer of the town saw the wagon on one side of the road, and the barrels of flour on the other, and other citizens had notice. About noon of the same day, the barrels had been removed, and the plaintiffs passed along with their horse and wagon. The horse shied just before reaching the wreck of the wagon, and threw out both plaintiffs, bruising them in the fall quite severely. The plaintiff husband did not lose command of the horse; they gathered up the contents of their wagon, which had been thrown out, and went on their journey. There was evidence that the horse which the wife plaintiff called "the colt," was accustomed to shy at lumber loaded teams.

J. H. Webster, for the plaintiffs, to the point of defect, cited *Frost* v. *Portland*, 11 Maine, 271; *Johnson* v. *Whitefield*, 18 Maine, 286; *Verrill* v. *Minot*, 31 Maine, 299; *Ham* v. *Wales*, 58 Maine, 222; *Willey* v. *Belfast*, 61 Maine, 569; *Rogers* v. *Newport*, 62 Maine, 101; *Clark* v. *Lebanon*, 63 Maine, 393.

D. D. Stewart, for the defendants.

Assuming that the colt was frightened by this wagon body, thus placed, it was not such a defect as will render the town liable. *Brooks* v. *Acton*, 117 Mass. 204, 210. *Cook et ux.* v. *Charlestown*, 98 Mass. 80. *Cook* v. *Montague*, 115 Mass. 571. *Keith* v. *Easton*, 2 Allen, 552. *Kingsbury* v. *Dedham*, 13 Allen, 186. *Cook* v. *Charlestown*, 13 Allen, 190.

PETERS, J. The body of a common riding wagon was left on the side of the road, laid up edgewise against some bushes, being within the limits of the road, but entirely outside of the traveled track. The plaintiffs' horse took fright at it, and an injury was caused thereby. Whether that was an incumbrance sufficient to

render the town liable for a defect in the highway, is the precise question presented.

It is difficult to determine what would be, and what would not be, a defect that would render a town responsible in damages for an injury received upon a highway. It may be a question of law or of fact, or of law and fact combined, according to circumstances. If the evidence is clear and undoubted, it may be so palpable a case that the law can easily settle it one way or the other. The doubtful cases belong usually to the jury, for decision. This case is left to us, both upon the law and the fact, to be determined according to our view thereof.

In *Card* v. *Ellsworth*, 65 Maine, 547, we recently had occasion to review the decisions in this state affecting the liability of towns in cases of injury occasioned by the fright of horses at objects upon the highway. We there decided that a person might, under proper evidence, recover in a case of the kind, where the object of fright was situated within, and was *per se* a defect upon, the traveled portion of the highway. There is no doubt that a town would be liable in damages in many cases where horses become frightened by objects within the traveled way, when the same objects could not reasonably be regarded as constituting a defective road if situated outside the traveled way. Whether a recovery can be had where the fright is caused by an object outside of the traveled road, but within its located limits, and, if so, to what extent and under what limitations and conditions, we are disposed to regard as questions not yet judicially determined in this state. Our opinion is, that upon the facts of this case the plaintiffs are not entitled to recover.

In the case cited, the court laid down the general proposition, that in no such case can a plaintiff recover, "unless the object of fright presents an appearance that would be likely to frighten ordinary horses; nor unless the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect; nor unless the horse was, at least, an ordinarily kind, gentle and safe animal, and well broken for traveling upon our public roads."

Subjected to this test the plaintiffs' claim fails. A wagon body

is a very common and practical thing. It is accustomed to be seen in all forms and shapes upon and about our streets. It resembles, in any position, nothing frightful or ugly. Besure, the horse was alarmed by its appearance. But the same horse might as well be terrified by suddenly seeing some rocks or bushes by the roadside, or be alarmed at a wood pile, a manure heap, a hay rack, a cart, a wheelbarrow, a guide-board, a telegraph pole, or something else of the numberless inanimate things necessarily seen near or upon our streets and highways. All the eccentricities of sensitive horses cannot be guarded against by towns. The slightest objects will sometimes frighten them. A bright chip, or a bit of paper in motion, or an umbrella, or even a shadow, will terrify some horses. But many such incumbrances there are upon our roads that cannot be considered defects. There must be a sensible and practical limitation of the municipal responsibility. Towns are not to be regarded as insurers. The truth is, that, in many of this class of cases, more fault should be charged upon the horse and his driver, and less upon the town. It is an easy thing for witnesses to bolster up the character of horses for gentleness, and to swear to careful driving, where it is a point to be proved by opinion. But we think that the circumstances of this case render it very doubtful, at least, whether "the colt" (so called by the female plaintiff,) was safely adapted to traveling on the road.

But, at all events, we are not satisfied that it should reasonably have been expected by the town, that the wagon body, situated as it was, would naturally have the effect to frighten "an ordinarily kind, gentle, and safe animal, well broken for traveling upon our public roads." The common experience of men would not lead, and did not in this case lead, the town officers to anticipate such a thing. The town could not reasonably foresee that such an event might be likely to happen. The town, therefore, was not in fault for the accident; and if the plaintiffs were not, then the accident was a casualty and misfortune merely, without fault upon the part of any one. *Plaintiffs nonsuit.*

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

WILLIAM DECKER *vs.* SOMERSET MUTUAL FIRE INSURANCE COMPANY.

Somerset, 1876.—May 26, 1877.

Evidence. Exceptions.

Presumptions, like probabilities, are of different degrees of strength; and while it is true that, in civil causes, a preponderance of evidence is all that is required, still, to create a preponderance, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence, and more evidence will be required to maintain the affirmative of an issue, when the opposing presumption is strong than when it is weak.

To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations.

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It is not error to instruct a jury that they are to require more evidence to prove that the defendant set fire to his buildings to defraud an insurance company than to establish payment of a note or prove an account in set-off.

Exceptions will be sustained only when it affirmatively appears that the party filing them has been aggrieved by the ruling excepted to.

Where the defendant excepted to the admission in evidence of a paper without first proving its execution, and it did not appear that he had made the affidavit required by rule X of this court, nor that the paper was not mentioned in the plaintiff's declaration, the exception was not sustained.

Where the defendant excepted to the admission of oral evidence to prove the interest of a certain mortgagee, and that he paid the premium for the insurance, and it did not appear for what purpose the evidence was offered, nor what the ground of objection was, the exception was not sustained.

ON MOTION AND EXCEPTIONS.

CASE upon an insurance policy against fire.

The exceptions state that it became material for the plaintiff to show that he had made proof of loss; and for that purpose he offered a paper purporting to be signed by John Diggles, and having upon its face a slip of paper attached by mucilage upon which was written C. A. Atkinson; that the defendant objected to the paper as incompetent, also that in case the paper was read, the plaintiff should prove its execution; but the court allowed the paper to be read without such proof; that the plaintiff offered oral evidence to prove the interest of a certain mortgagee, and that the premium for insurance was paid by him; and that the court admitted the evidence against the defendants' objection.

The court instructed the jury among other things, as follows:

"Some question has been raised in regard to the amount of proof necessary to establish this defense.

I instruct you that in order to establish the defense, you must find that it has been reasonably established, that is, that it has been established to your reasonable satisfaction; but when that amount of proof is furnished you, then you would be authorized to find that the defense is made out. You are to require more evidence in cases of this kind than you would to establish payment of a note, or establish an account in set-off filed against an action brought on a contract. Considering the gravity of the charge, you as reasonable and reasoning men would ordinarily, if the law did not lay down any rule at all, require stronger proof of its truthfulness than you would in ordinary cases between party and party arising out of matters of contract."

The verdict was for the plaintiff and the defendants alleged exceptions.

H. Knowlton, for the defendants, contended that the action being civil in its form and nature should be determined by the preponderance of evidence; that no more proof was required in this than in any other civil suit; that it was error to instruct the jury that they were to require more evidence in cases of this kind, citing *Knowles* v. *Scribner*, 57 Maine, 495; that the evidence to establish the genuineness of the paper should be the best attainable and that the paper was inadmissible without proof of its execution.

S. D. Lindsey, for the plaintiff, contended that the instruction in regard to the amount of proof was correct and in accordance with the doctrine of Knowles and Scribner cited by the defendants' counsel. *Schmidt* v. *New York F. Insurance Co.*, 1 Gray, 529. *Gordon* v. *Parmelee*, 15 Gray, 413. That the notice of loss was seasonably furnished the defendants, and if defective, they should have notified the plaintiff and required more formal proof or defects would be regarded as waived. *Bartlett* v. *Union M. F. Ins. Co.*, 46 Maine, 500. *Walker* v. *Metropolitan Ins. Co.*, 56 Maine, 371. *Patterson* v. *Triumph Ins. Co.*, 64 Maine, 500. And

that the plaintiff was not required to furnish proof of signature to notice of loss, referred to in the writ and falling within the 10th rule of this court.

WALTON, J. This case is before the law court on motion and exceptions. It is an action on an insurance policy against fire. One ground of defense is that the fire was willfully set by the plaintiff himself, or by his procurement.

I. The presiding judge instructed the jury that in order to establish this defense, they must find that it had been reasonably established; that is, that it had been established to their reasonable satisfaction; that they were to require more evidence than they would to establish payment of a note, or prove an account in set-off; that they would consider the gravity of the charge, and require stronger proof of its truthfulness than they would in ordinary cases arising out of matters of contract. Such was the substance of the charge upon this point; and it is claimed that it must have given the jury to understand that something more than a mere preponderance of evidence was necessary to establish the defense, and was therefore erroneous. We think the objection is not sustained. Certainly the judge did not say in so many words that anything more than a preponderance of evidence was necessary. Nor do we think it is implied in what he did say.

To create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own buildings, should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in set-off; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required

to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not violate the rule that in civil suits a preponderance of evidence is all that is required to maintain the affirmative of the issue; for, as already stated, to create a preponderance of evidence, it must be sufficient to overcome the opposing presumptions as well as the opposing evidence. *Ellis* v. *Buzzell*, 60 Maine, 209. *Knowles* v. *Scribner*, 57 Maine, 495.

II. The defendant also excepts to the admission in evidence of a paper, purporting to be the proof of loss required by the terms of the policy, without first proving its due execution. The exceptions do not show that this objection was open to him. For aught that appears the paper may have been declared on or mentioned in some specification filed by the plaintiff, in which case it would be necessary for the defendant to make the affidavit required by rule X of this court, or he would not be in a position to call for proof of its execution; and it does not appear that such an affidavit was made. No error being made affirmatively to appear, the exception must be overruled. *Reed* v. *Canal Corporation*, 65 Maine, 53.

III. The exceptions state that the plaintiff offered oral testimony to prove the interest of a certain mortgagee, and that he paid the premium for the insurance; and that this testimony was admitted, notwithstanding the defendant objected to it; but the exceptions do not state the purpose for which the evidence was offered, nor the ground of objection to it. There are many purposes for which such evidence would be admissible, and it not being apparent that it was admitted for an illegal one, this exception must also be overruled.

IV. The motion for a new trial on the ground that the verdict is against the weight of evidence must also be overruled. We are not satisfied that it is against the weight of evidence.

Motion and exceptions overruled.

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

WARREN HOLBROOK *vs.* ALONZO P. TOBEY.

Somerset, 1876.—May 26, 1877.

Damages.

Where a party binds himself in a sum certain not to carry on, or allow to be carried on, any particular kind of business, within certain territory, or within a certain time named, the sum mentioned will, in general, be regarded as liquidated damages, and not as a penalty.

ON REPORT.

ASSUMPSIT on the following contract:

"Be it known that for a valuable consideration, paid by Warren Holbrook, of Bingham, I hereby bind myself to said Holbrook, in the sum of five hundred dollars, to close up my house, as a public house, for the term of five years, meaning that the stables, nor the house shall not be used for the entertainment of the traveling public, for the next five years. Bingham, May 25, 1872.

A. P. Tobey."

The plaintiff introduced evidence tending to prove that the house and stables referred to in the contract, had, previous to the date thereof, been occupied by the defendant, as a tavern and place of public entertainment; that the plaintiff also kept a tavern in the same village, and that the defendant, having sold his house and stables, they were re-opened by the defendant's grantees, as a tavern, on the tenth day of August, 1873, and ever since kept as a tavern. The plaintiff claimed he was entitled to judgment for the five hundred dollars named in the contract as liquidated damages. The defendant, on the contrary, contended that the sum named in the contract should be treated as a penalty, and the damages assessed by the jury.

The case was then by consent withdrawn from the jury, and reported to the full court. If the five hundred dollars named in the contract, should be considered as liquidated damages, judgment to be rendered for the plaintiff for that sum, otherwise the case to stand for trial, and the damages to be assessed by the jury.

S. J. Walton & L. L. Walton, for the plaintiff.

The $500 named in the contract should be regarded as liquidated damages, because unaccompanied by any statement that the

parties regarded it as penal. *Gammon* v. *Howe*, 14 Maine, 250, 254. Even if the term penalty had been used, that of itself would not have been conclusive. Parsons' Con., vol. 3, c. 8, § 2. *Dwinel* v. *Brown*, 54 Maine, 468, and opinion near close of p. 471, and opinion p. 475. *Chase* v. *Allen*, 13 Gray, 42, 45. *Hodges* v. *King*, 7 Met. 583, 586.

The parties intended to fix the amount of the damages, on account of the difficulty if not impossibility of ascertaining and computing them. Parsons' Con., vol. 3, c. 8, § 2.

The sum fixed is reasonable; and the case does not come under any one of the exceptions, where the sum named has been regarded by the court as a penalty.

S. D. Lindsey, for the defendant.

The primary undertaking of the defendant was not to pay money, but to close his house; and the sum specified is collateral.

It is not named as damages.

Forfeitures are not favored. If possible, the court will treat the sum as a penalty, and permit the defendant to show actual damages.

To hold the damages liquidated might lead to inequitable results. Suppose he opened his house but for a single day, near the close of the term.

There neither exists in this case the express stipulation that the $500 should be considered liquidated, nor is the nature of the contract such that the damages may not be satisfactorily ascertained. *Shute* v. *Taylor*, 5 Met. 61. *Stearns* v. *Barrett*, 1 Pick. 443. *Merrill* v. *Merrill*, 15 Mass. 488. *Lawrence* v. *Parker*, 1 Mass. 191. *Higginson* v. *Weld*, 14 Gray, 165. *Fish* v. *Gray*, 11 Allen, 133. 2 Greenl. Ev., § 258.

WALTON, J. The defendant bound himself in the sum of $500, to close his house as a public house, and not to allow his house or his stables to be used for the accommodation of the traveling public for the next five years; and the only question is whether the sum mentioned shall be considered as liquidated damages or a penalty.

We think it must be regarded as liquidated damages. The

authorities run in nearly an unbroken current to the effect that, where a party binds himself in a sum named not to carry on any particular trade, business, or profession, within certain limits, or within a specified period of time, the sum mentioned will be regarded as liquidated damages, and not a penalty.

In *Leighton* v. *Wales*, 3 Mee. & W. 545, where the defendant bound himself not to run a coach over a certain road, at any time within one hour before or after certain specified hours of the day, under a penalty of £40: held, that the £40 must be construed as liquidated damages, and not as a penalty.

In *Crisdee* v. *Bolton*, 3 Car. & P. 240, where, in an agreement for the sale of a public house, the seller agreed not to be concerned in carrying on the business of a publican within a mile of the house he had sold, under the penal sum of £500, it was held that the whole sum was recoverable as stipulated damages.

In *Rawlinson* v. *Clarke*, 14 Mee. & W. 187, where an apothecary sold out his business, and agreed not to carry on the business within three miles of the then place of business, and for a breach of the agreement, to pay £500, it was held that the measure of damages was the full sum named.

In *Price* v. *Green*, 16 M. & W. 346, where the defendant bound himself in the sum of £5000, not to engage in the business of a perfumer in London or Westminster, it was held that for a breach of the agreement the plaintiff was entitled to recover the whole sum of £5000.

In *Galsworthy* v. *Strutt*, 1 Exch. 659, where an attorney agreed that he would not within the next seven years engage directly nor indirectly, in the business of an attorney or solicitor, within fifty miles of a place named, and, if he should violate his agreement, that he would pay the plaintiff £1000, it was held that the sum named must be considered liquidated damages, and not a penalty.

In *Sainter* v. *Ferguson*, 7 C. B. 716, where a surgeon agreed that he would not practice within seven miles of a place named, under a penalty of £500, it was held that the £500 was not a penalty, but liquidated damages.

In *Atkyns* v. *Kinnier*, 4 Exch. 776, where a surgeon agreed

that he would not practice within certain limits named, and, for a breach of the agreement, would pay £1000, it was held that the £1000 was liquidated damages, and not a penalty.

In *Pierce* v. *Fuller*, 8 Mass. 223, where the defendant agreed not to run a stage on a certain road, under the penalty of $290, it was held that the sum named must be regarded as liquidated damages.

In *Dakin* v. *Williams*, 17 Wend. 447, S. C. 22 Wend. 201, where the defendant sold a newspaper establishment, and bound himself in the sum of $3000, not to publish a rival paper, the sum named was held to be liquidated damages.

In *Mott* v. *Mott*, 11 Barb. 127, where the defendant bound himself in the sum of $500 not to practice medicine within a certain town named, for five years, it was held that the $500 must be regarded as liquidated damages, and not as a penalty. In this case the court recognize the principle that where a certain sum has been agreed upon as damages for the violation of an agreement restraining a party from the use of a trade or profession, the sum named will, in general, be considered as liquidated damages.

In *Streeter* v. *Rush*, 25 Cal. 67, a butcher sold out, and bound himself in the sum of $400 not to go into business again in the same place, without the plaintiff's consent; and in *Duffy* v. *Shocky*, 11 Ind. 70, the defendant agreed not to have a marble shop within certain territory under a penalty named; and in *Gresselli* v. *Lowden*, 11 Ohio St. 349, that he would not work a laboratory, claimed to be a nuisance to the plaintiff's premises, and if he did, to pay $3000; and in *Jaquith* v. *Hudson*, 5 Mich. 123, a retiring partner agreed to forfeit $1000 if he went into business again in the same place within a certain time; and in *Cushing* v. *Drew*, 97 Mass. 445, the defendant sold out an express business, and agreed not to engage in the same business again in the same place so long as the plaintiff should continue in it; and in all these cases the sums named were held to be liquidated damages, and not penalties.

We think the case now before us falls clearly within the principle of these decisions, namely, that where a party binds himself in a sum certain not to carry on, or allow to be carried on, any par-

ticular kind of business, within certain territory, or within a certain time named, the sum mentioned will, in general, be regarded as liquidated damages, and not as a penalty. Of course, if the sum named should be out of all proportion to any possible damage which the plaintiff could sustain, the court would hold otherwise, upon the very reasonable presumption that the parties never could have intended that the sum named should be regarded as liquidated damages. But in all ordinary cases, where there is no such disproportion, we think the sum agreed upon should be the amount recoverable. In this case there is no such disproportion, and our conclusion is that the defendant must abide by the agreement which he thought proper to make.

Judgment for plaintiff for $500.

APPLETON, C. J., DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

JOSIAH PENLEY *vs.* CALVIN RECORD *et al.*

Androscoggin, 1874.—August 28, 1876.

Pleading.

The description of the defendant party in a declaration upon a promissory note signed by two persons, as of the singular number, "defendant," is not good cause for special demurrer, where it is clearly discernable from the declaration, as a whole that both of the persons sued are intended to be described as promisors.

Such a clerical error will not be allowed to have effect, despite the proof that it is an error and against the true intent and meaning of the declaration considered as a whole.

ON EXCEPTIONS.

ASSUMPSIT, "for that the said *defendant*, at said Auburn, on the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy, by their promissory note of that date by them signed, for value received, jointly and severally, promised the plaintiff to pay him or his order the sum of four hundred dollars in six months, with interest," etc. There was but one count in the writ.

The defendants demurred to the writ and declaration and assigned for causes of demurrer "that the plaintiff has not, in or by his said declaration, alleged or shown that both of said defendants signed said note declared on, nor which of the said defendants so signed the same; nor does the plaintiff allege in or by his said declaration which of the said defendants severally signed said note, nor does it appear by said writ or declaration but that one or the other of said defendants have paid said note and prior to the bringing of said suit; nor does it appear in or by said declaration but that said note has been paid; by means whereof," etc.

The presiding justice overruled the demurrer, and adjudged the declaration good; and the defendants alleged exceptions.

C. Record and L. H. Hutchinson, for the defendants.

The defendants demurred specially, assigning for cause the uncertainty as to which of the two defendants executed the note.

It has been suggested that the term "defendant" was legally applicable to and included both defendants; or, in other words, that the singular may include the plural in such a case. But this is an error; such a construction only applies to statutes. R.S., c. 1, § 4.

"The certainty necessary, in a declaration, is to a certain intent in general, which should pervade the whole declaration, and is particularly required in setting forth the parties, time, place and other circumstances necessary to maintain the action." 1 Chitty on Plead., tit. Declaration, page 256.

While the declaration might be sufficient, in case of a default or verdict, yet it is not so when the defect is shown as cause of demurrer. The declaration should set forth the cause of action with as much certainty as the return of a levy on real estate. *Hathaway* v. *Larrabee*, 27 Maine, 449. *Harriman* v. *Cummings*, 45 Maine, 351. *Ware* v. *Barker*, 49 Maine, 358.

In *Hathaway* v. *Larrabee*, the court say: "the plaintiff contends, that the several persons named as defendants in that writ constituted the party defendant and that the officer must be regarded as using the term defendant, to designate the party defendant composed of three persons. This is not in accordance with the common use of language as exhibited in judicial proceedings

to designate parties 'defendant,' when there are more than one. When the plaintiffs or defendants in a suit have been numerous, courts have authorized and even required that the terms plaintiffs or defendants should be used in the pleadings instead of all the names; but they do not appear to have authorized them all to be regarded as one and to be designated by the use of one of those terms in the singular number." *Meeke* v. *Oxlade*, 1 B. & P. New Reports, 289. *Davison* v. *Savage*, 6 Taunt. 121. "Such a use of language to designate several persons as parties defendant is not usual in common parlance." But the court enforce this view further by the following decisive language:

"When several persons subscribe an instrument containing a covenant or promise in language applicable to one person only, they are, as the plaintiff contends, all bound. Each one by subscribing the instrument adopts the language as applicable to himself. There is little of similarity between such a case and the present. Neither of the defendants in that suit adopted the language used by the officer or appropriated it to himself."

So in this case, neither of the defendants has "adopted," the term "defendant" in the plaintiff's declaration as applicable to himself. Instead of that, they have shown the uncertainty of the term as a cause of demurrer; and we contend that the demurrer ought to be sustained, and the exceptions also.

N. Morrill & G. C. Wing, for the plaintiff, admitted that the word "defendant," the fifth word in the declaration after the word case, should have been written in the plural number instead of the singular, as it now is by mistake; but claimed that notwithstanding that mistake or circumstantial error the persons of the defendants and the case could be rightly understood by the subsequent terms and allegations in the declaration taken together. R. S., c. 1, § 4, rule II. R. S., c. 82, § 9.

DICKERSON, J. The principle cause assigned for the demurrer is the alleged uncertainty as to which of the defendants signed the note in suit. It is argued in support of the demurrer that the designation of the defendant party in the declaration, as of the singular number, renders it uncertain which of the defendants executed the

notes. This would undoubtedly be good cause for demurrer, if it was not obviated by the subsequent language of the declaration. From that it appears that the note sued is described as "their promissory note by them signed," and that the promise to the plaintiff was "joint and several." This phraseology obviously refers to, and designates both of the defendants previously named in the writ as the promisors, the one equally with the other, and shows that the use of the singular number in the previous description of the defendant party was a clerical error. The intendment of the declaration, as a whole, is clearly discernible from the language used, and that is all that the rules of pleading require. To give effect to a clerical error despite the proof that it is an error, and against the true intent and meaning of the declaration, as a whole, would not only be repugnant to common sense, but a refinement even of the theories of the old writers upon pleading.

The case of *Hathaway* v. *Larrabee*, 27 Maine, 449, 452, cited by the counsel for the defendants is inapplicable. Waiving the question, whether the same certainty in the description of parties is required in a declaration as in an officer's return of an attachment of real estate, there is a wide difference between the two cases. In that case there was nothing to explain, qualify or control the return of the officer that he had "attached all the right, title and interest the defendant had in any and all real estate," &c., upon a writ against three defendants. The court held that this language was too vague and uncertain to create a lien upon the estate of either one of the defendants. In delivering the opinion of the court in that case, Shepley, J., observes, that "courts will give effect to returns made by officers, though informally made, when the intention is sufficiently disclosed by the language used to be clearly discernible," thus indorsing the doctrine we have applied to the case under consideration.

The other ground of demurrer is not valid, and is not relied upon in the argument. *Exceptions overruled.*

Declaration adjudged good.

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

STATE *vs.* H. A. PAGE.

Androscoggin, 1876.—October 5, 1876.

Intoxicating liquors.

One may be indicted and convicted for a nuisance in selling cider and wine made from fruit grown in this state, for tippling purposes, provided the jury find they are intoxicating liquors.

ON EXCEPTIONS.

INDICTMENT, for keeping a liquor nuisance. The defendant was called as a witness in his own behalf, and testified that he kept a saloon on Lisbon street in Lewiston, and that he sold cider and wine by the glass to be drunk on the premises, and stated that the wine was known as Mains' wine, and was made from fruit grown in this state.

The jury found the defendant guilty.

The presiding judge ruled that, notwithstanding the provisions of R. S., c. 27, do not extend to the manufacture and sale of unadulterated cider, nor to wine made from fruit grown in this state, still, under the act of 1873, c. 152, which declares that "the provisions of R. S., c. 17, entitled 'nuisances,' shall apply to any house, shop or place, where intoxicating liquors are sold for tippling purposes," one may be indicted for and convicted of keeping or maintaining a nuisance, although no other kinds of liquors are sold than cider and wine made from fruit grown in this state; provided such liquors are intoxicating, and are sold for tippling purposes.

To the foregoing ruling, the defendant excepted.

L. H. Hutchinson & A. R. Savage, for the defendant.

The defendant sold only such articles as were expressly excepted by R. S., c. 27, § 25.

Chapters 150 and 152, of the acts of 1873, the former reviving R. S., c. 27, § 25, and the latter extending the provisions of c. 17, to any house, shop or place where intoxicating liquors are sold for tippling purposes, approved on the same day, must be in conflict if this defendant can be held.

W. H. White, county attorney, for the state.

APPLETON, C. J. The defendant is indicted for a nuisance, by selling intoxicating liquors for tippling purposes.

Chapter twenty-seven of the revision of 1871, relates entirely to the subject of intoxicating liquors.

By § 25, it is enacted that "the provisions of this chapter shall not extend to the manufacture and sale of unadulterated cider in any case, nor to wine made from fruit grown in this state, nor to the sale by agents appointed under the provisions of this act, of pure wine for sacramental and medicinal uses."

It is obvious therefore that the seller "of unadulterated cider," and of "wine made from fruit grown in this state," is not amenable to the penalties provided by R. S., c. 25. He cannot be punished for a single sale. He cannot be indicted as a common seller. He has not violated any of the provisions of this chapter.

But the defendant is not indicted for the violation of any of the provisions of chapter twenty-five. He is indicted under the act of 1873, c. 152, by which it is provided that "the provisions of chapter seventeen of the revised statutes entitled 'nuisances,' shall apply to any house, shop or place where intoxicating liquors are sold for tippling purposes."

Under this act one may be indicted for a nuisance for selling cider and wine made from fruit grown in this state for tippling purposes, provided they are intoxicating liquors. Whether they are such it is for the jury to determine. If they are, the seller is manifestly within the statute.

The act under which the defendant was indicted is subsequent to the revision of the statutes. It must be construed by its own language. Liquors, exempted from the provisions of R. S., c. 27, are not therefore, necessarily exempted from those of the act of 1873, c. 152. That act embraces all liquors which are intoxicating and sold for tippling purposes. It has no exceptions or exemptions. The ruling of the presiding justice was in strict conformity with the law. *Exceptions overruled.*

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

ANN SHANNY, *per pro ami*, *vs.* ANDROSCOGGIN MILLS.

Androscoggin, 1876.—November 21, 1876.

Master and servant.

It is the master's duty, not only to provide suitable machinery for the use of the servant, and that which shall impose upon the servant no other or greater danger than is naturally incident to the business or employment, but to exercise all reasonable care in keeping it in the same condition.

The servant whose duty it is to keep machinery in repair, is not a fellow servant with one whose duty it is to use the same machinery, so that the master would be exempt from liability on that ground for an injury to the latter, in consequence of the neglect of the former.

A servant receiving an injury through a defect in the machinery, caused by the negligence of the master, cannot recover, if he received such injury through a want of care on his own part, or in the disregard of a reasonable regulation of the master.

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ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

CASE for an injury to the plaintiff, October 9, 1875, caused by the alleged negligence of the defendants in failing to keep a certain portion of their machinery, upon which the plaintiff worked, properly covered.

The declaration, after setting out matters of inducement alleged that "the defendants knowingly, carelessly, negligently, and wrongfully permitted said machinery and gearing, to be improperly, defectively, and insufficiently covered, and for want of a proper and sufficient covering for said machinery and gear, all of which was unknown to the plaintiff, but was well known to the defendants, the plaintiff who was then and there in the said employment of said defendants, and by their special direction was with due care, cleaning said machinery and gear, then and there, without any fault of her own, and by reason of said improper, defective, and insufficient covering of said machinery and gear, was caught by her right hand in said machinery and gear, and thereby the said hand of the plaintiff was greatly injured and damaged, so that the plaintiff entirely lost two fingers of her said hand, and lost the use of the third finger of said hand," &c., &c.

Plea, the general issue.

It was not denied that the plaintiff, in the employ of the defend-

ants, was hurt to the degree alleged, and that it occurred by her fingers being caught in the gearing, while wiping the ends of the machinery when in motion.

It appeared that the covering or fencing had been broken a few weeks before, and that the new castings which were necessary for repairs were finished; and that it was through the negligence of a servant of the corporation, that they were not returned so that the repairs could be completed before the plaintiff was hurt.

As to the precise spot where her fingers caught, there was conflicting evidence; but by the findings of the jury, it was where there was a defect—a want of covering—for which the defendants were at fault.

It was in evidence, that even when the machinery was fenced, in the customary way, it was not free from danger, and that although it was the duty of the employees, such as this plaintiff was, to wipe the ends of the machinery, there was a time set apart for that purpose, and that they were expressly forbidden, by a rule of the corporation, to wipe those ends while the machinery was in motion, and that this plaintiff knew of the rule, and of the danger, and had once before been threatened with dismissal for stopping the machinery at an unreasonable time for the purpose of cleaning; that every Saturday at four o'clock, the machinery was stopped for this purpose, and that there was sufficient time after that, within working hours, to do the cleaning, and that this plaintiff was hurt on this Saturday afternoon, some fifteen minutes before four o'clock, while wiping the machinery then in motion.

The point was taken at the trial that the plaintiff, on account of her infantile age and inexperience, was not informed, made sensible of the danger and the degree of it. The evidence on this point was that she was some months more than fourteen years of age and that she had worked in cotton mills, in one capacity or another, more than four years.

The defendants at the trial, among other things, contended that if the jury found the alleged carelessness in the want of a proper covering for the machinery, and that the omission was occasioned by the carelessness of a fellow-servant whose duty it was to repair it, then the defendants were not liable.

The presiding judge, among other things to which no exceptions were taken, charged the jury as follows:

"It is a rule of law, that where there are different persons engaged in the same employment, so that they are what are called fellow-laborers or fellow-servants, if one of them is injured by the careless act of another, the master is not liable; that they take the risk upon themselves, when working together in their common employment; that while the person injured might have a remedy against the careless servant, he would have none against the master.

That is a well settled rule of law. But I instruct you, it does not apply to an omission on the part of the master or employer. It does not apply to the machinery and the putting of it into proper condition. It is the duty of the master, whether the master is a corporation or a natural person, to furnish suitable machinery for carrying on his work; and for any omission to guard it properly, the master is liable.

At any rate, this is not a case where the rule in relation to the carelessness of a fellow-servant applies: If some act of one of the laborers in the same room with the plaintiff—or if in doing their work one of the other girls employed in this mill, had done a careless act, and thereby injured the plaintiff, the defendants would not be liable.

But where the alleged carelessness relates to the machinery or the roads or bridges connected with a factory, and constituting a part of it, if there is an omission, it is the omission of the master or employer in contemplation of law; so that the doctrine in relation to the carelessness of fellow-servants does not apply."

The verdict was for the plaintiff; and the defendants seasonably filed a motion to set aside the verdict as against law and evidence, and for a new trial, and also alleged exceptions, to so much of the charge of the presiding judge as is set forth herein.

W. P. Frye, *J. B. Cotton & W. H. White*, for the defendants.

L. H. Hutchinson & A. R. Savage, for the plaintiff.

I. As to the exceptions:

A master is bound to provide safe and sound materials and accommodations for his servants and such appliances as are reasona-

ble safe and necessary to insure their safety. Shearman & Redfield on Neg., pp. 119, 672. *Buzzell* v. *Laconia Co.*, 48 Maine, 113. *Ford* v. *Fitchburg Railroad*, 110 Mass. 240. *Gilman* v. *Eastern Railroad*, 10 Allen, 233, and 13 Allen, 433. *Snow* v. *Housatonic Railroad*, 8 Allen, 441.

A master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow-servant contributes to the accident. *Cayzer* v. *Taylor*, 10 Gray, 274.

II. As to the motion.

The jury having heard the evidence and viewed the premises, have established the defendants' negligence beyond any reasonable question. *Brown* v. *Moran*, 42 Maine, 44. Plaintiff was bound only to use ordinary care. Shearman & Redfield on Negligence, pp. 35 and 36. An infant is held only to such a degree of care as is usual among children of his age. Shearman & Redfield on Negligence, pp. 63, 127. *Brown* v. *Railroad*, 58 Maine, 387. *Birge* v. *Gardiner*, 19 Conn. 507, 512. *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572.

The court will not interfere and grant a new trial, unless upon strong conviction that the jury have fallen into some error in regard to the nature and force of the evidence, or that justice has not been done. *Smith* v. *Richards*, 16 Maine, 200. *Marshall* v. *Baker*, 19 Maine, 402.

DANFORTH, J. This is an action by an employee against her employer to recover damages for a personal injury resulting from an alleged defect in the machinery provided for her use. It depends upon the obligations of the master to his servant while in his employment. The action has been submitted to a jury and comes before us upon exceptions and a motion for a new trial.

The presiding justice gave the rule of law contended for by the defendants so far as it relates to their liability for an injury to the plaintiff resulting from the negligence of a fellow-servant. But he further instructed them that "this is not a case where the rule in relation to the carelessness of a fellow-servant applies." He then states where the rule does apply, and goes on to say, "but where the alleged carelessness relates to the machinery or roads or bridges connected with a factory, and constituting a part of it, if

there is an omission, it is the omission of the master or employer, in contemplation of law."

The first part of this instruction is clearly correct. The declaration alleges an omission and neglect on the part of the defendants. It sets out no other cause of action. Whatever may have been the facts, or whatever may be the law in relation to the liability of the master for the negligence of his servants, in this action, if the plaintiff can recover it must be on the ground set out in her writ, that of an omission amounting to culpable negligence on the part of the defendants. True this omission need not necessarily be personal—in the present case a corporation being defendant it could act only by servants or agents—but it must be such if on the part of an employee as to be imputable to or legally that of the employer.

From the remainder of the instructions the jury could only infer that the defendants would be directly responsible for all defects in the machinery furnished, and under the writ and the facts in the case not only to exercise the proper care in providing fit and suitable machinery for the purpose intended and that which is as reasonably safe as its use will permit, but to use the same degree of care in keeping it in that condition. The degree of care requisite was undoubtedly explained to the jury, as no objections are raised upon that point. The objection seems to be that by the instruction, where in a case of this kind it is shown that through the want of such care of the machinery as the law requires it is permitted to become and remain in a dangerous state, the fault is imputable to the master or employer, and he cannot excuse himself on the ground that it was through the negligence of an agent or servant.

This we have no doubt is good law. No objection is or could successfully be made to it as applicable to the machinery furnished in the first instance. It is now too well settled to be doubted that the servant under his contract for service assumes such risks only as are incident to his employment. These risks include the use, not the purchase, of the machinery, as well as the dangers resulting from the carelessness of a fellow-servant, not the responsibilities of hiring, in the first instance. *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572, and cases cited.

The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continues in his employment after a knowledge of such incompetency or carelessness, or when in the exercise of due care he should have known it, as if he had been wanting the same care in hiring. The same may very properly be said of the machinery. The servant has no more control of the repairs than of the purchase, no more responsibility for the one than for the other. The use of it is for him, and the risk of that use whatever it may be he assumes. That comes within his contract; but, as part of the same contract, the employer provides the means of carrying on the business; and as a matter of course he assumes the responsibility that his work shall be done with due care; and, as the responsibility continues so long as the means are used, so must the same care be exercised in keeping the required means in the same safe condition as at first.

This doctrine has been so fully and satisfactorily discussed that it is unnecessary to do more than to refer to some of the later decisions. *Buzzell* v. *Laconia Manufacturing Co.*, 48 Maine, 113. *Gilman* v. *Eastern Railroad Co.*, 13 Allen, 433. *Snow* v. *Housatonic Railroad Co.*, 8 Allen, 441. *Ford* v. *Fitchburg R. Co.*, 110 Mass. 240. *Lawler* v. *Androscoggin Railroad Co.*, 62 Maine, 463. *Cayzer* v. *Taylor*, 10 Gray, 274, 275.

It is however claimed that the machinery became injured and dangerous, if it were so, without the fault of any one and that its continuance in that condition to the time of the injury, if the result of negligence, was the fault of the superintendent whose duty it was to keep the machinery in repair and was therefore the carelessness of a fellow-servant, a risk which the plaintiff assumed. The facts contained in this proposition may be admitted. If the law is correct, undoubtedly the instructions were wrong as being too broad. The effect of them was as claimed; they took from the jury the consideration of these facts. But the principle of law here claimed is fallacious in several respects. Assuming that the superintendent was negligent, that negligence was indeed a remote

but not the proximate cause of the injury. This was the immediate and necessary result of the defective machinery. It is only when the carelessness of a fellow-servant, in the use of the machinery or independent of it, causes the injury that it can be said to be the efficient cause so as to exempt the master. In this case the defective machinery, for which the master was responsible, intervened between the carelessness and the injury and was of itself an independent and efficient cause of the accident.

Besides, the person whose duty it was to keep the machinery in order, so far as that duty goes, was not in any legal sense the fellow-servant of the plaintiff. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common result. The one can properly be said to begin only when the other ends. The two persons may indeed work under the same master and receive their pay from the same source; but this is not sufficient. They must be at the time engaged in a common purpose or employed in the same general business. Shearman & Redfield on Negligence, §§ 100 and 108. We do not now refer to the different grades of service about which there is considerable conflict of opinion, but of the different employment. In the repair of the machinery the servant represented the master in the performance of his part of the contract and therefore in the language of the instructions, his negligence in that respect, is the "omission of the master or employer, in contemplation of law." *Ford* v. *Railroad Co.*, above cited, p. 260.

The plaintiff, so far as regards the repair of the machinery, stands in the same position as any person not a servant but who was rightfully in her position; and the same responsibilities and liabilities rest upon the master for acts of himself or servant as would in such a case. *Coombs* v. *New Bedford Cordage Co.*, before cited, p. 599. The instructions are in accordance with well settled principles of law, and the exceptions must be overruled.

This brings us to the motion for a new trial on the ground that the verdict is against the law and the evidence. There appears to be but little conflict of the testimony in the case; and such conflict

is perhaps more apparent than real. As to the place where and the manner in which the accident happened the testimony comes mainly from the plaintiff and though some of the circumstances proved by other witnesses tend to throw doubt upon her statement, the jury must have found it substantially true and we see no reason to disturb their finding in that respect. We assume then that she was injured through a defect in the machinery and one for which the defendants were liable, the defect having existed for so long a time that its condition must be imputed to culpable neglect on the part of the defendants.

But this alone is not sufficient to enable the plaintiff to maintain her action. She might herself have assumed all the risk and danger arising from the condition in which the machinery was. The duty of the master to furnish reasonably safe and suitable machinery is one which the servant may waive and it is claimed that she did so in this case.

The employer may undoubtedly exercise his own judgment as to the kind of machinery he will use, as well as to the condition in which it shall be kept. Having due regard to the rights of others he may do that which in his own view his interest may dictate or he may even be careless of that interest. But if he elects to use machinery unsuitable, or permits it intentionally or carelessly to get out of repair so that in its use the employee incurs more danger than fairly and naturally belongs or is incidental to the business or employment, another and a somewhat different duty devolves upon him. In such case he is required to give such information to the servant as will enable him to enter into his contract intelligently and with a full understanding of the unusual dangers he is to encounter. As ordinarily the employee assumes the responsibilities of such dangers as are naturally incident to the employment, so, by the same rule in the absence of any evidence to the contrary, his contract is presumed to cover all the risks of which he has knowledge. *Sullivan* v. *India Manufacturing Co.*, 113 Mass. 396. To relieve the master from liability upon this ground it must appear not only that the servant had knowledge of the insufficiency of the machinery but that his age and experience or the instructions given him by the master or some one

in his behalf were such as to enable him fully to understand and appreciate the dangers attending the employment. That he assumes the ordinary risks, the law will infer from the contract of service. If the master would impose upon him the extraordinary risks the burden is upon the master to show as matter of fact that such was the contract. *Coombs* v. *New Bedford Cordage Co.*, before cited, pp. 585-6. Shearman & Redfield on Negligence, § 94 and note. Mere knowledge or even appreciation of the danger would not in all cases lead to the conclusion that the servant had assumed the risk. If such were the condition of things at the beginning of the service, the inference would follow. But if the danger arose from subsequent neglect with an expectation that repairs would be made with due diligence, it would seem that the servant might continue work with no more assumption of risk than would follow from such delay only as due diligence, would allow, though undoubtedly if by neglect of the master dangers accumulate, the servant at his option may abandon the contract.

In the case at bar the plaintiff not only had knowledge of the defect complained of, but if we may believe the testimony was fully instructed in and cautioned against the changes. She, herself states in her cross-examination "I knew all about it, knew it was dangerous." She had also had the benefit of considerable experience in the business. But if this were all we might hardly feel justified in setting aside the verdict. The plaintiff was of a tender age; the jury saw her upon the stand and had full opportunity of judging of her intelligence and capacity, of appreciating the situation in which she was placed by what may be fairly assumed as the culpable negligence of the defendants. They also viewed the premises and saw the machinery as it was at the time of the accident, and though we discover no lack of intelligence on her part, from the reported testimony, their better opportunities may have justified their finding upon this point.

But this is not all. It is difficult to understand how the jury could have found that she, even for one of her age, was herself in the exercise of ordinary care. The testimony not only fails to show this affirmatively, but very clearly shows the contrary. That she had knowledge of the danger is conceded. This not only has

a bearing upon the nature of the contract, but is entitled to very grave consideration upon the question of due care. It is not conclusive in all, or perhaps in most cases. *Reed* v. *Northfield*, 13 Pick. 94. *Whittaker* v. *Boylston*, 97 Mass. 273. But it is often of great weight depending upon the accompanying circumstances. If as in *Coombs* v. *New Bedford Cordage Co.*, the plaintiff's attention is for the time withdrawn from the danger by the requirements of the employment, its probative force would be diminished. But in this case the plaintiff's employment at the time of the injury was such as necessarily to direct her attention to the danger. She was not using the machinery, so much as she was at work upon it, and if her attention was upon her work it must also have been upon that which caused the injury. Hence we can hardly account for the injury except upon the ground of inattention to her duties, as well as to the danger, the existence of which she was by no means ignorant.

But a matter more decisive of the plaintiff's right to recover is the fact that the only inference which can be drawn from the testimony is that her injury came to her while disobeying a rule adopted by the defendants regulating the very work in which the plaintiff was engaged. That the defendants had the right to make the rule is not denied. That it was reasonable and proper is evident from the fact that it was made for the protection of the operatives and if obeyed this injury could not have happened. It was in fact an indulgence to the servant. In relation to this matter, there is little or no conflict of testimony. The plaintiff by her own admission, fully understood that the frame was to be stopped at four o'clock for the purpose of cleaning the gearing. She says that did not give her time; but from her own testimony, as well as from that of others, there was an abundant time to clean the ends where the danger was, after the mill had stopped. Other parts of the frame could be cleaned with safety when the mill was running, this could not. She claims that she understood that she must clean it running, or "be sent out" if she stopped it, and says on one occasion she was so threatened.

But from her own statement it appears that she had stopped it out of time, and it does not appear that she stopped for the purpose

of cleaning the ends. The testimony so decidedly shows a want of due care on her part, and that the injury occurred while she was acting contrary to a regulation made for her own protection, that we conclude that the verdict of the jury was the result of a failure to comprehend the case, or of a prejudice so strong as to prevent a candid exercise of their judgment. *Motion sustained.*

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

ALBERT B. FURBISH *et al. vs.* JOHN F. PONSARDIN.

Androscoggin, 1876.—November, 27, 1876.

Arbitration.

The acceptance or rejection of an award or report of a referee is a question of discretion, not of law. If the court to which the award is returned refuses to recommit it, the decision is not subject to revision by a court of law on exceptions.

ON EXCEPTIONS.

There was an award of a referee made in the case at the January term of this court, 1876, under a rule of reference previously issued therefrom.

Before the acceptance of the award, the defendant moved that it be re-committed to the referee therein, for his further consideration; because,

I. There now appear to be structural defects in the building, which did not appear at the time of the hearing, but which were demonstrated by the effect of the wind and storm which occurred on or about the second instant, and on the fifteenth instant.

II. That the effect of said storm and wind has been to displace the entire roof, and throw the walls out of plumb, so that from two to three feet of the upper walls must be taken down and rebuilt. The slates are badly damaged, broken and blown off. The trimmings of the buttresses are displaced, and the buttresses themselves damaged. The roof is so far injured that it cannot be made perfect by repairing.

III. The walls, roof and entire building are permanently injured.

IV. The injury would not have occurred, if the roof and walls had been properly constructed.

V. The work was not done according to the specifications and the plans of the architect.

VI. These defects, omissions and departures, were not known at the time of the hearing before the referee; and the award was based upon the assumption that whatever had been done by the plaintiff, was done thoroughly, and in accordance with the plans and specifications.

And the said defendant further alleges, that the foregoing facts were not known to him at the time of the hearing before said referee, and could not have been known to him by reasonable diligence, and that he has discovered these facts since said hearing, and on, or about the second and fifteenth days of the present month.

The defendant introduced evidence in support of his motion, which the presiding justice after hearing denied; and the defendant alleged exceptions.

B. Bradbury & A. W. Bradbury, for the defendant.

W. P. Frye, J. B. Cotton & W. H. White, for the plaintiffs.

APPLETON, C. J. This case was referred by rule of court. The award of the referee being offered for acceptance, the defendant moved its re-commitment on the ground of newly discovered testimony. The evidence offered in support of the motion having been heard, the presiding justice refused to re-commit and accepted the award, to which the defendant alleges exceptions.

The acceptance or rejection of an award or report of a referee is a question of discretion, not of law. If the court to which the award is returned refuses to re-commit it, the decision is not subject to revision by a court of law on exceptions. In *Walker* v. *Sanborn*, 8 Maine, 288, it was held that the question of the re-commitment of a report of referees appointed under a rule of court is one addressed to its discretion, and that its decision is not the subject of a bill of exceptions. In *Cutler* v. *Grover*, 15 Maine,

159, Whitman, C. J., says, "whether the report should be accepted or rejected, upon the evidence adduced in the court below, depended upon the discretion of the judge. There is no proper ground upon which we can set aside his judgment and substitute our own." In *Preble* v. *Reed*, 17 Maine, 169, 172, it was decided that the acceptance or rejection of the report of referees was a discretionary power entrusted to the court, and that exceptions could not be alleged to its exercise of such power. In *Harris* v. *Seal*, 23 Maine, 435, 437, the previous decisions of this court were affirmed, and it was held that the refusal to re-commit a report would be no legal ground for exceptions.

The justice presiding heard the proofs and the arguments of counsel, and upon full deliberation accepted the report of the referee. His judgment is conclusive. His discretion is final. It must determine the rights of the parties.

Exceptions overruled.

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

THOMAS GOSS *vs.* D. A. COFFIN.

Androscoggin, 1876.—April 10, 1877.

Bankruptcy.

An assignee in bankruptcy, in the absence of fraud, takes only such rights and interests as the bankrupt himself had and could assert, at the time of his bankruptcy.

Thus: Where A and B claimed title to the same premises; A, through an earlier and unrecorded conveyance; B, through an assignment in bankruptcy of A's grantor, made after and without knowledge of the conveyance to A; *held*, that A had the better title.

ON EXCEPTIONS.

TRESPASS for taking and carrying away six tons of hay in July, 1874, admitted to be of the value of fifty-five dollars. Writ dated May 21, 1875.

Both parties claim title to the possession of the farm in Bethel, from which the hay was taken, through Daniel M. Goss; the

plaintiff by a life lease, dated March 24, 1859, and reciting that it was "in consideration of a deed of the farm of the same date from Thomas Goss, and that all crops of hay therefrom are at all times the sole property of the said Thomas Goss during his natural life." In consideration of the same deed, Daniel M. Goss gave a bond of the date of the lease, for the maintenance of Thomas Goss.

The defendant claimed directly from Josiah A. Bucknam, who took possession of the farm, as assignee in bankruptcy of Daniel M. Goss, as a part of his effects mentioned in the schedule by him in the proceedings in bankruptcy.

There was evidence showing that Bucknam had no knowledge of the existence of the lease from Daniel M. Goss to Thomas Goss, until after he sold the hay to Coffin, the defendant.

The defendant at the trial contended, as the lease from Daniel M. Goss to Thomas Goss had never been recorded, and the deed from Thomas to Daniel was recorded in the registry, December 20, 1859, and as the record showed the title to be in Daniel, when the petition in bankruptcy was filed against him by his creditors, May 14, 1874, that the lease was not valid against Bucknam, nor against the defendant who purchased the hay of Bucknam. He further contended that the lease was not in fact executed at the time of its date, but was, after the proceedings in bankruptcy, and in fraud of the creditors of Daniel M. Goss.

The presidin g justice, among other things, instructed the jury, that if the plaintiff's lease was executed before the bankruptcy of Daniel M. Goss, and was free from fraud, it gave to the plaintiff a better title than that of Bucknam, under whom the defendant claimed, and he was legally entitled to the possession of the farm, and the growing grass, and to recover for the hay in suit ; but if the lease was not executed till after the bankruptcy, or was fraudulent as against the creditors of Goss, Bucknam, his assignee, had a legal right to enter and dispossess the plaintiff, and cut the grass, and the action could not be maintained against the defendant who held under him.

The verdict was for the plaintiff for $55 ; and the defendant alleged exceptions.

T. B. Swan, for the defendant.

David Dunn, for the plaintiff.

VIRGIN, J. The defendant contended before the jury that the lease was in fact executed after the proceedings in bankruptcy, and in fraud of the creditors of the bankrupt. The presiding justice instructed the jury "that if it were executed after the bankruptcy of the bankrupt, or it were fraudulent as to his creditors, this action could not be maintained; but if it was executed before the bankruptcy, and was free from fraud, it gave to the plaintiff a better title than that of the assignee under whom the defendant claims, and that he was entitled to the possession of the farm, and to recover for the hay in this suit."

Under these instructions, the jury returned a verdict for the plaintiff, for the value of the hay; and therefore, they must have found that the lease was executed prior to the bankruptcy, and was free from fraud as to the creditors of the bankrupt. With the verdict so far as it is based upon the decision of these facts, the defendant finds no fault, and therefore has filed no motion to set it aside as being against the weight of evidence. He contends, however, that the instructions were erroneous when considered in connection with the two facts, that the lease was not recorded, and that the assignee had no knowledge of its existence, until after the hay was sold to the defendant; and he urges upon us, in substance, the proposition applicable to an attaching creditor or to a purchaser for a valuable consideration, to wit, that when D. M. Goss was declared a bankrupt and his property assigned, the record shewed the title of the farm to be in the bankrupt; and the assignee having no knowledge of the existence of the lease, it could not be valid against the assignee by reason of the provisions of R. S., c. 73, § 8.

Assuming that this lease is such an instrument as is mentioned in the statute cited, and that therefore it is not "effectual against any person except the grantor, his heirs and devisees, and persons having actual knowledge thereof, unless recorded," still the proposition of the defendant cannot be sustained; for by the terms of the statute, the lease would be valid against the grantor, and the assignee in this case stands in the place of the grantor. Or,

in other words, an assignee in bankruptcy takes only such rights and interests as the bankrupt himself had and could assert, at the time of his bankruptcy, except in case of fraud; and the jury has decided that the case at bar is not within the exception.

Such was the well established doctrine under the bankrupt act of 1841. *Kittredge* v. *McLaughlin*, 33 Maine, 327. *Winsor* v. *McLellan*, 2 Story, 492. And the same doctrine has been sustained under the act of 1867, by Mr. Justice Shepley, in an elaborate opinion in which he decides that a chattel mortgage valid between the parties and not fraudulent under the bankrupt act, is good against the assignee or trustee of the mortgageor in bankruptcy, although not recorded as required by the statute of the state in which it is made. *Coggeshall* v. *Potter*, 1 Holmes, (U. S. C. C. 1st C.) 75 and cases there cited. In cases where unrecorded mortgages are declared to be fraudulent and void as against creditors, another rule is applicable. *Second Nat. Bank* v. *Hunt*, 11 Wall. 391.

Had the assignee received full title to the farm, he would have been entitled to the crops. But as the lease was valid as against the assignee, he had no right to enter, dispossess the plaintiff, harvest the hay and sell it to defendant; and by doing so, he became a trespasser. Having himself no title to the hay, he could give none to the defendant. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, DANFORTH and LIBBEY, JJ., concurred.

KATE G. HERRICK *et al. vs.* JOHN MARSHALL.

Androscoggin, 1876.—April 30, 1877.

Easement.

A, owning two adjacent lots of land, one of which was his house lot, conveyed the second lot, "with the restriction or reservation, that no building shall be hereafter erected on the above (second) lot within ten feet of the easterly line of A's house lot.

Held 1. Whether this can be regarded as a technically good reservation or not, that by a fair interpretation it creates or reserves a right in the nature of a servitude or easement for the benefit of A's house lot.

Held 2. This right is appurtenant to A's house lot and building, and binding on the second lot; and the right and burden thus created, will pass to the subsequent grantees of the respective lots.

Held 3. Where the parties had no actual knowledge of this right, and only constructive knowledge from the deeds and the registry, and the subsequent grantee of the second lot, erected a building within ten feet of A's former house lot, and when it was partially finished, this right came to their actual knowledge, the grantee of the first lot was not estopped from claiming the easement in the second lot; although he had seen the building erected without objection.

ON FACTS AGREED, stated in the opinion.

CASE to recover damages for the infringement of an easement.

C. Record, for the plaintiffs.

It was for the defendant to see to it that he did not trespass upon others.

The plaintiffs, as soon as they ascertained their rights, notified the defendant, and forbade his further proceeding. This accidental delay on the part of the plaintiffs, is no evidence of abandonment of their rights. Wash. on Easements, c. 5, § 5, *et sequens.*

Every continuance of a nuisance is in contemplation of law a fresh nuisance. 8 Am. Law Reg. 382, citing *Coshocton Stone Co.* v. *Buffalo, N. Y. & Erie Railroad.*

N. Morrill, for the defendant, contended that the language in the deed from Murray to Smith, "with the restriction and reservation that no building shall hereafter be erected on the above lot within ten feet of the easterly line of said Murray's house lot," contains no apt words of reservation of an easement of light and air, because no name is mentioned for whose benefit the reservation is; and that there are no words of limitation and inheritance; there is no language used creating an obligation on the part of the grantee to suffer Murray, the grantor, his heirs and assigns, to use it. 2 Wash. Real Prop. 646–7. *Hornbeck* v. *Westbrook*, 9 Johns. 73.

Again; if there be any restriction or reservation, the plaintiffs should not recover, because the defendant purchased without notice or knowledge of it, and the defendant expended money in making additions to his buildings with the knowledge of the plaintiffs who stood by and permitted him to do so without objection,

until he had expended large sums ; and although the plaintiffs say they were ignorant of the language in the deed, by the registry they had constructive notice.

Barrows, J. The plaintiffs claim damages for the obstruction of an easement for light and air over the defendant's lot, to which they say they are entitled by virtue of a clause contained in the deed given by Simeon H. Murray (from whom both parties derive their titles,) to one Smith whose title has come through several mesne conveyances to the defendant.

Prior to 1862, Murray owned both lots. He built and lived on the lot now owned by plaintiffs to whom he conveyed in March, 1873. In March, 1864, he conveyed the lot now owned by the defendant (which adjoins the plaintiffs' lot on the east side thereof,) to Smith, by a deed duly recorded and containing the following restriction, viz. : "with the restriction and reservation that no building hereafter erected on the above lot shall be erected within ten feet of the easterly line of the said Murray's house lot." This restriction was copied verbatim in Smith's deed to Patrick C. Shannon. Direct reference is made to those conveyances in Shannon's deed to Caleb Smith, and in the subsequent deeds, under which the defendant holds his lot the premises are spoken of as the same conveyed by one or other of the previous deeds all of which were duly and promptly recorded. It is agreed, however, that the defendant and his immediate grantor had no actual knowledge of the "restriction and reservation" aforesaid, nor had the plaintiffs such knowledge until June, 1875, when the defendant had erected and completed on the outside, an addition to his buildings within two feet of the plaintiffs' easterly line. As soon as the restriction came to the knowledge of the plaintiffs, they required the defendant to desist from the completion of his addition, and to remove it, which he refused to do and has ever since occupied it by himself or his tenants.

He grounds his resistance to the plaintiffs' claim on the following positions: 1. That the language quoted from the deed of Murray to Smith is insufficient to create a reservation, and for want of proper words of limitation or inheritance, if there was one, it cannot be enforced by Murray's grantees. 2. That plaintiffs are

estopped from asserting their claim by their knowledge that defendant was expending money in the erection of his addition, and their failure to object until it was nearly completed.

I. The objections to the sufficiency of the language used to sustain the right claimed by the plaintiffs, are, that no one is named in whose favor the reservation is made and that this is contrary to the rule that a reservation must be to him who made the deed and not to a stranger, and that there are no words of limitation and inheritance which would make it available to the grantor's heirs and assigns. Whatever the technical appellation should of right be, whether reservation, restriction, or exception, we think the language of Murray's deed imports the creation of a negative easement for his house lot now owned by the plaintiffs as a dominant estate over that granted and now owned by the defendant.

When this is done by means of language in a deed which must be held to convey distinctly to the grantee's mind the character of the act which he is to abstain from doing on the land granted, and to identify the lot to which his own is made servient, we do not understand that it is necessary either to name the person who is to be immediately benefited by the clause, or to insert words of limitation or inheritance in order to have his rights pass to his heirs or assigns.

In this respect the language does not differ materially from that used in *Dyer* v. *Sanford*, 9 Met. 395, cited for defendant. There, what is spoken of indiscriminately as a reservation or exception was created by a clause in a deed from a remote grantor of the plaintiff, to a party under whom the defendant derived his title, of the following tenor: "reserving however to the dwelling-house of said deceased, Christopher Tilden, the right of caves drops where it bounds on said lot, and also the right of forever keeping open the great stair case window," etc. Here, as there, the reservation was for the benefit of the grantor's house lot as a dominant estate, and words of limitation and inheritance are in such cases not necessary to enable the grantee of that estate with its appurtenances to maintain the right as against those into whose hands the servient estate may fall.

Touching this subject, Professor Washburn in his excellent trea-

tise on easements and servitudes remarks (page 30,) as follows: "In respect to whether the reservation is of a perpetual interest, like a fee in the easement reserved, the question seems to turn upon whether it is a personal right, an easement in gross, or one for the benefit of the principal estate and its enjoyment, whoever may be the owner. In the latter case it is held to be a permanent right appurtenant to the principal estate in the hands of successors and assigns without words of limitation. The courts of Maine treat such a reservation as an exception to obviate the objection." *Winthrop* v. *Fairbanks*, 41 Maine, 307, 312. *Smith* v. *Ladd*, 41 Maine, 314, 320. See also *Borst* v. *Empie*, 5 N. Y. 33. *Bowen* v. *Conner*, 6 Cush. 132.

In *Whitney* v. *Union Railway Co.*, 11 Gray, 359, 365, the court remark: "When therefore it appears by the fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land." The defendant had constructive notice, by the references from one to another in the chain of deeds which make his title, of the servitude with which his estate was burdened, and without regard to the question whether the clause in this deed relied on by the plaintiffs is or is not technically good as a reservation, we must hold him bound by it and restricted in the use of his lot for building purposes within ten feet of the easterly line of the plaintiffs' lot. See also *Mendell* v. *Delano*, 7 Met. 176. *Barrow* v. *Richard*, 8 Paige, 351. *Bronson* v. *Coffin*, 108 Mass. 175, 180.

II. Nor can the defense be sustained on the ground of estoppel. The plaintiffs did not sleep upon their rights. The case finds that they asserted them as soon as they knew they had the means of substantiating them, and that the defendant paid no heed to their claim. The plaintiffs might well be ignorant of what was included in the grant to them of "the appurtenances" to their lot. But

the defendant was bound to know their rights by the reference in his own deed to that of former grantors and those therein contained. His means of actual knowledge of the restriction were fully equal, to say the least, to those of the plaintiffs, and he can not complain of any laches on their part. The case does not indicate anything like license or abandonment on the part of the plaintiffs and it is plainly not within the principles of equitable estoppel by matter *in pais* which the defendant invokes.

According to the stipulation in the agreed statement, as the plaintiffs are entitled to recover, the entry must be

Judgment for plaintiffs for $1.00 *damage.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

STATE *vs.* WILLIAM W. LEAVITT.

Androscoggin, 1876.—May 31, 1877.

Indictment.

An indictment for larceny, presenting that W L, of [&c.,] on [&c.,] in the year [&c.,] at [&c.,] two oxen of the value [&c.,] of the goods and chattels of one C J, then and there being found, feloniously did steal, take and carry away, against the peace of said state, and contrary, [&c.,] *held* sufficient, on demurrer thereto.

ON EXCEPTIONS.

INDICTMENT of the form following, (omitting formal commencement and conclusion.)

The jurors for said state upon their oath present that William W. Leavitt, of Auburn, in the county of Androscoggin, and state of Maine, laborer, on the thirty-first day of October, in the year of our Lord, one thousand eight hundred and seventy-four, at Auburn aforesaid, in the county of Androscoggin aforesaid, two oxen of the value of one hundred and eighty dollars, one horse of the value of one hundred dollars, one certain riding wagon of the value of ninety dollars, and one harness of the value of twenty dollars, of the goods and chattels of one Charles P. Jordan, jr.,

then and there being found, feloniously did steal, take and carry away, against the peace of said state, and contrary to the form of the statute in such case made and provided.

The defendant, before his arraignment, filed a special demurrer to the indictment, for causes following:

I. That there is no possession of the goods and chattels named in said indictment, set forth therein, or that they were at the time of the alleged taking, in the possession of any one.

II. That there is no trespass in the taking and carrying away set forth or alleged in said indictment.

III. That it is not alleged in and by said indictment that the possession of the articles of property therein alleged to be taken and carried away, were ever in the possession of any one, and had not been abandoned or lost by the owner; and that said indictment is in other respects informal and insufficient.

The presiding justice, after joinder, overruled the demurrer and adjudged the indictment good; and the defendant alleged exceptions.

M. T. Ludden, for the defendant.

L. A. Emery, attorney general, for the state, submitted without argument.

APPLETON, C. J. The indictment alleges that the defendant "feloniously did steal, take and carry away, against the peace of the state, and contrary to the form of the statute in such case made and provided," certain described property "of the goods and chattels of one Charles P. Jordan, jr.," &c., and the defendant by his demurrer admits he did so. This is precisely what is forbidden by R. S., c. 120, § 1, the language of which is followed in the indictment. I think the indictment good. I should regret the giving a sanction to what the defendant has done, by declaring it no offense. Wharton's Precedents, 417. 2 Archbold's Crim. Pr. & Pl. 343. The indictment is alike good at common law and by statute. *Exceptions overruled.*

VIRGIN, J. The original taking must in any event be wrongful; and the wrongful possession either when taken, or at some

time during its continuance, must be accompanied by felonious intent. The allegations in the indictment deny the possession of the defendant to be rightful. If the evidence does not so show, he will be entitled to acquittal. I concur therefore.

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

BENJAMIN PULSIFER *vs.* ISAAC PULSIFER.

Androscoggin, 1876.—June 5, 1877.

Promissory Notes.

An action will not be sustained on a witnessed promissory note, commenced twenty years after the cause of action accrues, where there had been no new promise or partial payments.

The statute of twenty years limitation, R. S., c. 81, § 86, is a bar to a witnessed promissory note.

ON EXCEPTIONS.

ASSUMPSIT on an account annexed, and a count for money had and received.

To sustain the count for money had and received, the plaintiff offered two notes, signed by the defendant and witnessed. One of the notes was dated August 31, 1836, payable on demand; and the other was dated Sept. 12, 1836, payable in six months. The statutes of limitations were pleaded—both the six years and the twenty years limitations.

The presiding justice ruled that the lapse of time was not a bar to the plaintiff's recovering upon the notes; but was only *prima facie* evidence of payment, which might be rebutted by proof that they had not been paid.

To which ruling the defendant excepted.

A. M. Pulsifer, W. W. Bolster & J. R. Hosley, for the defendant.

The cause of action on the first note named in the report accrued August 31, 1836; on the second, March 12, 1837. The writ was dated February 23, 1875, thirty-eight years, five months and twenty-two days after the first note became payable, and thir-

ty-seven years, eleven months and eleven days after the maturity of the second note.

The statute of limitations in force when the remedy is sought, and not that existing when the contract was made, must govern the remedy. *Sampson* v. *Sampson*, 63 Maine, 229.

Witnessed notes, after the lapse of twenty years from the time they become payable, are barred by the statute of limitations. *Joy* v. *Adams*, 26 Maine, 330. *Howe* v. *Saunders*, 38 Maine, 350. *Lincoln Academy* v. *Newhall et al.*, 38 Maine, 179, 182, 183. R. S., c. 81, § 86.

Witnessed notes secured by mortgage of real estate are barred by our statute of limitations in twenty years after they become payable, while the mortgage security is not deemed to be within any branch of the statute of limitations. The lapse of twenty years from the accruing of the indebtment is only a presumption that the mortgage had been satisfied, which may be removed by circumstances tending to produce a contrary presumption. *Joy* v. *Adams*, 26 Maine, 330 (see pp. 332, 333.)

The twenty years limitations in R. S., c. 81, § 86, is an absolute bar to an action upon promissory notes signed in the presence of an attesting witness, as defined in section 83 of the same chapter. *Brewer* v. *Thomes*, 28 Maine, 81, 84.

Had the legislature intended the six and the twenty years limitations mentioned in R. S., c. 81, §§ 79, 83, 86, as presumptions or proof of *prima facie* payments on the contracts and causes of action named in these sections, it would have used language similar to that used in section ninety-seven relative to judgments and decrees of the court of record of the United States, or any state or of a trial justice, which, as the section reads, "shall be presumed to be paid and satisfied at the expiration of twenty years after any duty or obligations accrued by virtue of such judgment or decrees."

If the plaintiff would avoid the statute bar, he must prove a new promise within twenty years next preceding the date of his writ.

D. Dunn, for the plaintiff, cited the statement of Shepley, C. J., from the opinion of the court in *Howe* v. *Saunders*, 38 Maine, 350. "The only limitation applicable to this note is that of twenty years. The application of that limitation, as an effectual bar,

may be avoided by proof that would rebut the presumption arising from the common law after the lapse of twenty years."

VIRGIN, J. This being an "action on a promissory note signed in the presence of an attesting witness," by the express terms of R. S., c. 81, § 83, none of the limitations provided in §§ 79 to 83, apply to it.

It is, however, subject to the general twenty years limitation of § 86, inasmuch as it is a "personal action on a contract, not limited by any of the foregoing sections or other law of the state."

Section 85, unlike § 97, (pertaining to actions on judgments of certain courts therein specified) is not founded upon a presumption of payment liable to be rebutted by evidence; but its object, based on public policy, is to close the judicial tribunals against all contracts therein described commenced after the cause of action is twenty years old. The language is peremptory, that the action "shall be commenced within twenty years after the cause of action accrues." The phrase "and not afterwards" found in § 79 adds nothing; and if it were appended to § 86 would not affect its meaning; for as now expressed it is equivalent to a provision that no action shall be commenced after twenty years. In the absence of any partial payment, the twenty years begin to run from the time when the note is payable; but when such a payment has been made, whether indorsed or not, then, so far as the one who made the payment is concerned, the limitation re-commences at the date of that. *Estes* v. *Blake*, 30 Maine, 164. *Howe* v. *Saunders*, 38 Maine, 350. *Quimby* v. *Putnam*, 28 Maine, 419. *Sibley* v. *Lumbert*, 30 Maine, 253. *Evans* v. *Smith*, 34 Maine, 33. R. S., c. 81, § 96.

In an action of debt upon a judgment, to which the statute of limitations was pleaded, this court said: "If the legislature had intended the presumption should stand uncontrolled by the evidence, it would have fixed an absolute bar of twenty years, by way of limitation, as it has done by § 11, (§ 86 present revision,) of the same chapter, in relation to actions on contracts, not limited by any of the other foregoing sections, or any other law of the state." *Brewer* v. *Thomes*, 28 Maine, 81, 84.

So in a writ of entry brought upon a mortgage of real estate, given to secure certain promissory notes, Whitman, C. J., said:

"The defense rest upon the presumption of payment by the mortgageors, arising from the lapse of time since the debt secured by the mortgage became payable. The notes given therefor, although witnessed, are unquestionably barred by our statute of limitations. c. 146, § 11," (§ 86 present revision.) *Joy* v. *Adams*, 26 Maine, 332.

In *Howe* v. *Saunders*, 38 Maine, 352, Shepley, C. J., intimates a different view by saying: "The only limitation applicable to this note, is that of twenty years, § 11. The application of that limitation, as an effectual bar, may be avoided by proof that would rebut the presumption arising from the common law after the lapse of twenty years;" and he cites two cases of actions brought on judgments. These cases could not support the proposition, however, for they gave a construction to § 97 pertaining to actions on judgments. And the next succeeding sentence in the opinion referred to, shows that the eminent jurist who wrote it did not intend to express his deliberate judgment upon this question. At best it was a *dictum*, the question then before the court being as to the effect of a partial payment.

The provision now under consideration first appeared in the statute in this state in the revision of 1841. A similar provision first appeared in Massachusetts, in the revision of the statutes of that commonwealth adopted in 1836. It was added by the legislature, after the draft of the commissioners had been submitted to the legislature by the legislative committee. *Von Hemert* v. *Porter*, 11 Met. 210, 216. And whenever the provision has been before the court there, it has been considered an absolute bar. *Denny* v. *Eddy*, 22 Pick. 533, 534. *Gray* v. *Bowden*, 23 Pick. 282. *Clark* v. *Swift*, 3 Met. 390. *Bancroft* v. *Andrews*, 6 Cush. 493. *Prescott* v. *Reed*, 8 Cush. 365, 366.

Exceptions sustained.

APPLETON, C. J., WALTON, BARROWS, DANFORTH, PETERS and LIBBEY, JJ., concurred.

ELIJAH FULTON *vs.* JANE NASON.

Cumberland, 1876.—August 5, 1876.

Executor and administrator.

Where in a pending action, both parties have deceased, the administrator of the plaintiff has a right to appear, and to summon in the administrator of the defendant.

ON EXCEPTIONS, at the April term, 1876.

Both plaintiff and defendant having deceased, the plaintiff's administrator appeared; a citation issued to Eben Leach, administrator of the defendant, returnable at this term, to appear and take upon him the defense of the action. Leach appeared specially under protest, and said, "that this action was entered in this court at the January term, 1874; that thereafterwards Fulton died, and his death was duly suggested upon the docket at the April term, 1874; that thereafterwards, and before the appearance or appointment of any administrator of said Fulton, Jane Nason died, and her death was duly suggested upon the docket at the October term, 1874.

Whereupon he says that he cannot take upon himself the defense of this action, because no action is pending, and no statute compels his appearance therein."

The presiding justice overruled the protest, and ruled that Leach appear. And Leach alleged exceptions.

W. H. Vinton, for the defendant's administrator.

S. C. Strout & H. W. Gage, for the plaintiff's administrator.

APPLETON, C. J. This is an action of assumpsit. During the pendency of the suit, both the plaintiff and the defendant have deceased. After the death of the parties had been suggested upon the docket, the administrator of the plaintiff entered his appearance, and claimed the right to further prosecute this suit.

At common law, by the death of the parties, the suit would have abated. But by R. S., c. 82, § 30, the death of a party being suggested, his executor or administrator may become a party, or be summoned in to become a party, at the instance of the opposing

party, when the cause of action survives. The statute applies to plaintiff and defendant. The administrator of the plaintiff has the same right to appear after the death of a defendant, as if he were living. The death of a defendant affords no reason why the executor or administrator of the plaintiff should not become a party, and becoming a party, he may by statute summon in the executor or administrator of a deceased defendant.

The motion of the defendant's administrator to dismiss the suit is denied. *Exceptions overruled.*

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

DANIEL B. SOULE *vs.* SAMUEL WINSLOW.

Cumberland, 1876.—August 7, 1876.

Exceptions. Malicious prosecution.

To authorize a court to sustain exceptions it must affirmatively appear that the party excepting was aggrieved by the rulings to which exceptions are taken.

In an action against the defendant for a malicious prosecution, when he consented to the use of his name as *prochain ami* in a suit by one being or claiming to be a minor, evidence of the professional advice of an attorney, when such consent was obtained, is admissible to negative malice.

He would not be liable for the errors of the court if any were made, in the rendition of judgment.

Nor if the suit was erroneously brought against his expectation and without his consent, express or implied.

ON EXCEPTIONS from the superior court.

CASE for malicious prosecution.

The prosecution, alleged to be malicious, was one called for distinction's sake, the "tender suit," in which the parties were the same as in this case but reversed, with this difference: that Winslow here is simply defendant, while there the plaintiff was "Winslow, next friend of Harrison Joy, minor." The "tender suit" was on account annexed for two months, eight days labor, at $18 per month, $41.52 with a credit of $5.43, leaving a balance claimed of $36.09. Soule at first declined to pay, because Joy contracted to

labor for a year, and left before the time expired; but subsequently tendered to his counsel $17; the agreed price being, as he said, $10 per month if Joy left before the year was out. The tender being refused, and an action afterwards brought, he deposited the money in court. It was admitted for the purpose of that trial, which was before Judge Symonds of the superior court, without the intervention of a jury, that no more than $17 was due; and the only question there, was the validity of the tender. Judge Symonds found the tender valid and ordered judgment for the plaintiff for $17 without costs; and further, that the defendant Soule recover his costs of court, taxed at $28.38.

Soon after the execution was issued to Soule for his costs, in February, 1873, he commenced this action for malicious prosecution, setting out the proceedings in the "tender suit," and averring among other things that the said defendant (Winslow) well knew that the said plaintiff was not indebted to the said defendant, as next friend to said Harrison Joy in more than the sum of $17; that he knew the tender was made to Motley as attorney for Joy, September 30, and afterwards, October 14, sued out the writ, and caused his real estate to be attached, &c., &c., that he had no legal or probable cause and was guided by malice.

I. The exceptions further show that at the trial before the jury, testimony having been offered by Soule tending to show threatening language used by the defendant, Winslow, towards him prior, and only so, to the hearing upon the tender. Porter, a witness for the defendant, testified against objection, to a conversation with the plaintiff, omitting expletives, thus: "He said, 'I want you to go with me to Mattocks' office, and state what you heard Winslow say.' I said, 'I know nothing that will help you;' he said, 'you heard him say I will make you pay for your sauce.' I said, 'I did, and he had a big occasion.' He said, 'I know I made a fool of myself, when I went up with the execution in the condition I was;' he said he was sorry that he went up."

II. Mr. Motley, a counselor, was called by the defendant to show, that he, the defendant, acted by the advice of counsel; but the plaintiff objected, unless it was first shown that Motley, as counsel, was first put in possession of all the facts; but the judge

admitted the testimony, remarking that the objection went to the value of the testimony, and not to its admissibility. The answer was this:

"I stated to Winslow, that the boy was a minor, and could not bring the action in his own name, but would be obliged to bring it in the name of another, a next friend, and asked him if he would allow his name used as next friend. Winslow asked whether it would subject him to any trouble or cost to allow his name to be used. I stated it would not, and it was the only way minors could collect their claims legally. Mr. Winslow says, 'very well, I don't want to get into any trouble about this, you can use my name.'"

III. In the former jury trial of the action, at which a verdict was rendered for the plaintiff, the written finding of the court in the tender trial was not offered in evidence, as at the present trial. At this trial the presiding justice instructed the jury that the original record in the alleged malicious action "shows conclusively, and we cannot go beyond it, that seventeen dollars was the amount due from Soule for the services of Joy at that time. The question arises, whether it has been proved to you affirmatively, by the evidence of the plaintiff that the bringing of that original suit for more than seventeen dollars, was malicious, and without probable cause. The plaintiff in the original action, whoever he may have been, had a perfect right to bring it to recover seventeen dollars."

IV. The question being raised whether Joy was in fact a minor, as alleged, and evidence on both sides adduced thereon by the parties, the defendant having testified that he was a minor, the plaintiff's counsel requested the instruction that the allowing of one's name to be used in an action as next friend of an alleged minor, when he knew such person not to be a minor, would be want of probable cause. The presiding justice refused so to instruct, but said to the jury:

"Now if you should come to the conclusion that Joy was of age, and that he made the contract stated by Soule, giving him only ten dollars a month, if he left before the expiration of the year, it does not follow that Winslow did not have reasonable and probable grounds for bringing his original suit."

And further: "The theory of the defense is that Winslow did not know anything about this matter until Soule informed him of it, and took no part in it until he was in Motley's office, when Motley requested him to act as *next friend*. If that was the fact of the case, and that was all the part that Winslow took in the proceeding then that would be evidence tending strongly to show that there was no malice."

The verdict was for the plaintiff; and the defendant alleged exceptions.

C. P. Mattocks & E. W. Fox, for the plaintiff.

I. As to Porter's testimony. The point to be tried was whether Winslow was malicious before and during the trial of the original action, and not whether Soule was so after that trial or in instituting this. It is not competent to try the short-comings of both parties in one suit.

II. As to Motley's testimony. Neglect to inform counsel of all the facts on which his advice is asked, goes not to the value but to the admissibility of the testimony. The advice that he did ask was not as to his duty, but how he could escape liability for costs. Advice given under such circumstance was no excuse. *Blunt* v. *Little*, 3 Mason, 102. *Hewlett* v. *Cruchley*, 5 Taunt. 277. *Stone* v. *Swift*, 4 Pick. 389. *Stevens* v. *Fassett*, 27 Maine, 266.

No material fact must be withheld. *Wills* v. *Noyes*, 12 Pick. 324, 327. *Wilder* v. *Holden*, 24 Pick. 8. *Com.* v. *Bradford*, 9 Met. 268.

III. The whole record of the original action shows want of probable cause in bringing it. The previous decisions in this case, 64 Maine, 518, is not decisive because the complete record of the previous case was not before the court. It now appears that the tender of $17 was made before the commencement of the action; that the pleadings show but $17 was due; that the only question tried by the presiding justice was the validity of the tender; that he found it valid; that the only valid judgment was that in favor of Soule for his costs; that the judgment for the plaintiff for $17 was erroneous; and that the result, but for this error was unfavorable to the present defendant. Can the law court now say the record shows a right to sue, and probable cause for bringing an action

for at least $17? On the contrary, it shows but $17 was due, and the bringing of the action for a larger sum was *prima facie* evidence of malice; because malice may be inferred from want of probable cause. 4 Phil. on Ev. 257. *Munns* v. *Dupont*, 1 Am. Leading Cases, 200, 209. *Wheeler* v. *Nesbitt*, 24 Howard, 544, 551. The instruction that the plaintiff in the original action had a perfect right to bring it, was clearly wrong. The tender was a complete bar to the action. *Slingerland* v. *Morse*, 8 Johns. 474.

IV. The presiding justice erred in his instructions in reference to Joy's age. After the evidence tending to show that Joy was of age and that Winslow knew it, and the request for the instruction that "the allowing one's name to be used in an action in such a case as next friend, was want of probable cause, that the assuming of a representative capacity not warranted by the facts of the case was an abuse of legal process," the presiding justice should have squarely given or squarely refused it. By the instruction given, that "even if Joy was of age, it does not follow that Winslow did not have reasonable and probable grounds for bring ing the original suit," the jury were not informed of the difference between knowledge and ignorance on Winslow's part.

W. H. Motley & H. M. Sylvester, for the defendant.

APPLETON, C. J. This is an action on the case for malicious prosecution. The facts as now presented do not materially differ from those as stated when this case was before us in 64 Maine, 518.

I. The testimony of one Porter is objected to, but upon perusal it is rather adverse than favorable to the party by whom it was offered, and of that the plaintiff cannot reasonably complain. It is, however, of so little importance that it is difficult to perceive why the defendant should offer it or, when received, why the plaintiff should object to its reception. To sustain an exception, it must affirmatively appear that the party excepting was aggrieved thereby.

II. It seems that one Harrison Joy claiming to be a minor had a demand against the plaintiff for work and labor. W. H. Motley testified that he "stated to Winslow when he came to his office, that the boy (Joy) was a minor and could not bring the action in

his own name, but would be obliged to bring it in the name of another, a next friend, and asked him if he would allow his name to be used as next friend. Winslow asked whether it would subject him to any trouble or cost to allow his name to be used. The witness stated it would not, and it was the only way that minors could collect their claims legally. Winslow said, "very well, I don't want to get into any trouble about this; you can use my name."

It is objected that this evidence is inadmissible; but we think otherwise. It shows the circumstances under which the defendant allowed his name to be used as next friend, and completely negatives any malicious intent on his part at that time. If the suit was erroneously commenced it was not his fault.

It is argued that here was a concealment of facts on the part of the defendant. But it does not appear that he had any knowledge about the matter, but what he received from Joy's counsel, and concealment of any fact on the part of counsel would not tend to prove malice on the part of the defendant.

III. It is argued that the judgment against Soule for seventeen dollars was erroneous. If it was so, it neither indicates nor tends to indicate malice on the part of the defendant. He is not to be held responsible for an error of the court, which escaped the keen eye of the vigilant counsel for the plaintiff.

As in the suit claimed to be malicious, judgment was rendered for seventeen dollars, and no exceptions were taken to that adjudication and the judgment is in full force and not reversed, the plaintiff cannot complain of a ruling which affirms the validity of such judgment.

IV. There is no evidence showing that the defendant was aware that a tender had been made. He was not informed of that fact by Mr. Motley; and if he had been, the party tendering had a right to contest its sufficiency, without being liable to a suit for malicious prosecution. Indeed, suits of that character would be almost infinite in number if an action for malicious prosecution could be maintained every time a plaintiff recovered less than he sued for.

V. It seems there was at the last trial evidence tending to show that Joy was not a minor when the suit against Soule was commenced.

The plaintiff's counsel requested the court to instruct the jury that the defendant's allowing his name to be used in an action as next friend of an alleged minor, when he knew such person not to be a minor, would be want of probable cause. This instruction the court refused to give.

The writ contains no count alleging that the plaintiff allowed his name to be used as next friend for one whom he knew not to be a minor. There is no evidence whatever to show the defendant had any knowledge of such supposed fact, but the reverse, for he swears Joy was a minor. A court is not bound to give instructions upon a non-existent state of facts, or upon facts not proved in the case as existing.

The refusal of the court to give the instruction was correct.

VI. If the suit is to be regarded as brought in the defendant's name through the mistake of counsel, assuredly the defendant cannot be held liable in a suit for malicious prosecution, when such suit is so brought contrary to his expectations, and without his authority or knowledge. *Exceptions overruled.*

WALTON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

IRA C. SAWYER *vs.* INHABITANTS OF NAPLES.

Cumberland, 1876.—October 5, 1876.

Way—defective.

The notice of a party, injured by a defect in a public highway, to the town liable for the damage required by the act of 1874, c. 215, need not be in writing. It is otherwise by the act of 1876, c. 97.

It is not necessary that the amount of damages claimed should be stated in dollars and cents.

ON EXCEPTIONS from the superior court.

CASE, for damages, for injuries received, through a defect in a highway, February 26, 1875.

On the point of notice required by c. 215, of the acts of 1874, the plaintiff testified that on March 24, 1875, he went into the store of Mr. Bray, one of the selectmen, and said to him, "I shall

claim damages of the town for injuries received in the back, on the Sylvester Paul road. He asked me how much. I told him I did not know; we would wait and see how I got over it. He said they would object on the ground I was not in the road."

The presiding justice ruled, that it was incumbent on the plaintiff to satisfy the jury that he had given the notice required by the act of March 3, 1874; and defined the requirements of the notice as to its contents in a manner to which no exceptions were taken; but ruled against the defendants' objection that such notice proved by parol testimony was sufficient, and further that it was sufficient if given to one municipal officer or selectman.

The verdict was for the plaintiff for $1750; and the defendants moved to set it aside as against evidence, and alleged exceptions.

N. S. Littlefield, for the defendants.

S. C. Strout & H. W. Gage, for the plaintiff.

APPLETON, C. J. This is an action against the defendant corporation to recover damages for an injury occasioned by a defect in a highway which it was bound to keep in repair. It comes before us upon exceptions to the ruling of the presiding justice and upon a motion for a new trial.

By R. S., c. 18, § 65, persons injured by defects or want of repair, etc., may recover damages against the towns or cities responsible for such defects or want of repair. This section was amended by c. 215 of the acts of 1874, which provides that "any person who sustains any injury or damage as aforesaid, shall notify the county commissioners of such county or the municipal officers of such town, within sixty days thereafter by letter or otherwise, setting forth his claim for damages and specifying the nature of his injuries."

The presiding justice ruled that notice proved by parol testimony was sufficient. To this ruling the defendants excepted.

The object of the notice is to enable the town seasonably to investigate claims for injury before the proof of the facts shall become unattainable from lapse of time or loss of life or memory. It is for the benefit of the town. Notifying the town of an injury received enables its officers to proceed to ascertain the facts and contest or

settle with the party claiming damages as they may deem expedient.

The notice is by "letter or otherwise." If by letter it is in writing. If "otherwise," it may be in writing or verbal. "Otherwise" includes all modes of notice except by letter. Verbal notice is a compliance with the statute.

It is objected that the notice is given to but one of the selectmen. But a notice to one is a notice to all. It was given to a municipal officer in the line of his duty and to be communicated to his associates. It would be imposing a useless and unnecessary burden to require notice to be given to each of the selectmen. The notice was sufficient. *Newbit* v. *Appleton*, 63 Maine, 491. *Rogers* v. *Newbury*, 105 Mass. 533.

It must be borne in mind that the act of 1874, c. 215, has been amended by the act of 1876, c. 97, which requires the notice given to the town to be by "letter or otherwise in writing." But that amendment relates to the future and can have no effect upon a notice given before its passage.

Neither is it necessary that the extent of damages should be stated in dollars and cents. The party injured may not know the extent of the injury received. It may be greater than is at first supposed or it may be less. What the legislature deemed important was that towns should be notified that damages are claimed, not what sum of money would be sufficient to compensate the party injured.

The exceptions are untenable.

The trial occupied four days. The defense was conducted by able and experienced counsel. There is conflicting evidence as to all the facts in controversy. It is not enough that the court might have come to a different conclusion. That alone would not justify our setting aside the verdict. The law has made the jury judges of fact. No exceptions which are available are taken to the charge of the judge. We cannot say that the jury have so misconducted or have been so under the influence of prejudice or passion, or have so entirely disregarded the weight of evidence that it becomes our imperative duty to disturb the verdict.

Motion and exceptions overruled.

DICKERSON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

GEORGE W. ENDICOTT *vs.* AUGUSTUS M. MORGAN.

Cumberland, 1876.—October 25, 1876.

Pleading.

The plea of *nul tiel record* to a judgment rendered in a court of record of another state concluding with an issue to the country is bad on demurrer.

Whether *nil debet* is not a good plea to such a judgment where the court rendering it had not jurisdiction, *quære.*

When a judgment is rendered by a state court having no jurisdiction, that fact may be shown by a plea in bar to such judgment.

ON EXCEPTIONS from the superior court.

DEBT on a judgment of the supreme judicial court of New Hampshire, to which the defendant pleaded *nul tiel record*, concluding to the country, with a brief statement, among other things, that the judgment was rendered without notice, and that the court had no jurisdiction.

The plaintiff demurred to the plea because it concluded with an issue to the country, instead of a verification; he made no answer to the brief statement.

The justice sustained the demurrer, after joinder, adjudged the plea bad, and ordered judgment for the plaintiff; and the defendant alleged exceptions.

J. Howard & N. Cleaves, for the defendant, contended in substance, that a conclusion of the plea of *nul tiel record*, with a verification, would be improper, because the plea is in the negative, and because it introduces no new matter; that they had the statute right to plead the general issue with a brief statement; that *nul tiel record* was the general issue in this case, and that the plea and brief statement together constituted a full and sufficient answer to the declaration; that although the formal conclusion to the country is not proper in a plea of *nul tiel record*, to a domestic judgment, which is conclusive until reversed, it is proper to a foreign judgment which is only *prima facie* evidence, and not conclusive.

P. Bonney, for the plaintiff, contended, in substance, that although the defendant might rightfully plead the general issue of *nul tiel*

record, yet he had no right to plead it with a conclusion to the country; that the issue raised by this plea is the existence of the record as declared on, and is to be determined by the court by an inspection of the record, or an exemplification thereof; that not having properly pleaded the general issue, the brief statement has no force; that had the defendant filed a proper plea of the general issue, the different issues could have been made and tried, as in *Potter* v. *Titcomb*, 16 Maine, 423, the only case in which this question has been raised in this state, and which is decisive of the case at bar.

APPLETON, C. J. This is an action of debt upon a judgment recovered in the supreme judicial court of New Hampshire, to which the defendant pleaded *nul tiel record*, with an issue to the country, and brief statement setting forth that when the suit on which the plaintiff's alleged judgment was rendered, was commenced, he was not, nor has he since been a resident in the state of New Hampshire; that he had no last and usual abode in said state, no agent or attorney, and no property therein; that he never had notice of the pendency of said suit, and said judgment was rendered without his knowledge or consent, and that the court in which said judgment was rendered had no jurisdiction over his person or his property.

To the plea the plaintiff specially demurs because it tenders an issue to the country instead of concluding with a verification.

To the brief statement no replication is made. It is left without notice. Its existence is ignored.

The issue on the plea of *nul tiel record* to be determined, is whether there is such a record or not. The parties cannot, unless where it is a foreign judgment, put themselves on the country, when this is the plea. This issue is to be determined by the court on inspection and examination of the record, and not by the jury. Stephens on Pl. 130. "Whether there is a record or not," observes Parker, C. J., in *Hall* v. *Williams*, 6 Pick. 232, 237, "is generally to be tried by the court, and not the jury; for it is to be tried by inspection only, and the court are the proper judges whether what is shown for a record is one. If the judgment declared on is of a foreign court, it is not treated as a record, and a

plea of *nul tiel record* is not a proper plea; but under an issue to the country, all exceptions may be taken to what is produced as a record, and the judgment proved is only *prima facie* evidence of debt."

The plea of *nul tiel record*, as it concludes with an issue to the country, is bad.

It is intimated in *Hall* v. *Williams*, that when the defense is, that the court rendering judgment had not jurisdiction, the plea of *nil debet* may be used, and that under that plea the jurisdiction of the court may be inquired into. In *Thurber* v. *Blackbourne*, 1 N. H. 242, *nil debet* was held to be a good plea to an action of debt on a judgment rendered in a court of record of another state, when it did not appear from the record in the suit that the defendant had notice of the suit. This decision was reaffirmed in *Wright* v. *Boynton*, 37 N. H. 9. But it is not necessary to decide whether it be a good plea or not; for it is universally conceded that the defense of want of jurisdiction may be pleaded in bar to a judgment rendered in another state.

But *nul tiel record* is not all the answer made to the plaintiff's declaration. The brief statement sets forth facts which, if true, negative jurisdiction on the part of the court by which judgment was rendered. It affords a complete answer to the plaintiff's claim. The record of the judgment of the court of another state, is only entitled to full faith and credit when the court has jurisdiction of the person. Such has been the uniform decision of the courts.

The brief statement was properly filed. Any special plea may be pleaded which would be good to avoid the action. The defendant may show by plea that the court rendering judgment had no jurisdiction of the person sued, or the subject matter of the suit. *Shumway* v. *Stillman*, 4 Cow. 292. In *Mc Vicker* v. *Beedy*, 31 Maine, 314, the judgment was held void upon a plea embracing substantially the facts set forth in the defendant's brief statement. In *Price* v. *Hickok*, 39 Vt. 292, there was a plea of *nul tiel record*, and a plea setting forth facts similar to those in the defendant's brief statement; and the court held, they constituted, if proved, a defense to the judgment in suit.

The brief statement, if true, is a complete defense. The demurrer relates only to the general issue. The plea is bad, but by R. S., c. 82, § 19, the defendant may plead anew on payment of costs from the time when it was filed.

Plea bad. Defendant has leave to plead anew on payment of costs as provided by R. S., c. 82, § 19.

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

CHARLES P. MATTOCKS *vs.* CHARLES YOUNG.

Cumberland, 1876.—November 21, 1876.

Evidence. Tender. Trial. Contract.

When a party signs his name to an instrument by himself as attorney it has the same binding force and effect as if he simply signed his name; and his authority as attorney will be presumed without proof.

The same result will follow if he thus adopts his name previously signed by another.

In the absence of any suggestion of fraud a party is conclusively presumed to know the contents of a paper to which he has subscribed his name as a party.

A tender required by a contract will be waived by the party in whose favor it was required, by any words or acts on his part showing that it would not be received or denying any liability under the contract.

A party waives his right to a jury trial by a suggestion to the court that its rulings have left nothing for the jury to pass upon, provided such rulings have been in accordance with the law.

A power of attorney and the written contract entered into by virtue of such power, though executed at the same time, are not necessarily to be construed as one paper.

In the absence of any ambiguity in the contract, or any reference to the power, the contract is to be construed by its own terms, and the power is to be referred to only to show the nature and extent of the authority conferred.

ON EXCEPTIONS from the superior court.

COVENANT BROKEN for refusing to transfer a draft after tender of amount agreed in accordance with contract under seal.

The facts are these: In December, 1872, John W. Jones, corn packer, was indebted to Levi Millett for corn furnished at Bridg-

ton factory, balance of $101.64; to G. G. Learned, same account, $90.50; to Charles Young, same account, $88.72.

On January 10, 1873, the defendant settled his own account together with Millett's and Learned's, receipting in full for each account and signing the accounts of Levi Millett and G. G. Learned on the corn Ledger, "Levi Millett per Charles Young," "G. G. Learned per Charles Young," taking in payment one draft upon Jones, drawn by his Bridgton agent, payable at sight to his (Young's) order. This draft was accepted upon presentation, but during the three days of grace, Jones failed, and the draft was not paid. An attempt was soon after made to compromise with creditors. In this attempt Charles Young, who still held the dishonored draft, was treated with as a creditor to the extent of the draft and chosen one of a committee of nine, appointed on behalf of the creditors whose debts had been incurred at the Bridgton factory, with full power under seal as their attorneys to settle, compound, sell or transfer their debts, or to make binding agreement so to do upon such terms and conditions as they should see fit.

Many of the corn planters in Bridgton, had received one-half of their pay for corn furnished in 1872, as in the case of Learned and Young, while others had received little or nothing as in the case of Millett. It was agreed therefore, that all the creditors represented should transfer their claims to the plaintiff in this suit, for such sum as, with amounts previously received, should give them the first half of their indebtedness in full, and ten per cent on the balance. There were over three hundred Bridgton factory creditors represented by these nine attorneys, and their names were appended to the instrument, by which the agreement to transfer was made in alphabetical order, the christian names coming last, with seals annexed. Among these names were placed the names of the committee. To the paper so drawn, the words "by their attorney," were then added, and the committee, (defendant included,) then signed and delivered the document, March 20, 1873. (Exhibit A.) By its terms the purchase was to be made within sixty days. Before that time elapsed the plaintiff notified the defendant and others that he should purchase the claims on April 10, 1873, at Bridgton.

At the time appointed the plaintiff tendered the defendant $104.30, in legal currency. By some error in computation the amount tendered considerably exceeded the amount due Young, upon the draft by the terms of the covenant. The defendant made no question as to the amount but refused to take the tender on the ground that he had not agreed to do so. He, however, consented to and did take $48.90, the amount due upon the Levi Millett debt, incorporated into the draft and indorsed on the back of the draft, $101.64 being Levi Millett's part, as paid. The plaintiff then notified the defendant, that the tender would be kept good, and they parted. Soon afterwards the defendant commenced an action against Jones for the full balance due on the draft, after deducting Millett's portion, and at the September term of the superior court, 1875, recovered judgment for $251.86, debt and costs, which was paid.

This action was brought for breach of covenant in refusing to transfer the Jones draft, in accordance with the terms of exhibit A, after the tender was made.

The defendant contended that he was not properly a creditor of Jones and testified that although corn was credited to him on Jones's book yet it belonged to Trull & Hamlin, customers at his store, the proceeds realized from Jones to be credited on their store account; that though he signed his name to paper A, as one of the attorneys of the creditors, he did not know that his own name was one in the list of creditors for whom he purported to be acting; that it was put there without his authority or consent.

The court admitted paper A, and also ruled other points adversely to the defendant.

After the evidence was closed, the counsel for the defendant stated that he did not care to argue the case; that, under the rulings, he did not see that the court had left any question for the jury. Thereupon under the direction of the justice, the jury returned a verdict for the plaintiff for $186.10; and the defendant alleged exceptions.

S. C. Strout & H. W. Gage, for the defendant, contended, in substance:

I. That the deed in question was not the deed of the defendant,

but only the deed of such creditors as had specially appointed him by power of attorney, to represent them.

II. That Young was not properly a creditor of Jones; that the debts due to Millett and Learned included in the draft, were still due Millett and Learned, at the time the paper A was executed and the tender made, and that the corn credited on Jones's book to Young, was really the property of one Trull and one Hamlin, and the indebtedness of Jones for said corn, was likewise an indebtedness to Hamlin and Trull at the time that paper A was executed and the tender made; that Young not being a creditor, plaintiff could not have suffered by any refusal to transfer on his part.

III. That Mattocks, the plaintiff, really executed the paper for Jones's interest, and in his behalf and that this suit is likewise prosecuted solely for Jones's benefit.

IV. That the proper amount due by the terms of the covenant was not tendered.

V. That there were certain disputed issues of fact in the case, which should have gone to the jury, and upon which the court unwarrantably passed.

VI. That there were other errors in the admission and in the exclusion of testimony.

C. P. Mattocks & E. W. Fox, for the plaintiff.

DANFORTH, J. The first question presented by the exceptions in this case is whether the instrument declared upon is the deed of the defendant. The only objection raised is a want of execution. There is no dispute about the facts upon this point. There are many signatures to the paper as parties all of which, including that of the defendant, were written by one person. Then follows the word "by" with the genuine signatures of nine persons, and the words "their attorneys." Among these nine is the name of the defendant. The objection is that the only signature of the defendant, attached to the paper, which is genuine was put there as attorney only and that which is put there as a party was without authority. It is conceded that the name first put to the deed was put there by a person having no authority to make the paper a

binding contract, nor was it put there for such purpose until adopted by the committee of nine. But when the committee signed, it was for the purpose of making it a binding contract upon all whose names had been previously affixed, and such would be the effect if the committee were duly authorized so to do. It is not necessary for the attorney himself to write the name of his principal. That, as in this case, may be done by a clerk or any other person. It is sufficient if the name so written be adopted by the agent or attorney over his own signature with apt words to show such adoption. All this was done in this case, but testimony was offered tending to show that the defendant did not know that his name was to the paper when he signed as attorney and therefore he could not have adopted it. The testimony was excluded and properly so. He evidently put his name there for some purpose, and that purpose must be ascertained from the paper itself. His signature was in the proper place and accompanied by apt words to show that he with his associates intended to make the instrument binding upon those whose names had been previously written thereon, and that in fact they adopted the signatures there found and used them for the purpose for which they claimed authority. The instrument taken together will bear no other construction. The sanction given to the names was precisely the same as that given to the contract or any part of it, and the defendant or any party to it might as well seek to relieve himself from any particular provision therein contained on the ground that he did not know it was there, as to ask relief from the liabilities resulting from his signature because his sanction was given to it in ignorance. In the absence of any suggestion of fraud he is bound to know what he signs. He can hardly set up his own carelessness as a defense to a contract by him signed without the fault of the other party. *Winslow* v. *Driskell*, 9 Gray, 363.

But it is said that knowledge is a necessary element of ratification, and that therefore he could not ratify the unauthorized act of the party who put his name there. This may be true, but strictly speaking, here is no question of ratification, nor so far as appears, any unauthorized act to ratify. True, he says he did not authorize his name to be put there. He was, however, one of a com-

mittee of nine, to whom he had given authority to enter into such a contract. That contract was prepared including the names, presumably by their direction, as a committee. It was not intended as a contract, until it had received their sanction. So far it was merely a clerical act. So far we cannot say it was unauthorized. If he means, as probably he does, that he authorized no one to put his name there, as to a binding contract, it is undoubtedly true, and it is quite as true that it was not put there for such purpose. There was then no occasion for him to ratify anything. The act was his own. The form merely was presented to him, that he might give it life and force. This he did by his signature, and he is now estopped from pleading ignorance of its contents. Hence, whether the act of writing the defendant's name was authorized or otherwise, no question of ratification is raised; that is done only when one assuming an agency, performs some act which purports to impose an obligation or liability upon another. Such was not the case here. An act was done, not to impose an obligation upon, but for the consideration of the defendant with others. If he gave it vitality without sufficient investigation, it was his fault alone, and he must abide the consequences.

It is however contended that the attorneys had no sufficient authority to bind the defendant to such a contract, and that, as far as they did or could bind him, the covenant has been fully executed.

The case shows the failure in business of one J. W. Jones, having a large number of creditors. A portion of these creditors selected the committee of nine spoken of, and authorized them by a written power of attorney to make such settlement or disposition of their claims as in their judgment might seem proper. The power of attorney recites, that "we, the undersigned, . . . creditors of John Winslow Jones, for the amounts set against our respective names, do hereby make, constitute and appoint, (naming the nine persons who executed the covenant in question,) our true, lawful and sufficient attorneys, with full power . . . to sell, assign and transfer, and according to their best judgment, finally adjust, or otherwise dispose of our said claims," &c. The defendant was one of the attorneys named, and signed the power with the words and figures, "to amount of $101.64," against his name.

At the time of the execution of this instrument, as well as that containing the covenant in question, the defendant had in his possession a draft for $280.86, payable to himself or order, drawn and accepted by said Jones. This draft was made to cover three distinct and different debts, one due Levi Millett for $101.64, one to G. G. Learned for $90.50, and the other as appears from Jones's books, to the defendant, for $88.72. These debts were severally receipted by the defendant, upon the books, as having been paid to him in full.

It is contended that as the defendant's claim in the power of attorney was limited to the sum of $101.64, and as that was the amount of Millett's claim, a fair construction of the two papers will show that the defendant in this transaction was acting for Millett alone, and that debt having been settled in accordance with the covenant, no further liability rests upon him in relation to the other two demands; in other words, the covenant covered the Millett demand alone. But in this construction we meet with some insurmountable difficulties. The two papers, as the defendant testifies, may have been executed at the same time; but we cannot consider them as a part of the same transaction in such a sense as to require them to be construed as one instrument. They are in furtherance of the same final purpose; but the first is only a step in reaching the end, while the second is the end itself. The deed contains all there is of the contract and is free from any ambiguity. It must therefore be interpreted by its own terms alone. The deed makes no reference to the power for any limitations or explanations, and besides the two are not made by the same parties. As the attorneys have signed as such, we may inquire into the extent of their authority to make such a contract; but for its meaning we must be confined to the writing in which it is set out. The contract is one thing, the authority or want of authority is another and entirely different thing.

We come then to the question as to the authority of the attorneys to make the contract they did. So far as the attorneys and principals are not the same persons, the written power must settle that question.

When, however, as in case of this defendant, the principal and

attorney are the same, a different rule must prevail. When a party signs his own name by himself as attorney or, what is here the same thing, adopts his name already signed, it would be somewhat of a novelty to permit him to say he was not authorized to do so. It would be a little singular to permit the same man to say as attorney he had authority and as principal he had given no authority. There is nothing so sacred in a written instrument that it cannot subsequently be changed in its terms or enlarged in extent even by parol, so that whenever we find the name of a party to a contract, though he may choose to put it there by himself as attorney, we need look no further than the paper itself for his authority and the extent of his liability. Nor is it material that others were associated with him in executing the power. This may explain in this case the reason why the defendant executed the covenant as he did. He signed with the others with a conclusive presumption that he knew what he was doing, as well as what the writing contained. He knew then or should have known that they were binding him to the terms of the contract and now that the rights of other parties have intervened, it is too late for him to object on the ground of a want of authority.

Independent of this, it is by no means certain that the power did not authorize the attorneys to make the contract which they did.

The defendant describes himself as a creditor to a certain amount, giving no indication that such is not the full amount, then gives his attorneys power to settle not that amount but his debt. In pursuance of that power they assign his debt without limiting the amount. Does not such an assignment carry the debt? If they had assigned or discharged it for the percentage due on the amount given, he would undoubtedly have been estopped from claiming more of the attorneys, and for aught we see, of the debtor in the absence of fraud or mutual mistake, but in the case of sale we see no reason why the purchaser might not claim the whole amount due. But a decision of this point is not necessary.

The result is that the instrument declared upon is the deed of the defendant and he is bound thereby according to its terms.

It is claimed further that the deed is not admissible because

there is a variance between that and the declaration. This may be so. No copy of the writ has been furnished. But if so it is now immaterial. At the trial the objection was not put upon that ground but solely upon another and entirely distinct one. Therefore that objection, if it had any existence, by well settled rules of practice, was waived and cannot be revived in this court.

An objection, suggested to the maintenance of the action, is that no sufficient tender was made. It is true that as a condition precedent to any liability or obligation on the part of the defendant there was "to be paid or tendered to him within sixty days, a sum equal to ten per cent thereof, on first receiving a sum which with payments already made shall equal fifty per centum of the original indebtedness, said fifty per centum or the balance thereof to be paid one-half cash and one-half in negotiable indorsed paper . . the said ten per centum to be computed on said balance remaining due after said fifty per centum has been paid." It will be noticed that the payment in notes applied only to the fifty per cent, and not to the ten per cent. If, therefore, the first half of the indebtedness was paid and received by the creditor there was no occasion to make any tender of a note; it only remained to tender the ten per cent on the balance which was to be in cash as no other way was provided for its payment. Now, whatever may have been the defendant's claim; the first half had been paid and received before the commencement of the action. That part which was due to Millett had been settled in full by the agreement of parties. The half due to Learned and more than half due to himself, or Trull and Hamlin, as the case may be, had been paid before even the agreement was made. These in any view covered all his claims; and, therefore, in this action no question can arise as to the payment or tender of the first half. It was claimed that the ten per cent had been tendered, and testimony offered, which we think would have authorized a jury to have so found. But whether so or not, the defendant, by his refusal to receive any sum less than the whole amount after the Millett demand was paid and denying that the balance of the draft or any part of it was included in the covenant, waived such tender as should otherwise have been made. *Hazard* v. *Loring*, 10 Cush. 267.

Upon principles of law applied to the undisputed facts in the case, it is clear that the paper declared upon is the deed of the defendant and that he is liable for whatever damages may have resulted from the breach of the covenant therein contained. The breach relied upon is the refusal to assign his claim against Jones as agreed. Whatever that was was to be assigned. There are no limitations, qualifications or exceptions whatever. The proof of his debt is the draft of Jones already referred to. Whether he was the owner of the whole draft is a question of fact upon which testimony was offered on both sides. It is conceded that three different accounts are embraced in it. One of them has been settled and the amount indorsed upon it. When negotiable paper is given for the amount due on an account, the presumption is that it was in payment. In confirmation of this, the defendant had receipted these accounts in full and taken the draft in his own name. He signed the power of attorney claiming to be a creditor in his own right, in a less amount to be sure then the amount of the draft; but, from his own testimony, he had more interest in the balance than in that; he entered into a covenant with the plaintiff to assign the whole of his demand, which was the draft so far as the plaintiff knew. He had assumed to control that and no other claim, and finally obtained judgment upon and collected it in his own name. Under these circumstances, a fair inference would be that it was intended that the covenant should attach to that debt. If so the damages are correctly made up. It is claimed that this point involves a question of fact which should have been submitted to the jury. It is also claimed there are other questions of fact, and that the covenant itself was without consideration and void. How far testimony may be admissible upon this point under a sealed instrument we do not deem it necessary to inquire in this case. There are some rulings as to the admission of certain papers which have not been furnished and therefore we assume that the exceptions to such are waived. Upon a careful examination we find no error in the ruling of the law. If there were any questions of fact for the jury they were waived inasmuch as it was not only not claimed that there was anything for the jury to pass upon, but the reverse was stated. We think, however, that the law applied to

the undisputed facts in the case not only authorizes, but requires, judgment upon the verdict. *Exceptions overruled.*

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

GEORGE H. PITMAN *vs.* JAMES B. THORNTON *et al.*

Cumberland, 1876.—November 27, 1876.

Equity.

It is an essential element of a decree in a bill of equity to redeem a mortgage that the time of redemption be fixed.

When such a bill is referred to a referee, under a rule of court, he has the same power to fix the time of redemption in his original award, or by amendment thereof, upon its recommitment to him, that the court would have had without a reference.

The dismissal of a bill for redemption with costs, or any judgment or decree of the court upon its merits operates as a foreclosure of the mortgage; and the adjudication by a referee, that the mortgage shall be forever foreclosed upon neglect of the mortgageor to redeem at the time specified in his award, is unobjectional, as it only declares what would be the legal effect of his award if it were silent upon the question of foreclosure.

ON EXCEPTIONS, to the allowance of an amended award of referee. The exceptions to the order of recommitment are stated in 65 Maine, 95.

A BILL IN EQUITY, inserted in a writ of attachment, dated June 10, 1871, for the redemption of a mortgage described in the bill of complaint, was referred by rule of court at the January term, 1874. The referee at the April term, 1874, made report that the plaintiff was entitled to redeem the defendants' mortgage. On account of certain omissions, the bill and report were recommitted, and in May, 1876, the referee awarded as follows: "I award and determine that my award previously made, be amended by adding thereto as follows: if the plaintiff shall, for the space of fourteen days after the acceptance of this report and a decree of court therein signed, neglect to pay the sum above awarded, to entitle him to redeem the premises described in the defendants' mortgage then the plaintiff's bill is to be dismissed with costs of reference,

taxed at sixteen dollars and sixty-six cents, and costs of court to be taxed by the court, and said mortgage to stand forever foreclosed."

The defendant moved the acceptance of the report to which the plaintiff objected:

I. Because in making such amended report, the referee exceeded his jurisdiction.

II. Because such report, upon the face of it, is manifestly unreasonable, inequitable and unjust, and contrary to law and equity, and the manifest rights of the plaintiff.

The presiding justice overruled the objections, and accepted the report; and the plaintiff alleged exceptions.

J. Howard, N. Cleaves & H. B. Cleaves, for the plaintiff.

A. A. Strout & G. F. Holmes, for the defendants.

DICKERSON, J. It has been the uniform practice of courts of equity, in bills to redeem mortgages, to fix the time within which the mortgageor shall pay the mortgage debt, or the bill will be dismissed with costs. Such limitation is an essential element of the decretal order; without it the decree would not operate as a finality. The legal effect of the dismissal of such a bill with costs is a foreclosure of the mortgage though the decree is silent upon that subject. The court in Massachusetts recently held that no formal decree dismissing the bill with costs is necessary to operate as a foreclosure of the mortgage, but that all that is necessary is a decree or judgment which terminates the suit upon its merits. *Stevens* v. *Merrill*, 110 Mass. 57, 59. In that case the court say that "when a mortgageor obtains a decree of redemption his right is thereby defined, and no other or different right remains to him. It is the right of which he must avail himself, if he would redeem at all, and it is cut off when it expires by the terms of the decree." 2 Daniel's Chancery Prac. 998. 3 Daniel's Chancery Prac. 2222. *Borromscale* v. *Tuttle*, 5 Allen, 377. *Gerrish* v. *Black*, 109 Mass. 474. *Brown* v. *Simons*, 45 N. H. 211. 2 Hill Mort. 105.

It is clearly within the province of courts of equity having full equity jurisdiction, as this court now has, to render such a decree as substantial justice requires between the parties. By filing his

bill for redemption, the mortgageor invokes the aid of the court to enable him to determine and adjust the differences between him and his mortgagee. He declares that he desires to pay the mortgage debt, and thus relieve the mortgaged premises from the incumbrance. The court takes him at his word and ascertains the amount due, fixes the time when it must be paid, and the consequences of default of payment, to wit: expiration of the right of redemption, and a foreclosure of the mortgage. We do not perceive anything inequitable or unjust in such a decree. The action of the mortgageor subjects the mortgagee to expense in defending the bill; and he has rights to be regarded as well as the mortgageor. Both parties being in court either has a right to demand, and substantial justice requires, that the court should put an end to their controversy. To allow the time of redemption to remain open after default of payment as fixed by the decree would be to subject the mortgagee to the caprice of the mortgageor and compel an indefinite postponement of the controversy, which the mortgageor himself prayed to have determined by his bill.

By submitting their case to a referee the parties, under a rule of court, substituted him for the court, and he has the power to decide it upon the same principles, as the court have. The amendment of his previous award upon a re-commitment of it to him, fixing the time of redemption, as we have seen, was in accordance with the uniform practice in such cases, and necessary to give his award a finality over the subject matter referred to him; and his further amendment declaring the mortgage forever foreclosed upon the request of the mortgageor to redeem within a fixed time was simply a statement of what would have been the legal effect of such default, if the award had been silent upon that subject.

The other objection to the award, that the referee in fixing the amount to be paid by the mortgageor included the amount of certain improvements made by the mortgagee, does not seem to be well taken; as it appears that they were made in good faith and in the honest belief of the mortgagee that he was the absolute owner of the premises, as well as in some degree authorized by the acts and omissions of the opposing party. *Exceptions overruled.*

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

DANIEL B. BUSH *vs.* ISABELLA MURRAY.

Cumberland, 1876.—December 13, 1876.

Action.

One sustaining an injury caused by a person intoxicated must bring his action for the injury under the statute of 1872, c. 63, § 4, against the person by whom the sale of the intoxicating liquors was made, which caused the intoxication of the person by whom the injury was done.

The action cannot be sustained against the vendor to the person by whom the sale was made to the intoxicated person by whom the injury was done.

ON EXCEPTIONS, from the superior court.

CASE, under act of 1872, c. 63, § 4, for selling intoxicating liquor by means of which the plaintiff's wife became intoxicated and he injured.

The justice instructed the jury, if the liquors were sold by the defendant to Mrs. Flynn, and she without any knowledge on the part of the defendant gave it to the wife of the plaintiff whereby she became intoxicated and committed the damage, that the defendant was not liable.

The verdict was for the defendant and the plaintiff alleged exceptions.

C. E. Clifford & W. H. Clifford, for the plaintiff.

J. Howard, N. Cleaves & H. B. Cleaves, for the defendant.

APPLETON, C. J. This is an action under the provisions of c. 63, § 4, of the acts of 1872.

It is provided by this section that "every wife, child, parent, guardian, husband or other person who shall be injured in person, property, means of support or otherwise, by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating liquors or otherwise, have caused or contributed to the intoxication of such person or persons; and in any such action the plaintiff shall have a right to recover actual and exemplary damages."

The causing or contributing to the intoxication of the person by whom an injury has been done refers to the direct and immediate

result of the selling or giving the intoxicating liquors by which the intoxication was caused. The liability attaches to the person selling or giving and to no one else. The selling or giving must be to the person intoxicated by whom the injury to the person or property was done and must cause his intoxication. If A sells to B, and B to C, and so on till Z sells to the person intoxicated by whom the injury is done, A cannot be regarded as the person selling to the person intoxicated and responsible to one whose person or property has been injured by the individual to whom Z sold the intoxicating liquors causing the intoxication of the person by whom the injury was done. If A were to be held liable so would all the intermediate sellers prior to the last as well as the last, which would be absurd.

The giver of intoxicating liquors is not guilty of an offense against the law. If the doctrine contended for by the plaintiff's counsel were to be sustained, the donee by a subsequent gift might make the donor, who is guilty of no crime, responsible for the consequences of an act he could not foresee and in which he was in no respect a participant.

The seller or giver of intoxicating liquors to one other than the person doing the injury cannot within any reasonable construction of the statute be regarded as having caused or contributed to the intoxication of the person doing the injury. As well might it be contended that the farmer who raised the grain from which the whiskey causing the intoxication was distilled, the mechanic by whom the machinery used in its distillation was made, or the cooper in whose barrels the results of the distillation are poured, have contributed to the intoxication of one intoxicated by the liquors, in the production of which, their labor may have entered. No one would contend that they were to be held responsible for damages caused by a person intoxicated, on the ground that they have caused or contributed to the intoxication of the person by whom the damage was done by reason of their participation in the production of the liquor causing such intoxication. Neither does the first in an indefinite series of successive sellers or givers cause or contribute to the intoxication resulting from a sale or gift by some remote purchaser or donee of the same liquor. If it were so, one

would be held liable for the consequences of a sale or gift he did not make, of which he had no knowledge and which he would never have made had the opportunity been presented him.

The conclusion at which we have arrived does not touch the question of a sale made by the servant or agent of the individual sued or by his procurement. The master would be held liable for a sale made by those in his employ. *Smith* v. *Reynolds*, 8 Hun. (N. Y.) 128. *Exceptions overruled.*

BARROWS, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

MATTHEW ADAMS *vs.* JAMES MCGLINCHY *et al.*

Cumberland, 1876.—December 16, 1876.

Intoxicating Liquors. Trespass.

In a search and seizure warrant the omission of the pronoun "them" after the word "bring," in the sentence requiring the officer to bring the respondents into court, is not fatal to its validity.

In such a warrant if all, that is necessary to show that the liquors are liable to forfeiture and the persons arrested to punishment, is set out and the warrant duly issued from a court of competent jurisdiction, it is sufficient to hold the liquors.

One having the exclusive possession of property may maintain an action of trespass against a mere wrong doer.

An officer taking property under a replevin writ, without returning it with a bond into court, is a trespasser and cannot justify on the ground that one aiding him was the general owner of the property. In such case the servant must stand or fall with his master.

ON EXCEPTIONS, from the superior court. A prior bill of exceptions was before the court, stated in 62 Maine, 533.

TRESPASS, for taking and carrying away thirty-four casks of intoxicating liquors, submitted to the justice under a plea of the general issue, with right of exceptions.

The goods were on July 16, 1872, seized by the plaintiff, Adams, a deputy of the sheriff of Cumberland county, by virtue of an alleged warrant from the municipal court of the city of Portland, on a complaint in a place designated therein to be searched. The

complaint and warrant and all proceedings therein made part of the case.

The complaint and warrant were substantially of the form prescribed by the statute except that the complaint was attached to and made part of the warrant by reference, and that the allegations in the complaint were not repeated in the warrant; except also that the form in the R. S., c. 27, § 57, pp. 315, 316, was followed without the amendment provided in the acts of 1872, c. 63, § 5, "or shall have reason to believe such person has concealed them about his person," except further the omission of the word "them" after the word "bring," the clause reading, without supplying the omission, as follows: "and to apprehend said McGlinchy and McCue if they may be found in your precinct, and bring before said court," etc.

On July 27, 1872, while the proceedings on the libel were pending, the defendant, Hall, as coroner, accompanied and assisted by McGlinchy, Hall having in his hands a replevin writ and a bond therewith, wherein the penal sum was $1500 instead of $3000 as required by the writ, and having sufficient force to accomplish their purpose, against the will and protestation of the plaintiff, took the liquors and vessels in which they were contained, from the possession of the plaintiff and delivered them to McGlinchy, who caused them immediately to be removed beyond the limits of the state. No further service of the replevin writ was made, nor was it ever returned into court. The general property in the liquors and vessels was in McGlinchy at the time of the seizure.

McGlinchy asked the justice to rule.

I. That McGlinchy and Hall, finding the bond insufficient to justify Hall in the service of the writ, were not required to perform the useless ceremony of entering the writ in court, where it would be at once abatable; but are entitled to justify by showing that McGlinchy had a legal right to take the property without any writ.

II, III and IV. That the warrant was invalid, because it did not direct that any particular person should be brought before the court and because it did not direct the officer to have, or bring before the court the person keeping the liquors, although his name

was stated in the complaint; and that for these reasons McGlinchy, on said twenty-seventh day of July, had the legal right to the possession of the property aforesaid.

V, VI and VII. That inasmuch as said complaint in the municipal court states only that the complainant believes, and not that he has reason to believe, and does not show any reasons or probable cause nor that the magistrate who issued the warrant based on the complaint, had, or was shown, any reasonable cause, the proceedings on said complaint, especially the issuing the warrant which did issue and the search made thereon, violated that part of the first section of article 14, of the amendments to the constitution of the United States, which forbids any state from depriving any person of their life, liberty or property without due process of law; and therefore, the search made by virtue of said warrant, was illegal and unauthorized, and the proceedings upon said complaint, and the search made by virtue of said warrant, were in violation of section 5, article 1, of the constitution of the state of Maine, and therefore said McGlinchy cannot be ordered in this proceeding to return said property.

VIII. That if said warrant and search were illegal for any of the reasons herein claimed by said McGlinchy, the right to avail himself of that illegality, for the purpose of recovering his property in specie, was preserved to him by said part of section 1, article 14, of the amendments to the constitution of the United States and that as by the statutes of Maine, he could not assert said right in the municipal court, except on compliance with the terms of R. S., c. 27, § 37, said part of section 1, article 14, gave him the right to take possession of the liquors either with or without a replevin writ, provided the same could be done without a breach of the peace.

IX. That the proceedings in the municipal court were invalid because there was no adjudication that the liquors were illegally kept and deposited nor of the other matters alleged in the complaint; so that they are not sufficient justification to said Adams in retaining possession of said liquors and did not legally prevent the defendants from taking possession of these liquors and that in default of such adjudication, this suit cannot be maintained.

X, XI, XII and XIII. That so much of R. S., c. 27, § 35, of Maine, as directs the issue of a search warrant upon a mere oath that complainant believes, without other probable cause, violates said part of section 1, article 14, of the amendments to the constitution of the United states, and is therefore invalid, etc.; and that McGlinchy was authorized to take possession of his property at the time he did, even without a replevin writ, provided he could do so without a breach of the peace.

XIV and XV. That upon the facts appearing in this case, said portion of said amendment prevents the maintenance of this suit, and McGlinchy on the twenty-seventh day of July, A. D. 1872, had the legal right to the possession of said property.

Each of which requested rulings was severally refused by the justice, who ruled that the plaintiff was entitled to recover and ordered judgment for him for damages to be hereafter assessed by agreement of parties by the justice of the superior court at market value of liquors and vessels unless the parties agree upon damages.

And the defendants alleged exceptions.

W. L. Putnam, for the defendants, cited, as bearing upon the 2d, 3d and 4th requests, the following cases: *Guenther* v. *Day*, 6 Gray, 490. *Com.* v. *Martin*, 105 Mass. 178. *State* v. *Leach*, 38 Maine, 432. *State* v. *Staples*, 37 Maine, 228. *Com.* v. *Kennard*, 8 Pick. 133. *Com.* v. *Crotty*, 10 Allen, 403, 405.

On the 8th request, counsel cited *Preston* v. *Drew*, 33 Maine, 558. *Fisher* v. *McGirr*, 1 Gray, 1, 47, 48, 49. *Ewings* v. *Walker*, 9 Gray, 95, 96. *Rockwell* v. *Nearing*, 35 N. Y. 302.

On the 5th, 6th and 7th requests, he cited *State* v. *Doherty*, 60 Maine, 504. Cooley's Constitutional Limitations, 304. 2 H. P. C. 150. 1 Ch. Crim. L. 65. *Brown* v. *Kelley*, 20 Mich. 27. *Humphries* v. *Parker*, 52 Maine, 502, 505.

M. M. Butler & C. F. Libbey, for the plaintiff, cited the case between the same parties; 62 Maine, 533. 2 Greenl. on Ev., § 618. *Demick* v. *Chapman*, 11 Johns. 132. 1 Waterman on Trespass, 515.

On the constitutionality of the law, they cited *State* v. *Miller*, 48 Maine, 576. *Bartemeyer* v. *Iowa*, 18 Wall. 129.

On the omission of the word "them," the counsel answer that the sentence is good English as it stands; that the words "McGlinchy" and "McCue" are the direct objects of the verb "to bring," as well as of the verb to apprehend; simply following the Latin idiom in being placed before the former verb.

To the objection that the warrant was issued on complaint based upon belief, the counsel said that search warrants have been issued for the last half century, founded upon the oath of the complainant that he had reason to suspect, and did suspect, &c.; that to believe is a much stronger term than suspect, suspicion implying doubt, while belief implies confidence, authority; when a man swears he believes, he impliedly swears that he, at least, however it may be with others, has reason—authority for his belief. *Com.* v. *Lottery Tickets*, 5 Cush. 369.

DANFORTH, J. This is an action of trespass to recover the value of a quantity of intoxicating liquors taken from the possession of the plaintiff. The case was submitted to the justice of the superior court with the right of exceptions.

It appears that the plaintiff, a deputy sheriff duly qualified, had taken the liquors from one of the defendants, as being liable to forfeiture, by virtue of a warrant issued from the municipal court for the city of Portland. The taking by the defendants as alleged is admitted; and in justification it is claimed that the property in the liquors was in one of the defendants, and that the warrant under which the plaintiff acted was insufficient and void.

Many objections are made to the warrant, and the presiding justice was requested in his ruling to sustain them. All these requests were refused, and to this refusal exceptions were filed.

The second, third and fourth requests rest upon the same objection differently stated, which is, that the warrant does not require the officer to bring before the court the persons keeping the liquors. What the result as to the validity of the warrant would be if this defect existed, we do not find it necessary to decide, as we do not find any such deficiency. The complaint which is a part of the warrant in this respect is technically correct. In the warrant, the names of the persons are inserted, and the officer is required "to apprehend the said McGlinchy and McCue, and bring before said

court." The defect complained of is that the pronoun them is omitted after the word bring. It is true that in the form prescribed by the statute the word here omitted is inserted. But the statute does not provide that that form alone shall be used. It only provides that it shall be sufficient. Any other form which is in substance the same, may be equally valid. If the omission left the officer in any uncertainty as to his duty, or left him to ascertain it from inference, there might be some ground for the objection. But there can be no such uncertainty. The word "bring" must necessarily apply to the persons named just as much as the word apprehend, and the duty of the officers to bring them before the court is by the language used as clear and distinct as to arrest them.

The remainder of the numerous objections to the warrant allege its insufficiency under the constitution of this state and that of the United States, to authorize the officer to search the premises therein described. These objections we have no occasion to consider. The warrant was issued by a court of competent jurisdiction. It is sufficient in form to hold the liquor seized, and the persons therein named to answer for the violation of the law charged against them; in it every element necessary to make out the offense charged is duly and formally set out.

Such a warrant would seem to be sufficient to authorize the officer to hold the liquors for the purpose of trial against all persons whether owners or otherwise. *State* v. *McCann*, 61 Maine, 116. *State* v. *McCafferty*, 63 Maine, 223. *State* v. *Plunkett*, 64 Maine, 534. *Com.* v. *Welsh*, 110 Mass. 359.

But were it otherwise we see no ground upon which the acts of the defendants can be justified. The case finds that the defendant, Hall, as a duly authorized officer, took the liquors upon a replevin writ in due form, but which he neglected to return to court, and that in the service of said writ, McGlinchy, who was plaintiff therein, acted as his aid. The excuse for not returning the writ was the insufficiency of the bond.

By the first request, the presiding justice was asked to rule that the defendants "finding said bond insufficient to justify said Hall in the service of said writ were not required to perform the useless

ceremony of entering said writ in court where it would be at once abatable, but are entitled to justify by showing that said McGlinchy had a legal right to take said property without any writ." This request was properly refused. It is true that the writ would be abatable, but that would have been only at the defendant's election; and it is not for the officer to say that it would be a mere "useless ceremony" to have it entered in court. But the last part is certainly not applicable to the facts in this case. If the defendant McGlinchy, had taken the liquors from the plaintiff, it may be clear that he might have justified by showing a "legal right" to do so. But whether, having taken them with a replevin writ, he could afterwards abandon that, and justify by showing property in himself is much more problematical. But even that door is not open to him in this case. It distinctly appears in the facts found, that Hall, as an officer with the writ in his hands, and at least by inevitable inference, by force of it, with the assistance of McGlinchy, took the liquors from the plaintiff, and "delivered them to McGlinchy who caused them to be removed beyond the limits of the state. No further service of said replevin writ was made, neither was the same ever returned into court."

The act of taking them was Hall's and not McGlinchy's. Hall was the principal, McGlinchy the servant. If the act of the former can be justified, then will that of the latter be. If it is not justified, if the principal was in the wrong, he could convey no authority to the servant. Whether McGlinchy had the general property in these liquors is not a material question here, even on the ground that the warrant under which they were first taken was insufficient; it is rather a matter of right between the plaintiff and Hall.

It is conceded that at the time of the alleged trespass the liquors were in the exclusive possession of the plaintiff. That such a possession, even if wrongful, will enable him to maintain an action of trespass against one interfering with it without right, a mere wrong doer, is too well established to need the citation of authorities. The defendant, Hall, having taken them upon a legal precept not returned, cannot justify under that; and not only so, but in that act he violated an express provision of the law and was therefore

guilty of a wrong. That he had any other right is not pretended except such as he might derive from his co-defendant. This, as we have seen, was none; and he was therefore a mere wrong-doer. It is also the same with McGlinchy. He did not at the time act under any pretended right other than what he claimed from the officer, which failing, he has nothing upon which to stand. The fact that McGlinchy had the general property in the liquors, and that he lent his assistance to the officer, does not in the least change the character of the officer's act. It cannot make his violation of the law justifiable; and as he was aiding and abetting the officer he must share the same fate. We are not aware of any legal legerdemain by which these defendants having committed a violation of the law, a trespass, can, by changing places, make that right which when done was an unjustifiable wrong.

This proposition is not founded upon a mere technicality. The plaintiff, no doubt acting in good faith, had a right to the protection which the law gives him. If the property is taken from him without legal process, his remedy is one thing; if it is taken by legal process it is another, and a very different thing. It is certainly material for him to know whether the property is taken on a claim of right solely, or on a legal process which he could not resist, and under which he was entitled to a bond for his protection, instead of being turned over to mere personal responsibility, with the property transferred beyond the limits of the state. The law is imperative that an officer serving a replevin writ shall return it with a bond into court. If this defense is sustained the law may be nullified at the pleasure of the officer, and the parties left to try their title without the burden of giving a bond by the one, or the protection which it affords to the other.

Exceptions overruled.
Judgment for the plaintiff.
Damages to be assessed by superior court, as agreed by the parties.

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

JOHN H. POOR *et al. vs.* GEORGE H. KNIGHT *et als.*

Cumberland, 1876.—January 4, 1877.

Poor debtor.

Where the statute provides that the sureties in a poor debtor's bond, R. S., c. 113, § 24, may be approved in writing by the creditor; *held*, 1. That such approval by his attorney of record is sufficient. 2. That where the firm name of the creditors was "Joseph H. Poor & Brother," and the approval was by their attorney of record in the form following: "The above bond is approved by us, Poor & Brother by T. T. Snow, attorney." It was sufficient.

A fulfillment of the first of the three conditions in R. S., c. 113, § 24, to "cite the creditor before two justices of the peace and of the quorum, submit himself to examination, and take the oath prescribed in § 30," demands that the debtor follow the statute implicitly in all its requirements.

Thus: where the citation did not correctly give the date of the judgment or the term of the court at which it was rendered and the certificate followed the citation in its errors and contained a new one, incorrectly stating the amount of the judgment; *held*, that the first condition was not complied with.

It would seem that either of the enumerated errors would be fatal.

In order to confer upon the defendant, in an action on a poor debtor's bond, the right to have the actual damages assessed by the jury, under R. S., c. 113, § 52, it must appear that the justices who allowed the oath had jurisdiction.

Thus: where the citation to the creditor, which is the foundation of the jurisdiction of the justices, did not correctly describe the judgment in the bond; *held*, in an action thereon that the court had no power under R. S., c. 113, § 52, to reduce the damages.

ON EXCEPTIONS, from the superior court.

DEBT on bond of poor debtor.

T. H. Haskell, for the defendants.

T. T. Snow, for the plaintiffs.

LIBBEY, J. This is an action of debt on a poor debtor bond, and comes before this court on exceptions to the rulings of the justice of the superior court before whom it was tried without the aid of a jury. The rulings excepted to are that upon the evidence in the case "neither of the alternative conditions in said bond have been proved to have been fulfilled by the debtor," and that "the evidence does not prove legal notice to the creditors of the disclosure; and does not authorize the court to hear evidence as to the actual

damage sustained;" and he awarded damages for the amount of the original judgment and costs. The performance relied upon by the defendants was that the debtor took the oath prescribed in R. S., c. 113, § 30, in accordance with the provisions of that chapter within six months from the date of the bond. Does the evidence in the case show a performance of this condition? The bond was given on an execution, dated March 30, 1875, issued on a judgment recovered in the superior court at a term thereof, held on the first Tuesday of February, 1875, for $109.45 damages, and costs taxed at $13.40. The date of the rendition of the judgment was February 25, 1875.

The citation to the creditor recites that the debtor had been arrested and given bond on an execution dated March 30, 1875, issued on a judgment recovered on the 30th day of March, 1875, in said superior court, at a term thereof held on the first Tuesday of March, 1875, for the sum of $109.45 damage, and costs of court taxed at $13.40.

The certificate given to the debtor by the justice, recites the judgment as recovered at a term of said court, held on the first Tuesday of March, 1875, for $109.55 damage, and $13.40 cost.

In *Hackett* v. *Lane*, 61 Maine, 31, this court held that "the only bar to an action on a poor debtor bond is a complete fulfillment on the part of the debtor, of one of the three alternative conditions mentioned in R. S., c. 113, § 24. If the debtor would fulfill the first condition, requiring him to "cite the creditor before two justices of the peace and of the quorum, submit himself to examination, and take the oath prescribed in § 30," he must follow the statute implicitly in all its requirements. The statute, § 33, requires that the certificate delivered to the debtor by the justices, shall describe the judgment. The citation to the creditor is the foundation of the jurisdiction of the justices. Hence, it should describe the judgment on which the debtor claims to take the oath. The plea of performance of the first alternative condition in a bond given on execution issued on a judgment recovered on the 25th day of February, at a term of court held on the first Tuesday of February, for $109.45 damage, is not supported by the certificate of the oath taken on a judgment recovered on the 30th

day of March, at a term of court held on the first Tuesday of March, for 109.55 damage. The variance is material and fatal. *Garland* v. *Williams*, 49 Maine, 16. *Farrar* v. *Fairbanks*, 53 Maine, 143. *Prescott* v. *Prescott*, 62 Maine, 428. *Same* v. *Same*, 65 Maine, 478.

The evidence does not show that the debtor took the oath prescribed in § 30, on the judgment described in the bond, before two justices of the peace and of the quorum, having jurisdiction and legally competent to act in the matter, and therefore the case is not within the provisions of § 52, c. 113.

It is contended by the defendants' counsel that the bond in suit is not a statute bond, because it was not approved as required by § 24 of the statute above cited; that, it being a common law bond, evidence should have been received by the court below, as to the actual damage sustained. But we think it was approved in accordance with the requirements of the statute. If approved by the creditors in writing, it is sufficient. The approval which was indorsed upon the bond is as follows: "The above bond is approved by us. Poor & Brother, by T. T. Snow, attorney. Mr. Snow was the attorney of record in the suit. He had authority to bind the creditors as to the remedy for collecting their demand, and in the proceedings arising out of and connected with it. The arrest of the debtor, the giving of the bond and its approval, were proceedings arising out of and connected with the remedy by suit. He had authority to approve the bond by signing his own name as attorney, or by using the names of the creditors. *Gray* v. *Wass*, 1 Maine, 257. *Jenney* v. *Delesdernier*, 20 Maine, 183. *Rice* v. *Wilkins*, 21 Maine, 558. *Farnham* v. *Gilman*, 24 Maine, 250. *Phillips* v. *Rounds*, 33 Maine, 357. But it is said that the firm name of the creditors was Joseph H. Poor & Brother, and that the aproval of the bond is not by that name, but by the name of Poor & Brother. If either of the creditors had signed the approval by the name of Poor & Brother, instead of the full firm name; there can be no doubt but that it would bind them. The attorney, having full power to bind the creditors, might do so by using the name of Poor & Brother for the firm name. But if we discard the name of Poor & Brother as not representing the

creditors, though so intended, still the approval is signed by the attorney, and that is a good approval. We see no error in the rulings to which exceptions were taken. *Exceptions overruled.*

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

CITY OF PORTLAND *vs.* ATLANTIC & ST. LAWRENCE RAILROAD COMPANY.

Cumberland, 1876.—January 23, 1877.

Action.

Where a statute giving a remedy neither expressly nor by implication takes away a remedy previously existing, the statute remedy is cumulative and the party may pursue either.

Without the statute of 1871, c. 186, a railroad company (like an individual) would be liable to a city or town for the amount of damages which such city or town had been compelled to pay by reason of a defect in one of its streets caused by the negligence or unlawful act of such company in the construction or maintenance of a railroad crossing on such street; and if the company had been properly notified of the original suit, and the suit was defended by the city in its behalf and on its request, it would be liable for the costs as well as the damages.

There is therefore sufficient consideration for a contract on the part of the railroad company with the city for the defense of such a suit, and for a promise to repay the city such sum as it should be compelled to pay therein.

An action of debt will lie upon a simple contract as well as upon a specialty.

ON EXCEPTIONS.

DEBT, for that whereas the said railroad company on the twenty-ninth day of May, A. D. 1873, at said Portland, was indebted to said plaintiff in the sum of two hundred and seventy-seven dollars and forty-eight cents, according to the account annexed, to be paid to the said plaintiff by the said railroad company, on request, which sum remaining unpaid by the said railroad company, an action hath accrued to the plaintiff to demand and recover of said railroad company the said sum: Atlantic & St Lawrence Railroad Company, to City of Portland, Dr. To amount paid on judgment recovered in supreme judicial court for Cumberland county against said cit by Melinda T. Josselyn, for damages occa-

sioned by a defective railroad crossing, owned and occupied by said railroad company, and constituting a part of Commercial street in said city; said judgment having been rendered on the 24th day of May, A. D. 1873, viz: $277.48.

There was also what is called an omnibus count.

The defendants demurred to the declaration and the plaintiffs joined therein. The presiding justice overruled the demurrer and adjudged the declaration good; and the defendants alleged exceptions.

J. & E. M. Rand, for the defendants.

This is an action of debt based upon Stat. 1871, c. 186; to make out a case under which, certain facts named in the statute must be proved, and of course alleged.

This declaration is defective in several material allegations, to wit: it is not alleged that the city was obliged to keep Commercial street in repair, or that the railroad company were notified of the pendency of the suit against the city, or that the jury found specially that the damage was occasioned by the fault of the railroad company.

T. B. Reed, city solicitor, for the plaintiffs.

BARROWS, J. On demurrer. The writ contains a count in debt, alleging an indebtment in a sum certain according to an account annexed which states the origin of the claim and specifies the amount as having been paid on a judgment recovered against the plaintiffs by one Josselyn for damages occasioned by a defective railroad crossing, owned and occupied by the defendants and constituting a part of Commercial street in said city.

A second count alleges an indebtment in another sum for the various matters and things commonly included in a general count in assumpsit, among which we find claims for money paid by plaintiffs for use of defendants at their request, and for interest on moneys due and owing.

It is suggested in support of the demurrer, that the declaration contains no allegations that the city was obliged to keep Commercial street in repair, or that the railroad company were notified of the pendency of the suit against the city, or that the jury found

specially that the damage was occasioned by the fault of the railroad company, all which it is claimed should have been alleged and proved, to entitle the plaintiffs to recover under the statute of 1871, chapter 186.

But the demurrer was rightly overruled. No question arises as to what would be a good declaration under that statute.

The plaintiffs' attorney did not apparently attempt to frame such a declaration. The only question is whether he has sufficiently set forth a good cause of action.

The statute does not expressly or by implication take away any remedy which might have been available to the plaintiffs at common law.

In such case the statute remedy is simply cumulative ; and the party may pursue either. *Gooch* v. *Stephenson*, 13 Maine, 371.

Without the statute of 1871, the plaintiffs could have recovered in an action on the case against the defendants, such damages as they had been compelled to pay by reason of a defect in one of their streets caused by the negligence of the defendants in the construction or maintenance of their railroad crossing ; and if the railroad company had notice of the suit, and such suit was defended by the city at the request of the railroad company, the city could recover what they had been compelled to pay in costs also. *Portland* v. *Richardson*, 54 Maine, 46, and cases there cited. *Lowell* v. *Boston & Lowell R. R. Co.*, 23 Pick. 24. It follows then that there would be a sufficient consideration for a contract on the part of the railroad company with the city to defend the suit in their behalf, and for a promise to repay to the city what the city should be obliged to pay in damages and costs in such a case. It is apparently upon such a contract that the declaration before us is framed. And we think it is sufficiently set forth therein. An action of debt may be maintained on a simple contract as well as on a specialty. *Mc Vicker* v. *Beedy*, 31 Maine, 314, 318. *Norris* v. *School District in Windsor*, 12 Maine, 293, 298. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

STATE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland, 1876.—January 25, 1877.

Railroad.

The legislature may incorporate a new and distinct corporation out of two or more previously existing corporations.

By the act of 1857, c. 106, additional to an act to incorporate the Kennebec & Portland Railroad Company, that railroad was made subject to all the general laws of the state relating to railroads, and consequently became subject to the reserved right of the state to alter, amend, or repeal its charter.

By virtue of Stat. 1864, c. 238, § 4, the Leeds & Farmington Railroad Company became subject to the reserved right of the state to alter, amend, or repeal its charter.

The special act of consolidation of 1856, c. 651, is an act of incorporation, as well as of consolidation.

R. S., 1857, c. 46, authorizing the mortgagees of insolvent railroad corporations to form themselves into "a new and distinct" corporation is to be construed in connection with c. 46, § 17.

The general law of 1831, c. 503, by which the state reserves to itself the right to amend, alter or repeal all acts of incorporation subsequent to its passage, has been retained in all the revisions of the statutes, is in full force, and applies to all subsequent corporations, whether organized under general or special laws.

Where a *new* corporation is formed out of two or more previously existing corporations, and by the act is to "have the powers, privileges and immunities possessed by each of the corporations," whose union constitutes such new corporation, the new corporation will have only the privileges, powers and immunities, which the corporation with the fewest privileges, powers and immunities possessed and which were common to all.

When two or more corporations with a special immunity from general taxation, the amount of taxation being dependent upon certain precedent acts to be done by such corporations thus to be exempted, are incorporated into a new corporation, which is neither required nor able to do and perform the acts which are to precede such limited and special exemption from taxation, the new corporation thus created cannot claim such special exemption.

Immunity of taxation is not one of the franchises of a corporation.

ON AGREED STATEMENT OF FACTS sufficiently appearing in the opinion.

DEBT to recover a state tax.

Plea nil debet, with a brief statement that the statute, by authority of which the tax was assessed, is in conflict with the provision of their charter and of the constitution of this state and

of the United States in this, that it impairs the obligation of the contract in their charter.

L. A. Emery, attorney general, with whom was *R. P. Tapley*, for the state.

J. H. Drummond & J. O. Winship, for the railroad.

I. The Maine Central Railroad Company was originally formed by the consolidation of the Androscoggin & Kennebec, and the Penobscot & Kennebec Railroad Companies.

The charters of these two companies are identical in all matters affecting this case.

By the act of 1831, c. 503, acts of incorporation are liable to be amended, altered or repealed, at the pleasure of the legislature, "unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary."

In these charters there is inserted the express provision that they shall not be "revoked, annulled, altered, limited or restrained, without the consent of the corporation."

This clause prevents the legislature from taking away anything granted by these charters. *State* v. *Noyes*, 47 Maine, 189.

Both these charters provide that the corporations shall not be subject to any other tax than the one provided therein ; and the tax sued for is different from that.

This exemption was a contract which the legislature had no power to repeal. 2 Curt. 498. 15 Curt. 338. 21 Curt. 190, 230. 18 How. 331, 384. 1 Black. 436. 4 Wall. 143, 535. 8 Wall. 430, 439. 13 Wall. 264, 269. 15 Wall. 454, 460. 16 Wall. 244. 18 Wall. 206. 20 Wall. 36. 21 Wall. 492. 22 Wall. 215.

II. These two charters, therefore, contained valid exemption from taxation, and when the two companies were consolidated, this immunity passed to the consolidated company.

The act of consolidation 1856, c. 651, § 4, provides in express terms, that the "new corporation shall have all the powers, privileges and *immunities* possessed by each of the corporations" consolidated. Separate, they each possessed the same immunity from taxation ; consolidated, they possess the same immunity that each had, by the express terms of the act.

III. The consolidation under the act of 1873, was to be made and was made according to the terms of the act of 1856, giving the consolidated company, the same immunities which each separate company already had.

It is manifest that each portion of the consolidated railroad must be operated under the provisions of its original charter; and the rights, powers and immunities of the consolidated company, for a given portion of the railroad must be found in the charter under which that portion was constructed. By the act of consolidation all these pass to the defendants.

This is the express decision of the supreme court of the United States in *Tomlinson* v. *Branch*, 15 Wall. 460; the *Delaware Railroad Tax case*, 18 Wall. 406; *Humphrey* v. *Pegues*, 16 Wall. 244; *Branch* v. *Charleston*, 2 Otto, 677; *Central Railroad and Banking Co.* v. *Georgia*, 2 Otto, 665.

In these cases, it is held that if a company with an immunity from taxation consolidates with one without such immunity, the consolidated company has the immunity as to the road of the former, and not as to the road of the latter.

The last case also decides that an act authorizing such a consolidation, passed after the enactment of a law like our statute of 1833, does not subject the consolidated company to that law. The case last cited is directly in point, in favor of the defendants, upon every question thus far raised in this case.

But it is said that the charters of the two companies require certain duties to be performed in relation to the tax by certain officers of the company, and that those duties cannot be performed by the officers of the consolidated company, and therefore, the whole clause falls. But the act of the consolidation requires the officers of the consolidated company to perform all the acts required from either of the two companies; and one familiar with railroads knows that the tolls are based upon the miles traveled, and that it is as easy to make returns of the earnings of each portion of the consolidated road, as it was of each road when operated separately from the other.

APPLETON, C. J. This is an action of debt to recover of the defendant corporation a tax duly assessed upon its "corporate

franchise" in accordance with the provisions of c. 258, of the laws of 1874, and c. 115, of the laws of 1876.

The defendant corporation is composed of what were originally five several railroad corporations. It is the result of two consolidations.

The Androscoggin & Kennebec Railroad Company was incorporated March 28, 1845, and was afterwards organized, and constructed its railroad from Waterville to Danville.

The Penobscot & Kennebec Railroad Company was incorporated April 7, 1845, was afterwards organized, and constructed its railroad from Bangor to Waterville, where it connected with the Androscoggin & Kennebec Railroad.

In accordance with the provisions of "an act to authorize the consolidation of certain railroad corporations," approved April 1, 1856, and amended March 17, 1862, by the repeal of the ninth section thereof, the Androscoggin & Kennebec, and the Penobscot & Kennebec railroad companies were consolidated into one corporation under the name of the Maine Central Railroad Company. This new corporation was organized on October 28, 1862, and it has ever since owned and operated the railroads of the two corporations of which it was composed.

The Kennebec & Portland Railroad Company was incorporated April 1, 1836; it was afterwards organized, and constructed a railroad from Augusta to Portland; by a legislative authority it issued its bonds secured by a mortgage of its railroad and franchise; in 1859, proceedings were commenced under R. S. 1857, c. 51, and on May 18, 1862, the foreclosure of its mortgage was perfected, and on May 20, 1862, a new corporation was formed by the holders of the bonds secured by said mortgage, under the law of 1857, under the name of the Portland & Kennebec Railroad Company, which owned and operated the railroad constructed by the Kennebec & Portland Railroad Company, until it was consolidated with the Maine Central Railroad Company.

The Somerset & Kennebec Railroad Company was chartered August 10, 1848, was organized, and constructed a railroad from Skowhegan to Augusta.

The Androscoggin Railroad Company was incorporated August

10, 1848, and was duly organized, and constructed a railroad from Farmington to Leeds Junction. By legislative authority it issued its bonds secured by a mortgage of its railroad and franchise. This mortgage was foreclosed under R. S. 1857, c. 51, on May 11, 1865; and the holders of its bonds secured by mortgage formed a corporation by the name of The Leeds & Farmington Railroad Company, which owned and operated said railroad.

On February 26, 1873, "an act for the consolidation of certain railroads" was passed by the legislature, by virtue of which the Portland and Kennebec Railroad Company, the Somerset & Kennebec Railroad Company and the Leeds & Farmington Railroad Company were consolidated with the Maine Central Railroad Company into one corporation; thus forming a new corporation, which retained the name of the Maine Central Railroad Company.

Since November 16, 1874, the Maine Central Railroad Company, under the last statutory consolidation, has owned and operated the railroads consolidated with it as well as the railroads before that time owned by itself and acquired by the previous consolidation to which we have referred.

The tax in controversy is assessed upon the new corporation as organized under the last act of consolidation.

The validity of the tax is denied. In defense it is urged that some or all of the corporations, by whose union under a new organization, the defendant corporation exists, were by their several charters made liable only to a special and conditional taxation, and that the state had restricted its general right of taxation to the limited taxation authorized in said charters, that these several charters constitute contracts with the state, and that the act under which the tax in controversy is assessed, is in violation of those contracts, by impairing their obligation, and is therefore, in contravention of the constitution of the United States, art. 1, § 10, which prohibits any state from passing any "law impairing the obligation of contracts."

The charters of the Penobscot & Kennebec Railroad Company and of the Androscoggin & Kennebec Railroad Company, each contained the following sections:

"Sec. 14. Said corporation shall keep, in a book for that pur-

pose, a regular account of all their disbursements, expenditures and receipts; and the books of said corporation shall be open at all times to the inspection of the governor and council, and of any committee duly authorized by the legislature; and at the expiration of every year, the treasurer of said corporation shall make an exhibit, under oath, to the legislature, of the net profits derived from the income of said railroad.

"Sec. 15. All real estate purchased by said corporation for the use of the same, under the fifth section of this act, shall be taxable to said corporation by the several towns, cities and plantations in which said lands may lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate, of the same quality, in such town, city or plantation, and not otherwise; and the shares owned by the respective stockholders shall be deemed personal estate, and be taxable as such to the owners thereof, in the places where they reside and have their homes. And whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages, and incidental expenses, the directors shall make a special report of the fact to the legislature; from and after which time, one moiety or such other portion as the legislature may from time to time determine, of the net income from said railroad, accruing thereafter, over and above ten per centum per annum, first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation, as a tax, into the treasury of the state, for the use of the state. And the state may have and maintain an action against said corporation therefor to recover the same. But no other tax than herein is provided, shall ever be levied or assessed on said corporation, or any of their privileges or franchises."

"Sec. 17. The legislature shall at all times have the right to inquire into the doings of the corporation, and into the manner in which the privileges and franchises, herein and hereby granted, may have been used and employed by said corporation, and to correct and prevent all abuses of the same, and to pass any laws imposing fines and penalties upon said corporation, which may be necessary more effectually to compel a compliance with the pro-

visions, liabilities and duties, hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities or obligations. And this charter shall not be revoked, annulled, altered, limited or restrained, without consent of the corporation, except by due process of law."

By § 15, a tax may be imposed upon shares, and certain specified real estate of these corporations, but no tax is to be imposed upon the corporations until the net income of the same shall amount to ten per centum per annum, upon the cost of the road, &c., and then only one moiety or such other portion as the legislature may from time to time determine over and above ten per centum per annum, first to be annually paid to the stockholders.

It has been settled by a series of decisions, that a charter is a contract and that the state, having as one of the incidents of sovereignty the right to contract, may establish a special mode of taxation in its charter, to the exclusion of any other, or may limit the incidence of taxation, or exempt its chartered corporations from the burden entirely. The power to contract is all embracing. It embraces all subjects in which the interests of the state are involved, unless when restricted by constitutional prohibitions. The contracts of the state are as binding as those of individuals. It is not for the state to disregard its solemn contracts and to set the example of violating its own agreements.

It cannot make contracts and violate them at its own will and pleasure. Its contracts whether relating to taxation, or any other subject matter, are all alike within the protection of the constitution, which prohibits the impairing their obligation. In *Wilmington Railroad* v. *Reid*, 13 Wall. 264, Mr. Justice Davis says: "It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded." In the *Delaware tax case*, 18 Wall. 206, Mr. Justice Field says: "That the charter of a private corporation is a contract between the state and the corporators, and within the provision of the constitution prohibiting legislation impairing the obligation of contracts, has been the settled law of this

court since the decision in the *Dartmouth college case*. Nor does it make any difference that the uses of the corporation are public, if the corporation itself be private. The contract is equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators. This doctrine is not controverted by any one. It is the established law; and the question in all cases is whether the particular interference alleged does in fact impair the obligation of the contract; for it is not every kind of legislative interference with the powers, action and property of the corporation, which will have that result.

"It has also been repeatedly held in this court that the legislature may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the rate or amount of taxation, to which such property shall be subjected. And when such immunity is conferred, or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract and is equally inviolate with its other stipulations." In *Humphrey* v. *Pegues*, 16 Wall. 244, 249, Mr. Justice Hunt uses the following language: "Another question is raised, to wit: that a legislature does not possess the power to grant to a corporation a perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign state; that its exercise is a political necessity, without which the state must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the state. It is too late to raise this question in this court. It has been held that such a provision in the charter of an incorporation constitutes a contract which the state may not subsequently impair.. It has been held that the legislature has the power to bind the state in relinquishing its power to tax a corporation."

As long as the Penobscot & Kennebec and the Androscoggin & Kennebec Railroad Companies remained distinct and were running their railroads severally, the only taxation that could be imposed upon them was upon the net income over and above ten per centum annually, as provided by § 15 of their respective charters.

There could be no other or different basis of taxation. But it is to be observed that this restriction upon the general power of taxation is applicable to these railroads as several and distinct corporations, having each specific lines of road—each road with its stockholders and directors; for no other corporation is required to keep "a regular account of all their disbursements, expenditures and receipts" for the inspection of governor and council; nor can the treasurer of any other corporation make, at the expiration of each year, an exhibit under oath to the legislature of "the net profits" derived from the income of said railroad as is required by § 14, of their respective charters. As long as these corporations remained distinct, they were exempt from liability to general taxation and subject only to the remotely contingent taxation arising from an excess of income over and above the ten per centum per annum, provided for in § 15. There is no contract with any other corporation. This special taxation must be regarded as limited to these corporations, and as continuing and effective only during their corporate existence and as long as they can comply with their chartered duties and obligations, and no longer.

But, while, as has been seen, the state by contract and for a consideration may exempt specific property from taxation or may limit its amount, the law under which such exemptions are claimed must be clear and explicit in its terms, leaving nothing to doubt or inference. The power of taxation is essential to the existence of government. Its partial or total surrender is never to be presumed. "It has been held many times in this court," observes Mr. Justice Hunt in *Erie Railway Company* v. *Pennsylvania*, 21 Wall. 492, 498, "that a state may make a valid contract that a corporation or its property within its territory shall be exempt from taxation, or shall be subject to a limited and specified taxation.

The court has, however, in the most emphatic terms, and on every occasion, declared that the language in which the surrender is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further liability to taxation. A state cannot strip itself of this most essential power by doubtful words. It cannot by ambiguous words be deprived of the highest attribute of sovereignty. This princi-

ple is distinctly laid down in the cases referred to. It has never been departed from." In *Tucker* v. *Ferguson*, 22 Wall. 527, 575, Mr. Justice Swayne in speaking of the taxing power, says: "It is intended to promote the general welfare. It reaches the interest of every member of the community. It may be restrained by contract in special cases for the public good where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration beyond what the terms of the concession clearly require." "Every presumption," it is said by the court in *St. Louis* v. *Boatman's Ins. & Trust Co.*, 47 Mo. 155, "will be made against its surrender, as the power was committed to the government to be exercised and not to be alienated."

These corporations with a guaranteed right of limited and restricted taxation obtained from the state an act, c. 651 of the special laws of 1856, authorizing their consolidation into a new corporation which was composed of the corporations consolidating and embracing their several roads.

A new corporation may as well be created by the union under a new organization, of existent and distinct organizations as of individuals. The new corporation is equally distinct from its component part whether composed of corporations or individuals. The old corporations are dissolved except so far as they may be permitted to exist for the purpose of protecting creditors or mortgagees. The corporate rights of the new corporation are those derived from its charter—the act of consolidation—under and by virtue of which alone it began to be and is.

By § 1 of the special act of 1856, certain specified railroads are authorized to consolidate "into one corporation in the manner following:"

By § 2 "The directors of any two or more of said corporations, may enter into the agreement under their respective corporative seals, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors thereof, which shall not be less than five nor

more than eleven, the time and place of holding the first election of directors, the amount of capital, and the number of shares of the stock of the new corporation, the manner of converting the shares of capital stock in each of said corporations into the shares of such new corporation."

In each section of the act, the corporation coming into existence by virtue of its provisions is termed the *new* corporation.

By the agreement entered into by the two roads first consolidated, it was agreed that they "shall be consolidated into one corporation," and "that the name of the *new* corporation thus created shall be the Maine Central Railroad Company."

Provision is then made for fixing the number of directors, the place of holding meetings, the amount of capital, the number of shares of the stock of the new corporation and the manner of converting the shares of the capital stock of each of the corporations into those of the new corporation.

The fourth and fifth sections of said act are as follows, the preceding ones have provided for an agreement to be entered into by the two corporations to be consolidated under the act:

Sec. 4. "Upon the making said agreement, mentioned in the preceding section, in the manner required therein, and filing a duplicate or a counterpart thereof, in the office of the secretary of state, and immediately upon and after the first election of directors of said new corporation, the said corporations, so making said agreement shall be consolidated and together constitute the new corporation provided for in said agreement, to be known by the corporation name therein mentioned; and the details of such agreement shall be carried into effect as provided therein; and such new corporation shall have all the powers, privileges, and immunities, possessed by each of the corporations so entering into said agreement, and be subject to all the legal obligations now resting on them respective ly; provided, however, that nothing in this act shall be construed as extinguishing said consolidated corporations, or annulling their charters; but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity, ever possessed, exercised or enjoyed by either of them, may be necessary for the protection

of the creditors or mortgagees of either of them, or of such new corporation; the separate exercise of their respective powers, and the separate enjoyment of their respective privileges and immunities being suspended, until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far and for such time as the protection of such creditors or mortgagees may require.

Sec. 5. Upon the election of the first board of directors of the said new corporation, created by the agreement of the several companies, all and singular, the *rights, franchise and interest* of the said several corporations so consolidated, in and to every species of property, real, personal and mixed, and things in action, thereunto belonging, shall be deemed to be transferred to, and vested in, such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the rights of way, and all other rights of *property, franchise and interest*, in the same manner and to the same extent, as if the said several corporations, so consolidated, should have continued to retain the title and transact the business of such corporation; and the title and real estate, acquired by either of said corporations, shall not be deemed to revert or be impaired by means of such act of consolidation, or anything relating thereto; and all suits that either of said corporations, so consolidated, could have maintained, shall survive to and may be brought in the name of said new corporation.

The defendants' claim to immunity from taxation, or for a limited and conditional taxation, rests only on the word immunities, in § 4. But to entitle them to immunity they must first of all be enabled or required to make the several returns, and to do and perform the several acts upon which such limited taxation is to be based. But that they are not so enabled as required, will be fully seen. Nor is it pretended or alleged that such acts have been done.

Here, then, is a new corporation. It matters not whether composed of persons or corporations. The corporations comprising it have no further power to control their assets or direct their own movements. The new corporation has its stock, its stockholders, its directors, precisely as if the individuals owning stock had or-

ganized to form a corporation. "It is not questioned by the plaintiff," observes Storrs, C. J., in *Bishop* v. *Brainerd*, 28 Conn. 289, "and indeed it could not be in view of the authorities, that a state may create a new corporation out of two or more corporations created by the same state, as well as of two or more natural persons, or that a state may create a corporation composed of natural persons belonging to different states." The legislature can authorize the modified surrender of the old corporations or their total extinction and confer life upon the new one arising from their union. In *McMahan* v. *Morrison*, 16 Ind. 172, three corporations consolidated under act of the legislature authorizing them to merge and consolidate their stock "and make one joint company," and it was held that the effect of the act and of the terms of consolidation under it was a dissolution of the three corporations and the creation of a new one with property, liabilities and stockholders derived from those passing out of existence. These views were sanctioned by the supreme court of the United States in *Clearwater* v. *Meredith*, 1 Wall. 25, 40. In *State* v. *Sherman*, 22 Ohio, 411, it was held, when a corporation in pursuance of an act of the legislature, transfers or conveys its franchise to be a corporation to another, the transaction in legal effect is a surrender or abandonment of its charter by the corporation and a grant by the legislature of a similar charter to the transferees; and the charter so granted is subject to all the provisions of the constitution existing at the time it is so granted. It must be held equally subject to the general laws of the state except when specially, and in direct terms exempted from their operation. In *Hamilton M. Ins. Co.* v. *Hobart*, 2 Gray, 543, a new corporation was held to be created out of the members of several existing corporations. So in *Com.* v. *Atlantic & Great Western Railway*, 53 Penn. St. 9.

Here then, was a new corporation created by the act of 1856, c. 651, § 1, and the proceedings of the consolidating corporations under it. The old corporations existing only so far as may be necessary to protect their several creditors or mortgagees and ceasing to exist, when that necessity shall no longer exist.

The act of consolidation was a special act. It is the grant of a new charter. The new corporation came into existence by vir-

tue of and was organized under its provisions. Its corporate life dates from the day of its organization.

It is claimed that the new corporation, by virtue of the act creating it, is exempt from general taxation. Its exemption must arise from that act, if there be such exemption; for it could arise in no other way.

There is no exemption in clear and explicit terms and no inference can be raised in favor of such right. No consideration is shown for such exemption. The roads which were consolidated had been built for a long time. It is not perceived that the public could gain by the consolidation. The act was one conferring a benefit on the stockholders of the old corporations by giving them a charter to form a new one. All they did was to organize under it. In *Tucker* v. *Ferguson*, 22 Wall. 527, it was decided that "an act of the legislature exempting property of a railroad from taxation is not a 'contract' to exempt it, unless there be a consideration for the act;" and that "an agreement when there is no consideration is a nude pact; the promise of a gratuity spontaneously made, which may be kept or recalled at pleasure, and that this rule of law applies to the agreement of states made without consideration as well as to those of individuals." So in *Jones &c. Manufacturing Co.* v. *Commonwealth*, 69 Penn. St. 137, it was held that the right to tax is never presumed to be surrendered except by clear words and for what the legislature deems an adequate consideration. So in *St. Louis* v. *The Boatmen Ins. & Trust Co.*, 47 Mo. 150, 155, the court use this language: "A law which seeks to deprive the legislature of the power to tax must be so clear, explicit and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding."

In *Christ Church* v. *Pennsylvania*, 24 How. 300, an act was passed providing "that the real property, including ground rents, now belonging to Christ Church Hospital in the city of Philadelphia, so long as the same shall belong to said hospital, shall be and remain free from taxes." "This concession" of the legislature remarks Mr. Justice Campbell, "was spontaneous, and no service or duty, or other remunerative condition was imposed upon the

corporation. . . It is in the nature of such a privilege, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign."

If a consideration to the state is necessary to the validity of its surrender in whole or in part of its sovereign right of taxation, it is difficult to perceive what is the consideration rendered on the part of the defendant corporation.

But while there is no surrender in terms of the general right of taxation and no special limitation of that right in the act of consolidation, it is claimed that the new corporation is subject only to the special and limited mode of taxation prescribed by § 15 of the charters of the two corporations, which have, by the act of consolidation and the organization under it, become the new corporation. The new corporation—the defendant corporation, to entitle itself to the special exemption from general taxation must be able to do what the corporations composing it were required to do. The lines of road and the stockholders of the defendant corporation differ from those of the two consolidating corporations. But these corporations are only entitled to claim the limited and restricted taxation provided by § 15 of their charters. The defendant corporation cannot comply with the requirements of those charters. No provision is found in the defendants' act of incorporation requiring their directors to make the returns to the legislature required by § 14, of the charters of the consolidated companies, or that the then treasurers should make the payment, which the treasurers of those companies were required to make by § 15, upon the happening of the contingency therein specified. And if there had been, it would not be a compliance with the charters of the consolidating corporations; for the directors and treasurers would not be the directors and treasurers of the Androscoggin & Kennebec and of the Penobscot & Kennebec companies, who alone were by their charter to made the required returns and payments. Nor is any power or direction given to the defendant corporation to ascertain when the net income shall exceed ten per centum per annum. Nor could they do it, if they would. The assets of both corporations have become commingled and united. It has become impossible to show what would have been the net income of each

without consolidation, because it is impossible to prove to what extent the profits of each have been affected by the consolidation. And if they could do it, it would not be a compliance with the charters of these companies, because it would be done by those not authorized to do it and not by those upon whom these duties were imposed.

It may be said that each corporation has a limited existence for certain purposes. Granted; but what are those purposes? By § 4, of the act of consolidation, "They shall severally be regarded as still subsisting so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity ever possessed, exercised or enjoyed by either of them, may be necessary for the protection of the creditors or mortgagees of either of them or of such new corporation. The separate exercise of their respective powers and the separate enjoyment of their respective privileges and immunities being suspended, until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far and for such time as the protection of such creditors or mortgagees may require." It is obvious that the separate existence of these corporations is only and exclusively continued for the protection of creditors and mortgagees. That being accomplished, they have no longer nor further corporate existence. They have, the consolidation being perfected and all debts paid, neither organization, stock, stockholders nor assets. They cease to be. They have no directors to make returns, no net or other income, and no assets, so that if there was a net income ascertainable for each corporation, there would be no treasurer to pay it and no possible funds from which it could be paid.

That the several existence of the consolidated corporations is only for the purpose of securing their creditors is further shown by § 7, which provides in case the new corporation fails to pay the mortgages of either of the consolidating corporations, "the corporation which executed said mortgage shall again exercise and possess, separately, all its original powers, privileges and immunities, so far as the protection of the interests of such mortgagees may require." The act assumes that both corporations have only

the qualified right to be and to act, when necessary for the protection of their creditors and only so far as may be required for that purpose.

It has already been remarked that the defendant corporation has no exemption from limited or general taxation by the terms of the act creating it. The corporations out of which it is created cease to exist or exist only for special purposes. The defendant corporation is neither required to "keep a regular account of all their expenditures, disbursements and receipts," nor those of the corporations of which it is composed, nor is their treasurer to make an exhibit under oath of the net profits of their road or of the roads by whose fusion it exists. No basis is laid for the limited taxation claimed. It cannot claim a right to a limited taxation of its franchise; for it is not in the act. It cannot claim exemption under the corporations composing it; for it cannot do and perform what was required of them. The new corporation has assets, stock, directors, etc., but by its voluntary acceptance of its charter it is unable to discharge the duties upon which conditional immunity depends. It is not to be presumed that the legislature has surrendered its right of taxation of the new corporation, especially when it is obvious there is no consideration for such surrender.

The Maine Central Railroad Company first existed as a corporation on October 28, 1862, under the provisions of the special acts approved April, 1856, and amended March 17, 1862. This act of 1856, was an act of incorporation equally with the acts incorporating the two corporations therein named.

Now by c. 503, of the general laws of 1831, it was enacted "that acts of incorporation which shall be passed after the passage of this act, shall at all times hereafter, be liable to be amended, altered or repealed, at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained; unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary."

The act of 1831, was a public act, and has remained in force to the present time. All special acts of incorporation are subject to its provision. All parties are presumed to act with a full knowledge of its terms and their legal effect. In *Tomlinson* v. *Jessup*,

15 Wall. 454, 458, Mr. Justice Field, in reference to a similar statute, says: "The power reserved to the state by the law of 1841, authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference." When immunity from taxation constitutes a part of the contract, it is "by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made." When there is a law of the state reserving to the legislature the power to alter, amend or withdraw any privilege granted by such charter, this reservation qualifies the grant; and a subsequent exercise of the reserved power is not within the prohibition of the federal constitution, as an act impairing the obligation of contracts. *West Wisconsin Railroad* v. *Supervisors of Trempaleau County*, 35 Wis. 257. In this state it has been held that the act of 1831, applied to all subsequent acts of incorporation. *Bangor, &c. Railroad* v. *Smith*, 47 Maine, 34. So in *Roxbury* v. *Boston & Providence Railroad*, 6 Cush. 424, Shaw, C. J., in reference to a similar act of Massachusetts, says: "The defendants, then, having accepted their charter, after the above act, and whilst it was in force, took the charter subject to those provisions, and must be bound by any reasonable amendment and alteration, which the legislature might thereafter make."

"Charters subsequently granted," remarks Mr. Justice Clifford, in *Holyoke Co.* v. *Lyman*, 15 Wall. 500, "must be understood as standing just as they would if that reservation of the power to amend, alter or repeal the same, had been incorporated into each charter." "Where such a provision is incorporated in the charter," observes the same learned judge, in *Miller* v. *The State*, 15

Wall. 488, "it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. Such power also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be; in which case it is equally clear, that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation."

Now bearing in mind the uniform doctrine of the authorities, that all presumptions are in favor of the state, and that a surrender of the taxing power can only be established by the most clear and explicit language, one will look in vain in the defendants' act of incorporation for "any express limitation or provision" restraining the general right of the legislature to amend, alter or repeal the same. And if not, that right exists "in the same manner as if an express provision to that effect were therein contained."

The right to amend, alter or repeal, is reserved by a general law applicable to acts of incorporation which may be passed after 1831. No "express provision," negativing or restricting this reserved right of the legislature, can anywhere be found. It must be shown by unmistakable language, not by implication or forced construction of the words used. Nor can it be said that the act under which the defendant corporation has organized, is not an act of incorporation. It is an act of incorporation. If the stockholders of the respective corporations had been incorporated, it would have been one. It is none the less so by the incorporation into a new corporate body of previously existing corporations. It incorporates by consolidation. It none the less incorporates, because it consolidates. It is none the less an act of incorporation, because it is an act of consolidation. "There is no particular form of words requisite to create a corporation," observes Chancellor Kent, in *Denton* v. *Jackson*, 2 Johns. (N. Y.) Ch. 324. "A grant to hold mercantile meetings has been held to confer a corporate capacity."

The Portland & Kennebec Railway Company was incorporated by an act approved April 1, 1836. But in the charter there was no limitation upon the right of the state to tax. By an act in addition to the act incorporating this company, approved March 31, 1845, c. 273, § 3, the right to tax was limited to the surplus over ten per centum per annum, as provided by § 15, of the corporations whose rights we have already considered.

This road was authorized to issue bonds and secure them by a mortgage of their railroad by c. 220, of the acts of 1852. The mortgage debts not being paid, the mortgagees foreclosed the same, under the provisions of R. S. 1857, c. 51, and organized a new corporation.

Assuming that the amendment of 1845 placed this corporation in the same condition as to exemption from taxation, as if it had been a part of its original charter, then the question arises whether the new corporation formed of the mortgagees and bondholders of the old one, succeed to the exemption from general taxation, which was conferred upon the defaulting corporation through whose default it exists.

By R. S. 1857, c. 51, § 57, it is provided that "if the foreclosure of the mortgage be effectuated, it shall enure to the benefit of all the holders of bonds and coupons provided for in its condition. And they, their assigns and successors, are hereby constituted a company incorporated and chartered as of the day of the foreclosure, for all the purposes of the original company, with all the chartered and legal rights and immunities, which pertained to the original company at the time of foreclosure; and it shall be the duty of the trustees by suitable deed of release, to convey to such new company all the rights and interests by them held in said railroad, appurtenances and franchise, and other property by virtue of their deed of trust, and the foreclosure thereof," &c.

By § 58, provision is made for the organization of "*this new corporation, though a distinct one.*"

By § 60, "the original corporation shall continue in existence for the sole purpose of collecting and paying its debts, and bringing its unsettled matters to a close."

The exemption from general taxation was conferred upon the

original corporation. "In the case of a corporation," observes Mr. Justice Field, in *Tomlinson* v. *Jessup*, 15 Wall. 454, 459, "the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which corporators assume by accepting the charter." But whatever equitable claims the original corporation may have for its qualified exemption from taxation, the new corporation has none such. The new corporation is composed of a different body altogether—the mortgagees of the original railroad. The stock is co-extensive with the mortgage debt. The railroad has been built, and the new corporation has no peculiar claims as creditors of the old one for the exemptions, which in part induced its building.

The old corporation exists for "the sole purpose of collecting and paying its debts," &c. But it does not exist for the purpose of paying taxes. Nor is a tax a debt.

If a tax should accrue to the state by c. 273, § 3, of the acts of 1845, the old corporation would not be responsible for it. Nor would the new; for the obligation is not specifically imposed upon it.

But however this may be, the new corporation first came into existence on May 20, 1862. It was "*a new corporation, though a distinct one.*" It was a corporation created under the provisions of R. S. 1857, c. 51. But this general law is an act of incorporation, an act by and under which corporations come into existence. It is none the less an act of incorporation because more than one may be created by action under it. Now the act of 1831, c. 503, is found in R. S. 1857, c. 46, § 17, relating to corporations. Both these acts, c. 51, and c. 46, are found in the same revision. They were passed at the same time. They apply to the same subject matter. They must be construed together. Corporations created by a general act of incorporation, are as much within the reasons which induced the enactment of § 17, as corporations created by a special act. It is equally desirable that the state should reserve its general power of modifying or repealing charters in the one case as the other. This reservation is found in the act relating to "corporations," and must apply to all acts of incorporation whether general or special, in which "an express limitation or provision to the contrary" shall not have been inserted.

But no "limitation or provision" restricting the legislature in the exercise of its reserved right to amend, alter or repeal, is to be found in the act of 1857, c. 51, under the provisions of which the new corporation, the Portland & Kennebec Railway, derived its corporate existence.

Nor is this all. By the act of 1857, c. 106, being additional to an act to incorporate the Kennebec & Portland Railroad Company, authority was given to that corporation "to alter the location of its road, or any part of it," between certain specified points. The alteration authorized was duly made. But by § 3, "said railroad company is hereby made subject to all the general laws of the state relating to railroads." Consequently before the new corporation composed of its mortgagees was formed, it had lost by its own act whatever immunity it may have had from general taxation, and became subject to the provisions of R. S., c. 46, § 17, by which the state reserves the right to alter, amend or repeal charters granted by its authority, a reservation which applies to all corporations whatsoever, railroads as well as all others.

The Leeds & Farmington Railroad Company was formed by the incorporation of the mortgagees of the Androscoggin Railroad, on May 11, 1865, and is within the same category as the Portland & Kennebec Railroad Company.

Further, by c. 238, § 4, of the laws of 1864, "every railroad corporation that shall be formed by the foreclosure of a mortgage of any railroad heretofore or hereafter made, shall be subject to such laws as the legislature have enacted, or shall hereafter enact concerning railroads, anything in the original charter to the contrary notwithstanding."

This act was passed before the incorporation of the last named company, and is applicable to it, even if its application to other corporations previously formed should be denied.

The acts of consolidation, by which the defendant corporation exists, refer to the powers, privileges, etc., of the corporations which constitute the new corporation thereby created. The reference is in the most general language. It has been held that an act creating a corporation with the powers and privileges of another corporation formerly created, by reference, without setting

them forth should be construed strictly against the corporation, when the rights of others are concerned. *Bowling Green, &c. Railroad* v. *Warren County Court*, 10 Bush, (Ky.) 711. Much more should they be construed strictly as against the new corporation, when the essential sovereignty of the state in the matter of taxation is involved.

It has already been seen that the Maine Central Railroad Company under its organization had no immunity from taxation.

On November 16, 1874, the last consolidation and incorporation took place. The new corporation was formed of corporations which had no claim for exemption as well as of those which had such exemption. By the act of consolidation and incorporation the new corporation is to "have all the powers, privileges and immunities possessed by each of the corporations entering into the agreement of consolidation." It does not say it shall have all the powers, privileges and immunities possessed by each and any one, or any two of the corporations. Now some had a conditional and qualified immunity from taxation and some had it not. When the new corporation was organized it was a unit. All the powers, privileges and immunities which the new corporation was to have were those which each had, not all those which any or either one had. "Each" means "every one of any number separately considered." "All" means "every one or the whole number of particlars"—"the whole number." Now where the grant is made of the privileges, powers and immunities of each of the old corporations to the new one, it certainly carries the privileges, powers and immunities which they all (*i. e.* every one of them all,) had, and it just as certainly excludes those special privileges which some of them had and some of them did not have. It is not a grant of the privileges, powers and immunities which all collectively or either one, or any two of them had, but of those which every one of them, all had—to be exercised for the good of the new corporation as a whole, upon the territory and property which the old corporations had before possessed and controlled in severalty.

The line of road of the new corporation was different from that of the corporations out of which it was incorporated. The new corporation had different stockholders and different assets. It

could not have been the legislative intention that a fraction of this consolidated railroad should have a qualified immunity from taxation and a fraction not have it. Still less could it have been the intention to confer it when it did not previously exist. Every presumption is against the surrender by the state of any portion of its sovereignty and especially that of the right of taxation.

But each of "the corporations entering into the agreement of consolidation" had no immunity from taxation. Some had it and some had it not. This, therefore, is not an immunity which the defendants can claim under the act of consolidation and incorporation. The new corporation would have only the privileges, powers and immunities which the corporation with the least powers, privileges and immunities possessed and which were common to them all.

Further, it is a well settled principle of law that when a creditor has two classes of claims against his debtor, by uniting them in one suit and obtaining judgment, he reduces that, in which his rights are superior to the level of that, in which his rights are inferior. *Bicknell* v. *Trickey*, 34 Maine, 273. *Miller* v. *Scherder*, 2 Comst. (N. Y.) 262. As for instance by joining lien debts and non-lien debts in one suit and obtaining judgment, the priority of right, which a portion of the debt was entitled to before such joinder, is lost. The lien claim is extinguished. So here, by the consolidation of corporations claiming an exemption from general taxation with those not thus exempt, the right of limited and conditional taxation exists no longer in favor of those which had that right, it being impossible in this confusion of estates to ascertain when the contingency would happen,—when the fraction of the new and consolidated corporation would become liable to the special and limited taxation prescribed in the charter of such fraction as it existed before consolidation. The acceptance of the new charter is a surrender of exemptions as before existing. The state makes no surrender of any of its general rights of sovereignty or of its reserved rights.

That this is the true construction, is abundantly manifest by reference to § 5 of the act of consolidation, which provides that "all and singular, the rights, franchise and interest of the said sev-

eral corporations, so consolidated, in and to every species of property, real, personal and mixed and things in action, thereunto belonging, shall be deemed to be transferred to, and vested in, such new corporation, without any other deed or transfer; and such new corporation, shall hold and enjoy the same, together with the rights of way, and all other rights of property, franchise and interest, in the same manner and to the same extent as if the said several corporations, so consolidated, should have continued to retain the title and transact the business of said corporation." Now the words "rights, franchises and interest," do not include exemption from taxation, yet they represent what the new corporation is to have. "Rights and interest" certainly do not. Neither does the word "franchise" include such exemption. "The franchises of a railroad corporation," observes Mr. Justice Field in *Morgan* v. *Louisiana*, 3 Otto, 217, "are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them." "The rights, franchise and interest in and to every species of property," howsoever described, are by force of the act transferred to the new corporation and nothing more; and this language does not include immunity from taxation, whether general or special.

But, as before observed, immunity from general taxation was to be preceded by acts which, after consolidation, the old corporations could not do and which the new corporation was not authorized to do for them and was not required to do for itself.

The reasons already given, arising from their being no provisions for the new corporation making the returns required for the basis of the special and limited taxation authorized by the charters of the corporations entering into consolidation or for the old corporations doing and performing what was to be done and performed by them, apply with increased force in the case of the last consolidation and incorporation. No provision is found, to determine

when the state would be entitled to its tax, as provided by § 15 of the charters of the consolidating corporations. There is no basis upon which it can be ascertained. Is it upon the surplus over the ten per centum of the net income of the costs of all the roads entering into the new corporation? But that would not be in accordance with their several charters; for the assessment would depend upon the several earnings of the several roads. If it is to be on the several net incomes of the several roads, will it be upon the original costs of the roads foreclosed by the mortgagees, or upon the mortgage debts for which they were foreclosed? If the taxation is to be determined by the separate costs of the several railroads, each railroad entering into consolidation paying the tax on its cost, it will be manifestly impossible to assess such tax when the disbursements and receipts are commingled and the amounts received and paid out are affected as they must be by this union of these several corporations. But besides establishing no basis of taxation, no provision is made for returns "of the disbursements, expenditures and receipts" of the several roads of the aggregate corporation, or of the several fractions of the corporate union, which at the last incorporation by consolidation were exempt from taxation, when the new corporation was formed, composed of all the roads entering into consolidation.

The exemption from taxation of any of the consolidating roads is based upon their previous compliance with the requirements of § 44 of the charters of the corporations first consolidated. But it is apparent there is no mode provided by which they can be complied with, no conceivable basis established for the limited and conditional taxation claimed, so that in its results the defendants claim will lead to the entire exemption of the new corporation from taxation without its making the returns required—a result never intended by the legislature. The corporations, by incorporating under an act disabling them from performing the pre-requisites to their limited and conditional taxation, must be regarded as surrendering all right to such limited exemption from taxation.

The new corporations, whether under the first or second consolidation, have no specific immunity from taxation in the acts under which they are organized. Had the act of 1831, c. 503, been in-

serted in the charters, or in the act authorizing consolidation, the power to alter, amend or repeal would authorize the repeal of the immunity from general taxation as much as any thing else. But as has been repeatedly decided, the act is as much a part of the act under which the defendant corporation claims the right to organize and become a new corporation, as if inserted.

It results, that:

When a new corporation is formed out of two or more previously existing corporations, and by the act creating it, is "to have the powers, privileges and immunities possessed by each of the corporations whose union constitutes such new corporation, the new corporation will have "privileges, powers and immunities which they all (*i. e.* every one of them all) had, and it will not have those special powers, privileges and immunities which some had, and some did not have.

That, when two or more corporations with a special immunity from general taxation, the amount of such taxation being dependent upon certain precedent acts to be done by such corporation thus to be exempted, are incorporated into a new corporation which is unable, and is not required, to do or perform the acts which must precede such special taxation, the new corporation thus created cannot claim the special immunity belonging to the corporations out of which it is composed.

That, corporations formed by the action of the mortgagees of insolvent corporations and those formed by the consolidation of pre-existing corporations are new corporations, both by the rules of the common law and by the express terms of the statutes under and from which they derive their corporate existence—that, as such new corporation, they are subject to the general law of 1831, c. 503, which has been continued in force to the present time, and consequently they are liable to taxation.

As no exemption was granted in specific terms, the remark of Mr. Justice Clifford in *Holyoke* v. *Lyman*, 15 Wall. 500, is peculiarly applicable—that, "what is not granted in such acts is taken to be withheld."

It must be a clear and manifest violation of the constitution, which will justify a court in declaring an act of the legislature

void. "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed," remarks Mr. Justice Washington in *Ogden* v. *Saunders*, 12 Wheaton, 214, 270, "to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." Here no doubt exists. *Judgment for the state.*

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

LIBBEY, J., concurred in the result.

HENRY A. THOMPSON *vs.* JAMES P. DUDLEY *et al.*

Franklin, 1876.—August 5, 1876.

Judicial discretion. Trial.

It is for the judge presiding at the trial to determine whether an objection to evidence offered is seasonably interposed; and his determination is final and will not be revised by this court.

To constitute a valid objection to evidence which in some contingencies would be competent, the party objecting to its reception must state the ground of his objection. If he fails to do this, exceptions to the overruling of his objection will not be sustained.

ON EXCEPTIONS.

ASSUMPSIT on a writing given by the defendants to save the plaintiff harmless from all indebtedness of a firm composed of the plaintiff and James P. Dudley—the name of the firm being "Thompson & Dudley."

Subsequently to the execution of the writing, judgment was rendered against the plaintiff in this court in Somerset county, on a note signed, "Thompson, Dudley & Co."

Plaintiff claimed that this note was an indebtedness of the late firm of Thompson & Dudley, and that he was entitled to recover what he was compelled to pay on the judgment and interest from time of payment. The plea was the general issue.

The defendants claimed that the note in question was not a partnership indebtedness.

The plaintiff offered to introduce in evidence the docket entries of the clerk of the supreme judicial court, Somerset county, Decem-

ber term, 1871, and other terms to and including September term, 1873, in the action *Samuel Gould, adm'r*, v. *Henry A. Thompson & James P. Dudley.* The defendants objected to the competency of this evidence, stating in answer to the court that they had no other objection; but the presiding justice ruled that it was competent, and admitted the paper. The defendants then, and before said docket entries had been read to the jury, objected to the introduction of this evidence, for the reason that it was not properly certified under the seal of said court; but the presiding justice ruled that this objection came too late, and the paper was read to the jury. A copy of the judgment in that case was introduced in evidence by the plaintiff, and showed that the declaration was on a promissory note of Thompson & Dudley, by the name of Thompson, Dudley & Co. The verdict was for the plaintiff; and the defendants alleged exceptions.

S. C. Belcher, for the defendants, contended that it was not competent to introduce the docket entries where the extended record of the judgment had been made, nor until it first appear that the judgment had not been extended; that the objection that the copies of the docket were not properly certified, being made before they were actually read, was not too late. *Smith* v. *Keen*, 26 Maine, 411, paragraph 6, of opinion. *Kimball* v. *Irish*, 26 Maine, 444. *Bunker* v. *Gilmore*, 40 Maine, 88. *Stuart* v. *Lake*, 33 Maine, 87. *State* v. *Damery*, 48 Maine, 327.

H. L. Whitcomb, for the plaintiff, contended that it was immaterial in what order the docket entries and the judgment were introduced, citing *Hovey* v. *Chase*, 52 Maine, 304, top of page 312, and that the defendants had no cause of complaint that the docket entries were admitted after they were asked and declined to state the specific objection afterwards relied upon.

BARROWS, J. When the clerk's copy of the docket entries in the case of *Gould* v. *Thompson et al.*, was offered by the plaintiff, the defendants' counsel made a general objection to their competency, and in answer to an inquiry by the presiding judge, said he had no other objection. The exceptions do not indicate that he suggested the ground of objection upon which he now relies,

or any other; and the judge ruled that it was competent and admitted the paper. Then the counsel sought to interpose another objection which the judge ruled came too late. Exceptions to these rulings cannot be sustained.

It is for the judge presiding at the trial to determine whether an objection to evidence is seasonably taken, and his determination is final, and will not be reversed by this court.

Were it otherwise, we should not be inclined to establish the practice of allowing counsel, when called upon by the judge to state their objections to a piece of evidence, to withhold them until a ruling is made, and then claim consideration for their after-thoughts.

Had the counsel made known the grounds of his objection when called upon, it might have been obviated or sustained. Not doing this, it will not avail to give him a new trial. *White* v. *Chadbourne*, 41 Maine, 149. *Longfellow* v. *Longfellow*, 54 Maine, 240, 245, 246.

Moreover, the production of the extended record, (agreeing in all particulars with the docket entries) in the progress of the trial, deprives the exceptions of all semblance of validity as a ground for new trial; for the defendant could not have been prejudiced by the informalities of which he complains.

Exceptions overruled.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

ANN F. W. CRAGIN *vs.* GEORGE B. CRAGIN.

Franklin, 1876.—October 5, 1876.

Life insurance.

A procured a policy upon his life "for the benefit of his wife and children" and had it made payable to them and died intestate. *Held*, that the policy will not go to the administrator as assets; but to the beneficiaries by virtue of the contract and not by descent.

In the absence of any provision in the policy making an unequal division of the proceeds the payees will take equally.

R. S., c. 75, § 10, applies only when the policy is payable to and becomes assets of the estate; in which case neither the widow nor heirs can maintain an action for their respective share of the proceeds, but must seek their remedy in the probate court.

ON REPORT.

ASSUMPSIT, by the widow of John Cragin for her share of the amount of $2,358.05, collected by one of his sons, the defendant, under a power of attorney from her and his brothers and sisters, on a life insurance policy procured by John Cragin, "for the benefit of his wife and children," February 14, 1867.

John Cragin, at the time of his death, December 16, 1874, left ten children, all of age, by former wives, his only child by the plaintiff, born seventeen months after procuring the policy having died shortly before him.

After the defendant collected the money, a question arising whether the widow was entitled to one-third under R. S., c. 75, § 10, as she claimed, or only one-eleventh under the contract as the children claimed, this action was brought by her and reported to the law court, on facts, agreed for adjudication.

S. H. Lowell, for the plaintiff.

E. F. Pillsbury, for the defendant.

DANFORTH, J. John Cragin in his lifetime procured a policy of insurance upon his life "for the benefit of his wife and children." It was made payable "to the said assured their executors, administrators or assigns, or guardian of children under age." The said Cragin died intestate leaving a widow and ten children. After his death the defendant collected the amount due on the policy, by virtue of a power of attorney from the widow and children. The widow now brings this action to recover her share of the proceeds of the policy; and the amount of that share is the only question in controversy. She claims one-third of the whole amount by virtue of R. S., c. 75, § 10. But that section refers only to the distribution of money received on a life policy belonging to the estate. If this money were the property of the estate it could legally have been collected only by the administrator and must necessarily have been distributed through the probate court. In such a case the

plaintiff's remedy would not be by action, but only by process in that court, or perhaps in case of neglect of duty by the administor, by action upon his bond. It is very clear that in an action of this kind she cannot avail herself of any rights which she might have under the statute in cases to which it is applicable. These principles were settled upon satisfactory reasons in *Lee* v. *Chase*, 58 Maine, 432.

It follows that whatever rights the plaintiff may have in this case depends upon the construction to be given to the policy. That, as already seen, was obtained not only for the benefit of the wife and children, but was made payable to them. It could not have been collected in the name of the administrator, nor could its proceeds have been assets of the estate for distribution or otherwise. They were the property of the widow and children, not by descent, but by virtue of the contract. Had there been in the policy a provision for an unequal distribution of the proceeds among the payees, it would have been binding; and each would have received the share so provided. But in this policy there is no such provision, or any indication of intention in that respect, other than the general expression, payable to the assured, etc. In the absence of such provision all must share alike. *Gould* v. *Emerson*, 99 Mass. 154, 156, 157.

The defendant, as the case finds, having collected the money by virtue of a power of attorney from the beneficiaries, holds the plaintiff's one-eleventh as money received for her use, and is liable for it in this action. The amount as agreed by the parties is two hundred thirteen 73-100 dollars.

Judgment for the plaintiff for $213.73 *and interest from date of the writ.*

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

LYDIA M. HOLLEY *et al. vs.* JOTHAM D. B. YOUNG, *appellant.*

Franklin, 1876.—October 5, 1876.

Landlord and tenant.

The complainants, by lease under seal, leased to the tenant certain described premises at a specified rate for a year, and then added the following words: "We further agree to lease to said Young, (the tenant) said premises situated in Farmington village at the price and conditions named as long as he wishes to occupy the same. The said Young agreeing to take good care of premises and not to suffer them to go to waste more than the natural use of the same."

Held, 1. That remaining in possession at the expiration of the year was an election that the tenancy was to continue.

2. That this was not to be regarded as an agreement for a lease, but that it operated as a lease upon the election of the tenant to remain.

Parol evidence is admissible to show that a lease relied upon was fraudulently obtained.

ON EXCEPTIONS.

FORCIBLE ENTRY AND DETAINER.

Writ dated May 7, 1875. It was admitted that the plaintiff, whose name before marriage was Lydia P. Mace, had a deed of the premises and gave the defendant thirty days notice to quit before commencing the suit.

The defendant introduced his lease under seal, signed by the plaintiff, Lydia P. Mace, and by her sister Sarah F. Mace, dated December 10, 1873, and stating as follows: "For and in consideration of seventy-five dollars, to be paid by Jotham D. B. Young in quarterly payments of every three months during the year, which we do hereby acknowledge, and we do hereby lease and let to said Young, the east half of our house and shed and the whole of the stable during the year 1874, and to give possession on the 1st day of January next. We further agree to lease to said Young said premises, situated in Farmington village at the price and conditions named as long as he wishes to occupy the same. The said Young agreeing to take good care of the premises and not to suffer them to go to waste more than the natural use of the same."

It was admitted that the defendant paid his rent as it became due, and that both parties recognized and acted under the provisions of the lease and that there was no breach of its conditions.

The plaintiff offered to prove by parol evidence, the circumstances under which the lease was obtained, for the purpose of attempting to show that there was fraud practiced upon her; but the court ruled that the lease must speak for itself, and that the evidence offered was not admissible.

The plaintiff obtained possession of the premises, the defendant vacating the same after the officer holding the writ of possession had notified him, that he, the officer, had such a writ for his removal and the plaintiff thereafterwards held the same.

The case was submitted to the presiding justice with right of exceptions. He ruled that the action could not be maintained; and the plaintiff alleged exceptions.

H. L. Whitcomb, for the plaintiff, contended that after the expiration of a year, the plaintiff had the right to terminate the lease by the thirty days notice; that by the terms of the lease, it expired with the year 1874; that while true it was there was an agreement to lease further, that was an agreement to be performed *in futuro;* that the remedy of the defendant, if any, was by an action for breach of contract or a suit in equity to compel a performance; and that fraud rendering every contract void whether verbal or in writing, the parol evidence showing fraud was erroneously excluded.

S. C. Belcher, for the defendant, claimed that the clause "we further agree to lease to said Young said premises, at the price and conditions named, as long as he wishes to occupy the same," was a lease, and that the defendant indicated his election to hold over after the expiration of the first year by remaining in possession and paying rent according to the conditions of the lease, and that the plaintiff, by accepting the rent, showed that she so understood, and waived any right to notice, if she was entitled to any; and cited to various propositions subordinate to this, the following cases: *Hallett* v. *Wylie*, 3 Johns. 44, 47; *Thornton* v. *Payne*, 5 Johns. 74; *Jackson* v. *Kisselbrack*, 10 Johns. 336; *Kramer* v. *Cook*, 7 Gray, 550; *Delashman* v. *Berry*, 20 Mich. 292.

APPLETON, C. J. This is an action of forcible entry and detainer. The tenants claim possession by virtue of a lease from the complainants under seal. The rights of the parties depend upon the construction to be given to its terms.

The lease is dated Dec. 10, 1873. It leases and lets to the tenant certain premises therein described at a specified rent for one year. Then follow these words: "We further agree to lease to said Young said premises, situated in Farmington village at the price and conditions named as long as he wishes to occupy the same. The said Young agreeing to take good care of the premises and not to suffer them to go to waste more than the natural use of the same."

The lease in question clearly describes the premises leased and the rent to be paid. The tenant after the expiration of the year remained. His so remaining is an election to continue the tenancy. "The question whether a written instrument is a lease, or only an agreement for a lease, depends," observes Ames, J. in *Kabley* v. *Worcester Gas Light Co.*, 102 Mass. 392, "on the intention of the parties to be collected from the whole instrument. *Bacon* v. *Bowdoin*, 22 Pick. 401. The form of expression 'we agree to rent or lease' is far from being decisive upon this question, and does not necessarily import that a lease is to be given at a future day. On the contrary, those words may take effect as a present demise, and the words 'agree to let' have been held to mean exactly the same thing as the word 'let' unless there be something in the instrument to show that a present demise could not have been in the contemplation of the parties." *Doe* v. *Benjamin*, 9 Ad. & El. 644. In *Doe* v. *Ries*, 8 Bing. 178, Tindal, C. J., says, "*agrees to let* and *agrees to take*, have been held words of present demise from the case of *Goodtitle d. Estwicke* v. *Way*, 1 T. R. 735, to the present time." In *Kramer* v. *Cook*, 7 Gray, 550, the contract was "to hold for the term of three years from the date hereof . . . and, at the election of the said Cook, for the further term of two years next after said term of three years, yielding and paying," &c. "The provision in the lease," remarks Thomas, J. "is not a mere covenant of the plaintiff for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease *de futuro*, requiring only the lapse of the preceding term and the election of the defendant to become a lease *in presenti*. All that is necessary to its validity is the fact of election." In *Weed*

v. *Crocker*, 13 Gray, 219, the lease was of a mill on certain terms and conditions for the space of ten years, and it was further added therein that "at the termination of the lease said Crocker is to have the right of renewing said lease for five years, giving to said Weed or his assigns three months previous notice." This was held not an agreement for a lease, but a lease. These views are clearly and fully affirmed in *Sweetser* v. *McKenney*, 65 Maine, 225.

The tenant was to go into possession of the premises under the lease for a year, and he did. Being in possession under the lease, it could not have been the expectation of the complainants that he should quit possession and take a new lease and then enter under such lease. The parties must have intended that the occupation of the tenant should continue as long as he should wish to occupy the premises leased.

The plaintiff offered to show by circumstances attending the giving of the lease, that it was fraudulently obtained. This evidence was erroneously excluded by the justice presiding.

Exceptions sustained.

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

ASBURY LIFE INSURANCE COMPANY *vs.* AUGUSTUS B. WARREN *et als.*

Franklin, 1876.—December 12, 1876.

Evidence. Juror.

When the bodily health of any person is material to be proved, the representations of such person of the nature, symptoms and effects of the malady under which he is laboring at the time, are admissible as original evidence.

But if such representations are made to an unprofessional man they must be confined to the usual and natural expressions of a present existing condition of health and not include such as are a narrative or statement of past feelings or condition.

A person who has expressed a belief that one who has been convicted and sentenced for a criminal offense, has been sufficiently punished therefor, and has signed a petition for his pardon, is not competent to sit as a juror for the trial of the same person in a civil action against him founded upon the same charge.

ON EXCEPTIONS, to the exclusion of evidence and on motion of the plaintiffs to set aside the verdict, which was for the defendants.

CASE, to recover money obtained of the plaintiffs through a conspiracy of three defendants wherein they defrauded the plaintiff company by procuring from them a policy upon the life of a person far gone in pulmonary consumption, representing that at the time of procuring the policy she was in health and free from any disorder.

The policy was taken out October 3, 1873, for $3,000, on the life of Serecta Anna Warren, an unmarried sister of the defendant, Dr. Warren, in whose family she occasionally resided, the assurance in case of death, payable to him.

Miss Warren died December 28, 1873; and there was paid on the policy, July 1, 1874 by the plaintiffs to the defendant, Doctor Warren, $2,979, which they seek to recover in this action.

The evidence showed that Dr. Warren signed his sister's name to the application for the policy, that the defendant, Luther Curtis, signed as a witness to her signature, that after the money was deposited in bank for the payment of the policy, the defendants disagreed as to its application, the defendant, Reuben Fenderson, the agent of the company in procuring the insurance, insisting that he should be paid one-third of it for his share, but finally compromising his claim by taking $300. The defendant, Curtis, also received some of the money which he claimed was in payment of former indebtedness of Warren to him and on account of services in recovering the money and in the settlement of the claim of Fenderson.

There was evidence introduced by the plaintiffs tending to show that Miss Warren had during the summer and fall of 1873, been sick, and to prove that fact, they offered one Abby Howes, her intimate friend, to testify to the declarations made by Miss Warren about her health, physical diseases, disorders and maladies, to Miss Howes at the time she was laboring under and suffering the same; also offered two letters written by Miss Warren while at New Sharon to Miss Howes, one dated September 15, 1873, and one dated October 14, 1873, and received by Miss Howes at Augusta, Maine, by due course of mail, in which were

statements concerning her health, physical condition and maladies under which she was then and there laboring; also offered to prove by Betsey Churchill, who was the nurse and attending upon said Serecta Anna during the last ten hours of her life, her declarations during that time and after she was conscious that she could live but a short time, concerning the cause of her then present sufferings and the length of time they had existed, all of which evidence was excluded by the presiding justice. The verdict was for the defendants, and the plaintiffs alleged exceptions.

They also filed a motion to set the verdict aside as against law, evidence and its weight, and because of the disqualification of a juror.

The facts bearing upon the motion are that at the September term of this court, 1874, for Franklin county, an indictment was found against the same defendants for the same conspiracy and Warren and Curtis were tried thereon at the March term thereafter, found guilty and sentenced to imprisonment, the defendant, Fenderson in the meantime having died. After Warren and Curtis were sentenced, petitions for the executive pardon of Curtis were circulated and numerously signed in Franklin county, of the form following:

"To his excellency the Hon. Nelson Dingley, jr., governor of the state of Maine: The undersigned, citizens of Farmington, in the county of Franklin, being persons well acquainted with Luther Curtis, now confined in Auburn jail for the crime of cheating by false pretenses, believing that he has been sufficiently punished; that the ends of justice do not demand that he should be longer incarcerated, and invoking the mercies of executive clemency, hereby petition your excellency for the immediate and unconditional pardon of the said Luther Curtis, and as in duty bound will ever pray."

Among the grounds stated in favor of the motion is the following,

"IV. Because James Cutts, one of the jurors who was summoned as a talesman to serve on the panel which tried and returned a verdict in this case, was not legally qualified to serve thereon in said trial for the following reason:

"Said juror, having been summoned as aforesaid, was interro-

gated by the counsel for the plaintiffs, as follows: 'Have you signed any papers or petitions to any persons or parties for the relief of either or all of these defendants since their conviction?' meaning the conviction of the defendants for the crime of cheating the plaintiffs by false pretenses. To which interrogatory said juryman answered, 'I have not;' when, as matter of fact, said juryman had heretofore, to wit: on or about the first of December last, signed a petition to the governor and council for the pardon of Luther Curtis, one of said defendants, which fact the plaintiffs and their attorneys were ignorant of till after said verdict, which facts the plaintiffs are ready to verify;" etc.

Cutts afterwards deposed that he did sign the petition some little time after their commitment, that he remembered that the question was put to some of the jurors, whether they signed the petition referred to, but did not recollect that the question was put to him.

T. W. Vose, for the plaintiffs.

H. L. Whitcomb, for the defendants.

DANFORTH, J. On the third day of October, 1873, the defendant, Warren, procured of the plaintiff company a policy of insurance payable to himself, upon the life of his sister, Serecta Anna Warren. The policy was issued upon an application purporting to have been signed by the assured and his sister, in which the health of the said Serecta was fully set out and described in answer to questions therein propounded. Very soon the said Serecta died, and upon proof of the death the company paid the amount due, and now seek to recover it back on the ground of fraudulent representations, in which it is alleged that all the defendants were participants. These alleged fraudulent representations consist mainly in the answers found in the application relating to the health of the person to be insured. In order to establish these allegations, the plaintiffs offer certain declarations of the said Serecta, relating to her health at or about the time of the application, and others made just before her death, for the purpose of showing the falsity of the answers in the application.

These declarations offered and rejected were of two classes, first

those which relate to, and are descriptive of her health and feelings at the time they were uttered; and second, those "concerning the cause of her then present sufferings, and the length of time they had existed." We think those properly coming under the first class should have been admitted.

Usually such testimony comes from a party, and is offered in his own behalf. In this case it comes from one who was neither a party to the record, nor in interest, one who, if she had been living, would have been a disinterested witness pecuniarily. Still the same principles apply in either case. The health of the person whose life was insured, was the ground upon which the policy was issued, and a true description of it was necessary to the validity of the contract.

If the action were upon the policy, it might have been sufficient to show the representations false. In this case it is necessary to go one step further, and bring a knowledge of it home to the defendants, to show that they were participants. In either case, the truth of the representations is in issue, and the principles applicable to the testimony upon this issue the same.

The general rule applicable to such cases would make this testimony hearsay. But to this rule there are many exceptions, and when the declarations come within any exceptions they become original testimony. When the fact of such a declaration having been made is to be proved regardless of its truth, it is original testimony necessarily. When an act of a third party is material, and has more or less weight according to the motive which prompted it or the purpose for which it was done, under well known and established principles of law, any cotemporaneous declarations explanatory of that act are admissible as a part of it. The same principle will apply when it is material to prove the physical health or bodily or mental feeling of any person.

In this case it became important to prove the condition of health in which the said Serecta was at the time of the application. Witnesses testified as to certain indications of ill health. These indications may have a slight or a deep foundation, or may be entirely illusory. What she may have said in explanation of them at the time has universally been regarded as *res gestæ* and, as

such, original evidence. Greenleaf, in his work on Evidence, vol. 1, § 102, states the rule thus: "Wherever the bodily or mental feelings of an individual are to be proved, the usual expression of such feelings, made at the time in question, are also original evidence." In the same section he says: "So, also, the representation by a sick person, of the nature, symptoms, and effects of the malady, under which he is laboring at the time, are received as original evidence."

It is particularly to be noticed that in this definition the declarations are such as are "made at the time in question," and relate to the "malady under which he is laboring at the time."

In *Bacon* v. *Charlton*, 7 Cush. 581, 586, Bigelow, J., says: "The rule is now well settled, and it forms an exception to the general rules of evidence, that where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor." In *Insurance Company* v. *Mosley*, 8 Wall. 397, the rule with its limitations and restrictions is fully stated and settled in accordance with the other authorities cited. The rule itself seems now to be settled beyond question; the only difficulty is in its extent and application. In the case last cited the principle seems to have been carried to the extreme limit, and so far that two of the judges in a very able opinion by Clifford, J., dissented in part.

The principle as laid down by Greenleaf and Bigelow, above cited, was not questioned, but its application to certain declarations as to the cause of the injury, was denied in the dissenting opinion, while the court admitted the declaration on the ground that it was so near the time, and so connected with it by the circumstances developed, that it was in fact a part of the thing to be proved. *Ashland* v. *Marlborough*, 99 Mass. 47, is to the same effect. So also, *Jacobs* v. *Whitcomb*, 10 Cush. 255.

Is the rule sufficiently extensive to cover the declarations in relation to the "cause of her then present sufferings, and the length of time they had existed?" From the testimony we learn that these declarations were made a few hours before her death, and after she became conscious that she could not live, and relate

to her condition, not at the time when made, but some time previous, and before the date of the application for the policy. They contain undoubtedly important testimony, as bearing upon the issue. But in no sense can they be considered as part of the *res gestæ*. They were not the "natural expression" of her then condition, but simply a narrative of that condition as it was at some previous time. Bigelow, J., in *Bacon* v. *Charlton*, above cited, says: "Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Any thing in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady."

In *Emerson* v. *Lowell Gas Light Co.*, 6 Allen, 146, it was held that "a plaintiff's narrative of past events, though made to his attending physician, are incompetent evidence in his favor."

There is undoubtedly a distinction to be made between declarations made to an attending physician, and such as may have been made to others; much more liberality is to be allowed in the former case than in the latter. This is allowed on the ground of their necessity, to enable the physician to form an opinion as to the true condition of the patient, as well as because the professional man is less liable to be deceived than others. But even in such case it is rather to show the reasons and foundation of the medical opinion, than as substantive proof of the facts stated. *Barber et ux.* v. *Merriam*, 11 Allen, 322. But the limits of the rule under discussion are so clearly laid down by Clifford, J., in his dissenting opinion in *Insurance Co.* v. *Mosley*, that it is unnecessary to pursue the discussion further. It is clear that the rule itself is not sufficiently broad to cover the second class of declarations offered, while the principles upon which it is founded, and the limitations to it, established by the decisions, will exclude them.

But it is claimed, that as the application was produced by the defendants, with Serecta's name attached to it, thereby giving it her sanction, the plaintiffs should be permitted to put in her subsequent conflicting statements to prove its falsity. But she was

in no sense a witness. The defendants had procured the application either with or without her genuine signature, and passed it to the company vouching for its truth; and, so far as this question is involved, it is immaterial whether the signature was hers or otherwise. They not only vouched for its truth, but one of them at least authorized the inference that it had her sanction. If she ever had any interest in it, that interest ceased as soon as it passed from her. Whether it passed from her as true or false, she could certainly have no stronger relation in the transaction, to those receiving it, the defendants, than that of vendor or assignor. In such case, it is well settled that her subsequent declarations cannot be received to impeach that to which she has given currency; and this would be quite as true, if it never had had her sanction. In either case she would have stood in the same relation as any other person competent to be a witness, but whose declarations not under oath, and without an opportunity of cross-examination, are subject to all the infirmities of hearsay testimony. The declarations of a vendor after the sale cannot be received to impeach his title, or that of his vendee. *Greene* v. *Harriman*, 14 Maine, 32. *Fisher* v. *True*, 38 Maine, 534. *Bartlet* v. *Delprat*, 4 Mass. 702. 1 Greenl. Ev., § 180. *Hatch* v. *Bates*, 54 Maine, 136.

In opposition to these cases we have that of *Aveson* v. *Lord Kinnaird*, 6 East. 188, cited and relied upon in the argument. This case, so far as the question under discussion is concerned, is like the present and fully sustains all that is claimed for it. It is cited in *Gilchirst* v. *Bale*, 8 Watts, (Pa.) 355, as authority for the doctrine there enunciated though the latter case does not go so far as the former. It is also cited in many more modern cases with approbation and without any suggestions that the principles sustained are in any respect to be limited or qualified. In an earlier case that of *Climer* v. *Littler et al.*, 3 Burr. 1244, where a question arose as to which of the two wills should be established as the true one, the later was in the hand writing of William Medlicott, who had possession of both, and was also a subscribing witness to the last one. This Medlicott on his death bed took the earlier will from his bosom and delivered it to his sister, saying "it was the

true will," and at the same time declared that the later will "was forged by himself." The sister was a witness and testified to these acts and declarations without objection. Upon a motion for a new trial, it was objected that this testimony should not have been received. But Lord Mansfield, after alluding to the fact that it came in without objection, said, "as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience; I am of opinion the evidence was proper to be left to the jury." This case would certainly seem to have a decided tendency to support the principle established in *Aveson* v. *Lord Kinnaird*, in its full extent.

But a more careful examination of it will very much detract from its force in that respect. Both wills were in the possession of Medlicott, and had by him been secreted, and the competency of the testimony is made evidently to rest very much, if not mainly, upon these facts. In the opinion it is further said in relation to the first will, "it was necessary to show how it was secreted, and how it was discovered; the declaration of Medlicott in his last illness, when he delivered it for the use of the plaintiff, is allowed to be competent and material evidence;" and of the last, "the instrument of 1745, it was equally in his custody and secreted. The account he gave of it in his last moments, is equally proper." We think, therefore, the decision may be sustained upon the ground that the declarations were a part of the *res gestæ*, and does not afford much aid to *Aveson* v. *Lord Kinnaird*, in sustaining the principle under discussion.

In *White et ux.* v. *Holman*, 12 Maine, 157, 160, Weston, C. J., after analyzing *Aveson* v. *Lord Kinnaird*, says, "in our opinion, no general principle can be extracted from a case, so peculiar in character."

In *Stobart* v. *Dryden*, 1 Mee. & W. 615, it was *held* that declarations made by a deceased attesting witness, respecting the attested instrument, are not admissible in evidence, though admissions of fraud or forgery on his own part, and though his handwriting has been proved as proof of the instrument, and *Aveson* v. *Lord Kinnaird*, was overruled.

Thus it will be seen that the last named case so far as it author-

izes the declarations of past transactions, feelings and facts, whether for the purpose of proving the past state or condition of health of the person making them, or of impeaching an instrument to which such person by his acts or signature had given credit, is contrary to well established principles and nearly all the authorities to which our attention has been directed.

The result is that, such declarations of the said Serecta, as were descriptive of her state of health at the time they were made, and were "such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady," as were offered and excluded, should have been received. While the second class offered, relating as they did to her past condition, and being "in the nature of narrative or statement," were properly excluded. It is to be understood that in order to make such declarations admissible, it must first appear that at the time when made, her condition as to health was a material fact to be proved.

We do not mean to intimate an opinion that it may not be material to prove the nature of the disease of which she died; and in proving that, such declarations as come within the principle indicated may be admissible. If from such proof it should appear, that her death was caused by such a disease as must necessarily have existed from a period anterior to the date of the application, or by a fair inference may be considered as having a bearing upon her condition at that time, we see no objection to its use for that purpose.

There is also a motion in the case to set aside the verdict because it is against the law and the evidence, and "because James Cutts, one of the jurors, who was summoned as a talesman to serve on the panel which tried and returned a verdict in this case, was not legally qualified to serve thereon in said trial."

It appears from the testimony that two of the defendants, Warren and Curtis, had prior to the trial in this case been convicted under an indictment for the same offense as that charged in the writ, and had received their sentence therefor. The testimony also satisfactorily shows that the juror, Cutts, had signed a petition for the pardon of Curtis on the ground that "he has been sufficiently

punished" and that on being interrogated in regard to the matter he denied it. Whether this denial was from a want of memory or otherwise does not appear; nor is it necessary that it should. It was a fact material for the counsel for the plaintiff to know and which was kept from him. If the juror had in writing expressed a belief in the defendant's guilt or innocence it would not probably have been claimed that he was possessed of that entire impartiality which is proper in the trial of a cause. A much more serious objection as we think lies when, as in this case, the opinion is not only entertained that his punishment has been sufficient but expressed in writing and that writing made known at least to the friends of the defendant and especially such as have made manifest the most interest in relieving him from any further penalty. In the former case the mind, certainly of a candid man, would still be very much influenced on listening to the testimony and if decided might be expected to be controlled by it. But in the latter case it is hardly conceivable that the testimony should have any effect whatever. The guilt is admitted and it is believed that the punishment already suffered is adequate to the crime and after such an exhibition, how shall the juror justify himself to the friends of the accused if he should assent to a verdict of guilty. It is true that the criminal and civil liability for the same offense are entirely distinct; but this hardly mends the matter and may perhaps make it worse. The prosecutors in the civil action would almost certainly be looked upon as the complainants in the criminal, and the result would be that the plaintiff would be looked upon as at least attempting to push the matter to the extent of the law without regard to justice; and thus on the part of the juror, prejudice against the plaintiff would be added to sympathy for the defendant. We think a person thus situated could hardly possess that impartiality which the law requires in a juror; and he certainly would not inspire that degree of confidence which it is very desirable the parties should have in the tribunal which tries their causes.

The verdict in this case is so clearly against the testimony that it would be difficult to account for it upon any other ground than that the jury failed to comprehend the distinction between a civil and criminal proceeding upon the same charge, and thus the plain-

tiffs' rights, as well as the defendants' liabilities, appear to have been overlooked or ignored.

Exceptions and motion sustained.

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

HENRY M. HAWES, executor, *vs.* GEORGE W. BRAGDON.

Franklin, 1876.—May 31, 1877.

Wills.

When a bill in equity is brought under the provisions of R. S., 1871, c. 77, § 5, to determine the construction to be given to a will, all those named therein, whose rights and interests are involved in such construction, should be made parties thereto.

BILL IN EQUITY, to determine the construction of a will.

Timothy Bragdon died testate, leaving no widow and leaving two sons, George W. and Aaron E. Bragdon, his only heirs-at-law, both married and having children. By his will, after making bequests of $100 to each of his sons, $250 among his granddaughters, and $100 to others, in all $550, the residuary clause reads thus: "Eighthly. As to all the residue and remainder of my personal estate of every description whatsoever, after the payment of all my just debts and the expenses of executing this my last will, I give and bequeath the same to my grandson Eda Bragdon aforesaid, conditional that if said Eda Bragdon when he arrives at the age of twenty-one years is a steady and industrious man; and if he is not a steady and industrious man, the same is to be divided equally between said Eda and his two sisters Minnie and Lizzie Bragdon aforesaid."

The next clause reads thus: "Ninthly. I direct and empower my executor to sell and deed all my real estate that I may have at the time of my death; also, all the personal estate that I may have; I order him to sell and dispose of both to the best advantage he can and convert it into money and put it at interest till it is to be paid out to the several legatees who may not be of the age of twenty-one years at the time of my decease."

The inventory shows that he left real estate amounting to $1,175 and personal estate amounting to $1,227.57. The indebtedness of the estate was about $800.

The bill shows that a controversy arose between the plaintiff, executor, and George W. Bragdon as to the construction of the will, (George claiming that the real estate was not devised, and the executor that it was) and prays a decision of the following questions: 1. Does the real estate descend as if no will had been made. 2. Is the executor authorized to sell the real estate with or without license from the probate court. 3. And if so authorized, how shall he pay over and dispose of any balance; and 4. Who is to determine, if necessary, if Eda is a steady and industrious man, when he arrives at the age of twenty-one years.

S. Belcher, for the plaintiff.

H. L. Whitcomb, for the defendant.

APPLETON, C. J. This is a bill in equity brought under the provisions of R. S., 1871, c. 77, § 5, to determine the construction to be given to certain clauses in the will of Timothy Bragdon.

Before the court should be called upon to give a construction to a will, the meaning of which is disputed, all the legatees or devisees, whose rights and interests are involved, should be made parties thereto, so that they see to the due protection of their respective rights and interests.

It is obvious that Aaron E. Bragdon is interested equally with the defendant that the real estate of the testator should descend to the heirs-at-law, while Eda Bragdon and Minnie and Lizzie Bragdon are interested that it should not so descend as well as in the question, "who is to determine whether Eda is a steady and industrious man" when he shall have arrived at the age of twenty-one years.

The most important question undoubtedly is whether the testator meant to have his whole property of every description converted into money and distributed as such. Upon this, those who, in case of an equitable conversion of real into personal property, would be entitled to the proceeds of the property so converted, should be heard, but they are not made parties.

The bill is to be dismissed unless the complainant sees fit to amend by summoning in the necessary parties.

DICKERSON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

CHARLOTTE B. HARVEY, petitioner, *vs.* EDWIN A. LANE.

Oxford, 1876.—October 5, 1876.

Divorce.

Under R. S., c. 60, § 19, a decree by the court granting a divorce, giving the custody of the minor children to the mother, may be subsequently changed by the same court, if the circumstances require, by an addition thereto ordering the father to pay a certain amount for their support.

ON EXCEPTIONS, to a ruling, sustaining a demurrer to a petition to alter a decree in a divorce suit.

ON PETITION, representing that the petitioner, formerly the wife of the respondent, was divorced from the bonds of matrimony September 24, 1869, by this court holden at Paris, [&c.;] that on the same judgment for divorce it was further ordered and decreed that the custody of their two youngest children be given to the mother; that the respondent pay the petitioner thirty dollars each year for five successive years; that said children have always lived with her and are much attached to her, [&c.;] that she desires to have them continue with her during their minority; that the five years expired September 24, 1874; that the thirty dollars per year has been fully paid, and that the respondent has large property while hers is nearly exhausted. The petition closes with a prayer that the court so far alter its decree as to order the respondent to pay the petitioner such reasonable sum towards the support and education of the daughters during their minority as upon an examination, justice may require, under provisions of R. S., c. 60, § 19.

To this petition, the respondent demurred generally, the presiding justice sustained the demurrer, and the petitioner alleged exceptions.

M. T. Ludden, for the respondent, contended that the decree of thirty dollars a year contained no provision for the support of the minor children; that there was no decree concerning their support and that the decree concerning the payment of money having been fully complied with, there was no decree in existence "to alter;" that the court having decreed a specific sum in lieu of alimony the decree was final and after having been complied with, could not then, if ever, be legally altered; that the authority of the court "to alter" their decree given by R. S., c. 60, § 19, applied only to the care and custody of the children and not to the sum fixed upon in lieu of alimony.

E. G. Harlow, for the petitioner, submitted that the decree of thirty dollars per year for five years was part of the decree as to the custody of the children.

DANFORTH, J. This is a petition for an alteration of a decree of this court under R. S., c. 60, § 19. The respondent files a general demurrer which was sustained in the court below and exceptions filed. The principal objection to the petition is that it does not set out such a decree as can be changed and that the alteration asked is of a decree which does not exist and cannot therefore be "altered."

The petition alleges in substance that the petitioner was formerly the wife of the respondent from whom she was divorced at the term of this court holden in Oxford county in September, 1869; that in said judgment for divorce, "it was further decreed by said court that the custody of their two youngest children be given to the mother, and that the said Edwin A. Lane pay to the said Charlotte B. Lane the sum of thirty dollars each year for five years."

It is claimed that the sum here named is given as alimony and cannot now be enlarged. Whether this may be so it is not material now to inquire. The petition does not ask an increase of alimony. It only asks "that the court may so far alter its decree as to order the said Edwin A. Lane to pay your petitioner such reasonable sum towards the support and education of said girls during their minority as . . . justice may require."

It is further claimed that this request does not come within the statute, as that only authorizes an alteration in a decree already made; while in this case there is no decree in relation to the support of the children.

We think neither of these positions well founded. It may be uncertain from that part of the decree set out in the petition whether the sum given is for alimony or for the support of the children. As it immediately follows that part giving the custody to the mother, the fair inference would seem to be that it was given for their support. But suppose it to be otherwise. Under the statute the court granting the divorce "may also decree concerning the care, custody and support of the minor children of the parties . . . and alter their decree from time to time as circumstances may require." Here the care, custody and support are connected together for the consideration of the court, and so joined that all are presumed to become elements of the decree. The children must be cared for and supported; and where the custody is given to one of the parties, the care and support is to follow unless otherwise ordered. In this case the custody was given to the mother. If the father is now ordered to pay for the support, it can only be changing that support from the mother to the father. It is so far a change in the existing decree, and a change whether it be an addition or subtraction is equally an alteration and comes within the statute.

But we may go even further than this. If there were no decree as to the custody or support, the court may now pass one. This power is not limited to the judge who may chance to preside when the divorce is granted, nor to the term when the judgment is entered. In this respect the statute is unlimited. The authority to enter the decree in the first instance and to alter it from time to time is given in the same terms and may be exercised at any time when the circumstances may require. If the condition of the parties, at the time of the divorce, does not require any decree as to the care, custody and support of the children, the statute is broad enough to authorize such a one by the same court, at any subsequent time within their minority, when the circumstances may require it.

It is suggested that R. S., c. 24, §§ 9 and 10, afford the proper and a sufficient remedy. But those sections refer to paupers only; and there is no suggestion that these children come within that class of persons. The objections to the form of the petition are not material under a general demurrer.

The exceptions must be sustained and the petition stand for a hearing.

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

SAMUEL D. MARSHALL *vs.* SAMUEL W. DUNHAM.

Oxford, 1876.—January 23, 1877.

Evidence.

Each party claimed under a separate mortgage from the same grantor. The plaintiff's deed, though earlier in date, was not recorded till after the registry of the defendants. *Held*, essential for the plaintiff, if he would postpone the defendant's mortgage to his own, to prove by a preponderance of evidence that the defendant had actual notice of the existence of the prior mortgage when he received his.

ON REPORT.

WRIT OF ENTRY. Plea, *nul disseisin.*

Both parties claim title under one William S. Dunham; the plaintiff, under a mortgage deed, dated October 14, 1868, and recorded January 24, 1874; the defendant, under a mortgage deed, dated May 29, 1872, and recorded June 3, 1872. The latter deed having been executed before the former was recorded, the question for determination is whether the defendant had actual notice of the existence of the former deed at the time the deed to him was executed; and if so, what the legal effect of such notice is to have upon the rights of the parties under the circumstances established by the evidence. The mortgage of May 29, 1872, was assigned to Jonas Bisbee, October 12, 1872, and re-assigned to the defendant, June 12, 1875, under the circumstances stated in their testimony.

The defendant in consideration of $600, assigned his mortgage at its date to one Bisbee, who re-assigned it to the defendant, June 12, 1875; Bisbee at no time having any notice or knowledge of the existence of the prior mortgage, from W. S. Dunham, to secure the maintenance of his father and mother, which was afterward assigned to the plaintiff. The evidence tended to show that a part or all the money received from Bisbee was used to extinguish another prior incumbrance, called the Kittridge mortgage.

It appeared that Bisbee, being unwilling to advance more than $400 on the security of the mortgage, the defendant indorsed his agreement to be surety for $200 of the $600 paid by Bisbee, and that he finally repaid Bisbee when he took the re-assignment.

C. P. Benson, for the plaintiff, contended that, as matter of fact, the defendant had actual knowledge of the prior mortgage to secure maintenance, that he mistook the law, supposing the record title would avail notwithstanding his actual knowledge.

A. Black, for the defendant, contended as matter of fact that the defendant had no actual notice of the prior mortgage to secure maintenance, and that if he had, it being conceded that his assignee Bisbee, had no such knowledge, the assignment to Bisbee cured the defects in the title, if any existed while in the defendant; and further that Bisbee could give a good title to anybody; and to the defendant even if he had notice; that a perfect title in Bisbee could not be rendered an imperfect one in the defendant, by his knowledge of a pre-existing fact; that it would be contrary to the decisions. *Pierce* v. *Faunce*, 47 Maine, 507. *Flynt* v. *Arnold*, 2 Met. 619, 623. *Trull* v. *Bigelow*, 16 Mass. 406.

Benson, in reply submitted that S. W. Dunham retained an interest to the amount of $200 in the mortgage after its assignment to Bisbee; and for that reason, after the re-assignment of Bisbee, he should be charged with actual notice relating to the time of his taking the mortgagee. *Haynes* v. *Wellington*, 25 Maine, 458, 461. *Johnson* v. *Candage*, 31 Maine, 28, 32. *Buck v. Swazey*, 35 Maine, 41, 52.

BARROWS, J. The burden is upon the plaintiff, if he would postpone the defendant's mortgage to his own, to prove actual notice

to the defendant of the existence of his mortgage. For this purpose he offers the deposition of W. S. Dunham, the mortgageor in both cases, who testifies that he told the defendant, of the mortgage to his father a few days before he made the mortgage to the defendant, in presence of another person whose testimony is not produced nor its absence accounted for. The defendant positively denies the reception of any information of the sort and testifies that W. S. Dunham told him on the contrary that there was no mortgage besides the Kittridge mortgage, which was paid and canceled on the day that the defendant took his mortgage. The uncontradicted testimony of the defendant is that his mortgage was given to secure the repayment of the money which he advanced to pay the Kittridge mortgage which was prior in time to the one given by W. S. Dunham to secure the bond for the support of his father and mother, under which the plaintiff claims. It further appears that the market value of the property was rather less than more than the amount of the defendant's mortgage. The probability is that under such circumstances the defendant when advancing money to pay off a prior mortgage would have taken an assignment of it instead of having it canceled and taking a new mortgage had he known that the place was burdened with the support of the mortgageor's parents. The circumstances tend to corroborate the statement of the defendant rather than that of the plaintiff's witness. At all events, the plaintiff fails to produce a preponderance of evidence on this vital point.

This view makes it unnecessary to determine what effect, if any, the assignment of the defendant's mortgage to Bisbee and the re-assignment by Bisbee to the defendant might have.

Judgment for defendant.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

GREENLEAF WOOD *vs.* CHANDLER DECOSTER *et al.*

Oxford, 1876.—February 25, 1877.

Debt. Demurrer.

The assignee of a judgment for debt and cost may maintain an action of debt thereon in his own name, under and by virtue of the statute of 1874, c. 235.

The statute of 1876, expressly conferring this right, does not affect the right, previously existing under the statute of 1874.

Nor is the right confined to the immediate assignee of the judgment creditor; the remedy is available to any subsequent assignee who can show a good title.

Upon demurrer to a declaration alleging the sale, transfer, and assignment, the presumption is, that the assignment is valid under the statute; and if the defendant would contest its validity or sufficiency, he must do it by plea or brief statement.

Neither that question nor any alleged failure to file the assignment with the writ in conformity with the requirements of the statute, is open to him on demurrer.

Where one of two co-defendants demur, and the allegations in the declaration are, as to him, specific and sufficient, the want of a precise and formal allegation as to his co-defendant, will not suffice to sustain his demurrer.

Nor will erroneous mention, in some parts of the declaration, of the defendants as singular, when they are in fact plural, or of the plaintiff as plural, when there is but one, suffice to defeat the action, if upon the declaration as a whole, the persons and case can be rightly understood.

ON EXCEPTIONS to the overruling of a general demurrer to the declaration.

DEBT on a judgment of this court in Oxford county, recovered at the March term, 1867, in favor of Sullivan C. Andrews against these two defendants, brought in the name of the plaintiff as assignee of one Bisbee, who was the assignee of Andrews, alleging assignments, but not alleging that the assignments were in writing, and no copy of assignment being filed with the writ. The declaration closed as follows: "Whereby an action hath accrued to the plaintiff, to have and recover of the said Chandler Decoster, (omitting the name of the defendant, Addison G. Wood,) the sums, [&c.] Yet the said defendant (singular,) has not paid and doth wholly refuse," [&c.] "To the damage of the plaintiffs."

To the foregoing, the following demurrer was filed: (After stating the term,) "*Greenleaf Wood* v. *Chandler Decoster*, (omit-

ting the name of Wood.) And now the defendant comes and defends, &c., when, &c., and says that the plaintiff's declaration is insufficient in law." The demurrer was joined and the declaration adjudged good; and the defendant alleged exceptions.

G. A. Wilson, for the defendants, to the point that such action brought in the name of an assignee, could not be sustained at common law, cited *Skinner* v. *Somes*, 14 Mass. 107. To the point that by legislative construction, "judgments" were not included under the term "choses in action," upon which, under the statute of 1874, c. 235, assignees may maintain actions in their own names, he cited the statute of 1876, c. 102, § 2, which extends the statute of 1874, so as to embrace judgments.

If the law court should hold that an action could be sustained under c. 235, in the name of the assignee of a judgment, he then urged that the writ was defective in not declaring the assignment of the judgment to have been in writing, and in not having a copy of the judgment filed with it, as required by the statute. *Drowne* v. *Stimpson*, 2 Mass. 441, 444. *Soper* v. *Harvard College*, 1 Pick. 177. *Williams* v. *Hingham & Quincy Bridge*, 4 Pick. 341.

G. D. Bisbee, for the plaintiff.

Barrows, J. The demurrer presents the naked question of the sufficiency of the declaration in a writ in which Decoster and another are named as defendants. The declaration is in a plea of debt, and sets out in the usual form that one Andrews at the March term, 1867, recovered a judgment for debt and costs against the defendants, and that said Andrews, on April 10, 1875, for a valuable consideration, "did transfer, sell, and assign" the same to one Bisbee, and that said Bisbee on June 1, 1875, for a like consideration paid by the plaintiff, did transfer, sell and assign the same to him. It avers that said judgment is in full force, &c., "whereby an action hath accrued to the plaintiff to have and recover of the said Chandler Decoster the said several sums," &c., "yet the said defendant has not paid the same," and it concludes with the ordinary averments of request and neglect and refusal by both defendants, "to the damage of said plaintiffs." Decoster alone demurs generally.

Though not a model of careful pleading, we think the persons and case can be rightly understood, and that the declaration was correctly adjudged good on demurrer.

Chapter 235, of the laws of 1874, runs thus: "Assignees of choses in action, not negotiable, assigned in writing, are hereby authorized to bring and maintain actions in their own name, and the assignee shall hold the assignor harmless of costs, and shall file with his writ the assignment or a copy thereof, and all rights of set-off shall be preserved to the defendant."

In support of the demurrer it is claimed that a judgment is not properly speaking, a chose in action, and therefore this statute is not applicable, and the laws of 1876, c. 102, § 2, by which an action of debt is expressly given to the assignee of a judgment which has been assigned in writing, and is not discharged, is cited to show that in the opinion of the legislature no such action could be previously maintained. But the construction of the law of 1874, is not affected by the later statute. Instances are not wanting in which the legislature, designing to make the law more explicit, have enacted statutes which are found to be only declaratory of the law as it previously existed. It may be that here the statute of 1876 extends an assignee's remedy to judgments upon which execution might issue. But the question is, what is the true construction of the law of 1874? Chancellor Kent defines choses in action as "personal rights not reduced to possession, but recoverable by a suit at law." 2 Kent's Com., part V., p. 351.

There can be no doubt that a judgment which has remained unsatisfied from 1867, to 1875, and upon which apparently no execution could now issue, and which must be collected, if at all, by a new suit, comes strictly within this definition. Inasmuch as the execution is one step in a suit at law, necessary to the enforcement of the creditor's rights, it might well be said that a judgment upon which execution could issue, falls within the same category.

Kent and all standard writers on elementary law include under the general head of things in action, "money due on bond, note, or other contract." A debt of record constitutes a contract of the highest nature, being established by the sentence of a court

of judicature. 2 Black. Com., c. 30, p. 465. There can be no question that the statute of 1874, authorized the assignee of a judgment like this to maintain a suit thereon in his own name. Nor do we think that this right is confined to the first assignee. The remedy is available to any subsequent assignee who can show a good title from the judgment creditor.

The demurrer admits the assignment; and the presumption is, that it is a valid assignment. If the defendant would have questioned its validity or sufficiency, he should have done so by plea or brief statement. *Lawrence* v. *Chase*, 54 Maine, 196, 199.

While it would have obviously been the better practice for the plaintiff to set out his title and the mode of transfer more fully, we do not think that the failure to do so can be regarded as fatal under the pleadings. The same must be said of any alleged failure to file the assignment with the writ, according to the requirement of the statute.

As against this defendant, Decoster, the right to maintain the action is specifically alleged. The other defendant, not appearing, can never be heard in error to allege any want of form. *Page* v. *Danforth*, 53 Maine, 174. The defect as to him, cannot avail this defendant. Had there been an absolute non-joinder, it would have been good only in abatement. There seems to have been some confusion in the pleader's mind as to the respective number of the parties plaintiff and defendant; but for reasons before alluded to, we see nothing that can be regarded as fatal on demurrer. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

WILLIAM T. PERKINS, administrator, *vs.* INHABITANTS OF OXFORD.

Oxford, 1876.—February 25, 1877.

Way—defective. Town. Trial.

The statute of 1874, c. 215, does not require the administrator of a person instantly killed, by reason of a defect in a highway or bridge, to give the notice to the selectmen of the delinquent town, which one injured in his

property or person is there required to give, within sixty days after the occurrence of the accident.

Acts of incorporation which make a fresh water and running stream the boundary of a town are to be construed in the same manner as deeds which make such a stream the boundary between conterminous proprietors; and the thread, not the bank, of the stream, is the boundary in the absence of language indicating a contrary intention.

It is proper for the presiding judge, in giving a requested instruction, to call the attention of the jury to the controverted question of fact upon their decision of which its applicability depends.

Towns are liable, severally, in the cases referred to in the statute, for damage caused by defects in ways and bridges which they are bound to maintain; and they cannot be relieved, either in whole or in part, from this liability, by the fact that they had united with another town in maintaining a bridge across a stream which constitutes the dividing line between them, though both towns are negligent, and the bridge is defective in the neighboring town, where the accident is caused by a defect on their own side of the line.

ON EXCEPTIONS.

CASE, for loss of life of Mrs. Hannah Blake, the plaintiff's intestate, May 14, 1874, through a defective bridge, while she, with her husband, who was then living, but has since deceased, was removing from Oxford to Hebron.

The defective bridge was across the inlet of Matthews' pond, a small stream dividing Hebron and Oxford. The evidence showed that four stringers spanned the stream, resting upon stone abutments, fourteen feet apart at the base, and somewhat more at the top; that the planking of the bridge was twenty-four feet long and fourteen feet wide; that while Mrs. Blake was riding on her goods loaded in a hay-rack, drawn by four oxen, the up river stringer broke, and she was precipitated into the stream, and killed.

The defendants introduced evidence, tending to show that the load as it passed on to the bridge was driven so near the upper edge that the near wheel struck the plank directly over the upper stringer, and that the cart passed on to near the center of the bridge, when the stringer and ends of the plank on the upper side of the bridge broke under the near wheel, and let it down.

The plaintiff introduced evidence tending to show that the breaking occurred as soon as the cart passed from the abutment on the Oxford side; that the outside stringer on the upper end of the bridge was more or less decayed and unsound; that in conse-

quence of said decay and unsoundness, the end resting on the Oxford abutment, fell to the bottom of the stream, and the other end resting on the Hebron abutment fell therefrom about two feet; that when Mrs. Blake fell from the top of the load, a portion of the goods, including a stove, fell on to her, and that when she was taken out, she was dead.

The defendants introduced evidence tending to show that the Oxford abutment was built some five or six feet into the stream measuring at high water mark, and the Hebron abutment, but one or two feet; that the place where the wheel broke through the planks, was from four to six feet on the Hebron side of the center line of the stream.

And the plaintiff introduced rebutting evidence.

The defendants introduced the "act to incorporate the town of Oxford, approved February 29, 1829, the first section of which reads as follows:"

"Be it enacted by the senate and house of representatives in legislature assembled, that so much of the town of Hebron, in the county of Oxford, as lies south-west of Matthews' pond, so called, and the inlet of said pond, running from Paris, and the outlet of said pond, running into Minot, be, and hereby is incorporated into a town by the name of Oxford," &c., &c.

The counsel for the defendants requested the presiding justice to instruct the jury:

I. That unless the plaintiff gave notice to the selectmen of the defendant town, setting forth the plaintiff's claim for damages, and specifying the nature of the injuries received, before the commencement of this action, it cannot be maintained.

II. That as a matter of law, the south-westerly bank of the inlet of Matthews' pond, at high water mark, is the dividing line between the towns of Hebron and Oxford, and if they find the defect which caused the accident, on the Hebron side of this line, the plaintiff cannot recover.

III. That if they find the place where the cart broke through the plank on the bridge, was within the limits of the town of Hebron, they must find for the defendants.

IV. That if they find the bridge described in the plaintiff's

writ, part in the town of Oxford, and part in the town of Hebron, and that the same had been supported and kept in repair, by said towns in common and undivided, that a stringer under the bridge, extending from one abutment to the other, was so rotten and decayed that each end fell from the abutments upon which it rested, an action for damages against the defendant town alone, for injuries to which the defective stringer contributed, cannot be maintained, and their verdict must be for the defendants.

V. That if the inhabitants of the defendant town, through its officers or agents, have for more than twenty years made repairs on highways, roads or bridges, outside of its corporate limits, such labor or repairs do not operate to change town lines or boundaries, or render them liable for damages caused by defects in such highways, roads or bridges.

The presiding justice declined to give the requested instructions in Nos. 1, 2, and 4, but gave No. 5, and No. 3, with this qualification: "If it was the breaking of the planks which caused the accident, and that breaking of the planks was within the limits of the town of Hebron, undoubtedly that result would follow; for beyond the limits of the town of Oxford, or thread of the brook, the defendants are not responsible for the condition of the bridge; so that the main and great question for you to pass upon, is, whereabouts was the defect which caused the catastrophe."

The verdict was for the plaintiff, for $700; and the defendants alleged exceptions.

J. J. Perry, for the defendants.

H. C. Davis & A. Black, for the plaintiff.

Barrows, J. Action upon the case to recover for the benefit of the estate which the plaintiff represents, the damages given by R. S., c. 18, § 65, in cases of loss of life.

The accident by which the plaintiff's intestate lost her life was the breaking down of a bridge over "the inlet of Matthews' pond," described in the exceptions as "a small stream dividing the towns of Hebron and Oxford."

It was in controversy before the jury, whether the disaster occurred by reason of the breaking of a rotten stringer, as soon as

the wheel of the cart in which the deceased was riding, left the abutment on the Oxford side of the stream, or by the breaking of planks on the Hebron side of the thread of the stream.

The first exception relied on by the defendants, is to the refusal of the presiding judge to rule that the action could not be maintained unless the plaintiff had given notice to the selectmen of the defendant town, setting forth his claim for damages, and specifying the nature of the injuries received, before the commencement of the action.

To support their claim to this notice, the defendants rely upon the provision in laws of 1874, c. 215, requiring the person who receives any bodily injury, or suffers any damage in his property through any defect or want of repair, &c., to give such notice within sixty days thereafter.

Obviously this requirement applies to another class of cases. It does not by its terms embrace such as the one before us, and could only be made to do so, by a forced, unnatural and unreasonable construction which we cannot adopt.

The second exception is based upon the idea that a different rule of construction obtains as to legislative acts defining the boundaries of towns from that which governs the construction of deeds and grants and makes a running stream the boundary between co-terminous proprietors; and that the act, which makes so much of the town of Hebron as lies south-west of this stream and Matthews pond and its outlet to constitute the town of Oxford, makes the south-western bank instead of the thread of the stream, the boundary of Oxford. The idea is apparently a novel one to the inhabitants of Oxford, who seem from the fourth and fifth requested instructions to have acted on a different notion of their boundaries and duties. It was elicited, doubtless, by the exigencies of this case. Counsel seek to support it by the citation of sundry acts of incorporation where the legislature, *ex abundanti cautela*, have expressly made the centre of a stream the boundary between towns. We do not perceive that these affect the question, which is, what is the true construction, where the stream is made the boundary, and the special precaution to avoid controversy by precise and definite expressions is omitted?

We see no good reason for adopting a different rule for the construction of acts of incorporation, in the matter of boundaries, from that which prevails as to the construction of deeds and grants, and which was laid down in this state, in *Morrison* v. *Keen*, 3 Maine, 474; and has often been reiterated and referred to as settled law. *Lincoln* v. *Wilder*, 29 Maine, 169. *Pike* v. *Monroe*, 36 Maine, 309. *Robinson* v. *White*, 42 Maine, 209.

It is obvious, that as town lines are frequently made lot lines in conveyances, much confusion and inconvenience would result from applying a different rule of construction to the instruments by which they are defined, and besides imposing unjust burdens upon some towns for the benefit of others, the titles of many private individuals would be disturbed.

Where the question has arisen, other courts seem to have held that acts of incorporation and deeds should be construed by the same rule in this particular. *Cold Spring, &c.*, v. *Tolland*, 9 Cush. 492. *Ipswich, pet'rs*, 13 Pick. 431. *Knight* v. *Wilder*, 2 Cush. 199, 210. *State* v. *Gilmanton*, 9 N. H. 461. *Jones* v. *Soulard*, 24 How. (U. S.) 41. *Schools* v. *Risley*, 10 Wall. 91. *McCannon* v. *Sinclair*, 2 El. & El. 53. And in the somewhat analogous case, where a boundary of a parish is described in the statute creating it, thus: "with all the houses and grounds abutting on and upon the said road," the parish is held to extend to the middle of the road. *Queen* v. *Strand District*, 4 B. & S. 526. Construing the act of incorporation as we should construe a deed, the refusal to give the requested instruction was right. *Morrison* v. *Keen*, 3 Maine, 474. In what is called a qualification of the third request for instruction, the presiding judge merely called the attention of the jury to the controverted question of fact, upon their decision of which the applicability of the instruction depended. The instruction as given, was manifestly correct. Without the qualification, the instruction requested would have been obnoxious as an expression of opinion upon a question of fact, prohibited by laws of 1874, c. 212. There is no merit in the exception. There is no report of the instructions given, but it appears by the one to which the exception we have last considered was taken, that the jury were required to find that the defect

which caused the accident was on the Oxford side of the line, and that they were distinctly instructed that Oxford was not responsible for anything that happened by reason of the condition of the bridge on the Hebron side. This was undoubtedly correct; but it is not consistent with the fourth request, which proceeds upon the idea that if the town authorities of Oxford had seen fit to unite with those of Hebron in the maintenance of the bridge, and both had neglected their duty, and the Hebron side was defective as well as the Oxford side, the liability for an accident must of necessity be joint, and unless the injured party could maintain a joint action, he could maintain none at all. This is not so. Towns are severally responsible under the statute, for injuries suffered by reason of defects that are within their limits. The negligence of the Hebron town officers, if it produced any effect within the boundaries of Oxford, was the negligence of the Oxford officers also; and Oxford must answer for injuries caused by a defect on its own side of the line.

The liability is a statute liability, and the remedy which the statute furnishes must be pursued. The instruction requested was properly refused. *Exceptions overruled.*

Judgment on the verdict.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

BENJAMIN B. OCKINGTON *et al. vs.* THOMAS K. LAW.

Oxford, 1876.—February 25, 1877.

Promissory notes.

The plaintiffs conveyed by deed to the defendant a part of two patent rights, with a condition in the deed that the sale was to be and become void upon a default in either or any of the payments. At the same time and as a part of the same transaction, the defendant gave the notes in suit for part payment of the price.

Held, 1. That the condition in the deed was for the benefit and security of the vendors, which they alone could waive, and could not be given in evidence as a defense to an action upon the notes.

2. That an oral agreement to extend the time of payment of the notes for

a good consideration, till the defendant could make the money out of the "clothes pin business," if made at the same time and as part of the contract evidenced by the notes, was not admissible in defense to an action upon them.

3. That if such oral agreement was subsequent to and independent of the contract as shown by the notes, it would be admissible only by showing also that the defendant had used due diligence to make the money, or that such diligence would be useless, and that upon this point the burden was upon the defendant.

On exceptions.

Assumpsit on three similar promissory notes, the first of which was of the form following: "$1833. For value received I promise to pay B. B. & A. J. Ockington, or order, one thousand eight hundred and thirty-three dollars in two years from date, with interest, at 5 per cent per annum, (dated) October 14, 1872. (Signed) T. K. Law." The second was for $916.50, dated the next day, and witnessed. The third was for $916.50, dated February 26, 1873, on which was this indorsement. "August 28, 1874. Received on the within note, $807.17."

The defendant consented that the plaintiffs have judgment on the third note; but pleaded to the other two the general issue with a brief statement: 1. That they were not due at the date of the writ, February 17, 1875, (the time of payment having been extended.) 2. That they were null and void, (or voidable at his option.) 3. That the consideration had failed.

The consideration of these notes was an interest in a patent right for an improvement in the machinery for making clothes-pins, and for the patterns from which to construct the machines. The plaintiffs conveyed to the defendant a four-tenths interest at the date of the first note for a consideration of $5500, of which $500 was paid in cash and the balance in three notes, the first payable in a few days, and the second and third, for $1833 each, in one and two years respectively. October 15, 1872, the plaintiffs conveyed to the defendant two-tenths more of the same property at the same rate; and three other notes were given, the first payable in a short time, and the second and third for $916.50 each, payable in one and two years respectively.

The conveyances were by writing under seal; and each contained the condition following: "That the party of the second part shall

pay to the parties of the first part two certain promissory notes, (describing them) payable to B. B. & A. J. Ockington or order, and both signed Thomas K. Law, and payable, the first in one year and the other in two years from date, with interest, (etc.) And if there shall be default in either or any of such payments, then this deed is to be and become void and of no effect to convey said patent rights, and the party of the second part shall forfeit the money already paid."

At the trial, after the plaintiffs read the notes in evidence, the defendant offered the two agreements between the parties of October 14, and October 15, 1872, to prove that the notes in suit are the same named in said agreements, and contended that the notes were voidable at his option. But the presiding justice ruled that these agreements constituted no defense. He then offered to prove the plaintiffs agreed, in consideration that he would pay them $1000 on notes they held against him about two months before maturity, that they would extend the time of payment of the notes in suit, until he could realize enough from his clothes-pin business to pay said notes, that he paid the $1000, and that at the date of the plaintiffs' writ, he had realized nothing from his said business.

The presiding justice ruled that this would constitute no defense. A verdict was rendered in favor of the plaintiffs for the amount of the notes, and the defendant alleged exceptions.

D. Hammons, for the defendant.

A written agreement may be changed by a subsequent verbal one. *Leavitt* v. *Savage*, 16 Maine, 72. *Chute* v. *Pattee*, 37 Maine, 102. *Cummings* v. *Arnold*, 3 Met. 486. *Munroe* v. *Perkins*, 9 Pick. 298. *Richardson* v. *Cooper*, 25 Maine, 450. *Lattimore* v. *Harsen*, 14 Johns. 330. *Richardson* v. *Hooper*, 13 Pick. 446.

In *Dow* v. *Tuttle*, 4 Mass. 414, the agreement was a collateral one, not to sue for a certain time the note then in suit. The case at bar is dissimilar. The contract which the defendant offered to prove was an executed one, and the notes have never been transferred.

The agreement that, in case of failure to make either of the pay-

ments, the deed is to become void and the money paid at the time of the failure shall be forfeited, was mutual and the damages liquidated. They have by forfeiture, the property for which the notes were given; they have received $5499 therefor, which they are entitled to retain as liquidated damages.

E. Foster, jr., for the plaintiffs.

I. The agreements are independent and, therefore, constitute no defense to the notes. *Manning* v. *Brown*, 10 Maine, 49, 51, is directly in point. See also *Pitkin* v. *Frink*, 8 Met. 12, 17. *Chandler* v. *Marsh*, 3 Vt. 161. *Traver* v. *Stevens*, 11 Cush. 167. *Hodgkins* v. *Moulton*, 100 Mass. 309, 311, 312. *Dow* v. *Tuttle*, 4 Mass. 414. *Wait* v. *Chandler*, 63 Maine, 257.

II. The proof offered in regard to the extension of the time of payment of the notes would constitute no defense. *Dow v. Tuttle* and *Wait* v. *Chandler*, before cited. *Central Bank* v. *Willard*, 17 Pick. 150. To render such a collateral agreement binding so that it would release a surety on a note, the time of extension must be definite. *Dunn* v. *Spalding*, 43 Maine, 336.

It was rather an independent agreement upon which an action might lie, than a defense to the notes. *Central Bank* v. *Willard*, *Dow* v. *Tuttle*, before cited.

DANFORTH, J. This is an action upon three promissory notes, to two of which a defense is claimed upon two grounds.

I. It is contended that the notes became void because the defendant neglected, or elected not, to pay them when due. To show this the defendant offered in proof two contracts in writing of different dates but of a similar tenor, by which it appears that the notes in question were given for parts of a patent right sold to the defendant. The notes are absolute and unconditional. The contracts of sale were made at the same time the notes were and as part of the same transaction. In each of these contracts we find a clause which reads thus, "and if there shall be default in either or any of such payments, then this deed is to be and become void, and of no effect to convey said patent rights and the party of the second part shall forfeit the money already paid." These instruments are signed by both parties. In them is a sale to the defend-

ant and on his part a consent that such sale shall become void if the price is not paid, while in the notes we find an unconditional promise to pay that price. There is then a condition for the benefit of the plaintiffs, but none in favor of the defendant. However hard the contract may be we can only apply the familiar principle of law that he alone, for whose benefit a condition is made, has authority to waive it. In this case clearly the right of election rests with the plaintiffs and not with the defendant. The fact that the sale was completed and rests upon a condition subsequent and not precedent, does not change the principle. The defendant's promise is none the less unconditional and the right to avoid the sale is equally the right of the plaintiffs. The principle is the same as that of a bond for the conveyance of property upon payments secured by note. The liability of the maker of the note does not rest upon any act to be previously performed by the payee, and upon this point the ruling of the court was in accordance with a long series of authorities. *Manning* v. *Brown*, 10 Maine, 49.

II. The defendant offered to prove that the plaintiffs agreed, in consideration the defendant would pay them the sum of one thousand dollars on notes they held against him about two months before maturity, that they would extend the time of payment of the notes in suit until he could realize enough from his clothes pin business to pay said notes, and that he did pay them said one thousand dollars, and that at date of plaintiffs' writ he had realized nothing from his said business."

It is as well settled as any principle of law can be that parol testimony is not admissible to vary the meaning of a written contract, by adding to its terms, or by extending or limiting them. "Where a promissory note, on its face, is payable on demand, oral evidence of an agreement, entered into when it was made, that it should not be paid until a given event happened, is inadmissible." *Porter* v. *Porter*, 51 Maine, 376, 379. Where parties choose to commit their contracts to writing the written words are held to be the conclusive evidence of that contract. It is however just as well settled that the terms of such written agreement may be changed, modified, or its obligation wholly or in part discharged

by a subsequent, independent agreement resting upon oral testimony. In this case no time is alleged when the agreement offered to be proved was made; nor does it anywhere appear whether it was contemporaneous with the making of the note and a part of that contract, or whether it was subsequent to and independent of it. In this respect, therefore, the offer is clearly insufficient; for if the former is the offer the ruling was clearly right. Hence the excepting party fails to show that he is aggrieved by the ruling complained of.

But assuming, as we may perhaps infer from the argument and possibly from the ruling of the court, that the offer refered to a subsequent and independent agreement, still there is a fatal defect in it as a defense to the notes. If it acted upon the notes and became a part of the contract therein evidenced, still the promise to pay remained. The only change would be in relation to the time of payment, or possibly the payment might be contingent upon the success of the "clothes pin business." In either case there is a necessary element in the agreement not included in the offer of proof. The business referred to was the business of the defendant, over which the plaintiffs could have no control. The money for the payment of the notes to be made out of that business, must depend somewhat upon the exertion and diligence of the defendant and in no part upon that of the plaintiffs. Such an agreement then as the defendant offered to prove would not postpone the payment of the notes, indefinitely at least, until it appeared that the defendant had made the proper exertion and used due diligence in the business to realize the amount required. Upon this point the burden of proof must necessarily rest upon him upon whom is the duty of action, and yet the offer contains no element of this kind nor anything from which we can infer any purpose to show any effort or diligence whatever, but rather an entire absence of it. There is no proof nor an offer of any to show what profits might or might not be made from the business, or that none could be made, and efforts in that direction would be useless.

Besides if the payment were extended it would only be for a reasonable time. The case shows that the action was commenced some months after the notes were payable by their terms.

Whether this alleged agreement was made before they were payable, or when it was made, does not appear, and upon this point there is no offer of proof. Hence, in the absence of any proof or offer of any in relation to the profits of the business, neither the court nor the jury can say that the plaintiffs have not waited a reasonable time. *Sears* v. *Wright*, 24 Maine, 278. *Wilder* v. *Sprague*, 50 Maine, 354. *Bradford* v. *Drew*, 5 Met. 188.

Exceptions overruled.

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

NATHAN P. RYERSON *vs.* ROBERT A. CHAPMAN.

Oxford, 1875.—April 4, 1877.

Damages.

A grantee in a deed of general warranty, who became seized in fact of the estate granted, and was afterwards evicted by one having the superior title, is entitled in an action on the covenants to recover of the grantor the amount of all judgments obtained against himself by the party dispossessing him, after paid by him, together with all reasonable expenses attending the litigations, whether the recovery resulted from actions of trespass brought against him, or by him, if affecting the title of the estate, and if the grantee in prosecuting and defending the suits, exercised a due degree of caution and care, notwithstanding the grantor had no notice of the pendency of the prior suits.

But in case the grantor is not notified to appear in the actions, the burden will be upon the grantee to show the superior title of the recovering party, and that the actions against himself were reasonably defended, and the costs therein fairly incurred.

And as to the costs in cases in which the grantee was plaintiff, instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant, and whether the grantee was notified or not, from the nature of the facts, the burden will be on the grantee to show such items to be reasonable and proper claims, if the grantor did not appear and take upon himself the management of the suits.

ON REPORT to the full court, to settle law and fact on so much of the evidence as legally admissible.

The defendant and his brother, since deceased, were copartners in business in 1849, attached the real estate of one John Frost,

extended their execution thereon, December 21, 1849, and in consideration of $35, deeded the same by warranty, December 29, 1851, to the plaintiff, who continued in peaceable and undisturbed possession up to June, 1868, when one John E. Carleton claimed to own the premises under deeds from Frost to one Smith, and from Smith to him. The plaintiff brought an action of trespass *quare clausum fregit* against Carleton; other suits followed between Carleton and Ryerson, and those claiming under them, until some nine suits were pending, one of which, *Carleton* v. *Ryerson*, is reported, 59 Maine, 438, where the court decided the levy was not valid. Thereupon judgment followed against Ryerson in that suit and the remaining eight suits, the amounts of which he paid. He then called upon this defendant, Chapman, to make good his covenant, and according to the then understanding of some of the parties and counsel as to the law, Chapman paid to Ryerson the amount of the judgment and counsel fees in the reported case and took a receipt signed by Ryerson's then attorney, which in its terms "exonerated and relieved said Chapman on any other suits already brought against said Ryerson by said Carleton, or by said Ryerson against said Carleton."

The defendant afterwards paid the plaintiff the value of the land awarded by referees, $125, and costs $15. After which the plaintiff brought this action claiming to recover the amounts paid on the other judgments of Carleton against him, $162.67, of Hastings against him, $46.46, and of Carleton against two other defendants, G. W. and C. E. Ryerson, justifying under him, $214.06, with counsel fees $178; in all, $601.19.

S. F. Gibson & C. E. Holt, for the plaintiff, cited and relied upon *Merritt* v. *Morse*, 108 Mass. 270.

E. Foster, jr., & C. H. Hersey, for the defendant, contended, as to the facts, that the evidence did not prove actual seizin in the Chapmans, at the date of their deed to the plaintiff; it did not sufficiently appear by competent evidence that in any of the suits excepting the one carried to the law court, that the title to the premises was in controversy; it did not appear in any of the suits between third parties that any of them were the servants of the

plaintiff; and that the evidence of payment and the receipt sustained the plea of accord and satisfaction.

Upon the hypothesis of facts as found by the court, they contended that in an action for a breach of covenant of general warranty by the grantee, where he was seized in fact, and has been evicted by judgment of law, the measure of damages is limited to the value of the land, and the expenses of the single suit settling the title, and cited authorities. *Swett* v. *Patrick*, 12 Maine, 9. 4 Kent's Com. 475. 3 Wash. Real Prop., c. 5, § 5. *Hardy* v. *Nelson*, 27 Maine, 525, 530. *Gore* v. *Brazier*, 3 Mass. 523, 544. *Sumner* v. *Williams*, 8 Mass. 162, 222. Sedgwick on Dam. 168. *Pitcher* v. *Livingston*, 4 Johns. 1. *Straats* v. *Ten Eyck*, 3 Cai. (N. Y.) 111. *Bennet* v. *Jenkins*, 13 Johns. 50, 51. *Smith* v. *Sprague*, 40 Vt. 43, 46. *Pitkin* v. *Leavitt*, 13 Vt. 379.

PETERS, J. The evidence in this case is meagre. Aided by the briefs of counsel, we understand the facts, among other things, to show as follows: The defendant, getting a supposed title to a parcel of land by levy, conveyed the land to the plaintiff by a warrantee deed. The plaintiff had been in an undisturbed occupation of the land under his deed for about fifteen years, when his possession was invaded by one Carleton, who claimed title to the land upon the ground that the levy under which the defendant acquired the land, was defective and void. The plaintiff sued Carleton, and Carleton sued the plaintiff, in actions of trespass, and several other suits followed between them. While all the suits were pending, one of them was carried up to decide the question of title to the land, and Carleton prevailed, as will be seen in *Carleton* v. *Ryerson*, 59 Maine, 438. After this, the defendant paid to the plaintiff all the costs and counsel fees incurred in the defense of that action, and also paid him the value of the land from which he was evicted, but refuses to pay the damages, costs, and expenses incurred in the other actions. Several actions were brought against the plaintiff, and there were two in his favor. Several questions of law and fact are referred to us and we have, by agreement, jury powers to aid us in deciding them.

First: The defendant asserts that there is no evidence that the plaintiff received from the defendant any seizin of the land in law

or fact, and that therefore the plaintiff cannot recover, having already received more than the amount of the consideration paid therefor, with interest on the same. But we think the legitimate inference from the evidence is, that a seizin in fact was obtained. The parties have proceeded in the case upon that assumption, and the defendant claims that he has already settled all the damages on that basis.

Then, the defendant contends, that it is not shown that the judgments recovered against persons of the name of Ryerson, other than the plaintiff, arose out of suits instituted against them as the servants of the plaintiff, or that the suits were defended in vindication of the plaintiff's title to the land, or that the plaintiff had paid the judgments. But we think that these facts, though not clearly stated, are fairly inferable upon an examination of all the evidence in the case.

This brings us to the principal question of law in the case, which is, whether the plaintiff is entitled to recover, under the warranty of title, any more of the costs and expenses of litigation paid by him than what grew out of a single suit. The defendant maintains that he cannot recover more, upon the supposition that one litigation was sufficient to settle the question of title. It is our judgment that the plaintiff can recover more than the expenses of litigating one suit.

This question is pretty well solved by a reference to the nature of the covenant of warranty. The American form (in most deeds) is a brief one, but much more than is expressed therein is technically implied. It is the "sweeping" covenant in this country, and practically includes what is embraced in the covenant for quiet enjoyment generally found in English conveyances. The words of the latter covenant when set forth at length, (some short form is generally used) are these: "It shall be lawful for the said grantee, his heirs and assigns, from time to time, and all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possess and enjoy the said lands and premises hereby conveyed or intended so to be, with their, and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, to and for his and their use and benefit, without any let, suit,

trouble, denial, eviction, interruption, claim, or demand whatsoever, of, from or by him, the said grantor, or his heirs, or any person or persons whomsoever." Rawle on Cov. 182. This covers extensive ground. In *Howell* v. *Richards*, 11 East. 633, 642, Lord Ellenborough, C. J., says: "The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee or his heir takes place; if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events."

The covenant of warranty amounts to an agreement of indemnity. The foundation of a claim for damages under it, must be that an eviction, or something equivalent thereto, has properly taken place. The covenantee, who has been evicted, is entitled to have repaid to him all reasonable outlay which he in good faith expends for the assertion or defense of the title warranted to him. Weston, C. J., says: (*Swett* v. *Patrick*, 12 Maine, 9, 10,) "He (covenantee) was justified in making every fair effort to retain the land." If he is assaulted with ever so many suits, he must defend them, unless it is clear that a defense would avail nothing. If he defends but one, and lets the others go by default, he might get himself into inextricable trouble. It is as essential that he should defend all the suits as any one of them. A defender of a walled city might as well plant all his means of defense at a single gate, and leave all the others undefended, to be entered by the enemy.

The covenantee becomes the agent of the covenantor, in making a defense against suits. He should do for his warrantor what the warrantor should do for himself, if in possession. It is no more expensive for the warrantor to defend suits brought against his agent, than suits against himself, and the presumption is, that he would have been a party to the same litigations, had he remained in possession. But the agent must act cautiously and reasonably. He has no right to "inflame his own account" (11 A. & E. 28,) nor indulge in merely quarrelsome cases.

It follows, therefore, that the plaintiff may recover for the dam-

ages and costs and expenses of suits brought against him, and also for the costs and expenses of suits brought by him, affecting the title to the estate. Each suit may have been a part of the means by which the title was sought to be defended. The case in 108 Mass. 270, (*Merritt* v. *Morse*,) cited by the plaintiff, seems quite identical with this case. We have carefully considered the able argument of the counsel for the defendant, but cannot concur in it. The cases cited by him upon this point, do not go far enough to sustain his position. The language used in them is appropriate enough to the idea of one suit only being necessary to settle a question of title, but in such cases the damages and costs of one suit only were involved. None of them decide, or undertake to decide, the question presented here.

The defendant contends that he is not liable for the costs and counsel fees in some of the actions, of the pendency of which he was not notified. But notice was not necessary to put upon him such a liability. Without a notice, the plaintiff can recover his damages caused by the failure of the title warranted to him. And, in this state, the costs of the former action and the expenses of counsel fees attending it, whether in asserting or defending the title, are a portion of the damages recoverable. The want of notice of a suit to the warrantor, undoubtedly increases the burden of proof that falls on the warrantee. In such case he would be held to prove that the actions brought against him were reasonably defended, and that the costs were fairly and necessarily incurred. And as to the costs in cases in which the warrantee was plaintiff instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant, and whether the covenantor was notified or not, from the nature of things, the burden is on the covenantee to show such items to be reasonable and proper claims, where the grantor does not appear in the suits. The case of *Swett* v. *Patrick*, 12 Maine, 9, does not decide that such items are not recoverable where no notice was given, but gives the fact of notice as an additional or conclusive reason why they should be included in the damages. We are aware that it is maintained in many cases that a judgment against a warrantee is *prima facie* evidence of both eviction and

the infirmity of the title, even though the warrantor had no notice of the former litigation, in a suit by the warrantee against the warrantor upon the covenants in the deed. But we think the law has never been so regarded in this state. Such judgment "is legally admissible to prove the act of eviction, but not the superior title of the recovering party." *Hardy* v. *Nelson*, 27 Maine, 525, 530. If the grantor has notice of the former suit and an opportunity to defend, then, in the absence of fraud or collusion, the judgment in the former suit is conclusive against him. But we do not think it reasonable that a grantor should be required to prove that a judgment was wrongfully recovered against his grantee, when he had no notice to be heard. *Veazie* v. *Penobscot Railroad*, 49 Maine, 119. *Thurston* v. *Spratt*, 52 Maine, 202. *Coolidge* v. *Brigham*, 5 Met. 68. *Chamberlain* v. *Preble*, 11 Allen, 370. Rawle on Cov. 122 *et seq.* *Smith* v. *Compton*, 3 B. & Ad. 407.

The defendant's next point of defense is, that the claims now sued for have been settled by an accord and satisfaction, evidenced by a receipt which is a part of the case. We think this point in the defense fails also. This part of the controversy grows out of a misapprehension of the law by some of the parties concerned, all of whom were acting honorably. The then plaintiff's counsel supposed that what he got from the defendant was all that the plaintiff was legally entitled to receive, writing the receipt accordingly. But we think the learned counsel was in error in that respect. The receipt was not apparently given in compromise of any disputed or doubtful claim, but was intended as an admission of the sum received, and of the purpose for which it was received, and to exclude the presumption that it was given for anything else. There was no consideration for a discharge by the plaintiff of his present claim. The receipt is worded upon the mistaken idea that there was no legal claim.

Upon the question of damages, our decision must necessarily be somewhat of an arbitrary character. The case, in some of its aspects, is a blind one. The evidence is uncertain and doubtful upon some points, and lacks completeness. It does not appear whether there was any necessity for, or wisdom in bringing the

suit of replevin by the plaintiff, nor whether the suit in which the plaintiff recovered nominal damages concerned this title or not. All the costs look large. There was carelessness and folly somewhere, in carrying on so many suits. The burden is upon the plaintiff. He claims $600 and more, damages. He may have judgment for $400, and interest thereon from the date of writ.

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

OSCAR D. ROLFE *et ux. vs.* INHABITANTS OF RUMFORD.

Oxford, 1876.—May 1, 1877.

Trial.

It is error for the presiding justice to permit counsel, in addressing the jury, against seasonable interposition, to proceed with his argument upon ass erted facts not in evidence and having no legitimate pertinency to the issue.

ON EXCEPTIONS AND MOTION.

CASE, for injury to plaintiff wife through defective town way January 15, 1874.

The case was on trial nearly a week and resulted in a verdict for the plaintiffs of $275, which they moved to set aside for inadequacy, as against law and evidence. They also filed the following bill of exceptions.

"*E. G. Harlow*, one of the counsel of the defendants, in his closing argument to the jury at the trial of said case, was permitted by the court against the seasonable objection and protest of the counsel for the plaintiffs, to state to the jury the amount of damages recovered in other cases than the one on trial, concerning which no testimony had been offered and which was not in any law report, and to declare as matter of fact that said cases were identical or similar to the one then on trial; and to argue that the damages in the case on trial should in no event be greater than the damages found by the jury in the cases so commented upon; and further, that the cause of action in the case on trial had prob-

ably passed out of the control of the plaintiffs in the case, and of the administrator of Elizabeth S. Rolfe, and to state to the jury certain alleged facts as to the death by consumption of other persons than the said Elizabeth S. Rolfe, alleged by said Harlow to be within his knowledge, but concerning which no testimony was offered; and to argue to the jury that the counsel for plaintiffs came from another county, and had appeared in other cases against other towns in Oxford county, and had recovered damages therein against said towns, although no evidence was offered touching the same, which statements and arguments the plaintiffs' counsel seasonably requested the court to exclude, but which the court declined to exclude. The presiding judge failed to give any instructions touching said acts, arguments and statements of alleged facts done and made by said counsel for the town, except that the facts were to be settled from the testimony in the case given under oath."

A. A. Strout & S. C. Andrews, for the plaintiffs.

E. G. Harlow, for the defendants.

VIRGIN, J. We think the learned judge before whom this case was tried erred in permitting the counsel for the defendants, against the seasonable interposition of the plaintiffs' counsel, to proceed with his argument upon asserted facts not in evidence and having no legitimate pertinency to the issue.

It is indispensable to the orderly course of judicial procedure and an impartial administration of the laws, that those officially engaged in the trial of causes shall faithfully observe the established rules of practice. The constitution guarantees to the parties of a cause the right of a trial by a jury duly constituted, and to have the trial conducted according to the course and usage of the common law and the long established rules of judicial proceedings; and whenever these rules are substantially violated, the right of the parties litigant is to that extent denied.

The law, with great care, prescribes numerous rules for determining the admissibility of the facts to be submitted to the jury, vigilantly and scrupulously excluding from their consideration all such as do not come within the rules. These rules require among

other things that the facts shall be material and pertinent to the issue; and that, when not contained in documents, they shall be delivered under the sanctions of an oath, and their truthfulness tested by cross-examination. Even a juror's own personal knowledge of pertinent facts cannot be considered by himself and his fellows in making up their verdict unless it take on the form of testimony by being delivered from the stand by the juror under oath as a witness. Otherwise, testimony which might influence a verdict would escape the ordeal of cross-examination and discussion. As a sequence of these rules, one of the essential elements in the trial by jury is that they are sworn to render their verdict in accordance with such facts only as are adduced at the trial; and whenever it is rendered without evidence, against evidence or upon incompetent evidence which may have come to the knowledge of the jurors by direct ruling in the court room, or by accident or mistake outside of the court room, it is liable to be set aside and a new trial granted.

So the courts have usually been very firm, whenever occasion has required, in confining counsel within proper and reasonable bounds to whatever is pertinent to the matter on trial. Statements of alleged facts not adduced in evidence, and comments thereon are irrelevant, not pertinent and are therefore clearly not within the privilege of counsel; and any such practice on the part of counsel should be promptly checked, especially when objected to by the other side. *Berry* v. *State*, 10 Ga. 511. *Mitchum* v. *State*, 11 Ga. 615. *Bullock* v. *Smith*, 15 Ga. 395. *Dickerson* v. *Burke*, 25 Ga. 225. *Wightman* v. *Providence*, 1 Clifford, 524. *Tucker* v. *Henniker*, 41 N. H. 317.

In this connection we adopt the views of the courts of Georgia, and New Hampshire expressed in the following forcible and felicitous language:

"It is irregular and illegal for counsel to comment upon facts not introduced in evidence before the jury, and not legally competent as evidence. The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause, may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects

him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury, it is his privilege to descant upon the facts proved, or admitted in the pleadings; to arraign the conduct of the parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.

"To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt; and indecency in words or sentiments is contempt. This is a matter of course in the courts of civilized communities, but not of form merely; for no court can command from an enlightened public that respect necessary to an efficient administration of the law, without maintaining, in its business proceedings, that courtesy, dignity and purity which characterize the intercourse of gentlemen in private life. . . .

"When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said in answer to these views that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render their verdict only according to the evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely

disregard them. They may struggle to do so and think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested." Nesbit, J., in *Mitchum* v. *State*, *sup.* Fowler, J., in *Tucker* v. *Henniker*, *sup.* See also *Baldwin's Appeal*, (Conn.) 3 L. & Eq. Rep. 409.

Whether or not the verdict is so inadequate as to warrant us in setting it aside upon the motion, we have not considered it necessary to express an opinion. In actions of this nature, the principles upon which damages are assessed are very indefinite at best, and therefore very much is necessarily left to the good judgment and sound discretion of the jury. Hence, when, as in the case at bar, the testimony is conflicting on several points, courts are very reluctant to interfere with the verdict on the alleged ground of excessive or inadequate damages, except when it is so large or so small as to show that it is the result of perverse judgment or gross error, or that the jury had acted under undue motives or misconception. Therefore we do not pass upon the motion. But inasmuch as that part of the closing argument to which exceptions are alleged was clearly illegal and violative of the rights of the plaintiffs, and urged by an experienced counsel of high character and acknowledged ability, must have necessarily had more or less influence upon the minds of the jury, notwithstanding the instruction of the presiding justice that the case must be settled from the sworn testimony, we think the exceptions must be sustained.

Exceptions sustained.

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

INHABITANTS OF WOODSTOCK *vs.* INHABITANTS OF BETHEL.

Oxford, 1876.—May 4, 1877.

Pauper.

The annexation of a plantation to a town by an act of the legislature, which is silent on the subject of pauper settlements, does not change the settlements of the inhabitants of the plantation, which they have in other towns.

A person residing in a plantation at the time of its annexation to a town, it not appearing that he has resided there five years, retains his prior pauper settlement.

ON FACTS STATED.

ASSUMPSIT, for pauper supplies furnished Arabella Estes and her five children: John G., Sylvester B., Hannah E., (legitimate;) Eugene and Mary M., (illegitimate.)

PLEA, general issue with a brief statement that the notice was insufficient, (not stating the names of the children,) and that Arabella with her five children had her home in Hamlin's Grant plantation at the time of, and more than five years next preceding, the annexation of that plantation to the plaintiff town, without receiving supplies as a pauper.

The facts were stated in substance thus: Josiah S. Estes had his settlement in Bethel where it continued till his death in the army in 1864. He married Arabella, April 12, 1857, at Hamlin's Grant plantation. The first three children named were born in wedlock; the last two were illegitimate. Arabella and her five children had their home at Hamlin's Grant at the time it was annexed, and it continued in the same place after the annexation, which was February 13, 1873, until the supplies were furnished in April after. The "agreed statement," does not show the fact stated in the "brief statement" and relied upon by the counsel that Arabella and her children had resided at Hamlin's Grant five years and more before the annexation. It was further agreed that the settlement of Arabella and children was in Bethel at the time of the annexation and continued there till the supplies were furnished, unless the act of the legislature approved February 13, 1873, annexing Hamlin's Grant plantation to Woodstock changed it. That act is silent on the subject of pauper settlements. The objection to the notice was to its first clause which ran thus: "You

are hereby notified that Mrs. Arabella Estes and her five children inhabitants of your town having fallen into distress," etc., (not specifying names.)

R. A. Frye, for the plaintiffs.

E. Foster, jr., for the defendants.

APPLETON, C. J. This is an action for supplies furnished by the plaintiff town for the support of Arabella Estes and her five children.

Arabella Estes was legally married to Josiah S. Estes April 12, 1857, at Hamlin's Grant plantation, at which time the settlement of the husband was in Bethel where it continued to be until his death, June 22, 1864, and where the derivative settlement of the wife was at the time.

On February 13, 1873, Hamlin's Grant plantation was annexed to Woodstock, c. 269. At the time of the annexation Arabella Estes and her five children resided in Hamlin's Grant plantation and continued to reside there until April 12, 1873, when the supplies in controversy were furnished.

It is admitted by the agreement of the parties that the settlement of Mrs. Estes and children remained in Bethel up to the time the supplies in question were furnished unless changed by the act of the legislature annexing Hamlin's Grant to the plaintiff town.

Two of the children of Mrs. Estes born since the death of her husband are conceded to be illegitimate.

The notice to the defendant town set forth that Arabella Estes and her five children had fallen into distress and were in need of immediate relief and that the supplies needed to relieve such distress had been furnished.

The objection is taken that the notice is not sufficiently definite. The cases relied upon to establish the invalidity of the notice are materially different from the one under consideration. In *Bangor* v. *Deer Isle*, 1 Maine, 329, a notice that "S and his family" or that "S and several of his children" were chargeable was held insufficient for indefiniteness. In *Dover* v. *Paris*, 5 Maine, 430, that case was re-affirmed. In *Embden* v. *Augusta*, 12 Mass. 307, the notice that "the family of J S" had become chargeable with-

out stating the number of persons composing such family was held too uncertain, "inasmuch," says Parker, C. J., "as the overseers of Augusta might not know what individuals composed that family, so as to provide for their removal or support." In *Walpole* v. *Hopkinton*, 4 Pick. 358, a notice that "E S and her three children" have become chargeable, was held bad, as to the children, she having four. To the same effect was the case of *New Boston* v. *Dunbarton*, 12 N. H. 409. *Northfield* v. *Taunton*, 4 Met. 433.

But these cases have been modified by subsequent decisions. In *Orange* v. *Sudbury*, 10 Pick. 22, notice that A E and wife and three children were in distress and were chargeable, there being but three, was held sufficient. In *Lynn* v. *Newburyport*, 5 Allen, 545, the notice was Mrs. A B and three children had applied for relief, etc. "One objection taken to the notice is," observes Metcalf, J., "that they do not mention the names of the children of the several parents. But it is not shown nor even suggested that either of the parents had more than three children. The cases of *Walpole* v. *Hopkinton*, 4 Pick. 358, and *Northfield* v. *Taunton*, 4 Met. 433, and other similar cases do not sustain the objection."

In *Burlington* v. *Essex*, 19 Vt. 91, it was held that the order of removal of a pauper and his wife and four children would not be quashed although it did not state the names of the children nor allege that they were minors. The objection was taken that the notice was defective and reliance placed upon the cases where the notice was that A B and family were chargeable, etc. "But that reason fails in this instance," remarks Royce, C. J., "since the family is described as consisting of the pauper's wife and his four children. It is contended that the defect is not cured, inasmuch as the children are not alleged to be minors. But we think the want of such an averment is not fatal. For so long as it appears they were the pauper's children and living with him as part of his family, we should rather intend that they were dependent on him as a parent and subject to parental control, than that they were adult children and emancipated." Here the case shows the children were minors.

The notice here stated truly and definitely the number of the children of Arabella Estes, unless the doctrine that a bastard is

nullius filius, is to be invoked to negative the truth of the number of children as set forth in the notice of the plaintiff town. The statute settles that they have the settlement of the mother.

This is a case of the annexation of a plantation to an existing town. It is not a case of a division of towns. The plaintiffs' case is not within R. S., c. 24, § 1, rule 4, which relates to the division of towns, nor to rule 8, which refers exclusively to the incorporation of unincorporated places. The brief statement of the defendants alleges a residence of the paupers for more than five years in the plantation of Hamlin's Grant, but that fact is not admitted in the agreed statement, nor is it in proof. The paupers, therefore, have no settlement in the plaintiff town.

It may not be amiss to observe that the law as to the effect of incorporation on those resident in an unincorporated place at the date of such incorporation, has been materially changed since the passage of the laws of 1821, c. 122, relating to paupers, and consequently the decisions in relation to that statute are somewhat inapplicable to the modifications and changes in subsequent revisions. *Judgment for plaintiffs.*

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

JAMES HOBBS, administrator, *vs.* EASTERN RAILROAD COMPANY.

York, 1875.—August 28, 1876.

Railroad. Trial.

In an action on the case against a railroad company to recover damages sustained by a passenger, through the alleged fault of the servants of the defendant corporation, at the trial of which it was claimed that the fault consisted in whole, or in part, of a violation of the established rules of the company, a book containing the rules and regulations of the company, and intended for the use of their employees, to direct them in the discharge of their duties, is admissible in evidence.

Where the issue before the jury is upon the negligence of the parties, and the testimony upon the points in controversy is conflicting or uncertain, it is not erroneous for the presiding judge, after stating to the jury in language to which no exception is taken the degree of care required on either side and that the plaintiff's right to recover depends upon proof to their satisfaction that the

injuries were received by the fault of the defendants, without fault on the part of the passenger contributing to the result, to decline upon request to determine as matter of law whether a certain state of facts, claimed on one side to exist and denied on the other, would or would not constitute negligence.

In such case the presiding judge is not required to anticipate every possible phase of disputed facts and determine in regard to each of them whether negligence, on the one side or the other, does or does not result therefrom as a legal conclusion; but may properly leave it to the jury to say under the rules of law given whether, upon the facts as they find them, any want of reasonable care on the passenger's part contributed to produce the injury.

On exceptions and motion.

Case for negligence of the defendants, whereby the plaintiff's intestate was so injured that she died. The full stenographic report of evidence and charge made part of the case on both motion and exceptions.

The declaration, with some other necessary averments, alleges that on November 6, 1872, the defendants carried the plaintiff as a passenger for hire, from North Berwick to South Berwick junction, arriving in the night time, and were negligent in not affording the intestate proper time or means of departure from the cars, and in the management and control of their engine and cars, that while she was in the act of departing from the cars, the defendants, suddenly and without warning to her, started their engine and cars backward with great force, whereby she was thrown under the wheels and run over by the cars, by reason whereof her arm was crushed and severed from her body, and that she was otherwise injured, and thereby suffered great pain of body and anxiety of mind, put to great expense, and rendered unable to live.

The evidence tended to show that she was injured in the manner alleged; that she was taken home, some thirty rods, by her husband, who was an employee of the railroad at the station; that a surgeon was called and amputated the arm, and that she died in the afternoon of the next day; that the train was made up of cars belonging to two railroads, the Eastern ahead, and the Boston & Maine in the rear, all drawn by one engine; that the cars of the two companies separated at the junction; that the Boston & Maine end of the train was detached about a quarter of a mile from the station at the South Berwick junction, the usual place; that a switch divided the trains about fifty rods from the

depot, and the Eastern train ran some two hundred feet past the depot, and then suddenly backed without the signal which the rules of the company required; that the cars had arrived at the platform, and were still in motion when she attempted to alight, and somehow went under the moving train. The defendants' theory was, that she held to the rail with her right hand, having her valise in the left, facing the rear end of the car, that in stepping towards the platform, without releasing her hold, she swung around and fell on her face, her left arm under the cars; but to this theory the plaintiff's counsel did not agree. There was evidence further tending to show that she was warned before alighting, not to get off while the cars were in motion, and that there would be time enough after the cars stopped.

The exceptions state thus: Against the seasonable objection of the defendants, the plaintiff was permitted to introduce in evidence a book entitled: "General rules and regulations of the Eastern Railroad," "For employees only." "August 5, 1872." "First edition"—and to read from the same at his pleasure, and the book went to the jury, and was by them carried to the jury room.

The defendants requested the presiding judge to instruct the jury, "that if any want of due and ordinary care on the part of Mrs. Hobbs contributed in any degree to cause the accident, resulting in her death, the plaintiff cannot recover." The judge gave appropriate instructions as to ordinary care and contributory negligence, but added: "What were the exact circumstances there that night? You do not know precisely; you haven't it from living witnesses. Nobody that has testified saw Mrs. Hobbs come away from that train, leave that car. . . . . There is no doubt of one fact, and it is admitted that she was fatally injured there. Just how it was done, there is no evidence that I am aware of, except such as may be inferred from such facts as you have. Whatever was done by her, was she in the exercise of due and ordinary care? If she was, and the railroad company was at fault, under the instructions I have given you, this plaintiff has a right to your verdict. If she was not in the exercise of due and ordinary care by getting out upon that platform while the cars

were in motion, backing upon the track to adjust themselves to the station, then there is one further question. Although the railroad company was in fault, and though the plaintiff was also in fault by not being in the exercise of due and ordinary care, still, if her want of care did not contribute to the injury, she can recover."

The defendants requested to have the jury instructed: "That if Mrs. Hobbs stood upon the lower step of the foot-board, encumbered with baggage, and attempted to alight therefrom while the train was in motion, this was such negligence as to preclude the plaintiff from maintaining this action." This instruction the judge declined to give, but left it to the jury to say whether, upon the whole facts, the negligence, or want of due and ordinary care, of Mrs. Hobbs, contributed at all to produce the injury which resulted in her death.

The verdict was for the plaintiff, for $5000; and the defendants alleged exceptions.

E. B. Smith, with whom was *I. T. Drew*, for the defendants.

G. C. Yeaton, for the plaintiff.

VIRGIN, J. This is an action on the case brought to recover damages for personal injuries sustained by the plaintiff's intestate a passenger on one of the defendants' trains. The injuries were fatal, and are alleged to have been the result of negligence on the part of the defendants' servants in the management of the train. The verdict was for the plaintiff in the sum of five thousand dollars, and the case comes before this court upon exceptions and a motion for a new trial.

The first exception to the admission of the book containing the rules of the defendant corporation, is not insisted upon in the argument and cannot be sustained. The admission of the book as part of the evidence in the case for the purposes and under the limitations stated in the charge (to which the bill of exceptions authorizes the court to refer) was not erroneous; and the use of it by the jury in their room after retiring to consider the verdict, was within the discretion of the justice presiding at the trial.

Exceptions are also taken to the refusal of the presiding justice

to give two specific instructions requested by the defendants, upon the subject of contributory negligence on the part of the plaintiff's intestate, and to certain extracts from the charge as it was given, relating principally to the same topic.

Although the precise language of the first request was not adopted by the court, the right of the plaintiff to recover was made to depend throughout the charge, upon proof to the satisfaction of the jury that the injuries were received by the fault of the defendant company without fault on the part of the plaintiff's intestate contributing to the result; and the degree of care required on either side, failure to exercise which would constitute a fault, is stated in language to which no exception is taken. It can only be said that the first requested instruction was refused in the precise terms in which it is drawn: but this affords no ground for exception since its entire substance was covered by the charge as given.

The bill of exceptions further states that the judge gave appropriate instructions as to ordinary care and contributory negligence, but then follow certain sentences from the charge, to which exception is taken.

We do not perceive that this exception is urged in argument, and upon examination we fail to see that whether standing alone or taken in their proper connection with the instructions of which they form a part, they are not, so far as they touch upon any matter of law, in exact accordance with well recognized and established legal principles.

The remaining exception has reference to the refusal of the court to give the instruction last requested.

This was substantially a request in a case where the issue was upon the negligence of the parties and where the testimony upon vital points was not only more or less remote and uncertain, but seriously conflicting, to withdraw from the consideration of the jury and to determine, as matter of law, the question whether a certain state of facts, claimed on the one side to exist and denied on the other, would or would not constitute negligence on the part of the plaintiff's intestate. To grant the request, or at least to sustain exceptions for not granting it, would be to make the

question of negligence, upon admitted facts, in all cases, in the first instance, a question purely of law. If it were erroneous to refuse this, it would have been equally erroneous for the court to decline upon request to declare whether any other state of facts, which it would be possible, or at least justifiable, for the jury to find from the evidence, would or would not constitute negligence on the one side or the other.

The decisions and the practice in the courts of this state do not go to that extent. The law establishes the standard of care required in given cases. It furnishes general rules and principles —as given to the jury at this trial—by which to determine whether the conduct of men, under varying circumstances, has been charterized by a reasonable degree of discretion, or by the absence of it, whether there has been in any instance a departure from that standard. Whether there has been an absence of the degree of care required, is usually a question of fact. More especially should it be so regarded where the facts must be evolved from a mass of testimony more or less doubtful or conflicting, and where it might be impossible for any number of instructions based upon supposed facts to cover the actual finding of the jury.

We are aware that this court, in *Webb* v. *P. & K. Railroad*, 57 Maine, 117, 131, has said in substance that possibly there might be a case where the facts were so clear and free from controversy as to make the question of negligence a question of law, and that this doctrine may perhaps have been confirmed by the recent case of *Kellogg* v. *Curtis*, 65 Maine, 59; but we know of no case in this state in which it has been held to be error on the part of the judge presiding at the trial of a case like this to decline to select a series of facts possible to exist from the testimony and state to the jury as matter of law whether such facts, if found, would or would not constitute negligence.

In cases like the present, which involve the credibility and the accuracy of witnesses, where the questions in controversy are questions of fact, where the vital issue is to be determined by drawing the correct inference from facts which immediately preceded and immediately followed the principal transaction, and when it is possible to perceive more than one decision at which the tribunal

established for determining questions of fact might arrive without being open to the charge of manifestly disregarding the evidence, it is not the duty of the judge to anticipate every possible finding of the jury and state to them whether negligence is or is not the legal inference from each. In view of the instructions given, the refusal to give the last requested instruction affords no ground for exception. However true it may be as a proposition of fact, that the acts set forth in said request would constitute negligence on the part of the plaintiff's intestate, notwithstanding, even, it might be the duty of the court (if the facts supposed were the real ones,) to set aside a verdict of the jury to the contrary, as against evidence, yet after full and appropriate instructions on this subject, it was not error on the part of the judge to decline to assume these facts as an hypothesis and declare that they would constitute negligence. Clear definitions to the jury of what the law means by the term negligence, and the control of the court properly exercised over verdicts erroneously rendered, will be adequate to preserve the legal rights of parties without requiring the judge presiding at a jury trial first to determine what may be the possible phases of disputed facts, and then to withdraw each from the consideration of the jury and say as matter of law whether negligence on the one side or the other does or does not result as a legal conclusion.

The exceptions state that after declining to give the requested instruction, the judge left it to the jury to say whether upon the whole facts Mrs. Hobbs' negligence or want of due and ordinary care contributed at all to produce the injury which resulted in her death. This was correct.

Upon the motion for new trial on the alleged ground that the verdict is against law and evidence, much that has been said in regard to the exceptions is pertinent.

That the defendant corporation was in fault, that at the time and place of the injury it was conducting the train on which the plaintiff's intestate had taken passage without reasonable regard for the security of passengers and in violation of provisions of law intended to promote the safety of travelers upon railways, are conclusions to which if the jury were not compelled, they were at least justified in reaching. Whether such fault on the part of the

defendants was the sole cause of the injury, or whether the negligence of the plaintiff's intestate contributed in any degree to cause it, are questions upon which the jury have passed under correct rulings on matters of law. After careful examination of the case we do not find such disregard of the instructions of the court or such errors in findings of facts as will justify us in setting aside the verdict.

A partial obscurity rests upon the case as to what took place at the very time when Mrs. Hobbs left the train. But if the jury found that at that moment the backing train had halted and by a sudden start, she while in the act of alighting was thrown under the wheels, or if they found that the train while backing, did not stop entirely, but that Mrs. Hobbs, while standing upon the platform of the car and not attempting to alight, was thrown off and under the wheels by a quick sudden increased motion of the train, we could not say that either finding was manifestly against the evidence in the case, or that it was easy to find any theory which would better explain the facts of the case, than one of these; and if the jury were warranted upon the testimony in finding either of the above theories to be facts, then the other testimony in the case clearly justified them under the rulings given in finding that the defendants were liable. *Sauter* v. *N. Y. C. & H. R. Railroad*, New York case not yet reported.

The motion founded on the alleged ground that the damages are excessive, is also overruled.

There is no evidence of misconduct, mistake or prejudice on the part of the jury except the presumption which it is claimed arises from the verdict itself. In this class of cases, wide discretion is left to the jury in the assessment of damages, and it is clearly at present the intent of the laws of this state that it should be so.

We know of no standard by which it can be determined that the sum of $5000 for injuries sustained under the circumstances developed in the testimony in this case and resulting in death, are excessive. *Motion and exceptions overruled.*

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

JOHN H. SEED *vs.* NOAH E. LORD.

York, 1876.—November 21, 1876.

Sale.

When personal property is sold to be paid for by note, the giving of the note is a condition precedent; and the title does not pass until the condition is performed or waived.

The absolute delivery of property thus sold is not necessarily a waiver of such condition; but such delivery may be controlled by other evidence.

In such case, sending the note to the vendor many days after the delivery of the property, after the vendee has become insolvent and suspended payment, after notice from him to the vendor of his inability to pay, and after possession taken by the vendor, is not such a compliance with the condition as will pass the property.

ON REPORT.

REPLEVIN of twenty packages of wool of the value of $1050, belonging to the plaintiff, from the defendant by a writ served August 19, 1875.

Plea, non cepit, with a brief statement, that the defendant, a deputy sheriff of this county, attached the wool by virtue of a writ in favor of *Pike et al.* v. *Brierly & Son*, that the plaintiff sold and delivered the wool to Brierly & Son, that after sale and delivery, the Brierlys suspended payment, were adjudicated bankrupts and their property conveyed to one Sanborn, assignee, that subsequently they made a composition with their creditors (at 19 per cent) and Sanborn by decree of court re-conveyed to the Brierlys.

The evidence tended to show that the wool of the plaintiff in New York, was sold to the Brierlys at Acton, by a commission merchant by sample; if when received it complied with the sample, (of which they were the judges) they were to send a note on ninety days. The wool was forwarded. The circumstances of sending the note after their insolvency, and the efforts of the plaintiff to reclaim, and other facts appear in the opinion.

W. J. Copeland, for the plaintiff.

I. T. Drew, for the defendant.

DANFORTH, J. An action of replevin, in which the title to the property, a quantity of wool, replevied is in question. The plain-

tiff was the original owner and through a broker agreed to sell it to Edward Brierly & Son. In pursuance of that agreement, the wool was shipped to the vendees July 30, 1875, and received by them August 4th. On the 11th of August the defendant, then a deputy sheriff, attached the wool as the property of Brierly & Son, on a writ in favor of their creditors.

It further appears from the bill sent with the wool, and from the testimony of the broker who negotiated the sale, that it was to be paid for by a note on ninety days, with interest after thirty days.

The legal effect of such a contract, is, that the giving of the note is a condition precedent, and until that is done or waived, the title does not pass from the vendor. *Stone* v. *Perry*, 60 Maine, 48. *Whitney* v. *Eaton*, 15 Gray, 225. *Hirschorn* v. *Canney*, 98 Mass. 149. Nor is a delivery under such a contract though absolute, necessarily a waiver, but whether so or not is a question of fact to be ascertained from the testimony. *Farlow* v. *Ellis*, 15 Gray, 229. In this case we find no evidence which would authorize an inference of waiver; it all tends the other way.

The next question is whether the condition was complied with, so that at the time of the attachment the property had vested in the purchasers. We think the testimony clearly shows that it had not. True the note was sent, but probably not until after that time. But if before, under the circumstances, it was not in season. It was certainly a number of days after the wool was received, and after it was well known that the vendees were insolvent. Before it was sent, the vendees, by letter, informed the plaintiff of their inability to pay and, at that time, neither sent the note nor said anything in relation to it. From this neglect we can only draw the inference that they had then decided not to do so, and the notice must have been for the purpose of enabling the plaintiff to assert his rights under the contract, and resume the possession and control of his property. Thereupon the plaintiff by his agent takes the necessary means to get his property, and after a time gets it into his actual possession for the purpose of having it returned, and was prevented from returning only by the interference of the vendees, not on their own account, but as it seems instigated by two of their creditors. It was after this, and by the advice of coun-

sel, that the note was sent. Under these circumstances it would seem clear that the property had not vested in Brierly & Son, but remained in the plaintiff. As it had not vested in Brierly & Son, there was nothing for the attachment to fasten upon. Their creditors could take no more rights than they had. *Whitney* v. *Eaton*, above cited.

But assuming that the title passed by the delivery, still the defendant would be in no better condition. Before the vendees had actually received the wool into their possession, they, as well as others, had become aware of their insolvent condition. It was therefore equitable that the sale should be rescinded though the plaintiff's right of stoppage *in transitu* may have ceased. The vendees apparently recognizing this equity, notified the vendor of their inability to pay, and neglected to send the note. We can account for this only on the ground of their willingness, if not desire, that the contract of sale should be rescinded. The interest and act of the vendor is sufficient proof of his concurrence. He at once takes the proper steps to accomplish that purpose by sending his agent for the property, and that agent takes it into his possession. Whether this possession was with the absolute or conditional consent of the vendees, is made a question upon which there is a conflict of testimony. But assuming that it was conditional, it is evident that the condition was imposed only in behalf of creditors. The vendees had no objection on their own account, if it would not interfere with the rights of creditors. At that time no attachment had been made, no rights of creditors intervened. The only parties interested were the parties to the sale; all that was required to accomplish the rescission was their concurrence and that was had.

Judgment for the plaintiff, with one cent damage.

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

CORNELIUS SWEETSER *vs.* BOSTON & MAINE RAILROAD COMPANY.

York, 1876.—January 11, 1877.

Assumpsit.

In an action of assumpsit for the value of earth taken from the plaintiff's land by a railroad company's engineer for the construction of their road, submitted to the full court to settle law and fact, where the defense was, that the taking was tortious, and not under a contract, and the evidence was, that the engineer asked permission of the owner to take the earth, and there was no evidence of any reply, the full court found there was a contract, and ordered judgment for the plaintiff for damages.

ON REPORT to settle law and fact.

H. Fairfield, for the plaintiff.

G. C. Yeaton, for the defendants.

LIBBEY, J. This is ASSUMPSIT to recover for a quantity of earth taken from the plaintiff's land by the defendants, by their agent, and used in the construction of their railroad. The taking of the earth by the agent of the defendants, duly authorized therefor, is not controverted. But it is maintained on the part of the defendants, that the evidence does not show that it was taken by virtue of any contract, express or implied, but on the contrary that the taking was tortious. If this is so, then this action cannot be maintained, because the plaintiff has not shown that the defendants converted the earth taken into money, or money's worth, and he cannot therefore waive the tort, and maintain assumpsit. To maintain this action, the plaintiff must show that the earth was taken by defendants by virtue of a contract, express or implied. Upon this point there is no conflict of evidence. The only question is, what inference can legitimately be drawn from it. Henry Bacon, engineer-in-chief, of the defendants, having charge of the construction of the extension of their railroad, says: "I remember the borrow pits made on the Joseph Mitchell farm. They were made by my direction. I asked Mr. Sweetser's permission to take the earth. The pits were staked out under my general direction, by W. A. McKey, who was assistant engineer." There is no evidence showing the response of the plaintiff when Mr. Bacon asked

permission to take the earth. The evidence shows that the plaintiff owned the Joseph Mitchell farm; that defendants commenced taking the earth in the fall of 1872, and continued taking it till some time in 1873, and that the taking was of such a character as to do permanent injury to the estate. There is no evidence of any objection by plaintiff, nor by his tenant, Mitchell, who occupied the farm. Although the evidence fails to prove directly the response of the plaintiff, when Mr. Bacon asked his permission to take the earth, we think, from the facts proved, the inference may justly be drawn that Mr. Bacon had the plaintiff's consent before going on to his land, and taking the earth. It would not be just to him to infer that, admitting the plaintiff's title and claiming no right to enter upon his land in behalf of the defendants, he applied to him for consent, and it was refused, and he then went on and took the earth, thereby committing a willful trespass. The fact that the plaintiff consented to the taking, and that thereby Mr. Bacon acted lawfully, is consistent with all the facts in the case. In such case the inference should be that consent was given, and that the taking was lawful, and not that it was a willful violation of law. The defendants having taken the earth from the plaintiff's land by his permission, the law implies a promise to pay a reasonable compensation therefor.

The plaintiff's witness states the quantity taken to be, by measurement, 5,818 and 28-100 cubic yards. The defendants do not controvert this evidence. The evidence of the value of the earth taken, comes wholly from the plaintiff's witnesses, who estimate it at from ten to twelve cents per cubic yard. Upon the evidence in the case we assess the damages at five hundred and eighty-one dollars and eighty-two cents, with interest from the date of the writ. *Judgment for plaintiff.*

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

ORREN G. JONES *v.* INHABITANTS OF SANFORD.

York, 1874.—January 30, 1877.

Town.

Under the statutory provision that the notice for a town meeting shall be posted seven days, unless the town appoints by vote in legal meeting a different mode, the defendant town voted that its meetings (with certain exceptions named) should be notified by posting a notice therefor not less than three months. *Held*, that a town by-law or ordinance requiring so long a notification is unreasonable and on that account unauthorized and void.

A town does not exceed its powers by making a contract to allow a dramatic company the use of its town house for the period of six years, when not wanted for town purposes, in consideration of money to be expended by such company for enlarging the building and putting upon it necessary repairs.

ON REPORT.

ASSUMPSIT, for $2000 for labor done and materials furnished, in the fall of 1872, under a contract signed by a committee of the defendant town, in the improvement and repairs of their town house. A part of the improvements was the adding of an upper story for a hall for the use in part of a dramatic company in consideration of certain aid in the repairs. No question was made but the plaintiff performed his part of the contract and the dramatic company rendered such aid as they agreed.

The defense was that the seven days notice, under which the town meeting was called which acted in the matter, was not sufficient and, therefore, that the committee appointed at the meeting were not authorized to contract; and further, that the town had no power to make such an arrangement with the dramatic company.

Copies of certain town records were put in, the preliminary parts of which are omitted as no point was made of any irregularity other than as before stated.

A record of a town meeting of the defendants, August 3, 1872, shows: "Voted that the Sanford Dramatic Company and others be permitted to make an addition of thirty feet in length to the town house, provided that they furnish the frame and raise it, and board and clapboard and shingle it at their own expense, and also that they be permitted to make such alterations, put in such par-

titions and furnish such additions as they may need, provided they do the same at their own expense."

Also, "voted that the town agree that the Sanford Dramatic Company shall have free use of the town house for their entertainments for six years on condition of their making such additions as above voted, reserving the right of the town to use said house at any time they may need it for town business and also the right to let it for all other purposes."

Also, "voted that the town, on conditions that the Sanford Dramatic Company and others put on the town house an addition of thirty feet and furnish as per foregoing votes, will at the same time and in connection with said alterations put on said house an additional story of suitable height for a hall and permit the said Sanford Dramatic Company to use the upper story for their entertainments, reserving for the town the right to let said hall, for their own benefit, to all other parties."

Also "voted to choose three persons as a committee on the part of the town, to superintend the alterations and additions to the town house, make a plan and specifications and to empower them to contract, in behalf of the town, with some person or persons to do the work or to let out by the job the improvements above voted, provided the Sanford Dramatic Company shall do the amount of work above voted. Chose I. S. Kimball, Hosea Willard and Moses W. Emery said committee."

On the point of insufficient notice, the defendants put in copy of record of a town meeting, held June 4, 1868, which stated the organization and vote, which was unanimous, not to take $20,000 of stock in the Portland & Rochester Railroad, and then voted:

"That all future meetings of the town, until otherwise legally directed by the town, be notified by posting a true and attested copy of the warrant in three public and conspicuous places in the town, one of which shall be the outside of one of the main outer doors of the town house in said town, at least three months before the day named for said meeting; provided, that this vote shall not apply to the annual March town meeting for the election of town officers, nor to the September town meeting, for the election of state and county officers, nor to the November town meeting

held to vote for presidential electors, but these last named meetings shall be notified as heretofore, and all other meetings shall be held as by this vote contemplated."

It was admitted "that meetings of the town had been called and held prior to June 4, 1868, upon the question of aid to the Portland & Rochester Railroad Company, said meetings having been holden on April 25, May 25, May 26, May 28, May 29, May 30, June 1, June 2, June 3, in the year 1868, such meetings having been held upon several warrants; also that since that date all the meetings of the town, fifteen in number, have been holden upon warrants on which seven days' notice had been given, with the exception of a meeting holden June 21, 1873, upon three months' notice, such meetings having been for the purpose of raising money, acceptance of ways laid out, and the ordinary business of the town."

J. Dane & E. E. Bourne, for the plaintiff.

A. Lowe, for the defendants.

PETERS, J. On June 4th, 1868, the defendant town, at a legal meeting, voted that all future meetings of the town, with the exception of the annual spring and fall meetings, and the November meeting for the choice of presidential electors, should be notified by posting a notice therefor, for a period of time, not less than three months. Was this vote a valid one or not? If it was, then the meeting that authorized the contract in question to be made, having been called under the usual statutory (seven days') notice, was an illegal meeting, and the contract cannot be sustained. If it was not a valid vote, then the contract can be sustained, and the defendants are liable under it.

The defendants maintain their authority for passing the vote requiring three months' notice, under the provision of R. S., c. 3, § 7, which prescribes how and what notice shall be given for a meeting; "unless the town has appointed by vote in legal meeting, a different mode, which any town may do."

The plaintiff's interpretation of the statute, is, that a town can regulate the means by which a notice shall be made known to the inhabitants, but that they cannot prescribe the length of time that

the notice shall be published; and the defendants claim the correct interpretation to be, that "the mode" of calling a meeting embraces both the manner and duration of the notice. We think it would be difficult to sustain this position of the plaintiff. It would seem hardly practicable to confer only a partial discretion upon the town in such a matter. We are inclined to think that the design was, to restore to the town the privileges in that respect that were anciently enjoyed. Formerly, such notices were regulated by some practice or usage, or vote of the town; and town meetings were notified in many different ways, without any uniformity as to the length of time that the notices for them were given. The present statute is copied from the revision of 1841. Prior to that time the statutory provision for notice was no more than this: "The manner of summoning the inhabitants to be such as the town shall agree upon." Laws of 1821, c. 114, § 5. There, "the manner of summoning" the inhabitants included both the kind of notice and the length of time it should be given. While the section under examination uses the word "mode," another section employs the word "manner" in the same connection. Section 21, c. 11, R. S., provides that a school district, "at a legal meeting, may determine the manner of notifying its future meetings." The following cases have a tendency to show, somewhat indirectly, that "the mode" of calling a meeting, (as now styled,) or "the manner" of calling it, (as sometimes styled,) embraced both the kind of the notice and the time it should be given. *Moor* v. *Newfield*, 4 Maine, 44. *Tuttle* v. *Cary*, 7 Maine, 426. *Ford* v. *Clough*, 8 Maine, 334. *State* v. *Williams*, 25 Maine, 561, 566. *Christ's Church* v. *Woodward*, 26 Maine, 172, 179. *Jordan* v. *School District No.* 3, 38 Maine, 164. *Kingsbury* v. *School District in Quincy*, 12 Met. 104.

But there is a ground upon which, in our opinion, the vote requiring a three months' notice, should be regarded as invalid; and that is its unreasonableness.

In the first place, it cannot be questioned that the legislature, by the statutory provision referred to, conferred on the town merely a right to pass an ordinance or by-law. Ordinance and by-law are practically equivalent terms. *Heland* v. *City of Lowell*, 3 Allen, 407. And see Dillon on Mun. Cor. vol. 1, § 245, and particularly his citations in notes to this section.

It is also well settled, that ordinances and by-laws of municipal corporations, to be valid, must be reasonable, and not oppressive in their character. Any unreasonable ordinance or by-law is void. Numerous authorities bear out this proposition. *Kennebec & P. Railroad* v. *Kendall*, 31 Maine, 470, 477. *Wadleigh* v. *Gilman*, 12 Maine, 403. A. & A. on Corpor. § 347. Bac. Abr. By-Law. Dillon, cited *supra*, § 253, and cases there cited. If this was not so, it is easy to be seen, that a town could require such a length of notice as would really prevent the holding of any meeting during the year, except the September meeting, the day for which is fixed by a constitutional provision.

Whether a by-law or local ordinance is reasonable or not, is a question of law for the court. This proposition is too well settled to be argued. *Commonwealth* v. *Worcester*, 3 Pick. 473. *Boston* v. *Shaw*, 1 Met. 130. *Commonwealth* v. *Stodder*, 2 Cush. 562. *Commonwealth* v. *Robertson*, 5 Cush. 438. Dillon on Mun. Cor., vol. 1, § 261.

This principle does not apply, where that is done by a municipal corporation which is directly authorized to be done by the legislature. But where the power granted is a general one, the ordinance passed in pursuance of it, must be a reasonable exercise of the power or it is invalid. It is an authority, however, to be cautiously applied by courts. Discretionary powers are not, except in exceptional cases to restrain gross abuses, subject to judicial control. Dillon on Mun. Cor., vol. 2, § 669.

By this criterion, we think the vote requiring three months' notice for an ordinary town meeting, was unreasonable; that it was an abuse, rather than a fair use, of the power entrusted to the town. It was undoubtedly intended to prevent an expression of the public will upon certain public measures. It was so exorbitant a demand, it has never been at all observed in any way, until it was invoked as a defense to this suit. It appears that the town itself paid no regard to the vote in any of its subsequent (fifteen) meetings; and many important proceedings of the town could be questioned, if the vote is upheld. Not a murmur was raised against the legality of the meeting when the contract now in suit was authorized to be made, although the question of the expedi-

ency of the contract was stoutly contested. The vote amounted to almost a denial, to a portion of the inhabitants, of the right of assembling to consider questions of public interest, should such questions arise. The action of the town might be demanded in various ways, upon questions of public concern, without a reasonable opportunity being afforded them to act, both in times of war and peace, if such a vote were to stand. Questions unforeseen at the annual meeting, requiring immediate consideration, might come up in relation to taxation, the schools, the poor, the public health, and the public defense, and in many other ways. A freshet might carry away a bridge, and the public travel be blocked for at least one-fourth of a whole year before the town might have an opportunity even to consider how it should be replaced. Town officers might refuse to accept, or die, or resign their places, and others could not be elected for three months. An act of the legislature might be submitted to the votes of the people, and this town have no chance to vote upon it, for want of time to give the required notice to the inhabitants. Many illustrations could be added, showing how unreasonably might the inhabitants, or a portion of them, be affected by the operation of such a vote.

In fact, the whole theory of a New England town meeting, has been, that upon all necessary occasions, the inhabitants upon short notice, could come together. Upon this idea is based the provision (R. S., c. 3, § 4,) that where the selectmen unreasonably refuse to call a town meeting, a justice of the peace may call one upon the application of any ten or more voters. But this privilege became practically nullified by this vote, as far as the voters of Sanford are concerned. The vote is incompatible with all the statutes requiring notice in other cases. The general law requires a notice of seven days; plantations can organize in fourteen days; all processes of court require a notice of but fourteen days, save such as are to be served on corporations, and on them require but thirty days' notice; corporations can organize after seven days' notice; parish and religious societies are called together upon seven days' notice; proprietors of lands, wharves, and other real estate, in common, upon fourteen; a foreclosure of mortgage requires three publications, which may be accomplished in about

fourteen days. Three months is all the time required to constitute a resident in this state a voter. There is no statutory notice of any kind, anywhere that we are aware of, analogous to a notice of a call for a town meeting, that requires a publication or service for a time exceeding thirty days at the outside. We venture to say, that there cannot be found any law of any state, ever prescribing the necessity of a three months' notice for an ordinary municipal meeting, or anything like it. By the English municipal corporations' act, three days' notice only is required of the time and place of a meeting, by posting the call on or near the town hall. 1 Dillon on Mun. Cor., § 203. Seven days' posting was adjudged to be a reasonable notice of a town meeting, in *Rand* v. *Wilder*, 11 Cush. 294.

Our conclusion is, that the vote in question, undertaking to establish a law of the town requiring such a notice, was unauthorized and void. This conclusion sweeps many of the other points from the case, making their consideration unnecessary.

The defendants contend that the town exceeded its powers in several respects pertaining to the claim of the plaintiff. First, that it was beyond the scope of its authority, to raise money to afford aid and encouragement to a "dramatic company." But no such design appears to have been entertained. The end to be attained was, to get an improved town hall, and the contract with the dramatic company was designed as a means by which it could be accomplished. This mode decreased the amount of money necessary to be raised.

Then it is said that the extensiveness of the town house, as rebuilt and added to, was beyond the reasonable wants and the ability of the town. "But," as said in *French* v. *Inhabitants of Quincy*, 3 Allen, 9, cited by the plaintiff, "within reasonable limits the town may exercise its own discretion on the subject." The wants of the future, as well as of the present, are to be considered. More use is made of the accommodations afforded by commodious public halls and town houses now than formerly. In large towns, the good of society, in its moral, social and educational aspects, may be much promoted by them. It would be difficult to fix a rule for towns upon the subject. Towns are not apt to be extra-

vagant or oppressive in the direction complained of. When they are, or threaten to be so, the prevention of it is much better attained by a resort to the restraining power of this court by injunction, wherever its intervention might be proper and legal, than to wait until persons other than tax payers have become interested in the validity of the action of the town. None of the points taken by the defendants can be sustained.

Defendants defaulted.

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

SUPPLEMENT.

IN MEMORIAM.

PROCEEDINGS OF THE CUMBERLAND BAR IN RELATION TO THE RECENT DEATH OF HON. ETHER SHEPLEY, FORMERLY CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT, HAD BEFORE THE COURT AT THE APRIL TERM IN PORTLAND, ON WEDNESDAY, APRIL 11, 1877.

The court room was filled by a large attendance of members of the bar and other citizens on the morning of the second day of the term. Shortly after the empaneling and organization of the jury, Hon. Bion Bradbury, president of the bar, arose and spoke as follows:

May it please your Honor:—The members of the Cumberland bar desiring to notice with appropriate ceremonies the decease of the late Chief Justice ETHER SHEPLEY, in testimony of their great grief at his death, and of the profound veneration they entertain for his public character and private virtues, appointed a committee to prepare and present to this court resolutions expressive of their sentiments. As the organ of this bar, I now ask your Honor's leave that this committee may report.

The presiding judge assenting, Hon. Joseph Howard, the chairman of the committee presented the resolutions, prefacing them with the following remarks:

JUDGE HOWARD'S REMARKS.

The resolutions, which I have the honor to submit, have reference to one, for whose memory we cherish the highest respect and

admiration. We would gladly bring the choicest of garlands to weave with the unfading laurel upon his brow. He seems to have a living presence here, where, as your records show, many of his best intellectual achievements were accomplished.

It has been my good fortune to enjoy the acquaintance of Judge Shepley, from 1816, and through many years of professional and social intimacy. Then he was just fairly embarked in the practice of law, and was vigorously preparing for the high position, to which he was aspiring, with auspicious hope and generous ambition.

I was his junior, by more than ten years, but well recollect that when this state took on her separation from Massachusetts, and assumed her independence, he was going to the front, among his illustrious contemporaries, Mellen, Nicholas Emery, John Holmes, Longfellow, Whitman, Orr, Fessenden, Daveis, Greenleaf and Preble, and other eminent lawyers; and that he soon became their peer was then great fame to him.

As a practitioner, he stood upon a high plane, and was bold, skillful and upright; always regarding law as a practical science, founded in good morals, and to be construed and applied on sound principles; hence he abhorred all the arts and tricks in the practice that demoralize and degrade a lawyer, and bring disgrace upon the profession.

The censures or cheers of the multitude never diverted him from his immortal purposes; for he never courted applause, but wherever he took a stand, there he had the will and courage to brave, and the fortitude to endure; but he had no poisoned arrows in his quiver.

I have been asked whether he was an eloquent advocate. When we heard him, and witnessed with what skill, directness and power he grasped his case and, as by intuition, took in the whole of it, and carried conviction to court and jury, when it was possible, and with an artless but captivating manner, although without attempting impassioned declamation, or brilliancy of rhetoric, it was truly an intellectual refreshment, and we thought him eloquent. Yet his methods were his own, and not prescribed by any rules, but his reasonings were so cogent and clear that his conclusions seemed like coming events, to cast their shadows before, and the results were, surely, all that eloquence might claim.

He was a most diligent and accomplished student; but he had no taste for indulgences outside of his duties, not even for recreations, so fascinating, and usually esteemed so necessary to the health of body and mind. He appeared to need nothing of the kind.

Unremitting labor in his high vocation gave him constant delight. In all his ways he had the inspiration of great faith, and the accomplishments that are born of it. He loved the law, conscientiously sought its distinctions and gained them, with liberal rewards.

From 1814 to 1836, Judge Shepley practiced in the state and federal courts with unabated zeal, and with continued success. It was there that his large legal and moral attainments became a recognized power, not easily matched or resisted. He was a representative in the legislature of Massachusetts in 1819, a member of the convention to form our state constitution, the same year, and the distinguished attorney for the United States, for this district, from 1821 to 1833, but never was much inclined to the workings of political life.

In 1836, after resigning his seat in the senate of the United States, which he had occupied some three years, he accepted an appointment to the bench of this court. This was an important event in the history of our jurisprudence, as all were then assured that he would become a good and great judge, upon whom the ermine would never be soiled. Up to this time he had been prominent, decided and consistent in the politics of the country. But when he assumed judicial life, he held all active politics in abeyance, and even relinquished his electoral franchise.

To a young man, a former student of his, who had requested a recommendation to the governor, for appointment to an office, he replied by letter as follows: . . . . "If I could do so, without violating a rule which I prescribed for myself, when entering upon a judicial situation, I should with great pleasure give a line, as you desire. But I have felt obliged to abstain from the exercise of all political rights, while acting in a judicial office. It will give me pleasure to bear testimony to your moral worth and acquirements anywhere." (The letter is dated October 20, 1838.)

This was his rule prescribed by himself, because of the supposed danger of diversion, and confusion of rights and duties; and to it he adhered conscientiously through his long judicial life; for so it seemed good in his sight.

The mental powers of Judge Shepley were vigorous and strong, and his intellectual vision very clear. He saw, as with a light ahead, the solution of seemingly abstruse problems, with broad distinctions, often not readily perceived by others. If he was sometimes apparently positive in his manner and opinions, it was because he had great confidence in his own matured reasonings and conclusions. Strong minded, he was also right minded. His will was sustained by an energy that never flagged in the accomplishment of his duties.

Learned broadly in law and equity, as much in the spirit as in the letter, he applied his great knowledge with matchless skill and force to the work before him; for he estimated largely the value of human pursuits by their bearing upon human rights and interests. His independence and impartiality were always refreshing. Parties before his tribunal were but the representatives of principles. There the Grecian and the Scythian were alike to him, and there the rights of contestants were never imperiled by preference, prejudice or chance. His decisions will stand the severest judicial tests; and it is believed that time will but deepen the paths bravely marked out by him in the advancement of jurisprudence.

The Chief Justice was never found crusading for theories to combat or overcome, but he was content to solve questions and settle principles as they arose in the labors and duties of his exalted position. This he did with consummate ability, and with the rare talent for continuous mental effort, without exhaustion, and with exemption from the usual anxieties and worry which beset us in such methods. Yet his most extended and critical researches he could suspend and resume with great facility, and without disturbing the thread and scope of his investigations. He gave the whole influence of his character, public and private, to the support of sound principles on all occasions. He had the honor, courage and self-denial, with power, to maintain and defend the right in the

fear of God; and herein lay his strength and glory, as we estimate men. He endeavored to discharge the debt which, according to Lord Bacon, every man owes to his profession, and with a success that was never questionable.

No judge was ever more conscientious in maintaining that the faithful observance and administration of laws are essential to the character and stability of government, and the happiness of mankind. He had a genius for knowing and doing with all his might. Heaven endowed him with this spirit, and bestowed upon him the faculty to give it effect.

These are some of the traits of our late Chief Justice, to which the profession and the public turn with grateful veneration. His whole being as a man, a jurist, and a soldier of the cross, was strong and immortally beautiful.

The learned and incorruptible judgments which he has left in forms as imperishable as the things of this world can be, are a monument to his name and reputation, more durable than bronze. And he had the rare satisfaction vouchsafed to him of looking back upon this monument, in all its majestic proportions and finish, as of the past, while in the fullness of years he yet stood upon this shore, awaiting the call.

Judge Howard then read and laid upon the clerk's desk the following resolutions:

Resolved, That the Cumberland bar have learned with regret the death of ETHER SHEPLEY, for many years an associate justice and for seven years chief justice of the supreme court of this state.

Resolved, That we can bear witness to the integrity and uprightness of his character, to his devout love of truth, to his strict conscientiousness in the discharge of his duties, to his uniform courtesy and kindness, and to his generous sympathy in all efforts for the public good.

Resolved, That we look with an honorable pride upon his long judicial career, its eminent ability, its spotless purity, and its untiring industry. We are grateful that he was permitted to live so long, and to do so much for the state, and for the great cause of sound jurisprudence. We can bear him in our hearts with manly pride, and hold him up as a fit example for professional and judi-

cial emulation. He will long live in the memory of his brethren; and more permanently in the recorded legal judgments which have stamped his name indelibly upon our judicial records.

After the reading of the resolutions, Judge Barrows responded as follows:

JUDGE BARROWS' REMARKS.

A long life of honorable activity, potent and enduring in its influence in many directions, and spotless in its purity, has been crowned by a period of tranquil contemplation not void of pleasure and instruction, and by a peaceful death, in the sure and certain hope of a brighter life to come.

It is sixty years since the name of Ether Shepley began to be widely known and respected among the people of this state. It is twenty since he ceased to occupy the last of the prominent official stations which he so long adorned. Yet so strong was the impression he had made by his life and its works, that I am sure the announcement of his death carried with it a sense of loss, not only to the survivors of those amongst whom he wrought, but to those who have grown up since his retirement from any active participation in the work in which he was so long and so usefully engaged.

It is eminently fit and proper that we, as members of this bar, should place upon record the testimony of our gratitude and our respect for all that he was, and all that he did, and some brief memorial of a life so worthily employed. Yet to his name and fame, it matters not at all what we say or omit here to-day. A more lasting memorial than any words of his contemporaries or successors is the record that he has made of himself as counsel and as judge in the first forty volumes of the Maine Reports.

He was born in Groton, Massachusetts, November 2, 1789, to parents highly respectable but not wealthy, relieved in his youth by reason of his delicate physical organization from the manual labor which seemed in the outset to be his lot, and allowed to seek the liberal education and culture for which he was by nature so much better fitted. He graduated at Dartmouth in 1811, studied law in York county, and settled in Saco in 1814. For a short time a partner with the late Judge Preble, he had, by the vigor of his intellect, his tenacity of purpose, and unwearied application,

gained prominence as a lawyer, while this state was still a part of the old commonwealth. And those were the days in which Mellen and Whitman, and Orr and Longfellow, and Samuel Fessenden and Greenleaf, and Davcis and Holmes and Emery, were either in full practice in his vicinity, as his seniors at the bar, or as competitors striving with him for the honorable distinction which they attained.

At the age of thirty years he was one of the fathers and founders of the state.

Ardently favoring the separation from the parent commonwealth, he was elected to the legislature in 1819, to promote it, and subsequently to the convention to form the constitution for the new state. In 1821 he was appointed district attorney of the United States, and held the position till he was chosen to represent the state as a senator in congress in 1833, as the colleague of Peleg Sprague and the successor of John Holmes. He loved his chosen profession better than the political honors that were open to him, and in 1836, resigned the senatorship, to accept a place as a justice of this court, with which he was connected as associate or chief justice for nineteen years.

Were I to attempt here and now to delineate his character as a judge, or to tell how he filled and adorned the position he held so long, I should encounter the same difficulty to which Pericles refers in his oration on the soldiers who died in the first year of the Peloponnesian war, where he says in substance : "I have always thought it a thing both difficult and superfluous to praise in words, those who are already exalted by their deeds ; for whatever one may say, to some it will seem to fall short of the merit which it seeks to portray, and envy will inspire others with the thought that it savors of sycophancy, and no one will be satisfied."

Yet I do not hesitate to declare my conviction that the language of your resolutions is simply just, without adulation, and that the noteworthy traits in his character and conduct, are therein set forth without partiality or exaggeration.

The amount of judicial labor which he performed was very great. To form any idea of it, it would be necessary to examine not only his numerous opinions contained in volumes 14–40 inclu-

sive, of our reports, but the dockets and files of the court in the different counties all over the state, at the many protracted terms where he presided, and where it is safe to say, that justice never failed for want of diligent and faithful labor on the part of the judge. He had the rare faculty of doing two things at once, and both well. I have known him to give his aid to inexperienced counsel in the preparation or condensation of a case to go forward to the full court, without apparently relaxing in the discriminating attention which he was giving to another case in progress before the jury. Many a member of the bar was indebted to him not only for kindly words of encouragement, but for graver words of admonition and reproof, as kindly meant. His rulings were prompt, reliable and peremptory, precluding further discussion, but I have known him, after laying down the law in his usual decisive manner, to say just as emphatically, "I take that back," on being satisfied that through inadvertence an error had been committed, or that there was danger that what he had said might be misunderstood ; and you may be sure there was no want of care, clearness or precision in the ultimate expression of his views on the case, whether it was of great pecuniary importance or not.

To say that he was impartial, is but common praise. If he had an idol, it was the law; and no swerving from it could be tolerated. Simon Greenleaf reports him when at the bar as replying to the assertion of opposing counsel, that the justice of their claim was obvious—"The law is the rule of decision, and the law is the justice of every case." On the bench he adhered to this doctrine, and recognized the duty of the court to decide cases according to the legal rights of the parties, and not to suffer fancied or seeming equities between the immediate contestants to make shipwreck of the law. But the law to which he adhered was not the confused mass of clashing decisions and dicta that is found in the digests, from which a selection may always and easily be made, which would seem to warrant a decision in cases depending on the same principles, one way this year and another the next ; but it was the law as described by Hooker, "whose seat is the bosom of God, and whose voice is the harmony of the world." He would say with Sir John Powell, "let us consider the reason of the case, for nothing is law that is not reason."

He seldom dissented—not because of any weak fear that sound law would suffer from the fullest discussion, nor because of any idle notion that numbers or unanimity would give any lasting force as authority to an erroneous adjudication, but because the clearness and precision with which his views were presented, almost always commanded assent. His judgments were such as Sallust describes those of Cato Uticensis:

"*Postquam Cato assedit, consulares omnes itemque senatus magna pars, sententiam ejus laudant; Cato clarus atque magnus habetur; Senati decretum fit, sicut ille censuerat.*"

It was not in his chosen profession and by the faithful performance of his official duties alone, that he sought the good of his fellow men. Seriously disposed from his early manhood, he was the warm friend of all institutions designed to promote morality and religion, and always gave his efficient aid to the cause of thorough education.

For thirty-seven years he discharged the duties of a trustee of Bowdoin college, and gave much time and attention to its affairs. He was the last survivor in this state, of the original corporators of the Maine Historical Society, and a little more than a year ago, evinced his undiminished interest in its object and work, by a brief address at a public meeting of the society held in this city.

Full of years and honors, he entered the long desired haven of eternal rest, January 16, 1877.

Of him, as of one of England's late honored chief justices, it may properly be said: "In discharging the duties of his high office, without ever losing sight of the civil or religious liberties of the people, he was vigilant to maintain the dignity of the constituted authorities and the law of the land. In private life he was a dutiful son, a tender husband, an affectionate father, a faithful friend, and a sincere Christian."

The clerk will enter your resolutions on the records, and in token of our sincere respect to his memory, the court will now adjourn.

Thereupon the court adjourned for the day.

PROCEEDINGS OF THE PENOBSCOT BAR IN RELATION TO THE RECENT DEATH OF HON. EDWARD KENT, FORMERLY A JUSTICE OF THIS COURT, HAD BEFORE THE LAW COURT AT THE JUNE TERM IN BANGOR, ON TUESDAY, JUNE 26, 1877.

CHIEF JUSTICE APPLETON presided, and seated with him on the bench were Associate Justices, Dickerson, Danforth, Virgin, Peters and Libbey. Hon. Edward Fox, judge of United States district court, and formerly a justice of this court, was also present with the officers of his court then in session at Bangor. There was also present a large assemblage of members of the legal profession from various parts of the state, and citizens of other callings.

At the coming in of the court at the afternoon session, Hon. A. W. Paine, on behalf of the Penobscot bar, presented a series of resolutions which he accompanied with the following remarks:

May it please your Honors:—By the partiality of the bar, the duty has devolved on me to announce to the court the lamented decease of our brother EDWARD KENT. The event occurred at his residence in this city, on the 19th day of May last, just as the sun was rising on one of the most beautiful mornings of the year. He passed away in the full possession of his reason and consciousness, calm and resigned, meeting the change as such an one might be expected to do.

> "Like one who wraps the drapery of his couch
> About him, and lies down to pleasant dreams."

Mr. Kent was a native of New Hampshire, born at Concord, on the 8th day of January, A. D. 1802, and was hence at the time of his death, in his 76th year of age. He early entered upon the duties of life, graduating at Harvard, at the age of nineteen, and being admitted to the bar in 1825, at the age of twenty-three. He commenced practice in Bangor, in that year, and has ever since continued to make his home here over the space of more than half a century, and his connection with the bar has remained unbroken. He was early called into public service as a member of the state legislature for several years, then appointed judge of the court of sessions, besides holding many other subordinate

positions. In 1836 and 1837, he held the office of mayor of Bangor, and at the age of thirty-six he was elected, and two years afterwards re-elected as governor of Maine. Four years' residence at Rio Janeiro, as United States consul, followed. In 1842, he took an active part as one of the commissioners of Maine in effecting the treaty with Great Britain, so far as his state was interested, rendering very essential service to Mr. Webster in his negotiations with Lord Ashburton on that occasion. His useful life was crowned by service, for fourteen years, upon the bench, as an associate justice of the court which I now have the honor to address. A later duty was performed by him as president of the late constitutional convention of our state. In all these positions he acquitted himself with ability and faithfulness, and to the entire satisfaction of the public and those whom he served. Such in brief is the history of him whose removal from us is now announced.

As a man, in the highest sense which that name imports, Mr. Kent had few equals, no superiors. His manly, noble physique was but the outward form of an equally noble, manly soul, prompted and guided by a heart and brain well fitted to govern the machinery of his life. His was emphatically *mens sana in corpore sano*. He was eminently social, free from all vanity and conceit, affable towards all without regard to position, and at the same time of dignified demeanor, commanding the respect of all. While worthily the peer of presidents and nobles, in his own esteem the humblest laborer on the street was the peer of him.

Lord Bacon says: "Among a man's peers, a man shall be sure of familiarity, and therefore it is good a little to keep state." Mr. Kent however needed not that "little," for he had the quality of "familiarity" without any danger of losing caste.

As a domestic man he was consequently richly endowed with all those characteristics which made him a genial companion, an affectionate husband, and a loving father. His home was ever the home of intelligence, of culture and refinement.

> "None knew him but to love him,
> None named him but to praise."

As a citizen, no inhabitant of our municipality existed, who did not take a pride in having him walk our streets as one of our own;

and there is to-day no one who does not join in the regret that he walks our streets no more.

As a politician, though firm and decided in his preferences, he knew no party prejudices; no man was his enemy, or even undervalued because of them, and on the other hand none lost confidence in him because of any difference of political creed or party alliance. As in all the other departments of life, so in politics, people gave him credit for honesty, and trusted him accordingly.

In religious matters he was deeply imbued with the doctrines of liberal Christianity in the best meaning of the term, free from all sectarianism. He respected all religious creeds and convictions in others, when seen to be honestly entertained and carried into life, but no man more thoroughly despised all cant, hypocrisy and bigotry. He held that faith alone had no saving efficacy, except as its genuineness was supported by the evidence of good works.

As a lawyer, Mr. Kent at once entered upon a successful course of practice which he retained until his promotion to the bench. Kind and affable in his intercourse with his clients, he entered with heart into their cause and won their confidence, as one who would be faithful and reliable. And such they always found him. If he gave them encouragement, the result generally justified his advice; if his judgment was unfavorable, he was frank to say so, and discourage litigation. He studied his cases and left no stone unturned, no decisions unexplored, so that the truth might be vindicated and justice done. Early in his profession he entered into partnership with our late brother Cutting; and the connection continued so long as they both remained in practice. The two were tenants of the bench together for fourteen years, during all which time and until death the closest intimacy existed. The touching eulogy which our now deceased brother, on this floor, only seven short months ago, pronounced on the occasion of his partner's death, may well be now transferred to him. With how much force may we do this in adopting the beautiful sentiment with which that eulogy closes:

"His character yet remains with us. It is a legacy to the bar worth more than dollars or rich bequests, if rightly appreciated

and made effectual by careful examination and practical imitation. It calls upon us all to stand in our place as he stood, upright and unflinching in the discharge of the duty of the place and of the hour, in the fear of God but knowing no other fear."

In contemplating their lives how strongly are we reminded of the similar instance recorded by the sacred historian: "Saul and Jonathan were lovely and pleasant in their lives, and in their death they were not divided."

As a judge, Mr. Kent was by general consent regarded as signally fitted for the place. By nature he was eminently endowed with the personal qualifications which the place demands. Of commanding form, his very presence inspired respect, his habits of life seconded the impression, and his calm and deliberate manner fitted him for a patient hearer. He was slow but sure, and not until he had fully heard all sides, and given the matter his careful consideration, was he ready to adjudge. Well read in the profession, familiar with the principles of the law and with the authorities, he added to all these traits a warm devotion for the place, an integrity which knew no faltering, and a rigid impartiality. To these he united a bland and winning dignity, free from all superciliousness, which commanded the acquiescence and the confidence of every one.

The sixty volumes of the Maine Reports after the 5th Greenleaf afford abundant proof of all that has now been said. As counsel, whenever the reporter has presented him, he showed a minute acquaintance with his case and its needs, and an ingenious presentation of his argument. His judicial opinions, though lacking the conciseness of those of the great masters, Parsons and Shaw, yet afford equal evidence of their correctness and are ever drawn in such an attractive style as to be justly cited as among the best specimens of judicial art.

In a word, his life may well be regarded as a "finished" one, built up of a material adapted to the wants of its nature, matured as if by the art of a master, ornamented with the graces of a high culture, and withal furnished with the elegance of careful study and reflection. Having thus reached the end of this life's especial use and prepared himself for leaving, he seemed as one waiting for

the train to take him along to a new station. At the given signal he bade his friends good bye, stepped on board and passed on.

Such is the man whose removal from us we this day mourn. And wherefore do we mourn? That he has gone from us and will no longer mingle with us here is true; that we shall never again meet him at our bar, enjoy his society in our offices and in our library where we have so often met him in social and professional converse, all this is hard to realize, and harder to feel; but is not this with us a selfish regret when viewed by the side of that infinite gain which accrues to him from the change? That he still lives, is the dictate of every mind; and does not reason, experience and inspiration teach that the scene of his after life is in immediate connection with his former one, bearing a corresponding relation to this life that the soul does to the body, that he has simply changed his residence, his domicile, to another state for which this life was a mere academy of preparation, and that death is but the graduation into the life of the future where corresponding duties, employments and pleasures await the candidate? If this be so, (and who can doubt?) may we not rather hail our brother at his promotion, wish him a *bon voyage* across the border, well assured from his life here that he has gone to enjoy a higher life there, where in the beautiful language, (slightly changed) of his venerated class-mate.

> All before him is the day,
> Night and darkness are behind.

The bar of our county have adopted certain resolutions expressive of their estimation of their deceased brother, which I have now the duty to present for your Honors' concurrence.

Mr. Paine then read the following

RESOLUTIONS OF THE PENOBSCOT BAR:

The members of the Penobscot bar having for more than half a century enjoyed the association of their late brother EDWARD KENT who has been removed by death, we who survive him desire to express our appreciation of his character and our estimation of his worth as a man, in the various relations, which he sustained in life. Therefore

Resolved, That in the death of our brother we recognize the removal of one who in his intercourse with others, in all his social and business relations, has ever exhibited the rarest traits of character, such as entitle him to be regarded as one of the great benefactors of our race in all that ennobles man and makes him a guide to be followed and a friend to be loved and held in long remembrance.

Resolved, That as a lawyer he had a mind richly stored with general intelligence and a knowledge of his profession, capable of wisely discriminating between the right and the wrong in human actions, and ever eager to carry out in practice the great principles of the law in their truest sense; that always faithful to the interests of his clients he was yet never wanting in the most scrupulous regard for the feelings and rights of his adversary, never seeking any unfair advantage, but careful and jealous even that the law should have its true course;—courteous to his brethren of the bar without regard to age, and ever ready to lend them a hand whenever he could by word or act aid them in their advancement—thus making himself an example to be followed by all who would practice the profession or engage in the business of the courts.

Resolved, That as a judge he was learned in the law and well acquainted with its principles and the authorities, thorough in his investigations of causes which came before him for adjudication and eminently impartial in their trial, patient and attentive to the calls of suitors, and to the requirements of their counsel, desirous only that justice might be done and the right might win.

Resolved, That we tender our sympathies to the widow and son of our deceased brother and direct a copy of these resolutions to be presented to them.

Resolved, That these resolutions be presented to the court for their concurrence, to the end that they may be entered upon their records; and that they be published in the several newspapers of the city.

Hon. William H. McCrillis, seconded the resolutions in the following terms:

REMARKS OF MR. MCCRILLIS.

I cannot forbear adding my humble tribute to the memory of

our departed brother. Death has knocked at our door and taken from this bar its most conspicuous member, and from the state one of her most honored and illustrious citizens. My brother Paine has in fitting terms spoken of the eminent ability of Judge Kent as a lawyer and a judge of our highest judicial tribunal, and of the distinguished ability and fidelity with which he performed the duties of many other high offices of trust and honor to which he was called by his country and his adopted state. He also spoke in feeling terms of his character as a man in his social intercourse with his fellow men. In this respect the memory of our departed brother is a very great memory.

We love the man—the kind, good man. It was the love of the man of noble and generous impulses that sprung from his nature as naturally as a plant springs from the bosom of the earth that filled our eyes with tears and the community with mourning at the death of our brother. It is for the qualities of his heart that we especially shall revere his name and cherish his memory with affectionate regard. Any words of mine would stop far short of fully presenting his grand character as a man.

Of commanding form and presence and of great physical strength, he was the gentlest of men; of rare talents, he was the most unassuming and modest of men. No person, even his most intimate friend, ever heard him claim any merit for himself.

Men are selfish in their dealings with each other, but he had none of that worldly wisdom that seeks advantage through a profitable bargain. He fulfilled all his obligations to others up to the fullest measure that could be marked out as the boundary of justice.

Engaged in the strifes of men during a long and laborious professional life, he maintained amidst the excitement of a judicial trial between fierce and contending parties, an amiable and urbane equanimity and never uttered a harsh or unkind word to his opponent.

He loved his adopted state and his native state and New England. He loved his country. He always took a lively interest in public affairs; his patriotism embraced the whole country, and no man had a higher appreciation of the sagacity and sound sense of his countrymen, or more faith in the future of his country and the

perpetuity of her free institutions. If his own opinions and convictions were decided, and maintained with zeal, he was tolerant of the adverse opinions of others and construed their motives to be sincere. He was fond of society and conversation, cheerful, imparting cheerfulness to others; dignified, but abounding in humor, a charming companion, and a favorite at the social circle.

He loved his fellow men. His heart was full of benevolence toward all. He knew that all men were equal in the sight of their Creator, and in the sight of our deceased brother all men were equal before man. He respected the rights of others and sympathized in the afflictions of others. At the close of his life and upon a retrospect of it he could truthfully say, in all these things I have endeavored to do right. His whole life was the doing of "whatsoever things are true, honest, just, pure, lovely, and of good report." He was a kind and affectionate husband and father. His friendships were strong and enduring. No man ever enjoyed the respect, the esteem, the confidence and the affection of the community to a greater extent than our deceased brother.

He died after he had reached the verge of life, and before his intellect was dimmed, or his body bowed down by old age. His great example linking his life with ours will influence the living long after his mortal part has mouldered to dust in the grave.

We may all rejoice if, when the summons of the angel of death shall come to each of us, we can hear it with the tranquillity, resignation and faith in immortality that marked the last hours of Edward Kent.

Hon. S. H. Blake, Hon. A. G. Jewett, and General Charles Hamlin, followed in eulogistic remarks. Letters were also read from his former associate, Judge Rice, and others unable to be present.

Hon. F. A. Pike's letter closed as follows:

He was considerably older than Cicero when the *Senectute* was written, and older than the correspondent to whom its words of consolation were addressed, and yet he fulfilled all the conditions the great orator set out as necessary to the highest and best devel-

opment of old age. And quite appropriate is the line of the ancient poet that Cicero applies to Titus.

Ille vir haud magna cum re, sed plenu' fidei.

An honor to his profession that holds him among the foremost, and an honor to the state that will esteem him among its greatest characters, he has achieved an enviable place in history, and his contemporaries, so long as they live will always keep for him the warmest and kindest place in their memory.

Chief Justice Appleton then responded for the court and ordered the resolutions to be entered on the records.

REMARKS OF CHIEF JUSTICE APPLETON.

For more than fifty years I have intimately known Judge Kent and so knowing him I can most sincerely assure you of my entire concurrence with you in your high appreciation of his character and life and in your expressions of regret at his loss. During that long period, whether in the intercourse of social life, in the antagonism of the bar, or in our judicial deliberations, nothing ever occurred to disturb in the slightest degree those kindly relations, which commencing with our first acquaintance, ended only with his existence. The friend of my youth, the companion of my mature years, the associate in judicial labor is no more, and in him is severed almost the last link connecting the past with the present. I well remember the last time he addressed the court, when as the representative of the bar he delineated with pathetic and heartfelt eloquence, and with such truth and beauty the character of one whose memory was so dear to him and to us all. Little did I then imagine that his familiar face would here no more be seen, and his voice would here be heard no more forever. I mourn with you the loss of a friend and brother. But death is inexorable and unpitying, sparing neither the good nor the bad, neither the pure nor the impure, neither youth in its blossom, nor old age in its maturity.

Judge Kent came to this city in the prime of early manhood. A graduate of Cambridge, a ripe scholar, fond of literature, he prepared himself for the practice of his chosen profession under teachers of unsurpassed genius and learning. A student in the

office of Orr, of whose power and eloquence a dim recollection only remains, soon to fade into that deep oblivion which covers the grandest efforts of the most brilliant advocate; a pupil listening to the instructions of the great American chancellor, whose written words of judicial wisdom will be the guide of the jurist as long as the law of which he was the greatest exponent, or the language in which they were written shall endure, he commenced professional life with that thorough mastery of legal principles, so indispensable to success. With learning and with industry, ability and integrity added thereto, he at an early day rose to the highest rank at the bar. As a counselor, no one was more safe, judicious and reliable. Cautious, prudent—his advice to his clients, always replete with sound sense and judgment, predominating elements in his character, was ever preventive rather than advisory of litigation.

As an advocate, he was earnest, fluent, a thorough master of the facts to be discussed, omitting nothing which could conduce to the result sought to be attained. Judicious, frank and open, scorning all artifice and concealment, despising all trickery, he addressed himself to the merits of his cause, and to the calm judgment of the jury. His commanding presence, the recognized purity of his life and the integrity of his character, gave force and strength to an argument, in itself forcible and strong without the added weight of those great accessories. His success as an advocate was marked and distinguished.

Enjoying in an eminent degree the confidence of the community, it was not to be expected that he would be permitted to remain in private life. To the demands of the public he felt it his duty to yield. Few men have held more important, varied and responsible public offices. There were few in the gift of the people or the executive, which he has not been called to fill. The interests of the city were entrusted to his vigilance as its representative in the legislature, and to his watchful oversight, as its chief magistrate, while his judicial ability was early called into requisition as chief justice of the court of sessions. But he was soon summoned to higher duties and graver responsibilities. Twice elected to the chief magistracy of the state, in times of high party

excitement, he so wisely and judiciously managed its affairs as to increase the confidence of his friends, and to acquire that of his opponents. The purity of his motives was never questioned; the integrity of his official action was never doubted.

Upon the election of General Taylor, he was appointed consul to Rio Janeiro. At the expiration of his official term, he returned to this city, and here resumed the practice of his profession. Indeed, I hardly think he would have been happy elsewhere. Here he was among life-long friends; this was the city where the struggles of life began; it was associated with his joys and his sorrows; it witnessed and rejoiced in his success; it sorrowed with true, heartfelt sorrow at his decease.

A vacancy occurring upon the bench of this court, he was selected with the unanimous voice of the bar and of the public to fill the vacant seat. With what ability and integrity he discharged the grave duties of that high trust, you well know. In the trial of causes, his greatest anxiety ever was that right should prevail. Patient in investigation, he carefully examined and fully understood the merits of the case before him, and in clear and perspicuous language he endeavored to make the precise points in controversy intelligible to the tribunal, upon which devolved the duty of their determination. Dignified, but not austere, he presided firmly but impartially. He had no favorites. He had no animosities. The young and inexperienced practitioner knew that wherever he presided the just rights of his client would be safe. I well remember, upon his retirement from the bench, how deeply affected, and how profoundly gratified he was at the expressions of affectionate regard and of gratitude, from younger members of the profession for his kindness to them in their early professional efforts.

As a jurist his written judgments will ever command the respect of the profession. While respecting authority, he respected more the great principles upon which authority rests, and without regard to which authority loses its most essential sanction. His decisions rest upon principle and authority—the principle strengthened and confirmed by authority—the authority deriving its vitality from the underlying principle. His mind was singularly free from bias

or prejudice. His great purpose was rightly to apply legal principles to existent facts. He spared neither time nor labor in his legal investigations. He discussed legal questions with a clearness of illustration, a strength of argument, a fullness and variety of learning rarely equalled and still more rarely surpassed. His style was clear, lucid and vigorous. Occasionally he was fond of enlivening the somewhat arid discussions of legal principles with flashes of wit and humor in which his genial nature so much delighted. His judicial career extended over fourteen years. He retired from the bench he had so adorned with the regret of the bar and of the bench.

Judge Kent loved the profession of which he was a distinguished member. He was proud of its reputation and sensitive of its honor. His relations with the bar and those of the bar with him were mutually and reciprocally friendly. When his days were fast drawing to a close one of his last utterances was of love and affection for his professional brethren. His last official act was as a member of the constitutional commission over whose deliberations he presided, giving weight by his wisdom to its conclusions.

In social life he was eminently popular. With a varied experience, with a mind amply stored with general information, genial, full of wit and humor, he was a welcome as well as an instructive companion. Cheerful and happy himself, he radiated happiness upon those around him. He has gone to his grave in a full age, like as a shock of corn cometh in in his season. The tender and loving husband, the affectionate father, the true friend, the upright judge is no more upon earth. Calmly, with no disturbing fear, with his intellectual vigor neither dimmed by age nor weakened by disease, trusting in the loving kindness of God, he met the fate predestined from the beginning for us all; and we cannot doubt that to him there was the joyful greeting, "well done, good and faithful servant: thou hast been faithful over a few things, I will make thee ruler over many things: enter thou into the joy of thy Lord."

Let the resolutions of the bar be entered of record and in token of respect the court stand adjourned.

INDEX.

ACTION.

See DEBT, 4. ASSIGNMENT, 1, 2. CONTAGIOUS DISEASES. INSURANCE, 3. PRINCIPAL AND AGENT, 1, 2. TOWN, 3.

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See ABATEMENT, 2, 3. RAILROAD, 7.

CARRIERS.

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COUNTY COMMISSIONERS.

1. The county commissioners have a right of access to the records of the register of deeds and to the use of a portion of the office for the purpose of making the ledger index authorized by c. 227, of the acts of 1874.
Hawes v. *White*, 305.

2. In case the register resists this right, the writ of mandamus is the proper remedy. *Ib.*

DAMAGES.

1. Where a party binds himself in a sum certain not to carry on, or allow to be carried on, any particular kind of business, within certain territory, or within a certain time named, the sum mentioned will, in general, be regarded as liquidated damages, and not as a penalty.
Holbrook v. *Tobey*, 410.

2. A grantee in a deed of general warranty, who became seized in fact of the estate granted, and was afterwards evicted by one having the superior title, is entitled in an action on the covenants to recover of the grantor the amount of all judgments obtained against himself by the party dispossessing him, after paid by him, together with all reasonable expenses attending the litigations, whether the recovery resulted from actions of trespass brought against him, or by him, if affecting the title of the estate, and if the grantee in prosecuting and defending the suits, exercised a due degree of caution and care, notwithstanding the grantor had no notice of the pendency of the prior suits.

But in case the grantor is not notified to appear in the actions, the burden will be upon the grantee to show the superior title of the recovering party, and that the actions against himself were reasonably defended, and the costs therein fairly incurred.

And as to the costs in cases in which the grantee was plaintiff, instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant, and whether the grantee was notified or not, from the nature of the facts, the burden will be on the grantee to show such items to be reasonable and proper claims, if the grantor did not appear and take upon himself the management of the suits. *Ryerson* v. *Chapman*, 557.

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DEBT.

1. The assignee of a judgment for debt and cost may maintain an action of debt thereon in his own name, under and by virtue of the statute of 1874, c. 235. *Wood* v. *Decoster*, 542.

2. The statute of 1876, expressly conferring this right, does not affect the right, previously existing under the statute of 1874. *Ib.*

3. Nor is the right confined to the immediate assignee of the judgment creditor; the remedy is available to any subsequent assignee who can show a good title. *Ib.*

4. An action of debt will lie upon a simple contract as well as upon a specialty.
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DEED.

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the duty of the city so to maintain and keep the drain in repair that it should at all times afford sufficient and suitable flow for all water entitled to pass through it.

2. That under the provisions in the same section that "if such town does not so maintain and keep it in repair, any person entitled to drainage through it, may have an action against the town for his damages thereby sustained," the city was liable to the plaintiff for the damages caused him by the overflow.

3. That under the statute, the liability of the city was equivalent to that of insurers, and that it was no legal defense that the rains which caused the overflow were extraordinarily severe. *Blood* v. *Bangor*, 154.

EASEMENT.

1. If one sell a building, the light necessary to the reasonable enjoyment of it, coming across the grantors' adjoining land, goes with it as an incident to the grant; but not that which would be a convenience simply, without being a necessity. *White* v. *Bradley*, 254.

2. Whether a right to the continued enjoyment of light coming across the grantors' adjoining lot to existing windows in a building conveyed, can ever be implied, or can exist without an express grant or covenant, *quœre*. *Ib.*

3. The deed of the trustees to these plaintiffs, expressly reserving the right to the grantors, and those claiming under them, to build upon the foundation wall, on that side of the plaintiffs' block, is conclusive against the existence of such right here. *Ib.*

4. A, owning two adjacent lots of land, one of which was his house lot, conveyed the second lot, "with the restriction or reservation, that no building shall be hereafter erected on the above (second) lot within ten feet of the easterly line of A's house lot."

Held 1. Whether this can be regarded as a technically good reservation or not, that by a fair interpretation it creates or reserves a right in the nature of a servitude or easement for the benefit of A's house lot.

Held 2. This right is appurtenant to A's house lot and building, and binding on the second lot; and the right and burden, thus created, will pass to the subsequent grantees of the respective lots.

Held 3. Where the parties had no actual knowledge of this right, and only constructive knowledge from the deeds and the registry, and the subsequent grantee of the second lot, erected a building within ten feet of A's former house lot, and when it was partially finished, this right came to their actual knowledge, the grantee of the first lot was not estopped from claiming the easement in the second lot; although he had seen the building erected without objection. *Herrick* v. *Marshall*, 435.

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The complainants, by lease under seal, leased to the tenant certain described premises at a specified rate for a year, and then added the following words: "We further agree to lease to said Young, (the tenant) said premises situated in Farmington village at the price and conditions named as long as he wishes to occupy the same; the said Young agreeing to take good care of premises and not to suffer them to go to waste more than the natural use of the same."

Held, 1. That remaining in possession at the expiration of the year was an election that the tenancy was to continue.

2. That this was not to be regarded as an agreement for a lease, but that it operated as a lease upon the election of the tenant to remain.

Holley v. *Young*, 520.

See ESTOPPEL, 1, 2.

LAW AND FACT.

See TRIAL, 14, 15.

LEASE.

An instrument from the owner of the land to the plaintiff, granting him all the timber, grass, and berries that may be found or grown upon the land for a term of years and giving him possession for the purpose of managing and enjoying the property granted, is valid between the parties; and entitles the plaintiff to sue in his own name for any of the productions of the land unlawfully taken during his term by strangers therefrom.

Freeman v. *Underwood*, 229.

LIEN.

1. The statute lien on logs, etc., under R. S., c. 91, § 34, takes precedence of a prior mortgage. The action to enforce a log driver's lien, as it comes through a contract, though not a part of it, should be against his employer, whether owner or not; and not against an owner with whom there is no contract. *Oliver* v. *Woodman*, 54.

2. Where several owners separately employ the same person to drive their respective logs, the laborer's lien is not upon the whole mass collectively, but is to be apportioned to each, *pro rata*. *Ib.*

3. The plaintiff, under employment of the defendant, drove three lots of intermingled logs belonging to three different owners. In a suit where the employer was defaulted, and damages were $379.05, *held*, that the plaintiff was entitled to judgment against the defendant, for that sum and interest from date of writ, and a judgment *in rem* for that amount against all the logs, to be apportioned among the several parcels thereof, according to the quantity of each owner. *Ib.*

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Questioned. A *dictum* in *Howe* v. *Saunders*, 38 Maine, 350. See page 445.

Followed. Sewall v. *Cargill, Preacher's Aid Society* v. *Rich, Tappan* v. *Deblois, Howard* v. *American Peace Society.* See page 100. *First Baptist Society in Leeds* v. *Grant.* See page 400.

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PAUPER.

1. The annexation of a plantation to a town by an act of the legislature, which is silent on the subject of pauper settlements, does not change the settlements of the inhabitants of the plantation, which they have in other towns.

Woodstock v. *Bethel*, 569.

2. A person residing in a plantation at the time of its annexation to a town, it not appearing that he has resided there five years, retains his prior pauper settlement.

Ib.

See EMANCIPATION, 1, 2, 3, 4, 5.

PAYMENT.

1. A town order, passed by a debtor to his creditor for the purpose of paying his debt and received for that purpose, both parties acting in good faith, will not operate as a payment if, at the time, it was utterly worthless for the reason that the drawers and acceptor had no authority to make or accept it.

Hussey v. *Sibley*, 192.

2. When money is appropriated to the discharge of a tax of a particular year at the time of its payment, such appropriation cannot be changed to the injury of the collector. *Richmond* v. *Brown*, 373.

See PROMISSORY NOTES, 14.

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See PAUPER, 1, 2.

PLEADING.

1. The declaration alleging substantially in the language of the statute the doing by the defendant of the acts for which R. S., c. 95, § 11, gives the injured party the right to recover in an action of trespass a sum equal to three times the value of the property taken, and alleging that these acts were done against the form of the statute in such case made and provided; *held* sufficient, although the declaration did not set forth a claim for treble damages, and did not refer to the statute by which treble damages were given, nor claim statute damages for the acts complained of. *Black* v. *Mace*, 49.

2. It is not necessary in an action brought under that section to aver or prove that the defendant knew that the plaintiff was the owner of the land and the property taken therefrom. *Ib.*

3. A reference to the registry of deeds in the declaration is immaterial, when the description of the premises to be recovered is sufficient without such reference. *Bragg* v. *White*, 157.

POOR DEBTOR.

RAILROAD.

SALE.

SCIRE FACIAS.

See TRUSTEE PROCESS, 1, 2, 5.

SEAL.

See DEED, 4, 5.

SEARCH WARRANT.

See INTOXICATING LIQUORS, 3, 4.

SLANDER.

STATUTES.

See ACTION, 2, 5. ARSON, 1, 2, 3. CONTAGIOUS DISEASES. CORPORATION, 3. COUNTY COMMISSIONERS, 1. DEBT, 1, 2. DIVORCE. DRAINS AND COMMON SEWERS. EVIDENCE, 3. INSURANCE, 3. INTEREST, 3. LIEN, 1. LIMITATIONS, STATUTE OF. MORTGAGE, 2. PLEADING, 1. POOR DEBTOR, 1, 2, 3, 4, 5, 6, 7. RAILROAD, 1, 9, 10, 11, 12. TAX, 1, 4. TRIAL, 1. WAY, 8, 9, 11.

STATUTES CITED.

PUBLIC LAWS OF MAINE.

SPECIAL LAWS OF MAINE.

STATUTES, CONSTRUCTION OF.

See TRUSTEE PROCESS, 4.

TAX.

1. The three assessors of the town of Freedom, where Flye resided, met at the time and place duly notified, under R. S., c. 6, § 65, to receive the lists of the polls and estates. Flye did not appear at the time and place; but after the assessors had finished their session for the day, two of their number called at Flye's store and received his list under oath. At a subsequent day the three assessors called upon Flye for a further statement, when he made answers in writing to their questions, but refused to subscribe and make oath thereto. *Held*, that such refusal barred his right to have an adjudication by the commissioners. *Freedom* v. *County Commissioners*, 172.

2. If one who is properly assessed for certain personal property in a town, is also assessed therein for certain other personal property alleged to be taxable therein, but which in fact is taxable in an adjoining town, and pays the tax upon the last mentioned property under protest, an action does not lie against the town therefor. His proper remedy is by application for abatement. *Waite* v. *Princeton*, 225.

3. The same rule is applicable to the taxation of real estate. *Ib.*

4. The tax upon savings banks provided by the statute of 1872, c. 41, § 1, as finally amended by the laws of 1875, c. 47, § 1, is a tax upon the franchise of the bank, and first becomes a subsisting debt against the bank, when the return of the average deposits therein required, should be made. *Jones* v. *Winthrop Savings Bank*, 242.

5. Such tax cannot be recovered of a bank whose charter had previously expired by a decree of sequestration. *Ib.*

TENDER.

TOWN.

TOWN LINES.

See TOWN, 6, 7, 8.

TOWN MEETING.

See TOWN, 10, 11.

TRESPASS.

TROVER.

TRUST.

WILL.

WITNESS.

WORDS.

WRIT.

ERRATA.

Page 20, 11th last line. Substitute "were" for "was."
Page 94, at middle. Substitute "tract" for "track."
Pages 123–4–5. Substitute "jailer" for "jailor."
Page 124, at middle. Substitute "c. 283" for "c. 284."
Page 205. Substitute "Isadora W. Drinkwater" for "Isadora Ward."
Page 444, line 10. Substitute "§ 86" for "§ 85."
Page 513, 13th last line. Substitute "14" for "44."
Page 540, 5th last line. Substitute "mortgage" for "mortgagee."
Page 542, sixth head note. Substitute "demurs" for "demur."

Some typographical errors in head notes are corrected in "Index."
For index pages of cases cited, see "Table of Cases cited by the Court."

Errors noted in Vol. 65.

Page 219, line 14. Substitute "were" for "was."
Page 370, lines 17, 18. Read between the lines an omitted section or substitute "a different" for "such a."
Page 501, line 3 of statement. Substitute "daughter," for "sister."
Page 543, line 9. Substitute "defendants" for "plaintiffs."
Page 543, line 10. Substitute "plaintiffs" for "defendants."