# REPORTS

OF

# CASES IN LAW AND EQUITY

DETERMINED BY THE

# SUPREME JUDICIAL COURT

OF

# MAINE.

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By JOSIAH D. PULSIFER,
REPORTER TO THE STATE.

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## MAINE REPORTS,
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# JUDGES

OF THE

# SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

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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.

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ATTORNEY GENERAL,

Hon. LUCILIUS A. EMERY.

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# CASES

IN THE

# SUPREME JUDICIAL COURT

OF THE

# STATE OF MAINE.

STEPHEN H. WEST *vs.* ALBERT B. FURBISH *et al.*

Androscoggin. Decided August 4, 1877.

*Bankruptcy.*

Assumpsit against F. and another, to recover a debt provable in bankruptcy and for which the defendants were jointly liable. Prior to the commencement of the action, F. had become adjudged a bankrupt, but had not received his discharge. *Held*, that the plaintiff, on proper suggestion of the bankruptcy, might strike the bankrupt's name from the suit, without costs, and prosecute his action against the other defendant. R. S. c. 82, § 47.

ON REPORT.

ASSUMPSIT to recover $738.95 of the defendants, who were builders and copartners in business at the time the services charged for were rendered.

At the time of bringing the action, in September, 1876, one of the defendants, Furbish, was in bankruptcy and not discharged at the April term, S. J. C., 1877, when the plaintiff, by the provision of R. S., c. 82, § 47, discontinued as to him and struck his name from the suit without costs.

Thereupon the defendant, Swett, contended that inasmuch as the plaintiff had voluntarily released the bankrupt without waiting for his final discharge in bankruptcy, such release operated as a release of the other defendant, and that this action as against him alone could not be further maintained. If, in the opinion of the court, this position of the defendant is well taken, it was agreed

that a nonsuit should be ordered, otherwise that judgment should be rendered for the plaintiff.

*L. H. Hutchinson & A. R. Savage*, for the plaintiff, relied upon R. S., c. 82, § 47.

*W. P. Frye, J. B. Cotton & W. H. White*, for the defendant, Swett, contended in substance that though true it is that the plaintiff may, by virtue of section 47, strike the name of the bankrupt defendant from the suit, yet that section, on this question, differs from section 11 of the same chapter, only in the matter of costs; section 11 providing that the plaintiff may strike out the name of any defendant, on payment of costs; and section 47 providing that he may strike out the name of a bankrupt defendant, without costs; that it would not be claimed in this case if Furbish had not filed his petition in bankruptcy, that the action could be maintained against Swett alone even though the plaintiff had discontinued and paid costs under section 11; that the permission of the statute to strike out a name, in either case, was one to be exercised at the plaintiff's risk, at the hazard of having his writ abate by reason of non-joinder of necessary parties; that whether the name of the bankrupt defendant, Furbish, was properly struck out could only be known after he had obtained his discharge in bankruptcy, and after he had pleaded it.

*Reply.* To be sure under section 11, the plaintiff may, if he will, strike out a defendant's name unreasonably and incur risks; but the statute was not intended to cover such a case; perhaps he might do that without the statute. It is implied in both §§ 11 and 47, that the discontinuance is rightful and that after striking out one defendant, the plaintiff may proceed against the other.

Striking out of a defendant in bankruptcy, will not operate as a release of a co-defendant. *Dole* v. *Warren*, 32 Maine, 94. *Walker* v. *McCulloch*, 4 Maine, 421. *Ruggles* v. *Patten*, 8 Mass. 480. *Shaw* v. *Pratt*, 22 Pick. 305. *McAllester* v. *Sprague*, 34 Maine, 296.

VIRGIN, J. In actions *ex contractu*, the common law generally requires that a recovery must be against all or none of the joint contractors. This general rule, like most others, has its exceptions; as where one of the joint promisors resides without, and has no

property within the jurisdiction, so that no service can be made upon him, (*Dennett* v. *Chick*, 2 Maine, 191; *Rand* v. *Nutter*, 56 Maine, 339); or has deceased, (*Harwood* v. *Roberts*, 5 Maine, 441); or pleaded infancy, (*Cutts* v. *Gordon*, 13 Maine, 474); or bankruptcy, (*Coburn* v. *Ware*, 25 Maine, 330); in which cases their names may be stricken from the writ, and judgment be recovered against the other defendants. 65 Me. 499

The same rule required all the joint promisors to be made parties, although one of them had received his discharge in bankruptcy. 1 Chit. Plead. 42, 42 *a*. He might or might not plead his discharge. If he did and proved it, he recovered his costs. Such recovery did not prevent the plaintiff from obtaining judgment against the other defendants. The bankrupt act itself provides (§ 5118) that "no discharge shall release, discharge or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise."

In 1868, (cc. 157 and 223,) and 1870, (c. 79,) the legislature intervened to regulate actions pending in which any defendant therein is a bankrupt. The provisions are embodied in R. S., c. 82, §§ 46 and 47. Section 47 provides in effect that when it appears that any defendant is voluntarily or involuntarily adjudged a bankrupt, "either before or after the commencement of the action," it shall be continued until the proceedings in bankruptcy are closed on two conditions;

1. The plaintiff need not wait for the termination of bankrupt proceedings, to the end that if the bankrupt obtain his certificate of discharge he may plead it; but upon suggestion of the commencement of such proceedings, the plaintiff may, if he will, thereupon strike such bankrupt defendant's name from the suit "without costs," and proceed at once against the remaining defendants; or,

2. If such bankrupt defendant fail to use due diligence in the prosecution of his bankrupt proceedings after one term's notice in writing from the plaintiff, then, in the absence of any stay of proceedings from the bankrupt court under the provisions of U. S. Rev. Sts. § 5106, the plaintiff may by leave of court proceed without further delay against all the defendants including the bankrupt.

The objection that this statute permits the striking out of a bankrupt defendant's name only when he is a several promisor,

is not tenable. The statute makes no distinction between joint and several promisors, but applies in terms to "any defendant." There need be but one. *Severy* v. *Bartlett*, 57 Maine, 416. If the legislature intended it to apply to a several promisor only, the clause relating to defendants whose bankruptcy proceedings commenced "before" as well as "after the commencement of the suit," would be useless; for if severally bound, the bankrupt defendant who has filed his petition or has been adjudged a bankrupt before suit, need not be sued; but in such case, the plaintiff may select any solvent promisor and sue him alone; while if jointly bound, they must all be sued, even if one or more is in bankruptcy.

The object of the statute would seem to be two-fold. One clause is in consonance with U. S. Rev. Sts. § 5106, and is intended to protect the bankrupt, that the action shall, on suggestion of bankruptcy by the bankrupt, (*Palmer* v. *Merrill*, 57 Maine, 26,) be continued a reasonable time, to the end that the question of his discharge may be determined, and if obtained, that he may plead it; and the other to aid the plaintiff in obtaining a speedy judgment against his solvent debtors, when without the statute his remedy might be clogged by reason of the bankruptcy of one of them.

*Judgment for the plaintiff.*
*Damages to be assessed by clerk at nisi prius.*

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

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JOHN C. WHITE *vs.* AUGUSTUS B. JONES.

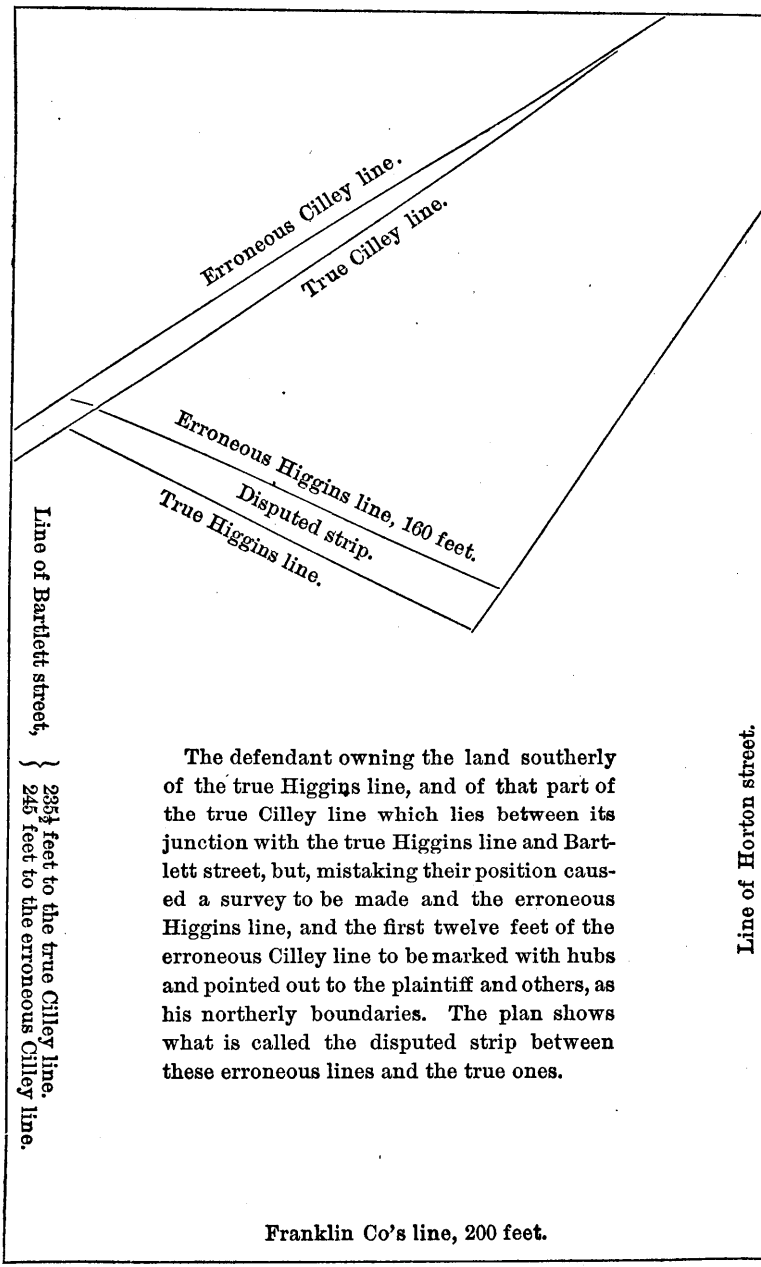
Androscoggin. Decided September 13, 1877.

*Deed.*

When the line of a lot is made a boundary, it means the true line, not a conventional one agreed upon by the parties.

When the call of a deed is to a (the Cilley) line, thence on the southerly line of said (Cilley) lot a certain distance, the call begins and continues on such line.

Thus: where the call in the deed was to the Cilley line, thence on said line, about twelve feet, to a stake and stones, and the stake and stones were not in fact upon the true Cilley line, but on a conventional one, they were rejected.




The defendant owning the land southerly of the true Higgins line, and of that part of the true Cilley line which lies between its junction with the true Higgins line and Bartlett street, but, mistaking their position caused a survey to be made and the erroneous Higgins line, and the first twelve feet of the erroneous Cilley line to be marked with hubs and pointed out to the plaintiff and others, as his northerly boundaries. The plan shows what is called the disputed strip between these erroneous lines and the true ones.

On exceptions.

Covenant broken. The writ alleges a breach of the covenants of seizin and good right to sell and convey contained in a deed of warranty from the defendant to the plaintiff, dated June 1, 1866, of a lot of land in Lewiston, described as follows:

Beginning on the westerly side of Horton street at the north-east corner of land this day conveyed by me to the Franklin company; thence westerly, at right angles with said Horton street on the northerly line of said last named land, to land conveyed to me this day by said Franklin company; thence, continuing the same course westerly, on the southerly side of said land conveyed to me by the Franklin company, to Bartlett street; thence northerly, on the easterly line of said Bartlett street about 245 feet, to land known as the Cilley lot; thence north-easterly, on the southerly line of said Cilley lot about twelve feet, to a stake and stones; thence south 72½ degrees east, about 147 feet, to a stake and stones; thence north, 11½ degrees east, about 112 feet, to the westerly line of said Horton street; thence southerly about 278 feet, on the westerly line of said Horton street, to the bound began at, containing about 66,989 square feet; meaning hereby to convey the aforesaid land conveyed to me by the Franklin company, and also all the land lying between the said streets which was conveyed to me by William H. Blair and wife, except the above-mentioned land conveyed by me to the Franklin company.

There was evidence tending to show that at the time when the defendant conveyed to the plaintiff, the parties did not know the true place of the Cilley line, or of the southern boundary of the Higgins reservation and that the defendant caused a survey to be made, and mistaking their position, caused hubs to be put down at places further north than the true Cilley line or the true Higgins line would authorize.

The plaintiff contended that the terms of the defendant's deed to him would cover a certain strip of land on the southerly side of the Higgins lot, about six feet wide at one end and nine feet at the other, and about one hundred and sixty feet long, to which it was admitted that the defendant had no title, and which was a part of the Higgins lot referred to in the deed of William

H. Blair and wife to the defendant; the defendant contended that by a legal construction of his deed to the plaintiff, the strip being a part of the Higgins lot was reserved and excepted; he also contended that if he had pointed out to the plaintiff, the hubs put there by the surveyor, yet they were not the monuments called for in his deed to the plaintiff, and could not prevail over other lines and monuments which were named in the deed. But the presiding justice, *pro forma*, overruled these positions of the defendant, and instructed the jury for the purpose of the trial, as follows:

"The first inquiry is in regard to that stake and stones at the end of the line described as about twelve feet on the Cilley line. If that stake, set up by Mr. Read when he surveyed it for the grantor, in April previous to the date of the deed from the defendant to the plaintiff, is the stake here intended by the parties, and the evidence satisfies you that that is the stake referred to in that deed and was so intended by the parties, then the plaintiff is entitled to recover." The verdict was for the plaintiff, and the defendant alleged exceptions.

*W. P. Frye*, *J. B. Cotton & W. H. White*, for the defendant.

*M. T. Ludden*, for the plaintiff, contended that although true it was that, if in answering the third call in the deed the plaintiff must not pass the true Cilley line, he could never reach the stake and stones, yet as there are two monuments named, the Cilley line and the stake and stones inconsistent with each other, the stake and stones being more certain and prominent must prevail; *Lincoln* v. *Wilder*, 29 Maine, 169; and that the two descriptions not coinciding, the plaintiff, the grantee, is entitled to hold that which would be most beneficial to him. *Esty* v. *Baker*, 50 Maine, 325.

APPLETON, C. J. The rights of the parties depend upon the construction given to the third and fourth calls in the defendant's deed to the plaintiff.

The third call is as follows: "thence northerly, on the easterly line of said Bartlett street, to land known as the Cilley lot." The true line of the Cilley lot is not in dispute. This call is not to a stake and stones. It is to an ascertained and unquestioned line.

Nor does it matter that there may have been a misapprehension as to where the Cilley line was or an occupation of land by the coterminous owners not in accordance with the true Cilley line. That line, when ascertained, is the termination of the line indicated by the third call. *Wiswell* v. *Marston*, 54 Maine, 270. A quit-claim deed of land bounding it by the land of A. conveys the grantor's title up to the true line of A., notwithstanding a portion of the grantor's land was held adversely by A. in consequence of an erroneous location of the division fence. *Sparhawk* v. *Bagg*, 16 Gray, 583. The line of a lot means the true line, not a conventional line which may have been agreed upon by the parties.

The fourth call is: "thence northeasterly on the southerly line of said Cilley lot about twelve feet to a stake and stones."

The point of beginning is fixed. It is on the Cilley line not off of it. It is where the third call in the deed meets that line. Beginning then at a point on the Cilley line, this call requires its whole length to be "on the southerly line of said Cilley lot," not off of that line. If it begins off that line, and runs the course and distance prescribed, it will be in direct violation of the clear and explicit language of the deed. Were it not for "stake and stones" at the end of the fourth call, which are claimed to be some nine and one half feet distant from the line of the Cilley lot, there would be no question. But one cannot reach the point claimed by the plaintiff, except by ignoring clear and well ascertained facts—the Cilley line at the junction of the third call with it and the Cilley line, for its whole distance of twelve feet. For it must be remembered that the Cilley line—an undisputed line—is to be regarded as a continuous monument for its whole distance; and it must control. It is obvious the grantor, when he conveyed, did not intend to convey land he did not own.

The *pro forma* ruling of the presiding justice was erroneous.

*Exceptions sustained.*

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

G. W. COLTON *et als vs.* WILLIAM F. STANWOOD *et als.*

Androscoggin. Decided October 30, 1877.

*Amendment.*

The plaintiffs, Colton, Z. and R. declared on a poor debtor bond given by the defendants to them in the ordinary form. One of the defendants prayed oyer and demurred for variance, the names of the obligees in the bond being given as Carlton, Z. and R. The presiding justice sustained the demurrer, but allowed the plaintiffs to amend without terms, by describing the bond as given to the plaintiffs by the names of Carlton, Z. and R. The defendants excepted to the allowance of the amendment.

*Held,* that the declaration was amendable and that the plaintiffs, on proper averments and on proof that they, though misnamed, were the parties really intended, might maintain the action.

*Held* also, that it was no good ground of demurrer, that the bond though several as well as joint was not so described; this being a joint action, was sustained by the production of a bond in which the defendants bound themselves jointly and severally.

But, *held,* that R. S. c. 82, § 19, is imperative as to the terms on which the plaintiffs may amend their declaration when adjudged insufficient on demurrer, and that it was erroneous to permit the plaintiffs to amend here, except on the statute terms.

ON EXCEPTIONS, at the April term, 1877.

DEBT on a poor debtor bond.

William F. Stanwood, one of the defendants, on oyer of the bond, set out the same at the September term, 1876, and demurred specially; and the demurrer was joined by the plaintiffs. The other defendants severally pleaded the general issue at the same term. The cause of demurrer assigned was a variance. "The obligees mentioned in the bond are G. W. Carlton, C. B. Carlton, H. F. Zahm and L. A. Roberts, co-partners, doing business under the firm name and style of Carlton, Zahm and L. A. Roberts, and not the plaintiffs, G. W. & C. B. Colton, Zahm and L. A. Roberts, copartners, doing business under the firm name and style of Colton, Zahm and Roberts, as set forth in the plaintiffs' writ and declaration."

At this (April) term, the demurrer filed by Stanwood, was sustained and the declaration adjudged bad. Thereupon the plaintiffs filed a motion to amend their writ, which motion was allowed

by the presiding justice without terms; and to its allowance, the defendant, Stanwood, alleged exceptions.

*C. Record*, for the defendants. The amendment was not permissible upon any terms. *Venn* v. *Warner*, 3 Taun. 263. *Gould et als* v. *Barnes*, 3 Taun. 504. *Blackmore* v. *Flemyng*, 7 Durnf. and E. 447. *Willard* v. *Missani*, 1 Cow. 37. *Hemmenway* v. *Hickes*, 4 Pick. 497. *James* v. *Walruth*, 8 John, 410. *Pitt* v. *Green*, 9 East. 188. *Ehle* v. *Purdy*, 6 Wend. 629. *Turner* v. *Eyles*, 3 Bos. and Pul. 456. 1 Chitty Pl. (3 ed.) 228.

If this court should otherwise hold, then it was error to allow the amendment without terms. R. S., c. 82, § 19. *Wakefield* v. *Littlefield*, 52 Maine, 21. Rules of court 4 and 5.

*W. P. Frye*, *J. B. Cotton* and *W. H. White*, for the plaintiffs. The amendment was allowable. *Farrar* v. *Fairbanks*, 53 Maine, 143.

BARROWS, J. It was long since held, and, so far as we know, it has never been questioned, that if a plaintiff sues as payee of a bill or note, or as promisee in a simple contract which purports on its face to be payable to, or made with a person of a different name, this may be explained by evidence *aliunde*, and there will be no variance to defeat the action, if the record contains the proper averments, and the plaintiff can show that he was the person really meant. *Willis* v. *Barrett*, 2 Stark. 29. Starkie on Evid. Metcalf's ed., part. IV, *1579, and cases there cited. 2 Greenleaf's Evid. (2d ed.), § 160. *Com. Bank* v. *French*, 21 Pick. 486, 489. *Medway Cotton Manufactory* v. *Adams*, 10 Mass. 360. *Ch. Association* v. *Baldwin*, 1 Met. 359. The same doctrine was held applicable to a specialty in *Lowell* v. *Morse*, 1 Met. 473.

We see no valid reason to question the propriety of this. The undertaking of the defendants might well be declared on according to its legal import and effect, and it is only necessary upon proper averments and proof, to ascertain to whom the promise was really made. The bond would seem to have been delivered to the officer as the agent of these plaintiffs, and the best aspect that the case can wear for the defendants, is, that they made a mistake in the name of the parties with whom they were dealing, which the agent of those parties did not discover.

We find in it no substantial ground of defense. This court in *Wilton Manuf. Co.* v. *Butler*, 34 Maine, 431, decided as a question of fact, upon which parol evidence was admissible, whether a certain corporation was the party to a judgment recovered under a name variant from the corporate name. The *dictum* in *Farrar* v. *Fairbanks*, 53 Maine, 143, was based upon such authorities as the foregoing.

The bond was pleaded with a profert, and the presiding judge rightly sustained the demurrer for the variance. By R. S., c. 82, § 19, he had the same power as the full court, after such ruling and before exceptions filed, to allow the plaintiffs to amend. We think the amendment was allowable. It was simply a case of misdescription of the contract upon which the plaintiffs undertook to declare, and comes within the principles laid down in *Cummings* v. *Buckfield Branch*, 35 Maine, 478; *Wing* v. *Chase*, *id.* 260, and *Cooper* v. *Bailey*, 52 Maine, 230. It is no good ground of demurrer that the bond, though several as well as joint, was not so described; this, being a joint action, is sustained by the production of the joint bond of the defendants. But the exceptions state that the judge allowed the plaintiffs to amend their declaration without terms.

If it had been a case where the allowance of the amendment was subject only to such terms as the judge in his discretion might see fit to impose, the defendant would have no ground of exception.

But in respect to demurrers to declarations, R. S., c. 82, § 19, is imperative as to the terms upon which the plaintiff may amend, if his declaration is adjudged defective upon demurrer. In such case if the declaration is amendable, "the plaintiff may amend upon payment of costs, from the time when the demurrer was filed." This demurrer was filed at the September term, 1876. It was error to allow the plaintiffs to amend their declaration at the April term, 1877, without payment of costs, and for this reason only the exceptions are sustained. Plaintiffs may have leave to amend upon the statute terms. *Exceptions sustained.*

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

MARY B. TRUE, in equity, *vs.* DANIEL C. EMERY *et als.*

Cumberland. Decided January 30, 1877.

*Attachment.*

Where two several creditors simultaneously attach a debtor's real estate consisting of an equity of redemption, as between themselves an undivided half thereof becomes holden as attached on each writ, and the equity may be sold in moieties upon executions recovered upon such writs, one undivided half upon each execution, where neither moiety is sold upon the execution for a sum exceeding the amount due thereon.

Where an officer in his return of a sale of an equity upon execution, declares that he published in a certain newspaper, the notice which the statute requires to be given, it is not competent for the debtor or any one claiming under him, to contradict the officer's return by the production of such newspaper, showing the return to be untrue.

There is no legal necessity of returning to the clerk's office, within any definite time, the execution upon which an equity has been sold by an officer, in order to make the sale valid, as against a subsequent purchaser. The registry of deeds (by statute) discloses the state of the title in such case.

BILL IN EQUITY, to redeem a farm in Gorham, from a mortgage by Merrill W. Mosher to one David D. Thorn and his assigns, to secure the payment of $2500, in one year from date, May 1, 1871, with interest; the right of redemption having been assigned to the complainant by Mosher, by his deed of March 30, 1874.

The bill sets out that at the October term, 1873, the mortgagee, Thorn, recovered a conditional judgment against Mosher, for $2760.20 debt, and $31.86, costs; that Thorn assigned this judgment to Emery, January 19, 1874, who, on failure of payment of the judgment, April 22, 1874, sued out an alias writ of possession, whereby Emery was put into full possession of the mortgaged premises, on May 14, 1874; that the plaintiff, as assignee of Mosher, delivered to Emery, a request in writing for a true account; and that Emery refused to comply therewith. The bill closed with a prayer that Emery, Thorn and Libby be required to answer, and that she be permitted to redeem, and for other relief.

The defendant, Emery, admitted the foregoing facts. But set up in defense, that on July 9, 1874, the time of the admitted demand, the complainant had no right to make it or to redeem; that on March 7, 1872, the right in equity of Mosher to redeem was

attached simultaneously on two several writs, in two suits, on that day commenced against him and returnable to the superior court, one in favor of him, the said Emery, and the other in favor of his co-defendant, Libby, and in each, judgment was recovered by the respective plaintiffs at the April term, 1873, and executions issued, on each of which a deputy sheriff, May 17, 1873, seized an undivided moiety of said Mosher's right in equity, and after due proceedings had, on June 27, 1873, to satisfy said two executions, sold both of said undivided moieties, one on each execution, to the said Libby, and on the same day executed to him two several deeds thereof, whereby Libby became seized and the lawful owner of the whole of said Mosher's right in equity to redeem, subject only to the right of said Mosher or his assigns to redeem from the sales on said executions within one year thereafter, and that the year expired June 7, 1874, and Libby then became the absolute owner of the whole of the equity.

*F. O. J. Smith*, for the complainant, contended that there was no statute authorizing an officer to seize and sell by auction on execution, a moiety or any fractional part of a debtor's right to redeem his real estate from a mortgage; that the purchaser cannot compel a mortgagee to relinquish any part of his mortgage security, short of the whole, and only on payment of the full amount of the mortgage debt; nor can a party, by the purchase of one part, acquire the right to redeem an incumbrance on another part.

A creditor may, at his own hazard of removing by agreement existing incumbrances, levy upon a fractional part of his debtor's mortgaged real estate by metes and bounds, as was done in the case of *Franklin Bank* v. *Blossom*, 23 Maine, 546; but he cannot have the incumbrance deducted from his appraisement, as is virtually done by selling an entire equity of redemption. *Warren* v. *Childs*, 11 Mass. 222.

The statute points out the mode of reaching the debtor's interest, R. S., c. 76, § 29, and c. 87, § 21, and does not authorize the sale of numerous equities for one sum, nor the reduction of an equity to less than an entirety and the sale of a fractional part, and the imposing upon it the entire incumbrance.

The counsel contended and argued elaborately at length that

the equity could not be split; and under various positions taken, cited, besides some of the cases appearing in the opinion, the following: *Bacon* v. *Leonard*, 4 Pick. 277; *Shove* v. *Dow*, 13 Mass. 529; *Allyn* v. *Burbank*, 9 Conn. 151; *Young* v. *Williams*, 17 Conn. 393; *Jessup* v. *Batterson*, 5 Day, (Conn.) 371; *Franklin* v. *Gorham*, 2 Day, 149.

Counsel also argued upon the insufficiency of the notice which in the opinion appears.

*G. B. Emery*, for the defendants.

A debtor can convey one moiety of his equity to one person and the other to another by one deed, or by separate deeds. If he should convey the whole equity to one and the whole equity to another at precisely the same time by deeds recorded simultaneously, the grantees would take in moieties. The same is the result of a statute conveyance by the officer.

This subject has been thoroughly investigated by his honor, Mr. Justice Walton, as referee, in a case growing out of this sale by the officer, and involving this precise question, and his conclusion was, the sale was valid. In his report Judge Walton remarks: "The ultimate question to be decided is whether in the case of two simultaneous attachments of real estate under mortgage, each attaching creditor can legally cause an undivided moiety of the debtor's right to redeem, to be seized and sold to satisfy his execution. My conclusion is that he can. It being settled that simultaneous attachments create equality of rights, and give to each attaching creditor a lien upon an undivided moiety only, it seems to me that each creditor has a right to have such interest seized and sold to satisfy his execution. In other words, that each creditor has a right independently of the other, to have seized and sold on his execution what was attached on his writ."

PETERS, J. The main question to be decided is, whether an equity of redemption can be sold in separate portions or shares, by an officer, upon different executions, under the particular circumstances existing in this case. The precise question presented has never before arisen in any reported case in this state nor has it been decided elsewhere, under a statutory system like our own, that we are aware of.

Two several creditors made simultaneous attachments upon a debtor's real estate. The property attached turned out to be an equity of redemption. By virtue of the attachments, upon executions afterwards obtained, the equity was sold in moieties at the same time to the same bidder by the officer holding both executions, one undivided half thereof upon one execution and the other half upon the other. Can the sales be upheld? We think they can. If not, then the circumstance that the attachments were made at the same time renders them both void. Attachments made at the same instant stand upon an equal footing. Neither can exclude the other. Each covers the whole estate as far as the debtor is concerned, and one half thereof as between each other; where neither moiety is appraised upon execution for a sum exceeding the amount due thereon. *Fairfield* v. *Paine*, 23 Maine, 498. *Durant* v. *Johnson*, 19 Pick. 544.

The complainant relies upon several authorities, to show the sales to be void. We think the position taken is not sustained by the cases cited.

In *Stone* v. *Bartlett*, 46 Maine, 438, it was held that several distinct equities could not be sold upon execution together for a gross sum, but should be sold separately. The same decision is repeated in the case of *Smith* v. *Dow*, 51 Maine, 21. *Fletcher* v. *Stone*, 3 Pick. 250, decides the same question in the same way. The reason of the decision in those cases is, that a debtor has the right of redeeming one equity without redeeming the other. No such reason can apply in this case.

In *Chapman* v. *Androscoggin Railroad*, 54 Maine, 160, it was determined that our statutes do not permit the sale of an equity of redemption upon two or more executions jointly in favor of two creditors. Undoubtedly, such a proceeding was awkward and illogical in the extreme. Nor was there any necessity for it in that case. There the attachments were successive in point of time and not simultaneous. The equity could have been sold on one execution under the provisions of our statutes. R. S., c. 84, § 21. But here it is different. The equity could not be sold on one execution, because one half of the equity only could be held as attached thereon. It became necessary to provide a way to make such sales

as would save both attachments and make them effectual. The distinction between that case and this, is a marked one, and the reasons upon which the conclusion in that case must rest, although having some appearance of it, are not really pertinent to such a state of facts as is presented here.

While we do not regard the foregoing cases as militating against, there are several cases which by their force and effect strongly support our present view. In *Franklin Bank* v. *Blossom*, 23 Maine, 546, it was decided that, where land situated in two adjoining towns is included in the same mortgage, an officer may sell the right of redeeming the land within one of the towns only. That decision approaches to the proposition sought to be established in this case, very nearly. If an officer could sell what was in one town on one execution, he might sell what was in the other town upon another execution, and the different creditors could resort to a court of equity to settle the matter between them. The complainant thinks that *Bank* v. *Blossom*, stands upon doubtful ground. But we do not perceive that its force has been broken by any of the later decisions.

The case of *Durant* v. *Johnson*, *supra*, is quite in point. In that case there were simultaneous attachments, by two creditors, of the same parcel of land. One creditor levied upon the whole land, acquiring thereby a title to but a moiety of the land as against the other creditor. Therefore, an undivided moiety remained for the other creditor. By the law of Massachusetts, (same as here) a creditor ordinarily could levy only by metes and bounds upon an estate held by the debtor in severalty. But the latter creditor, to relieve himself from the predicament he was in, levied upon an undivided share of the land, and the levy was declared to be good. The court there, say: "There is no statute provision declaring the effect of simultaneous attachments, or directing the mode of levying executions in such cases, but the court have applied to the cases that have occurred, such legal principles as would most effectually do justice to the conflicting claims of creditors, without violating any existing laws." See *Sigourney* v. *Eaton*, 14 Pick. 414, and *Verry* v. *Richardson*, 5 Allen, 107.

Upon principle, we think these proceedings should be sustained.

We do not go so far as to say that an attachment and a sale of a part of an equity would be valid, when the whole is as open to attachment as any part of it. We confine our decision to the facts of this case. No injury need be suffered by the debtor, by selling his equity in this way. It may be an advantage to him. He can redeem from one sale and forego a redemption of the other, if he desires to. It is urged that a sale in two halves, by splitting the equity, would not bring so much money as a sale of the entirety would. That is not evident. But, if it was, any liability to loss could be avoided by the debtor, by redeeming from the sales, and less money would be required to enable him to do so. The purchaser holds the land subject to the mortgage. If the debtor redeems from both sales, his property is restored to him. If he redeems from one sale only, he becomes a tenant in common with the purchaser, subject to the mortgage. The debtor would then be in the same condition as he would be, had he conveyed an undivided half of the land to the creditor, subject to the mortgage. That would be, by no means, an uncommon relation of parties in an ownership of an estate, and it might be brought about in several ways. Should the debtor, as a tenant in common, redeem the estate by paying up the entire mortgage, he would have an equitable lien upon the half not his own, for the sum he may advance upon it. Nor is there any contingency affecting the situation of the debtor which would debar his interests from a reasonable and sufficient protection. *Smith* v. *Kelley*, 27 Maine, 237. *Bailey* v. *Myrick*, 36 Maine, 50.

The complainant, *arguendo*, says that an article of personal property cannot be sold on execution in common and undivided shares. But it can be, if the debtor owns in it only an undivided share. And in such a case the debtor's situation would exceedingly resemble the position of the debtor here.

The complainant next contends that the notice of sale given by the officer, as published in the Portland Argus, was not a legal and sufficient notice. But this point is not open to the complainant. If it was admitted by the respondents to have been the notice in fact given, the point would have been open. But the respondents refuse to admit it, and rely upon the return of the offi-

cer, that he gave due and legal notice, as conclusive. The sworn return of the officer is conclusive. The rule is very general. The exceptions are very rare, and this case is not one of them. *Blanchard* v. *Day*, 31 Maine, 494, 496. *Grover* v. *Howard*, Id. 546. *Huntress* v. *Tiney*, 39 Maine, 237. *Bunker* v. *Gilmore*, 40 Maine, 88. *Dutton* v. *Simmons*, 65 Maine, 583. *Pullen* v. *Haynes*, 11 Gray, 379. In *Sykes* v. *Keating*, 118 Mass. 517, the officer's return set out that the notice of the sale was of land on Union street in a city, and it was held that evidence that in the published notice of sale the premises were described as situated on Avon street was not competent to contradict the return. The remedy would be against the officer for a false return. We do not mean to intimate, however, that the published notice in the present case is not a perfectly good one. On the contrary, we do not now perceive any valid objection to it. It seems to be in the common form, as laid down in the books of forms for officers' proceedings. It is objected that the whole equity was advertised for sale upon each execution. So was the whole equity attached on each writ. The notice was proper enough as far as that point is concerned. *Non constat*, that the attachments would be in the way of each other when the day of sale should arrive. One of them might be paid or released or waived. The debtor was not prejudiced upon that ground to any extent whatever. The case of *Roche* v. *Farnsworth*, 106 Mass. 509, cited by complainant, does not apply.

Another objection is raised against the validity of the respondents' title. It appears that upon one of the executions, besides the sale thereon of one half of the equity, a levy was also made, other real estate having been taken in satisfaction of a part of the execution. The execution, with all the returns thereon, was left with the register of deeds, to have the levy recorded. The register, very improperly, for his own convenience in copying, cut the papers annexed to the execution, apart; and, when the execution was lodged with the clerk, after the extent was recorded, the part of the papers containing the officer's doings in making sale of the equity was missing. The officer afterwards got the papers together and restored them to their original shape. He is accused of

making an illegal amendment, by so doing. But his act merely had the effect of preventing an amendment or alteration, or a diminution of his return.

The point started by the complainant is that the execution, although returned to the clerk's office, had no officer's return of the sale of the half of the equity thereon until after three months from the time it was issued, nor until after the equity was conveyed by the debtor to the complainant. The answer is, that there was no legal necessity of returning the execution to the clerk's office within any definite time, in order to make the sale of the equity valid as against a subsequent purchaser. The registry of deeds discloses the state of the title. R. S., c. 76, § 33. *Ingersoll* v. *Sawyer*, 2 Pick. 276. *Prescott* v. *Pettee*, 3 Pick. 331. *Gorham* v. *Blazo*, 2 Maine, 232. *Emerson* v. *Towle*, 5 Maine, 197. *Clark* v. *Foxcroft*, 6 Maine, 296.

It becomes unnecessary to consider the other questions discussed on the briefs of counsel.

*Bill dismissed, with costs to respondents.*

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

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JOHN FURBISH, executor, *vs.* ROBERT ROBERTSON.

Cumberland. Decided January 31, 1877.

*Abatement.*

A plea in abatement for the nonjoinder of a co-defendant is fatally defective when it does not allege that he was at the date of the writ alive and resident within this state.

In a writ of entry where the defendant alleged exceptions to the ruling of the presiding justice, sustaining the demurrer to his plea without asking leave to plead anew, and the full court sustained the ruling, *held*, that the defendant waived any right to answer further, and that the judgment must therefore be final against him at the next term; when the plaintiff on proper motion can have conditional judgment awarded.

ON EXCEPTIONS.

IN A PLEA OF LAND, wherein the said John Furbish, in his capacity of executor as aforesaid, demands against the said Robert

Robertson one messuage with the appurtenances, situated in said Brunswick, and bounded as follows, viz: Beginning on the north side of Pleasant street at a stake; thence northerly, parallel to and five and a half rods distant from the east line of land formerly owned by Humphrey Given, about twenty rods, to land formerly owned by John O'Brien; thence easterly, on the south line of said O'Brien land, four rods; thence southerly, parallel with the west line about twenty rods, to said Pleasant street; thence westerly, by said Pleasant street four rods, to the first bounds, which he claims in his said capacity of executor. And thereupon he says that said Benjamin Furbish was himself seized of the demanded premises in his life time, in fee simple as aforesaid, within twenty years last past, and thereof the said Robert Robertson unjustly and without judgment, disseized him the said Benjamin Furbish, deceased, within said twenty years last past, to the damage, &c.

To this, the defendant seasonably pleaded in abatement, "that the premises in the said writ and declaration mentioned were at the time named in said writ and declaration in the possession of him the said Robert Robertson, together with one Isaac Plummer, and ~~was~~ were in the possession of the said Robert Robertson alone, and this, he, the said Robert Robertson, is ready to verify. Wherefore, inasmuch as the said Isaac Plummer is not named in the said writ and declaration together with the said Robert Robertson, he, the said Robert Robertson, prays judgment of the said writ and declaration, that the same may be quashed and for his costs."

The plaintiff demurred generally to the plea; the defendant joined the demurrer, which the presiding justice sustained; and the defendant alleged exceptions.

*T. M. Giveen*, for the defendant.

I. The legal effect of the demurrer was to admit the truth of the statement in the plea of the joint possession of the premises by the defendant and Plummer.

II. Plummer should have been joined with the defendant in the action.

In *Varnum* v. *Abbot*, 12 Mass. 474, 480, Jackson, J. says "if a man is disseized by two or more persons, the disseizors have one

joint estate, and one title; the entry of all of them is one act: and the disseizee must, in such a case, sue them all jointly."

So in Stearns on Real Actions, 210, joint tenure is said to be "the proper plea when two or more persons hold jointly, and are not all sued."

It would also appear indirectly, that this view of the law was held by Shepley, J., in *Treat* v. *Strickland*, 23 Maine, 234.

*W. Thompson*, for the plaintiff.

I. The writ and declaration are not defective. *Clifford* v. *Cony*, 1 Mass. 495.

II. The sufficiency of the plea in substance and in form is alone in question, and the highest degree of certainty is requisite. *Getchell* v. *Boyd*, 44 Maine, 482. *Hazzard* v. *Haskell*, 27 Maine, 549. *Adams* v. *Hodsdon*, 33 Maine, 225. *Burnham* v. *Howard*, 31 Maine, 569. *Tweed* v. *Libbey*, 37 Maine, 49. 1. Ch. Pl. 238.

III. The plea does not allege that Plummer was living when it was filed. 1 Ch. Pl. 441, 442.

IV. The Plea does not show whether Plummer and the defendant were in possession of several parts, or had joint possession of the whole. R. S., c. 104, § 10. The language of a dilatory plea should not admit of more than one construction.

V. The plea does not aver that the plaintiff's testator was disseized by two or more. All who were in possession are not necessarily disseizors. *Varnum* v. *Abbott*, 12 Mass. 474.

VI. The plea does not show Plummer a necessary party, for it only says he was in possession; it does not say he claimed a freehold, or had actually ousted the plaintiff or his testator. He might have been tenant for years or at will of the defendant or of the plaintiff and not a disseizor. Story's Eq. Jur. § 998. 1 Ch. Pl. 65. R. S., c. 104, § 6.

VII. The defendant waived his right to answer over by filing and entering his exceptions, without reserving the right, or obtaining leave to plead double. A different ruling would enable a party to use the right of exceptions for purposes of delay, which R. S., c. 77, § 22, was enacted to prevent. *State* v. *Inness*, 53 Maine, 536, 540. If the demurrer is sustained, judgment should be final for plaintiff.

VIRGIN, J. The object sought by a dilatory plea, is the defeat of the particular action upon some technical ground foreign to, and regardless of the real merits of the case. Hence the marked disfavor with which pleas in abatement have always been regarded, as witnessed by the degree of certainty and precision in matter of form as well as of substance demanded in such pleas. The rule requires the pleader to "anticipate and exclude all such supposable matter, as, if alleged on the other side, would defeat the plea." Gould's Plead., c. 3, § 57. *Tweed* v. *Libbey*, 37 Maine, 49. The plea and the writ cannot both be good. When matter in abatement is seasonably and well pleaded, the action must necessarily abate; but when the allegations in the plea may all be true, and still the action stand, the plea must be bad.

Judged by this rule, the plea in the case at bar must be adjudged to be fatally defective. For the law does not allow deceased persons to be impleaded, or non-resident defendants to be joined with those within the jurisdiction, though jointly interested. If, therefore, all the allegations in the plea be true, still the writ and declaration may be good by reason of the death or non-inhabitancy of Plummer, neither of which supposed facts has been denied by the plea.

The decision being based on a demurrer, the judgment cannot be entered until the term next after the decision is certified. R. S., c. 82, § 19. *State* v. *Peck*, 60 Maine, 498.

The defendant alleged exceptions without asking leave to plead anew, and entered his action in the law court. This has been considered a waiver of any right on his part to answer further; and the judgment must therefore be final against him. R. S., c. 77, § 22. *State* v. *Inness*, 53 Maine, 536, 541. At that term the plaintiff, on motion, can have a conditional judgment awarded, and the sum adjudged.

*Exceptions overruled.*
*Judgment to be final at the next term after decision certified.*

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

DANIEL F. EMERY *et al.* petitioners *vs.* CHARLES V. BRANN *et als.*

Cumberland. Decided March 31, 1877.

*Certiorari. Poor debtor.*

In a petition for certiorari to require justices of the peace and of the quorum to certify up the record of their proceedings in taking the disclosure of a debtor under c. 113, R. S., and to quash the same, it is not competent for the petitioner to introduce evidence *dehors* the record, to show error in the record or proceedings, or fraud, or that injustice was done.

Regularly, the petition should allege that the errors complained of appear by the record of the proceedings.

An allegation in the citation, that the debtor was arrested on the execution by a deputy of the sheriff of Somerset county, is sufficient to give jurisdiction to justices of the peace and of the quorum for that county. It will be presumed that the arrest was made within the jurisdiction of the officer.

ON REPORT.

PETITION FOR A WRIT OF CERTIORARI, to bring up and quash the proceedings of three justices of the peace and quorum, in admitting Charles V. Brann to the benefits of the oath provided in R. S., c. 113, § 30.

The petition did not set out the record or assign errors apparent therein; but did recite minutely and at length the judgment, execution, its delivery to the officer, and proceedings thereon, embracing the proceedings before the three justices. The petition, copy of the record, answers of the respondent and the original papers referred to, made part of the case.

The petitioners offered the original papers, showing the proceedings before the magistrates and proof of identity to impeach and complete the record, and to show fraud, and that injustice was done; also the deposition of S. J. Walton, one of the magistrates who acted but did not sign the record, and other proof for same purpose.

If the original papers or other testimony are competent to be introduced to show error in the record of proceedings, or fraud, or that injustice was done, the case to stand for trial; otherwise, judgment for respondents.

The petitioner alleged misconduct and fraud of the magistrates,

and offered evidence thereof *dehors* the record, and closed with the following "objections to the legality and validity of the proceedings before the magistrates, touching the examination and disclosure, and all matters relating thereto."

"I. No legal citation.

"II. The magistrates excluded important and material witnesses and important and material testimony of witnesses present, and declined to and did not hear testimony offered which would have prevented the debtor from taking the oath before referred to.

"III. The debtor's examination and disclosure was not full and complete, but unfinished and incomplete for the various reasons herein before stated.

"IV. The debtor not having made the disclosure provided for and contemplated in R. S., c. 113, the justices were most manifestly in error in administering the oath to Brann.

"V. The justices were in error in not allowing and requiring the debtor to answer all interrogatories tending to show the real condition of the business of the debtor, and his ability to pay the debt due the creditors, and interfering with the examination by the counsel for the creditors, by limiting the time in which the examination must be closed, whether complete and thorough, or not."

The application to the justice, which was made, by reference, a part of the citation, commenced and continued so far as to raise the legal objection thereto, as follows: "To J. F. Holman, esquire, one of the justices of the peace in and for the county of Somerset: whereas I Charles V. Brann, of Madison, in said county, have been arrested by Josiah Tilton, a deputy sheriff under J. H. Chapman, sheriff of said county, on an execution which issued from the county of Cumberland," &c.

*H. Knowlton* and *W. J. Knowlton*, for the petitioners.

The question presented for the consideration of the court by the agreed statement, is not whether the particular evidence offered is competent for the purposes indicated, but whether any evidence, however clear and decisive, is admissible to establish either of the allegations.

The court is to determine whether fraud may be shown by any of the evidence offered or any which might be offered, and whether the record may be shown to be incorrect, by any of the evidence sought to be introduced, or by any testimony, oral or documentary.

The court is to determine in this case, whether gross injustice may be done by a court of inferior jurisdiction, and the injured party be entirely without remedy.

Fraud vitiates all proceedings. Brooms Legal Maxims, 736. If the proceedings were fraudulent or without jurisdiction from any cause, then they are void absolutely.

That the magistrates had no jurisdiction, and that the proceedings were fraudulent, that the record is not in accordance with the facts, and that great injustice was done, the petitioners claim to show by proper evidence in a court of competent jurisdiction to try and determine the rights of the parties.

*T. B. Reed*, for the respondents.

A petition for writ of certiorari is a proceeding well defined in its character and limitations. It is to quash a record for errors in the record itself. It is not an appeal or a new trial.

The proper practice is for the petitioner to set forth the record in his petition, and to specify the errors in the record on which he relies. On the part of the petitioner no evidence can be primarily introduced. The court say in *Rutland* v. *Co. Com. of Worcester*, 20 Pick. 71, 77, 78, "A petition for a writ of certiorari is well understood to be addressed to the discretion of the court. When the record is before the court upon the return of the writ, the court will look only at the record; for this reason it would be futile to admit evidence to contradict the record, on the petition for a certiorari; but it being within the discretion of the court to grant or refuse the writ, evidence extrinsic to the record may very properly be received to show that no injustice has been done, and that a certiorari ought not to be issued. The petitioners in the case before us, will in the first place exhibit the record and point out in what particulars they deem it to be erroneous or defective; and then the respondents may prove by extrinsic evidence, that no injustice has been done, that if the proceedings shall be quashed,

the parties cannot be placed in *statu quo*, or that for any good reason a certiorari ought not to be granted. If such evidence shall be offered by the respondents, the petitioners will of course have a right to rebut it by like evidence." In other words the petitioner is bound by the record. The respondent, appealing to the discretion of the court, may show by extrinsic matter, that the certiorari ought not to be granted, even if there were errors, and the petitioners may rebut that showing, and that is all that can be done.

Here the petitioner admits, not in terms but by force of the stipulation in the last paragraph, that there are no errors in the record. He does not desire to quash the record but to impeach it. That cannot be done in this way. It is true after a general way, that fraud vitiates all things. But even in the cases where fraud can be set up it must be in proceedings which permit proof. If this were a proceeding to reverse the judgment, proof of fraud might then be admissible. But it is not a proceeding to reverse the judgment; it is a proceeding to quash a record. To propose to impeach a record by a proceeding to quash it, is like offering evidence on a demurrer. On a motion to quash an indictment no one has ever yet been heard to prove fraud on the part of the grand jury. The best test of petitioner's position is the absurdity which would result from its adoption. Practically although not in terms the record is admitted to be without error, consequently if it should be certified up it could not be quashed, and the writ would be issued for nothing. Courts of justice never intentionally do futile things.

This very question seems to have been repeatedly decided in this state. *Ross* v. *Ellsworth*, 49 Maine, 417.

We suggest that in both the Maine cases doubts are expressed if the writ of certiorari can properly be issued in such cases as this. See also *People* v. *First Judge, etc.*, 2 Hill, 398. *Allyn* v. *Commissioners*. It would seem to be true that the doubt has ripened into certainty.

*Knowltons*, in reply.

The petitioners ask for a writ of certiorari to correct a proceeding not in accordance with the common law. R. S., c. 102, § 13.

"Proceedings" is a broader term than "record," and embraces all that was done.

The record might be upon its face complete and the entire record fraudulent, and the party injured without remedy, if the court is not to examine the proceedings.

No appeal lies from the decision of the magistrates. This court has superintending power over inferior tribunals. *Dow* v. *True*, 19 Maine, 46, and cases.

By inspection it will be seen that interrogatory 239 of the original papers was important, was objected to and was not allowed to be answered by the debtor, and the papers show upon their face that the creditors were restrained in their examination. No claim is made that the interrogatory was improper, but the magistrates closed the examination as appears against the protest of the counsel for the creditors.

The original papers show that Brann had once been defeated before three magistrates, two of whom he selected, and his defeat would have been certain again after a full and fair disclosure.

If the creditors were restrained in the examination, the writ will issue. *Little* v. *Cochran*, 24 Maine, 509.

The citation making a part of the record does not show the debtor to have been arrested in Somerset county.

The entire record, or what purports to be, and the original papers are before the court, and the original papers written at the time, are the real record, and cannot be changed properly, to make a record to suit any party or to serve the interest of any party.

It would appear from the record made at the time most clearly that the creditors were restrained in their examination and, if so, the law as settled in *Dow* v. *True*, above cited, is applicable in this case.

The petitioners claim that the record (real and true) shows that the debtor did not disclose in that full, clear and honest manner contemplated by law by reason of the unjustifiable interference of the magistrate.

LIBBEY, J. The petitioners set out in their petition certain alleged irregularities and errors in the proceedings of the justices

of the peace and of the quorum, in taking the disclosure of the debtor, and administering to him the oath prescribed in c. 113, R. S. But it is not alleged in the petition that the irregularities and errors specified appear by the record of the justices, which they seek to have quashed. The petition should contain such an allegation. The respondent appeared and answered, and presented a copy of the record of the proceedings of the justices, duly certified, which is made a part of the case. We shall therefore consider the case as if the petition contained the proper allegations. The only alleged error appearing in the record, to which the attention of the court is called by the counsel for the petitioners, in their argument, is that it does not appear by the citation that the debtor was arrested and gave bond in the county of Somerset, and therefore the justices had no jurisdiction. This alleged error is not set out in the petition. The citation alleges that the debtor was arrested by a deputy sheriff, under the sheriff of the county of Somerset, and the petition contains the same allegation. The presumption is that the arrest was made by the officer within his jurisdiction. If, however, the debtor was not arrested in that county, the proceedings were unauthorized and void, and will furnish no defense to an action on his bond.

We have carefully examined the record of the proceedings before the justices, certified by them, and discover no error apparent upon the record.

But the petitioners claim the right to introduce evidence *dehors* the record, "to complete and impeach the record and to show fraud, and that injustice was done," and for these purposes they offered the original papers showing the proceedings before the magistrates, and proof of their identity, and also the deposition of S. J. Walton, one of the justices, who acted but did not sign the record. By the report, "If the original paper or other testimony are competent to be introduced to show error in the record or proceedings, or fraud, or that injustice was done, the case is to stand for trial, otherwise judgment for respondents."

In *Pike* v. *Herriman*, 39 Maine, 52, the petitioner offered to prove certain facts *dehors* the record; but the evidence was held inadmissible. The court say, "A writ of certiorari can present

only a record of their proceedings; no testimony can be received from the petitioner to affect the record, or to prove other facts not appearing in it;" citing *Commonwealth* v. *Bluehill Turnpike Corp.*, 5 Mass. 420. The same rule was affirmed in *Ross* v. *Ellsworth*, 49 Maine, 417. See also *Rutland* v. *County Commissioners*, 20 Pick. 71.

Among the papers offered as original papers, the only one not contained, in substance, in the record, and which tends to contradict it is a paper purporting to be "Interrogatory 239. How did you lose the $600 or $700 to which you refer in your answer to interrogatory 233?" "The above inquiry or interrogatory I put into this examination and desire that the debtor may be permitted and required to answer." . . . . This is signed by the attorney for the creditors, but there is nothing upon it showing that it was presented to the justices before the examination was closed, and ruled upon by them. By the record it appears that no such question was put to the debtor by the attorney for the creditors. The evidence offered is not admissible to show error in the record. Nor is it admissible to prove fraud. Upon this point it is sufficient to say that the petition alleges no fraud in the record. If there was fraud in the proceedings a writ of certiorari is not the proper remedy to correct it. Nor is the evidence admissible to show that injustice was done by the justices, for the reasons stated in the cases above cited.

In *Dow* v. *True*, 19 Maine, 46, and *Little* v. *Cochran*, 24 Maine, 509, cited and relied upon by the counsel for the petitioners, the errors complained of appeared by the record of the proceedings.

*Writ denied. Costs for respondents.*

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

## FRANKLIN WHARF COMPANY *vs.* CITY OF PORTLAND.

Cumberland. Decided April 2, 1877.

*Sewers.*

Under R. S. 1857, c. 16, §§ 2 and 3, as amended by chap. 153 of the public laws of 1860, the municipal officers of the city of Portland had the right to construct the sewer in question with an outfall in the public dock, below low water mark, to be used for collecting rubbish and filth and conducting and depositing them there.

As this right must necessarily be exercised conjointly with the public right of navigation, and the rights of the owners of wharves lawfully erected in such waters, it should be so exercised that such rights shall be no further limited or impaired than is reasonably necessary to accomplish the purpose of the statute which gave it.

That purpose was to enable the city to collect and deposite refuse matter in the public dock where it would ordinarily be so distributed and dissipated by the elements as not to create a nuisance, public or private.

The right of the defendants under the statute is not a right to create a nuisance in the public dock; it is rather to make deposits there temporarily, and not to obstruct navigation permanently.

If such deposits accumulate in such quantities as to obstruct navigation, or cause special and particular damage to the owners of the wharves there, not common to the public, it is the duty of the defendants to cause them to be removed.

If they unreasonably neglect or refuse to do so, they will be guilty of creating a public nuisance, and liable to indictment in the one case, and of creating a private nuisance and liable to an action of tort, at the suit of the wharf owners, in the other.

ON REPORT.

CASE, in tort, for obstructing entrance to plaintiffs' wharf in Portland, by solid deposits of sewage.

The plaintiffs are a corporation established and holding wharf property, in Portland, by virtue of Private Laws of 1850, c. 415, of Private Laws of 1857, c. 98, and of Private Laws of 1871, c. 661.

The plaintiff corporation offered to prove that in 1860 the defendant corporation constructed a sewer through Thames St., and made an outlet for it, into and at the head of the dock on the easterly side of the plaintiffs' wharf; that this dock before the construction of the sewer had been wholly below the line of low water; that the dock was public property, a collection of water open to

the sea, below the line of low water, and from time immemorial had been resorted to by large ships for landing goods at the wharves of the plaintiffs and their grantors, and that the plaintiffs and their grantors had been accustomed to pass and repass over the same.

That the sewer leading into the dock, and the other sewers and drains leading into said sewer, were constructed without traps or cess-pools or other contrivances to catch earth, gravel and other solid matter, coming into the sewers, and prevent the same from being washed into the dock.

That from 1860 down to the present time, the dock in question has been gradually filling up with earth, sand, gravel, mud and filth, brought down in said sewer, and deposited in said dock, until the dock has become so obstructed thereby that the upper portion thereof has become wholly unnavigable and the lower portion unnavigable for vessels of large tonnage, and the plaintiffs have been obliged, in order to use their wharf, to dredge the dock at large expense.

That the plaintiffs have suffered special damage by reason of this deposit of earth, sand, mud and filth, and by the depreciation of the value of their wharf property by reason of the docks being filled up, and by reason of their being obliged to pay out moneys to partially dredge the dock, and by the loss of wharfage and dockage which would have accrued from vessels loading and unloading at plaintiffs' wharf, if the dock had not been so obstructed.

That the defendants have been requested by the plaintiff corporation to remove the sewer deposit in the dock by dredging, before the commencement of this action, but have neglected so to do.

That the construction of said sewer and other sewers leading into the same, with traps, cess-pools and other contrivances to catch and hold the solid matter passing through said sewers and drains, would have effectually prevented a great portion of the fill and deposit complained of, and of the consequent injury to plaintiff corporation.

The city solicitor contended that the foregoing facts, if proved, would not sustain an action against the city of Portland.

Thereupon it was agreed by the parties to report the case to the

law-court for the determination of the following questions of law:

1. Whether the city of Portland have a right to construct a sewer opening into one of the docks of the city, so as to cause a filling up of the same, as above stated, to the injury of the adjoining wharf owners.

2. If so, whether it is not the duty of the city to cause the dock to be dredged and cleared of such deposits, from time to time, as the same shall become an obstruction to navigation.

All ordinances and by-laws of the city of Portland, and all acts of the legislature, bearing upon these questions, are made part of the case. When these questions of law have been determined, the action is to stand for trial.

*C. P. Mattocks & E. W. Fox*, for the plaintiffs, contended that the general authority conferred upon municipal corporations did not authorize them to construct and maintain sewers in such manner as to obstruct the navigation of public navigable waters.

That there was nothing in the acts of the legislature authorizing the construction of sewers by the city of Portland, which grants any peculiar privileges to that city as regards the filling up of the docks, harbor, or public navigable waters surrounding that city, referring to R. S. of 1857, c. 16, §§ 2 and 3, as amended by c. 153, of the public laws of 1860.

That any obstruction of navigable waters is a public nuisance, especially if made below low water mark.

That a public nuisance can be legalized only by legislative enactment, explicit, definite and unequivocal.

That while it is said that the sea is the natural receptacle of the offscourings of the land, and that the filth and refuse of great cities, which must be deposited somewhere, can be deposited in the sea with the least expense and detriment to public health; this argument has little force in view of the fact that sewers may be so constructed that their deposits may be made in the sea without injury to navigation.

That it is the duty of the city either so to construct their sewers that the solid refuse shall never reach the docks, or else to remove it therefrom as soon as it becomes an obstacle to navigation.

That the rule once laid down in *Rex* v. *Russell*, 6 B. & C., 566, "If that which in itself is a public nuisance, as there is no question but what an obstruction to public navigation is, benefits a vastly larger number of people than it incommodes, and in a vastly more important way, then it ceases to be a public nuisance and becomes a public benefit," has been overruled in *Rex* v. *Ward*, 4 Ad. & E., 384, where Lord Denman says, "there is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public which may suffer for their advantage," and that the law of this country and of this state is that the fact of such obstruction being a benefit to the greater number does not render it any the less a nuisance.

The counsel, in their argument, discussed the following cases. *State* v. *Freeport*, 43 Maine, 198. *Knox* v. *Chaloner*, 42 Maine, 150. *Garey* v. *Ellis*, 1 Cush. 306. *Gerrish* v. *Brown*, 51 Maine, 256. *Sherman* v. *Tobey*, 3 Allen, 7. *Eames* v. *N. E. Worsted Co.*, 11 Met. 570. *Renwick* v. *Morris*, 3 Hill, 621. *Hickok* v. *Hine*, 23 Ohio St. 523. *Proprietors of Locks* v. *Lowell*, 7 Gray, 223. *Pennsylvania* v. *Wheeling & Belmont Bridge*, 13 How. 518. *Gunter* v. *Geary*, 1 Cal. 462. *Pilcher* v. *Hart*, 1 Humph. 524. *Washburn & Moen Man. Co.* v. *Worcester*, 116 Mass. 458. *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396. *Brayton* v. *Fall River*, 113 Mass. 218. *Child* v. *Boston*, 4 Allen, 41. *Merrifield* v. *Worcester*, 110 Mass. 216.

In their closing summary they said:

I. That the city of Portland have no authority, express or implied, to empty their sewers into the public docks, if by so doing the docks are partially filled with deposit and navigation obstructed. We claim this irrespective of the question whether or not the sewer could be so constructed as to avoid the deposit of matter. If deposit necessarily results in the dock, it is the duty of the city to carry its drain elsewhere.

In this view of the case it follows that the city being a wrongdoer in making the deposit, *a fortiori*, it is their duty to remove it.

II. That even if by any implication absolute authority to enter the docks be conferred upon the city, it is their duty so to exercise the power that no obstruction of the docks shall result, as could be done by the use of suitable traps,—or if such obstruction does necessarily result, then, inasmuch as there is no express authority conferred upon the city to obstruct the docks and it is well known that the obstruction can be removed by dredging, the more reasonable inference is that the city is to be allowed to enjoy the privilege of drainage subject to the burden of repairing the evils it does by dredging.

III. We claim that the sewer in question, though built by the defendant corporation, was never located according to law, and that whatever authority over the docks the city may possess, as regards sewers legally located, they are as regards this particular sewer, wrong-doers in opening it into the dock in question, and consequently liable for all injuries inflicted upon the plaintiff corporation thereby.

*T. B. Reed*, city solicitor, for the defendants.

Unless the legislature had authorized the plaintiffs to construct their wharf where it now is, wholly below low water mark, it would have been itself a nuisance, with no rights which a person of any color would be bound to respect.

I. The question before the court is, whether a wharf corporation, building its wharf by authorization of the legislature out into the public navigable water, has rights which are paramount or subservient to the rights of the inhabitants of the city of Portland. Before any wharves were built below low water mark, no one would doubt or question the right of the city to build drains through their own property into the tide water. Did they lose any of their rights in consequence of the act which incorporated the plaintiff? This is believed to be an entirely new question, and as yet undetermined. It will be noticed that there is an essential difference between this case and the Massachusetts cases, cited by plaintiffs' counsel. In this case, the wharf alleged to be injured is wholly below low water mark. Outside the permission of the legislature they have no rights whatever.

In the Massachusetts cases, the parties complaining had direct proprietary rights in the dock or other navigable stream alleged to have been filled up or injured. This will be seen more clearly by an examination of the cases, commented on by plaintiffs' counsel, *Boston Rolling Mills* v. *Cambridge*, *Haskell* v. *New Bedford*, *Brayton* v. *Fall River*.

II. The people of the city of Portland, by the paramount law of necessity, and by the imperative demands of health, are entitled to the right to make sewers and drains, and discharge sewage into the sea, the great natural receptacle for all the drainings of the land, where flow all the waters which wash the surface of the earth, and where of necessity, must flow all the artificial sewage matter which would otherwise poison with its filth the whole population of the city. If no wharves had been built beyond low water mark, the scour produced by the ceaseless ebb and flow of the tide through the harbor, up into the Stroudwater river and back again, would have swept all the deposits into the Casco bay, and left no ground of complaint on the part of that greater public, of which the inhabitants of Portland are a portion. How it is possible to deny a right so important to the health and necessities alike, of the inhabitant and the stranger, is beyond conception. Statement is the only argument needed in its favor. While this right on the part of the city existed and had always existed, the plaintiff corporation was formed, and obtained from the legislature (act of Aug. 29, 1850) the right to extend its wharf into tide water. Unlike the plaintiff's case in *Haskell* v. *New Bedford*, (*supra*,) no right as to docks is given to the corporation. It takes by the act simply the right to extend its wharf. We claim that when they took the right to extend their wharf, they took it *cum onere*, subject to the right of drainage then existing in the public. By building a solid wharf, they, and those who built the wharf on the other side of the space, now used as a dock, disturbed the natural scour of the tide, and caused the accumulation of sand, if there be any, of which complaint is made. And there is no reason why they should not pay for the dredging which their own erection may have made necessary. But aside from this, we say that the privilege which the legislature granted them was subservient to

the natural right of the people of Portland to drainage into the sea. Plaintiffs ought to clear out the dock if they desire to use it. And why should they not? They have received from the state a privilege of great value for nothing, and as a consequence, they claim that the health and comfort of four or five thousand people shall be subordinated to their right to make a hundred or two dollars more a year. The only right plaintiff corporation has to the dock in question, is the right of navigation in common with all the world. As between it and the people of Portland there are no equities in the plaintiffs' favor whatever. By R. S. 1857, c. 16, § 3, we had this right confirmed to us. The legislature thereby authorized us to build this sewer which was ordered January 20, 1860, *prior* to the repeal of this section.

III. There is no special damage which entitles plaintiffs to this action. If the accumulation said to exist is a public nuisance, if the right of drainage must give way to the right of navigation, then one public right gives way to another, and the proper method when the public is aggrieved is by indictment. Plaintiffs cannot maintain their action unless their grievance is special and peculiar, different in its nature and kind, and not merely in degree, from the grievance of other persons. *Blood* v. *Nashua & Lowell Railroad*, 2 Gray, 137. *Brightman* v. *Fairhaven*, 7 Gray, 271. The only injury which plaintiffs suffer is precisely what the owner of Galt's wharf next to it suffers; just what the public suffers; for the proprietors of Galt's wharf and the public have the same right in that dock that Franklin Wharf Company have. If the plaintiffs owned any portion of the dock next their wharf, this would be within the case of *Haskell* v. *New Bedford*, and the case of *Brayton* v. *Fall River*. The damage would be peculiar, differing in its nature from that suffered by the public; for they would then have a right to water of a certain height different from the general right of the public. When the plaintiff owns a dock or land in front of his wharf, he has a peculiar property therein, different from the right of navigation, and any obstruction of that right becomes a private nuisance. But if he owns nothing beyond his wharf, all the right he has in the sea is the right of navigation. And that is what the public has. The advantage which plaintiffs

have in having their wharf where it is, arises from the fact that the dock is a public highway, the wharf is at the side of it, and the public can come and go. While it is true that some early English cases, like *Wilkes* v. *Hungerford Market*, 2 Bing. N. C. 281, held an obstructor of a public highway liable at the suit of a shop keeper on the side of the way for diminished business, the latter cases in this country leave public injuries to be redressed by the public. *Smith* v. *Boston*, 7 Cush. 254. *Brainard* v. *Connecticut River Railroad*, 7 Cush. 506. *Blood* v. *Nashua & Lowell Railroad*, 2 Gray, 137. *Harvard College* v. *Stearns*, 15 Gray, 1. The appropriate remedy for a nuisance in a common highway is indictment. *Rowe* v. *Granite Bridge*, 21 Pick. 344. *Weeks* v. *Shirley*, 33 Maine, 271.

To conclude, the defendants contend that inasmuch as the plaintiffs have no exclusive or peculiar proprietary rights in the dock, and received no privilege from the legislature, except to extend their wharf, they received that privilege subject to the existing right of the city to drainage.

That if as between the city and the public any nuisance exists by reason of the outflow from the sewer, the proper remedy is by indictment of the guilty party.

No peculiar right of the plaintiffs is violated by the acts complained of, no injury done them differing in nature and kind from that done the general public.

If these propositions are correct, the two questions of law propounded to the court, so far as this case is concerned, must be answered in favor of the defendants.

Dickerson, J. Though the case does not show the precise time when the outlet to the sewer in controversy was built, it is reasonable to conclude from the order of the mayor and aldermen passed Jan. 20, 1860, "authorizing the committee on drains, &c., to construct and extend the sewer which has its outlet in Thames street through Thames street to the dock," and the report of that committee to the mayor and aldermen on March 30, 1860, "that they had built a portion of the same" and "recommending that the completion thereof be referred to the next city council," that it was built under the authority of §§ 2 & 3 R. S. of 1857, as

amended by c. 153 of the public laws of 1860, which took effect April 19, 1860. The second section of that statute is as follows: "The municipal officers of a town, and mayor and aldermen of any city, may construct drains or sewers in a substantial manner, through, along or across any public street, highway or town way therein, and over or through any lands of private persons or corporations, when they shall deem it necessary for public convenience or health, at the expense of the town or city; and they shall be under their direction and control."

Under the general authority conferred by this section of the statute upon the municipal officers of towns and cities, to improve the public drainage and sewerage in their respective municipalities, we have no doubt but they had the right to construct a suitable outfall for a sewer in the public dock below low water mark, whenever they deemed it necessary for "public convenience or health." Indeed, without such authority, the section would be a nullity, in many cases not unlikely to occur in the larger cities where the difficulty, inconvenience and expense of providing suitable cess pools for retaining the rubbish and filth that naturally seek an outlet through sewers, would render it next to impossible to supply them. The power of these municipal officers is limited in the statute by the demands of "public convenience or health," which obviously require that the refuse matter and impurities in large cities should be deposited and dissipated in the sea, which is the great receptacle provided by nature for the offscourings of the land. If the adjudication of the municipal officers of the city of Portland upon the question of "public convenience or health" was open for revision, we see no objections to affirming their decision. But their adjudication is conclusive upon that matter.

When the outlet of the sewer was built, the plaintiff company had extended their wharf into tide waters below low water mark under the authority of a grant from the legislature. Neither party had any right to make any erections there so as to obstruct navigation without legislative authority therefor. With such permission, they respectively had the right to make and maintain erections according to their respective grants and the law in such cases. The act under which the sewer was built is silent as to the

rights, duties and liabilities of the city in respect to the disposition of the deposits that might accumulate at the outlet of the sewer, and the several legislative acts passed for the benefit of the wharf company contain no provisions upon this subject. The questions in dispute between the parties, therefore, are to be determined by a construction of these respective statutes and the rules of law applicable to the facts in the case, it being premised that both parties have rightfully made their respective erections.

The right to build the sewer and outlet implies the right to use them for the purposes for which they were intended, to wit, for the collection and discharge of the debris of that part of the city, where they should be constructed, into the dock below low water mark. But it is to be borne in mind that the right to do this being in contravention of the right of the public, at common law, to use the sea as a public highway, should be construed strictly and made to harmonize, as nearly as may be, with this paramount right of the public; for we do not, by any means, assent to the proposition of the counsel for the defendants that the right of navigation is subordinate to the right of sewerage. No authority has been cited to sustain that position, nor is it reconcilable with the well established doctrine of the common law.

The public right to the navigation of the sea is not qualified or limited, at common law, by any private or municipal right of sewerage. "It is an unquestionable principle of the common law," say the court, in *Arundel* v. *McCullock*, 10 Mass. 70, "that all navigable waters belong to the sovereign or, in other words, to the public, and that no individual or corporation can appropriate them to their own use, or confine or obstruct them so as to impair the passage over them, without authority from the legislative power." So in *Commonwealth* v. *Charlestown*, 1 Pick. 180, Parker, C. J., says: "There can be no doubt that, by the principles of the common law, as well as by the immemorial usage of this government, all navigable waters are public property for the use of all the citizens; and that there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them." The same doctrine has been repeatedly held and applied in this state to tide waters and navigable streams. In

*Gerrish* v. *Brown*, 51 Maine 256, it was held that navigable rivers are public highways, and that if any person obstruct such a river by carting therein waste material, filth or trash, or by depositing material of any description except as connected with the reasonable use of such river as a highway, or by direct authority of law, he does it at his peril, and is guilty of creating a public nuisance.

The statute under which the defendants built the sewer and outlet is not to be construed, therefore, as authorizing an unnecessary infringement of existing rights and privileges; but it is to have such a construction that the wharf company shall be no further limited or restricted in these respects than may be reasonably necessary to accomplish the purpose of the statutes; and it is the duty of the defendants to exercise the power thus conferred in accordance with this rule. *State* v. *Freeport*, 43 Maine, 198, 202. *Newburyport Turnpike* v. *Eastern Railroad*, 23 Pick. 326.

The city have the right to use the sewer, and the wharf company the right of navigation and the use of their wharf. These respective rights are to be reasonably enjoyed. Neither party can destroy, or unreasonably and unnecessarily impair the rights and privileges of the other. The purpose of the defendants' erection under the statute is substantially accomplished by the discharge of the deposits at the outlet of the sewer. It cannot be presumed or implied that the statute contemplated the erection of a public nuisance below low water mark, by allowing the deposits from the outlet of the sewer to accumulate and remain there in such quantities as to menace the public health, obstruct navigation and seriously to impair, if not entirely to destroy, the plaintiffs' erections, previously made under an act of the legislature of equal authority with that under which the defendants made their erection. Nor is it reasonable to conclude that the grant under which the plaintiffs extended their wharf into tide waters, implies the right thereby to create a public or private nuisance either in the manner of using their wharf or by its disuse and allowing it to go to decay.

The purpose of the legislative grant to the wharf company was, not to destroy or obstruct navigation and commerce but to facilitate them. So the purpose of the statute under which the city

acted was not to authorize it to transfer a nuisance from the city to low water mark, or to create one there, but to enable it to conduct the rubbish and impurities from a particular portion of the city to a point in the sea where they would ordinarily be so distributed and dissipated as not to create a nuisance. If, however, this result is not produced either by reason of the action of the elements or from some other cause than the fault of the plaintiffs, it is the duty of the city to remove those deposits within a reasonable time and in such a manner as to prevent their becoming a nuisance to the public or a private nuisance to the wharf company. The right of the defendants to construct an outfall for their sewer in the sea does not include the right to create a nuisance, public or private; it is a right to make deposits temporarily, and not a right to obstruct navigation permanently.

The legal status of the defendants is analogous to that of persons using a public highway, whether upon the land or water, who have a right to the reasonable use thereof, for all legitimate purposes of travel and transportation, though this not unfrequently involves the necessity of a temporary obstruction of the highway. In *Davis* v. *Winslow*, 51 Maine, 264, 297, the court use this language: "Firemen in extinguishing fires, builders in erecting or removing buildings, teamsters in hauling logs or masts to market, truckmen in loading or delivering merchandise, shipmasters and boatmen in receiving, transporting and delivering their cargoes, raftsmen in managing their rafts, river drivers in running logs, and mill owners in securing them, oftentimes, of necessity, require so much of a highway as temporarily to obstruct it; but, in such cases, they must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the circumstances of the case; and when they have done this, the law holds them harmless."

The view we have taken of this case corresponds with the recent decisions upon this important subject, as the cases cited by the counsel for the plaintiff abundantly show. *Haskell* v. *New Bedford*, 108 Mass. 208, 214, is directly in point. In that case the court say: "The owner of any lands bordering upon the sea,

may lawfully throw refuse matter into it, provided he does not create a nuisance to others. And there can be no doubt but public bodies and officers, charged by law with the power and duty of constructing and maintaining sewers and drains for the benefit of the public health, have an equal right. But it by no means follows that either the city or any private person has the right to deposit filth upon the sea-shore in such quantities as to create a nuisance to health or navigation. . . . The right conferred upon the city of New Bedford to lay out common sewers through any streets or private lands, does not include the right to create a nuisance, public or private, upon the property of the commonwealth or of an individual, within tide water."

A more recent case in Massachusetts, that of *Brayton* v. *Fall River*, 113 Mass. 218, 230, is substantially a duplicate of the present case in its facts and legal status. The court there held that the plaintiff could maintain an action of tort against the defendants for obstructing his wharf erected upon a tide water creek, with the rubbish from their sewer. "An individual," say the court in that case, "cannot maintain a private action for a public nuisance, by reason of any injury which he suffers in common with the public. The only remedy is by indictment or other public prosecution. But if by reason of a public nuisance, an individual sustains peculiar injury differing in kind, and not merely in degree and extent, from that which the general public sustains from the same cause, he may recover damages in a private suit for such peculiar injury. . . . We are of opinion that this was an injury, special and peculiar to him, for which he may maintain this action. He has a right to the water at his wharf at its natural depth. By the filling up of the dock, his use of his wharf for the purposes for which it had been constructed and actually used, were impaired, and he was subject to an inconvenience and injury which was not common to the public."

We understand that this is precisely what the plaintiffs complain of in this case, the diminution of the depth of water about their wharf by deposits from the defendants' sewer, so as materially to interfere with vessels taking in and discharging cargoes there, as they had been accustomed to do. The report of the case sets

forth that these deposits had accumulated to such depth as to render "the upper portion of the dock wholly unnavigable, and the lower portion unnavigable for vessels of large tonnage, and that the plaintiffs have been obliged in order to use their wharf to dredge the dock at large expense." This would undoubtedly bring the case within *Brayton* v. *Fall River*, unless the alleged obstruction was in some part of the dock, not adjoining the plaintiffs' wharf, and did not diminish the natural depth of the water about their wharf. In that case the injury would be to the public right of navigation which the plaintiffs enjoy in common with the public, and the remedy would be by indictment as the counsel for the defendants contends: their injury, though perhaps differing in degree, would not be special and peculiar to them, but would be the same in kind as that of the public, in which case the private remedy by action would be merged in the public remedy by indictment.

Taking the view of the purport of the report of the case, as before stated, we have come to the conclusion that the defendants under the statute have the right to construct sewers opening into the public docks of the city, and to use them in a reasonable manner for conducting and depositing therein, refuse matter and impurities, but that it is their duty to cause such docks to be cleared of such deposits, whenever they become an obstruction to navigation, or injurious to the public health. If they neglect to do this within a reasonable time, they are guilty of creating a public nuisance and are liable to an indictment; and if such obstruction cause damage to the owners of wharves by diminishing the depth of water about them and thereby impair their use for the purposes for which they were constructed and have been used, causing inconvenience and injury not common to the public, they are guilty of imposing a nuisance upon the wharf-owners, and become liable to an action of tort therefor. If the injury to the wharf owners is merely an injury to the right of navigation in common with the public, the defendants will not be liable in a civil suit. With these qualifications and limitations we answer both of the questions submitted, in the affirmative. *Action to stand for trial.*

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

## STATE *vs.* WILLIAM WEEKS.

Cumberland. Decided April 3, 1877.

*Intoxicating liquors.*

An agent for the sale of intoxicating liquors is not a city or town officer. His situation is not an office but an employment, which ceases if not renewed at the end of the year. He does not hold over until his successor is chosen, by virtue of R. S., c. 3, § 25, nor is the mode of his appointment by § 27 of that chapter, but by c. 27, §§ 26 and 27.

*Thus*, where W. was appointed agent by a majority of the board of mayor and aldermen, without the consent of the mayor and against his protest, and gave the statute bond which was approved by the majority of the board, though the mayor protested against the approval and refused to sign the certificate: *Held*, that a complaint against W. for a single sale could not be sustained, where the sale was lawful if he was agent.

ON REPORT, from the superior court.

COMPLAINT, for violation of the liquor law, on appeal from the municipal court of Portland.

On May 5, 1873, William Weeks, the defendant, was appointed by the mayor of Portland, by and with the consent of the aldermen, agent of the city to sell liquors for mechanical, medicinal and manufacturing purposes, under the provisions of § 26, c. 27, R. S., and upon giving bond as provided in § 27 of the same chapter, received the certificate mentioned in said section and entered upon the duties of his situation. The next year he was appointed to the same situation by vote of the board of mayor and aldermen, gave bond according to law, received the proper certificate and continued to act. From the date of Weeks' appointment in 1873 to the date of the complaint, no successor had been appointed except Weeks himself; but on May 3, 1875, the mayor nominated Horace J. Bradbury to the position, and the aldermen refused, 5 to 1, to confirm the nomination, and subsequently, on June 8, 1875, the board of mayor and aldermen, by a vote of five to one at a regular meeting, appointed the defendant agent for the sale of intoxicating liquors under § 26, c. 27, R. S. This was done against the protest of the mayor, and without his consent. Weeks gave the proper statute bond, which was approved by the board of

mayor and aldermen, who thereupon issued and delivered to Weeks the certificate required under § 27 of said chapter, and Weeks continued to act as agent. The mayor refused to sign the certificate and protested against the approval of the bond.

The complaint in this case was for a single sale made by Weeks under his claim to act as liquor agent, and was in all respects lawful, if he was agent.

Upon this report of facts, the question whether Weeks was the duly appointed and qualified agent of the city, for said purpose at the time of the sale, is reserved for the decision of the law court.

*B. Bradbury* with *C. F. Libby*, county attorney, for the state.

*T. B. Reed*, for the defendant.

BARROWS, J. The defendant's authority to sell as the agent of the city is questioned because he was appointed by a majority of the board of mayor and aldermen without the consent of the mayor and against his protest. He gave the proper statute bond which was approved by the board who thereupon gave him the certificate required by § 27, c. 27, R. S., though the mayor protested against the approval of the bond and refused to sign the certificate.

Section 26 of c. 27, gives the power of appointment in such cases to the selectmen of any town, and the mayor and aldermen of any city. If this section is to be regarded as the governing rule, the defendant was duly appointed the agent of the city in 1875; for there can be no doubt that a majority of the municipal board therein named may lawfully act in the premises.

But it is insisted on the part of the state that the case falls within the provisions of § 27, c. 3, R. S., which runs thus: "In all cases where appointments to office are directed or authorized to be made by the mayor and aldermen of cities, they may be made by the mayor by and with the advice and consent of the aldermen, and such officers may be removed by the mayor."

This brings up the question whether the city agency for the sale of liquors is an office, or only an employment.

We cannot but regard the changes made by c. 33 of the laws of 1858 in the phraseology employed in c. 166, Laws of 1855, respect-

ing the appointment, powers and duties of their agents as clearly significant of an intention on the part of the legislature to deprive the situation not only of the name but of the essential characteristics of an office—to reduce it distinctly and definitely to a mere employment, revocable by the appointing power, and absolutely annulled by the conviction of the agent for any breach of the regulations limiting his power to sell, or by a judgment against him on his bond to the town or city conditioned for his conformity to the provisions of the law relating to "the business" for which he is appointed. A comparison of the language of the two statutes above referred to, we think, demonstrates this beyond the possibility of mistake, and at the same time settles it conclusively that this position is not a city office to be filled under the provisions of § 27, c. 3, or the agent an officer who may be removed by the mayor under the final provision in the same section—but that the position is a mere business agency or employment, and the agent simply a servant or employe, whose place is to be filled and vacated in the manner prescribed in § 26, c. 27, the statute which authorizes the employment of such agents. There are too many provisions in that chapter which are inconsistent with the idea that this position is to be regarded as an office to permit us so to construe it. For example, in case of misconduct, the agent's certificate is to be withdrawn by the aldermen; very clearly he is not removable by the mayor, like the city officers referred to in § 27, c. 3.

Again, were we to regard it as a subordinate city office, and hold that the provisions of § 27, c. 3, were applicable to the mode of appointment and removal, we ought for the same reason to hold that § 25, c. 3, should be applied to ascertain the duration of its term. It is there provided that subordinate officers of cities shall hold their offices one year, and "until others are chosen and qualified in their stead." In the statute of 1855, which recognizes the agency as an office, this tenure was expressly declared. "He shall hold his office one year and until another is appointed in his place unless sooner removed." This was in conformity with the law respecting other such offices. But under the law of 1858, c. 33, § 5, and R. S. c. 27, § 26, the provision is "he shall hold his situation one year unless sooner removed." And this is absolutely

inconsistent with the tenure prescribed for subordinate city officers in § 25, c. 3.

There was an obvious design apparent throughout c. 33, Laws of 1858, so to change c. 166, Laws of 1855, as to reduce this agency from an office to a mere temporary employment; and this purpose was adhered to in the revision of the statute which has since taken place.

The creation of an office ordinarily implies succession. The office is not abolished by the expiration of the term of the incumbent. Not so with an employment. When a definite term is fixed it comes to an end by the lapse of time unless renewed.

And such is the situation of the agent of a municipality for the sale of intoxicating liquors.

We see no propriety in importing, by construction into c. 27, R. S., (which creates and regulates this whole business with specific provisions for the appointment and removal of these agents from their situations,) the provisions of § 27, c. 3, which relate to a different class of appointments. It would be obviously unjust to regard the defendant as an officer within the purview of § 27, c. 3, and so raise a question as to the validity of his last appointment, and then refuse to regard him as such officer within the provisions of § 25 of the same chapter, which under the facts here reported would extend his lawful official tenure to a date subsequent to the commencement of the prosecution.

But he was not an officer. His "situation" is not an office. He was lawfully employed by those who had authority, under chapter 27, R. S. to employ him, as the agent of the city. He acted in strict pursuance of his employment, and this prosecution cannot be maintained.

*Judgment for defendant.*

APPLETON, C. J., DICKERSON, DANFORTH AND LIBBEY, JJ., concurred.

JOHN SUTHERLAND *vs.* ISAAC T. WYER, et al.

Cumberland. Decided April 9, 1877.

*Damages.*

The plaintiff contracted with the defendants to play first old man and character business for thirty-six weeks. At the close of the nineteenth week, the defendants discharged the plaintiff without fault on his part, who commenced an action for breach of the contract during the next week. *Held*, that the action was not premature; *held*, also, that the plaintiff was entitled to recover as damages for the remainder of the term at the stipulated rate, less what he actually earned or might have earned by the exercise of reasonable diligence, with interest; that having obtained another contract within the line of his profession within the time of his original contract with the defendants, the sum which he might have earned thereby to the time when his contract with the defendants expired, should be deducted from the contract price with the defendants.

ON EXCEPTIONS and MOTION from the superior court to set aside the verdict.

ASSUMPSIT to recover damages for breach of contract under which the plaintiff agreed to play for the defendants at the Portland museum, from September 6, 1875, thirty-six weeks at $35, per week. On December 27 following, the whole company of which the plaintiff was one were addressed by one of the defendants thus: "Ladies and gentlemen, I find it necessary to reduce your salaries one-third; any one not willing to accept these terms will get their full salary this week and be discharged." The following documents were in evidence. "Portland, December 29, 1875, Mr. J. Sutherland, Your salary, from this date, will be twenty-four dollars per week. Per order, I. T. Wyer, Wm. Weeks, Treasurer."

"Portland, December 31, 1875. I. T. Wyer, Esq., Dear Sir, Your note intimating your determination to reduce my salary from 27th instant, duly received. I most respectfully refuse to assent to any such proposition, and will expect my full salary every week in fulfillment of the terms of our contract. Respectfully yours, J. Sutherland."

"Portland, January 3, 1876. Mr. Sutherland, Your services will not be required at the Portland museum after January 8, 1876. I. T. Wyer."

The writ was dated January 11, 1876. It appeared that the plaintiff received his full salary to that date, and rendered the defendants no service after January 10. He afterwards went to New York, where he received $60, for services a part of which was for an engagement at Booth's which was for eight weeks, from April 10, at $25 per week, but which he left ten days after, to attend this trial. Other facts sufficiently appear in the opinion.

Judge Symonds upon the question of damages instructed the jury as follows:

"If, on the other hand, you find for the plaintiff upon both branches of the case, you will come to the question of damages, which in this case assumes a somewhat peculiar phase. The writ is dated January 11th. When the writ was brought, according to the contract nothing whatever was due to the plaintiff. The plaintiff had been paid in full up to January 8th. And this writ was brought on Tuesday, the 11th, before another week had elapsed. So, according to the terms of the contract, when this action was brought nothing whatever was due to the plaintiff.

"The general rule is—and it is almost an invariable rule, with the exception of some classes where prospective damages are allowed resulting from injury—that the damage to be allowed is the damage that had accrued when the writ was brought. The ordinary rule is that a man can only recover what was due him at the time when he sued. But I apprehend there is a rule which will guide as correctly in determining the damages here. The damage to be allowed is what had been sustained by the plaintiff at the time this writ was brought. Now what is that damage he had sustained then? It is conceded that he had been discharged. He had lost then the prospect of earning his wages in accordance with the terms of the contract; that is to say, when he brought this writ he had been discharged, and of course if you come to this question of damages, the defendant had broken his contract.

"With the contract in full force the plaintiff had a certainty of $35 a week during the theatrical season. As we are discussing the question of damages we will assume the defendant had broken the contract. By breaking the contract the defendant had deprived the plaintiff of the right to earn by his services $35 per

week according to the terms of the contract during the theatrical season. So that the certainty of earning the money, in accordance with the terms of the contract, is one thing the plaintiff had lost; but it does not follow that he is entitled to recover that full sum during the theatrical season. A man has not the right to remain idle if other work offers and charge the whole amount to his employer. Notwithstanding the damage in such case done to the plaintiff, the law would still require him to exercise his best diligence to obtain new employment and so diminish the damage. So that the rule of damage in this case, as I understand it and as I give it to you for the purpose of this case, would be the amount accruing subsequently to the discharge in accordance with the terms of the contract itself less whatever, you are satisfied from the evidence in the case, the plaintiff might earn by the exercise of reasonable and proper diligence on his part. The jury must take the whole testimony together and from their best judgment of what the plaintiff might earn by the exercise of reasonable diligence on his part, and that, if you come to the question of damages, you must deduct from the amount due according to the contract."

The verdict was for the plaintiff for $570. The defendants moved to set aside the verdict and also alleged exceptions.

*J. Howard*, *N. Cleaves* and *H. B. Cleaves*, for the defendants.

The decisions have not been uniform in regard to the question of damages in this class of cases.

In some of the states, it has been held that it being actual loss and not prospective damages that are recoverable, the amount should be measured by the contract down to the time of trial, deducting what had been earned or might have been earned by active diligence on the part of the plaintiff. *Gordon* v. *Brewster*, 7 Wis. 355. *Fowler* v. *Armour*, 24 Ala. 194.

But whatever view is taken of the law, and if the instructions of the court are correct, the verdict should be set aside.

In the rules and regulations which form a part of the contract, "the manager reserves the right to discharge any person, who may have imposed on him by engaging for a position which in his judgment they are incompetent to fill properly."

Mr. Wyer, the defendant, testifies, "I discharged the plaintiff because I considered him incompetent to fill the position for which he engaged," and the testimony fully sustains the judgment of the defendant.

The testimony shows that the plaintiff had actually received sixty dollars between the date of the writ and the time of trial; and that he had on the tenth of April entered into an engagement of eight weeks, at twenty-five dollars per week, which he voluntarily abandoned to attend this trial, which he forced on against our motion for continuance, as the docket entries show, while one of the defendants, and most important witness, was out of the country. It will be noticed that eighteen weeks remained of the thirty-six at the date of plaintiff's discharge, and the jury only deducted sixty dollars from the sum that would have been due if the contract had remained in full force, and plaintiff had continued in the service of defendants. Whether the jury deducted this as the amount he might earn under his engagement in New York, or whether it is the sixty dollars already earned, it is impossible to decide. They should have done both. The verdict is against the law and the evidence.

*C. Hale*, for the plaintiff.

The rule of damages given by the judge in his charge is correct. According to that rule the damages to be allowed are the damages which plaintiff had sustained when writ was brought; circumstances up to time of trial developed what the amount of those damages was.

VIRGIN, J. The plaintiff contracted with the defendants to "play first old man and character business, at the Portland museum, and to do all things requisite and necessary to any and all performances which" the defendants "shall designate, and to conform strictly to all the rules and regulations of said theatre," for thirty-six weeks, commencing on Sept. 6, 1875, at thirty-five dollars per week; and the defendants agreed "to pay him thirty-five dollars for every week of public theatrical representations during said season." By one of the rules mentioned, the defendants "reserved the right to discharge any person who may have imposed on them

by engaging for a position which, in their judgment, he is incompetent to fill properly."

The plaintiff entered upon his service under the contract, at the time mentioned therein, and continued to perform the theatrical characterizations assigned to him, without any suggestion of incompetency, and to receive the stipulated weekly salary, until the end of the eighteenth week; when he was discharged by the defendants, as they contended before the jury, for incompetency under the rule; but, as the plaintiff there contended, for the reason that he declined to accept twenty-four dollars per week during the remainder of his term of service.

Three days after his discharge and before the expiration of the nineteenth week, the plaintiff commenced this action to recover damages for the defendants' breach of the contract. The action was not premature. The contract was entire and indivisible. The performance of it had been commenced, and the plaintiff been discharged and thereby been prevented from the further execution of it; and the action was not brought until after the discharge and consequent breach. *Howard* v. *Daly*, 61 N. Y. 362, and cases. *Dugan* v. *Anderson*, 36 Md. 567, and cases. The doctrine of *Daniels* v. *Newton*, 114 Mass. 530, is not opposed to this. Neither do the defendants insist that the action was prematurely commenced; but they contend that the verdict should be set aside as being against the weight of evidence.

The verdict was for the plaintiff. The jury must therefore, have found the real cause of his discharge to be his refusal to consent to the proposed reduction of his salary. The evidence upon this point was quite conflicting. Considering that all the com pany were notified, at the same time, that their respective salar ies would be reduced one-third, without assigning any such cause as incompetency; that no suggestion of the plaintiff's incompetency was ever made to him, prior to his discharge; and that his written disch arge was equally silent upon that subject, we fail to find sufficient reason for disturbing the verdict upon this ground of the motion, especially since the jury might well find as they did on this branch of the case, provided they believed the testimony in behalf of the plaintiff.

There are several classes of cases founded both in tort and in

contract, wherein the plaintiff is entitled to recover, not only the damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. Among the torts coming within this rule, are personal injuries caused by the wrongful acts or negligence of others. The injury continuing beyond the time of trial, the future as well as the past is to be considered, since no other action can be maintained. So in cases of contract the performance of which is to extend through a period of time which has not elapsed when the breach is made and the action brought therefor and the trial had. *Remelu* v. *Hall*, 31 Vt. 582. Among these are actions on bonds or unsealed contracts stipulating for the support of persons during their natural life. *Sibley* v. *Rider*, 54 Maine, 463. *Philbrook* v. *Burgess*, 52 Maine, 271.

The contract in controversy falls within the same rule. Although, as practically construed by the parties, the salary was payable weekly, still, when the plaintiff was peremptorily discharged from all further service during the remainder of the season, such discharge conferred upon him the right to treat the contract as entirely at an end, and to bring his action to recover damages for the breach. In such action he is entitled to a just recompense for the actual injury sustained by the illegal discharge. *Prima facie*, such recompense would be the stipulated wages for the remaining eighteen weeks. This, however, would not necessarily be the sum which he would be entitled to; for in cases of contract as well as of tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury. *Miller* v. *Mariners' Church* 7 Maine, 51, 56. *Jones* v. *Jones*, 4 Md. 609. 2 Greenl. Ev. § 261, and notes. *Chamberlin* v. *Morgan*, 68 Pa. St., 168. Sedg. on Dam. (6th Ed.) 416, 417, cases *supra*. The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere, during the remainder of the term; and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages. And

this balance with interest thereon should be the amount of the verdict. Applying the rule mentioned, the verdict will be found too large.

By the plaintiff's own testimony, he received only $60, from all sources after his discharge—$25 in February and $35 from the 10th to the 20th of April, at Booth's. His last engagement was for eight weeks, commencing April 10, which he abandoned on the 20th, thus voluntarily omitting an opportunity to earn $57, prior to the expiration of his engagement with the defendants, when the law required him to improve such an opportunity, if reasonable and proper. We think he should have continued the last engagement until May 6, instead of abandoning it and urging a trial in April, especially inasmuch as he could have obtained a trial in May, just as well. The instructions taken together were as favorable to the defendants as they were entitled to.

If, therefore, the plaintiff will remit $57, he may have judgment for the balance of the verdict; otherwise the entry must be verdict set aside and new trial granted.

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

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PAUL E. MERRILL *vs.* GEORGE F. MERRILL.

Cumberland. Decided April 30, 1877.

*Evidence.*

Where a party is seasonably notified under rule XXVII. of this court to produce at the trial a specified book and it is produced and the party calling for it examines it and omits to introduce it in evidence, the party producing it may introduce so much of it as is pertinent.

Where exception is taken to the omission of a part of a deposition, and the case does not show what that part is, the exception will not be sustained.

Where exception was taken to the use by the presiding justice, of the phrase "as has been stated by counsel" and it did not appear to which counsel he referred or how the excepting party was aggrieved, the exception was not sustained.

Where exception is taken to the expression of an opinion by the presiding justice, under statute of 1874, c. 212, the bill of exceptions must show in some mode what the issue was upon which the alleged opinion was expressed.

This may be done by reporting the pleadings and so much of the evidence as is material, or the excepting party may allege in terms what the particular issue was; and then so much of the charge as is the subject of complaint would present the question.

On exceptions, from the superior court.

Assumpsit for money had and received, to recover back $293.17 paid under protest to redeem certain real estate from a mortgage.

While the suit was pending a deposition was taken on the part of the plaintiff out of the state by commission and duly placed on file. This deposition contained an important reference to the book of accounts of the late Frederick Merrill, which book was in the possession of the plaintiff. After this deposition had been filed, and before trial, notice was duly served on the plaintiff under the rule to produce the book. When the deposition was offered at the trial, the question and answer which contained, among other things, this reference to the book, was objected to by the defendant. The objection was sustained and the question and answer wholly stricken out. During the progress of the trial, and after the offering of the deposition, the book of accounts lying upon the table, the counsel for the defendants asked the counsel for plaintiff to let him see it. The counsel for the plaintiff asked the counsel for the defendant if he called for the book and, upon his assenting, granted the request; and the counsel for defendant saw the book and examined it, and nothing more.

On account of this examination the counsel for the plaintiff claimed that this book was made evidence and should go to the jury. The court thereupon recalled so much of the deposition as related to the book and was explanatory of certain entries therein which had been stricken out, and admitted it and admitted the book.

It is conceded that the only entries on the book which were admitted were pertinent to the case.

The presiding judge, among other things, instructed the jury as follows:

The defendant says that in 1853 his father and he purchased some timber of the Winslows and gave $850 for it; that they purchased it jointly, equally interested in the results of the transaction;

that he paid $250 towards it in gold; that three notes were given of $200 each, payable in one, two and three years; that after making the cash payment himself, entirely out of his own money, as defendant says, then the two notes which matured earliest, the one and two years notes, were paid out of the proceeds of the Winslow timber; that before the third note became due, the Winslows wishing to realize upon the note and as the defendant and his father were not ready to advance the payment of it prior to its maturity, the note was sold to Henry Gallison; that subsequently the defendant by labor performed upon the barn of Gallison, and by materials furnished, and perhaps in some other way in which he states, paid his one-half of that third $200 note, and that it was indorsed upon the note as paid by his hand, and that note he claims has not been produced here at the trial.

So that the defendant claims two of the notes were paid out of the joint proceeds of the timber purchased, and that he had paid his one-half of the third note, leaving his father's half, due and unpaid, and that this one-half subsequently went into the mortgage; that the father gave this mortgage to secure the payment of it. But the defendant says nothing was ever received by him as remuneration for the $125, gold, which he had paid in cash for his father at the time of the cash payment towards the Winslow timber; and he says from 1853 down to the date when the ship timber was delivered to him for the brig, which was in the winter of 1863-4, he had never received from his father any payment of the amount so advanced in his father's behalf, and that when he came to build this brig, he told his father it would require all his property to build his quarter of the brig, and asked his father to deliver to him this ship timber in payment of the $125, and interest, he had advanced so long before for the benefit of his father, towards the purchase of the Winslow timber.

That, briefly stated, is an outline of the case which the defendant presents, and it may perhaps aid you somewhat in bringing the case down to the precise limits where the controversy lies.

Now you perceive that the investigation of a question like this is beset with many difficulties. The lapse of time, the fact that the parties have reduced so little of the transaction to writing, the

fact that so much must depend on the credibility and accuracy of witnesses speaking of remote transactions, is of course a consideration which clearly indicates the difficulty of arriving at the true facts of a transaction of this sort.

* * * * * * *

In this case, as has been stated by counsel, it will be important for you to observe the acts of the parties, whatever there is of record, whatever there is that is probable or improbable in the statement of witnesses, what was their apparent intention in regard to it, and whatever there may be to guide you in arriving at certain and correct results.

In regard to these three notes, which it is said on the part of the defendant were given for the purchase of the Winslow timber, I think you will find upon examination of these two notes which have been introduced in evidence here, that if the notes were given on one, two and three years, or about that time, that they were to fall due in about one, two or three years, or something near that time; then that the first of the series—the one that fell due in one year—is missing and not the one that fell due in three years.

The notes which are produced here are dated in January, 1853. The first note produced here falls due in one year from the last day of February, 1854, which would be February, 1855. It is dated in January, 1853, so that it falls due in a little more than two years after its date.

The second note is the same date, January, 1853, and falls due in one year from , 1855, and therefore falls due in 1856, a little more than three years from its date. So that if the defendant is correct in his statement, that three notes were given towards the payment of the Winslow timber, and is correct that they fell due in about one, two and three years, then he could not be correct in his statement that the third note is missing, and that an indorsement of his half is on that note. The two statements cannot be correct; which is correct is for you to determine.

*Counsel for the defendant*: "In regard to the Winslow notes, Mr. Merrill, the defendant, says the notes were given on one, two and three years. If he meant one, two and three years from date, then of course your Honor is right; but if he meant payable one

year apart, that is, one, two and three years from a future date, then I suggest to the court that there is no discrepancy in the defendant's testimony.

In addition thereto, if the Gallison mortgage was not given for one-half of that note, what was it given for?"

COURT: "I don't think I will change the ruling in regard to that."

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

*W. H. Vinton*, for the defendant.

I. I examined the book with no reference to its being evidence. The gratification of my curiosity did not make the book evidence.

II. I object to the phrase, "as stated by counsel." Whenever a judge uses this phrase, the jury immediately determine which counsel and, having determined, they at once put the judge upon that side and, so not to be at variance with the judge, put their verdict upon the same side.

III. The judge argues the case upon the Winslow notes, and starts out with "I think." The jury, as is their custom so in this case, substituted the thoughts of the judge for the testimony. In this part of the charge, he interpolated not intentionally the word "about." The testimony was "the notes were payable in one, two and three years," not "about." True the notes were not payable in any exact number of years from the date, but from a future time, and so the judge interpolated the word "about." The witness only intended to testify to the fact that the notes were payable in a certain number of years, not from date, but from a future time, and were payable one year apart; and in this view, his testimony was correct and his defense made out; and yet the judge told the jury that his testimony in regard to the missing note could not be correct, and caused them to believe that the defendant had willfully falsified and threw distrust over his whole defense and lost him his case.

*C. P. Mattocks & E. W. Fox*, for the plaintiff.

I. The plaintiff had the right to put in the book. It would give an unconscionable advantage, to enable a party to pry into the

affairs of his adversary for the purpose of compelling him to furnish evidence against himself, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties. 1 Greenl. on Ev., § 563. *Penobscot Boom* v. *Lamson*, 16 Maine, 224. *Blake* v. *Russ*, 33 Maine, 360. The rule applies even where the party calling is mistaken as to the contents of the instrument called for. *Clark* v. *Fletcher*, 1 Allen, 53. The book being in evidence, it became the duty of the court to admit so much of the deposition as was explanatory thereof. There was nothing that the defendant was aggrieved by in the admission. The law court will not presume in favor of the exceptions. *Webster* v. *Folsom*, 58 Maine, 230.

II. The exception to judge's charge. No evidence is reported. No facts involved in the case are presented except as shown in the charge. The court will not presume error. *McCrillis* v. *Hawes*, 38 Maine, 566. *Neal* v. *Paine*, 35 Maine, 158. *Beeman* v. *Lawton*, 37 Maine, 543. *Whidden* v. *Seelye*, 40 Maine, 247. There was nothing reported in the evidence to show that question of the notes was material.

VIRGIN, J. The thirty-first rule of the superior court is a transcript of the twenty-seventh rule of this court. And it has been repeatedly decided that when, as in the case at bar, a party is seasonably notified under the rule to produce at the trial a specified book, and it is produced, and the party calling for it examines it and omits to introduce it in evidence, the party producing it may introduce so much of it as is pertinent. *Blake* v. *Russ*, 33 Maine, 360. *Penobscot Boom* v. *Lamson*, 16 Maine, 224.

II. Whether or not the particular part of the deposition was admissible, we have no means of knowing, inasmuch as no part of the deposition is contained in the bill of exceptions. We cannot presume the ruling to have been erroneous. *Howes* v. *Tolman*, 63 Maine, 258.

III. It is objected that the judge, in his charge, prefaced some general observations in relation to weighing the testimony of the witnesses, with the phrase "as has been stated by counsel." If this could be considered objectionable in any case, the defendant

fails to show how he was aggrieved in this case, for it does not appear in the exceptions to which of the counsel the remark had reference. If to the defendant's, we cannot perceive how he could be aggrieved thereby.

IV. The St. of 1874, c. 212, in substance provides that whenever an interested party is aggrieved by the expression of an opinion by the presiding justice upon issues of fact arising in a jury trial, he is entitled to a new trial upon exceptions. To bring a case within the provisions of this statute, the bill of exceptions must show in some mode what the issue was upon which the alleged opinion was expressed. This may be done by reporting the pleadings, and so much of the evidence as is material, or the excepting party may allege in terms what the particular issue was; and then so much of the charge as is the subject of complaint would present the question. But nothing of the kind appears in this case, with the exception of a few extracts from the charge; and from these we can glean no expression of opinion upon any issues of fact which may have arisen during the trial. *Allen* v. *Lawrence*, 64 Maine, 175. *State* v. *Benner*, 64 Maine, 267, 291. *State* v. *Smith*, 65 Maine, 257, 269. *Exceptions overruled.*

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

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SAMUEL L. CARLETON *vs.* WILLIAM D. LEWIS.

Cumberland. Decided April 30, 1877.

*Trial. Exceptions.*

The rule that exceptions must be alleged at the term at which the ruling was made or that the right to allege them will be waived, applies in the superior court as well as in the supreme judicial court.

The ruling of the presiding justice is presumed to be correct unless the alleged error is made to appear. Exceptions will not be sustained to his ruling that the declaration is sufficient upon the mere "claim of the defendant" that it contained certain errors.

*Thus*, where the presiding justice was requested to instruct the jury that the action could not be maintained because "as the defendant claimed" the declaration sets forth a felony and there had been no conviction for such felony or prosecution therefor, and the instruction was refused, the exceptions to the refusal were overruled.

Exceptions do not lie to a refusal to order a non-suit.

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On Exceptions from the superior court, at the April term, 1876.

Trespass on the case. Writ dated February 10, 1876, entered at the March term, 1876. The defendant filed a general demurrer to the declaration at the March term, 1876. The demurrer was overruled, and to that ruling at the April term the defendant alleged exceptions.

The defendant at the trial at the April term requested the presiding judge to instruct the jury that the action could not be maintained because, as defendant claimed, the declaration sets forth a felony, and the case shows that there had been no conviction for such felony and no prosecution commenced by plaintiff or any other person, against the defendant for such supposed felony, and because for other reasons the action had not been made out and a non-suit ought to be ordered. Which requested instruction was refused; and the defendant, the verdict being for the plaintiff, alleged exceptions.

*C. Hale*, for the defendant.

*J. S. Abbott* with *S. L. Carleton*, for the plaintiff.

Virgin, J. I. In this court a party must allege exceptions "during the term" at which the ruling was made. R. S. c. 77, § 21. Exceptions must be alleged in the superior court as in this court. St. 1868, c. 151, § 7. In the case at bar the demurrer was overruled at the March term; and no exceptions having been then taken, the right to allege exceptions for that cause was waived.

II. Neither the writ nor the pleadings is made part of the bill of exceptions. And having no means of ascertaining whether what the "defendant claimed" is true, to wit, that the declaration set forth a felony and that the case shows that there had been no conviction for such felony, we must presume the ruling was correct, and not erroneous, especially, inasmuch as we are not informed by the bill of exceptions what the felony was. For if it was larceny, previous conviction is not necessary. R. S. c. 120, § 12. *Howe* v. *Clancey*, 53 Maine, 130.

III. Exceptions do not lie to the refusal to order a non-suit.

*Exceptions overruled.*

Appleton, C. J., Dickerson, Barrows, Danforth and Libbey, JJ., concurred.

FARRINGTON H. MARSHALL *vs.* EBEN N. PERRY, *et al.*

Cumberland. Decided May 3, 1877.

*Sale. Usage.*

A party who sells butter with a warranty of its quality cannot limit or control the legal effect of such warranty at common law by proof of a local usage among merchants in the trade, where the sale is made, to the effect that in the ordinary transactions in the trade, the seller is not liable to take back the butter or make any deduction from the price agreed, unless the purchaser examines the butter as soon as may be after delivery and, in case of defect in quality, returns it to the seller, or gives him notice of the defect at once.

A local usage is not binding upon a party to a contract to be affected by it, unless it is shown that he had knowledge of it at the time he made the contract.

ON EXCEPTIONS, from the superior court.

ASSUMPSIT, for the price of a quantity of butter, $170.96. The amount and price of the butter were admitted as alleged in the writ.

The defendants claimed that the butter was warranted to be of a certain quality, and that a portion of it was not of that quality, and claimed a reduction in the price on that account.

Upon the question of the terms of the warranty, testimony was conflicting; but the plaintiff claimed that by the contract of sale, and also under the custom of the trade in Portland, if there were a warranty and a breach of it, the defendant was bound to return the goods, or give notice of the breach of the warranty within reasonable time after receiving the goods, or he would be precluded from having any reduction in the price.

The defendant admitted that no such notice was given within ten days, or for a long time thereafter.

The following is a full report of the testimony upon the question of custom.

*Charles Walker*, called by the plaintiff, testified: I am a member of the firm of Charles McLaughlin & Co., composed of three members besides myself,—wholesale grocers, not dealing in butter. It is my opinion a custom has been fallen into by general consent as to the time when a man shall either accept or reject his goods

and notify the sellers. We put it on our bill head, ten days. The general accepted time is time enough to get the goods home, examine them and give notice, which we think is ten days. We claim that the notice is in writing. I do not wish to be understood that there is any organized agreement, but we have fallen into it by general consent. That in my opinion is the general usage.

*Cross examined.* I cannot say it is the universal custom in the city; can't say how long since it arose,—several years at least. I have not personal knowledge whether it applies to articles like butter and cheese. We deal in cheese somewhat.

*Question.* You understand by that, if a man receives a lot of goods, they are sold to him; he cannot reject them unless he does it in a usual time, which you fix at ten days.

*Answer.* We try to bind them to that. That does not apply to goods when they could not be examined in ten days. We should not claim it applied to goods falsely packed, or goods warranted to keep for years in any climate, like canned goods. If any article like canned goods should turn out bad in six months, they are liable to be returned.

*Question.* Do you understand it applies to cases where goods are not returned and a part of them does not come up to the quality ordered.

*Answer.* I can only speak as far as our custom goes. We do not allow any discount on goods at all. We claim they must be returned in ten days. That is our custom. We sometimes vary it out of policy.

*Direct resumed.* I have dealt in butter in years gone by. Butter exposed to the air will deteriorate more in September and October than in January, February and March.

*Cross resumed.* The more butter is exposed to the air, the worse it is. I should keep it as near air tight as possible. Butter kept in a cool cellar, ought to keep well in September and October, if not knocked out of the the tubs too many times.

*Question.* Was it your practice, if you bought ten tubs of butter, to examine every tub.

*Answer.* I do not know. I should apply the same rule I do to

cheese. If I take in fifty boxes, I examine six, eight or ten, and if satisfactory, pile up the rest without examining further.

*George L. Hodgdon*, called by the plaintiff, testified: I belong to the firm of Hodgdon and Soule, merchants on Commercial street—have dealt somewhat extensively in butter. There is a custom among merchants in regard to the terms on which butter is sold by wholesale. I should say the common usage was, that in a reasonable time they should be notified if there was any dissatisfaction with the goods shipped. A reasonable time would be owing to the men we were dealing with. The number of days in which discount may be demanded, differs with different concerns.

*A. M. Tyler*, called by the plaintiff, testified: I am a purchaser of Vermont butter; have been in the business ten years. The general usage among those that deal in butter, I should say, was if the butter was not what they sent it for, to notify the parties, and they would either have it returned, or make the price satisfactory, at once on examination. The custom is to examine it and ascertain whether it is good or bad.

*Cross examined.* We deal with more or less of the dealers in the city,—don't know the custom of Perry & Foss; never dealt with Thompson and Hill; know what Hodgdon's custom is; have dealt with him; think I never returned any butter to them; don't know the custom of Bean Brothers, nor of Dodge.

*E. N. Perry*, defendant, recalled, testified: I don't know of any general custom, such as has been spoken of here. So far as I know, each man has his own custom. I do not conform to any such custom.

The counsel for the defendants contended that no such custom or usage was proved, as matter of law, as would affect this contract. But the presiding judge instructed the jury as in the opinion appears.

The verdict was for the plaintiff, for the full amount claimed; and the defendants alleged exceptions.

*J. H. Drummond & J. O. Winship*, for the defendants.

*J. O'Donnell*, for the plaintiff.

LIBBEY, J. This was assumpsit for the price of a quantity of

butter, sold by plaintiff to defendants. The defendants claimed that plaintiff warranted the butter to be of a certain quality, and that a portion of it was not of that quality, and claimed a deduction from the price on account of the breach of the warranty.

The plaintiff claimed that if there was a warranty and a breach of it, under the usage of the trade in Portland, where the sale was made, the defendants were bound to return the goods, or give notice of the breach of the warranty, within a reasonable time after receiving the goods, or they would be precluded from having any deduction on account of the breach of warranty.

The plaintiff introduced evidence having some tendency to prove that there was such a usage as he claimed, applicable to the general transactions of merchants in the trade, but the evidence had no tendency to show that the alleged usage applied to sales with an express warranty of quality.

The defendants introduced evidence tending to prove that they had no knowledge of the usage claimed by plaintiff. They did not claim that the butter was returned or notice given within a reasonable time after the purchase.

Upon the point thus raised by the parties, the presiding judge instructed the jury as follows: "It is claimed, on the part of the plaintiff, that the rights of the parties are affected by the general usage of the trade, proved to have been established. The value of testimony relating to usage of trade, in all cases, depends either upon the universality of the usage in the trade or upon its being known to the parties at the time of the transaction. That is to say, a half a dozen different firms in the same trade may have different customs, different methods of doing business and different usages to which they conform. Of course persons dealing with each of these firms, having knowledge of their manner of doing business, familiar with their usage, may properly be held in a court of law to be bound by such usage. The usage may be considered as entering into the contract. But any such attempted usage as that, by a single firm or a few firms, can only affect the parties who deal with those firms and have knowledge of the usage so prevailing in that business. But, on the other hand, there may be a usage so universally prevailing throughout the

trade, known to all persons who have relations in business of that sort, that the jury may be justified in finding that the parties, from the very fact of the universality of the usage, have dealt with each other with reference to that usage.

"So here, whether any general usage of the trade has been established, which should affect under this rule the legal rights of the parties, is a question of fact for you to determine.

"If this evidence satisfies you that there is a general custom among butter merchants in the city of Portland, by which the purchaser of butter is to examine it at once, upon its delivery to him, and is either to return it at once or notify the seller, and if the custom prevails to that extent, that if he does not give such notice he shall not be entitled to a discount upon the price agreed upon in the contract, if a general custom extending so far as that has been proved to your satisfaction, I shall rule as matter of law that there is nothing unreasonable in the custom; and if the jury find it established, you may consider it with reference to the legal rights of the parties in this case. In other words, it may be considered as a general usage of trade, and entering into and affecting the contract regarding this sale of butter."

This instruction must have been based upon the assumption that the jury would find the contract of warranty of the quality of the butter as claimed by the defendants. The defendants claimed under an express contract of warranty. They did not claim under the warranty qualified by the usage claimed by plaintiff. If the jury should find that there was no such warranty as the defendants claimed, they were entitled to no deduction, and the usage could have nothing to do with the rights of the parties. The instruction, then, authorized the jury if they found the contract claimed by the defendants, and the usage claimed by the plaintiff, to consider such usage as a general usage of trade entering into and affecting the contract of warranty, without finding that the defendants had knowledge of such usage. We think the instruction erroneous. The decisions as to the effect of usage upon contracts, are not uniform; but we think the current of authorities in this country, both state and federal, establishes the proposition that local usage cannot be shown to contradict or

vary the terms of a contract express, or implied by law, or control its legal interpretation and effect. Upon a careful examination of the cases apparently in conflict, it will be found that they do not differ so much in legal principles as in their application to particular cases.

In Massachusetts, this subject was fully considered in *Dickinson* v. *Gay*, 7 Allen, 29, in which the court, after a full examination of the authorities in that and other states, held that if manufactured goods are sold by sample, by a merchant who is not a manufacturer, and both the sample and the bulk of the goods contain a latent defect, there is no implied warranty against the defect, and evidence is inadmissible to show that by usage of merchants the seller is responsible therefor. In discussing the question the court say: "The gist of the objection is not that the custom is in contradiction to the express terms of the contract; but that it permits a general rule of law which is applicable to the contract, to be superseded by a local rule, adopted by particular classes of men, and thus leads to confusion, misunderstanding and wrong." Again, "another principle by which usages are limited, is that they are void if they contradict the terms of a contract, or the legal interpretation or effect of a contract."

These principles were fully affirmed in the following cases, subsequently decided by that court. *Dodd* v. *Farlow*, 11 Allen, 426. *Potter* v. *Smith*, 103 Mass. 68. *Davis* v. *Galloupe*, 111 Mass. 121. *Brown* v. *Foster*, 113 Mass. 136. *Haskins* v. *Warren*, 115 Mass. 514.

In New York, in *Collender* v. *Dinsmore*, 55 N. Y. 200, upon a careful examination of the authorities on the subject, the same principles are affirmed. The court say, "custom or usage is resorted to only to ascertain and explain the meaning and intention of the parties to a contract, when the same cannot be ascertained without extrinsic evidence, but never to contravene the express stipulations; and if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions." "Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract."

In Pennsylvania, the same doctrine is established. *Coxe* v. *Heisley*, 19 Pa. St. 243. *Witherill* v. *Neilson*, 20 id. 448.

In *Barnard* v. *Kellogg*, 10 Wall. 383, the supreme court of the United States affirms the same doctrine. After defining the proper office of a custom or usage as affecting contracts, the court say, "And it is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made." This court has affirmed the same doctrine. *Randall* v. *Smith*, 63 Maine, 105.

Under the contract of warranty claimed by defendants, the rights and liabilities of the parties were fixed and well defined by the general principles of the common law. To authorize the defendants to maintain an action for breach of the warranty, it was not necessary that they should examine the butter at once, and either return it to plaintiff or give him notice of the breach. The legal interpretation of the contract made the plaintiff liable for the damages on proof of the breach of the warranty. The rule given to the jury steps in and supersedes the well defined legal effect of the contract as made by the parties, and substitutes therefor the qualified and limited liability under the local usage claimed by the plaintiff. This could not have been the intention of the parties. If they knew the usage, and their rights and liabilities under it, and made an express contract of warranty, it must be presumed that they were not satisfied with their rights and liabilities under the usage, and therefore made the express contract, taking the case out of the usage.

The usage was local. If not known to the parties, it could in no event affect their rights and liabilities. *Packard* v. *Earle*, 113 Mass. 280. *Nonotuck Silk Co.* v. *Fair*, 112 Mass. 354. *Dodge* v. *Favor*, 15 Gray, 82. *Fisher* v. *Sargent*, 10 Cush. 250. *Walls* v. *Bailey*, 49 N. Y. 464. *Barnard* v. *Kellogg*, *supra*. The

only evidence on the part of the plaintiff, tending to show that the parties had knowledge of the usage, was that in regard to its universality. There was evidence by defendants tending to show that they had no knowledge of it. If the usage was one that could affect the rights and liabilities of the parties, the jury should have been instructed to give it no effect unless they found from the whole evidence, that it was known to the defendants when the contract was made. *Exceptions sustained.*

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

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MARY L. CHASE *vs.* PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

Cumberland. Decided May 3, 1877.

*Insurance.*

A policy indorsed by the company, "Non-forfeiting life policy," contained these terms: "it being understood and agreed that if after the receipt by this company of not less than two or more annual premiums this policy should cease, in consequence of the non-payment of premiums, then upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for such sum as is proportionate with the annual payments which have been made." *Held*, that the right of the assured in the policy did not depend upon the surrender of the policy and the taking out of a new paid up policy. The provision that the policy shall cease and determine upon the non-payment of any of the annual premiums, on or before the date specified, cannot be construed as defeating the right to recover thereon such proportionate part of the amount insured, while there is an express stipulation in the same condition that upon such failure of payment, the company will not be liable for the whole sum insured, but only for such proportionate part.

Cancellation of the policy upon the books of the company without the knowledge and consent of the assured cannot affect his rights. Upon a policy, like this, distinctly made non-forfeitable in part, by partial non-payment of premiums, nothing in the application looking to an avoidance of the policy and a forfeiture of premiums by such non-payment, can be received to work such forfeiture.

ON REPORT.

ASSUMPSIT, on a policy of insurance of the tenor following:

[Indorsement.] "NON-FORFEITING LIFE POLICY."

"No. 23,634. THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONN. INSURANCE ON THE LIFE OF GRANVILLE M. CHASE. IN FAVOR OF MARY L. CHASE.

67 Me. 421

"Amount, $2000. Date, Dec. 5, 1867. Term of life. Annual payment, $223.50. Policy, $1.00. $224.50.

"Five years' payments, with guarantee of paid-up policy.

[Margin.] "Annual premium, $223.50. Sum insured, $2000. Age 40 years. Term, Life. 5 payments.

[Policy.] "This Policy of Assurance witnesseth, that the Phœnix Mutual Life Insurance Company, of Hartford, Connecticut, in consideration of the representations made to them in the application for this policy, and of the sum of two hundred and twenty-three dollars and fifty cents, to them duly paid by Mary L. Chase, daughter, and of the annual payment of a like amount on or before the fifth day of December, in every year during the continuance of this policy, or until five full annual payments have been made, do assure the life of Granville M. Chase, of Portland, in the county of Cumberland, state of Maine, for the sole use of Mary L. Chase, in the amount of two thousand dollars, for the term of his natural life.

"And the said company do hereby promise and agree to pay the amount of the said insurance at their office, in the city of Hartford, Conn., to the said assured, for her sole use, if living, in conformity with the statute; and if not living, to her heirs, or assigns, in ninety days after due notice and proof of the death of the said party whose life is hereby insured, any indebtedness to the company on account of this policy being first deducted therefrom.

"It being understood and agreed, that if, after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years have been made, it will issue a policy for two-fifths of the sum originally insured; if for three years, for three-fifths; and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge, except the interest annually, in advance, on all premium notes unpaid on this policy.

"This policy is issued and accepted by the assured upon the following express conditions and agreements:

"First. That said Granville M. Chase shall not visit certain latitudes, &c.

"Secondly. If the said premiums shall not be paid at the office of the company, in the city of Hartford, Conn., or to an agent of the company, on his producing a receipt, signed by the president or secretary on or before the date above mentioned, then, in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments made as above specified, and this policy shall cease and determine.

"Thirdly. In every case where this policy shall cease and determine, or become or be null and void, for any cause other than non-payment of premiums, then all payments thereon shall be forfeited to this company.

"This policy to take effect when countersigned by W. I. Hough, agent at Portland, Me.

"In witness whereof, the said Phœnix Mutual Life Insurance Company, of Hartford, Conn., have by their president and secretary, signed and delivered this contract this fifth day of December, one thousand eight hundred and sixty-seven. Signed, E. FESSENDEN, President. Signed, J. F. BURNS, Secretary."

The plea was the general issue with a brief statement of the terms of the policy on which the defense relied. It was admitted, that Granville M. Chase made three annual payments on policy No. 23,634, as per receipts exhibited; that he died as alleged in the plaintiff's writ, December 28, 1873.

That Mrs. Helen Chase will testify that she went to the office in Hartford, Conn., and offered proofs of the death of her husband, Granville M. Chase, and that the company declined to receive the same on the ground that all rights under said policy had been forfeited.

That neither Granville M. Chase, nor any person for him, ever paid any premium due on the policy after December, 1869; nor subsequent to the failure to pay the fourth annual premium, ever applied to the company for a paid up policy during the time in

which he would have been entitled to the same under the terms of the policy, nor was the policy surrendered to the company within two years from the time the payment was last made.

That the books of the company show that in January, 1871, an entry was made on them to the effect that the policy in suit was canceled, and that the application signed by Granville M. Chase, if admissible for that purpose, would show that it contained this clause: "That should the applicant . . . neglect to pay the premium on or before the day it becomes due, the policy shall become null and void, and all payments thereon shall be forfeited."

Jesse T. Reynolds, called by the defendant, testified as follows: I am the general agent for Maine for the Phœnix Mutual Life Insurance Company, of Hartford, Conn.; was acquainted with Granville M. Chase in his lifetime. I came to Maine as general agent, about August, 1870; found on the books of the agency this policy of Chase, and also that the policy had lapsed for non-payment of premiums the December previous, which would be December, 1869; hunted Mr. Chase up, and had several interviews with him on the subject of renewing his policy; urged him with all the eloquence I had as insurance men generally do, to renew his policy. Of course I could make something out of it, and that was one of the reasons I had for doing it. He gave me various reasons why he could not pay—that he was hard up, and one thing and another. Up to the time he left to go to Chicago, I saw him I don't know but a dozen times, and when he decided that he would not renew his policy I then explained to him fully what his rights would be, as I understood them, that if he did not renew his policy he would have to take a paid-up policy, or else surrender everything, and I advised him strongly to take a paid-up policy. I did not do that, however, until he made up his mind not to renew. He used some strong language about the matter, and wouldn't do anything more about it; said "it might go to the devil," or something like that.

The foregoing testimony was seasonably objected to by the counsel for the plaintiff, but admitted subject to objection.

Upon so much of the foregoing evidence as is admissible the full court is to order such judgment as the rights of the parties require.

*J. D. Fessenden*, for the plaintiff.

The second express condition in the policy fixes the liability of the defendants. It is three-fifths of the amount insured, less any indebtedness to the company on account of the policy.

It is, by its terms, a "non-forfeiting" policy. Bliss on Insurance, 405.

Neither subsequent entries on the company's books, nor any agreement in the application, are admissible to vary the terms of the policy.

The "intention of the parties is always to be sought for in the instrument itself."

"And though in a written commercial contract it is necessary to go out of the instrument itself, more frequently than in most others, yet the instrument being understood is conclusive of the rights and liabilities of the parties, and its provisions are not subject to be controlled or superseded by preliminary negotiations or communications, or by verbal agreements." 1 Phillips on Insurance, § 120. *Sleght* v. *Hartshorne*, 2 Johns. 531, 539. *Bell* v. *Western Fire Marine Ins. Co.*, 5 Rob. (La.) 423. *Graves* v. *Boston Insurance Co.*, 2 Cranch—opinion page 439.

Declarations of G. M. Chase were inadmissible, because, first, he was neither a party in interest nor a party to the record; second, he could not waive any right that had accrued, or might accrue to the plaintiff.

The cases where the policies have been held to be forfeited by the non-payment of premiums have been on the ground of a clause to that effect in the policy itself.

*S. C. Andrews*, for the defendants, cited in his argument, the following cases. *Pitt* v. *Berkshire Life*, 100 Mass. 500. *Williams* v. *Washington Life*, 4 Bigelow's Life Insurance Reports, 56. *Union Life* v. *McMillen*, *id.* 384. *Hodges* v. *Guardian Life*, *id.* 621. *Robert* v. *New England Life*, *id.* 634. *Simpson* v. *Accidental Death Ins. Co.*, *id.* 497.

BARROWS, J. The defendants "in consideration of . . . . and $223.50, . . . . and of the annual payment of a like amount on or before the fifth day of December in every year during the continuance of this policy, or until five full annual payments

have been made," issued December 5, 1867, a document which they labeled in capital letters, "A Non-forfeiting Life Policy," of insurance for $2,000 on the life of one G. M. Chase, in favor of this plaintiff, the daughter of the person insured. Five annual payments were to entitle her to a paid-up policy for $2000. Three such payments were made, but none after December, 1869. G. M. Chase died in 1873, and the required proofs of death were offered, but the company declined to receive them, claiming that all rights under the policy had been forfeited.

The language of the policy is: "This policy is issued and accepted by the assured upon the following express conditions and agreements:" [The conditions set forth under the first head relate to the acts and doings of the person whose life was insured, and to the cause of death; and it is not claimed that any of them were broken.]

"Secondly. If the said premiums shall not be paid at the office of the company, in the city of Hartford, Conn., or to an agent of the company on his producing a receipt signed by the president or secretary, on or before the date above mentioned, then, in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments made as above specified, and this policy shall cease and determine."

"Thirdly. In every case where this policy shall cease and determine, or become or be null and void, for any cause other than non-payment of premiums, then all payments thereon shall be forfeited to this company."

Elsewhere, not among "the conditions and agreements," upon which "the policy is issued and accepted," we find the following: "It being understood and agreed that if after the receipt by the company of not less than two or more annual premiums, this policy should cease in consequence of the non-payment of premiums; then upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one subject to any notes that may have been received on account of premiums; that is to say, if payments for two years have been made, it will issue a policy for two-fifths of the sum originally

insured; if for three years, for three-fifths, and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge except the interest annually in advance, on all premium notes unpaid on the policy."

The question is whether this last recited understanding and agreement is so connected with the conditions and agreements upon which the policy is issued and accepted as to work a forfeiture of all rights under this "non-forfeiting policy" when the insured neglected to surrender the policy and apply for a reduced paid-up policy within twelve months after the failure to pay the fourth annual premium.

Stipulations for a forfeiture in a policy thus labeled should be strictly construed. We do not think the second express conditions should be so construed as to make the right of the insured to recover such part of the sum as is "proportionate with the annual payments" which have been made, dependent upon the surrender of the policy within twelve months after the first failure to meet an annual payment and upon the reception of a new policy. If such had been the design of the provisions respecting the issue of new policies, it would have been easy to say so. But there is no such stipulation. The terms upon which the company will issue paid-up policies, (which the insured would doubtless find more convenient and available to be used, as they often are, as security for a loan) are stated by themselves. There is no necessary connection between them and the second express condition, nor anything to indicate that the limited liability recognized in that condition is to be ignored, unless the insured surrenders the old and takes out a new policy. The meaning and effect of that condition seems to be that a failure to pay one of the annual premiums on or before the day specified will put an end to the contract for the whole sum, at the option of the insurers; and thereafterwards they will be liable only for such proportion thereof as the payments previously made bear to the whole amount of the premiums stipulated for. It may serve to enable the company, when there is a failure of prompt payment, to rid themselves of a bad risk for anything in excess of that which has not been already secured by the payments previously received; but not to convert

a non-forfeiting policy into a forfeitable one, nor to relieve the company from the limited liability which they expressly admit in it.

The third condition implies that there is to be no forfeiture, by mere non-payment of premiums, of payments already made; and this is in keeping with the express stipulation which we think is decisive of the rights of these parties, that upon such a failure of payments as occurred here "the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments made as above specified." Bliss on Life Insurance, § 249.

The cancellation of the policy upon the books of the company was done without the knowledge or consent of Mary L. Chase, or any one authorized to act for her, and is of no avail.

In the face of such a policy as this, nothing in the application, looking to an avoidance of the policy and a forfeiture of payments for failure to make them promptly and completely, can be received to work such a forfeiture. It is one of the cases where the instrument itself "is conclusive as to the rights and liabilities of the parties, and its provisions are not subject to be controlled or superseded by preliminary negotiations and communications." 1 Phillips on Ins., § 120. *Graves* v. *Boston Insurance Co.*, 2 Cranch, 439.

Nor if the subsequent conferences between G. M. Chase and the agent of the company, were admissible in evidence, do we perceive anything in them that could affect the rights of this plaintiff already acquired, upon the view which we take of the construction of the policy. The plaintiff is entitled to judgment for $1200, less the amount of the notes given on account of premiums, and interest on the same reckoned annually in advance. Upon the balance thus found the plaintiff can recover in addition interest from the date of the writ only, for lack of evidence as to the time when the proofs of death were submitted to the company.

*Judgment for plaintiff accordingly.*

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

JOHN W. JONES, *et al. vs.* GEORGE BURNHAM, JR., *et al.*

Cumberland. Decided May 8, 1877.

*Contract. Trial.*

If a patentee, in consideration of a royalty, grants to another a license to use his patent, who uses it, the patentee's right being in litigation and that fact known to the licensee, he not having been interfered with, cannot plead in defense that the invention was not new nor that the patentee was not the first inventor.

Where there is no evidence showing or tending to show fraud, it is not error in the court to decline submitting that question to the jury.

ON EXCEPTIONS, from the superior court.

ASSUMPSIT, on a written contract, to recover royalty under a license, dated August 25, 1874, for the years from 1874 to 1878, inclusive, given by plaintiffs to defendants, upon what is known as, the "Green corn patents."

The case presented by the plaintiffs was that the defendants had taken the license from the plaintiffs to make use of letters patent of the United States, No. 34,928 and No. 35,274, and had agreed to pay twenty-five cents for every dozen of cans of green corn packed; and that during the year 1875 the defendants packed 33,830 dozen of cans, for which they refused to pay.

The defenses set up were in substance these:

1. That the letters patent in question were void for want of novelty, that there was therefore no consideration for their agreement to pay license fee.

2. That they had received no benefit or advantage for their license and that there was therefore no consideration for their agreement.

3. That at time of the granting of this license the plaintiffs had knowledge of certain English letters patent, subsequently held by the supreme court of the United States, to anticipate the letters patent in question; that such knowledge on the part of the plaintiffs, (although shared by the defendants) made this contract void by reason of legal fraud.

The counsel for the defendants offered the record in the case of *Jones* v. *Sewall*, to which the plaintiffs' counsel objected.

The presiding judge ruled these defenses insufficient, and in the matter of the offer said :

"The precise question which has been argued now, is in regard to the admissibility of the record in *Jones* v. *Sewall*. Objection is made upon two grounds: First, that it is not between the same parties as in this suit; that it is merely conclusive against Jones, so far as Sewall is concerned; Second, that the invalidity of the patent is no defense to the present case.

"In regard to the first ground, I understand the law of this state to render the record admissible, so far as that objection is concerned. It is a suit to which Jones is a party, and where the question of the invalidity of the patent was directly raised. So he had an opportunity to be heard upon that question before a court having jurisdiction. I am aware that formerly there was a different rule, but I understand the decisions of this state to be that the record is admissible against Jones in any proceeding to which he is a party, where the precise question determined by the court is involved.

"So that so far as the first ground of the objection is concerned, I shall rule that the record is admissible.

"It is then claimed that it is immaterial, and affords no defense to the prosecution of this suit. To determine that question, I apprehend it is necessary to consider somewhat the position of the parties at the time this contract was made, so far as it appears from the evidence in the case.

"I understand it to be conceded that at the time of the execution of this contract, in August, 1874, this proceeding in equity to determine the validity of the patent was then pending, known to all parties to the suit to be pending; that at that time the decision of the circuit court of the United States had been rendered sustaining the patent, which fact was also known to the parties to this suit. From that decision appeal had been taken to the supreme court of the United States, so that no final judgment had been rendered. I understand it further to be conceded, that upon that appeal final judgment was rendered, declaring the patent void for want of novelty, but rendered subsequent to the packing of the corn for the year 1875, by the defendants.

"Returning to the date of this agreement, in August, 1874, the plaintiffs were holders of the letters patent claiming they were valid. There were controversies pending, but a preliminary decision had been rendered in favor of the patent itself. Jones was in the position of a man claiming to have the legal right to hold letters patent, and control the manufacture of this patented article. They were asserting their rights, claiming they were legal and valid.

"The defendants then were in a position where they could adopt either one of two courses. They could treat the patent as invalid, and proceed to manufacture the article in defiance of the patent, and abide the consequences, whatever they might be.

"The second course was to make some arrangement with the person holding the apparant legal right to the patent, by which they could manufacture the article by his consent, without subjecting themselves to damages in case the patent was sustained. This course the defendants adopted. They made an agreement by which they were to pay twenty-five cents a dozen as a royalty to holders of the patent.

"Leaving out the question of fraud, which is open to the defendants if they propose to establish it by any competent evidence, the question arises here, whether, under the pleadings, the defense of want or failure of consideration of the contract has been sustained, or whether this record of the supreme court tends to sustain such a defense.

"In my view of the case it does not. I think the consideration which the defendants received was the right to manufacture the patented article during the year 1875 without fear of legal proceedings being instituted against them, and purchasers from them were protected from any litigation. In my judgment, that is a sufficient legal consideration for the contract itself; and I shall rule in the absence of proof of notice or any act tending to terminate the contract, and in the absence of fraud, that corn packed by the defendants under this process, prior to the decision of the supreme court, must pay the royalty in accordance with the terms of the agreement.

"I therefore, upon the immediate question, rule that this record

is admissible if the defense propose to connect it with competent evidence of fraud in the original contract; otherwise not admissible."

After the introduction of further evidence the judge said: "I shall rule as matter of law, that there is no evidence here of fraud, no evidence of any facts known to Jones, that were material, that were not known to Burnham at the same time; and if known to both parties there can be no fraud."

The judge then ordered the jury to render a verdict for the plaintiffs for the full amount claimed. That verdict was for the plaintiffs, for $8,556.16; and the defendants alleged exceptions.

*A. A. Strout & G. F. Holmes*, for the defendants.

*C. P. Mattocks & E. W. Fox*, for the plaintiffs.

APPLETON, C. J. On the 25th of August, 1874, these plaintiffs having letters patent of the United States, as assignees of Isaac Winslow, for certain improvements in Indian corn preserved green, gave the defendants, who were "desirous of manufacturing and selling the product protected by said patent," a license to manufacture the patented article in this state "during the remaining years of the life of the patent," for which they agreed to pay the royalty specified in the license, upon all corn packed by them.

They packed during the season of 1875, 33,830 dozen cans, and this suit is brought to recover the royalty due by the terms of the license, on that amount.

The main defense is, that Isaac Winslow, the plaintiffs' assignor in the letters patent, was not the original and first inventor of the patented invention claimed and described therein, and that they were wholly void.

When this license was given, the plaintiffs were the holders of letters patent issued in due form, and claimed they were valid. At that time controversies were pending for the purpose of testing their validity. A decision of the circuit court of the United States, had been rendered sustaining the patent. The plaintiffs claimed the right to control the manufacture of the patented article. All these facts were fully known to the defendants, and with that knowledge they procured their license and manufactured under it, in preference to manufacturing in defiance of the patent.

An appeal was entered in the case pending in the circuit court, and upon a hearing before the supreme court of the United States, the decision in the circuit court was reversed and the plaintiffs' patent declared void, for want of novelty. *Sewall* v. *Jones*, 91 U. S.

The question presented is whether the plaintiffs under these circumstances, are entitled to recover.

The defense set up, is a want of consideration. Here was a patent. It was *prima facie* valid. It had been adjudged valid, by the circuit court of the United States. The plaintiffs had obtained an injunction for an interference with their rights. An appeal had been taken. The rights of the parties were in contestation. All this was known to both parties. Nothing was concealed. Nothing was misrepresented. The defendants were unwilling to incur the risk, attendant upon interfering with a patent already adjudged valid by a court of high authority. They bought a license and proceeded to manufacture. They have not been interfered with in their business. They have obtained all they bargained for, and have never offered to surrender their license, or said they should not manufacture. According to the weight of judicial authority, the plaintiffs are entitled to recover.

A license is not an assignment of the patent. It is simply a permission to do certain things under it. In *Lawes* v. *Purser*, 88 E. C. L. 930, which is like the case at bar, Lord Campbell says, "what then is the plea? Simply that the patent is void; and, if it could be shown that the patent was, for any reason whatever, invalid, the plea and every allegation in it would be proved. Then, there having been such an agreement as stated in the declaration, and permission to use the invention having been enjoyed under it, can it be permitted to the defendants, after such a contract and such acquiescence on their part in the plaintiff's claim, and such enjoyment by them of the invention, to say that they will not pay the stipulated price because the patent is void, and so to force the plaintiff to try his right to the patent in this action at great disadvantage. I am of opinion that the defendants, not denying that they have used the invention under the agreement, cannot set up this defense. This plea would be proved

though the plaintiff had really made a useful invention, and had taken out a patent for it, treated by every one as valid and supposed by all parties to be so, if at the time of the trial it were discovered, for the first time, that there had been some previous use of the invention or some part of it, though utterly unknown both to the plaintiff and defendants. It would be monstrous if the defendants after such an agreement acted upon could, on this ground, refuse payment. No fraud is alleged. No renunciation of the permission, warning the plaintiff that the defendants meant to claim to use the invention in their own right, is averred. I think therefore it would be contrary to all principle to hold this plea good." In *Smith* v. *Neale*, 89 E. C. L. 67, 89, Willes, J., says: "In short, the defendant in this case contracted for the plaintiff's right, such as it was, without regard to whether it could be sustained upon litigation or not; and there is nothing unreasonable or uncommon in such a bargain." In *Norton* v. *Brooks*, 7 H. & N. 499, it was held that if a patentee, in consideration of a royalty, grants to another a license to use the patent invention, and the latter uses it, he cannot plead as a defense to an action for the royalty, that the invention was not new, or that the patentee was not the first inventor. "So long as the term of the patent lasts, if the defendant chooses to work under it," remarks Pollock, C. B., "he must pay the stipulated price." To the same effect are *Hall* v. *Conder*, 89 E. C. L. 22. *Baird* v. *Neilson*, 8 Cl. & Fin. 726. *Trotman* v. *Wood*, 16 C. B. (N. S.) 479. *Taylor* v. *Hare*, 4 B. & P. 260. In *Adie* v. *Clark*, 2 Law Rep. App. cases, 423, it was held in the Vice Chancellor's court, that the licensee of a patent cannot dispute its validity.

The decisions in this country are to the same effect. In *Marsh* v. *Dodge*, 4 Hun. 278, 280, it was held that a licensee must notify the owner of the patent of his renunciation of the license, before he can repudiate his obligations under it. "Moreover," remarks Gilbert, J., "the defendants were estopped to deny that the rakes were manufactured under the plaintiff's license, so long as they retained the license itself. They were at liberty to relinquish it at any time and they were bound to do so, if they intended to deprive the plaintiff of his royalty." In *Marston* v. *Swett*, 66 N. Y. 206,

it was held that the patent being void, there was no consideration for the royalty; but upon appeal, the decision was overruled. In delivering the opinion in the court of last resort, Earl, J., says: "Here was no fraud and the defendants got all they bargained for. During the time mentioned in the complaint, they enjoyed all they could have had, if the patent had been valid." Tending to the same result, are the cases of *Johnson* v. *Willimantic Linen Co.*, 33 Conn. 436. *Wilder* v. *Adams*, 2 Woodb. & M. 331. *Kinsman* v. *Parkhurst*, 18 How. 289.

It is well settled, that a note given in consideration of a sale of a patent, or of an interest in the same, where the patent has been adjudged void for want of novelty, cannot be enforced. In that the grantor grants a monopoly of the use of the patent; but if he has none he grants nothing. In the case of a license, the licenser grants the use of what he has and nothing more, and that without warrant. In the one case he grants a right which does not exist—in the other he grants whatever right he may have, be the same more or less.

The counsel have referred us to *Saxton* v. *Dodge*, 57 Barb. 84; but that case may be regarded as overruled by the court of appeals in *Marston* v. *Swett*, 66 N. Y. 206, or if it be sustained, it is upon the ground of fraud and misrepresentation, and that the defendant failed to get what he bargained for.

It is objected that the question of fraud was not submitted to the jury. But there was nothing to submit. The defendants' own testimony negatives that. They knew the patent was in litigation. They wanted such right as the plaintiffs could give them, and obtained it and retained it. It is not the duty of the court to submit the question of fraud to the jury, when the defendants' testimony negatives its existence; and when, if the jury without and against evidence had found it, it would be their imperative duty to set such verdict aside.

The defendants by their letter of 1st November, 1875, gave an account of the corn packed by them during the season of 1875. The letter assumes that the packing was all done under their license. They set up no allegation of any other packing than under the plaintiffs' patent. The claim was not made before the jury. Had

the defendants desired to raise any such issue, it should have been at the time. The verdict, as we understand it, is upon the amount returned by the defendants and to the payment of which the only objection taken is the invalidity of the patent.

*Exceptions overruled.*

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

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WILLIAM W. GROWS *vs.* MAINE CENTRAL RAILROAD CO.

Cumberland. Decided May 31, 1877.

*Trial. Railroad.*

A question in a trial arising out of undisputed facts is one of law for the court. The question of reasonable care, when the facts are agreed, is one of law.

The plaintiff in his declaration stated that he being in a narrow fenced lane leading to the crossing over the defendants' railroad, and distant about two and a half rods from its track, and perceiving the defendants' train forty rods from, but approaching the crossing, he being distant seven rods therefrom, attempted to cross the track before the train should reach it; that his attempt was unsuccessful, and that he was injured. *Held*, on demurrer to the declaration that on the plaintiff's statement of facts he was not in law entitled to recover.

ON EXCEPTIONS from the superior court.

TRESPASS ON THE CASE, for that, on the thirtieth day of November in the year of our Lord eighteen hundred and seventy-four, at said Brunswick there was an open way leading from the old turnpike road, so called, and from a point near the dwelling house of the plaintiff to a point in the highway leading from Brunswick village to Bath, near to Haines' brook, which said way was crossed by the railroad of the defendant corporation upon the same level, upon which said way persons were then and there often passing and repassing on foot and with their teams and carriages. And so much of said way as extended from the old turnpike road aforesaid, to the crossing of said railroad was then and there a lane with fences upon each side thereof so narrow that teams having once entered into the same could not be turned around without great difficulty. And the plaintiff says, that on the thirtieth day

of November, aforesaid, he had entered said lane, and was passing upon said way with his horse harnessed to a good and strong team wagon of the value of thirty dollars, upon which he was then riding, and approaching said crossing, and had reached a point about seven rods from said crossing, and about two and one-half rods in a direct line from the track of said railroad, when an engine and train of cars under the direction, management and control of the defendant corporation by its servants and agents, approaching said crossing, came in view about forty rods from said crossing without any warning or signal having been given of their approach thereto. And said plaintiff knowing that he could not turn his said team in said lane, and believing that he could get his said team over and across said crossing before said train would reach the same, and that he could secure his safety in no other way, and supposing said train was approaching at an ordinary rate of speed, urged his said horse forward, and used his utmost exertions to get his said team over said crossing before said train should arrive at the same, which he could well have done if said train had been moving at an ordinary rate of speed. But the plaintiff says that said train was then and there running at an unusually rapid rate of speed, and although the said plaintiff drove his said horse forward very rapidly in his efforts to get safely over said crossing, he was overtaken by said train before his said team had passed entirely over said crossing, and his said wagon was struck by said engine and thereby dashed to pieces, broke and destroyed, and the plaintiff was struck upon his back and thrown by said engine a great distance whereby he was greatly bruised, strained, hurt and injured.

And the plaintiff says that in his efforts to get over and across said crossing with his said team he was in the exercise of due and reasonable prudence, care and diligence, and that said defendants were guilty of gross carelessness and negligence in running said train rapidly in its approach to said crossing, and giving no warning or signal of its approach thereto, and in not checking or slacking the speed of said train when they saw that the plaintiff was in danger of being struck by said engine if it continued running as rapidly as it was then moving, whereby, the plaintiff says, he has suffered great bodily pain and mental anguish; that he has

been rendered unable to labor thereby; that he was for a long time confined to his bed, and although nearly seven months have elapsed since said injury, he is unable still to dress himself without assistance, and he still suffers great pain from the effect of said injury, and must suffer from the effects thereof as long as he shall live; and he has been obliged to incur great expenses by reason of said injury, and suffered great loss, and must hereafter suffer great loss by reason of his inability to labor as before said injury he was wont to do. To the damage of the said plaintiff (as he says) the sum of six thousand dollars.

By agreement, the case was submitted to the law court as upon a demurrer to the declaration filed at the first term, the decision to be the same as if presented on exceptions, to be argued in writing under R. S., c. 77, § 14.

*J. H. Drummond* and *J. O. Winship, for the defendants.*

The plaintiff alleges that the defendants were negligent, and that he was in the exercise of prudence and ordinary caution. As he has set out all the circumstances in his declaration, if the facts show that these allegations of negligence on one side and care on the other are not true, the general allegations cannot avail even on demurrer to the declaration. They are conclusions of law and not of fact, and therefore not admitted by the demurrer.

I. When the facts are undisputed, the question whether in a given case the parties have exercised due care or have been guilty of negligence is a question of law.

The question of negligence "includes two questions: 1, whether a particular act has been performed or omitted, and 2, whether the performance or omission of this act was a breach of legal duty. The first is a pure question of fact, the second a pure question of law." Shearman & Redfield on Negligence, § 11. *Gavett* v. *Manchester & Lawrence*, 16 Gray, 501, 506. *Dascomb* v. *Buffalo & State Line*, 27 Barb. 221. *Biles* v. *Holmes*, 11 Ired. 16. *Avera* v. *Sexton*, 13, Ired. 247. *Heathcock* v. *Pennington*, 11 Ired. 640. *Herring* v. *Wilmington Railroad*, 10 Ired. 402. See also 53 N. Y. 654; 13 Barb. 9; 4 Vroom, (N. J.) 430; 38 Md. 588. *Gahagan* v. *Boston & Lowell*, 1 *Allen*, 187, 190. *Burns*

v. *Boston & Lowell*, 101 Mass. 50. *Todd* v. *Old Colony & Fall River*, 3 *Allen*, 18, 22. *Lucas* v. *New Bedford & Taunton*, 6 Gray, 64. 7 Allen, 207. 8 Allen, 235. *Forsyth* v. *Boston & Albany*, 103 Mass. 510. A distinction is to be taken as to the manner in which the question arises. Cases in which it has been properly held that the question of ordinary care is for the jury are not like this where the facts are established by demurrer. It is a familiar rule of pleading that on demurrer the judgment of the court is prayed, not of the jury. And that judgment should be based upon the plaintiff's case as he states it in his declaration without the aid of supplementary circumstances.

II. The allegations of negligence on the part of the defendants are not in law negligence. The way not being a public way, the defendants were under no legal obligation to signal their approach. They have a right to run their trains at unusual speed. No allegation except by inference that the defendants' servants saw the plantiff at all, and not even by inference that they saw him in season to check the train.

III. The hurt received by the plaintiff was the result of his own criminal recklessness.

*F. Adams*, for the plaintiff.

Though the way was not laid out under our statutes, it was a way open to travel crossing the railroad on the same level, and the provisions of R. S., c. 51, § 17, are applicable; and even if it were not, the defendants are bound to use care in crossing. A railroad company may comply with all statute requirements, and still have negligence imputed to them. *Webb* v. *Portland & Kennebec*, 57 Maine, 117. *Bradley* v. *Boston & Maine*, 2 Cush. 539. *Richardson* v. *New York Central*, 45 N. Y. 846. *Beers* v. *Housatonic Railway*, 19 Conn. 566. *Pennsylvania Railroad* v. *Barnett*, 59 Pa. St. 259.

The attempt of the plaintiff to cross the track was not *per se* negligence. Whether it was so or not depended upon the circumstances. Negligence is not a question of law, even when the facts are undisputed, unless there has been a violation of plain legal duty. *Pennsylvania Canal Co.* v. *Bentley*, 66 Pa. St. 30.

True, the case being before the court on demurrer, all the facts declared are admitted, but not all that are in the case. It is not necessary to declare all the facts and circumstances. The judgment of the court is prayed whether in substance the plaintiff has stated sufficient material facts to entitle him to recover, provided they with other facts and circumstances which may be proved without being set out, show that the injury was caused through the negligence of the defendants without any contributory want of care on his part.

APPLETON, C. J. This case comes before us upon a demurrer to the plaintiff's declaration. There are, then, no facts in dispute. The facts being admitted, it becomes the duty of the court to apply the law to the facts. It was held by the supreme court of Pennsylvania, in *Hoag* v. *Lake Shore & Michigan Southern R. R. Co.*, 1 Reporter, 89, that, where facts are admitted or established without conflict, the court may declare, as a matter of law, whether such facts do or do not amount to negligence.

The plaintiff being in a narrow fenced lane leading to the crossing over the defendants' railroad, and distant about two and half rods from its track, and perceiving the defendants' train forty rods from but approaching the crossing, he being distant seven rods from the same attempted to cross the track before the train should reach it. His attempt was unsuccessful and he was injured. Hence this suit.

It is negligence to attempt crossing the track of a railroad without looking to see if the cars are approaching. If the traveler does not look and his omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge in omitting to sound the whistle or ring the bell. *Gorton* v. *Erie Railway*, 45 N. Y. 660. *Allyn* v. *Boston & Albany Railroad*, 105 Mass. 77. *Wheelock* v. *Boston & Albany Railroad*, 105 Mass. 203. *Butterfield* v. *Western Railroad*, 10 Allen, 532. But it is greater negligence for one seeing the cars approaching at ordinary speed to make the attempt. The plaintiff was protected by the fences. He had nothing to do but to rein in his horse. He saw the danger and hastened to incur it. The excuse given for the foolhardy attempt

made, is that the lane was so narrow that he could not turn. But the fact that he could not turn was no excuse for driving on. He should have stopped where he was till the cars had passed. "The right of a man to risk his own life, and that of his horse," observes Paxson, J., in *Philadelphia, W. & B. Railroad* v. *Stinger*, 78 Pa. St. 219, 220, "may be conceded; but not the right, by an act of negligence, if not of recklessness, to place in peril the lives of hundreds of others who may happen to be traveling in a train of cars."

He assumed the risk of an attempt which put in peril the lives of passengers, as well as his own life. His own rash act contributed to the injury, and in such case a party cannot recover. The facts being undisputed the question of contributory negligence is one of law. *Morrison* v. *Erie Railway*, 56 N. Y. 302. *Nichols* v. *Great Western Railway*, 27 Canada, Q. B. 382.

It is not enough to show negligence on the part of the defendants, if the plaintiff's negligence contributed to the injury he cannot recover. But here it is difficult to perceive wherein the negligence of the defendants is shown.

The alleged negligences of the defendants are, (1) that no warning was given of the approach of the train. But it is not pretended that the crossing was one where the statute requires a bell to be rung. And if it was, the omission to ring did not contribute to the injury, inasmuch as the plaintiff saw the approaching train. Vision was better than hearing. (2.) It is stated as a matter of complaint that the defendants were running at unusual speed. Trains must make connections. They are not limited to any rate of speed. The court cannot say as matter of law that running with more or less than the average or usual speed is negligence. *McKonkey* v. *Corning &c. Railroad*, 40 Iowa, 205. The hypothesis of the plaintiff's writ, is that hastening and slacking speed is of itself negligence.

The plaintiff does not allege in his writ that the servants of the defendants saw him in sufficient season to have avoided the collision; and if they did not, they were not required to slacken speed without any apparently existing cause therefor.

The remarks of Hagarty, J., in *Nichols* v. *Great W. Railway*, 27 Canada, 382, 395, in a case almost precisely like the one under

consideration, are peculiarly applicable. "I can see," he says, "nothing moving towards this unfortunate accident, . . except an utter disregard on the part of the cab driver of that common prudence and care which should govern every person about to cross a well known railway crossing, known to be unfenced and to be constantly traversed by trains. If parties so acting can recover, it must be solely on the ground that the defendants are a railway company; and to hold such parties entitled to damage, notwithstanding this disregard of their own safety, is to encourage carelessness and endanger human life, not only on the part of those crossing the track, but also on the part of the passengers on the trains." *Declaration bad.*

*Demurrer sustained.*

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

VIRGIN, J., concurred in the result.

DICKERSON, J., dissenting. This case is presented to us upon a demurrer to the declaration filed at the first term, and the decision is to be the same and have the same effect as if the case were presented on exceptions.

The demurrer admits the facts alleged in the declaration, and the court are to determine from them, as pleaded, whether the plaintiff, as matter of law, is entitled to maintain this action. To maintain the suit, it is incumbent upon the plaintiff to allege due care on his part and negligence by the defendants. It is not pretended by the learned counsel for the defendants that the writ does not allege in general terms due care on the part of the plaintiff, but he argues that the specific allegations upon this point show such a state of facts as to authorize the court to declare, as matter of law, that there was contributory negligence on his part.

In addition to the general allegations of due care by the plaintiff, the declaration sets forth, in substance, that the plaintiff with a horse and team wagon was passing along an open way, crossed by the railroad upon the same level, which way people were accustomed to travel, and which was inclosed with fences on each side, and so narrow that teams could not be turned around without great difficulty, and that he had reached a point about seven rods

from the railroad crossing, and about two and a half rods in a direct line from the railroad track, when the train approaching the crossing came in view about forty rods therefrom ; and that knowing he could not turn his team in the lane, and believing he could pass over the railroad crossing before the train would reach it, and that he could secure his safety in no other way, and supposing that the train was approaching at an ordinary rate of speed, urged his horse forward, driving him very rapidly, and used his utmost exertions to get his team over the crossing before the train should reach it, which he could well have done if the train had been going at an ordinary rate of speed, but that the train was moving at an unusually rapid rate of speed, and overtook him, and the engine struck his wagon before he had got over the crossing, dashed it in pieces, and inflicted severe injury upon himself and horse.

It is argued in defense, and held by a majority of my brethren, that the facts being admitted by the demurrer, the question whether the plaintiff was in the exercise of ordinary care, is one of law and not of fact. I cannot assent to this proposition, as an absolute rule of law. Waiving the question of possible cases, I think the better rule, and that which accords with principle and authority is that, even when the facts are undisputed, the question of ordinary care is in general a mixed question of law and fact to be submitted to the jury under proper instruction. This is the law as administered in the early cases in this state, and recently affirmed in *Webb* v. *Portland & Kennebec Railroad Co*, 57 Maine, 117, 131.

I am aware that the court in Massachusetts, in certain railroad cases, have inclined to the doctrine contended for by the counsel for the defendants, but that line of decisions has not been followed by the court in this state, and is not in accordance with the recent decisions in the English courts, the courts in Pennsylvania, Michigan and other states, as well as the supreme court of the United States. *Patterson* v. *Wallace*, 28 Eng. L. & Eq. 48. *Penn. Canal Co.* v. *Bentley*, 66 Pa. St. 30.

In *Detroit & Milwaukee Railroad* v. *Van Steinburg*, 17 Mich. 99, the court lay down the rule, as deduced from an extended analysis of the cases, that where the facts are disputed, or when

they are not questioned, but different minds might honestly draw different conclusions from them, the case must be left to the jury.

This seems to be the view the supreme court of the United States took of this question in *Railroad* v. *Stout*, 17 Wall. 657. After theorizing in regard to extreme possible cases, the court say: "But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible impartial man would infer that proper care had not been used, and that negligence existed; another man equally reasonable and impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education, and men of little education, men of learning, and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than one man does, that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge."

In *West Chester etc. Railroad* v. *McElwee*, 67 Pa. St. 311, 315, the court say: "The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary care. In such cases, the measure of duty is not fixed but variable; under some circumstances a higher degree of care is demanded than under others, and when the standard shifts with the circumstances of the case, it is in its very nature, incapable of being determined, as a matter of law, and must be submitted to the jury to determine what it is and

whether it has been complied with." Thus the rule of law adopted in this state, upon this subject, is not only sustained by the decisions of courts of the highest authority, but its *rationale* is susceptible of moral demonstration. It is believed that the true rule of law is, that when different men of equal intelligence and impartiality may honestly draw different inferences, and form different conclusions from the admitted facts, upon the question of ordinary care, the case should be submitted to the jury under appropriate instructions of the court in matters of law. This rule is explicitly affirmed and applied by this court in the recent case of *Larrabee* v. *Sewall*, 66 Maine, 376. I am unable to perceive why this doctrine does not apply with equal force in actions against railroad corporations. In that case, as in this, several alternatives were presented to the plaintiff by which she might fairly hope to avoid collision with the defendant's carriage; and the court held, upon solemn argument, that she could not be held guilty of contributory negligence, as matter of law, for adopting one, and not another, of the alternatives presented, but that such question was a question of fact solely for the determination of the jury. I cannot therefore avoid the conclusion that the opinion of a majority of my brethren in this case, is in direct conflict, and irreconcilable with the law as laid down in *Larrabee* v. *Sewall*. In my judgment the law does not sanction the withdrawal of the question of ordinary care from the jury in actions against railroad corporations, while it requires the submission of the same question to them, in actions between individuals; the law confides no such dispensing power in this court.

In passing from the law to the allegations in the writ it becomes obvious that this is not one of "the extreme cases," referred to by the court in *Railroad* v. *Stout*, *ante*, where the court would be authorized to predicate contributory negligence, as matter of law, upon the facts admitted, but rather a case where, in the language of the court, in *Detroit & Milwaukee Railroad* v. *Van Steinburg*, *ante*, "different minds might honestly draw different conclusions from the admitted facts," in which case the question must be determined by the jury. The plaintiff was lawfully upon the road, and had a legal right to drive across the railroad track.

He was not in the violation of any duty imposed by positive law. Upon the question, what did ordinary care require him to do, when he suddenly saw the danger that beset him, "different minds might honestly draw different conclusions." Whether to dash on as he did, or to try and turn his team about in that narrow lane, or attempt to stop and hold it, so near the rapidly approaching train, were questions which might have been differently decided at that time by different travelers, of equal intelligence, sagacity and prudence, so much depended upon a due estimate of the velocity of the train, and his distance from it, the fleetness of his horse, and his susceptibility of control, or the contrary, and his own temperament, activity and presence of mind, in the midst of sudden and imminent personal peril. *Larrabee* v. *Sewall*, 66 Maine, 376.

Upon the question of presence of mind, so to speak, in a sudden emergency, Wharton in his law of Negligence, § 304, uses this language: "As a rule, therefore, we may say that a person is not chargeable with contributory negligence, who, when unwarned peril comes on him, suddenly acts wildly and madly. For persons in great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowances for and leaves the circumstances of their conduct to the jury." If to the considerations to which I have adverted, we add the want of evidence, not necessary to be alleged in the declaration, but, nevertheless, material to the issue, such as the plaintiff's age, weight and ability for quick decision and prompt action, I think it is apparent that the case is a proper one to be submitted to a jury. The situation required of the plaintiff a rapid survey of the whole field of danger, a speedy deduction of inferences, expert calculation, and instant choice of chances; and although we can never know what would have been the result if he had adopted the alternative of attempting to stop his team, or turn it around, yet it seems to me that it would be a reproach upon the law to hold him guilty of contributory negligence, as matter of law, for adopting the alternative that actually carried him within a single second of safety.

Nor do I think the other position taken by the counsel for the

defendants, and sustained by a major ity of my brethren, tenable— that the allegations of negligence in the declaration are insufficient in law, and should so be pronounced by the court. These allegations are, running the train at an unusual rate of speed, giving no warning or signal of its approach, and not slacking its speed when the plaintiff came in view of it. The first allegation may or may not show negligence; it is allowable for trains to be run at an unusual rate of speed under certain circumstances and not under others; whether allowable or not depends upon the positive provisions of law, and all the surrounding circumstances. It is not a sufficient answer to the first allegation that the statute makes no provision in regard to the rate of speed to be o bserved by a train in approaching such a crossing. Only a tithe of the duties devolved upon railroad corporations is specifi cally enjoined by statute. A compliance with the requirements of the statute, by no means absolves such corporations from observing such other precautions as reasonable and ordinary care require under the circumstances of the case. This principle applies as well to the making of signals and slacking of speed when the train is approaching a crossing, as to the first allegation. *Webb* v. *Portla nd and Kennebec*, 57 Maine, 117.

The three fold negligence of the defendants is distinctly, and we think sufficiently stated, as the cause of the plaintiff's disaster. Whether those allegations amount to negligence, is a mixed ques tion of law and fact to be submitted to the jury with proper instructions in view of all the evidence in the case. Whether due care required the conductors of the train to run it at a moderate rate of speed, when approaching the crossing, or to give warning of such approach, or to slacken its speed on that occasion, depends upon the usual amount of travel over the crossing, the opportunity for seeing the plaintiff, the provisions of the statute, if any, upon that subject and all the circumstances of the situation. From the admitted facts in this case different men of equal intelligence and prudence might honestly draw different inferences, and form different conclusions. One man might conclude that due care required of the defendants the use of one, at least, or all of these precautions; another,

that it did not require either. In such a case, it would be little short of tyranny in the court arbitrarily to interpose its fiat, and declare that the defendants are guiltless of all fault. The law, it is submitted, in its wisdom, rather invokes the aver age judgment of the jury on such occasions. I think the entry should be,

*Demurrer overruled, declaration adjudged good, action to stand for trial.*

BARROWS and LIBBEY, JJ., concurred in this dissenting opinion.

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BENJAMIN F. HALL, appellant from a decree of the judge of probate, *vs.* PAUL E. MERRILL.

Cumberland. Decided June 4, 1877.

*Executors and Administrators.*

Chapter 116, laws of 1873, is a rule for the proceedings of the probate court in all cases where the estate was represented insolvent after that act took effect; and the probate judge may properly order the sum allowed by commissioners appointed under c. 115, laws of 1859, to be added to the list of claims entitled to dividends upon such estate, though the commissioners of insolvency disallow all the other claims presented, and by reason of such disallowance, the estate is able to pay all the debts.

A claim thus allowed by commissioners, under the statute of 1859, in 1867 is not barred by any statute of limitations in 1874; and, but for the represen_tation and decree of insolvency upon the estate, the creditor would be entitled to execution upon it, under the provisions of R. S., c. 82, § 131, at any time before the estate is finally settled in probate court.

It is competent for a claimant to acknowledge notice of the petition of an executor or administrator for the appointment of commissioners under c. 115, laws of 1859, or R. S., c. 64, § 51, and for claimant and executor or administrator to acknowledge notice of the time and place of hearing before such commissioners; and the fact that this is done, is not of itself proof of fraud in the allowance of the claim, and will not affect the validity of the proceedings.

ON EXCEPTIONS, from a ruling affirming a decree of the judge of probate.

On the third Tuesday of May, 1867, on the application of Mary A. Merrill, widow and executrix of the last will and testament of

Frederic Merrill, deceased, representing that a certain claim made by Paul E. Merrill, (appellee) son of said Frederic, was exorbitant, the judge of probate, in accordance with the provisions of the St. of 1859, c. 115, (R. S., c. 64, § 51) appointed commissioners to determine whether any and what amount should be allowed on such claim, and issued a warrant to them therein directing them to "appoint a convenient time and place for meeting to examine said claim, and to give personal notice thereof to the claimant and executrix, in writing, at least seven days previous to the time appointed," and to make return of their proceedings to the probate office in two months.

On June 20, 1867, the commissioners were sworn, and the claimant and the executrix indorsed upon the warrant an acknowledgment of notice over their several signatures.

At the term of the probate court, held on the first Tuesday of July, 1867, the commissioners made their report on the back of the warrant, therein stating that they had been sworn, had given notice of the time, place and purpose of their meeting as directed, and had examined and allowed the whole of the claim of $770, and $4.00 interest thereon. At the same term, the judge of probate accepted the report, and ordered the same to be filed and recorded; from which no appeal was taken.

At the Oct. term, 1873, of the probate court, (the executrix having deceased) Benjamin F. Hall, (appellant) was duly appointed and qualified administrator *de bonis non cum testamento annexo* of the estate of Frederic Merrill. At the succeeding April term, the estate was represented insolvent; and the commissioners of insolvency after due notice and hearing of claimants, made their report at the Oct. term, 1874. The commissioners disallowed six notes of various sums and dates, presented by different persons. The only remaining claims presented were that of Paul E. Merrill, (appellee) for $774, and one other of like character, concerning which the commissioners in their report say: "It appearing that these claims have been allowed by other commissioners, and reported to the judge of probate and by him ordered to be filed and recorded, and no appeal taken therefrom, we do not regard them within our jurisdiction, and therefore take no action upon

them." The report was accepted by the judge of probate; from which no appeal was taken.

At the December term, 1876, on the petition of Paul E. Merrill praying therefor, the judge of probate after notice and hearing decreed, "That said claim, viz: the sum of $774, together with interest thereon from the first Tuesday of July, 1867, being the date of the acceptance of the report of the commissioners allowing the same, be and the same is hereby ordered to be added to the list of debts entitled to dividends from said Frederic Merrill's estate." From this decree the administrator *de bonis non* appealed, and assigned the following reasons:

1. There is no law under and by force of which the petition can be allowed or the decree made.

2. The claim allowed by the commissioners was a fraud upon the estate.

3. The claim is barred by the statute of limitations.

4. The estate is not insolvent, but solvent, and hence is not an estate of dividends.

5. There is no list of debts entitled to dividends, and hence nothing to which this claim can be added.

6. It is not a claim which carries interest, and so if it can be allowed, it should be allowed without interest.

The presiding justice at *nisi prius* sustained the decree; and the appellant alleged exceptions. Other facts appear in the opinion.

*W. H. Vinton*, for the appellant.

I. The petition is based upon c. 116, of the public laws of 1873. The special commissioners upon the claims of Paul E. Merrill were appointed in 1867. Laws are not retroactive. The decisions are too numerous to cite. The commissioners were not appointed under chapter and section of the R. S. referred to in the act of 1873. This petitioner has mistaken his remedy. The law applicable is found in R. S., c. 82, § 131.

II. No notice was given as required by law. Parties met, notice waived, commissioners sworn, claim allowed, made up and signed all in one day.

III. If the finding of the commissioners is a method of finding

the amount due the estate, it is barred; if in the nature of a judgment, it is not barred.

IV. The statute of 1873 applies only to insolvent estates. When this petition was presented in the probate court, the estate was solvent in fact and by the record.

V. Nothing to add to.

VI. Interest is not allowed unless by contract or statute.

*C. P. Mattocks & E. W. Fox*, with whom was *A. B. Holden*, for the appellee.

Claims established by commissioners upon insolvent estates are never outlawed. *Bancroft* v. *Andrews*, 6 Cush. 493.

An estate once represented insolvent, must be settled after the manner of insolvent estates throughout.

BARROWS, J. The case is before us on exceptions to the *pro forma* ruling of the judge at *nisi prius*, affirming the decree of the judge of probate.

We proceed to examine the grounds of the appeal in the order in which they appear in the reasons of appeal.

I. It is claimed that there is no law under and by force of which the petition of the appellee could be allowed, or the decree made. The counsel for the appellant errs in assuming that it is giving a retroactive effect to c. 116, laws of 1873, to apply it to proceedings in insolvency which were initiated in the probate court in 1874, although certain other proceedings relative to the estate had been had before the act of 1873 was passed. The existence of that statute as the governing rule of the action of the probate court in such cases at the time of their appointment was rightly recognized by the commissioners of insolvency, and was the precise ground upon which they determined that they had no jurisdiction of the claims of Paul E. Merrill and Margaret J. Merrill. Chapter 116 of the laws of 1873, was designed to regulate the proceedings of commissioners of insolvency, and of the probate court, in all cases where such commissioners should be appointed after the act took effect. Frederic Merrill's estate was not represented insolvent until April, 1874. That must be regarded as the date of the commencement of the proceedings which have culminated in this appeal;

and the law under which this decree was passed had then been in force more than a year. To say that the statute does not apply because the commissioners were not "appointed under the provisions of R. S., c. 64, § 51," but of Stat. 1859, c. 115, which in the revision reappears as § 51, c. 64, might be adhering to the letter, but would be in disregard of the spirit and intent of the statute we are to construe.

II. There is no evidence which tends to show fraud in the original allowance of the claim by the commissioners appointed under the statute of 1859, to examine it as a claim alleged by the executrix to be exorbitant and illegal. The surmise that it may be so because the claimant and the executrix both acknowledged notice of the time and place of the meeting of the commissioners, thereby saving to the estate the expense of the service of a formal notice from the commissioners, is idle. It was competent for the parties thus to acknowledge notice, and for Paul E. Merrill to acknowledge notice of the petition of the executrix upon which the commissioners were appointed, and these facts do not in any way affect the validity of the proceedings.

III. Nor is the case within any statute of limitations so as to bar the claim of the appellee. Those statutes, so far as they relate to the assertion of claims against the estates of parties deceased, require prompt action on the part of creditors in bringing forward their claims, and in enforcing them, if denied, in the modes provided by law. But an executor or administrator cannot, by merely postponing payment of a claim that has once been adjudicated upon by competent authority and allowed, defeat the right of the creditor to final payment out of the assets in his hands. *Greene* v. *Dyer*, 32 Maine, 460. *Bancroft* v. *Andrews*, 6 Cush. 493.

The adjudication of the commissioners appointed under the statute of 1859, not having been appealed from, was conclusive as to the right of Paul E. Merrill to the amount allowed, so long as the administration of the estate remained incomplete; and the fact that, instead of sequestering a portion of the estate in which Frederic Merrill had given his widow a life estate, he suffered the provisions of the testator's will to be carried out in that particular, cannot prejudice his rights in the ultimate distribution so long as there is no statutory bar that can be interposed.

Up to the time of the representation and decree of insolvency, he could have had on application to a judge of this court under c. 293, laws of 1865, (R. S. c. 82, § 131) an execution for the amount allowed him by the commissioners, and interest thereon from the time of the return of their report to the probate court, with certain costs as provided in those sections. The proceedings in insolvency substituted for that remedy the one given by c. 116, laws of 1873, which it was the lawful design and scope of the decree to enforce, and which might be made at any time before the estate was finally closed.

IV. The fourth and fifth reasons of appeal may properly be disposed of together. They are in substance that the decree ought not to have been made because Frederic Merrill's estate did not "prove to be insolvent," but the contrary; and because there was no "list of debts entitled to dividends," inasmuch as all the other claims but those of Paul E. Merrill and Margaret J. Merrill were disallowed by the commissioners of insolvency. We cannot adopt the narrow construction for which the appellant contends. After the decree of insolvency and the acceptance of the report of the commissioners of insolvency, the estate is to be settled as an insolvent estate, though it pays dollar for dollar and leaves a residuum for the heirs or legatees; and if there are any claims legally established against it by the adjudication of commissioners appointed under c. 64, § 51, R. S., or c. 115, laws of 1859, they are to be entered by the judge of probate on the list of debts entitled to dividends, (and to payment in full if the estate is sufficient) whether there are any other entries on that list or not. The estate cannot be suffered to escape the payment of them because the commissioners of insolvency report nothing else due.

If it were competent for the probate judge to revoke the proceedings in insolvency and allow the estate to be settled as a solvent estate, the only consequence so far as this appellant is concerned would be to make the estate in his hands liable to an execution to be issued under R. S. c. 82, § 131, and himself to a charge of waste if he suffered it to be taken on such execution.

*Exceptions overruled. Decree of the judge of probate affirmed, with costs for the appellee.*

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

NATHAN CLEAVES, judge of probate, *vs.* KATE H. DOCKRAY, executrix, *et als.*

Cumberland. Decided July 18, 1877.

*Executors and Administrators.*

The executrix, a residuary legatee, instead of the bond required by the statute in such case, gave the bond required of an ordinary executor, containing conditions not required by the statute of an executor, who is also a residuary legatee and omitting an important condition required in such case. It imposed burdens upon the executrix more onerous than the statute enjoins, and if the additional matter was rejected as surplusage, there was not enough left to meet the requirements of the statute.

*Held*, 1. That it could not therefore be enforced as a statute bond.

2. That it might be sustained as a bond at common law, so as to give legal effect to the appointment of the executrix, and to afford security for all interested in the estate.

3. That, as such, it could only be enforced according to the rules of the common law; that the obligors were not subject to the penal provisions of the statutes, and were liable only for the actual damages resulting from a breach of the conditions of the bond.

4. That the action could not be maintained in the name of the present plaintiff, as the bond was given to his predecessor in office; that the statute authorizing the successor of a judge of probate, to whom the bond is given, to maintain an action in his own name, applies exclusively to bonds given in conformity with the statute.

ON AGREED STATEMENT.

DEBT ON BOND, originally brought in the name of John A. Waterman, judge of probate for Cumberland county, and prosecuted in the name of his successor in office, whose name was brought in by amendment.

The case was submitted to the law court upon the following agreed statement, to render such judgment as the law and facts require:

James R. Dockray died October 4, 1868, leaving a will in four items, which gave four children one dollar each, and then stated; "My reasons for giving the above small amount to my children are that they wrongfully and fraudulently obtained from me my property situated on the corner of Fore and India street, in Portland. Fifth, I hereby give to my wife, Kate H. Dockray, all of my prop-

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79 " 164

erty, both real and personal, of every name and nature that I die possessed of. . Sixth, I hereby appoint my wife, Kate H. Dockray, sole executrix of this my will." This will was admitted to probate. On appeal taken, the decree of the judge of probate was affirmed by the supreme court.

Pending the appeal, the defendant, Kate H. Dockray, was appointed executrix and gave the bond in suit, following the form prescribed in R. S., c. 64, § 9, of the present revision, for ordinary executors instead of the form in § 10, in case of an executor who is a residuary legatee, as this defendant was in effect though not in terms. No other bond was given. Letters testamentary were issued December 15, 1868, and she seasonably returned an inventory of the estate. A suit was commenced against her as executrix by Ammi R. Mitchell, September 24, 1870, on which judgment as against an insolvent estate for $5,537.77 debt and $141.85 costs was recovered at the April term, A. D. 1874. The estate was represented insolvent November 4, A. D. 1873, and commissioners of insolvency were appointed. This commission was returned and extended, which extended commission expired January 1, 1875, and was duly returned, one claim for $391.58, having been proved and allowed under it. The commission was accepted and ordered to be filed and recorded, the first Tuesday of June, A. D. 1875. Mitchell's claim under his judgment, was duly filed in the probate court, and ordered to be added to list of debts. On May 5, 1875, no account having ever been settled, it was ordered by the probate court that said Kate H. Dockray should be cited to appear before the probate court on the third Tuesday of the same month, to show cause why she should not be cited to settle her account.

Personal service was duly made, and on the third Tuesday of May, there being no appearance on the part of said Kate, it was ordered that she render her account on oath, into said court, on or before the first Tuesday of June, 1875. Due service was made of this order, and on the said first Tuesday of June, the said Kate not appearing nor complying with the same, it was ordered that the petition and order of court thereon be recorded and filed.

On the third Tuesday of June, 1875, Mitchell filed his petition

in the probate court, setting out that said Kate H. Dockray had been duly cited to render an account and settle the said estate according to law, but had neglected and refused to do so, and had mismanaged the estate, and praying that she be removed from said trust and that he might be authorized to bring an action upon the bond in the name of the judge of probate. A hearing was ordered on this petition on the first Tuesday of July; and on the third Tuesday of July, said Kate having appeared and been heard, it was decreed that the facts alleged having been fully proved, said Kate should be removed from her trust, and that Mitchell be authorized to bring this action, copies of all which proceedings are annexed and made parts of this statement. Mrs. Dockray appealed from this decision of the judge, and the appeal was entered at the October term, 1875, of the supreme court, and dismissed at the same term.

A petition that Lewis Pierce be appointed administrator *de bonis non cum testamento annexo* was filed the first Tuesday of November, A. D. 1875, was opposed by Mrs. Dockray and he was appointed the first Tuesday of March, A. D. 1876, until which time, after the removal of Mrs. Dockray, the office was vacant.

The amount of the estate realized by Mrs. Dockray is $8,318.22; she has paid out for charges and expenses of administration $1,029.26, as appears by an account filed by her and her sureties in the probate court on the first Tuesday of April, 1876.

There has been no order of distribution among the creditors of said estate, nor from the time of the removal of Mrs. Dockray to the time of commencing this suit was there any new administrator appointed, nor has there been any decree directing her to pay or turn over the whole or any part of said estate to any person.

The plea was *non est factum* with a brief statement. 1st. That said Waterman's term of office has expired, and Hon. Nathan Cleaves is his successor as such judge, and that this suit cannot be maintained in the name of said Cleaves, as the bond in suit is a common law bond and not a statute bond. 2nd & 3d. That it is not a statute bond, because said Dockray was residuary legatee, was so constituted and appointed by the will, and the bond is not in conformity with the statute in such case provided; that therefore

the defendants claim that damages, if any are to be assessed by the court according to what is justly due, not exceeding the penalty of the bond. 4th. That no person has been appointed to whom she could pay or turn over the estate. The specifications closed with a general statement of performance and no damage.

*J. D. Fessenden*, for the plaintiff.

The bond is a statute bond.

The trust was committed to the executrix under R. S., 1857, c. 64, § 31. (R. S., § 36.) It was the proper bond under the circumstances. The opinion of the judge of probate is entitled to weight on this point.

The provision of R. S., c. 72, § 5, regarding suits of this kind applies to any kind of probate bond, and is broad enough to cover this case.

Breach was sufficient to maintain this action. Damages are actual, not nominal. The case shows a large amount of property in the hands of the executrix, which she pertinaciously refuses to pay over to the creditors. Her account filed on compulsion after her removal from her office, leaves a large balance in her hands after deducting all the allowance that she claims. This suit is the creditors' only remedy to recover this. There is no claim that she has turned over this balance to her successor.

Damages are fixed by §§ 15 and 18 of c. 72. They are the amount of personal property realized, viz: $8,318.22. *Williams* v. *Esty*, 36 Maine, 243.

The fourth specification of special matter alleges that "no person has been appointed to whom she could pay or turn over the estate." The case finds that the writ was dated August 14th; that the order for her removal was made on the third Tuesday of July, 1875; that her appeal, (allowed so far as relates to her removal,) was entered and dismissed at the next October term; that in November following, a petition for the appointment of a new administrator was filed, and that he was appointed against her opposition in the November following, and that the office was not vacant when the suit was commenced, nor is it now.

But the right to maintain this suit does not depend upon the

removal of the delinquent or the appointment of a successor. The judgment is recovered in trust by the judge, and he can order the delinquent to charge herself with the amount if in office, or assign it to his successor to be collected and accounted for. R. S., c. 72, § 17. *Williams* v. *Esty*, *supra*.

*W. L. Putnam*, for the defendant, Milliken.

Had the bond in suit been the same as provided by law for residuary legatees, there would have been no liability to account, and consequently no breach of the bond for not accounting until "six months after the report on claims was made." We note that c. 64, § 53, provides that every executor shall render his account agreeably to the condition of his bond. In the case at bar, by mistake, the bond provided in R. S., c. 64, § 9, was given in lieu of the residuary legatee's bond. It would be inequitable to enforce the penalty provided by c. 72, § 15, when such penalty would not have accrued had the proper bond been given.

*J. T. McCobb*, for the defendant, Gerrish.

A bond is not a statute bond when not according to the provisions of the statute. *Lord* v. *Lancey*, 21 Maine, 468. If not a probate bond, the action cannot be maintained by the successor of the judge to whom it was payable. *Lord* v. *Lancey*, *supra*.

Bonds not conforming altogether to the statute are either to be enforced by rejecting as surplusage the erroneous portions, as in *Hall* v. *Cushing*, 9 Pick. 395, or must be declared invalid, as in *Purple* v. *Purple*, 5 Pick. 226. *Dicta* to the contrary must be disregarded. *State* v. *Hatch*, 59 Maine, 410. The bond in suit is in no respect according to the statute excepting in regard to filing an inventory. In that particular there was no breach.

DICKERSON, J. After making a nominal bequest to each of his children, the testator bequeathed "all of his property, both real and personal, of every name and nature, to his wife, Kate H. Dockray," the principal defendant in this suit, who thereby became the residuary legatee as well as the executrix under the will. In such case the statute requires that the bond of the executor should be given according to R. S. c. 64, § 10, which differs materially from that

required of an ordinary executor, as provided in the preceding section, under which the bond in suit was given.

A bond required by statute is not void, in all cases, as a statute bond, because it does not in all respects conform to the statute under which it is taken, as, for instance, when the bond contains all that the statute requires, and a further clause more favorable to the obligors than that the statute calls for (*Van Deusen* v. *Hayward*, 17 Wend. 67, 70); or when the condition in the bond is not more prejudicial to the obligors than one with a condition, in due form, would have been (*Morse* v. *Hodsdon*, 5 Mass. 314, 316); or the additional matter may be rejected as surplusage (*Proprietors of Union Wharf* v. *Mussey*, 48 Maine, 307, 312); or the bond is so drawn as to include all the obligations imposed by the statute, and allow every defense given by law (*Commissioners* v. *Way*, 3 Ohio, 103); or where the bond is voluntarily given, and the portion of the condition in excess of that required by law is separable from that provided by the statutes. *United States* v. *Mynderse*, Int. R. Rec. 94, and *Postmaster General* v. *Early*, 12 Wheat. 136. In the absence of any statutory provision declaring a variance from the statute form fatal, such variance does not render the bond void when the condition does not impose upon the obligors a greater burden than the law allows. *Commonwealth* v. *Laub*, 1 Watts & S. (Pa.) 261. *Baldwin* v. *Standish* 7 Cush. 207, 209.

In the present case the bond is defective in its provisions and omissions. It contains conditions not required by the statute, of an executor who is, also, a residuary legatee, and omits an important condition which the statute enjoins in such cases. It imposes burdens upon the executrix more onerous than the statute provides, and if the additional matter is rejected as surplusage, there is not enough left to meet the requirements of the statute. The bond, therefore, cannot be enforced as a statute bond. There are numerous cases, however, where bonds purporting to be given as statute bonds, though invalid as such, have been held good at common law. Bonds given by poor debtors, and public officers, injunction and replevin bonds and bail bonds, are familiar instances of the application of this principle. *Ware* v. *Jackson*, 24 Maine, 166. *Lord* v. *Lancey*, 21 Maine, 468, 470. *Clap* v. *Cofran*, 7 Mass. 98, 100.

*Sweetser* v. *Hay*, 2 Gray, 49, 51. *Stephens* v. *Crawford*, 3 Ga. 499. *Williams* v. *Shelby*, 2 Oreg. 144.

In the case before us the bond was approved by the judge of probate in its present form, and ordered to be recorded in the probate office. No appeal was taken from the decree of the judge of probate, allowing and approving it, and the executrix upon filing it received her letters testamentary, and acted under them by returning an inventory of the estate. It contains ample conditions and provisions to protect the estate from all real loss, and we know of no principle of law that would be violated by upholding it. On the contrary we think that it may be held valid at common law upon principle and authority so as to give legal effect to the appointment of the executrix and the ulterior proceedings of the judge of probate, and to afford security to all interested in the estate. *Baldwin* v. *Standish*, *ante*. *Pettingill* v. *Pettingill*, 60 Maine, 411. *Abercrombie* v. *Sheldon*, 8 Allen, 532.

As this is a bond at common law, it can only be enforced according to the rules of the common law. The obligors are not liable to the provisions of R. S. c. 72, § 15, or for any penalties, but only for the actual damages resulting from a breach of the bond; and the judgment for the penalty in the bond will stand as security for other damages, if any, that may hereafter be proved. *Stephens* v. *Crawford*, *ante*.

But there is a fatal objection to maintaining this action in the name of the present plaintiff. There is no promise to him, and he has no interest in the contract. The promise was made to his predecessor in office. A successor in office to a judge of probate can maintain a suit on a bond given to his predecessor, only when authorized by statute. The statute giving such authority applies only to bonds given in conformity to the statute. *Lord* v. *Lancey*, 21 Maine, 468, 470, and the cases cited are decisive of this question. *Plaintiff nonsuit.*

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

STATE *vs.* MARY JANE STAFFORD.

Cumberland. Decided July 23, 1877.

*Words. Nuisance.*

The phrase, "knowingly permits," implies consent as well as knowledge.

By R. S. c. 17, §§ 1 and 4, if any person knowingly permits any building or tenement owned by him or under his control to be used for the illegal sale or keeping of intoxicating liquors, he shall be deemed guilty of aiding in the maintenance of a nuisance. *Held*, that mere knowledge without permission was not sufficient; that to constitute the offense, there must be permission or consent as well as knowledge.

Where the presiding justice on the trial of an indictment for aiding in the maintenance of a nuisance under R. S. c. 17, §§ 1 and 4, instructed the jury: "If the government has satisfied you the rooms were used by the persons stated in the indictment, and for the purposes therein alleged, with the knowledge of the respondent, that is all the government is bound to prove;" exceptions to the instructions were sustained.

ON EXCEPTIONS from the superior court.

INDICTMENT for keeping and for aiding in the maintenance of a nuisance. The verdict was "guilty on the first twelve counts" and "not guilty on the thirteenth and fourteenth counts;" and the defendant alleged exceptions, as in the opinion appear.

*C. P. Mattocks & E. W. Fox*, for the defendant.

*C. F. Libby*, county attorney, for the state.

VIRGIN, J. All places used as houses of ill fame, resorted to for lewdness or gambling, for the illegal sale or keeping of intoxicating liquors, and all places where intoxicating liquors are sold for tippling purposes, are common nuisances. R. S. c. 17, § 1, St. 1873, c. 152.

By the provisions of c. 17, § 4, any person is deemed guilty of aiding in the maintenance of a nuisance, who (1) knowingly lets any building or tenement owned or controlled by him, for any of the purposes named in § 1; or (2) "knowingly permits the same or part thereof to be so used."

Each of the first twelve counts in the indictment is founded on the second clause of § 4. They differ, however, (1) as to the dates of the alleged offenses; (2) the persons who kept or maintained the nuisances; (3) the tenements used; and (4) the purposes for which they were used.

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The defendant's thirty-first prayer for instruction was: "It is not enough that she [defendant] knew, she must have permitted or consented to the offenses committed in the building."

Upon this point, the learned judge, in the early part of his charge, instructed the jury as follows: "Each of the first twelve counts charges the aiding in the maintenance of a nuisance—that is to say, charges that she lets parts of certain buildings under her control, knowing them to be used for the purposes stated." Subsequently, after calling the attention of the jury to the direct testimony of the police officers, to the uses made of the shops and the manner in which they were fitted up, he charged: "You also have some direct testimony as to what has been done in these shops during these periods of time; and it is for you to say as matter of fact from all the testimony in the case, whether these shops were used for the illegal sale and the illegal keeping of intoxicating liquors. If you have no doubt upon that point, then the question arises, was this with the knowledge and consent of the respondent."

There is no doubt of the correctness of this latter clause of the charge; and notwithstanding the imperfect statement in the former, we might well conclude that taking both these extracts together the defendant would have no reasonable ground of exception. But still later the charge continues: "If the government has satisfied you the rooms were used by the persons stated in the indictment, and for the purposes therein alleged, with the knowledge of the respondent, that is all the government is bound to prove;" and concludes as follows: "In order to make out the offense under either one of these counts, the government must satisfy you that by the persons stated in the count, the nuisance was kept. That is to say, in each count consider the question whether it is proved by the evidence in the case that the person, who is charged as using the premises, did keep a nuisance in those premises—did keep them for the illegal sale or keeping of intoxicating liquors, or as a house of ill fame. If the fact under each count is made out—proved beyond reasonable doubt—that a nuisance was kept by the person or persons named in the count, then the question is, was it with the knowledge of the respondent. If so, then the respondent is guilty under such ones of the first twelve counts, or under all of them, as you may find those facts proved."

These last two portions of the charge ignore the idea of permission or consent on the part of the defendant. This omission we apprehend from other parts of the charge and from the statement of the defendant herself that she owned, lived in and had the control and management of the building, is explained by the fact that the real controversy before the jury upon this point seems to have been in regard to her knowledge of the offenses alleged as nuisances, rather than her consent or permission thereof. But these instructions, with the omission mentioned, were suited to convey an erroneous idea, if the jury considered them a full statement of the law. Being the last statements to the jury they would naturally so consider them and be the more likely to remember them instead of the correct exposition given them in the earlier part of the charge. And when in connection with these instructions we consider that there was evidence tending to show that the defendant forbade the sale of liquors on the premises and so notified her tenants, we think there is reason to believe the jury was misled and considered knowledge on the part of the defendant as sufficient without her consent or permission.

*Exceptions sustained.*

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

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STATE *vs.* THOMAS H. REED.

Cumberland. Decided July 25, 1877.

*Indictment.*

**The signature of the prosecuting officer is not essential to the validity of an indictment.**

ON EXCEPTIONS from the superior court.

INDICTMENT for felonious assault.

To the indictment, which was not signed by the prosecuting officer, the defendant demurred. The demurrer was joined by Charles F. Libby, attorney for the state, for the county of Cumberland, and overruled by the presiding judge, who then ruled on the offer

of the county attorney and against the defendant's objection that he might affix his official signature to the indictment. To the aforesaid rulings, the defendant alleged exceptions.

*C. P. Mattocks & E. W. Fox*, for the defendant, claimed that neither the common law of England nor our constitution or statute required the indictment to be signed by the prosecuting officer, yet it was the practice and founded upon good reason. In England it was not the practice of the prosecuting attorney to be present with the grand jury, as it is with us. Our court has not yet decided the question and are free to act.

The legislature of this state has distinctly recognized the necessity of the signature of the county attorney in prosecuting the simplest form allowable for an offense against the liquor law. R. S. c. 27, § 57.

The counsel cited authorities under various positions. Webster's case, 5 Maine, 432. 1 Ch. Cr. Law, § 32. *State* v. *Squire*, 10 N. H. 558. *Hite* v. *State*, 9 Yerger, (Tenn) 198. *Fout* v. *Tennessee*, 3 Heywood, 98. I Wharton Cr. Law, § 474. *Teas* v. *State*, 7 Humph. 174. Hawkins, P. C. c. 25, §§ 97-98. *Rex* v. *Wilkes*, 4 Burr. 2527. *State* v. *Stuart*, 23 Maine, 111.

*C. F. Libby*, county attorney, for the state.

The signature of the prosecuting officer was not required at common law, and in the absence of express statutory provision it is not required at all. 1 Bish. Crim. Proc. c. 47, § 702. *Com.* v. *Stone*, 105 Mass. 469. *State* v. *Farrar*, 41 N. H. 53. *Anderson* v. *State*, 5 Ark. 444. *Ward* v. *State*, 22 Ala. 16. *Harrall* v. *State*, 26 Ala. 52. *M'Gregg* v. *State*, 4 Blackf. (Ind.) 101. *Keithler* v. *State*, 18 Miss. (10 Smed & M.) 192. *Thomas* v. *State*, 6 Mo. 457.

VIRGIN, J. This court as early constituted, held that the certificate, "a true bill," appended to an indictment and officially signed by the foreman of the grand jury which returned it into court, is not only the legal evidence that the indictment was legally found, but that such certificate is essential; and also, that its omission is not cured by a verdict of guilty. *Webster's case*, 5 Maine, 432.

In this state, as in many others, (in some of which, we believe, it is required by statute) the public prosecuting officer who draws

the indictment habitually countersigns it in his official capacity. In fact the custom has been so invariable here, we recall no other instance of the omission of such official countersignature. But however uniform the custom has been, and how much soever we might regret a discontinuance of any such purely formal practice in criminal procedure, we know of no rule in the common law, we are sure there is no statute in this state, making such countersigning essential to the validity of an indictment. Otherwise the grand jury would be entirely under the control of the prosecuting officer. Of course no such practice was ever heard of in England, as prosecuting attorneys never were present with the juries there.

Here, as in most of the states, the attorney for the state is present with the grand jury during its sessions. He is required to swear witnesses in the presence of the jury (R. S. c. 134, § 6); and generally examines them and always advises the jury in relation to the law of the cases which come before them. He is also required to attend court and act for the state (R. S. c. 79, § 13); and when absent, a county attorney *pro tempore* may be appointed, § 16. But the indictment derives its legal sanction from the certificate and official signature of the foreman together with its due presentation in open court in the presence of the whole jury which found it.

To be sure the form of indictment for being a common seller of intoxicating liquors, provided in R. S. c. 27, § 57, has a blank space next preceding the words "county attorney," as it has next preceding the word "foreman;" and it was the intention of the legislature that those blanks be filled by the signatures respectively of the officers named. The provision of the section, however, is not that all indictments for that offense shall literally follow that form, but that "the form shall be deemed sufficient in law." This language does not conclude the government, any more than the provision in § 55, that "delivery shall be sufficient evidence of sale," does the respondent charged. *State* v. *Hurley*, 54 Maine, 562.

Although there is high authority in support of the defendant's position, we think the great weight of authority cited on the brief in behalf of the government fully sustains the conclusion at which we have arrived.

The ruling in relation to the amendment is immaterial, since the permission to affix the signature of the county attorney was not followed. What may be the effect of extending the statute of *jeofails* to criminal processes we have no present occasion to consider.

*Exceptions overruled.*

APPLETON, C. J., WALTON, DICKERSON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

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CHARLES G. MACINTOSH *vs.* JEREMIAH BARTLETT *et al.*

Cumberland. Decided August 4, 1877.

*Exceptions.*

Exceptions of a general character cannot be sustained where any of the instructions excepted to are found correct.

ON EXCEPTIONS from the superior court, and MOTION to set aside the verdict.

TRESPASS for assault and battery, committed by the defendants upon the person of the plaintiff, at Bryant's Pond, July 18, 1876, by reason of which the plaintiff, as he said, received serious injury to his person, causing him great pain and sleepless nights, obliging him to resort to blisters upon his arms, and subjecting him to outrage to his person and public degradation. His counsel states the case thus: That the plaintiff, fifty three years old, a manufacturer engaged in buying, selling and pulling wool, who never, prior to this affair, was assaulted by any person, and who never assaulted any person, went to Bryant's Pond, where the defendants resided, for the purpose of inspecting and overseeing the packing of a lot of wool in the hands of the defendants, purchased by them for Elias Thomas & Co., of Portland, which wool, or so much as was merchantable, it was expected Morrill was to take at two cents advance upon each pound delivered. That just before noon, the plaintiff was introduced to the defendants, who were father and son, by Mr. Marshall, at the store of the son; that he disclosed to them his business; that upon inquiry he found the defendants had purchased more wool than he expected they would purchase,

and, wool having declined in price, he complained that defendants had exceeded their authority, and had purchased after the decline, paying more than they ought to have paid; that at his request he examined the wool with the younger Bartlett, and complained that the fleeces contained dirty wool; that the son informed him that the wool could not be packed that afternoon as it was not all in, and thereupon ordered his horse and left the store; that after dinner Mr. Macintosh went to the store again, and there had some words with the father, and then telegraphed to Mr. Thomas for instructions; that the reply came just before the arrival of the train, and Macintosh, without waiting for it to be written out went to the store, where both defendants were, and communicated the dispatch; that thereupon the young man said that Thomas should not have the wool at all, and that plaintiff should not touch it; that plaintiff went back to the depot, and receiving the written dispatch from the operator, returned to the store and offered it to the son; that further words passed between them, when the plaintiff started out of the store on to the platform; that thereupon both father and son assaulted him, and he backed toward the depot, both defendants following him, and that he had gone fifteen or twenty feet from the platform when he was thrown or fell to the ground, the Bartletts falling on top of him; that assistance came and the parties were separated, and the plaintiff returned to his home after completing his tour of inspection; that the assault was in the highway, in the presence of many people, and in the daytime. But the plaintiff says in addition that the assault upon him was without the slightest justification; that the defendants, angry because the unmerchantable condition of their wool was discovered, covered him with oaths and abuse, and finally whilst he was retreating towards the depot and making the best of his way from their presence, set upon him and followed him up with blows and kicks, kicking him even after he was upon the ground.

The plea was not guilty, with a specification of self defense. The defendants testified to very abusive language, and epithets by the plaintiff, and that his whole manner was exceedingly provoking; that he first assaulted one of the defendants, the son, by striking at him and immediately the parties were in the street, the

plaintiff down, the defendant on one knee holding him by the collar; that the plaintiff kicked out toward the father who then caught his leg; that neither of the defendants struck.

The exceptions state that among other instructions the judge instructed the jury as follows, which were all the instructions given upon these branches of the case. Then followed six printed pages of this size, containing in general the legal definitions of assault and battery, with illustrations, followed by instructions upon the right of self defense, with its limitations, and closing as follows:

"As a general rule, the theory of the law is that damages should be compensatory; that they should be such a sum as would compensate the injured party for injuries he proves he has sustained. In this case, the plaintiff, if entitled to recover, is entitled to recover compensatory damages, damages for the actual injury he has sustained. That is to say, whatever loss of services he has sustained, whatever diminished capacity to labor has resulted from the wrong of the defendants, whatever expense of medical attendance he has incurred, and whatever physical pain he has suffered, the law allows as elements of damage. Of course the law can give you no rule by which to compute it. It merely says the jury may consider that, as an element of damage, and allow such sum as in their good judgment is proper. The plaintiff, if entitled to recover in an action of this sort, is not limited to loss of dollars and cents, but he is entitled to recover such reasonable sum as the jury fix upon for the insult, for the sense of disgrace and degradation attending a public assault.

"Every man's self respect, every man's pride of character, are just as much under the protection of the law as his property or his person, and if a man is exposed to public and wanton assault, then the law allows the jury to consider as a part of the compensatory damages the injury to his feelings, loss of self respect, sense of disgrace, and fix such sum as they deem proper by the way of compensation for such insult.

"Thus far, if the defendants are liable at all, the plaintiff is entitled to recover as matter of right. Then there is another branch of the subject of damages which is entirely distinct from that. If you award damages to the plaintiff to the extent I have

indicated, he will have recovered full compensation for the loss he has sustained. But in cases of gross, wanton, malicious injury, the law allows the jury, never requires them, if they deem right and proper to allow a reasonable sum, such sum as they determine in their discretion, not by way of compensation to the plaintiff, but by way of penalty to the defendant. That is, in a certain sense, it blends the interest of the plaintiff with the interest of the community, and allows the plaintiff to recover a certain sum as a penalty to the defendant for the wrong he has done, and by way of deterring him from the repetition of the offense.

"That is not a legal right. The plaintiff has in no case a legal right to recover it; it is a question resting in the sound discretion of the jury in a case of gross injury, in which the law gives them the power to award such damage if they see fit.

"Upon this branch of the case the wealth of the defendant has been received in testimony. In cases of this sort the law allows the reputation of the defendants for wealth to be put in. That is upon the theory that a gross and aggravated assault is attended with greater injury to a man when it comes from a person of wealth and standing in the community than from a person without wealth and standing. And upon the question of exemplary damages, the actual wealth of the defendant is allowed to be shown so that the jury can consider that, in determining what amount to award by way of exemplary damages."

The verdict was for the plaintiff for $1,391; and the defendants filed exceptions, and also a motion to set aside the verdict on the grounds that it was against law, the charge of the justice, and against evidence, that the damages were excessive, and that it was the result of bias or prejudice.

*S. C. Strout & H. W. Gage*, for the defendants.

*A. A. Strout & G. F. Holmes*, for the plaintiff.

BARROWS, J. The exceptions are taken to the bulk of the charge, in fact, "to all of the instructions" given upon the principal branches of the case.

It has been held that exceptions of this general character cannot be sustained if any of the instructions are found correct. *Beaver* v. *Taylor*, 3 Otto, 46.

Sufficient warning has been given that this court is not disposed to entertain exceptions thus taken. *State* v. *Reed*, 62 Maine, 129, 135. *State* v. *Pike*, 65 Maine, 111.

In addition to these cases it has now been directly decided in *Harriman* v. *Sanger* (in Penobscot county, not yet announced) that the exceptions must specify the rulings and instructions to which they are designed to apply, and, if taken in gross, will not be considered. As to the greater part of the instructions here reported as excepted to, it must be said that their accuracy and pertinency are manifest at a glance. Many of them are favorable to the defendants. Indeed the defendants base their motion to set aside the verdict of the jury in part upon the allegation that it "is against law and evidence, and the charge of the justice."

We do not feel called upon to consider the exceptions to the charge more particularly. The offer of defendants to prove that plaintiff was an irritating and provoking man, and had trouble with others in reference to similar transactions was rightly overruled.

The damages are manifestly excessive, and the finding must have been the result of some improper bias or prejudice. The testimony discloses nothing which justifies so large a verdict either for compensation of the plaintiff or as punishment of the defendants.

The motion must be sustained unless the plaintiff will remit all over four hundred dollars.

*Exceptions overruled. Motion sustained unless plaintiff will remit all over* $400. *If he so remits, Motion and Exceptions overruled.*

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

## CITY OF PORTLAND *vs.* PORTLAND WATER COMPANY.

Cumberland. Decided August 15, 1877.

*Tax.*

It is within the constitutional authority of the legislature, to empower the city council of the city of Portland, to exempt from taxation for a term of years property belonging to the Portland Water Company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes.

Under an act of the legislature, authorizing an exemption for six years, a vote of the city council to exempt for five years, is valid.

The term of exemption does not necessarily commence running from the passage of the act by the legislature, but may begin when the exemption is voted by the city council, if the vote is passed within a reasonable time afterwards.

The legislative act allowed the exemption to extend to property of the company not in existence when the act was passed. *Held*, that this would include, as taxable, all real estate at a value according with the condition it was then in, and would exclude all personal property acquired after that time.

ON FACTS AGREED.

DEBT, brought under the provisions of chapter 232, of the public laws of 1874, to recover a tax claimed to be due and unpaid.

The amount of the tax assessed is $875, on real estate and $1,625 on personal estate; total, $2,500.

No question is made as to the legality of the tax otherwise than is indicated in the facts following:

The Portland Water Company's charter was amended by the legislature of the state of Maine by chapter 364 of the special acts of 1867. The contract of March third, 1868, called an ordinance to authorize the Portland Water Company to supply the city of Portland with pure water, may be referred to and made part of the case. July 28, 1870, an order was duly passed by the city council of the city of Portland, of which the following is a copy: "Ordered that the property of the Portland Water Company in this city be exempted from taxation for five years." The tax in question was assessed April, 1874. Under this order and the provisions of its charter, and the additional acts and contract above referred to, the Portland Water Company claim to be exempt from the tax assessed.

*T. B. Reed*, city solicitor, for the plaintiffs.

*A. A. Strout & G. F. Holmes*, for the defendants.

PETERS, J. The defendants' charter, as amended in 1867, contained this provision: "The city council of the city of Portland may, by vote, exempt any property of said corporation, not now in existence, from taxation for the term of six years." In 1870, the city council passed an order, "that the property of the Portland Water Company be exempted from taxation for five years." This suit seeks to recover a tax assessed upon the property of the company in 1874.

It is contended, by plaintiffs, that the legislature had no constitutional right to pass such an enactment. The objection is, that it is partial legislation, and in conflict with section 8 of article 9 of the constitution, which provides that "all taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." The case of *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62, is relied on to support this proposition.

We do not think the authority of that case reaches the question presented here. There, no question of a charter from or a contract with the state was considered. It was not pretended that any legal consideration moved from the Brewer Brick Company to either the town or state. Here, the action of the legislature, with the vote of the city in pursuance of it, partakes the character of a contract with the defendant corporation. The consideration for a contract upon the part of the city is palpable. The defendants are obliged to furnish, without any expense to the city, all the water for its public buildings and school-houses, and for the extinguishment of fires, that may be needed therefor; and the defendants are also under other considerable obligations to the city and state. Another distinction between this case and the case cited is, that water works corporations cannot be rivals of each other in any sense. Manufacturing corporations of all kinds may be.

The view taken by the plaintiffs is, we think, an imperfect interpretation of the constitutional clause quoted. The requirement is,

not that all real estate shall be assessed, but that whatever is assessed shall be apportioned and assessed equally. The plaintiffs argue that a law which exempts water works in Portland from taxation, operates unequally, if it does not at the same time exempt all water works in the state from taxation. But all such works are not alike situated in respect to the benefits created by them. One set may be of vastly more consequence to the state than another. The state, through the general benefits to the public, may receive a sufficient compensation for the remission of taxes to one corporation and not to another. This state never has assessed all the real estate within its borders. We do not tax the forts and arsenals of the United States; nor the property of the state itself; nor lands, situated within this state, belonging to Massachusetts; and there are considerations justifying and requiring such exemptions. We are not satisfied that the legislature cannot, by charter or contract, in any case and under any circumstances, for sufficient considerations, release one corporation from taxation, merely because it does not include in its exclusion from taxation all similar corporations in the state.

The property of the defendants has been appropriated and devoted to a public use, and may be exempted from taxation for the same reason that town-houses and school-houses and railroad tracks are exempted. It was only because their works were public works, that they could be permitted to take land for their purposes, under the exercise of the right of eminent domain. True, the title of the property is vested in the corporation. But the corporation holds it, to some extent, as a trustee for the public. It must be used for the public, and, in a great measure, its use may be controlled by the public. *Worcester* v. *Western Railroad*, 4 Met. 564. *Wayland* v. *Co. Com. of Middlesex*, 4 Gray, 500. *Worcester County* v. *City of Worcester*, 116 Mass. 193. See 60 Maine, 196.

If the legislature possessed the power to grant immunity from taxation to the defendants, could that power be delegated by the legislature to the city government of Portland?

In our opinion, this case falls within the limit where the doctrine of delegated powers becomes questionable. The inhabitants

and property holders of Portland were the persons chiefly interested in the introduction of water into the city. By the company's charter, the city council was to have an extensive supervisory direction over the construction and management of the works, and the city can at any time become the sole owner thereof at a price to be fixed by commissioners appointed by court. If Portland became the owner, there would be no pretense that the works would then be taxable. See citations, *supra*. The state and county taxes are not affected by this arrangement. The valuation upon which they are assessed remains the same. The other property of Portland bears the burden that the defendants' property is relieved of. The power assigned to the city by the state, relates to its local and internal affairs. It merely extended the authority of the city in a matter pertaining to police regulation, enabling the city to obtain a supply of water for its inhabitants. The legislation differs little if any in principle from that contained in the statutory provision (R. S. c. 18 § 56) which allows a town, at its annual meeting, to authorize its assessors to abate something from the taxes of a person who uses on the town roads cart wheels of a particular width, and directs an abatement from the taxes of an inhabitant who keeps a watering-trough on the highway for public convenience. *Wadleigh* v. *Gilman*, 12 Maine, 403. *Stone* v. *Charlestown*, 114 Mass. 214.

It is questioned, whether, under the right to exempt for "six" years, an exemption for but "five" years be valid. The power to do the one includes the other. The legislature did not submit an act to be wholly accepted or rejected by the city, but a discretionary power was conferred upon its council, to be exercised at pleasure.

The date of the act allowing the city council to vote the exemption was Feb. 26, 1867. The plaintiffs contend that the period of six years must commence then, and that the time during which the exemption would run expired in 1873, before the tax in question was assessed. The statute does not declare when the time of exemption may begin. It is clear, however, that it cannot be at the exact date of the passage of the act itself. It must be at some time afterwards. The city council must first have time to consider

and decide the matter. The exemption is to apply to property "not in existence" at the date of the act. The exemption could not be of much value until property was acquired. No doubt the exemption must be voted, if at all, within a reasonable time. What would be a reasonable time is a question of law. It appears that the contract between the defendants and the city, providing the manner in which the work was to be done, was not entered into until March 3, 1868; and that, on February 14, 1868, an act was passed by the legislature, allowing two years therefrom for the defendants to complete their works. This creates a probability that the defendants had no valuable property to be assessed, prior to 1869 or 1870, and that the action of the city government was influenced by and based upon that fact. The delay in voting the exemption was not unreasonable.

A question is discussed, as to the extent of the property that is to receive the immunity from taxation. The exemption is not to operate upon all the property of the corporation, but only upon such as was not "in existence" on Februrary 26, 1867. The idea, evidently, was that their property should be taxed irrespective of any increased value thereof caused by themselves. Such increased value was not property in existence, in the sense of the statute, when the act was passed. In this view, the real estate was taxable in 1874, at what it would have been then worth, provided no additions or improvements had been placed thereon by the defendants, enhancing its value. It is immaterial whether the defendants owned the real estate in 1867 or not. It was in existence, whoever owned it.

As to the personal property, anything held by the defendants in 1874, acquired by them since Feb. 26, 1867, we think, should be considered as newly created property, and not taxable, although more or less of the same may have in fact existed in other forms and conditions before 1867. It would be difficult and impracticable to apply any different rule.

As the defendants were taxable in 1874 for some property, perhaps, in strictness, the remedy would have been by an appeal to the county commissioners on account of an overvaluation. But as the briefs of counsel indicate a desire to waive technicalities,

and obtain in this suit a construction of the statute which should govern the rights of the parties, the entry is to be:

Defendants defaulted; damages to be assessed, at *nisi prius*, upon the principles established by the opinion.

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

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EBEN COREY *et al. vs.* JAMES C. PERRY *et al.*

Cumberland. Decided September 13, 1877.

*Bankruptcy.*

When a member of a firm files his petition in bankruptcy, giving no schedule of firm debts and assets nor praying for a discharge from firm liabilities, his discharge, when obtained, will only relieve him from his individual indebtedness and not from partnership liability.

ON EXCEPTIONS from the superior court.

ASSUMPSIT, commenced March 6, 1876, entered at the April term 1876, and tried by the justice without the intervention of a jury, at this February term, 1877, subject to exceptions in matters of law. *Ad damnum*, $60. Plea, the general issue, with brief statement, as follows:

That on the 3d day of March, A. D. 1873, said defendants' creditors filed a petition in bankruptcy against him, the said James C. Perry, in the district court of the United States for the district of Maine, upon which petition, after due notice, he was on the 7th day of April, A. D. 1873, by said court duly adjudged a bankrupt under the act of congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that regular and due proceedings were had in said court in said matter; that on the 26th day of May, 1874, said James C. Perry filed his petition in said court for his discharge; that after proper notice and due hearing, said court on the 7th day of September, A. D. 1874, granted said James C. Perry a discharge of and from all debts which by said act were provable against his estate, which existed on the 3d day of March, A. D. 1873; and

that the debt declared on in plaintiffs' writ existed, if at all, on said 3d day of March, and was provable against his estate.

The plaintiffs filed a counter brief statement that the account annexed to the plaintiffs' writ did not accrue against the said James C. Perry in his individual capacity, but against said Perry and one John G. Dunn, who was a co-partner with said Perry, under the firm name of Perry & Dunn, as will more fully appear by the bill of particulars, attached to said writ;

That the proceedings in bankruptcy, recited and referred to in the brief statement of the defendant, were not against the said firm of Perry & Dunn, but were originally commenced and subsequently prosecuted against said James C. Perry in his individual capacity;

That the partnership debts of said Perry & Dunn were neither proved, nor adjudicated upon, by the court in bankruptcy, under said proceedings;

That the final discharge (if any) granted said Perry, was a discharge from his private individual debts, and not against the debts or liabilities of the said firm of Perry & Dunn or the legal liabilities of said Perry as a member or co-partner in said firm; and

That neither said proceedings in bankruptcy, nor the discharge under the same, can be pleaded in bar against the lawful debts contracted by said firm of Perry & Dunn.

The defendant put in evidence his discharge in bankruptcy, dated September 7, 1874, and signed by Edward Fox, judge of the district court, U. S. for the district of Maine, which, omitting the formal heading and conclusion, was of the tenor following:

"Whereas James C. Perry of Paris, in the county of Oxford and state of Maine, has been by this court, on petition of his creditors, duly adjudged a bankrupt, under the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, and appears to have conformed to all the requirements of the law in that behalf; and it appearing that the assets of said bankrupt are not equal to fifty per cent. of the claims proved against his estate contracted after January 1st, 1869, upon which he is liable as principal debtor, and that the assets in writing of a majority in number and in value of

his creditors to whom he has become liable as principal debtor since that time and who have proved their claims, has been filed in this case before hearing on the application for discharge.

"It is therefore ordered by the court, that said James C. Perry be, and he hereby is, forever discharged of and from all debts and claims which by said act are made provable against his estate, and which existed on the third day of March, A. D. 1873, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy."

The following was the finding of the justice:

"The only question submitted to me for determination was whether the discharge of James C. Perry in bankruptcy, introduced in evidence by the defendants, discharged him from the debts of the firm of Perry & Dunn, of which he was a member on March 3, 1873. I rule that the liability of James C. Perry as a partner for firm debts then due was not thereby discharged, and give decision for the plaintiffs for the amount due according to the account annexed."

The defendants alleged exceptions.

*G. A. Wilson*, for the defendants.

*A. J. Blethen*, for the plaintiffs.

APPLETON, C. J. The bankrupt law of the United States provides for the discharge of individuals from individual debts and of partners from the debts of the firm. The assets of the individual cannot be diverted from the payment of individual debts to the payment of firm debts, nor can those of the firm from firm debts to the payment of individual debts. The individual estate and its assets and liabilities and the firm estate and its assets and liabilities are kept separate and distinct, so that the creditors of the firm and of the individuals composing it may receive equal and exact justice.

The twelfth rule of the district court of the United States for the district of Maine, is as follows: "Whenever a debtor shall desire to be discharged from his liabilities as a member of a co-partnership, as well as from his individual indebtment, Form No. 1, as

prescribed by the rules and orders of the supreme court, shall be altered by setting forth therein a description of such firm, with the names and places of residence of the co-partners and shall pray for the discharge of the petitioner from his liabilities as member of such firm."

The propriety and justice of this rule are apparent. The petitioners for a discharge in bankruptcy should clearly state from what debts they desire to be discharged: if as individuals, that they desire a discharge from individual liabilities; if as members of a firm, that they desire a discharge from partnership liabilities, or from partnership and individual liabilities.

The defendant, James C. Perry, was a member of the firm of Perry & Dunn. In his petition he desired only to be discharged as an individual. He did not set forth that he was a member of any firm. He petitioned for no discharge from firm debts. He set forth no firm liabilities and disclosed no firm assets. The firm of Perry & Dunn has not been declared bankrupt. It has not been before the district court sitting in bankruptcy nor within its jurisciction.

Is then the discharge of Perry a discharge from the firm debts as well as from his individual liabilities?

*In Re* William. H. Little, 1 Bankr. Reg. 341, Little had been a partner with one Dana, and commenced voluntary proceedings in bankruptcy in his own name. In his schedules the debts and assets of the firm of Little & Dana were mentioned, and the petitioner prayed to be discharged from all his debts, but fearing that by such proceedings he would not be discharged from the debts of Little & Dana, he asked that his proceedings might be so amended that Dana might be made a party and cited to show cause why the firm of Little & Dana should not be declared bankrupt. Upon this question of amendment, Blatchford, J. says "Under these circumstances, as the petitioner prays to be discharged from all his debts provable under the act, and some of the debts set forth in the schedule annexed to his petition are debts of the said firm, and as this petition is one to have the firm declared bankrupt on the petition of its partners, within the provision of section 36 of the act and of general order No. 18, as Dana did not join with Little in his (original) petition, he ought to have been brought in

by proper proceedings under general order No. 18, before an adjudication of bankruptcy was made on the petition of Little; the defect is now sought to be remedied by Little. His petition requires to be amended. When he is so brought in, he (Little) can be discharged from the debts of the firm because the theory and intent of § 36 of the act and general orders Nos. 16 and 18 are, that the creditors of a firm shall be required to meet, but once and in our bankruptcy forum, all questions in regard to the bankruptcy of the firm and in regard to debts against the firm." In *Amsinck* v. *Bean*, 22 Wall. 395, it was decided that the assignee in bankruptcy of the estate of an individual partner of a debtor co-partnership could not maintain a suit to recover hush money previously paid to a creditor of the co-partnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the bankrupt act. The suit should be by the assignee of the firm. So that in this case, the assignee of Perry could not have collected any of the assets of Perry & Dunn. The firm debts should not be discharged when the firm creditors could not possibly have their share of its assets.

The firm assets were never before the bankrupt court. Neither were the firm debts. "It is difficult," remarks Drummond, J., *In Re* Noonan, 3 Biss. 491, "to see how any member of the firm can be released from his personal liabilities as such without the court substantially looking into all the transactions of the firm and settling up its affairs. A man cannot be discharged from his liabilities as a member of the firm unless the debts and assets of the firm are considered and adjudicated upon by the court." The fact that persons have been adjudicated bankrupts as members of one firm is no bar to nor does it defeat a petition against them as partners with others in another firm. *In Re* Jewett, 16 Bankr. Reg. 48. In *Hudgins* v. *Lane*, 11 Nat. Bankr. Reg. 463, it was decided that the discharge of a member of a firm upon his individual petition in bankruptcy, and without any proceedings by or against the firm, does not discharge such member from the partnership debts. See also *Compton* v. *Conkling*, 15, N. B. R. 417.

The conclusion is that Perry has not been discharged from his partnership debts. *Exceptions overruled.*

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

JOB R. DURAN *vs.* GEORGE F. AYER.

Cumberland. Decided November 10, 1877.

*Trial. Interest.*

Upon the dissolution of a co-partnership of the parties under the name of Duran & Co., the defendant, by writing, promised the plaintiff to assume and pay all the debts and liabilities of the firm and hold (the plaintiff) Duran harmless from the same and from all costs and damages on account of the same; and there were outstanding notes signed by the plaintiff, payable to him or order, and indorsed by him and by Duran & Co.

*Held*, 1. That it was for the jury to determine whether these notes were debts and liabilities of the firm.

2. That when the plaintiff mortgaged his own real estate to secure the payment of firm debts, and he lost the house by a foreclosure of the mortgage, he was entitled to recover the amount of damages sustained thereby, but not to exceed the notes and interest.

When a note is given on time, with interest at the rate of twelve per cent., the holder after maturity receiving interest by operation of law and not under the contract, is entitled to six per cent. only.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on the following agreement: "Portland, Dec. 11, 1874. Job R. Duran having this day sold and conveyed to me all his interest in the property and rights and credits of the firm of J. R. Duran & Co., said firm consisting of said Duran and myself, and it being part of the consideration of said sale, that I shall assume and pay all debts and liabilities of said firm now existing, I do hereby promise and agree to and with said Duran, that I will assume and pay all the debts and liabilities of the said firm of J. R. Duran & Co., and hold said Duran harmless from the same, and from all costs or damage on account of the same. And I further promise and agree, in consideration of said conveyance to me, to pay to the said J. R. Duran the sum of fifteen hundred dollars in five equal installments of three hundred dollars each; the first payable March fifteenth; the second, April first; the third, April fifteenth; the fourth, May first; and the fifth, May fifteenth, 1875. (Signed) George F. Ayer. Witness, S. C. Strout."

The parties agreed, that of the $1,500, $806 had been paid, and the balance $694 and interest remained due.

The plaintiff claimed at the trial that two notes were given for loans to the firm and were firm liabilities, which the defendant, under the agreement in suit, was bound to pay. The defendant contended that the notes were the personal debt of the plaintiff and not the debt of the firm. These notes were of the following tenor: "$500, Portland, September 5, 1874. Four months after date, I promise to pay to the order of J. R. Duran, five hundred dollars, payable at Casco National, with interest, at 12 per cent., value received. (Signed) J. R. Duran. (Indorsed) J. R. Duran, J. R. Duran & Co."

" Mortgage duly stamped. $550. Portland, July 16, 1873. On demand, after date, I promise to pay to the order of Nathan Hill, five hundred fifty dollars, at any bank in Portland, value received, with interest of twelve per cent. per annum, payable semi-annually, till said note is paid. (Signed) J. R. Duran. (Indorsed) without recourse, Nathan Hill, J. R. Duran & Co."

Prior to the giving of either of the notes, the plaintiff owned a house in Portland, which was under mortgage, on which was then due about $1,400 and interest. July 16, 1873, he mortgaged the equity to Nathan Hill to secure note of $550. On March 5, 1874, a note was given for money loaned by George R. Davis, and the plaintiff secured this note by an absolute deed of his house, subject to the mortgage. The note of September 5, 1874, was given in renewal of the note of March 5, 1874, and in the same form. Davis at the date of the agreement in suit gave the following: "Portland, December 11, 1874, I, George R. Davis, hereby agree to and with Job R. Duran that upon the payment to me by George F. Ayer, of said Portland, of the sum of ten hundred and fifty dollars, with accrued interest thereon, within six months from date hereof, I will discharge a certain mortgage on the house No. 31 Elm St., in said Portland, now occupied by said Duran, made to secure the sum of five hundred and fifty dollars ; and I will also convey to said Duran, or to such other person as he may direct, by good and sufficient deed, all my right, title and interest in and to said house, subject to any other outstanding mortgages. (Signed) George R. Davis."

The plaintiff never paid either of said notes or mortgages, other-

wise than by his house which subject to said mortgage was taken by Davis who still holds the said five hundred dollar note. The plaintiff claimed, and there was testimony tending to prove, that the value of the house was $3000, and sufficient, at any time before it was taken from him, to pay all incumbrances on it, including the $500 note. Davis testified it would not sell for over $2000 at the time of the trial and offered to sell it for that. There was evidence tending to show that on July 1st, 1876, the whole amount due and secured by mortgages and deed to Davis of the house, including unpaid taxes, amounted to $3195. Plaintiff claims, and there was testimony tending to show, that the two notes in controversy were fully paid by the house taken by Davis, while Davis testified that the house was insufficient to pay the incumbrances by more than $1000.

The $500 note was signed by plaintiff, who testified that he placed the name of J. R. Duran & Co. on the back of the note, at its acceptance, and before he placed his own name on the back, and claimed this made the firm of J. R. Duran & Co. original promisors; and also claimed and testified that as between him and the firm, the notes were an accommodation by him. Mr. Davis who wrote and received the note, testified that the plaintiff signed and indorsed it, and handed it to him, Davis, and he, Davis, passed it back, and desired Duran to place the firm name on it, which plaintiff then did; and the defendant claimed that J. R. Duran and he were indorsers only.

Davis was surety upon a bond given by the defendant of record to release attachment against Ayer and to pay the judgment recovered in this case, and is the real party conducting the defense. Upon these issues the judge instructed the jury: "If a note is made payable to me and I indorse it, I assume simply the liability of an indorser; that is, upon non-payment by the maker, and due notice to me, that I will pay the note. Whereas, if a note is payable to a third person and signed by another person, and I at the time of the inception of the note, and as a part of it, put my name on the back of the note, I am not an indorser but an original maker, as liable as if my name appeared on the face of the note as one of the makers.

"The question is not whether the firm of J. R. Duran & Co. were liable as sureties or indorsers, or what their liability upon that note to Davis may have been; the question is, how does the matter stand between the firm of Duran & Co. and Duran. Was this a debt of the firm, or as between the firm and Duran was it a personal, private debt of Duran, which it belonged to him to pay.

"Upon this issue the burden of proof is upon the plaintiff to satisfy you by the balance of the testimony, by the weight of evidence, that at the time the amount of indebtedness represented by these two notes was a firm debt, a firm liability, one that as between this plaintiff Duran and the firm, it belonged to the firm to pay.

"So that you perceive that the determination of this case is free from any technicality. It is a pure question of fact and the determination of it must depend upon the finding of the jury from all the evidence in regard to that matter. That is to say, the plaintiff in order to recover here must satisfy you that this money was procured and advanced for the benefit of the firm of J. R. Duran & Co. It would not be sufficient if he simply put it in as a part of his capital which it was his duty to put into the firm. That would not create a firm liability, or if it was advanced by Duran as any money due from him to the firm which he had previously drawn out. If it was used in that way it would not create a firm liability. But the plaintiff must prove to your satisfaction, in order to recover, that this money was procured by him for the benefit of the firm, and advanced to the firm, money which was not due or owing from him to the firm but money which he advanced to the firm, and of which the firm had the benefit. If he has satisfied you of that, then he is entitled to recover for the amount of the notes; and upon this question, which is the vital question at issue, your determination of it will decide the case. You will consider the direct testimony of the witnesses, and determine what degree of credit to give it. You will examine the books and papers so far as they seem to you to throw light upon the case, and you will consider the probabilities and the circumstances of the parties, and say to which result your minds, after a review of the whole, incline.

"The notes you perceive are given for twelve per cent. interest,

which is a legal rate of interest under the law of this state as it now stands, when agreed upon and stated in the note.

"Instead of the instruction I gave you as to the amount that the plaintiff may recover upon the two notes, I modify my ruling to this extent, and say to you that for the non-payment by the defendant of the debts evidenced by the two notes in the case the plaintiff, if entitled to recover, is entitled to recover the amount of damage which he is shown by the testimony to have sustained thereby, not to exceed the amount of the notes and interest." No other instructions were given upon these points.

The verdict was for the plaintiff for $2214.01; and the defendant alleged exceptions.

*S. C. Strout & H. W. Gage*, for the defendant, contended that to fix the liability of the defendant, the agreement should be strictly construed, in this action at law, and not as in a suit in equity between partners (*Childs* v. *Walker*, 2 Allen, 259); that the claim, on the $500 note, not being one which he could enforce against the firm in an action at law, was not a "debt and liability" of the firm within the meaning of the agreement; the written words are the conclusive evidence of the intent; that the charge of the judge made the defendant liable for non-payment of matters which the firm was only morally or equitably bound to pay, while the agreement covered only legal debts and liabilities; that the instruction on the matter of damages was insufficient; that the value of the house was the measure of damages limited by the amount of the notes and interest; but to the value of the house as an element of damages, the judge made no allusion; that the interest on the $500 note could only be computed at twelve per cent. till it become due in four months, and after that time it must be computed at six per cent.; that reckoning the $500 note in this way and the $550 note at twelve per cent. to the time of trial and the $694, balance of the installments with interest from the time they severally became due to the time of trial, the utmost that could be claimed would be $2148.32; and the verdict was for $2214.01, showing that the jury acted under an erroneous ruling in regard to interest.

*A. A. Strout & G. F. Holmes*, for the plaintiff, contended that while Duran having to furnish the security for the money by a mortgage on his house naturally gave the notes in his own name, yet as matter of fact (which the jury must have found) the loan was to the firm as an independent transaction and that Duran was merely an accommodation signer; and that as matter of law in such case as between the accommodator and the party accommodated, whatever the relative position of their names on the notes, the latter as between the two, is the real principal to the note, which is his debt, though subsequent holders have the right to treat parties as they find them on the paper. *Hunter* v. *Kibbe*, 5 McLean, 279. *Thompson* v. *Clubley*, 1 M. & W. 212. *Torrey* v. *Foss*, 40 Maine, 74. *Collot* v. *Haigh*, 3 Camp. 281. *Parks* v. *Ingram*, 22 N. H. 283.

That the loss of the house constituted a damage for which the plaintiff was entitled to recover, not exceeding the amount due on the notes; and that the jury were in effect so instructed; that if defendant's counsel desired more specific instructions they should have asked for them. *Harpswell* v. *Phipsburg*, 29 Maine, 313. *State* v. *Conley*, 39 Maine, 78. *Gardner* v. *Gooch*, 48 Maine, 487. *Darby* v. *Hayford*, 56 Maine, 246.

That the instruction on the matter of interest was correct as far as it went, and none further was asked for.

APPLETON, C. J. The plaintiff and defendant were formerly partners. On the 11th of December, 1874, the plaintiff sold the defendant "all his interest in the property and rights and credits of the firm of J. R. Duran & Co." In consideration of this sale, the defendant, by his contract of that date, promised the plaintiff that he would "assume and pay all the debts and liabilities of the said firm of J. R. Duran & Co. and hold said Duran harmless from the same and from all costs and damage on account of the same." There is a further promise to pay the sum of $1500 in five equal installments in regard to which there is no dispute, the amount being agreed upon.

This suit is upon the agreement of December 11, 1874. The plaintiff introduces two notes signed by himself, payable to his own order and indorsed by him and by J. R. Duran & Co. These

notes were in the hands of G. R. Davis, to whom the plaintiff mortgaged a house owned by himself as security.

The main issue was whether these notes were "debts and liabilities" of the plaintiff or of the firm of J. R. Duran & Co.

Upon this question the presiding justice gave the following instructions: "Was this a debt of the firm, or as between the firm and Duran was it a personal, private debt of Duran, which it belonged to him to pay. Upon this issue the burden of proof is upon the plaintiff to satisfy you by the balance of the testimony, by the weight of evidence, that at the time the amount of indebtedness represented by these two notes was a firm debt, a firm liability, one that as between the plaintiff Duran and the firm, it belonged to the firm to pay."

To this the defendant cannot reasonably object, for if it was a "firm debt or liability" he was bound by his agreement to pay it.

The two notes in controversy not having been paid by the defendant as the jury must have found it was his duty to do, the plaintiff in consequence thereof has lost his house, which he mortgaged to secure their payment. He has paid this firm debt to the extent of the value of his interest in the house. This value has been very variously estimated. But the value, whatever it may be, is the measure of damage sustained by the plaintiff.

The presiding justice first instructed the jury that the measure of damage was the amount of the notes. If the notes had been fully paid by the house there could have been no objection to this instruction. But as the value of the house was in dispute, the judge subsequently modified his instruction thus: "Instead of the instruction I gave you as to the amount the plaintiff may recover upon the two notes, and modifying my ruling to this extent, I say to you that for the non-payment by the defendant of the debts evidenced by the two notes in the case the plaintiff, if entitled to recover, is entitled to recover the amount of damages which he is shown by the testimony to have sustained thereby, not to exceed the amount of the notes and interest."

The property of the plaintiff paid these notes to the extent of the value of his house. It might have been of much greater value than the notes. The plaintiff could not recover for such excess.

He was limited to the damage "sustained thereby;" that is, by the loss of the house. This is perfectly clear and intelligible. If the defendant desired anything more explicit, he should have asked for it. We think the jury could not have misunderstood this ruling. It was in no respect adverse to the defendant.

The notes were on time and at the rate of twelve per cent. It has been held in such case that after maturity of the note, the plaintiff is entitled to interest by operation of law, and not by any provision of the contract. *Brewster* v. *Wakefield*, 22 How. 118. *Burnhisel* v. *Firman*, 22 Wall. 170.

If there be an excess of interest in the verdict, as claimed by the defendant, the plaintiff upon entering a remittitur will be entitled to judgment.

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

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BENJAMIN FOSTER in equity *vs.* CYRUS KINGSLEY *et als.*

Cumberland. Decided December 17, 1877.

*Equity.*

To justify the reformation of a bond which has been assigned to a *bona fide* holder, for a valuable consideration, not only must the alleged error be proved, but it must also be proved that the assignee had notice of the error at the time of the assignment.

*Thus*, where a bond was erroneously written so that the maker by its terms obliged himself to give a good title to an unincumbered estate, when the understanding of the parties was that he should give a good title of his interest only as mortgager; *held*, that while the bond might be reformed as between the original parties, yet after its assignment to a third party without notice, a court of equity would not interfere to reform it; *held*, also that notice of the existence of a mortgage upon land is not notice that a bond by the owner of the equity of redemption, to convey the land by deed of warranty, is of necessity erroneously written.

BILL IN EQUITY for the reformation of a bond given in the sum of $2000, September 20, 1869, for the conveyance of certain real estate. The bill sets out that the defendant, Kingsley, made a conveyance to the plaintiff, subject to a mortgage of $1500, intended as security for $600 then lent by the plaintiff to him, and that the

plaintiff gave Kingsley the bond in question to reconvey, and by mistake of the scrivener the bond was written so as to require a conveyance to Kingsley or his assigns free from incumbrance and not excepting the mortgage, when the intention of the parties was that the plaintiff should reconvey only the same interest which Kingsley had conveyed to him, substantially an equity of redemption; that Kingsley, September 16, 1871, in consideration of $700, assigned the bond to Joseph Chenery and Joseph Humphrey; that the assignees tendered to the plaintiff, September 23, 1872, the $600 and interest, and demanded a deed with covenants of warranty against all incumbrance; that the plaintiff offered to convey subject to the mortgage; that the assignees refused to accept such a conveyance and commenced an action against him on the bond. The bill also alleges that the assignees knew the state of the title when they took the assignment, and asks that they be enjoined from prosecuting their action; that the bond be reformed by adding after the words "common form" in the condition thereof the words "but subject to the mortgage to Prudence Thombs to secure the payment of $1500 and interest;" and for other relief.

The defendant, Kingsley, admitted the statements in the bill, but the other defendants, the assignees, said in their answer that they had no personal knowledge of the outstanding mortgage, and that on inquiry by one of them of the plaintiff, before the assignment, he said he knew what was in the bond, and was ready to fulfill it, for that was what it was made for, and on the faith of that representation they purchased. They further said that at the time of the conveyance mentioned, Kingsley also made a bill of sale to his brother-in-law, the plaintiff, of all his attachable property, and all in defraud of creditors.

The deed from Kingsley to the plaintiff was recorded near its date. There was evidence tending to show that the real estate was of the value of $3000.

*J. H. Drummond*, for the plaintiff.

The blunder of the scrivener is apparent on the face of the papers. The record of the papers in the registry is notice to the defendants. The deed from Kingsley to Foster, becomes by reference a part of the bond; and the deed mentions the mortgage.

*A. A. Strout & G. F. Holmes*, with *P. J. Larrabee*, for the defendants.

The assignees did not have actual knowledge of the mortgage; but if they did, it does not follow there was any error in the bond. The plaintiff's affirmative answer to the question whether he knew what was in the bond concludes him.

*Drummond*, in reply. Foster's declarations were made before he knew of the mistake. Their question indicates their suspicion of the mistake and the circumstances confirm it. The farm was worth $3000. Foster's claim was $600, the mortgage $1500; and the assignee's claim less than the balance, yet they required Kingsley to throw in the mowing machine, which would have been unconscionable and improbable if they had supposed the $1500 mortgage was to be paid by the plaintiff.

WALTON, J. This is a bill in equity to obtain the reformation of a bond. The bond is for the conveyance of real estate. At the time it was given the real estate was encumbered by an outstanding mortgage, to secure the payment of $1500. The bond is so written as to require the conveyance of an unincumbered estate. It is claimed that this was a mistake; that it should have been so written as to require no more than the conveyance of the equity of redemption.

If the bond was still held by the obligee, there would be no difficulty in granting the reformation prayed for; for the obligee admits the error. But it is not now held by him. It has been assigned. And the evidence satisfies us that the assignees are *bona fide* holders for value. The question is not, therefore, whether it would be right to reform the bond as between the original parties to it, but whether it will be right to do so as between the obligor and the assignees. This, of course, will depend upon whether the assignees had notice of the error at the time the bond was assigned to them; for, to justify the reformation of a bond which has been assigned to a *bona fide* holder, for a valuable consideration, not only must the alleged error be proved, but it must also be proved that the assignee had notice of the error at the time of the assignment. *Whitman* v. *Weston*, 30 Maine, 285. 1 Story's Eq. Jur. § 165, and authorities there cited.

Upon this point the proof fails. We look in vain for the evidence that at the time of the assignment of the bond to them the assignees had any knowledge, from any source, that it did not truly embody the understanding and agreement of the parties. It looks as if one of the assignees might have had, at one time, a suspicion that the bond required of the obligor more than the latter was aware of; for he asked him, before taking the assignment of the bond, if he had read it. This the assignee admits. But he also swears that the obligor answered that he had, and knew what was in it, and that he would come up to the letter of it; that that was what it was made for. And both of the assignees swear directly and positively, that at the time of the assignment to them, they had no knowledge or intimation, from any source, that there was an error in the bond. And it is difficult to perceive how they could have had such knowledge; for neither the scrivener, nor the parties to the bond, had then discovered the error. How can strangers be supposed to have been wiser than the parties themselves? The contract was one which it was competent for the parties to make. No error was apparent upon the face of the bond. And if the parties who made the contract, and the scrivener who reduced it to writing, did not know that the instrument did not truly express the agreement, on what ground can it be assumed that the assignees knew it? They were not present when the agreement was made, nor when it was reduced to writing. How, then, could they know that the instrument was not correctly written? It is impossible that any one could have told them of the error, for no one, not even the parties themselves, then knew of its existence. The assignees are undoubtedly chargeable with constructive notice of the existence of the outstanding mortgage, for it was a matter of public record. But notice of the existence of the mortgage would not be notice of an error in the bond. It is neither illegal nor uncommon for parties to give a bond for the conveyance of an unincumbered estate when it is perfectly well understood that the estate is under mortgage at the time. If it is understood that the obligor is to remove the incumbrance the bond ought to be so written. Notice of the existence of a mortgage upon land, is not, therefore notice that a bond to con-

vey it by a deed of warranty is necessarily erroneously written.

A careful examination of the evidence fails to satisfy us that, at the time of the assignment of the bond to them the assignees had notice, actual or constructive, that it was not correctly written. The reformation prayed for cannot, therefore, be granted. A court of equity never interferes to relieve a party from the consequences of an error, when the only effect of such an interference would be to lift a burden from the shoulders of one and place it upon the shoulders of another, when both are equally innocent and equally free from fault. 1 Story's Eq. Jur. §§ 64 *c*, 108, 139, 165, 381, 409, 434, 436.

*Bill dismissed with costs for defendants.*

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

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GEORGE HEARNE *vs.* DANIEL BROWN.

Cumberland. Decided December 18, 1877.

*Trial.*

In general, a reference of a pending suit at common law, or its submission under the statute, operates as a discontinuance. But when it is plain from the terms of the agreement to refer, that it was the intention of the parties that the cause should remain upon the docket of the court, that the award should be returned to and that judgment should be then entered in accordance with the award of the referees, there is no discontinuance.

If, in such case, either of the referees declines to act, the cause will stand for trial.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on an account annexed, to which an account in set-off was seasonably filed.

The writ was dated September 26, 1870, and was entered at the October term following.

At the January term, 1877, the counsel for the defendant filed a motion to dismiss this action because all matters involved in this suit and account in set-off had been referred to certain referees and in support thereof introduced the following agreement to refer:

"State of Maine, Cumberland, ss. Supreme Judicial Court.

George Hearne *vs.* Daniel Brown.

"In the above entitled cause, commenced by writ dated September 26, A. D. 1870, and returnable to said court on the second Tuesday of October, A. D. 1870, and now pending therein, the parties hereby agree to refer all matters, charges, accounts and claims involved therein, and for which said action was brought, as also all matters, charges, accounts and claims involved in the account in off-set filed in said cause to Samuel L. Carleton and Melvin P. Frank, as referees and arbitrators, who are to decide the same by law and equity, and they are to be sole judges of the law and facts, giving to them also power to choose a third person in case they should fail to agree; the three, or a majority of them, to have the same authority hereby given to said Carleton and Frank. The report and decision of said referees is to be final, and to be reported to court and judgment entered thereon, which judgment is to be final, and no exceptions, appeals or writs of error, are to be taken to the same or to any of the proceedings. March 15, 1871. (Signed) George Hearne. (Seal). Daniel Brown. (Seal)."

On the hearing upon the motion at the April term following, the plaintiff offered, subject to objection, the written resignation of M. P. Frank, one of the referees, dated March 27, 1877, and the written revocation of the reference by the plaintiff, dated March 30, 1877.

Upon these facts, the presiding justice ruled *pro forma*, as matter of law, that the reference and such action as was taken by the referees operated as a discontinuance, and dismissed the action, to which ruling the plaintiff alleged exceptions.

*J. H. Drummond & J. O. Winship*, with *P. J. Larrabee*, for the plaintiff.

*N. Webb* with *D. W. Fessenden*, for the defendant.

Appleton, C. J. The agreement of 15th of March, 1871, is entitled as of a term of this court. It states the time when the writ was returnable and when it was entered; it recognizes the

suit as "now pending;" it refers "all matters, charges, accounts and claims" involved in the suit for which this action was brought and "all matters, charges, accounts and claims" involved in the account in offset to two referees therein named, with power to choose a third in case they fail to agree, the three, or a majority, to have all the powers given to the referees named; and it provides that the decision of the referees is to be final and is to be reported to the court and judgment is to be entered thereon, which judgment is to be final.

There is no mistaking the intention of the parties. The action was to remain on the docket until the award of the referees was returned, and then judgment was to be rendered thereon. The agreement excludes the idea of a discontinuance, and it affirms the idea that the action was to remain on the docket until its final disposition in accordance with the terms of the agreement. If the clearly expressed will of the parties is to govern, there has been no discontinuance.

When parties select another and different tribunal from that in which a case is pending to settle their controversies, as when they enter into a reference of a pending suit at common law or into a statutory submission, the cause thus referred is thereby discontinued. *Mooers* v. *Allen*, 35 Maine, 276.

But when the terms of the agreement provide that the action is to remain upon the docket, and that judgment thereon is to be entered in accordance with the award of the referees, there is no discontinuance. In *ex parte* Wright, 6 Cow. 399, the court say "A general submission to arbitration is a discontinuance. Not so of a submission, where a judgment on the report or a cognovit is to follow. By the very terms of the submission the cause is to be continued in court." To the same effect is the decision of Savage, C. J., in *Green* v. *Patchin*, 13 Wend. 293. A mere submission to arbitration will not be a discontinuance of a pending suit, when by express agreement or necessary implication the cause is to be retained on the docket until the arbitration is perfected by an award, and such an agreement will be implied from the stipulation that judgment shall be entered on the report or award. *Lary* v. *Goodnow*, 48 N. H. 170, reaffirmed in *Weare* v. *Putnam*,

56 N. H. 49. So, in *Rogers' heirs* v. *Nall*, 6 Humphrey, 29, it was held that the court had power to enter up judgment upon an award made in a case pending in court, though the submission was by arbitration bond and not by rule of court, provided the submission contained a stipulation that the award shall be made the judgment of the court.

Here, too, one of the referees declined to act. In *Chapman* v. *Seccomb*, 36 Maine, 102, it was held that, where the parties to an action pending in court agree in writing to refer it, with stipulations that it shall be withdrawn, each party to pay his own cost; if one of the referees declines to act, the agreement becomes inoperative and the action may stand for trial.

The *pro forma* ruling of the presiding justice was erroneous. The cause is still pending and it will stand for trial in its order upon the docket.

*Exceptions sustained.*

WALTON, VIRGIN, PETERS and LIBBEY, JJ., concurred.

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OTIS F. THOMPSON *vs.* ROBERT PENNELL and ROBERT BOWKER, Trustee.

Cumberland. Decided December 28, 1877.

*Trustee process.*

Section 50, c. 86, R. S., which provides that property mortgaged, pledged or delivered to a trustee may be made available to creditors, does not apply to a case where the conveyance is absolute in form and fraudulently intended by the parties to be so in fact, as to creditors, but as between themselves to be as security only.

On a disclosure in such case, the trustee should be holden absolutely and not on condition of payment to him of the consideration of the conveyance. R. S., c. 86, § 63.

ON EXCEPTIONS from the superior court.

ASSUMPSIT to which no defense was made. The contention was as to the liability of the alleged trustee, on whom the writ was served, March 23, 1875. At the May term, 1875, he disclosed as follows:

"On November 11, 1874, Robert Pennell was the owner of one-eighth of the ship Martha Bowker, and conveyed it to me, for which I was to pay him the sum of $1000. I made two payments of $300 and $244 in cash. He was indebted to me on account of the bark Caroline Lemont, of which I was agent, in the sum of $150, which indebtedness was canceled. I gave him my negotiable promissory note for $100, which I have not yet paid. He drew an order on me in favor of R. H. Bowker for $211.24, which I accepted. All these sums were intended to be in payment for said one-eighth, but the aggregate of them, when the order was accepted, was $1005.24, making an overpayment of $5.24 to Mr. Pennell. There had been some talk of his conveying the one-eighth to me as security for advances, and my giving a bond to re-convey upon his repaying me, but that was abandoned, and the sale made as aforesaid, outright."

The plaintiff filed the following allegations of fact:

"1, That at the time of the conveyance of the eighth of the Martha Bowker, the defendant, Pennell, was under great pecuniary embarrassment; 2, was in failing condition; 3, was insolvent; 4, that Bowker had knowledge thereof; 5, that the original intention of the parties that the defendant should convey in mortgage only was changed, and a conveyance absolute in form was made by the defendant and received by Bowker on account of such embarrassment and insolvency of the defendant, with the mutual intent to impede and delay the creditors of the defendant; 6, that $1000 was an inadequate price, that the eighth was then worth $2500."

Evidence was introduced and arguments were made by counsel; and Judge Symonds, at the March term, 1876, ordered as follows: "That on payment or tender of $1005.24, together with interest on the same from the twenty-third day of March, 1875, to the time of such tender, by the plaintiff to said Bowker, trustee, within ten days of the entering of this order, and the discharge of said Bowker from all his liability as owner of said one-eighth of said ship "Martha Bowker" for the expenses of said "Martha Bowker," (or his sufficient indemnification against said liability) the said Bowker shall deliver over the said one-eighth of the said ship

"Martha Bowker" to the officer serving the process, to be by him held and disposed of as if said one-eighth had been attached on *mesne* process, and that in default thereof said Bowker shall be charged as trustee of said Robert Pennell."

To this order the plaintiff alleged exceptions.

*W. Gilbert*, for the plaintiff, contended that the case did not come under R. S. c. 86, § 50, as the thing was not mortgaged, &c., to secure; but came under c. 86, § 63; that trustee process was an equitable suit (*Page* v. *Smith*, 25 Maine, 256, 264; *Fletcher* v. *Clarke*, 29 Maine, 485, 487, 488); that therefore the question of fraud should be determined as in equity; that the debt due the plaintiff having accrued before the conveyance, it is not material whether it is deemed actual or legal fraud; *Fletcher* v. *Clarke*, *supra*.

The counsel pointed out badges of fraud. Defendant was insolvent. Bowker knew it. The vessel was defendant's only attachable property. The price was grossly inadequate. The original agreement was that Bowker should give bond to re-convey. It was suffered to lie till plaintiff pressed hard when Bowker pretended to exact an unjust alternative and Pennell pretended to submit to the condition which ignored creditors. Pennell continued to take the earnings. *Hartshorn* v. *Eames*, 31 Maine, 93.

Bowker, making an unconscionable bargain by reason of grossly inadequate price, acted fraudulently against subsisting creditors. Story's Eq. Jur. §§ 244, 188, 349, 353, 369, 373.

*A. A. Strout & G. F. Holmes*, for the trustee, contended as matters of fact that the price was not inadequate and the sale not fraudulent.

LIBBEY, J. From a careful examination of the disclosure of the trustee and the evidence taken under the plaintiff's allegations, we are satisfied that the trustee, Bowker, on the 11th of November, 1874, took from the principal defendant, Pennell, a conveyance of one-eighth of the ship Martha Bowker, then worth at least $2500, as collateral security for about $1000, for a debt due from Pennell to him, money paid, and liabilities assumed for Pennell, with the verbal agreement between the parties that Bowker should give to

Pennell a bond to re-convey the same to him on payment of said sum; that the matter remained in that way till the 25th of February, 1875, the day before the commencement of this suit, when Bowker, knowing Pennell to be insolvent, and having reason to believe the plaintiff was about to bring a suit against Pennell, and in some form attempt to attach his interest in the ship, went to Pennell and refused to give the bond as he had agreed, and it was thereupon agreed between them that the conveyance should be treated as an absolute sale of the one-eighth of the ship for $1000, with a secret understanding between them that Bowker would re-convey to Pennell on payment by him of that sum.

This conveyance was for less than one-half of the value of one-eighth of the ship, and though absolute in form and to be treated as absolute as to third parties, it was not so in fact between the parties, but was intended as security only. Setting it up by Bowker as an absolute sale, against existing creditors of Pennell is, under the facts of the case, a fraud on them and they may avoid it. By virtue of R. S. c. 86, § 63, the trustee must be charged.

The court below erred in charging the trustee conditionally. He does not claim to hold the ship as security. He claims to hold it as against the plaintiff absolutely. This claim of title is fraudulent as against the plaintiff. If the trustee comes into court and sets up a fraudulent claim of title, he cannot invoke equity. If the decree will be a hardship to him, it results from the position he has voluntarily and deliberately assumed, and which, if he should be permitted to succeed, would defraud the plaintiff. But in this case he will not suffer by being charged unconditionally, as the interest in the ship is worth more than enough to pay plaintiff's claim and the sum advanced by the trustee.

*Exception sustained.*
*Trustee charged for one-eighth of the ship Martha Bowker.*

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

GEORGE KEELEY *vs.* BOSTON & MAINE RAILROAD COMPANY.

Cumberland. Decided January 5, 1878.

*Railroad.*

A railroad ticket with the words "Portland to Boston" imprinted on it, purchased in Portland under no contract other than what is inferable from the ticket itself, does not entitle the holder to a passage in a direction the reverse of that indicated on the ticket.

A ticket with the words "Portland to Boston" on it does not entitle the holder to a ride from Boston to Portland, although the holder has been permitted to take such rides on similar tickets over the same railroad before, and a conductor on another train at another time on the same road gave his opinion to the holder that the ticket would be good for a passage either way.

ON REPORT from the superior court.

CASE, setting out in substance and in extended legal form and phraseology that the defendants were common carriers of passengers; that the plaintiff purchased two tickets, one of the following form: "163. Issued by Grand Trunk R. R., and Boston & Maine R. R., Portland to Boston. Valid only within seven days. First class. Form 39. J. Hickson, General Manager, 3376," and another, similar in form, but which he is unable to describe; that he entered the defendants' cars at Portland for Boston whither he was carried; that he gave up the "similar" ticket on his passage to Boston, when the defendants promised and assured the plaintiff that the ticket "described" was good for a passage for him over the defendants' railway from Boston to Portland; that on the 26th day of January, 1876, at Boston, he entered the cars to be conveyed to Portland, and was in pursuance of said payments and ticket (described) conveyed to South Lawrence, where he was ordered out; that he re-entered and was conveyed to Haverhill; that the defendants then ordered him to leave the cars and ejected him therefrom and refused to carry him to Portland.

The plea was, not guilty.

The plaintiff testified in substance as follows: That he purchased the ticket described at Lewiston, at the ticket office of the Grand Trunk Railway with several others; that he traveled much between Portland and Lewiston, and when at Lewiston always purchased

a through ticket for Boston, and when in Boston got a through ticket for Lewiston; that there was a coupon attached to this ticket to come from Lewiston to Portland, which had been used; that January 25, 1876, he left home in Portland for Boston, had two of these tickets in his pocket, and when the conductor came around handed him the ticket described, and asked him—[Here the witness was stopped] that the conductor took one of the tickets for his fare to Boston, where he stopped over night; that he started for Portland the next day, got aboard the defendants' train, handed conductor Conway the ticket described; that Conway said it was not good, it reads from Portland to Boston. Witness continued thus: "I told him it was good, that the conductor whom I came down with yesterday morning told me it was good. Conway told me I would have to get off at Lawrence if I did not get a ticket. I got off at Lawrence, got aboard the train again without purchasing a ticket.

"The conductor came around after leaving Lawrence and I handed him the ticket the second time. He said, Didn't I tell you to get a ticket at Lawrence? I said yes. He said, You have got to leave this train at Haverhill.

"There was a gentleman from Boston with Mr. McGlinchy sitting on a side seat and I sat on the inside of the seat with McGlinchy next to the window. The conductor came along and we had some hard words and he beckoned me out to leave the train. McGlinchy says, you are not going to eject Mr. Keeley off from the train, for if it is not all right he will make it right in Portland. The conductor says, I am no doctor. I don't know nothing about injections, but he has got to leave this train. The Boston man says, if I was you I would leave the train and have no trouble, but it is outrageous, and if you want to use me at any time, if you are going to bring a suit against this road, here is my address. I got off the train."

It is admitted that if the testimony had not been excluded the plaintiff would have testified that he had the conversation with the conductor of the up-train on January 25th, 1876, which he testified he repeated to conductor Conway, and that he said the conductor of the up-train told him the ticket was good for a return

ride; and if such testimony would have been admissible it is for the purposes of this report to be considered as in the case.

There was much other testimony; but the foregoing is sufficient to raise the legal points. The case was reported to this court which is to order such judgment as the law and facts require.

*J. E. Butler*, for the plaintiff.

*W. L. Putnam*, for the defendant.

PETERS, J. This case presents this question: Does a railroad ticket, with the words "Portland to Boston" imprinted on it, purchased in Portland under no contract other than what is inferable from the ticket itself, entitle the holder to a passage, on the road of the company issuing it, from Boston to Portland? Does a ticket one way give the right to pass the other way instead? We find no case deciding that it does, nor do we assent to the proposition that the law should be considered to be so. Such is not the contract which the ticket is evidence of.

It has been held that, if a passenger purchases a ticket with a notice upon it that it is "good for one day only," in the absence of a statutory regulation to the contrary, he can travel upon such ticket only on that day. *State* v. *Campbell*, 32 N. J. L. 309. *Shedd* v. *Troy & Boston Railroad*, 40 Vt. 88. *Johnson* v. *Concord Railroad*, 46 N. H. 213. *Boston and Lowell R. R. Co.* v. *Proctor*, 1 Allen, 267. 1 Redf. on Railways, 99, and notes. It has been held also that, if the words "good upon one train only" are printed upon a ticket, the holder is not entitled to change from one train to another after the passage is begun. *Cheney* v. *Boston & Maine R. R. Co.*, 11 Met. 121. Redf. on Railways, *supra*. If such notices confine a passenger to a certain day and a particular train, why is there not as much reason to say in this case that the notice upon the ticket must restrict the holder of it to go in the particular direction named?

This position is not weakened by the suggestion that the company can transport the passenger as cheaply and easily one way as the other. If it were so, it would be no answer. A person who agrees to sell to another, merchandise of one kind, might find it to his profit and advantage to deliver merchandise of another kind, but he cannot be compelled to do so.

So a railroad could often, no doubt, transport a passenger as conveniently on one train as another and on one day as another; still, as before seen, there is no obligation to do so. But it does not follow that a railroad corporation can carry passengers as well for itself the one way as the other. There may be a difference arising from various considerations. There may be more travelers and more freight to be carried one way than the other. It may be more expensive. There may be more risk in the one passage than the other. The up train may go more by daylight and the down train more by night. That such considerations as these might arise in a case, whether in this instance they exist or not, helps to demonstrate that a ticket one way is a different thing from a ticket the other. Practically, the doctrine set up by the plaintiff, if allowed to prevail, would affect the defendants injuriously. It is well known that through tickets are cheaper *pro rata* than the way or local fares. This fact has led to a practice on the part of way travelers of buying through tickets and using them over a part of the route and selling them for the balance of the distance, so as to make a saving from the regular prices charged. It is easily seen that, if a passenger is permitted to ride in either direction on a ticket, it increases the chances for carrying on this sort of speculation against the interests of the road.

It does not avail the argument for the plaintiff at all, that before this he had passed over the road upon other tickets in a direction the reverse of that advertised upon their face; nor is it of any importance that another conductor upon another train at another time expressed an opinion to him that this ticket would be for either direction good. The contract is not shorn of a particular stipulation merely because it is not always enforced. Nor could such conductor in such manner bind the corporation, and it could not have been understood by the plaintiff that he undertook to do so. The conductor merely expressed an opinion about a matter which he at that time had no business with. The plaintiff had ample opportunity to purchase another ticket, and should have done so. *Wakefield* v. *South Boston Railroad*, 117 Mass. 544.

*Plaintiff nonsuit.*

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

JEREMIAH C. MCCARTHY *vs.* CITY OF PORTLAND.

Cumberland. Decided January 5, 1878.

*Way.*

An action does not lie against the town in favor of a person who receives an injury from a defective highway, while using such highway for the express purpose of horse-racing, and matching his horse for speed against other horses.

*Semble: Aliter*, if the fast driving was merely incidental to traveling upon the highway for any of the legitimate purposes for which a highway is designed to be used.

ON EXCEPTIONS AND MOTION from the superior court.

CASE for injury to plaintiff's horse from defective highway.

PLEA, not guilty, under which, evidence was introduced tending to show that the plaintiff was racing the horse, and matching it for speed at the time its leg was broken.

Upon that point, Judge Symonds instructed the jury as follows:

"Highways are only to be safe and convenient for travelers. If a man once intentionally starts upon a race, having that object in view, and not any legitimate purpose of travel, whether he has reached the point where the horses are to be put to full speed or not, from that moment he ceases to have any rights against the town as a traveler upon the highway. The intention to race, accompanied by the fact that the man has actually started upon the race, prevents his recovery in the action. It matters not if he has started at a walk, or at a very slow rate of speed, if the race is begun, if he has started upon the race and is in the act of racing, whether he sees fit to put his horse to full speed or not is immaterial; the race having begun, he having intentionally joined in it, the actual speed at which he is driving is immaterial; he has ceased to have the rights of a traveler, and his use of the highway for that purpose is not legitimate."

The verdict was for the defendants; and the plaintiff alleged exceptions and also moved to set aside the verdict.

*A. A. Strout & G. F. Holmes*, for the plaintiff.

*H. B. Cleaves*, city solicitor, for the defendants.

PETERS, J. We think the judge at the trial gave a correct ruling upon the point raised in this case, and presented the idea, involved in it, in apt and appropriate words. To enable the plaintiff to recover, he must have been "a traveler." That is not all. He must have been traveling for some purpose or other for which streets are required to be constructed and kept in repair. A person may be a traveler, but not such within the contemplation of the statute, which gives compensation for an injury occasioned by a defect in a highway. He may be within or without the protection of the statute, and still be a traveler. The distinction between what is a legitimate use of the streets or the contrary, is a nice and narrow one, and still it is an appreciable and palpable distinction. A boy may be within the protection of the statute while running upon a street, if going to or returning from school; but not, if participating at the time in a game of ball being carried on in the highway. He might be a traveler, perhaps, under some circumstances, while sliding down hill on his way to school; but not, if merely engaged in sliding down hill as a pastime and sport. The statute requires that the way shall be "safe and convenient for travelers with horses, teams and carriages." A horse being driven or led upon the street may be in the sense of the statute the horse of a traveler; but if an estray upon the common or highway, he would not be. The instruction in the case at bar prevents the plaintiff recovering, because he was using the highway at the time of the accident for the purpose of racing. Not because racing horses is an unlawful thing, but because it was a purpose for which the streets were not designed to be used. Playing ball and sliding down hill are not unlawful exercises and games. But the streets are not proper places for such recreations, nor are they appropriate as racing grounds for fast driving. Of course, while a person is racing his horse, he is passing along the highway, in one sense, as any traveler would. So is the boy passing along the street while running after the ball, or sliding down hill, or the horse while going astray. If the plaintiff had been on his way to his business house or home, or had been out riding for pleasure and recreation, and while so going had speeded his horse to keep up with or to pass other teams on the road, he might still have been

a traveler within the protection of the statute in case of accident from a defective way. (See *Blodgett* v. *Boston*, 8 Allen, 237, 241.) In such case the racing might have been merely an incidental or casual thing. But where a person uses a highway wholly for the purpose of horse-racing, and in the same manner he would have used it if a race-course fitted and designed for the purpose, and meets with disaster, he cannot recover of a town merely because the town has not afforded him and his horse a safer and more perfect track. *Stinson* v. *Gardiner*, 42 Maine, 248. *Leslie* v. *Lewiston*, 62 Maine, 468. *O'Connell* v. *Lewiston*, 65 Maine, 34. *Orcutt* v. *Kittery Point Bridge Co.*, 53 Maine, 500. *Stickney* v. *Salem*, 3 Allen, 374. *Blodgett* v. *Boston*, *supra*. To this extent did the instructions go, as we understand them, and no further. We think the verdict is sustained by the evidence.

*Motion and exceptions overruled.*

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

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RUFUS SMITH, appellant, *vs.* WILLIAM H. COLBY.

Cumberland. Decided January 16, 1878.

*Trover.*

Trover lies against a person who removes a quantity of fence from the land of its owner, although such person was acting at the time under the direction of town officers and mistakenly supposed the fence to be upon the land of the town.

ON EXCEPTIONS from the superior court.

TROVER, for a fence constructed of 700 feet of pine boards of the value of $12.00, and twelve cedar posts of the value of $3.00. Plea, general issue.

Judge Symonds instructed the jury as follows:

"The plaintiff is not entitled to recover for any portion of the fence taken from the land of the town, whether there by the permission of Potter or not. As matter of law he has no right to recover for any portion of the fence built on the land of the town.

"On the other hand, if any portion of the fence taken by Colby was taken from the land of the plaintiff and carried to a distance of 100 rods and piled up on the land of the town, and if he subsequently upon demand for it refused to deliver it until directed so to do by the overseers of the poor, (and I understand in regard to these facts there is no material dispute) then there is sufficient evidence to maintain the action as to that portion of the fence that stood upon the land of the plaintiff."

Other facts are stated in the opinion.

The verdict was for the plaintiff, for $6.92; and the defendant alleged exceptions.

*B. Bradbury*, for the defendant.

The case is a second time before the law court on similar facts. In 1874, the rescript was. "We think this verdict (for the plaintiff) is clearly against law, on the authority of *Davis* v. *Buffum*, 51 Maine, 160, and should therefore be set aside."

Conversion must be proved. Mere demand and refusal are not enough to establish conversion. The defendant had neither actual nor constructive possession of the lumber, and could not comply with the demand. *Davis* v. *Buffum*, 51 Maine, 160, last paragraph of opinion p. 164.

*J. D. Simmons*, for the plaintiff.

The case at the former trials stood on different grounds. This is the first trial where the plaintiff made a distinction and claimed only that part of the fence which stood on his own land; and this verdict under the charge was for that portion only.

PETERS, J. The question is, whether an action of trover is maintainable upon the following facts: The defendant was superintendent of the poor house of the town of Brunswick; the plaintiff, being an adjoining proprietor, located a portion of his fence over upon the land of the town; the defendant removed the fence under the direction of the selectmen of the town, carrying it some distance away, and refused, upon demand, to return it without the direction or permission of the town officers to do so; it turned out that, in removing the fence which plaintiff had wrongfully

located over upon the poor farm, the defendant also took up and carried away a small section of fence belonging to the plaintiff and situated either on the dividing line between the plaintiff's land and the town farm or upon the plaintiff's land. For this small portion of the fence the plaintiff recovered. We think the verdict must stand.

It is true, as contended, that a person acting under the direction of another as servant or bailee might not be guilty of conversion merely by carrying articles from place to place, without any knowledge of wrong doing, supposing the articles to belong to or to be rightfully in the possession of the person from whom the same are received. It is usually a protection to such person that the chattels are received from one in possession of them, possession being deemed *prima facie* evidence that he is the owner thereof. A different rule would impose innumerable burdens and liabilities upon servants, trustees, bailees, carriers and other agents. *Burditt* v. *Hunt*, 25 Maine, 419. *Fifield* v. *Maine Central*, 62 Maine, 77, 82. Nor does a demand upon such agent, servant or bailee to deliver to the true owner, and a neglect to comply with the demand, amount to conversion, if at the time of the demand it is not within the power of such person to deliver the property. *Davis* v. *Buffum*, 51 Maine, 160; and cases *supra*.

This case, however, differs from the cases supposed. Here, the defendant with his eyes open took and carried the plaintiff's property away. He took it from the plaintiff's possession if not from his land. He knew that the controversy between the plaintiff and the town related only to fence upon the town land. Whether done through blunder or misjudgment, the taking was wrongful and its responsibility rests upon him. This act amounts to conversion, whether the property was afterwards wrongfully detained or not.

*Exceptions overruled.*

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

SAMUEL F. MOSHER *vs.* THOMAS B. SMITH.

Franklin. Decided April 3, 1877.

*Sale.*

If C. delivers his oxen to T. as a pledge to secure payment of a note, and T. afterwards permits them to remain in C.'s possession to be re-delivered if C. does not pay the note in a week, a subsequent purchaser of C. within the week, without fraud against T., acquires a valid title against him.

If there is no delivery from C. to T., and the transaction between the parties is an agreement merely that the oxen shall be held as security, to be taken by T. in case of failure to pay the note, then T. takes no title and cannot contest the title of a subsequent purchaser, though his purchase was fraudulent.

ON EXCEPTIONS.

TRESPASS for taking a yoke of oxen.

There was evidence tending to show that Wm. Tarbox held a note against Joseph Collins; that he had a writ thereon put into the hands of the defendant, as deputy sheriff, and went with him to Collins' place; that the defendant there informed Collins that he was directed to attach the oxen, and that Collins thereupon "turned out" or delivered the oxen to Tarbox with the agreement that if Collins should pay Tarbox the amount of his note and cost within a week or ten days from that time, he had the right so to do; and the oxen were thereupon left with Collins; that within a few days after this transaction, and before the expiration of a week, Collins sold and delivered the oxen to the plaintiff, but they were still left in the possession of Collins; and Smith took them away afterwards as the servant and at the request of Tarbox by virtue of the trade and delivery to Tarbox in his presence.

The plaintiff claimed, and there was evidence tending to show, that the oxen were not in fact delivered to Tarbox by Collins so that they were in his actual possession and under his control, but that the transaction between the parties was an agreement merely that the oxen should be held as security, to be taken by Tarbox in case of failure to pay or secure the debt by Collins within a week or ten days.

The issue before the jury was, whether there was such a trade

that the oxen passed to Tarbox, and that he could hold them as against the plaintiff. The presiding justice instructed the jury as in the opinion appears. The verdict was for the plaintiff; and the defendant alleged exceptions.

*H. L. Whitcomb*, for the defendant.

*S. Belcher*, for the plaintiff.

DICKERSON, J. There was evidence in this case tending to show a trade for the oxen in controversy between one Joseph Collins, the owner, and W. Tarbox, and, also, a subsequent sale of the oxen to the plaintiff. In both cases the oxen were left in the possession of the vendor until they were taken away by the defendant, at the request and as the servant of Tarbox. The question before the jury was, whether the trade with Tarbox passed the title in the oxen to him so as to entitle him to hold them against the plaintiff as a purchaser.

There was testimony tending to show, and the plaintiff claimed, that the oxen were not in fact delivered to Tarbox by Collins, but that there was simply an agreement between them that the oxen should be held as security, to be taken by Tarbox in case of Collins' failure to pay or secure his debt to Tarbox within a certain time.

Upon these points the presiding justice instructed the jury as follows: "If Mr. Collins actually delivered the oxen to Mr. Tarbox to be kept by him, and he took possession and control of them as a pledge to secure his note, and Tarbox afterwards permitted the oxen to remain in the possession of Collins, to be re-delivered to him if Collins did not pay or secure the note in a week or ten days, and the plaintiff, without fraud against Tarbox, purchased the oxen, he would take a good title as against Tarbox. But if the purchase of the oxen by the plaintiff was not in good faith, but for the purpose of defrauding Tarbox, then Tarbox would have the right to retake possession of the oxen and hold them under the agreement as a pledge for security of his debt. But if the oxen were not in fact delivered to Tarbox by Collins, so that they were in his actual possession and under his control, but the transaction between the parties was an agreement merely that the oxen should

be held as security, to be taken by Tarbox in case of failure to pay or secure the note by Collins, then such an agreement gave Tarbox no title, and he cannot contest the plaintiff's title though his purchase was fraudulent."

These instructions are sufficiently explicit for a proper presentation of the law of the case, and free from objection. If the counsel for the defendant desired further instructions he should have asked for them. *Exceptions overruled.*

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

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STEPHEN OSGOOD *vs.* NATHAN R. MILLER.

Franklin. Decided September 13, 1877.

*Promissory notes.*

The consent of the surety to the release of the principal prevents such release operating as a discharge of the surety.

ON REPORT.

ASSUMPSIT on a note of the following tenor: "Wilton, April 28, 1868. For value received, I promise to pay Stephen Osgood or order nine hundred dollars on demand and interest. (Signed) James C. Miller. Surety, N. R. Miller, John Miller. (Indorsements) July 4, 1871. Rec'd thirty dollars on the within note. May 1, 1873, Rec'd on the within two hundred and sixty-three 50-100 dollars.

Annexed to a copy of the note was an agreement of the following tenor, introduced by the plaintiff.

"The undersigned, sureties of the note of which the above is a copy, and on which thirty dollars was paid and indorsed July 4th, 1871, hereby agree with said Stephen Osgood that he may release the principal maker of said note, James C. Miller, without prejudice to the rights to either party in interest to said note. Wilton, April 26, 1873. (Signed) Nathan R. Miller, John Miller."

Stephen Osgood testified, subject to objection, as follows:

"I am the plaintiff in this action, and the owner of this note. I erased the name of James C. Miller, April 26th, 1873, after the writing which is attached to the note was executed. I was advised by the committee to arrange the matter in this manner. I understood Miller contemplated going into bankruptcy. Miller, the principal on the note, paid me $263.50. I did not intend by erasing the signature of the principal in the note, to discharge the sureties; but I did intend to discharge the principal. I did not intend to prejudice the rights of any of the parties to the note except to discharge him. John Miller was present. Nathan Miller was about there, but can't say as he knew about it. James C. Miller's creditors contemplated to put him into bankruptcy, and in consequence of that I made the arrangement above stated."

Cross examined. Nothing was paid at the time I struck the name of James C. Miller off the note; but the $263.50 above referred to were afterwards paid in pursuance of the agreement of James C. Miller made at the time.

The following receipt was then introduced by consent, viz: "Wilton, Maine, May 1st, 1873. Received of James C. Miller, by the hand of Gilbert Miller, two hundred and sixty-three and 50-100 dollars, in full of all demands and accounts of every kind whatsoever to this date. (Signed) Stephen Osgood. Attest, R. Fenderson."

*S. Belcher*, for plaintiff.

*C. J. Talbot & H. L. Whitcomb*, for the defendant.

APPLETON, C. J. This is an action against one of the sureties on a note on which one James C. Miller was principal. The principal being insolvent and about to take advantage of the bankrupt law, the defendant agreed with the plaintiff in writing that he might "release the principal maker of the note, James C. Miller, without prejudice to the rights of either party in interest to said note."

In pursuance of this arrangement the principal on the note paid the sum of $263.50 which was indorsed on the note, and the plaintiff released the principal by drawing a line over his name. This was done in good faith by him, simply to discharge the principal, but with no design to prejudice the rights of the sureties.

The sureties now claim that they are discharged from all liability; but we think not. What was done was by their consent and probably for their benefit, inasmuch as the principal did not take advantage of the bankrupt law, and paid a sum which he probably would not, had he become a bankrupt.

A surety is not discharged by a contract, made with his assent, between the creditor and the principal debtor, although it may operate to extend the time of payment. *Wright* v. *Storrs*, 6 Bosw. 600, 601. In *Ex parte Harvey; In Re Blakely*, 27 Eng. L. & Eq. 272, Turner, L. J., says: "It is not disputed that a surety, who concurs in an arrangement between the principal and the debtor, is not discharged by such arrangement." This assent of the surety may be shown by parol. *Wyke* v. *Rogers*, 12 Eng. L. & Eq. 162. The surety is not discharged by the execution by the creditor of a composition deed with his consent. *Cowper* v. *Smith*, 4 M. & W. 519. The consent of the surety to the discharge of the debtor prevents such discharge operating to release the surety. DeColyar on Guarantees, 403. A surety by deed guaranteed the payment of a banking current account and agreed that no composition with the principal debtor should discharge his liability. The principal debtor entered into a deed of composition with his creditors, which contained an absolute release of his debts. Held, that the surety was not discharged by the release of the principal debtor. *Union Bank of Manchester* v. *Beech*, 8 H. & N. 672.

The alteration of the note by striking off the name of the principal was done in good faith and intended to be and was in conformity with the agreement signed by the defendant. The sureties agreed in writing to the discharge of the principal and no other mode being mentioned the erasure of his name from the note was not an improper mode of doing it. An alteration of a bond without any fraudulent intent will not, it seems, avoid such bond. *Adams* v. *Frye*, 3 Met. 103; nor when made merely to correct a mistake. *Ames* v. *Colburn*, 11 Gray. 390.

*Judgment for plaintiff.*

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

MARSHALL D. P. THOMPSON *vs.* JANE C. HINDS.

Franklin. Decided September 13, 1877.

*Promissory notes.*

Where a promissory note was given by a mother for an injury to the plaintiff by her son, and one of the defenses was that the plaintiff falsely and fraudulently exaggerated the extent of the injuries received, and the presiding justice instructed the jury "that the mere magnifying of the injuries would not of itself defeat the note, but if the defendant falsely, fraudulently, deliberately, misrepresented as to the extent of his injury, and as to the magnitude of his claim, it would discharge the defendant;" *Held*, on exception, that the instruction correctly stated the law.

ON EXCEPTIONS.

ASSUMPSIT on a note for $85, dated November 2, 1874, payable to the plaintiff on demand.

There was evidence introduced by the defendant tending to show that, on Sunday, November 1, the day previous to the giving of the note, the minor son of the defendant got intoxicated and discharged a pistol in the presence of the plaintiff and others, that the contents of the pistol passed through the pants of the plaintiff and hit his leg; but the extent of the injury was one question in controversy, it being claimed by the defendant that there was only a slight abrasion of the skin, that the plaintiff magnified his injury, represented it to be much more severe than it really was and induced the defendant to give this note in settlement thereof.

There was further evidence tending to prove that the plaintiff and others co-operating with him, represented the injury to be very severe, that he was liable to be a cripple for life, that the defendant's son was liable to be sent to the state-prison for his act, &c. It also appeared by the defendant's evidence, that the plaintiff and Owen Lander, an uncle to the defendant's son, and who was present when the pistol was fired, agreed "to go for them," (the defendant's family) and get all they could.

The presiding justice among other things instructed the jury as follows: "The defendant is liable if she signed the note as you would be, and to the same extent, if for a legal or valuable con-

sideration, if it was a valid contract. The question is, not whether she is liable, but what the note was given for; was it fairly obtained? You have heard the evidence. The plaintiff, this young lad, and an uncle of his, at sometime on Sunday, left home, went to a tavern, got pretty drunk and had a disgraceful scrape.

"The plaintiff says the note was to settle for damages. Was this what it was given for? I leave it to you. I do not mean to intimate any opinion one way or the other. If given to settle for damages sustained by the plaintiff with a full knowledge of the transaction, or without fraudulent representations, she is liable and must pay it. Was it so given? The defendant says that it was not; that in the first place, there were not any damages; that to be sure there was a pistol fired by a drunken boy, but it did not do any harm, merely made a hole in the plaintiff's pants; that there was a conspiracy between the uncle and this plaintiff to extort money from the fears of the family, and that that is the basis of the note, and that the note was obtained under such circumstances.

"If they falsely and fraudulently misrepresented the injury, conspired together to deceive this woman and compel her to pay a larger or smaller sum by way of settling this injury, and the settlement was unfairly obtained, dishonestly obtained, from fraudulent representations of the extent of the injury, I instruct you she is not liable.

"Was the note given for a fair, honest settlement of an injury sustained, or was it for the purpose of compounding a felony, corrupt,—this young lad to be discharged from criminal liability,—or was it obtained by false, fraudulent representations of injury sustained, deceiving the woman, the parties conspiring together to extort money? If it is, she is not liable. But if it was a fair settlement of a claim, made in good faith by the parties, deliberately entered into by this defendant, she is just as liable as you would be, whether married or not."

After the justice had closed his charge, the plaintiff's counsel asked the court "if the plaintiff magnified his injuries, may it not make a difference?" The justice replied "not of itself, merely; people ask a little more than they expect to get, but if he falsely, fraudulently, deliberately misrepresented as to the extent of the

injury, and as to the magnitude of his claim, that would discharge the defendant."

The verdict was for the defendant. The plaintiff filed exceptions, and also a motion for a new trial.

*H. L. Whitcomb & B. E. Pratt*, for the plaintiff, contended that if the plaintiff exaggerated his claim, and the extent of his injuries, it should not entirely defeat the note, not even if this was fraudulently done, that the excess should be shown by way of recoupment, in mitigation of damages and not to render the note absolutely void; that the evidence here showing that some injury was inflicted, the plaintiff should recover to that amount though it might be less than the full face of the note. Note to Sedgwick on Damages, p. 436; also Massachusetts cases found in 22 Pick. 510; 23 Pick. 283; 9 Met. 278; 11 Met. 559; 1 Cush. 271; 4 Cush. 215; 4 Gray, 50; 97 Mass. 166.

*P. H. Stubbs*, for the defendant.

Manifest fraud should avoid a contract *ab initio*. Bouv. L. Dict. tit. Fraud. *Pratt* v. *Philbrook*, 33 Maine, 17.

APPLETON, C. J. This is an action upon a promissory note of the defendant. It was given by her in settlement of a claim for damages for an alleged assault by her son upon the plaintiff, or for the purpose of stifling a criminal prosecution against him.

There was evidence tending to show threats made to the defendant, of a criminal prosecution of her son and of his being sent to state-prison unless the plaintiff's claim was settled; that the plaintiff falsely and fraudulently exaggerated the extent of the injury received, and that he was not injured at all. There was evidence to the contrary.

The presiding justice charged the jury that if the note was given on a fair settlement of a claim made in good faith, the defendant would be liable; that if it was for the purpose of compounding a felony,—the son to be discharged from criminal liability,—or if it was obtained by false and fraudulent representations of injuries sustained, deceiving the defendant, the parties conspiring together to extort money, she would not be liable.

These instructions were correct.

After the charge, the plaintiff's counsel asked the court "if the plaintiff magnified his injuries may it not make a difference?" to which the court replied, "not of itself merely; people ask a little more than they expect to get, but if he (the plaintiff) falsely, fraudulently, deliberately misrepresented as to the extent of the injury and as to the magnitude of his claim, that would discharge the defendant."

The plaintiff cannot justly complain of this. Assuredly a false, fraudulent misrepresentation deliberately made would not furnish a valid consideration for a note.

The verdict was fully justified by the evidence.

*Motion and exceptions overruled.*

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

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WILLIAM E. DOLBIER *vs.* AGRICULTURAL INSURANCE COMPANY.

Franklin. Decided September 18, 1877.

*Insurance. Pleading.*

A stipulation in a policy limiting the time for commencing suit upon it to twelve months after the occurrence of the loss, being in conflict with R. S., c. 49, § 62, is nugatory. Nor does the setting forth of such a stipulation in the declaration, nor the omission to refer to the statute which abrogates it, vitiate the declaration or indicate a waiver by the plaintiff of his legal rights under the statute.

The declaration contained the following averment of notice of loss: "That forthwith after the happening of the said loss and damage, to wit on the [blank] day of [blank] A. D. 187 [blank] he then gave notice thereof to the defendant, and as soon thereafterwards as possible, to wit, on the [blank] day of [blank] 187 [blank] then delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit; which said account was signed by the plaintiff, and accompanied by his oath, that the same was in all respects just and true, and showed the value of said property, and in what general manner the said building was occupied at the time of the happening of the said loss and damage, and the name of the person then in actual possession thereof, and when and how the said fire originated, so far as the plaintiff knew or believed, and his interest in the said property at the time; to which said account was annexed, and therewith delivered, a certificate under the hand and seal of a [blank] nearest to the place of fire, to wit, [blank] showing that he, the said justice had examined the circumstances attending the said fire, and the loss and damage alleged, and was

acquainted with the character and circumstances of the plaintiff, and verily believed that the plaintiff had by misfortune, and without fraud or evil practice, sustained loss or damage on the said property to the amount of $350." *Held*, on demurrer, that it was fatally defective, because it did not allege either the notice and proofs required by the policy, or those which are declared by R. S. c. 49, § 20, to be sufficient.

On exceptions.

Assumpsit on a policy of insurance.

The writ was dated August 25, 1876. The declaration stated the loss to have occurred on July 10, 1874, and set out by way of recital the entire policy, which contained, among other things, these:

"In case of loss, the assured shall give immediate notice thereof to the company, stating the number of the policy and name of the agent; and when required, shall deliver to the company as particular an account or statement of such loss or damage as the nature of the case will admit, signed by their own hand, and verified by their oath or affirmation; and if required, shall produce their books of account, and other proper vouchers. Such statement shall show whether any and what other insurance has been effected on the property; what was the whole cash value of the property insured, and what was their interest therein; whether there were any incumbrances of any nature upon the property; whether any other person or persons had any interest therein, and if so, the nature thereof; who were the occupants of building insured, and when and how the fire originated so far as they may know or have reason to believe. They shall also state whether since effecting such insurance the risk has been increased by any means whatever. Any neglect to comply with these provisions, or any misrepresentation, or concealment, or fraud, or false swearing in any statement or affidavit in relation to loss or damage, shall forfeit all claim upon the company by virtue of this policy, and shall be a full bar to all remedies upon the same.

"It is expressly covenanted by the parties hereto, that no suit or action against this company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or equity, unless such suit or action shall be

commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action shall be commenced against this company, after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The declaration also contained the averment of notice of loss as in the head note appears, with the blanks therein appearing unfilled.

The defendants filed a general demurrer to the declaration which was joined. The presiding justice overruled the demurrer and adjudged the declaration good; and the defendants alleged exceptions.

*S. C. Belcher*, for the defendants.

I. The action cannot be maintained for the reason that the declaration alleges that one condition of the policy is that no suit shall be sustainable thereon unless commenced within twelve months next after the loss occurs. The provision of R. S., c. 49, § 62, is not invoked by the pleadings and therefore waived. *Lewis* v. *Monmouth Mutual Fire Ins. Co.*, 52 Maine, 492, 497, 498.

II. The averment of notice is insufficient. It gives no date by which the court may judge whether the notice was given the company in "a reasonable time." There is no allegation that the account was sworn to before some disinterested magistrate, or that the plaintiff notified the company what other insurance, if any, existed thereon, or of the manner the building was occupied at the time of the fire. There is no intimation that the person making the certificate was a disinterested magistrate or that he ever administered any oath to the plaintiff, or that he ever saw the particular account of statement of the plaintiff. He does not certify to the truth or falsity of the statement. It does not appear that he knew of the existence of the plaintiff's statement. It neither complies with the conditions of the statute nor of the policy.

*H. L. Whitcomb*, for the plaintiff.

Barrows, J. The first point upon which the defendants rely in support of their demurrer is, that the action cannot be maintained because not seasonably commenced according to the declaration

itself, which shows that the loss occurred July 10, 1875, and sets out with much other superfluous matter the stipulation of the parties in the policy that no suit or action shall be sustainable in any court of law or equity unless commenced within twelve months next after the loss or damage shall occur. This action was not brought until August 25, 1876.

The stipulation referred to is not the only one which our legislature has found it necessary to exscind or nullify in order to make the contract of insurance what it purports to be. In the present case this is effectually (if not elegantly) done by R. S., c. 49, § 62, thus: "No conditions, restrictions or stipulations in its charter, by-laws or policies, shall deprive the courts of this state of jurisdiction of actions against such companies, nor limit the time of commencing them to a period less than two years from the time the cause of action occurs."

With this law before us we cannot say that the stipulation in the policy limiting the time for the commencement of an action to twelve months after the occurrence of the loss is binding on the assured.

The cases cited in defense, where, in the absence of such a statutory inhibition as that above quoted, stipulations for a special limitation of suits have been held valid and binding between the parties, are inapplicable. The statute is just as effective against the validity of the stipulation as though its insertion in a policy of insurance was prohibited under a penalty. Nor can it properly be held that the plaintiff waived the benefit of the statute by reciting the stipulation in his declaration and omitting to refer to the statute which abrogates it. The prosecution of this suit is conclusive against any intention to waive his rights under the statute. His design to avail himself of such rights was demonstrated by the commencement of this suit more than twelve months after the occurrence of the loss, and would be no more distinctly apparent if he had left out the stipulation when he framed his declaration, or if when he inserted it he had followed it up with a formal averment that it was deprived of its force by the statute. He is here asserting his legal right to maintain the action. The defendants cannot defeat it by the interposition of a stipulation which has no legal efficacy.

But there are more substantial defects in the declaration, which seems to have been hastily and carelessly drawn, and contains much surplusage, while it omits some weightier matters which were necessary to show a good cause of action. By the terms of the policy the defendants undertook to pay within sixty days after the reception of notice and proofs of loss.

Whether the time of payment has yet arrived, the declaration does not show. The pleader does not seem to have undertaken to aver notice according to the stipulations in the policy; but makes an abortive attempt to allege notice and proof in accordance with the requirements of R. S., c. 49, § 20. It is too defectively done to answer the purpose. Apparently the pleader had not troubled himself to ascertain when or how the notice was given or what proofs were made. It is true that the notice called for by the policy is of the simplest kind, and further proofs are essential only when required; but the plaintiff nowhere says he gave that notice.

It was necessary for him in order to show a just cause of action to allege either the notice and proofs stipulated for in the policy, or those which the statute peremptorily declares sufficient.

He has done neither, and must pay in costs the penalty of his remissness, although upon the more important question presented by the demurrer, and the only one to which the attention of the presiding judge was called at *nisi prius*, he was, as we have before seen, in the right. He may amend his defective declaration upon the statute terms. *Exceptions sustained.*

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

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ANSEL GAMMON *vs.* GEORGE B. HUFF *et al.*

Franklin. Decided October 9, 1877.

*Pleading. Evidence.*

In a writ of entry, the general issue admits the premises are in the possession of the tenant.

A defendant in a writ of entry offered in evidence under the general issue a deed of the demanded premises from the plaintiff to a third person, under

which he himself did not claim, and which was made after the commencement of the action. *Held*, inadmissible.

On Report.

Writ of Entry, dated September 12, 1876, to recover possession of a piece of land in New Vineyard. The defendant pleaded the general issue with a brief statement "that since the commencement of this action the plaintiff has conveyed away all the right, title and interest he ever had to the premises."

The plaintiff introduced a mortgage deed from Geo. B. Huff, one of the defendants, to the plaintiff, of the demanded premises, dated August 27, 1874, and the notes thereby secured, and judgment and execution on one of the notes secured, which remained unsatisfied; also office-copy of warranty deed from the plaintiff to George B. Huff, of same date as mortgage, of same premises and referred to in the mortgage.

The defendants introduced office-copy of warranty deed from Sarah A. Rand and James H. Rand to demandant, dated January 27th, 1870, of the *locus in quo*.

They then offered an office-copy of a mortgage deed from the plaintiff to one Angeline Gammon, dated November 18, 1876, duly acknowledged and recorded, which the defendants contended embraced the premises with other lands, which was objected to, and excluded by the court.

Whereupon the case was withdrawn from the jury, for the consideration of the full court. If the last named copy of mortgage was admissible in evidence, the case to stand for trial; otherwise, judgment to be entered for the plaintiff as of mortgage.

*H. Belcher*, for the plaintiff.

*H. L. Whitcomb*, for the defendants.

Appleton, C. J. This is a writ of entry by the mortgagee. The general issue admits the premises are in possession of the tenant.

The tenant offered the deed of the defendants, dated since the commencement of this suit, to one Angeline Gammon, and conveying the demanded premises, which the court excluded and prop-

erly. The tenants do not claim under it and they cannot invoke it in aid of their possession. *Parlin* v. *Haynes*, 5 Maine, 178. *Clark* v. *Pratt*, 55 Maine, 546.

*Judgment for plaintiff as of mortgage.*

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

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FRANCES FRENCH *vs.* EBENEZER R. HOLMES,
and
CHARLES F. FRENCH, by next friend, *vs.* SAME.

Oxford. Decided August 4, 1877.

*Fraudulent Conveyance.*

A voluntary gift by a husband to his wife, if he be indebted, or by a father to his son, is *prima facie* fraudulent as to creditors.

This may be rebutted by the circumstances of the case and by proofs.

The question whether the gift or conveyance is fraudulent or not is a question of fact to be determined by the jury.

The value of the gift is material as to the question of fraud.

It must at least be of sufficient value to pay for the expense of its sale by an officer on execution.

The wife stands in no worse relation to a gift from her husband as to creditors than would any other donee from him of the same gift.

ON EXCEPTIONS AND MOTION.

REPLEVIN in two cases tried together, wherein the defense was in one case that the sheep and lambs, in the other, the cow, were the property of John S. French, from whom they were taken by the officer on execution against him in favor of the defendant, and that they were not the property of the plaintiffs, the wife and son of the said John S. French; that the pretended gift by him to them of the lamb and calf, the origin and progenitor of those replevied, was fraudulent as to creditors. One of the positions of the plaintiffs was that the property was valueless to creditors when given. Upon this position the presiding justice instructed the jury that it was not a question of value but of property. The verdict was for the defendant in both cases, and the plaintiffs alleged exceptions, which in the opinion appear.

68 Me 212
72 " 224
76 " 356
" 260

*J. J. Perry*, for the plaintiffs.

*A. A. Strout & G. F. Holmes*, for the defendants.

APPLETON, C. J. These are actions of replevin. The first is to recover a cow four years old, alleged to be the property of the plaintiff. The second to recover four sheep and two lambs, alleged to be the property of the plaintiff, a minor.

The pleas were the general issue with brief statements, that the cow, sheep and lambs named in the replevin suits at the time of the alleged taking were the property of one John S. French, and that they were delivered by said French to one Stacy, a deputy sheriff, who took the same on execution in favor of said Holmes against said French, to be sold on execution according to law.

The writs are dated February 19, 1875. By the agreement of parties the actions were tried together.

The plaintiff, in the first named action, introduced evidence, (and the same was not contradicted) to prove that in June, 1871, her husband, John S. French, was the owner of a cow, which dropped a calf; that owing to the lateness of the season, he did not consider it of any value and was about to kill it, when the plaintiff stepped in and informed her husband that she would take and raise the calf by her own labor, and at her own expense, provided she could have it for her own. To this proposition her husband assented.

The plaintiff further testified that she did by her own labor raise said calf until it grew up to be a cow, and that it is the same replevied in this action.

The plaintiff likewise introduced evidence tending to show that this cow from the time she first took possession of it to the time she was taken away by the defendant, was kept and fed both summer and winter from the products of land owned by the plaintiff in her own right and without expense to her husband.

In the second case, it was proved by the plaintiff, a young man of sixteen years of age, and son of John S. French, that in the spring of 1868, a lamb disowned by its mother, was found in the pasture of his father; that his father gave the lamb to him as his own provided he could make it live and raise it; that said lamb

was nursed and raised by him as a "cosset" lamb ; that from this lamb and its progeny came the sheep and lambs replevied in this suit; that the proceeds and income of these sheep had always been received by him and appropriated in purchasing school books, tuition, &c.

The defendant in defense introduced an execution, recovered before the justices of the supreme judicial court, held at Paris, on the first Tuesday of December, 1874, in which said Holmes was plaintiff and said John S. French was defendant, for $503.57 debt or damage, and $16.19 costs of suit, and upon which an execution issued.

The writ upon which the judgment was founded and the execution issued, was dated November, 14, 1873, and contained three counts, one on a promissory note of said French, dated March 1, 1868, payable to the plaintiff for one hundred dollars and interest. The second was on a note dated January 11, 1871, signed by said French and payable to the plaintiff, and for the sum of $129.69 with interest at nine per cent. The third count was on a note signed by the defendant and payable to the plaintiff, dated January 11, 1872, for $172.43 on demand with interest at nine per cent.

Upon this state of the case, the presiding justice ruled that if the defendant by the union of debts precedent and subsequent to the gifts sought to be impeached, had voluntarily placed himself in the condition of a subsequent creditor, and if a subsequent creditor, then he could not impeach the conveyance or gift from the debtor, John S. French, to his wife or son.

This ruling was in entire accord with the decisions of this court.

The defendant then offered and was permitted to prove against the seasonable objections of the plaintiff's counsel, that the note on the second count was given for the balance of principal and interest on a note given by said French to the defendant about fifteen years since, for fifty dollars and interest at the rate of twelve per cent., and that the note in third count was given for other notes due from said French to him, and that the new notes were for the principal and interest due on said notes with the accrued interest at the rates specified in the notes taken up.

It is urged that the admission of this evidence is adverse to the decision of this court, in *Bangor* v. *Warren*, 34 Maine, 324. But as the exceptions must be sustained on other grounds, it becomes unnecessary to examine and determine that question.

The presiding justice instructed the jury that a father in possession of personal property of his own, which is liable to be taken on execution to pay his debts, cannot "give such property to a minor child so that the gift shall be valid against an existing creditor."

When a creditor contests a gift, sale or conveyance of his debtor as fraudulent, the question of fraud is a matter of fact to be determined by the jury. It was held in *Thacher* v. *Phinney*, 7 Allen, 146, that in case of a voluntary conveyance, the question should be submitted to the jury to determine whether or not it was made with an intention to defraud creditors. Whether a voluntary conveyance is in good faith or fraudulent as to creditors, is a question of fact for the jury, upon consideration of all the circumstances attending it. *Pomeroy* v. *Bailey*, 43 N. H. 118. In the case of a voluntary conveyance, as much as in other cases, the question is as to actual fraud, which must be passed upon by the jury. *Jackson* v. *Peek*, 4 Wend. 300, 301. Whether the deed in *Jackson* v. *Timmerman*, 7 Wend. 436, was fraudulent, "was," says Sutherland, J., "in this, as in all other cases, a question of fact for the jury. There is no such thing as fraud in law, as distinguished from fraud in fact." The presiding justice having ruled that the voluntary deed, which was contested, was void in law, and having withdrawn the consideration of the question of fraud from the jury, a new trial was ordered.

Now the ruling in question withdrew the question of fraud from the jury. The gift, sale or conveyance, though voluntary, is valid between the parties. It may be valid as to creditors. Whether it be so or not depends upon the condition of things at the date of such gift, sale or conveyance, not on what may subsequently happen. *Brackett* v. *Waite*, 4 Vt. 389. According to the instruction, no gift by a father to a son, however rich the father, however trifling the value of the gift, "is valid against an existing creditor." The attendant and surrounding circumstances are ignored. The rule laid down precludes all investigation, all expla-

nation. The broad proposition is made that every gift is *per se* invalid as against an existing creditor. A valid gift could not be made, however rich the giver, if he should happen to be indebted. No evidence is receivable to establish its validity. The ruling stamps with fraud a transaction, which no reasonable man could regard in fact as fraudulent. The jury must have understood the rule as inexorable and inflexible, for no jury could be found which would declare the gift of a feeble lamb, just born and disowned by its mother, by a father to his son, as a fraud upon and invalid as against creditors, unless compelled thereto by instructions of the most peremptory character.

The ruling of the presiding judge was in other respects adverse to the entire weight of judicial authority. In *Thacher* v. *Phinney*, 7 Allen, 146, Bigelow, C. J., says: "A voluntary conveyance is not *per se* fraudulent as against creditors. No doubt, such a conveyance, by a person who was deeply in debt, especially of a large and substantial portion of his estate, would be very strong evidence of a fraudulent intent. But such deed is not necessarily void." "The better doctrine seems to us to be," remarks Bigelow, C. J., in *Lerow* v. *Wilmarth*, 9 Allen, 382, "that there is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood and affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such a conveyance under such circumstances affords only *prima facie* or presumptive evidence of fraud, which may be rebutted and controlled."

This view of the law is fully affirmed in New Hampshire, in an elaborate opinion of Bellows, J., in *Pomeroy* v. *Bailey*, 43 N. H. 118. In *Salmon* v. *Bennett*, 1 Conn. 525, Swift, C. J., says that mere indebtedness will not render a voluntary conveyance void as to creditors, where it is a provision for a child in consideration of love and affection. To the same effect is the decision of the supreme court of Vermont, in *Brackett* v. *Waite*, 4 Vt. 389. So, in *Hinde's lessee* v. *Longworth*, 11 Wheat. 199, Thompson, J., in delivering the opinion of the court, says, "a deed from a parent to a child, for the consideration of love and affection, is not absolutely

void as to creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount, would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, &c. The want of a valuable consideration may be a badge of fraud, but it is only presumptive and not conclusive evidence of it, and may be met and rebutted by evidence on the other side."

In *Mateer* v. *Hissim*, 3 Penn. 164, it was said by Huston, J., in delivering the opinion of the court, that the Stat. 13 Eliz. c. 5, does not render void a conveyance made by a man simply because he is indebted. There must be a debt bearing some proportion to the property retained, which may render its payment doubtful. Whether it is fraudulent or not is for the jury. *Chambers* v. *Spencer*, 5 Watts. Pa. 404. Under the statute of Elizabeth voluntary conveyances to children as such are not absolutely void. *Smith* v. *Reavis*, 7 Ired. 341. In *Arnett* v. *Wanett*, 6 Ired. 43, the court commenting on the case of *O'Daniel* v. *Crawford*, 4 Dev. (N. C.) L. 197, which had been cited, say that it does not establish the doctrine that a voluntary gift is void by the common law against all debts of the donee existing at the time. In *Kehr* v. *Smith*, 20 Wall. 31, these views are fully affirmed as being in entire accord with the weight of judicial authority.

The latest English decisions are in accordance with these views. In *Kent* v. *Riley*, L. R. 14 Equity cases, 190, it was held that in the absence of actual intent to defeat, delay or hinder creditors, a voluntary settlement, made by a seller in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable extent remain unpaid. In other words, the conveyance though voluntary is not to be regarded as *per se* fraudulent as to existing creditors. Indeed in that case the counsel opposing the settlement admitted "that the mere fact of a man owing a few debts at the time he makes a voluntary settlement will not afford sufficient ground for setting aside a deed."

The ruling given by the presiding justice was based upon and is in accordance with the opinion of Chancellor Kent, in *Reade* v.

*Livingston*, 3 Johns. Ch. 481, 500, in which he says: "The conclusion to be drawn from the cases is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstances will permit those debts to be affected by the settlement or repel the legal presumption of fraud. The presumption of law, in this case, does not depend upon the amount of debts, or the extent of the property in settlement, or the circumstances of the case. . . The law has therefore wisely disabled the debtor from making any voluntary settlement of his estate, to stand in the way of his existing debts." But the reasoning of Chancellor Kent does not apply to a case like the present.

It relates to the settlements of estates, not mere gifts almost valueless, and by which the creditor would neither be hindered, delayed or defrauded. Its language excludes the consideration of all the circumstances attending the gift. It stamps with the mark of fraud any gift or conveyance, however inconsiderable its value, so that a millionaire, if in his prosperity, he should make a present, and subsequently his riches should take to themslves wings and fly away, the gift would be available to any one who happened to have been a creditor at the date of such gift. It creates a lien upon all the property of a man, so that if he owes a debt notwithstanding his solvency, he can make no gift, which may not thereafter in case of misfortune, be defeated. Now the extreme doctrine, as we have seen, has been repudiated by the clear weight of judicial authority. In New York, the case of *Reade* v. *Livingston* was referred to in *Seward* v. *Jackson*, 8 Cow. 406, and overruled. In delivering his opinion, Chancellor Jones says: "I should hesitate to act upon the principle, that a voluntary deed to children is absolutely void, as against creditors having debts owing to them at the time, and that no facts or circumstances can be sufficient to repel the legal presumption of fraud." The conclusion, reached by a majority of the court of errors, was that a conveyance or settlement, in consideration of blood and natural affection though by one indebted at the time, is *prima facie* only, and not conclusively fraudulent. The doctrine of this case has ever since been recognized as the law of New York. Chancellor Walworth so lays down the law in *Bank of U. S.* v. *Housman*, 6 Paige, 526. In

*Holden* v. *Burnham*, 63 N. Y. 74, it was held that a voluntary conveyance by a husband, through a third person, to his wife, is not necessarily or presumptively fraudulent; the want of consideration is simply a circumstance bearing upon the question of fraud, which is a fact for the jury.

It may be regarded as established law that mere indebtedness is not sufficient to render a voluntary conveyance void. Consequently a man, though indebted, may make a valid gift. Whether it is fraudulent or not, is to be determined by the jury upon a full knowledge of all the facts and the circumstances of the case.

But this ruling of the presiding judge forbade all explanation, for if a father could not make a gift so as to be valid as to creditors it would be idle to offer explanations, or to endeavor to establish the good faith of a gift which could not legally be made. It would be to attempt an impossibility.

2. The counsel for the plaintiff requested the court to instruct the jury (1) "that a gift to a wife by a husband, to be invalid as to the creditors, must be of some pecuniary value to such creditors. (2) that it was for the jury to find in these cases, whether the calf or the lamb, at the time of the gifts, was of any pecuniary value to such creditors; and if they were not, then the plaintiffs were entitled to their verdict."

The presiding justice declined to give the requested instructions, in the following words. "I decline so to instruct you. It is not a question of value, but of title."

This was a case, where the question was of fraudulent intent on the part of the donor at the time of the gifts. They could not be regarded as fraudulent if from their almost infinitesimal value the rights of the creditor would not thereby be impaired. The defendant's claim is that the voluntary gift by a father to a child, of a lamb just born, and which the mother refused to recognize was *per se* conclusive proof of a fraudulent intent on the part of the father to defraud his creditors, which no amount of evidence could disprove. If the lamb were attachable and attached, it would not have sold for the fees of the officer making the sale on execution, much less would it for the costs of obtaining the judgment upon which the execution would issue. If exempt and therefore not attacha-

ble, it was clearly no interference with the rights of creditors. Now could such a gift hinder, delay or defraud creditors? The fraudulent intent is to be collected from the comparative value and magnitude of the gift. Can any one believe the existence of a fraudulent intent? "Trivial gifts," observes Marshall, C. J., in *Hopkirk* v. *Randolph*, 2 Brock, 140, "made without any view to creditors, with intentions obviously fair and proper, do not seem from his language (referring to the opinion of Hardwick, Ch. in *Russell* v. *Hammond*, 1 Atk. 13) to have been on the mind of the judge. . In *Taylor* v. *Jones*, 2 Atk. 600, the master of the rolls said: 'I look upon it as being a standing rule, as to creditors, for a valuable consideration that it, (referring to a voluntary settlement after marriage,) is always looked upon as fraudulent and within 13 Eliz. c. 5.' "This expression," continues Marshall, C. J., "is a very comprehensive one; but it is applied expressly to a family settlement, not to an inconsiderable gift, and is used in a case in which the settler reserved to himself an interest for life." In the case under consideration the gifts were of two negro girls and a riding horse. "They," continued the Chief Justice, "do not differ much from wedding clothes, if rather more expensive than usual, from jewels, or an instrument of music, given by a man whose circumstances justified the gift. I have never known a case in which such gifts, so made, have been called in question. These gifts come, I think, completely within that class of presents, which, according to the case reported by Ambler, (*Patridge* v. *Goss*, Amb. 596) ought to be excepted from the general rule in favor of creditors." The gift of the waiting maids was regarded as clear, but there is an intimation of doubt as to that of the horse, but on the whole the court sustained both, affirming the general doctrine that there is no inflexible rule declaring all voluntary gifts are fraudulent as to creditors, without regard to the attendant circumstances. Bump on Fraudulent Conveyances, 289, *et seq.*

3. The principles and rules applicable to the gift of the lamb apply with increased force to the calf the debtor was about killing, but which he gave the wife, by whom and on whose farm it was kept and fed without expense to him. In this case it is obvious that the only interest the creditor can equitably have, (if he have

any whatsoever) is in the young calf as its value was at the time when the debtor was about to kill it. He certainly has none in the increased value arising from the care and the feeding of the calf by the wife on her own land.

But it is claimed that by R. S., c. 61, § 1, which provides that "when payment was paid for property conveyed to her from the property of her husband, or it was conveyed by him to her without a valuable consideration made therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase."

The meaning of this section is obvious. It was the object of the act to protect the wife. The husband may make a gift to his wife. The statute implies it. The gift is as valid if made to the wife as if made to any one else. This must be the law, else the result will be that there is difference between a gift to a wife and to a stranger, and that, too, in a statute specially enacted for the protection of wives in the control and enjoyment of their estates.

The gift from the husband to the wife is valid unless fraudulent as to existing creditors. The general principles governing sales and conveyances fraudulent as to creditors are thus specifically made applicable to sales and conveyances from the husband to the wife.

By recurring to the original act of August 2, 1847, c. 27, § 2, this will be made clear. By that section it was provided that "the said first section shall be subject to the proviso, that if it shall appear that the property so possessed, being purchased after marriage, was purchased with the money or other property of the husband, was conveyed by him to the wife directly or indirectly, without adequate consideration and so that the creditors of the husband might thereby be defrauded, the same shall be held for the payment of the prior contracted debts of the husband." "This," as Wells, J., says, in *Johnson* v. *Stillings*, 35 Maine, 427, "in case of fraud, loads the property transferred with the prior debts of the husband," but not otherwise. In the revision of 1857, the words, "so that the creditors of the husband might thereby be defrauded," are omitted as unnecessary. "The statute," says Shepley, C. J., in *Davis* v. *Herrick*, 37 Maine, 397, "was intended to allow a husband to pay for property conveyed to his wife, with his own money

or property, and to allow his wife to hold it, unless the creditors then existing of the husband should thereby be defrauded." The same view after the revision, was held in *Winslow* v. *Gilbreth*, 50 Maine, 90, 94, the court remarking that "the statute authorizes the wife to take a conveyance, and her rights, under it, are entitled to the protection afforded other grantees." In *Randall* v. *Lunt*, 51 Maine, 246, it was held that a husband, though insolvent, might convey land to her in payment of his note to her, provided there was no intent to hinder, delay or defraud creditors.

It is thus seen that the wife's position as a donee from her husband differs in no respect from that of any other donee of his.

The rulings of the court, as we have seen, were erroneous.

The verdict was manifestly against evidence, for no man can believe that the gifts in question, almost utterly valueless as they are, were made with the intent to hinder, delay or defraud creditors; but whether they were so or not, the jury were precluded by the inexorable rule of law laid down for their guidance from considering or determining the question of fraud.

*Motion and exceptions sustained.*

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

VIRGIN, J., concurred in the result. BARROWS, J., dissented.

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WILLIAM B. WHITE *vs.* THOMAS H. BROWN, administrator.

Oxford. Decided September 13, 1877.

*Witness.*

If a party who is excluded from testifying under a general rule of law would avail himself of a right to testify under an exception, he should make his claim to testify under the exception appear at the trial.

R. S., c. 66, § 5, provides that commissioners of insolvent estates may require a claimant to be sworn, and may examine him on all matters relating to his claim. *Held*, that this provision gives him no privilege to be a witness at his own instance as a matter of right.

R. S., c. 66, § 15, provides for an appeal, and that on trial before the court or referees the creditor may be examined on oath, as before commissioners. *Held*, that this provision gives him no claim to testify as matter of right before a referee.

ON EXCEPTIONS.

ASSUMPSIT for money had and received. The case comes up by appeal from the decision of the commissioners of insolvency, rejecting the claim of the plaintiff filed against the estate of Bezaleel White, of which estate the defendant was administrator. By consent of parties the action was referred. At the hearing the plaintiff was sworn, and claimed the right to testify as a witness. The referee ruled as matter of law that he had no such right, and excluded him. The defendant did not offer himself as a witness or testify. The plaintiff objected to the acceptance of the award of the referee, which was for the defendant, because of the exclusion and of the ruling. The presiding justice overruled the objections as matter of law and accepted the report; and the plaintiff alleged exceptions.

*J. J. Perry*, for the plaintiff.

*A. Black*, for the defendant.

APPLETON, C. J. The ruling of the presiding justice is clearly correct. The defendant was an administrator and did not testify. The plaintiff was not a witness under any of the provisions of R. S., c. 82 unless he could bring himself within the exceptions enumerated in § 87. It was for him to do it. The general rule is the exclusion of a party, whose opponent is an executor or administrator. The exception must be shown to exist, else the general rule obtains.

For the same reason, the plaintiff does not bring his claim to testify, within c. 145, of the acts of 1873.

By R. S., c. 66, § 5, claims against an insolvent estate must be supported by affidavit. The commissioners, before whom the claim is presented for allowance, "may require a claimant to be sworn, and may examine him on all matters relating to his claim." He is only sworn at the requirement of the commissioners, never at his own instance.

By c. 66, § 15, an appeal may be taken. By § 15, "on trial before the court or referees, the creditor may be examined on oath, as before commissioners, and with the like effect if he refuses to be examined;" that is, that his claim will be rejected as provided by § 6, in case of such refusal.

The plaintiff was not a witness at his own instance before commissioners. He was to be examined only when required by them and the examination was to be by them. The same limitation holds on the trial before the court or a reference, *Morse* v. *Page*, 25 Maine, 496. *Gould* v. *Carlton*, 55 Maine, 511, 514.

*Exceptions overruled.*

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

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LUCELIA E. CHAPMAN *et al. vs.* HEZEKIAH S. PINGREE.

Oxford. Decided October 31, 1877.

*Deed. Estoppel.*

A grant of a township of land upon condition that the grantee settle thereon a specific number of families within a specified time, is a grant upon a condition subsequent.

A conveyance upon a condition subsequent vests the title in the grantee subject to its being revested in the grantor by entry for breach of the condition.

When one claiming title to land stands by, and, without objection, knowingly suffers another to execute and deliver a deed thereof to an innocent purchaser who believes he is obtaining the legal title thereto, he is thereby estopped to set up title thereto against the successor of such purchaser.

ON REPORT.

TRESPASS *quare clausum.*

*J. J. Perry*, for the plaintiffs.

*S. F. Gibson*, for the defendant.

VIRGIN, J. The defendant admits that he entered upon, and cut and carried away the hay from the locus described in the writ, which consists of a twenty-five acre parcel of that part of lot 3, R. 7 in Riley Plantation, lying on the north side of Sunday River which flows through the lot; that it is the same twenty-five acres set-off by levy of an execution, Luther Perkins v. Mary Pingree, September 21, 1859; and that the judgment and levy were in all respects in conformity with law.

In a former action of alleged trespass upon the same locus brought by this defendant against a servant of these plaintiffs

(*Pingree* v. *Chapman*, not yet published) wherein the plaintiff in that action relied for his title upon a deed dated July 7, 1869, from Olive S. Littlehale to himself, this court decided that the land covered by the Perkins levy was expressly excepted in that deed; that the grantee, therefore, derived no title thereby, and gave judgment against him. Now, this defendant claims title through a quitclaim deed from the same Olive S. Littlehale, not containing the exception mentioned, but purporting to release to the defendant all her interest in so much of lot 3 as lies on the north side of the river, (which includes the locus) which I. B. Bradley released to her by his deed of August 27, 1860. But the latter deed from Olive S. Littlehale to the defendant was not executed until September 17, 1875, nearly four years after the trespass complained of, and alone could afford him no defense. We, therefore, might well stop here and give judgment for the plaintiffs, had not the parties, submitted to our determination, "upon the facts agreed and evidence presented, the question of title, as between these parties to the land covered by the Perkins levy."

The defendant claims title from the commonwealth of Massachusetts through the mesne conveyances by I. B. Bradley and Olive S. Littlehale, as follows:

In January, 1796, the commonwealth, by its committee, duly appointed and empowered, in consideration of $4596.17, conveyed to one Phebe Ketchum, 26,000 acres of land, being what is now known as Riley Plantation, in the county of Oxford, on condition that the grantee settle thereon twenty-five families within a certain specified time. This condition being in its nature a condition subsequent, the title, in accordance with well established rules of law, passed to the grantee, subject to its being revested in the grantor by entry for breach of the condition.

By a resolve passed by the general court, on March 14, 1845, the land agent was directed to take such measures as he deemed necessary, to recover to the commonwealth the possession of lands conveyed, as this township was, in those cases where the condition had not been complied with, provided that compliance with the provisions of a resolve passed April 1, 1836, relating to fulfilling the conditions of the sale of public lands, shall be deemed a satisfac-

tory performance of the conditions; and provided further that the land agent shall first give notice to the delinquent proprietors as therein prescribed, and they fail to give evidence to him necessary to prove their title complete, on or before the succeeding December.

The resolve of April 1, 1836, is not in the reported evidence and we cannot take judicial notice thereof. *Simmons* v. *Jacobs*, 52 Maine, 147. However, from certain recitals in the deed of release, of February 23, 1848, from the land agent of Massachusetts to I. B. Bradley, (under which the defendant claims) it might seem that the resolve of April 1, 1836, in cases where the settling duty had not been fully performed, commuted so much thereof as remained unperformed on June 1, 1836, to the payment of $30 for each deficient family, with interest after that date; and that Bradley paid for three deficient families. Giving to these recitals the full force of legitimate evidence, we are still left without means of knowing how lot 3, R. 7 would be affected thereby; for there is no evidence that the land agent ever undertook any action under the resolve of March 14, 1845, to revest the title in the commonwealth, or that Bradley did so after the release of the township to him.

Bradley having received the interest of Massachusetts in the whole township, by his deed of quitclaim, of August 27, 1860, for a nominal consideration, released his interest in that part only of lot 3 lying north of the river, to Olive S. Littlehale, who, by her deed of quitclaim, of July 7, 1869, released the interest in the same which she derived from Bradley, "excepting a certain set-off of some twenty-five acres or less to one Luther Perkins," to the defendant, who, (as decided in *Pingree* v. *Chapman*, *supra*) derived no title thereby to the locus. The last link in the defendant's chain of record title, is another deed of quitclaim, of September 17, 1875, from the same Olive S. Littlehale to him, not containing the exception of the Perkins levy mentioned in her former deed, but concluding the description of the premises in the following language: "Meaning and intending hereby to convey to said Pingree the same real estate which I. B. Bradley conveyed to me by his deed dated August 27, 1860."

These last three deeds fail to show any title in the defendant;

and the dates and substance of the last two are stated here for a purpose to be hereafter noticed.

The plaintiffs trace their title, through sundry mesne conveyances, from Alden Blossom, as follows:

On July 28, 1834, Blossom, as sheriff of the county of Oxford, by virtue of a warrant from the state treasurer, sold and conveyed the whole township, to R. K. Goodenow; who, on January 11, 1841, sold and conveyed lot 3, R. 7, to Lot S. Coburn; who, on November 12, 1844, conveyed said lot to Hezekiah Pingree, who died some time in 1852, just when does not appear, but, as the defendant claims, just before May 20, 1852, when his son, S. O. Pingree, by his deed of warranty, of that date, conveyed that part of the lot lying on the north side of the river, to John Glidden; who, five days thereafterwards, to wit, on May 25, 1852, by deed of mortgage and on March 11, 1858, by deed of warranty, conveyed the same part of said lot to Mary Pingree. On September 21, 1859, Luther Perkins, having duly recovered a judgment in the supreme judicial court against Mary Pingree, and duly levied his execution on the *locus in quo*, conveyed the same by his deed of warranty, of April 28, 1866, to the plaintiffs, who, with their predecessors, have held the exclusive possession of the premises ever since the date of Goodenow's deed to Coburn, in 1841.

It is said this state could not tax the township in 1833, because of the provision in the constitution, Art. X, § 1, which declares that the "lands within said district (of Maine) which shall belong to the commonwealth, shall be free from taxation while the title to the said lands remain in the commonwealth." But as already seen, the title to these lands was not in the commonwealth after the conveyance to Phebe Ketchum in 1796.

It is also urged that when Hezekiah Pingree died, in 1852, he left as children and heirs, two sons, S. O. Pingree and Hezekiah S. Pingree, the defendant, and one daughter, Olive S. Littlehale; that there being no evidence of any release from the defendant to his brother, S. O. Pingree, they were tenants in common of the estate inherited from their deceased father; and that although S. O. Pingree's deed of warranty, of May 20, 1852, purported to convey the whole estate described therein to Glidden, it would in fact convey only an undivided part at best.

It appears, however, that the Pingrees, Olive S. Littlehale and Coburn were neighbors; that S. O. Pingree's deed to Glidden was a warranty of the entire fee in the land on the north side of the river; that within five days thereafter, Glidden mortgaged the same to the mother of the Pingree children, to secure to her the payment of $25 annually during her natural life; that on March 11, 1858, Glidden conveyed the same to her, by deed of warranty the execution of which was witnessed by the defendant, and in which the same premises are described and S. O. Pingree's deed to Glidden expressly referred to "for further particulars in relation to said lot;" that this last named deed, by its terms, conveyed the premises "as full satisfaction for all demands existing between the said Mary Pingree and the said John Glidden up to this date;" that neither in this nor in the former action, has the defendant, either in his own right, or through any conveyance or license, verbal or written from his sister Olive, pretended to set up any rights to the premises by descent. These facts all tend to show that there must have been in fact some division of the lot among the heirs whereby S. O. Pingree derived the full title to that portion on the north side of the river. However this may be, the circumstances satisfy us beyond all cavil, that the defendant was connusant of these transactions made for his mother's support, and that when he witnessed the execution of Glidden's deed to her, he knew its contents. And having thus stood by, and knowingly suffered the conveyance to be made, under an impression and belief on the part of the parties thereto that the legal title thereby passed, without making known his own title, (if he had any) the law will not permit him to be heard in setting up such claim now against the successors in title of his mother.

Our conclusion is, that the plaintiffs shall have judgment according to the terms of the report; and that as between these parties upon the facts agreed and the evidence presented in the report, the plaintiffs have the better title to the land covered by the levy.

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

BERNARD MARBLE *vs.* ALBERT G. HINDS.

Oxford. Decided November 16, 1877.

*Limitations, statute of.*

The plaintiff having a claim against the defendant for balance of account, the last item of which would be barred by the statute of limitations on September 3, 1874, commenced a suit thereon on the second of the same September, returnable at a term of the supreme judicial court to be holden on the first Tuesday of December ensuing, retained the writ till the day preceding the last day of service, when he sent it by mail to a deputy sheriff in another town, where, in the ordinary course of mail, it would arrive on the day of its transmission; but it did not reach the deputy in season for service. *Held*, that the failure of service was not the result of unavoidable accident, within R. S., c. 81, § 87.

The writ first sued out was for a balance of account for $75. The second suit was for an account, the items of which amounted to $223.57, but no credit was given. *Held*, that the second suit was not an action for the same demand as was first sued, within § 87.

ON EXCEPTIONS.

ASSUMPSIT, on account annexed on a bill of items commencing May 24, 1866, and ending September 3, 1868, amounting to $223.57, on which no credit was given. The writ was dated November 21, 1874.

Plea, statute of limitations.

Replication, a prior writ seasonably made on the same demand and a failure of service by unavoidable accident, setting out in substance that, September 2, 1874, the plaintiff sued out a writ against the defendant on account annexed for $75, for a balance of the same account sued for in this writ; that he mailed it at Dixfield, on Monday, November 14, to the deputy sheriff at Oxford, in season for it to reach Oxford on that day; that there was a daily mail between Dixfield and Oxford, and that the time of service did not expire until midnight of the next day after which the letter should have arrived at Oxford by due course of mail, and that the letter did not reach the deputy sheriff in season for service. To the replication the defendant demurred, because the failure of service was not an unavoidable accident, but in consequence of the negligence of the plaintiff or his counsel, and because the demand named in the second writ was not the same demand named in the first writ.

The presiding justice overruled the demurrer and adjudged the replication good; and the defendant alleged exceptions.

*J. J. Perry*, for the defendant, distinguished the case at bar from *Bullock* v. *Dean*, 12 Met. 15. In that case, the court said "the creditor seasonably commenced his suit, and placed his writ, as he believed and had good reason to believe, in the hands of a proper officer for service. But by mistake he described the residence of the debtor as he had known it, and as it was until a short time before, when he had changed it to another town and county, of which it does not appear the plaintiff had any knowledge, and which the officer, who was charged with the service, did not seasonably discover." A very different case from the one at bar.

*E. Foster, jr.*, for the plaintiff, relied upon the case of *Bullock* v. *Dean*, cited by the defendant's counsel.

APPLETON, C. J. This is an action of assumpsit on an account annexed, the last item of which bears the date of September 3, 1868. The writ is dated November, 21, 1874. More than six years had elapsed after the last item of the plaintiff's account, when this suit was commenced. To this suit the defendant has pleaded the general issue and the statute of limitations.

The plaintiff, to avoid the effect of this plea, has filed a replication, by which he seeks to bring himself within the provisions of R. S., c. 81, § 87, which is in these words: "When a writ fails of a sufficient service or return by unavoidable accident, or default, or negligence of the officer to whom it was delivered or directed, or is abated, or the action otherwise defeated for any matter of form, or by the death of either party; or if a judgment for the plaintiff is reversed on a writ of error, the plaintiff may commence a new action on the same demand within six months after the abatement or determination of the original suit, or reversal of the judgment; and if he dies and the cause of action survives, his executor or administrator may commence such new action within said six months."

The plaintiff, in his replication, says that he "on the second day of September, A. D. 1874, being within the six years next after the last item in said plaintiff's account, sued out from the supreme

judicial court within and for the county of Oxford, a writ in due form of law against the said defendant, upon an account annexed thereto, which account annexed was for a balance of the same account named and sued for in this writ, and which said writ was returnable at the December term of said court, then next to be holden at Paris, in said county of Oxford; and on the fourteenth day of November next following the date of said writ, the plaintiff by his attorney duly mailed said writ at the post office in Dixfield, addressed to Samuel T. Beal, at Oxford, then a deputy sheriff for said county, and residing at Oxford, and in season for said writ to go by mail to said Oxford on said fourteenth day of November, which said day was Monday, thereby leaving that day and all the next for the service of said writ, the time for service of precepts expiring at midnight on the sixteenth day of November, the day following that on which said writ was mailed as aforesaid; there was a daily mail between said Dixfield and said Oxford, and the officer to whom said writ was directed was instructed by letter enclosed with said writ to serve said writ and make due return of the same; that said writ by the ordinary mail conveyance would reach said Oxford in season for service on the same day on which it left said Dixfield, but the officer to whom said writ was directed failed to receive said writ in season for service on said defendant for said December term, and so said writ failed of sufficient service by unavoidable accident; and thereafterwards, to wit, on the 21st of November, A. D. 1874, this action was commenced, it being within six months next after the determination of the original suit above named, and this action being upon the same demand as that named in the original suit as balance of account between these parties,"&c.

"The term unavoidable accident," observes Shaw, C. J., in *Bullock* v. *Dean*, 12 Met. 15, "we think, must have a reasonable construction, and does not mean to limit the case to a cause which no possible diligence could guard against, but an unforeseen cause, preventing the service of the writ, where due diligence has been used by the creditor to commence his suit seasonably, by the due and ordinary course of law."

Here is no failure by unavoidable accident. The plaintiff claims

that his writ was made on September 2, 1874. The writ, if then made, remained in the hands of the plaintiff or his attorney until November 14th, following. There was ample time in which the service could have been made. It was gross neglect on the plaintiff's part that the writ was not sooner forwarded. That can not be deemed unavoidable accident, which could have been so easily avoided. The risks of the probable absence of the deputy sheriff from home on the last day of service and of the possible miscarriage of the mail were unnecessarily and negligently incurred. In no sense can an unavoidable accident be regarded as existing.

The demand sued in this action is not the same demand as that in suit in the first named writ. This action is upon an account annexed for the amount of $223.57, the several items of which are specifically set forth. The first named suit was for "balance of account" $75.00. In this suit there is no credit and no balance stated. The plaintiff, on default, would be entitled to the amount sued for, $233.57. In the first suit on default, he could only recover $75.00. It is obvious that the demands cannot by any legerdemain be made the same. The present defendant would be compelled to prove the items in payment or set-off, by which the plaintiff's balance would be made the same as that originally claimed. A suit for the balance of an account and one for the account without any credit to show the balance cannot be deemed as identical.

*Exceptions sustained.*
*Replication bad.*
*Plea good.*

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

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CHARLES H. LEWIS *vs.* DANIEL SMART.

Oxford. Decided December 28, 1877.

*Replevin. Trial.*

**Where the defendant in replevin with the general issue pleads also property in himself and in third parties whose bailiff he is, avows the taking and demands a return, it is not necessary for the plaintiff to prove a demand for the goods previous to suing out the writ of replevin.**

***Seaver* v. *Dingley*, 4 Maine, 306, reaffirmed.**

After a trial upon the question of property in the goods presented by such pleadings, the defendant cannot be heard to complain of alleged errors and defects in instructions given as to what would constitute a demand and refusal. Such instructions are immaterial.

The plaintiff delivered to the defendant a letter from his son at the time he signed the mortgage note and pointed out to the plaintiff the property included in the mortgage. There was no evidence given or question asked as to the contents of the letter. The presiding justice said to the jury: "Was it a letter giving some directions from young Smart to his father in connection with that property? You have a right to draw all proper inferences in regard to it, whether it was in regard to that matter or not." *Held*, that the occurrence was one which the jury might properly consider on the question of the estoppel claimed against the defendant; and that the inquiry did not amount to the expression of an opinion and was not exceptionable.

It is proper for the judge in settling exceptions to require the excepting party to state such parts of the testimony as may have a bearing upon the question of the pertinency of the instructions.

On exceptions.

Replevin of a yoke of oxen, a cow, a horse and a wagon.

The defendant pleaded title in himself to the oxen, cow and wagon, and that the horse belonged to the estate of his deceased wife (which had not been administered upon) and that she left children, and denied the title or right of possession of the plaintiff, and introduced testimony tending to prove the truth of his plea.

The plaintiff claimed title in himself and also that the defendant was estopped by his acts to deny the title and right of possession of the plaintiff, and introduced testimony, uncontradicted, that in 1875, he and Daniel R. Smart, son of the defendant, were for a short time partners in trade, in Boston; that in May of that year, the plaintiff sold out to Daniel R. and took his note for $400, payable in ten months, secured by a bill of sale, absolute in form, of the property replevied, which was then in the possession of the defendant in Sweden, Maine, on the farm of his deceased wife, where the defendant then and has ever since resided; that Daniel R. then represented to the plaintiff that the property was his, that his father, the defendant, would sign the $400 note, and that the plaintiff should then pay a certain note of about $300 then held by one J. E. Hutchins of Lovell, signed by the defendant and D. R. Smart, and also by the plaintiff as surety; that in a few days thereafter the plaintiff and his father, who then lived in Lovell, went to

the defendant's residence, exhibited to him the bill of sale and $400 note, and at the same time gave the defendant a letter from his son, D. R. Smart; that the defendant pointed out the property described in the bill of sale, at the plaintiff's request, made no objections to the bill of sale, and did not deny the title of his son, D. R. Smart; that the plaintiff paid the $300 note to Hutchins; and that the property was left and remained in the possession of the defendant until June, 1876, when it was taken by the officer on this writ. The plaintiff and defendant both testified to the circumstances and the conversation attending the delivery of the letter; there was no notice to produce the letter at the trial, nor any question asked as to its contents. There was testimony tending to show the admission of the defendant that the goods and chattels replevied were the individual property of his son, D. R. Smart.

The defendant, on cross-examination, on being asked why, when the bill of sale, note and letter were handed to him and he pointed out the property, he did not tell the plaintiff that the property was not the property of D. R. Smart, answered, "for fear the thing would burst up, fall in."

The presiding justice, among other things, said to the jury: "what were the contents of that letter, which both Smart and Lewis testified Lewis brought there from young Smart and handed to his father, the defendant; its contents have not been put in. Was it in regard to this matter? Did it contain some directions from young Smart to his father in connection with that property? You have the right to draw all proper inferences in regard to it, whether it was in regard to that matter or not."

The presiding justice charged the jury at length as to what would constitute a demand and refusal, in terms which it becomes unnecessary to state.

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

*A. Black*, for the defendant.

*A. H. Walker*, *D. R. Hastings*, with him, for the plaintiff.

BARROWS, J. The owner or person entitled to the possession of chattels may, under our statutes, replevy them from any one who

has wrongfully taken them, or, who coming rightfully into possession of them, wrongfully detains them from him. One or the other of two different and entirely inconsistent contentions is liable to arise in a suit of this sort, depending on the defendant's pleadings. If he pleads merely, I did not take the chattels, he thereby admits the property in them to be in the plaintiff, and is not at liberty under that plea to dispute it; and he thereby throws upon the plaintiff the burden of proving only that he wrongfully took or wrongfully detained the goods at the place alleged. But, on the other hand, if by his pleadings he avows the taking and justifies it on the ground that the goods belong, not to the plaintiff, but to himself or to some third person whose bailiff he is, and so demands a return, the question then is as to the property and right of possession of the plaintiff, and the burden upon the plaintiff is to establish these, only, as against the defendant.

Hence the decision in *Seaver* v. *Dingley*, 4 Maine, 306, where the point is thus tersely stated by Mr Greenleaf in his head note: "In replevin of goods, the original taking of which by the defendant was lawful, if he plead property in himself, it is not necessary for the plaintiff to prove a demand of the goods previous to suing out the writ of replevin;" and Mellen, C. J., speaking for the court, remarks as follows: (p. 317) "the plaintiff, in his writ, makes the allegations required by statute, as to his own property in the goods, and the unlawful detention of them by Dingley; and the defendant pleads in bar of the action property in himself; thus waiving all objection as to the regularity of the proceedings on the part of the plaintiff; not denying that he took and detained the goods, but denying that he did either unlawfully, because, as he stated in his plea, the goods were his own; . . . As by the plea of *non cepit*, the question of property is not in issue, (1 Chitty's Pl. 499) so by the plea of property in himself, he did not deny the plaintiff's right to recover the goods, if they, by law, belonged to him; and as the jury have by their finding decided that fact in favor of the plaintiff, we are well satisfied that the defendant cannot now be received to urge the want of a previous demand of the goods, as an objection to the verdict." It is plain that the two positions represented by these two pleas are irreconcil-

able with each other. The defendant cannot in one and the same breath avow and justify the taking on the ground of superior right to the plaintiff, claiming a return, and still insist if that claim is negatived that he did not take the property, any more than he can be heard to dispute the plaintiff's property when he only says he did not take or detain wrongfully, as alleged.

The action of replevin for goods and chattels bears much the same relation to personal property that our writ of entry as regulated by statute does to real estate. The analogies are numerous and striking. The plaintiff in a writ of entry alleges his title and right of possession in the land, and a wrongful and continued ouster from the possession by the defendant. Of course upon such allegations there would be a palpable inconsistency in the defendant's saying "the land is mine, but I never denied the plaintiff's right in it." But perhaps on account of the old notion of the superior dignity and importance of real estate as compared with personal chattels, our law-makers have been unwilling to leave the course and effect of the pleadings to be regulated by common law decisions, and they have accordingly declared by statute that if the party named as defendant claims no freehold in the premises he may plead it in abatement, or by brief statement under the general issue within the time allowed for filing pleas in abatement and not afterwards without an order from the court enlarging the time. Or, if he has actually ousted the demandant or withheld the possession from him, he may be regarded as a disseizor for the purpose of trying the right; but, in any case, the plea of the general issue alone puts the strength of the respective titles only in issue. Now without any such statute regulation respecting the pleadings in replevin, but upon a like view of the necessary inferences from certain pleadings, Judge Mellen remarks, while holding in *Seaver* v. *Dingley*, *ubi supra*, that no previous demand is necessary where the defendant pleads title in himself or a stranger, as follows: "We do not perceive why a defendant in replevin, who has no merits and pretends to none" (*i. e.* who asserts no title in the property) "might not plead in abatement, that the goods replevied came lawfully into his possession, and that he did not unlawfully detain them; or he might be more particular and say that no demand for

the goods had ever been made upon him previous to the commencement of the action." But in the absence of any statute provision requiring a defendant in replevin to plead his non-claim in abatement or within the time allowed by the rules for the filing of pleas in abatement, he may doubtless put the plaintiff to the proof of a tortious taking or detention by the proper plea at any time before proceeding to trial; yet, if, claiming a better right than the plaintiff, he avows the taking and demands a return, we can only reaffirm the doctrine of *Seaver* v. *Dingley*, and hold that under such pleadings no proof of previous demand is necessary though his possession may originally have been lawful.

In the present case the defendant pleaded title in himself and in the estate of his deceased wife, in the chattels replevied, and after what seems to have been an acrimonious controversy before the jury upon the question of title, including the question whether the defendant was not estopped to assert such title by reason of his complicity in the fraud perpetrated by his son, (the plaintiff's mortgager) in case the son had no title, and when the jury has settled one or both of these questions against him, he comes here to complain that the judge presiding at the trial gave erroneous and deficient instructions as to what would constitute a demand upon and refusal by him to surrender the possession. The only conclusion which we can draw from the case is that such a demand would have been an idle ceremony which the law will compel no man to perform or prove. A part of the defendant's complaint is that the judge expressed doubts of the necessity of a previous demand, while upon the whole he instructed the jury that one was required. The doubts should have prevailed. The instruction was probably owing to a failure in the haste of a jury trial to observe that in none of the cases where a demand has been held necessary did the defendant by his pleadings assert a title superior to that of the plaintiff. Thus in *Newman* v. *Jenne*, 47 Maine, 520, the lawfulness of his possession by virtue of the plaintiff's permission and the want of a demand were all that the defendant asserted (amounting merely to *non cepit*) and the court held that as the defendant had done nothing except in submission to the plaintiff's title, a demand should have been proved, in order to change a possession

originally lawful into a tortious detention. But the case is in perfect harmony with *Seaver* v. *Dingley*, and with *Partridge* v. *Swazey*, 46 Maine, 414, where a sale by the mortgager in possession was held to be such a repudiation by the possessor of the mortagee's paramount rights as to make a demand upon his vendee unnecessary.

The error which the judge committed was not one which can give the defendant any just cause of complaint.

Nor do we see anything exceptionable in the suggestions made to the jury in respect to the letter delivered by the plaintiff to the defendant, and read by him at the time when he signed the note and pointed out the property included in the mortgage to the plaintiff. Neither of the parties had undertaken to prove its contents; but they stood in a different position with regard to their ability to do so. The plaintiff had no knowledge of the contents. He knew only what the defendant's son said he wrote, and this he communicated to the defendant and testified to as part of the conversation between the parties. The defendant seems to have had it in his power to give or to withhold them, and made his election. The occurrence was one which, looking at the position of the parties on the question of an estoppel as well as upon that of title, the jury were at liberty to draw all proper inferences from, and that was all which was permitted under the instructions.

It is proper for the court in settling exceptions to require the excepting party to insert such parts of the testimony as may have a bearing upon the question of the pertinency of the instructions; and nothing more seems to have been done here.

*Exceptions overruled.*

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

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ORPHA A. LITTLEWOOD *vs.* WILLIAM F. WARDWELL.

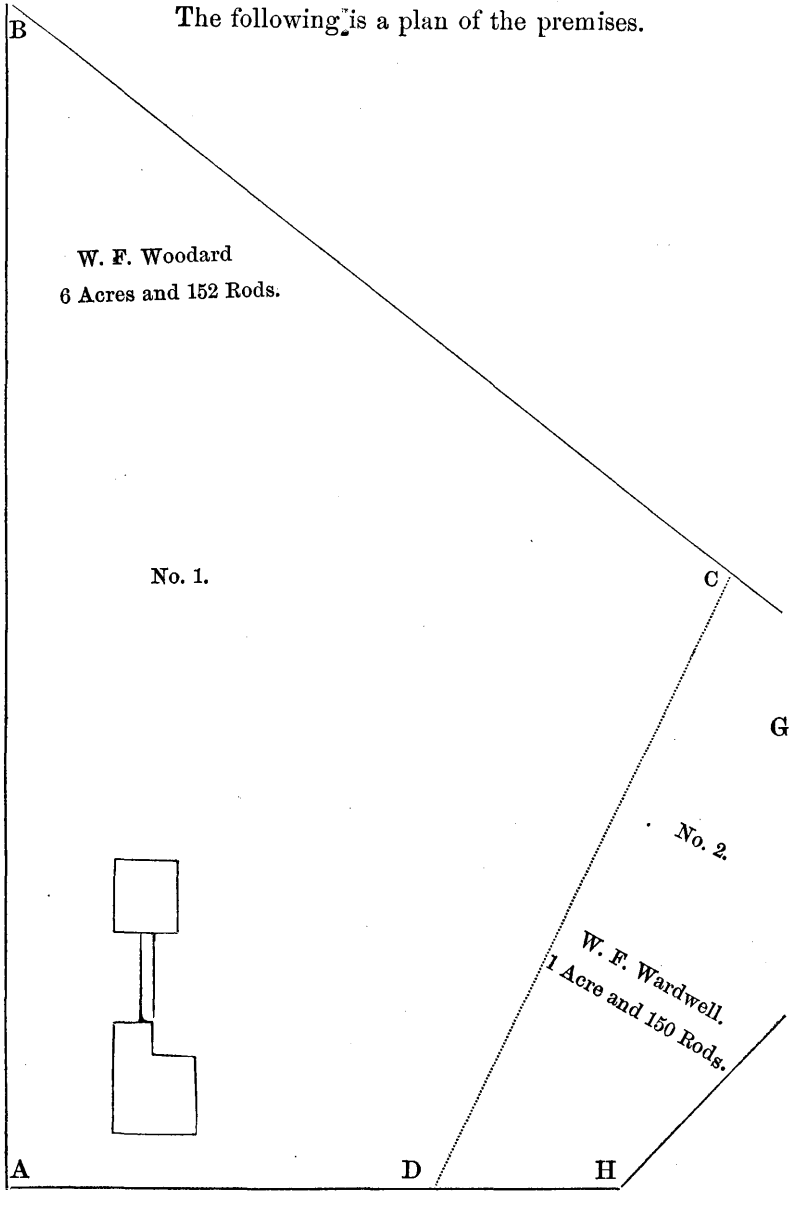
Oxford. Decided January 5, 1878.

*Execution.*

**Although a creditor cannot, ordinarily, levy upon an undivided portion of a divided part of a debtor's parcel of real estate; still, where several creditors**

simultaneously levy upon such part, each taking a fraction thereof and unitedly taking the whole, and the debtor at the same time or before the levies are recorded conveys away the balance of the parcel, the objection to such mode of levying is removed and the levies will stand.

The following is a plan of the premises.



ON REPORT.

WRIT OF ENTRY, demanding the same part of premises described in a levy on execution in favor of the plaintiff and against the defendant.

The plea was the general issue with a brief statement that the levy was void because the defendant's house-lot had been severed and divided, and then a fractional part thereof set out, not of the whole estate, as the statute requires.

A plan of the premises makes part of the case.

The case, partially stated in the head note sufficient to raise the legal question, is more fully stated in the opinion.

If, upon the evidence put in and offered, the plaintiff was entitled to recover, the action was to stand for trial; otherwise a non-suit was to be ordered.

*M. T. Ludden*, for the plaintiff, cited R. S. c. 76, § 9, which provides: "When the premises consist of a mill, mill privilege, or other estate more than sufficient to satisfy the execution, which cannot be divided by metes and bounds without damage to the whole, an undivided part of it may be taken and the whole described, or it may be levied on as provided in the preceding section."

Counsel also cited decisions. *Hilton* v. *Hanson*, 18 Maine, 397, 399. *Mansfield* v. *Jack*, 24 Maine, 98. *Merrill* v. *Burbank*, 23 Maine, 538. *Grosvenor* v. *Chesley*, 48 Maine, 369, and cases. *Johnson* v. *Farwell*, 7 Maine, 370.

The statute of Massachusetts touching the matter of levying upon an undivided portion of real estate is like our own. Mass. Gen. Sts., c. 103, § 10: "When the premises levied upon consist of a mill, mill privilege or other real estate which cannot be divided without damage to the whole, and which is more than sufficient to satisfy the execution, the levy shall be made upon an undivided portion of the whole, to be determined by the appraisers, and to contain as much as they deem sufficient to satisfy the execution; and the portion thus taken shall be held in common with the debtor."

Decisions were cited. *Bemis* v. *Driscoll*, 101 Mass. 418.

*McCormick* v. *Carroll*, 103 Mass. 151. *Ladd* v. *Blunt*, 4 Mass. 402. *Sargent* v. *Pierce*, 2 Met. 80. *Sigourney* v. *Eaton*, 14 Pick. 414.

The counsel also cited a case not printed in the reports, *Bassett* v. *Wheaton*, from Bristol county, head-noted in Mass. Dig. 644, where it was held under R. S. c. 73, § 10, which provides that "the levy shall be made upon an undivided portion of the whole," that the levy is valid if made upon an undivided portion of a part of such premises described by metes and bounds.

*E. Foster, jr.*, for the defendant.

A party claiming title by proceedings *in invitum*, must bring himself within the provisions of the statute under and by virtue of which he derives his right. The defendant is not to be disturbed except by one having superior right, and such superiority of right must depend on proof of a strict compliance with the requirements of law. *Smith* v. *Dow*, 51 Maine, 21, 27. *Lumbert* v. *Hill*, 41 Maine, 475.

The levy in this case to be valid must comply with R. S. c. 76, § 9, which contains this language: "An undivided portion of it may be taken *and the whole described.*" These italicised words are not found in the Massachusetts statute, § 10.

From the evidence and the plan, the defendant's lot consisted of one entire parcel of land in Oxford village, with the buildings thereon, all surrounded with fences, and bounded by other owners' land, viz: A, B, G, H. The levy is made upon A, B, C, D, a portion of the whole parcel, but the whole is not described; the consequence is that the debtor is left with a small piece in severalty, and made tenant in common with the creditor of the remainder. While this might be done according to the statute of Massachusetts, it is in direct contravention of the statute of Maine, and the levy is void.

*Ludden*, in reply, said that the defendant was not a tenant in common with three judgment creditors who had extended their executions upon his land, and that he, having conveyed his interest, stood before the court as if he had none.

PETERS, J. In October, 1875, the demandant, in conjunction

with two other creditors, simultaneously levied their three separate executions upon the land of the defendant, each taking an undivided fraction thereof, unitedly taking the whole. In each case the seizure was on the 18th, the officer's return on the 22nd, and the acceptance by the creditor on the same day. The set-offs were in all respects regular and conformable to the requirements of the statute, so far as the face of the proceedings is concerned. The defendant, however, shows that the three levies did not take his whole parcel of land, but only a divided part of the whole, each levy taking a fractional part of only a portion of his land. The objection is that, as between the parties to this suit, the operation of the demandant's levy would be to make the debtor a tenant in common with the demandant in a portion of the premises and an owner in severalty in the residue. To meet this difficulty, the demandant proves that, on the day of the date of the officer's return (October 22nd) the debtor conveyed the portion left to him in severalty to another person by a warrantee deed. Shall the levy stand?

Why has not a just and legal result been reached, even if there was an irregularity in the order of the steps taken to produce it? By means of the levies and the conveyance, taken in conjunction, all the elements co-exist by which the title of the debtor in all the land passes from him. Had the debtor's conveyance preceded the levies but for an instant, no exception to them could have been taken. Why has not precisely the same result been attained by the debtor's conveying subsequently to or contemporaneously with the levies? The same coincidence of facts exists as would have, if the order of the proceedings had been reversed. How is it material to the debtor that one step was taken before the other? Before the result was fully accomplished it might have been so. The creditor when he levied, took the risk of what the debtor would do. The control of the matter was wholly in the debtor's hands. He could have the levy valid or invalid. But the creditor's difficulty is avoided. The objection that the debtor is left owning a part of his land in common and a part in severalty disappears by his own act. He applies the remedy to the difficulty himself. The presumption is that it was his election and prefer-

ence to have the levies upheld. The facts manifestly indicate that the levies and the conveyance were intended by all parties to have the effect of concurrent and co-operating acts for the benefit of all concerned. The deed alludes to the levy as a boundary, and still the deed was recorded nearly a month before the levy was. The levy was completed on the 22nd of October, being the day on which the conveyance was dated and (presumably) delivered. The return of the officer was made on that day. The creditors could have repudiated the levies on that day and had others made, and it is not unlikely that they would have done so, but for the fact that the conveyance was made or was to be made in accordance with the levies. We think it would do no violence to the probabilities of the case, to infer that the creditors avoided taking the portion of the land exempted from the levies for the reason that the debtor was about conveying it, and in order not to contravene his interests and wishes.

The condition of parties here bears some resemblance to the dilemma that co-tenants get into, where one tenant conveys to a third person his interest in a specific portion of the common property. Such a conveyance does not bind the co-tenant. But by his own conveyance to others, or by partition at law corresponding with all the interests, the irregularity may be avoided and the first conveyance upheld.

No other question is raised by the defendant. We think the levy must be sustained. By the terms of the report, the entry to be:

*Action to stand for trial.*

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

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MINDWELL STOVER *vs.* MARY L. POOLE *et al.*

York. Decided February 25, 1877.

*Equity.*

**In a suit in equity relief can only be granted in accordance with some one or more allegations in the bill.**

**A court of equity will not set aside a voluntary conveyance as between the**

parties, unless upon the ground of fraud actual or constructive.

Nor is a mistake in law sufficient for that purpose, unless it occurs under such circumstances that fraud, imposition or improper influence may be inferred or to prevent intolerable injustice; and the mistake must appear from the strongest and most satisfactory proof.

To obtain relief on the ground of mistake, it must appear in the bill what it is that is relied upon; and the proof must follow the allegation, so that the court may know precisely what is asked and what is the relief sought.

BILL IN EQUITY, to remove cloud upon title.

The bill alleges that the plaintiff, the widow of Obadiah Stover, in the spring of 1868, was and ever since has been possessed in her own right, in fee simple, of a farm in York in the county of York, where she has resided for about fifty-seven years; that her daughter and daughter's husband, these defendants, claimed title in said land by virtue of a deed which they claim to have had from the plaintiff, September 16, 1868; that the oratrix never signed, sealed, executed and delivered any such deed to her knowledge; that the first she heard of it was about a year before her husband's death, when her son Edward told his father that Mark, the defendant, had such a deed; that the father laughed at him and said that he had never given any such deed; that the oratrix knew that she never gave any such deed; that after her husband's death, she was shown a bill of sale of the personal property to Mary, the defendant, in consideration of $1100; that neither she nor her husband ever received any money from her daughter; she knew she had never signed or made any such paper. On inquiry she was informed of the following facts: That when sick in 1868, and under the doctor's charge and unconscious, under the influence of opium depriving her of all knowledge of what was happening, a certain paper was brought into the house by Mark Poole, and her husband was asked to sign; he asked what it was; Mark said it is no matter, you sign; and he signed the deed without reading it or hearing it read and without any knowledge of its contents. After he signed it, it was taken to the bed and your oratrix was held up in bed, and unconscious of what she was doing, Mark Poole was standing by the side of her bed, and her signature was thus obtained without her knowledge and contrary to her wish and desire, without any reading of the paper in her presence and with-

out any knowledge on her part of its contents. Mark Poole thus obtained the pretended deed of real estate and bill of sale of personal property to his wife, fraudulently and without the knowledge or consent of the oratrix. The bill states that the oratrix is desirous to sell lots of land to various parties, the same being desirable for summer residences, and that by reason of the fraudulent deed she cannot sell; it closes with a prayer that the pretended deed and cloud upon her title may be set aside and removed as fraudulent and void.

The answer was in substance that the title to the real estate came from a brother of the female defendant, who on his deathbed and in contemplation of death gave a deed of it to his mother with the understanding and request that it be conveyed, at or before her death, to his sister and her husband, the defendants; that her mother being confined to her bed with a dislocated hip, but in full possession of her mental powers, voluntarily made and delivered the deed in question; that both the deed and the bill of sale were freely, fully, properly and understandingly executed and delivered by said Mindwell, who then knew, whether she now remembers or not, the exact nature, contents, purport and effect of each of said instruments, etc.

The deed in question under which the defendants claim, was dated September 16, 1868, signed, Obadiah Stover and Mindwell Stover, witnessed, acknowledged and recorded; and omitting formal commencement, close, description of premises and clause of qualified warranty, was of the following tenor:

I, Obadiah Stover and Mindwell Stover, wife of Obadiah Stover, both of York, in the county of York and state of Maine, in consideration of the sum of two thousand dollars paid by Mary L. Poole of York in said county, the receipt whereof we do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quit claim unto the said Mary L. Poole, her heirs and assigns forever, all our right, title and interest in and to a certain tract of tillage, pasture and wood land lying in said York and being our homestead farm, and being the same which we now occupy and bounded as follows. . . . . meaning to convey all our real estate which we now own in said York, containing one hun-

dred and twenty acres more or less, with the buildings thereon, reserving to ourselves the use and improvement of the same during our natural lives, being the same conveyed by Samuel H. Stover to Mindwell Stover per deed dated April 23, 1867, recorded in the York registry, book 303, page 373. To have and to hold the same with all the privileges and appurtenances thereunto belonging to the said Mary L. Poole during her natural life and then to her husband Mark Poole, their heirs and assigns forever.

At the May term, 1876, issues were framed for the jury which they returned with the following answers:

1. Was the said deed and bill of sale freely and voluntarily executed and delivered by Mindwell Stover, and was she at the time of the execution and delivery thereof of sound mind and legal capacity to convey her estate and property? Answer, yes.

2. Were the deed and bill of sale procured by any fraudulent practices of the respondents or either of them or any person in their behalf? Answer, no.

3. Were the said deed and bill of sale and each of them executed by said Mindwell Stover with a knowledge of their contents and purport? Answer, yes.

4. Was said deed freely and voluntarily executed and delivered by the said Mindwell knowing and understanding its contents and legal effects? Answer, no.

5. Was the said bill of sale freely and voluntarily executed and delivered by the said Mindwell knowing and understanding its contents and legal effect? Answer, no.

Other facts, and the points raised by counsel appear in the opinion.

*S. H. Goodall*, for the plaintiff.

*N. Hobbs*, for the defendants.

DANFORTH, J. This is a bill in equity in which the plaintiff alleges that she is the absolute owner of certain land and personal property therein described, and that the defendants claim to have a deed and bill of sale of the same executed and delivered by her to them. This execution and delivery she denies, setting out substantially that, if they have any such instruments of conveyance they

were obtained by fraud and executed and delivered by her unknowingly and in a state of mind when she was unable to appreciate or in any degree understand what she was doing. The prayer of her bill is that upon these grounds the conveyances may be set aside as a cloud upon her title.

The defendants answer severally, claiming that they have a deed of the land described, not absolute, but subject to a life estate in the plaintiff, and a bill of sale of the personal property running to the female defendant. They further deny all the allegations of fraud and improper influence, as well as the plaintiff's want of knowledge, asserting that both instruments were executed and delivered voluntarily with full knowledge and understanding of their contents and legal effect, to carry out an intention previously formed and without any influence or solicitation on their behalf.

The issues thus raised have been submitted to a jury and a verdict rendered, sustained as we think by the testimony, negativing all suggestions of fraud and improper influences, and finding that both instruments were executed and delivered voluntarily, that at the time the grantor "was of sound mind and legal capacity to convey her property," and that she had a "knowledge of their contents and purport."

This verdict sustained as it is by the evidence would seem to dispose of all the issues fairly raised by the bill and answers, and upon the familiar principle that the plaintiff can only stand upon the allegations in the bill the suit must fail.

But the plaintiff contends that the defendants have by their answers raised another and a different issue upon which the verdict is in her favor, and upon this she still claims to have her prayer allowed. Apparently conceding that a decree upon this last issue would not be founded upon any allegation in the bill, the counsel claims it upon the issue offered by the answer, that she understood the legal effect of her conveyance. The reasoning upon which this is sought to be established is hardly sound. It is true that the allegations in a bill as in a declaration may be denied or avoided by other facts. In other words, in equity as well as in law, the pleader may confess and avoid. By so doing the fact directly in issue before the jury may not be the fact alleged in the

bill, but the former must have a direct bearing upon the latter as tending to show that it cannot, even if true, entitle the plaintiff to recover. If it fail in this it is not pertinent to the case, and if established is not a defense, while if it is pertinent, it is a defense, only because it shows that the facts upon which the plaintiff relies cannot avail. Hence in any suit, whatever may be the pleadings, the judgment must depend upon the effect of the plaintiff's allegations and be in accordance with them.

But if we are permitted to leave the bill and wander over the whole domain of fact and law developed by the case, the plaintiff will be in no better condition. It is claimed that the conveyance is without pecuniary consideration and such is probably the fact. We assume then if it is to stand it is as a gift or advancement to a daughter and her husband. No question is raised as to the rights of creditors, subsequent purchasers, or any third persons, but only such as may arise between a donor and donee.

In such cases equity will not ordinarily interfere but, in the absence of fraud, leave the parties as it found them. If the gift has not been perfected it will not reform or enforce the contract so that it may be, whatever may be the agreement of the parties; if it has been perfected it will not restore it. In 1 White and Tudor's Lead. Cas. 324, the rule is thus laid down. "A court of equity will not set aside a voluntary deed or agreement not obtained by fraud, or against public policy, even if it be such as, according to the principles before laid down, it will not carry into effect. Equity stands neutral, and invariably follows the rule thus quaintly laid down in an old case, "that if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a court of equity will not loose the fetters he hath put upon himself, but he must lie down under his own folly." Numerous cases are cited in support of this rule, and it is believed to be well established.

In the case at bar, by the execution and delivery of the conveyances, the gift was completed, and nothing left to be done "to carry it into effect." The papers were executed voluntarily and of the plaintiff's own motion. There is nothing in the transaction which by any possibility can be construed as against public policy or so

far as appears as being impolitic as between a mother and daughter. The testimony not only fails utterly to show any fraud or improper influence, but such is negatived by the jury. On the other hand the verdict finds affirmatively that the conveyances were executed voluntarily and with a full understanding of their contents and purport. It would therefore seem to be clear that so far as the facts go the plaintiff has failed to show any ground for relief.

But it is claimed that at the time the conveyances were made the grantor did not understand their "legal effect" and the jury have so found, and that therefore she is entitled to relief because she acted under a mistake of law.

The general rule above referred to would seem to exclude any relief upon this ground, and we think it is applicable here as well as in other respects. That some cases may be found which are apparent exceptions to this rule may be true, but the decided weight of authority we think is in favor of its application to mistakes in the law. It is undoubtedly true that where both parties to a contract labor under the same mistake of the law, so that the written instrument does not express the meaning of the parties, a court of equity will upon a proper bill reform it. Such is the case of *Canedy* v. *Marcy*, 13 Gray, 373, and other cases cited by the plaintiff's counsel.

Even this however will be done only upon the strongest and most satisfactory proof. *Sawyer* v. *Hovey*, 3 Allen, 331. But when the mistake is that of one party only, a different and more stringent rule prevails. In *Bank of U. S.* v. *Daniel*, 12 Pet. 32; also 12 Curtis, 618, 626, it was held that "a mistake, or ignorance of the law, forms no ground of relief from contracts fairly entered into, with full knowledge of the facts, under circumstances raising no presumption of fraud, imposition, or undue advantage taken." In *Hunt* v. *Rousmaniere's administrator*, 1 Pet. 1, reported also in 7 Curtis, 419, 426, a similar doctrine is laid down.

In 1 Story's Eq. Jur. (9 ed.) § 138 *i*, the principles applicable to a mistake in law are thus summed up. "But where the mistake is of so fundamental a character that the minds of the parties have never in fact met; or where an unconscionable advantage

has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, equity will interfere in its discretion to prevent intolerable injustice."

If, as already seen, equity will not interfere to reform or set aside a voluntary conveyance except in case of fraud actual or constructive, there would seem to be no valid reason why the principles thus laid down as applicable to mistakes in law should not also be applied to deeds of gift, especially those given by an aged mother to a daughter. Making such an application to this case, on what ground can we say that there has been any fraud or imposition or improper influence which has led to such a mistake? The existence of these in any degree has been negatived. It does not appear that any unconscionable advantage has been obtained, but as far as the testimony shows the conveyance is not an unusual one, or one which we can say is improper.

Nor can we say that the mistake is of so fundamental a character that the instruments fail utterly to carry out the intention of the grantors. There is no pretense that the husband did not fully understand the nature and effect of the conveyances. The jury have found that the plaintiff understood their contents and purport. From the nature of the instruments of conveyance she must necessarily have known that she was parting with some interest in her property and that the grantees were receiving such interest.

But it is said that the plaintiff did not understand the legal effect of the instrument and the jury have so found. This may be true; but the testimony upon which the finding is based can hardly be said to be very strong or satisfactory. It is very much weakened by another part of the verdict in which it is found that she executed each with "a knowledge of their contents and purport."

But if this were so, and a simple mistake of the law sufficient to authorize a court of equity to rectify the mistake, there is still in this case an insuperable difficulty. It is not easy to correct a mistake of which we have no knowledge. It is not enough to say the plaintiff did not understand the legal effect of her act. She may

not now have that knowledge and from aught that appears in the case the instruments may be the best possible to carry out her intention and purpose formed at the time. If otherwise, if in any respect that intention has not been carried out, we are left in entire ignorance as to how or wherein the failure has occurred. The bill gives us no light, the testimony or verdict gives us no aid. It is incredible considering the nature of the instruments in question and the fact that she understood their contents and purport, that she did not know and fully comprehend that she was conveying some interest in her property to one or both of the grantees.

Under such circumstances no rule in equity will allow the instruments to be set aside, for in that case her intention deliberately formed in some part at least would be defeated. They cannot be changed or modified; for we have no knowledge as to the changes required, whether as to the estate granted or the persons to whom it is granted. If it had appeared by the proper allegations and proof that a will had been intended, but through misapprehension a grant had been executed instead, we will not say that such a mistake might not be so fundamental as to authorize and require a correction. But nothing of this kind appears. The allegation is that no instrument was intended; the proof is that the two were executed understandingly and without fraud. If then we should make any decree favorable to the plaintiff we could have no assurance that it would correct any mistake which she may have fallen into. *Bill dismissed with costs.*

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

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JOSEPH BURROWS *et al.*, appellants, *vs.* EDWARD E. BOURNE, JR., administrator.

York. Decided February 27, 1877.

*Probate court.*

The heirs of the intestate have no right to appeal from the decree of the judge of probate accepting the report of commissioners under c. 115, of the statutes of 1859. (R. S. c. 64, § 51.)

Neither can they appeal in the name of the administrator, without his knowledge and consent, or against his will.

Such appeal is not valid.

A payment made in accordance with an accepted report of the commissioners is properly allowed in the account of the administrator, notwithstanding an invalid and unauthorized appeal has been taken by the heirs at law in the name, but without the knowledge or consent, and against the will of such administrator.

*I. S. Kimball*, for the appellants.

*E. E. Bourne*, for the defendant.

APPLETON, C. J. This is an appeal from a decree of the judge of probate, at a probate court, holden on the first Tuesday of August, 1869, allowing the first account of Love Burrows, administratrix of the estate of Joseph Burrows, and ordering the same to be recorded.

Love Burrows was duly appointed administratrix on the estate of Joseph Burrows. Claims having been presented by John B. Burrows and Allen W. Burrows, which the administratrix deemed "exorbitant, unjust and illegal," she petitioned the judge of probate for the appointment of commissioners "to determine whether any and what amount shall be allowed on said claim." In pursuance of this petition, the judge of probate appointed Thomas M. Wentworth and Isaac H. Fall as commissioners, who, after giving due notice to all parties interested, of the time and place of hearing, made their report in writing, allowing John B. Burrows $853.17. Their report was duly filed in the probate office; and at a probate court holden July 6, 1869, the judge of probate decreed that the same be accepted.

On July 13, this claim was paid by the administratrix.

On July 19, Joseph Burrows and Allen W. Burrows, heirs at law of Joseph Burrows, deceased, filed a paper in the probate office, the concluding part of which is in these words: "With which said decree on said John B. Burrows' said claim and the decision of said commissioners on said claim, the undersigned being children of said Joseph Burrows, deceased, and heirs at law of his estate, are dissatisfied, and within twenty days after said report of commissioners is made and the decree accepting it, I,

Love Burrows, the administratrix on the estate of said deceased, hereby appeal therefrom so far as relates to John B. Burrows' claim, and hereby give written notice thereof at the probate office in said county. Dated July 19, 1869. (Signed) Love Burrows, administratrix, by request of Joseph Burrows; Allen W. Burrows, by attorney, I. S. Kimball."

On September 28, 1869, Love Burrows filed in the probate office an affidavit, stating that the appeal "purporting to be made in her name as administratrix as aforesaid by Joseph Burrows and Allen Burrows, as heirs at law, from a decree of the judge of probate . . on the 6th of July, A. D. 1869, in accepting the report of Thomas M. Wentworth and Isaac H. Fall, commissioners on disputed claims duly appointed under the provisions of the law of A. D. 1869, was made by Joseph Burrows and Allen W. Burrows without any previous consultation had with her (me) in relation to making and claiming said appeal, that the former was made without her (my) knowledge, consent or authority, and that she (I) had no information that said appeal was made or requested until she (I) had paid John B. Burrows the full amount of his claim as allowed to him by said commissioners, set forth in their report, allowed and decreed to be accepted by said judge of probate," &c.

On October 5, 1869, by her attorney, the administratrix filed in the probate office a waiver of all appeals taken in her name with a prayer that the same be no further prosecuted in her name.

These proceedings are under the act of 1859, c. 115. But under that, the report of the commissioners is final "saving the right of appeal."

But here has been no appeal. The heirs at law as such could not appeal. *Reed* v. *Foster*, 54 Maine, 499. But the only appeal is by them. The administratrix did not appeal, nor authorize, nor know of an appeal in her name. This is abundantly manifest.

The report of the commissioners being duly accepted by the judge of probate, and no valid appeal having been taken, the amount allowed must be regarded as a just debt.

It should be further observed that the appellants, in what they claim to be an appeal from the decree of the judge of probate

accepting the report of the commissioners, have filed no bond whatever.

The administratrix, having paid John B. Burrows, the sum of $853.17, was allowed the same in her first account, at a probate court holden on the first Tuesday of August, 1869. The present appeal is taken because this sum was allowed on the ground that the decree affirming the report of the commissioners had been vacated by appeal, because if not so vacated, their report is final. But we have seen there was no valid appeal.

Indeed, in their appeal in this case the appellants set forth that being children of said Joseph Burrows, deceased, and heirs at law of his estate, they were dissatisfied, and within twenty days after said report of said commissioners and the decree accepting it, were made, they in the name of Love Burrows as administratrix with their own names attached thereto appealed in writing from said decree of the judge of probate allowing said claim of John B. Burrows, &c. But they do not assert the least particle of authority for their action in the premises from the administratrix. It will hardly be pretended that they had a right to appeal in the name of the administratrix without her consent or authority and against her will.

*Appeal dismissed. Decree of judge of probate affirmed with costs.*

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

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SAMUEL T. BEAN *vs.* OCTAVIUS D. DOLLIFF.

York. Decided March 3, 1877.

*Exceptions. Promissory notes.*

Exceptions will be sustained only when it appears that the excepting party is aggrieved.

The plaintiff having property of a third person in his hands subject to a lien in his favor, at the request of said third person, passed it over to the defendant, taking his note therefor, payable to himself, to secure the same lien. *Held*, that the note takes the place of the property for which it was given, and that when the lien is discharged it becomes absolutely the property of such third person, and that the plaintiff cannot maintain an action on it for his own benefit.

On exceptions to the ruling and order of the presiding justice in a trial without the intervention of the jury, with the right of exceptions.

Assumpsit on a note of the following tenor: "$200. Biddeford, Maine, September 11, 1874. Due Samuel Bean two hundred dollars, for value received: (Signed) O. D. Dolliff." The signature and delivery of the note were admitted.

The defendant offered in evidence the disclosure of the plaintiff in a trustee process, whereupon the plaintiff objected to any evidence tending to show any agreement different from what the due-bill purports to be. The justice decided he would hear such evidence as was offered and then consider its legitimacy. The substance of the plaintiff's disclosure in the case of *Sanford et als* v. *Andrews, and Bean, trustee*, was: That Wm. G. Andrews was owing one Hill; that Hill had sued Andrews upon the claim and trusteed Bean, (the plaintiff in this case). Bean held in his hands the sum of two hundred dollars belonging to Andrews. Andrews, fearing the money would be attached by other creditors in Bean's hands, desired to have it transferred into the hands of Dolliff. This, the plaintiff Bean was unwilling to do, unless Andrews should furnish him some security against the Hill claim upon which he had been trusteed.

In his disclosure he said: "Finally I agreed to pay over the $200, provided he would bring forward some responsible party that would agree to see this matter settled with Capt. Hill. I agreed to it and turned the money over to Dolliff, who gave me his due-bill for the money. This due-bill was my receipt for the money, and was to be returned to him or destroyed when the matter was fixed."

The defendant, Dolliff, testified: "He (Bean) asked me to give him a writing to secure him against the Hill suit. I answered that I would give him a 'due-bill' as it was quicker done and more convenient. I did so. My note was given to secure him against the Hill claim."

It was agreed that the Hill matter was settled on the same day the note was given and the money paid. The evidence tended to show that the settlement was about eleven o'clock, A. M.; that

at about 3 o'clock P. M. the writ, *Sanford* v. *Andrews and trustee*, was served upon the plaintiff, who afterwards disclosed how he held the due-bill in question. He was, however, adjudged trustee and therefore brought this suit. Other facts appear in the opinion.

The presiding justice, "upon the foregoing testimony," ordered judgment for the defendant; and to the foregoing rulings and order the plaintiff alleged exceptions.

*H. H. Burbank & J. S. Derby*, for the plaintiff.

I. This instrument is a good promissory note. *Carver* v. *Hayes*, 47 Maine, 257. *Franklin* v. *March*, 6 N. H. 364. *Lequeer* v. *Prosser*, 1 Hill, (N. Y.) 256. *Cummings* v. *Freeman*, 2 Humph. 143.

II. When an agreement is reduced to writing, the writing must be taken as exclusive evidence of the understanding of the parties. Chit. on Con. 102. *Galpin* v. *Atwater*, 29 Conn. 93. *Hoyt* v. *French*, 24 N. H. 198, 203. *Erwin* v. *Saunders*, 1 Cow. 249.

III. In an action upon a note which is absolute on its face no evidence can be introduced of a parol agreement that it should only be paid in a certain contingency. *Hunt* v. *Adams*, 7 Mass. 518. *Adams* v. *Wilson*, 12 Met. 138. *Underwood* v. *Simonds*, 12 Met. 275. *Tower* v. *Richardson*, 6 Allen, 351. *Currier* v. *Hale*, 8 Allen, 47. *Cunningham* v. *Wardwell*, 12 Maine, 466. *Boody* v. *McKenney*, 23 Maine, 517. *Badcock* v. *Steadman*, 1 Root, 87. *Rose* v. *Learned*, 14 Mass. 154. *George* v. *Harris*, 4 N. H. 533. *Swank* v. *Nichols*, 24 Ind. 199. *Schurmeier* v. *Johnson*, 10 Minn. 319. *Fry* v. *Blackstone*, 31 Ill. 538. *Myers* v. *Sunderland*, 4 Greene, (Iowa) 567.

Parol evidence is not admissible to show an agreement that the note should be given in an event which has happened. *Tower* v. *Richardson*, 6 Allen, 351. *Henshaw* v. *Dutton*, 59 Mo. 139. *Shaw* v. *Shaw*, 50 Maine, 94.

*R. P. Tapley*, for the defendant.

The evidence of both parties shows the due bill was delivered as collateral security against the Hill claim, and that the Hill claim

was settled months before this action was commenced; that the plaintiff was notified of the settlement on the day it was made. These facts are legitimate evidence and do not vary, control or change the terms of the written instrument declared upon. They show an extinguishment of a right of action upon a note thus delivered.

They establish an independent contemporaneous agreement to secure which the note was given and the full execution of the agreement.

DANFORTH, J. This case was referred to the presiding justice with the right to except. It is a familiar principle of law founded upon the provisions of R. S. c. 77, § 21, that the party excepting must show that he is aggrieved by the ruling excepted to, or his exceptions will not be sustained. In this case there is an objection to the admission of the plaintiff's disclosure and "any evidence tending to show any agreement different from what that due-bill purports to be." This objection is too indefinite as it covers both that which may and that which may not be admissible. Testimony tending to show that the "due-bill" does not show the real contract entered into by the parties at the time, would perhaps be inadmissible. But it would be entirely competent for the parties to enter into a subsequent and independent contract to be proved by oral testimony different from that shown by the note and by which its terms might be modified, or its obligation discharged. If, then, this objection were overruled it does not appear that the objecting party has been aggrieved.

In the argument on behalf of the plaintiff it is claimed that, "when an agreement is reduced to writing, the writing must be taken as conclusive evidence of the understanding of the parties," that "no evidence of a parol agreement that a note absolute should be paid only upon a certain contingency," or "should be given up in an event which has happened," is admissible.

These several propositions are undoubtedly good law and well sustained by the authorities. But no specific testimony has been alluded to as received in violation of these principles, certainly none as having any bearing upon the judgment of the court.

The ruling of the court was that such testimony as might be

offered would be heard and its legitimacy subsequently considered. It follows that, as under the objection so under the ruling, so far as relates to the reception of testimony, or the testimony received, the plaintiff has failed to show any ground of complaint.

The final ruling excepted to is the order that judgment be rendered for the defendant "upon the foregoing testimony." Precisely what view was taken of the "foregoing testimony" or whether all or a part was considered as legitimate does not appear. Nor perhaps is it necessary that it should. There is no material conflict of evidence, nor is there room for any serious doubt as to the facts. Whatever might be the result if we should find any uncertainty as to the facts, it is very clear if we find from competent testimony undisputed facts sufficient to authorize the order of the court, the exceptions must be overruled. Upon this point we apprehend there was no occasion to consider how far the defendant might have a defense to the note in consequence of any agreement with the plaintiff that its payment should depend upon any contingency whatever.

The true question to be considered is whether the plaintiff has any such title to, or interest in the note, as will enable him to maintain the action for his own benefit; for it seems that in prosecuting the action he is acting for himself and not in behalf of any other person.

It appears from the disclosure of the plaintiff that on the day of the date of the note he had in his hands the sum of two hundred dollars, which was the property of Wm. G. Andrews, and upon which he had a lien to secure him against the claim of one Hill. On that day, at the request of Andrews, he paid the money to the defendant and took for it the note in suit, which he was to hold as security for the same claim for which he held the money. The note, then, took the place of the money, and was holden by the plaintiff for the same purpose and subject to the same claim on the part of Andrews. Subsequently, but on the same day, the claim of Hill was settled by Andrews, and thereby the note, as well as the money represented by it, was released from any lien which the plaintiff had upon it and it became the sole property of Andrews. The plaintiff having paid over the money at Andrews'

request and as his agent could no longer be liable to him for it, but only for that which he received in its place. The defendant, knowing that he was receiving the money of Andrews and that the plaintiff was acting in the transaction as an agent, would be liable to Andrews on the note, though it was made payable to the agent. This would seem to leave no ground upon which the plaintiff can recover, without resting upon any disputed or uncertain evidence.

Nor does the plaintiff gain any further lien upon the note by virtue of the judgments, in the trustee suits, offered in evidence. He had paid over the money before the service of the writs upon him; and the possession of the note, it being but a *chose* in action, would furnish no ground for charging him as trustee. If, therefore, he was charged for the money or note, it must have been for the want of a disclosure in accordance with the facts.

The suggestion that the note was given to aid Andrews in the fraudulent concealment of his property from his creditors, cannot aid this plaintiff in sustaining his action. It may be that the defendant did knowingly render aid to Andrews for the purpose indicated, and that he may be liable under the statute to a creditor for so doing. But this case is not founded upon any such claim. Besides, if it is probable that the defendant is thus guilty, it is certain that the plaintiff is in no better condition. By his own admission it appears that when he paid over the money at the request of Andrews he was expressly notified of the illegal purpose of Andrews and clearly understood that the change was made to hinder, delay or defraud creditors; and knowing this, without any benefit to himself, he not only assented to, but was an actor in accomplishing the change. The inference would seem to be that the note was the result of a contract entered into for an illegal purpose, and that the judgment of the court might be sustained upon that ground. *Exceptions overruled.*

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

JOHN GRAFFAM *vs.* BOSTON & MAINE RAILROAD COMPANY.

York. Decided March 29, 1877.

*Railroad.*

A railroad company is not obliged to carry as baggage the trunk of one who does not go by the same train. Upon receiving the trunk of such person to be forwarded it is received as freight, and the duties and liabilities of a common carrier attach, with the right to a reasonable compensation for transportation. *Wilson* v. *Grand Trunk*, 56 Maine, 60, and 57 Maine, 138, affirmed.

ON REPORT.

CASE against the defendants as common carriers.

*R. P. Tapley*, for the plaintiff.

*G. C. Yeaton*, for the defendants.

LIBBEY, J. On the 4th day of October, 1873, the plaintiff was a passenger on defendants' cars from Kennebunk to Saco. He did not take with him his trunk containing several articles of wearing apparel, but left it at Kennebunk to be forwarded over defendants' road to Saco on a subsequent day.

On the 6th day of October, 1873, the trunk was delivered to defendants' agent, at their station at Kennebunk, to be forwarded to the plaintiff at Saco, and was received by said agent for that purpose. There was nothing said about payment for its transportation. The plaintiff called at the defendants' station at Saco, on that day and for several days after for the trunk, but the defendants' agent there was not able to find it, and the plaintiff has never received it.

The case is within the authority of *Wilson* v. *Grand Trunk Railway*, 56 Maine, 60, and 57 Maine, 138. The defendants were not obliged to carry the plaintiff's baggage, as he was not a passenger accompanying it; they must be held as receiving it for transportation as merchandise, chargeable with the duties and liabilities of common carriers with the right to charge a reasonable compensation therefor. 12 Mass. 324

The defendants are liable for the value of the trunk and its contents, which is assessed at fifty dollars.

*Judgment for the plaintiff for fifty dollars, and interest from October 6, 1873.*

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

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SUSAN A. THORPE *vs.* GEORGE A. SHAPLEIGH.

York. Decided March 31, 1877.

*Husband and Wife.*

The husband is liable for necessaries furnished a wife, who for good and sufficient cause has left his bed and board.

One cannot furnish articles which are not necessaries and recover a fraction of their value because they might have answered the purpose of other articles which would have been necessaries.

The articles furnished must be necessaries, suitable and proper, regard being had to the condition of the parties, else no recovery can be had.

ON EXCEPTIONS.

ASSUMPSIT for supplies claimed to have been furnished by the plaintiff to the wife and minor child of defendant, from June, 1871, to June, 1874, $2,883. Verdict for the plaintiff. It was in proof and not controverted that during the earlier part of the time included in the account, the wife of defendant was lessee for her own life, at a nominal yearly rent, of a dwelling house, valued at $3000, fully furnished, (furniture valued at $1000) in Lebanon, in this county, with three or four acres of land; that during the currency of plaintiff's account defendant's wife was owner in fee of said property, not received from her husband or his relatives, and just prior to the beginning of the furnishing the support charged for in the largest item of plaintiff's account, said property was conveyed by deed in usual form by defendant's wife, without money consideration, to the plaintiff, who, it was claimed by plaintiff, held the same under such conveyance, and in trust only created for

Mrs. Shapleigh's children, then, and ever since, and still holds the same.

The defendant requested the court to instruct the jury that

1. "Plaintiff cannot recover for any alleged necessaries furnished to defendant's wife, while she (defendant's wife) was the owner of a dwelling-house and land, which she omitted to appropriate to the relief of her necessity.

2. "Plaintiff cannot recover for the support of Mrs. Shapleigh or son, furnished after and while she had in her hands the Lebanon property, without applying the same or its proceeds toward payment thereof.

3. "If the admitted value of property conveyed without consideration, actually paid, by Mrs. Shapleigh to plaintiff, exceeded the amounts of the items for $850, and the succeeding item for $100, plaintiff cannot recover here for any part of these items."

These instructions, and each of them, the court declined to give, and gave no equivalent instructions.

It was claimed by defendant that the articles in proof, as having been furnished by plaintiff, comprising among others a silk dress costing $50 or over, a flannel dress, costing over $30, were not reasonably suitable in kind, quality, or quantity, and he requested the court to instruct the jury that

4. "If the articles charged for in plaintiff's account were not reasonably suitable in kind, quality, or quantity, plaintiff can not recover therefor even so much as would have supplied suitable articles."

This the court declined to give, but did instruct the jury that although the articles actually furnished were not reasonably suitable in kind or quality, defendant would be liable for the price of articles reasonably suitable in kind or quality.

It was in proof that the largest item of the account accrued while journeying in Europe, and defendant requested the instruction,

5. "No part of the expenses of the trip to Europe, or the board or support, or clothing furnished during and while on that tour can be recovered here, because they cannot constitute necessaries."

This the court declined to give, but permitted the jury to find,

under this item, such a sum as was equivalent to reasonable expenses of board and clothes at Lebanon.

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

*G. C. Yeaton*, for the defendant.

*W. J. Copeland*, for the plaintiff.

APPLETON, C. J. This is an action of assumpsit for supplies furnished the wife and child of the defendant. There is no pretense of any express promise to pay on his part. The only ground upon which a recovery is sought is that the wife with her child left the defendant for good and sufficient cause, and that the husband is liable for necessaries furnished for her support and that of her child suitable to her situation and his condition in life.

It appears that during part of the time during which the plaintiff's account accrued that the defendant's wife was the owner of a house in Lebanon, worth $3000, and was possessed of furniture of the value of $1000.

The defendant requested the court to instruct the jury that "the plaintiff cannot recover for any alleged necessaries furnished to defendant's wife, while she was the owner of a dwelling house and land which she omitted to appropriate to the relief of her necessity."

The request was properly refused. When a husband wrongfully turns his wife away, he is by law liable for her support. A dwelling-house would seem to be as much a necessity for a wife and family to protect her from the inclemencies of the weather, as food to save her from starvation. The request implies an obligation to appropriate what is in and of itself a necessity to procure other necessaries, which would not be more needed than the one omitted to be appropriated. Whether if the wife had sufficient means of her own, or was able to earn a living for herself, the husband would be liable to support her has been questioned. *Johnston* v. *Sumner*, 3 H. & N. 261. *Liddlow* v. *Wilmot*, 2 Stark. 86. 1 Chitty on Con. 241. But it is not necessary to determine this question.

Further, the request presents a question of fact to be passed upon by the jury and not of law for the court.

The objection is taken that the articles of clothing which were furnished, were not necessaries. If the husband abandons the wife or by his ill treatment compels her to leave his house, he is liable for her necessaries and gives her a general credit to that extent. Such is the general rule. But for any thing beyond necessaries, he is not chargeable.

The objection being taken that certain articles furnished by the plaintiff were not reasonably suitable in kind, quality or quantity, the presiding justice instructed the jury "that although the articles actually furnished were not reasonably suitable in kind and quality, the defendant would be liable for the price of articles reasonably suitable in kind and quality."

This suit is for necessaries furnished. The issue is, were the articles furnished necessaries. If an article furnished is not a necessary, the defendant is not liable therefor. The credit, the husband gives his wife, is a limited not a general credit. So, too, if more goods are furnished than are necessary, the husband is not liable for the excess. *Eames* v. *Sweetser*, 101 Mass. 78. It is for the jury to determine whether the articles furnished are necessaries in kind and in quantity. Their verdict is to be for what was furnished, not for what might or should have been furnished.

The substance of the instruction was that the husband, while not liable for what the plaintiff furnished because not necessary, might be liable for what she did not furnish or for so much of what she did furnish as would be an equivalent of what he ought to have furnished. The articles were necessaries or they were not. If not, they should not have been furnished. The defendant is not liable for them, nor is he liable for a fraction of their value. Still less can he be made responsible "for the price of articles reasonably suitable in kind and quality" which he did not furnish because he furnished articles not reasonably suitable in kind or quality, which might have been of utility to the wife. The instruction given was manifestly erroneous.

"That the husband is liable for necessaries furnished to the wife such as necessary food, drink, clothing, washing, physic, instruction and a suitable place of residence, with such necessary furniture as is suitable to her condition, there is no doubt." *Ray* v.

*Adden*, 50 N. H. 82, 83. The wife in the case at bar had a suitable place of residence with necessary furniture. As there must be a new trial, it is not necessary to consider how far the husband of a wife thus situated would be responsible for the expenses of such wife and her child incurred by her in voluntarily journeying over Europe on a pleasure trip. Whether those expenses are necessaries may be a matter for the jury, under appropriate instructions. *Exceptions sustained.*

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

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SCHOOL DISTRICT, NO. 2, IN SANFORD *vs.* SIMON TEBBETTS.

York. Decided April 30, 1877.

*Action.*

In general, assumpsit as on a promise implied by law is not an appropriate remedy in cases of delinquency of a public officer. A special action on the case or, in some cases, debt is the proper form. But, aside from this, proof that the defendant as town treasurer received moneys of the district is not sufficient to maintain an action to call it out of his hands without proof of delinquency on his part or even of demand before the commencement of the action.

Nor can the plaintiffs in this action recover an unpaid district tax assessed against the defendant.

The money which accrued from the sale of the old school-house and stove belonging to the district, was shown to have been finally disposed of in accordance with the vote of the district, and in payment of its debts. *Held*, that the fact that it went through the defendant's hands contrary to the vote of the district before reaching its destination did not make the defendant responsible to the district a second time for it.

ON EXCEPTIONS to the order of a nonsuit.

ASSUMPSIT against the defendant, who was a town treasurer, for money in his hands belonging to the plaintiff district.

The treasurer's book, in the hand writing of defendant, showed under date of 1870, February 4th, a credit to the plaintiff district by cash $350; April, by order, $7.45; April 4th, cash $42.55. The evidence tended to show that Stephen Hatch paid the defend-

ant $40, received from the sale of the old school-house; that the defendant at the same time took up a note of $206.14 against the district, and applied the same $40 towards its payment. The plaintiffs offered to show that there was an unpaid tax of the year 1869, of the plaintiff district against the defendant, which he promised to pay but never did; and the evidence on objection was excluded. The presiding justice ordered a nonsuit; and the plaintiff alleged exceptions.

*I. S. Kimball*, for the plaintiffs.

*A. Low*, for the defendant.

BARROWS, J. That, under any ordinary circumstances, an action of assumpsit by a school district against the treasurer of a town is not the proper remedy to recover any balance of their moneys which has been paid into his hands as such treasurer, is sufficiently obvious.

The broad remark made by the court in *Bailey* v. *Butterfield*, 14 Maine, 112, and *McMillan* v. *Eastman*, 4 Mass. 378, that an action of assumpsit as implied by law is never a proper remedy against a public officer for neglect or misbehavior in his office, might under some unusual and peculiar condition of things need qualification. See *Adams* v. *Farnsworth*, 15 Gray, 423. But, ordinarily, a special action on the case setting forth the particulars which constitute the default or misfeasance, or, in some cases, an action of debt, has been deemed the proper form. Had it been adopted here and the claim been set forth in a special count in case, it is possible that the attention of the plaintiffs' attorney might have been called to some noticeable defects in the proof offered, which is plainly insufficient for the maintenance of any action by the district against the defendant. By R. S. c. 11, § 46, collectors and treasurers of towns "have the same powers and are subject to the same duties and obligations relating to [school] district taxes, as relating to town taxes."

It was the defendant's duty to receive the money when collected, keep it safely, pay it out upon orders from proper authority, and turn over any balance in his hands to his successor; and the reception of the money would not subject him to any action in behalf of

the district unless it also appeared that he was in some way delinquent. No proof of delinquency is offered. It does not appear that there was ever an order drawn by a committee of the district that was not paid, nor that any demand on the part of the district upon the defendant for any supposed balance of money in his hands was ever made prior to the commencement of this action. On this part of the case the single fact proved is that there was money of the district at one time in his hands as town treasurer. This is not sufficient to sustain the claim. See 15 Gray, 423, 425.

We do not understand the plaintiff's counsel now to contend that a case is made out for any money lawfully in the defendant's hands as the proceeds of taxes collected, or that the payment of the defendant's own tax in the district, which it is alleged is in arrears, can be enforced in this action. His position is that the action may be maintained for the forty dollars which was a balance of proceeds of sale of the old school-house and of a stove belonging to the district, and which he claims should never have gone into the defendant's hands, and was wrongfully appropriated by him to the payment of a debt of the district without any order from the committee. The testimony is very meagre; but the facts proved seemed to be that one Hatch (who with the defendant and one Dorman constituted a committee of the district) received this money under vote of the district "not to put it into the treasury but to pay where the district was owing." The district owed Hatch. In adjusting the business with the defendant, his associate on the committee, Hatch turned over the $40 to the defendant, who on the same day paid it back to Hatch with other money in discharge of Hatch's claim against the district. It was finally disposed of in accordance with the vote of the district; and the naked fact that contrary to the vote of the district it went through the defendant's hands in reaching its proper destination, cannot make the defendant responsible for it a second time to the district.

*Exceptions overruled. Nonsuit confirmed.*

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

STATE *vs.* MARY STARR.

York. Decided April 30, 1877.

*Trial.*

R. S. c. 27, § 22, enacts that "ale, porter, strong beer, lager beer and all other malt liquors shall be considered intoxicating liquors within the meaning of this chapter, as well as all distilled spirits." *Held,* that the question "what is the malt liquor intended by and embraced in the statute and prohibited from sale," is one of fact for the jury and not one of law for the court.

ON EXCEPTIONS, in two cases considered together.

INDICTMENT, for keeping a drinking-house and tippling-shop; also an indictment for being a common seller of intoxicating liquors. The exceptions are the same in both cases.

To sustain the issue the government introduced evidence tending to show the sale of an article called "Stanley's Hop Beer."

This article the government contended was a malt liquor within the meaning of R. S. c. 27, § 22, which proposition was denied by the respondent.

The respondent's counsel requested the presiding justice to instruct the jury :

1. What is the malt liquor intended by and embraced in the statute and prohibited by the statute from sale ?

2. That the statute does not mean every kind of liquor that has the smallest appreciable amount of malt in it.

3. That malt must form a substantial part of the liquid.

4. That unless the liquid contains the usual and ordinary amount of malt used in the manufacture of the malt liquors enumerated in the statute it is not deemed intoxicating by the statute.

5. That unless the liquid contains the usual and ordinary amount of malt used in the manufacture of such of those malt liquors enumerated in the statute as contain the least amount of malt, it is not a malt liquor within the statute.

The first requested instruction he declined to give or comply with, and said he must leave that question to the jury.

The second and third requests he declined to give, stating he must leave those matters to the jury to determine what would be

malt liquors, and for the jury to determine if the liquors sold were malt liquors. The fourth and fifth he declined to give without any comment concerning them.

The respondent's counsel requested the presiding justice to instruct the jury that a single sale of intoxicating liquor, and allowing the same to be drank on the premises where sold, does not constitute the offence of keeping a drinking-house and tippling-shop. This the presiding justice declined to give, and stated to the jury that such an act did constitute the offense, and read to them section 31 of chapter 27 of the revised statutes.

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

*R. P. Tapley*, for the defendant.

*W. F. Lunt*, county attorney, for the state.

LIBBEY, J. These cases are indictments, one for being a common seller of intoxicating liquors, the other for keeping a drinking house and tippling-shop. The exceptions are the same in both cases and therefore they are considered together.

To sustain the issue, the government introduced evidence tending to show the sale of an article called "Stanley's Hop Beer." This article the government contended was a malt liquor within the meaning of § 22, c. 27, of the revised statutes, which was denied by the respondent. The statute referred to declares that "ale, porter, strong beer, lager beer and all other malt liquors shall be considered intoxicating liquors within the meaning of this chapter, as well as all distilled spirits." All the requested instructions which are relied upon by the counsel for the respondent are based upon the ground that it was the duty of the court to instruct the jury as matter of law, what is the "malt liquors" intended by the statute, and embraced in, and prohibited by it. We think they were properly refused. The term malt liquor is a general term, embracing several kinds of liquor; what liquors are embraced in it, as well as the mode of their manufacture and the ingredients of which they are composed, is a question of fact for the jury, and not of law for the court. In every case in which the question is involved, it is competent for both parties to show by proper evidence, what a

malt liquor is, how it is manufactured and of what it is composed, and also to show whether the particular liquor in controversy is or is not a malt liquor, and the jury must determine the issue upon the evidence. The court might as well be required to instruct the jury as matter of law, what liquors are embraced in the term ale, or distilled spirits. The question is the same in principle as that which would arise under the same section of the statute, if the liquor sold was one not therein specifically declared to be intoxicating, but claimed to be intoxicating by the government. In such case it is well settled in this state and in Massachusetts, that what is an intoxicating liquor and whether the liquor sold was intoxicating or not are questions of fact to be determined by the jury upon the evidence in the case. *State* v. *Wall*, 34 Maine, 165. *Commonwealth* v. *Chappel*, 116 Mass. 7. *Commonwealth* v. *Blos. id.* 56. *Exceptions overruled.*

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

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EMMA F. HOLBROOK *vs.* GEORGE F. KNIGHT.

York. Decided May 3, 1877.

*Exceptions. Bastardy.*

A bill of exceptions will be overruled unless it contain a sufficient statement of the case to show that the ruling complained of was erroneous and prejudicial to the excepting party.

So, where the following instruction was excepted to: "That there is no evidence in the case that the complainant ever had any sexual intercourse with any other person than the respondent, that she was inquired of in relation to several persons and denied it in each instance with two exceptions," and the report of the evidence was not a part of the bill, the exceptions were overruled.

When the declaration in bastardy states the time, as between two dates, when the child was begotten, the jury are authorized to find the defendant guilty on sufficient proof, though the child was begotten outside of the dates stated.

The particulars of time and place are only material as bearing upon the credit of the complainant as a witness.

ON EXCEPTIONS and MOTION.

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COMPLAINT in bastardy process, declaring that she was on the 23d day of August, 1875, delivered of a bastard child begotten by the said George F. Knight; that the said child was begotten at the house of John Carroll in the town of South Berwick, sometime between the 25th day and 30th day of November, 1874; that being put upon the discovery of the truth at the time of her travail, she accused the said George F. Knight of being the father of said child, &c.

By her voluntary examination, May 17, 1875, she deposed that the child was begotten on or about the 15th of November, 1874.

The presiding justice instructed the jury among other things as follows:

"If you are satisfied from all the evidence in the case that he begot the child at any time, and you should find that it was not between the 25th and 30th, but prior to that time, then I say that you would not be confined to the time in the declaration. If you are satisfied from the evidence in the case that he actually begot the child, and that he begot it outside of the time between the 25th and 30th of November, then it would be your duty to say by your verdict he is guilty.

"There has been considerable said in relation to whether this complainant has ever had any sexual intercourse with any other person than this respondent; I instruct you that there is no evidence in this case that she has. She was inquired of in relation to several persons and asked if she had ever had any sexual intercourse with them. You heard her answers. I understood her to deny it in each instance with two exceptions. If she had said then she claimed the legal protection of not being obliged to criminate herself it would not be any evidence that she had sexual intercourse; that is a party's privilege; when upon the stand a party is not obliged to criminate himself in respect to any other than the issue before the court. She is before the court complaining that this respondent begot her child; and if inquired of whether she had sexual intercourse with any other person, that is not before the court, and if it was outside of the time when those persons could have begotten this child she would not be obliged to admit the fact; as a constitutional right she would not be obliged to

answer that question and it would not be evidence against her."

The verdict was guilty; and the defendant alleged exceptions.

*W. J. Copeland*, for the defendant.

*G. C. Yeaton*, for the complainant.

VIRGIN, J. The rule of practice is well established that a bill of exceptions will be overruled unless it contain a sufficient statement of the case to show that the ruling complained of was erroneous and prejudicial to the excepting party.

A report of the evidence is not made a part of the bill of exceptions, so we are confined to the instruction: "That there is no evidence in the case that the complainant ever had any sexual intercourse with any other person than the respondent; that she was inquired of in relation to several persons and denied it in each instance with two exceptions." Now whether the testimony in these two excepted instances was objected to and excluded because of the remoteness of the time to which it referred, and hence she did not have an opportunity to deny, the bill of exceptions fails to disclose. In proceedings of this nature, the character of the complainant for chastity is not in issue, and evidence that she had such intercourse with another man at a time so long previously that the child could not then have been begotten, would be irrelevant. *Parker* v. *Dudley*, 118 Mass. 602.

2. The issue to be passed upon by the jury in a case of this nature is, whether the child of which the complainant has been delivered was begotten by the respondent, and not on what particular time it was begotten. He was equally liable whether it was between November 25th and 30th, or on some other day about that time. *Beals* v. *Furbish*, 39 Maine, 469. The particulars of exact time and place are only material as bearing upon the credit of the complainant as a witness. *Bassett* v. *Abbott*, 4 Gray, 69. *Kennedy* v. *Shea*, 110 Mass. 152.

The testimony was conflicting. The jury saw and heard the witnesses. The jury believed the complainant and her witnesses. We cannot say they were wrong.

*Motion and Exceptions overruled.*

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

## STATE *vs.* CHARLES E. GORHAM.

York. Decided May 3, 1877.

*Intoxicating liquors.*

In the trial of an indictment for keeping a drinking-house and tippling-shop or for being a common seller of intoxicating liquors, the record of a former conviction for a single sale or upon a search and seizure complaint covering the same time charged in the indictment is competent evidence.

The construction to be given to such record is for the court; the force and effect and the inferences to be drawn from the facts established by the record are for the jury.

A requested instruction not based upon the evidence may be properly refused.

ON EXCEPTIONS.

INDICTMENT for keeping a drinking-house and tippling-shop from March 1, 1875, till the finding of the indictment, at the September term following; also an indictment for being a common seller of intoxicating liquors. Two cases covering the same time, supported by the same evidence and followed by the same verdict and exceptions, considered together.

To sustain the charge, the state offered in evidence the records of conviction of the defendant in three cases in this court for the September term, 1875, on complaints before the municipal court of Saco, where the defendant was adjudged guilty and appealed to this court at which he appeared and consented that the judgments of the court below be affirmed. One of these convictions was for illegally keeping intoxicating liquors, the two others were for single illegal sales, all within the time alleged in the indictment.

The presiding justice admitted the evidence subject to the defendant's objection.

The defendant requested the presiding justice to instruct the jury that a single sale of intoxicating liquor and allowing the same to be drank on the premises where sold, do not constitute the offense of keeping a drinking-house and tippling-shop. This instruction, the justice declined to give and said, I give you only the words of the statute.

The verdict was guilty; and the defendant alleged exceptions.

*R. P. Tapley*, for the defendant.

The evidence shows that, on the 31st day of May, A. D. 1875, intoxicating liquors were found upon the premises of the respondent intended for sale and were seized and carried away. These of course were not sold.

It further shows that upon the fifth day of July, 1875, the respondent sold one gill of intoxicating liquor to some person whose name was unknown to the complainant, and that on the 20th day of September, 1875, the respondent sold to W. M. C. Philips one glass of intoxicating liquor.

We submit that this evidence is incompetent to convict of the charge of keeping a drinking-house and tippling-shop; 1, Because it is no evidence that the liquors were drank upon the premises where sold or that they were sold in any vessel, building or boat; and 2, Because the presumption is that the whole offense committed by the act charged was set out in the complaints recited.

The statute provides that "if any person shall sell any intoxicating liquors in any building, vessel or boat in this state contrary to the provisions of law, and the same are there drank, he shall be deemed and held guilty of keeping a drinking-house and tippling-shop."

The offense is keeping a drinking-house and tippling-shop. The indictments which have been before this court and sustained in matter of form and substance have laid the offense with a *continuando*. This practice as well as the name of the offense suggests to every mind something more than a single sale of liquor and the same being drank upon the premises. Without this statute such an occurrence would never be held as keeping a tippling-shop. The idea of a single individual being guilty of tippling by a single act, in all his life, of drinking a glass of cider, wine, or indeed any intoxicating liquor is preposterous. No matter what the legislature calls it, it is not "tippling."

Words and phrases are to be construed according to the common meaning of the language. R. S., c. 1, § 4.

Whatever force may be attached to the docket entries, they only show two sales. One proceeding was for search and the others were sales. The record of former conviction was not within the

time named in the indictment. At the time of the trial in these cases, judgment had not been rendered in the cases put in evidence. Defaults had been entered and docket entries made. Since then the judgments have been extended as printed in this report. No sentence had been imposed or performed when the proceedings were introduced in evidence. Until sentence imposed the judgment of conviction has not taken place. That is the judgment of conviction. *Green* v. *Commonwealth*, 12 Allen, 155, 165. *Com.* v. *Richards*, 17 Pick. 295, 296.

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

I. Tippling-shop. The sufficiency of the evidence can only be considered on the question of a new trial. Exceptions or motion in arrest of judgment can only present the question of competency or admissibility. Any particular bit of testimony may be competent and admissible though by itself it would not warrant a conviction. The testimony reported tends to prove part of the charge, the selling of the liquor and the having liquor in a shop. I presume the county attorney proved by proper evidence the balance. The verdict shows that.

The ruling of the judge was right; the requested ruling was wrong. The statute says, "If any person shall sell any intoxicating liquors," &c. One glass is "any."

II. Common-seller. The sufficiency of the evidence is not the question. The admissibility of the evidence is. Evidence may be admissible which may be insufficient unless supported by other evidence. One fact may not be enough, while a chain of facts may. Each fact would be admissible as offered.

The objection that the records were incompetent, that they did not tend to prove the issue, must certainly be overruled. The defendant's pleading guilty twice to charges of selling liquor or having liquor for sale, certainly tends to prove him a common-seller. It is a step in that direction.

The objection that judgment of conviction had not been entered up cannot be taken here, for the case shows that judgment had been entered, sentence imposed and the fine paid. Counsel very likely is right in his statement, but that cannot change the case as before the court.

Further, judgment of conviction is not necessary. The confession, the default, the plea of guilty, is evidence that the defendant did have the liquor, and did sell the liquor. The government gets all it wants out of the plea or default, and does not care to show that the defendant was punished.

*R. P. Tapley*, in reply, admitted that it would have been better to have used the word "sufficient" or "insufficient" than the word competent. But taking the sentence together, it means the same. It was its competency to "sustain" the issue raised that was in question, not its admissibility. The exceptions state in one case that, "to sustain the charge the government offered in evidence the records in three several cases," &c.; in the other the phrase is "to sustain the issue raised."

These judgments had a certain legal effect. What that effect was, was a question for the court. If giving to these judgments all their legal effect they were insufficient to maintain the issue, there has been a mis-trial; and the only way to avoid giving the party a proper trial is to send the case off upon some verbal criticism upon the exceptions.

APPLETON, C. J. The defendant was indicted for keeping a drinking-house and tippling-shop and as a common seller.

The records of three judgments rendered against him, in all which he had pleaded guilty, had been sentenced and had paid the several fines and costs imposed upon him, were received in evidence. Two of the judgments were for single sales and the other upon a search and seizure complaint. These judgments were properly receivable in evidence.

The construction to be given them, if any doubt arose, was for the court. Their force and effect and the inferences to be drawn from the facts established by them were for the jury.

The counsel for the respondent requested the presiding judge to instruct the jury that a single sale of intoxicating liquor, and allowing the same to be drank upon the premises where sold, do not constitute the offense of keeping a drinking-house and tippling-shop.

This instruction the court declined to give and rightly. The

defendant had pleaded guilty to two complaints of single sales and one for keeping liquors intended for sale in his inn in violation of law. The instruction requested was not based upon the evidence. It was purely hypothetical and not applicable to the evidence before the jury. It was properly refused for that cause.

Further, the statute was given as the rule of law and that embraced all that was required for the jury.

Whether there was other evidence than the records introduced is immaterial, as the questions presented relate to rulings given at the trial, not to the sufficiency of proof. *Exceptions overruled.*

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

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ELISHA G. FERGUSON *vs.* AUGUSTUS W. BROOKS *et ux.*

York. Decided August 4, 1877.

*Husband and wife. Married woman.*

Where an action is against husband and wife for a tort committed by the wife, the liability of the husband necessarily follows from the existence of the marital relation, and when, by the pleadings, this is not disputed, a verdict that the wife is guilty disposes of the whole issue raised by a joint plea of not guilty.

The presumption, that in case of tort committed by the wife in the presence of the husband the wife acts under coercion, is not conclusive; and when it is repelled, the wife is responsible for wrongs done by her in his company.

The ancient doctrine of the common law, that a married woman cannot be a trespasser by prior or subsequent assent, is so far modified by our statutes giving them the power to manage and control their own property, that as to all acts done in their name and behalf for the enforcement of their supposed rights in such property, they are responsible, like other parties not under disability, for what they authorize or ratify.

ON EXCEPTIONS AND MOTION.

TRESPASS against husband and wife, that the said Mary J. Brooks, on the fifteenth day of November, 1872, at said Elliot, with force and arms took and carried away the two cows of the plaintiff then and there found, and being of great value, to wit, of the value of seventy-five dollars each, and for a long time, to wit, for the space of five days, detained the said cows, without any reasonably suit-

able care, shelter and food, and drove the same violently for a great distance, to wit, for the distance of five miles, whereby they were greatly damaged, to wit, to the sum of seventy-five dollars.

Also for that the said Mary J. Brooks, on the fifteenth day of November, A. D. 1872, at said Eliot, by herself, her servants, agents and employees, with force and arms, took and carried away and unlawfully impounded the two cows of the plaintiff, of great value, to wit, of the value of one hundred and fifty dollars, and for the space of five days unlawfully detained said cows, without any sufficient or proper shelter, care, attendance or food, and violently drove said cows for the distance of five miles, and prevented the said cows from coming to the possession or care of the plaintiff for said five days, whereby said cows were greatly injured, &c., &c. To the damage of the said plaintiff, as he says, the sum of two hundred dollars.

Plea. And now the said defendants come and defend, &c., when, &c., and say they are not guilty in manner and form as the plaintiff has declared against them, and of this they put themselves upon the country. By Burbank & Derby, their attorneys.

And the plaintiff doth the like. By G. C. Yeaton, his attorney.

The evidence was in substance as follows:

It was admitted that the wife owned the place.

The plaintiff testified that he saw both defendants driving the cows into the barn, Friday, and that he next saw the cattle Saturday evening, a mile away at the town pound.

Levi A. Shapleigh testified that he was pound keeper, that he gave no bond and had lost his record, that Mr. Webber turned the cattle in, that witness locked the pound and kept the key; that he received with them a written paper signed by the two defendants, giving a description of the animals, and stating they were taken from the inclosure of Augustus W. Brooks and Mary Jane Brooks; that Sunday night they were still there unfed; that they got out, he did not know how; he saw them out Monday.

Mary J. Brooks testified that she had nothing to do with the cattle, that she was present when her husband drove them into the barn, but did not assist; did not sign the certificate nor authorize its signing, tried to prevent their being impounded;

advised her husband to drive them home, instead of to the pound, that in what she did, she was not in any way coerced by her husband.

Augustus W. Brooks testified that he drove the cows to pound against the wishes of his wife, and that he interlined her name without her consent.

The presiding justice instructed the jury in part, as follows: There is another mode by which an agent's act, done for a party without any previous authority, may be adopted by the principal and thus do what the law calls ratify it. For instance, a person does some act for your benefit, and for you in your behalf; he comes and tells you what he has done, and you from that moment may adopt it and ratify it, and say you did right and I will pay you, or not, (just as you see fit) at any rate you may adopt his act as your act, and then it would govern you, and you would be responsible, and liable therefor just as much as if you had in the first instance authorized him to go and do that act. But before there can be a ratification of that kind the act itself, done by the agent, must have been done for you when he did it.

Verdict. The jury find that the defendant, Mary J. Brooks, is guilty in manner and form as the plaintiff has declared against her, and assess damages for the plaintiff in the sum of thirty dollars.

To the foregoing instruction, the defendants alleged exceptions. They also filed a motion to set aside the verdict as against law and evidence.

*H. H. Burbank & J. S. Derby*, for the defendants.

First, as to the exceptions.

The ruling complained of is, substantially, that a married woman may adopt and ratify the prior, tortious act of the husband so as to render her liable in trespass.

I. The position of the *feme-covert* as to torts is defined and governed by the common law. *Ballard* v. *Russell*, 33 Maine, 196. *Laughlin* v. *Eaton*, 54 Maine, 156.

At common law the husband is liable for torts of the wife; if committed in his company or by his order he is alone liable; if

not they are jointly liable. *Ball* v. *Bennett*, 21 Ind. 427. *Brazil* v. *Moran*, 8 Minn. 236. *Marshall* v. *Oakes*, 51 Maine, 308. *State* v. *Cleaves*, 59 Maine, 298. *Commonwealth* v. *Eagan*, 103 Mass. 71. *Commonwealth* v. *Burk*, 11 Gray, 437. *Carleton* v. *Haywood*, 49 N. H. 314. *Park* v. *Hopkins*, 2 Bailey, 411. *Kowing* v. *Manly*, 49 N. Y. 192. *Commonwealth* v. *Munsey*, 112 Mass. 287.

*A fortiori*, she cannot be held liable for torts committed by him in her absence "without any previous authority."

She cannot even be liable for the husband's fraud, committed in an exchange of her property, and of which she reaps the benefit. *Birdseye* v. *Flint*, 3 Barb. 500. 2 Hilliard on Torts, 513.

II. At common law a married woman "cannot be a trespasser by prior or subsequent assent." 1 Chitty's Pleading, 12th Am. Ed., 76, 80. Bacon's Ab., Title, Infancy, H. Co. Lit., 180, b, note (4); 357, a.

Second, as to the motion.

This action is trespass for unlawfully impounding two cows. The plaintiff declares against Augustus and his wife Mary Jane Brooks, alleging trespass by her; and the verdict against the latter only.

I. The verdict was against the law of the case.

The verdict should respond to the issue presented, otherwise it is bad. This being an action for the tort of the wife, and necessarily brought against husband and wife, the verdict must abide by that necessity. *Brown* v. *Chase*, 4 Mass. 436. *Commonwealth* v. *Wood*, 12 Mass. 313. *Whitmore* v. *Delano*, 6 N. H. 543.

II. The verdict was manifestly against the evidence and the weight of evidence in the case.

Mary Jane Brooks committed no act of trespass. Even the evidence of plaintiff, carefully analyzed and compared, shows no such act. Her evidence proves the negative.

*G. C. Yeaton*, for the plaintiff, replied orally.

BARROWS, J. The defendants contend that the verdict is against law, fatally defective, and that no judgment can be rendered upon

it because, although the jury have found that the wife, Mary J. Brooks, is guilty of the trespass alleged, they have not found the husband, Augustus W. Brooks, guilty also.

But the plaintiff did not allege the commission of any trespass by Augustus W. Brooks. The suit is not for a tort alleged to have been committed jointly by the husband and wife, but it is charged in the first count as committed by the wife, and in the second, by her and her servants, agents and employees.

Where a suit is thus brought against husband and wife for a tort committed by the wife, the liability of the husband necessarily follows from the existence of the marital relation, and a verdict that the wife is guilty disposes of the whole issue raised by a joint plea of not guilty.

The only question open for the jury to pass upon under such a plea is whether the wife committed the trespass. If she did, the law makes the husband responsible with her; and the jury have no occasion to find him guilty of a wrong which he did not commit, although he is bound to answer for it.

Where, as here, the writ describes the defendants as husband and wife, and the cause of action alleged is a tort of the wife, such a relation between the parties defendant as will make the man responsible for the torts of the woman must be regarded as admitted by the pleadings unless specially denied. It is not an open question under the general issue. In an ancient case, the plea of "Gray and Norton sued by the names of Gray and wife at suit of Kether," as given in Wentworth's Pleadings, vol. 1, p. 6, is a plea in abatement; while a denial of the marriage of parties joining as plaintiffs in that alleged relation seems to be pleadable in bar with a protestation that the defendant's wife is not guilty of the trespass charged. Went. Plead. vol. 1, p. 42.

In Oliver's edition of Story's Pleadings, p. 96, in the notes to the plea of no marriage, (which, as in Wentworth, is given among the pleas in abatement) while it is doubted whether in ordinary personal actions the plea is good, it is said that "if persons are sued as baron and feme who are not so *de facto* they may plead not covert."

In a case given in the Instructor Clericalis, vol. 6, p. 649, where

to a count against baron and feme for alleged trespass of the wife, the defendants pleaded not guilty as to part and a justification as to the remainder, judgment was given for the plaintiff because, among other things, the plea was bad for the reason that "by the declaration the wife only is charged to be the trespasser, and yet to all the trespasses, *prœter*, &c. they have both pleaded *quod ipsi non sunt culpabiles*."

Hence we see that the proper general issue in a suit like this is that the wife is not guilty, for she only is charged with the commission of the trespass; and if the wife is guilty, the husband is liable though not in any manner participating in the wrong-doing. This is so even though he is permanently living apart from the wife if the relation of husband and wife continues and it does not appear that the wife was living in adultery. *Head* v. *Briscoe*, 5 Car. & P. 484, E. C. L. R. vol. 24, p. 667.

Yet the husband must join in making this plea that the wife is not guilty because of the disability of the wife to plead alone. In *Tampiam* v. *Newsam et ux.* Yelv. 210, which was assumpsit, while it was held that husband and wife ought to join in the plea, it is said that "the record ought to be *quam prædicti Jo. et Bridgetta dicunt quod ipsa Bridgetta non assumpsit;* and further, that in a case against husband and wife for words spoken by the wife where the husband did not join in the plea, but the wife only pleaded not guilty, the plaintiff though he had a verdict could not have judgment but a repleader was awarded.

This is not a suit against husband and wife for a joint trespass, like *Vine* v. *Saunders et ux.* 4 Bing. N. C. 96, E. C. L. R. vol. 33, 615. There is no similarity between the case at bar and *Thacher* v. *Jones*, 31 Maine, 528.

But even in cases where husband and wife are sued for their joint act, a verdict of not guilty as to the husband will not relieve him from a judgment against him if the wife is found guilty. It is true that in one ancient case, *Drury* v. *Dennis*, Yelv. 106, it was held that, if in trespass for a tort committed by husband and wife the jury find the wife guilty, and give no verdict as to the husband or find him not guilty no judgment can be rendered. But the case never was followed and was very soon directly overruled in numerous cases.

An anonymous case is thus reported in Vent. 93. "In an action of battery against baron and feme the jury found the feme only guilty and not the baron. It was moved in arrest of judgment that this verdict was against the plaintiff; for he ought in this case to have joined the baron only for conformity, and he declaring of a battery by both, the baron being acquitted, he hath failed of his action, and so is Yelverton 106, in *Drury* v. *Dennis* case. But here the court gave judgment for the plaintiff and said that that in Yelverton was a strange opinion."

Judge Metcalf in a note to the case of *Drury & Dennis's*, in his edition of Yelverton remarks that, "when husband and wife are sued for a joint tort, the jury may find one guilty and the other not guilty and the verdict will be good as in other cases of several trespasses. But judgment is rendered against both if the wife only is found guilty, as in cases where both are sued for a tort committed by her alone; and both may be taken in execution."

And he cites *Hales* v. *White*, Cro. Jac. 203. *Mayo* v. *Cogshill*, Cro. Car. 406, and numerous other ancient cases which fully support the doctrine of his note.

The result of our examination in the case at bar is that as the coverture at the time of the alleged trespass was not in controversy under the pleadings, the verdict rendered that the defendant, Mary J. Brooks, is guilty, if sustained is sufficient to entitle the plaintiff to judgment against the husband as well as the wife.

If existing statutes have so changed the rule of the common law touching the interest of the husband in the property of the wife that there seems to be a hardship in holding him responsible for her torts, it is for the legislature to furnish such remedy as they think appropriate.

This has been done in Massachusetts by Stat. of 1871, c. 312.

Should the verdict be set aside as against the evidence?

The field into which the plaintiff's cows had strayed through a gap in that part of the fence which belonged to the defendants to repair, was owned by the wife; and the testimony on which the plaintiff relies tends to show that she and her husband together drove them into her barn where they were detained nearly twenty-four hours, the husband being a part of the time absent from

home, and that they were thence driven by the husband and a field-driver, and committed to the custody of a relative of the defendants, (who was acting as pound-keeper but had given no bond as such) by whom they were further detained to their serious injury.

There is testimony tending to show that the impounding certificate was subscribed with the name of the wife as well as that of the husband. All the acts shown to have been done by the wife appear to have been done in the presence, and to say the least of it, with the aid and countenance of the husband. She, herself, while positively denying that she assisted in driving the cows into her barn, or that she subscribed or authorized the subscription of her name to the impounding certificate, testifies that in whatever she did, she was not in any way coerced by her husband.

Aside from this, the case is barren of testimony to do away with the legal presumption that a tort committed by the wife in the presence of her husband is to be regarded as done by her under coercion and in obedience to his commands.

To find her guilty the jury must have accepted her disavowal of coercion while they rejected her denial of participation in or ratification of the acts of her husband in the premises. As presented by the report of the evidence the case approaches very closely the conditions which would require us to sustain the motion to set aside the verdict as against evidence. But it may be that the jury drew correct inferences from the demeanor of the witnesses whom they saw and heard; and, upon the whole, we are not entirely satisfied that justice would be promoted by sending the case to a new trial. The parties must abide by the conclusion to which the jury came unless the exceptions ought to be sustained.

There seems to be no question that the law respecting the wife's liability for acts done in the presence of her husband was correctly given, as settled in this state in the cases of *Marshall* v. *Oakes*, 51 Maine, 308, and *State* v. *Cleaves*, 59 Maine, 298.

The defendants complain only of an instruction given apparently with reference to a supposed ratification by the wife of the act of the husband in subscribing her name to the impounding certificate. They invoke the ancient doctrine of the common law

as laid down in Chitty's Pleadings, that a married woman cannot be a trespasser by prior or subsequent assent.

That this doctrine is still properly applicable to numerous actions of tort brought against married women, we do not doubt. We should be inclined to say, for example, that a wife ought not to be held liable for the tort of her husband or any third party, in which she does not participate as an actor, by reason of prior or subsequent assent, consent, advice or authority from her, in a case where she is not in any contingency to reap a profit, or her separate estate a benefit.

No change wrought by statute in her capacity to hold, control, manage, or dispose of her own property seems to require a change in the doctrine of the common law to such an extent as that. Just so far as the statute modifying the common law compels a change in its doctrines we go, and no further.

And we think that a necessary consequence of the statute-enlargement of her power to manage and control her property is a corresponding increase of her responsibility for all acts and contracts relating thereto or growing out of her management and control thereof.

Where she does act independently of her husband, and is subject to no coercion from him, but makes him her instrument and agent in enforcing some supposed right, we see no reason for regarding her as incapable of authorizing or ratifying any act done in her name and behalf, or for shielding her from responsibility therefor. The instruction complained of, viewed in the light most favorable to the excepting party, makes her *quoad hoc, sui juris;* and in this we think there was no error.

*Motion and exceptions overruled.*

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

## Inhabitants of York *vs.* Edmund N. Goodwin.

York. Decided August 4, 1877.

*Tax.*

"In addition to the methods now provided by law for the collection of taxes legally assessed in towns against the inhabitants thereof, or parties liable to taxation therein, an action of debt may be commenced and maintained in the name of the inhabitants of any town to which a tax is due and unpaid, against the party liable to such tax; provided, however, that no defendant in any such action shall be liable to costs of suit, or any part thereof, unless it shall appear by the declaration in the writ and proof, that payment of said tax had been duly demanded prior to the commencement of such suit." Pub. Laws, 1874, c. 232.

*Held*, 1. That as a remedy this is a retroactive act.

2. That the "collector" is the proper person to make the demand.

3. That if an action be brought under this act, it must be regarded as a waiver of procedure by arrest or distraint; that resort cannot be had to both processes at the same time, and that this is an additional, not a concurrent remedy.

A form of declaration held good on demurrer. See statement of the case.

On exceptions.

Debt: "For that the said Edmund N. Goodwin, on the first day of April, A. D. 1874, at said York, was an inhabitant of said town of York, and liable to taxation therein, and then and there was the owner and in possession of real estate lying within said town, and then and there was the owner of personal property; and then and there Samuel P. Young, Almon H. Merrow and Joseph H. Moody were the duly elected and legally qualified assessors of the said town of York; and the said assessors did duly and legally assess upon the poll of the defendant, and upon the real estate of the defendant, and upon the personal property of the defendant, as his proportion of the town taxes, and the due proportion of the state and county taxes allotted to said town of York, for the year then current, the following sums, to wit, upon his poll, the sum of three dollars; upon his real estate, lying within said town of York, the sum of seventy-three dollars and ninety-eight cents, and upon his personal property the sum of five dollars and twenty-two cents, in all the sum of eighty-two dollars and twenty cents; and the said assessors thereafterwards, to wit, on the twen-

ty-second day of August, A. D. 1874, did make a perfect list thereof under their hands, and commit the same to Joseph Bragdon, junior, of that name, who was then and there duly elected and qualified as collector of the said town, with a warrant in due form of law, of that date, under the hands of the said assessors. And plaintiffs further aver that the payment of the said tax has been duly demanded of the said defendant, by the said collector, prior to the commencement of this suit, whereby and by reason of the statute in such case made and provided, an action hath accrued to the plaintiffs, to have and recover of the said defendant the said sum of eighty-two dollars twenty cents, with interest thereon. Yet the said defendant, though requested has not paid the same," &c.

A general demurrer was filed to the writ and declaration by the defendant, joined by the plaintiff and overruled by the presiding justice. The defendant alleged exceptions.

*R. P. Tapley*, for the defendant, to the point that in order for an act to have a retroactive operation even as a remedy the intent must be clear, cited *Hastings* v. *Lane*, 15 Maine, 134; *Whitman* v. *Hapgood*, 10 Mass. 437; *Given* v. *Marr*, 27 Maine, 212; *Bryant* v. *Merrill*, 55 Maine, 515; *Prince* v. *U. States*, 2 Gall. 204; *Harvey* v. *Tyler*, 2 Wall. 328.

*G. C. Yeaton*, for the plaintiffs.

APPLETON, C. J. This is an action of debt brought to recover a tax of the defendant under and by virtue of the provisions of the act of 1874, c. 232.

The declaration contains the following averments, to wit: (1.) the defendant was an inhabitant of, and liable to taxation in the town of York; (2.) the due election and legal qualification of certain assessors; (3.) the legal assessment by them of the defendant's due proportion of the entire tax for the then current year; (4.) the listing and commitment of the list to a duly elected and qualified collector; (5.) payment of said tax duly demanded of said defendant by the said collector prior to the commencement of this suit; (6.) the non-payment by the defendant of the same.

The defendant demurred generally to the writ and in his argument relies upon the following grounds to sustain the demurrer.

(1.) It is objected that the tax was assessed before the statute became operative and therefore that it does not apply. But the act only gives an additional remedy for the collection of taxes. It interferes with no vested right. It only furnishes another mode of compelling the defendant to do what without compulsion it was his duty to do.

(2.) As it appears that a warrant was in the hands of the collector by whom the demand was made, it is urged that this suit cannot be maintained. The statute requires a demand to entitle the plaintiffs to recover their costs. But by whom is the demand to be made? By one, who in case of compliance with the demand, is authorized to receive the tax and to discharge the same. The collector is the person upon whom the duty of making a demand devolves.

It is said that these processes are inconsistent, and that having once placed a warrant in the hands of the collector, the plaintiffs are thereby precluded from maintaining this action. By the terms of the act, this action is "in addition to the methods now provided by law for the collection of taxes legally assessed." It is said that resort may be had to both processes at the same time. It does not appear that more has been done by the collector than to make the requisite demand. Had the demand been complied with, it would have discharged the tax as well as have been a bar to any suit for its recovery. Indeed, if a suit be brought it must be regarded as a waiver of procedure by arrest or distraint, for resort cannot be had to both processes at the same time. This is an additional not a concurrent remedy. The man who pays his taxes is in no peril.

*Exceptions overruled.*
*Declaration adjudged good.*

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

## Boston & Maine Railroad *vs.* Lewis Durgin.

York. Decided October 29, 1877.

*Forcible entry and detainer.*

The stringers of Cataract bridge rested, one end on an abutment in the city of Saco, the other on a pier in which the plaintiffs' railroad and the city had each an interest but which the plaintiffs were bound to maintain. To these stringers, beams were fastened and projected at right angles beyond the sides of the bridge. On these beams, outside of the limits of the highway and over the east branch of the Saco river and over land in which the plaintiffs had no interest, the defendant built, by permission of the city, a shop. The city made repairs upon Cataract bridge before and after the erection of the shop. *Held*, that the railroad could not maintain the process of forcible entry and detainer against the defendant for a part of their bridge.

On Report.

Forcible entry and detainer: "For that the defendant at Saco, on the twenty-ninth day of August, A. D. 1874, having before that time had lawful and peaceable entry into the lands and tenements of the plaintiffs, situate in said Saco, to wit: a portion of the bridge of the plaintiffs situate near the street in said Saco, known as Main street, and near the station of the plaintiffs' railroad in said Saco, and whose estate in the premises was determined on the twenty-eighth day of August, A. D. 1874, then did and still does forcibly and unlawfully refuse to quit the same; although the plaintiffs aver that they gave notice in writing to said Lewis Durgin, thirty days before the twenty-eighth day of August aforesaid, to terminate his estate in the premises. To the damage," etc.

The defendant pleaded not guilty with a brief statement: "That he has never disseized the plaintiffs of the property described in their writ and declaration; nor has he ever been or become a tenant of the plaintiffs; nor is he liable to the process of forcible entry and detainer, at the instance of these plaintiffs, to recover the property described in their declaration; that 'the portion of the bridge' described in the plaintiffs' declaration is not real estate, nor 'a building erected on the land of a third party,' within the meaning and intent of the Revised Statutes of Maine, chapter 94, and so this process is not maintainable therefor.

"That the premises mentioned in the complainants' writ and declaration are not the premises, lands or tenements of the complainants.

"That the respondent owns the building occupied by him, adjoining and attached to the bridge mentioned in the writ and declaration, and has the right (as have the public) generally, to pass and repass over said bridge, to and from said building and over said bridge, and claims no right to occupy any other premises than said building, with the use of the bridge to sustain and reach the same; and hold the said land over which said building hangs, under the owner, the Saco Water Power Company, by its permission and lease.

"That said building was originally attached to said bridge with the consent of all interested therein, indicated by vote of the city of Saco by its officers.

"That before the approval of the act approved February 17th, 1871, being chapter 630 of the private and special laws of 1871, this respondent had a building occupied by him for his business, connected with said Main street bridge, in Saco; there by lawful authority; that in the construction of the extension of the Boston and Maine Railroad it became necessary or desirable to remove said building; that in consideration of its removal and destruction, and of the respondent's forbearing to claim damages therefor, the said corporation (by its agents) agreed to aid in and facilitate the erection of the present building where it now stands, and to allow its continuance there; and the city of Saco, by action of the board of aldermen of said city, having charge of its streets and bridges, assented thereto; and this respondent has ever since occupied the same independently of said corporation and not as tenant under it."

The action originally brought before the municipal court of the city of Saco, was entered here under R. S. c. 94, § 6.

At the trial, the plaintiffs put in a deed from Laconia Company and Pepperell Manufacturing Company, to them dated June 10, 1874, in which in consideration of $3092.04, the grantors released and quitclaimed to them:

"The right to maintain forever the following piers and abutments

erected by said railroad on the line of their road in Biddeford and Saco aforesaid, so far as the same may be upon the lands of said grantors, viz: The pier upon the western bank of Jordan's creek, so called, and the abutment on the east side of the same creek; the abutment on the west bank of the western branch of the Saco river, and the pier in the middle of the same branch of the river; the pier in the middle of the east branch of the river, and the arch pier on the east bank of the same branch, the pier of six feet square near the north corner of said company's grist mill, and the pier of the same dimensions on the north side of said railroad, opposite the last pier, so far as the same may be on the land of the grantors; the next pier east, thirty-five feet long and seven feet wide at the base; the abutment next east of the last pier, adjoining Front street, in Saco, with its embankment covering an area measuring west thirty-eight feet on the north side of the embankment, and seventy-two feet two inches on the south side of the same embankment, with a breadth of thirty-five feet, four inches at the base of the same; with the land under all of said piers, embankments and abutments; together with the right to maintain forever the several bridges connecting said piers and abutments over said Jordan's creek, said branches of Saco river and over the land of said grantors in Saco, hereby releasing said Boston and Maine railroad from all damages sustained by the location, construction and operating of said railroad through Biddeford and Saco. And said grantees expressly agree with said grantors to keep said piers, abutments and bridges in such good condition that no injury from them may occur to said grantors. To have and to hold," &c.

Arthur B. Haines, called by the defendant, testified that he oversaw the building of the cataract bridge; there are about fourteen sticks of southern pine timber for stringers. One end of the stringers rests upon the eastern abutment and the other on the centre pier in the middle of the river. These stringers are covered with plank. The same pier in the middle of the river supports both the railroad and the wooden bridge. The iron bridge has nothing to do with the eastern abutment. The wooden stringers come right up near to the iron stringers and the planking

comes over so as to make one smooth surface. The iron and wooden stringers are not connected. Each bridge has separate supports independent of each other, nothing to do with each other as to the support of the stringers. All the stringers upon which the building rests, rest upon the centre pier and the east abutment.

Upon the foregoing and other facts appearing in the opinion, the case was reported to the full court for such order as upon the law and the facts they deem proper.

*G. C. Yeaton*, for the plaintiffs.

*H. H. Burbank*, for the defendant.

APPLETON, C. J. This is a complaint for forcible entry and detainer of "a portion of the bridge of the plaintiffs."

The premises occupied by the defendant consist of a small building owned by the defendant, attached by stringers extending laterally from the bridge-stringers and clasped and bolted thereto, to the westerly side of the bridge over Saco river, in the city of Saco, by means of which the plaintiffs' railroad crosses the river, and intersects Main street, crossing both by means of one bridge with its supports constructed partly of wood and of iron and the whole covered with co ntinuous wooden planking. This bridge was erected in 1872 by the joint co-operation of the railroad and the city, each furnishing a portion of the material and the railroad all the labor. The defendant erected this building in pursuance of a license from the city of Saco, and outside the limits of the street. The bridge to which the defendant's building is attached, was repaired by the city of Saco, both before and after the defendant's building was erected.

To entitle the plaintiffs to recover, they must bring their case within the provisions of R. S., c. 94, §§ 1 and 2.

The defendant claims no rights as a disseizor, nor is he one. He is not a "tenant holding under a written lease or contract," nor is he a "person holding under such tenant." Neither is he a "tenant at will" of the complainants. The complaint cannot be sustained under § 1.

Nor can the complaint be brought within the last clause of § 2 by which the preceding provisions of § 1 are made to "apply to

tenancies of buildings erected on land of a third party." The building is attached to a bridge under which the water is flowing. Besides, the complainants have no interest in or ownership of the building. The purpose of the legislature by the last clause of § 2, was to enable the owner of a building erected on the land of a third person to recover the possession of the same from a tenant who had forfeited his rights and after due notice had refused to quit. The defendant was never a tenant of the complainants.

Indeed, it is not readily perceived what rights the complainants have to interfere. The deed, under which they claim, gives them certain piers, embankments and abutments, "with the land under all of said piers, embankments and abutments," and nothing more. It excludes the land which the defendant's building over-hangs. Nor have they any interest in or title to the building for which they seek to recover possession.

The complainants, owning neither the building which overhangs the Saco river nor the bed of the river which is overhung thereby, cannot maintain this process to recover possession of a building to which they have no title whatsoever.

*Judgment for defendant with costs.*

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

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DAVID TUXBURY, appellant from a decree of the judge of probate.

York. Decided December 17, 1877.

*Executors and administrators.*

A surety upon a probate bond cannot sustain an appeal from a decree of the judge of probate settling the account of his principal; or upon a petition requiring such principal to charge himself in account with assets alleged to have come to his hands or interest thereon.

Such appeal, where one is to be made, must be taken in the name of the accounting principal, who is the person directly affected by the decree. *Woodbury* v. *Hammond*, 54 Maine, 332, affirmed.

The re-enactment of a statute after a judicial construction of its meaning, is to be regarded as a legislative adoption of the statute as thus construed.

ON REPORT.

The case was made up at the May Term, S. J. C., 1877, and thus stated:

"Samuel Whitten, of Saco, in said county, died testate, seized of real and personal estate. Bradbury Seavey was appointed administrator, with will annexed, April 7, 1868, and gave bond in usual form, with Lucinda Whitten, Charles Hill and David Tuxbury as sureties. Penal sum, $30,000. Seavey settled his first account December 8, 1868, leaving apparently $10,625.19 in his hands.

"He filed his second account in October, 1874, and notice thereon was duly issued and proved. By this account there would appear to be something over $7,600 balance in his hands at that time.

"August 19, 1876, suit was commenced in the name of the judge of probate, by a party claiming to be interested, upon the administrator's bond, and is now pending. On August 19, 1876, the real estate of Tuxbury was attached upon the writ in that suit, and upon August 23, 1876, a further attachment of his personal property was made on the writ. At the time of the commencement of the suit, Hill and Lucinda Whitten had deceased, Hill being insolvent. Service in the suit is made only upon Tuxbury, Seavey being then a resident of the state of Florida and for more than two years previous.

"Upon the first Tuesday of September, 1876, a person claiming to be interested in the estate of the testator, petitioned the judge of probate to order the said administrator to charge himself with the sum of $4000 as interest, profit and income derived from said estate, and to require an immediate settlement of his second account, and also filed a petition for the removal of the administrator.

"Upon notice the administrator came in by attorney, and verified his account by proper vouchers, and also appeared to show cause why he should not be charged with the amount of $4000, as prayed for in said petition.

"At the December term, 1876, of said court, the judge of probate ordered and decreed as follows:

"'State of Maine, York, ss. Probate Court, December Term, A. D. 1876. On the foregoing petition, the same having been duly considered, it is decreed that said Bradbury Seavey charge

himself with interest on the balance of his first account, deducting subsequent payments, the amount of said interest being $3207.66.

Nathaniel Hobbs, Judge.'

"December 18, 1876, Tuxbury, claiming to be a person interested and aggrieved, appealed from said order and decree, and upon the same day duly filed his reasons of appeal and bond as required by law. Thereupon his appeal was allowed and proceedings staid.

"At this term of the court, after seasonable and due service of the reasons of appeal, Tuxbury entered his appeal.

"For the purposes of this hearing, it is agreed that Seavey is insolvent and pecuniarily worthless, and was at the time of the commencement of the suit upon said bond, and for a long time before.

"Either party may have any of the documents referred to copied as a part of the case.

"The case is reported for the decision of the law court, upon the foregoing evidence or so much thereof as is admissible. The court are to determine whether the appeal shall stand or be dismissed."

*R. P. Tapley*, for the appellant, under various positions, cited *Deering* v. *Adams*, 34 Maine, 41; *Pierce* v. *Irish*, 31 Maine, 254; *Thurlough* v. *Chick*, 59 Maine, 395; *Farrar* v. *Parker*, 3 Allen, 556; *Boynton* v. *Dyer*, 18 Pick. 1; *Smith* v. *Sherman*, 4 Cush. 408, 409; *Paine* v. *Goodwin*, 56 Maine, 411. He endeavored to discriminate this case from *Woodbury* v. *Hammond*, 54 Maine, 332. The surety in that case claimed an appeal from the allowance of an account which his principal had filed and was putting himself at issue with his principal; and there was no suit pending and no attachment of the surety's property in that case.

*H. Fairfield*, for the appellees, relied upon *Woodbury* v. *Hammond*, *supra*, as decisive.

Barrows, J. The surety who has guarantied his principal's fidelity and accuracy to the probate court and thereby procured the trust to be committed to him, must, out of proper regard for

the rights of other persons interested, be content to let that principal represent him in that forum in the adjustment of the trust accounts while he is capable of doing it.

The principal, and he alone, can properly be said to be both directly and injuriously affected by an erroneous decree requiring him to account for more than he admits to be and more than there is in his hands. It is the amount of the principal's liability which is ascertained by the decree, and he is primarily and ultimately responsible for that amount unless he appeals from the decree. The surety can be holden only by and through an action at common law upon the bond, to which he would have a full and complete defense if his principal collusively suffered a surcharge in his accounts for the benefit of the parties interested in the estate, to the detriment of himself and his sureties. *Baylies, Judge*, v. *Davis*, 1 Pick. 206.

But it was early seen that the business of probate courts would be seriously and uselessly embarrassed unless it was held that those only who had a direct as well as a pecuniary interest in the subject of the decree were entitled to appeal. See *Downing* v. *Porter*, 9 Mass. 386, where one of the heirs of a residuary legatee was denied the right to appeal because the claim should have been made through the administrator of the legatee, representing all the heirs. In like manner as the administrator in that case represented the heirs entitled to the fund through his intervention, the accounting administrator here must represent his sureties, because he is the one directly affected by the decree, and they only through him and by means of a suit at common law. All their substantial rights are guarded. If the administrator here has no cause to appeal, this appellant has none. If, on the contrary, the administrator or his sureties supposed he had good reason to question the correctness of this decree it would have been as easy for this appellant to have enabled him to prosecute the appeal as it was to undertake its prosecution himself. If the administrator in collusion with the parties interested in the estate refuses to permit the prosecution of an appeal in his name in a case where there is an erroneous decree, it would be available to the sureties, as we have already seen in defense of the suit on the bond by which

their liability is to be established. On the other hand, if he and the sureties are colluding to furnish them a defense on the bond, both he and they must abide the consequences. But fraudulent collusions on either side are not to be presumed. We refer to the matter only to make sure that the rights of all concerned can be well guarded, while the rule that those only shall be regarded as aggrieved and shall have the right of appeal whom the decree directly affects is adhered to.

This discussion may be deemed superfluous for this court, upon full consideration, decided in *Woodbury* v. *Hammond*, 54 Maine, 332, 342, that a surety upon a probate bond could not be considered as aggrieved by a decree respecting the settlement of his principal's account, because, though pecuniarily, he was not directly interested in the decree. This decision was made in 1866. Five years afterwards the statute, the construction of which was thus settled, went into the new revision unchanged in this particular. This is to be regarded as a legislative adoption of the construction thus given. *Cota* v. *Ross*, 66 Maine, 161, 165, and cases there cited.

We find nothing in the case of *Farrar* v. *Parker*, 3 Allen, 556, which we deem sufficient cause for reversing our own decision thus adopted by the legislature. No good reason is shown there nor here why the appeal should not be taken in the name of the accountant who is directly affected by the decree. The opinion there seems to proceed upon the idea that the surety is more directly affected by the decree in cases of insolvency of the principal than where the principal has the property and means to protect him. But if he is not directly affected by a decree against a solvent principal, he does not become so, because the chances of his being indirectly affected by a decree against an insolvent one are greater. There is no distinction in principle between the case at bar and *Woodbury* v. *Hammond*, 54 Maine, 332; and that case must be regarded as decisive of this.

A single additional reason why the appeal in a case of this sort should be in the name of the accounting party may be referred to. It is with him that the chief knowledge of the facts bearing upon the question of liability ordinarily resides. He cannot be

permitted to screen himself and his sureties by shutting his mouth and withholding the necessary information. Where, as here, he has taken himself out of the jurisdiction of the court, if one who bound himself for his fidelity to his trust can sustain an appeal from the probate court in his own name, it might be difficult for the opposite party to furnish the proof which it was the duty of the accounting principal to afford, and which under R. S. c. 82, § 85. he might be compelled to afford upon an appeal taken as it should be in his own name.

*Appeal dismissed. Costs for respondents.*

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

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FIRST NATIONAL BANK OF BIDDEFORD *vs.* SIMEON P. MCKENNEY.

SAME *vs.* JOHN H. BURNHAM.

York. Decided December 19, 1877.

*Promissory notes.*

It is proper to declare upon a joint and several note signed by the defendant as surety for an individual or a co-partnership, as the note of the defendant, in a several action against him, without setting out the joint contract also, and without taking notice of the suretyship, or co-partnership between the principals.

After the general issue pleaded and joined it was competent for the presiding justice in his discretion to allow the plaintiff leave to amend without terms by describing the note as a joint and several note, and averring that the defendant promised the plaintiff by the name of the First National Bank.

The cases find that the bank became a party to the statute assignments made by the principals for the benefit of their creditors, at the request of the defendants, and under a stipulation that the bank should not be held thereby to release any right as against the defendants, the defendants at the same time agreeing to pay the balance of the notes over and above the amount of dividends received under the assignments with eight per cent. interest.

*Held*, that by such an arrangement the notes are not discharged as against the sureties, nor the right of action suspended, but suits thereon may be maintained against them without waiting for the adjustment of the assignment accounts.

ON EXCEPTIONS.

ASSUMPSIT on several promissory notes, in each of two cases, presenting similar facts and the same legal points, submitted to the presiding justice and tried together without the intervention of a jury, with right of exceptions.

The second count of the first writ was in this form: "Also for that the said defendant, at said Biddeford, on the fourteenth day of October, A. D. 1875, by his promissory note of that date by him subscribed, for value received, promised the said bank to pay it the sum of fifteen hundred dollars in four months after said date, which time has long since elapsed."

At the time of trial and before offering any evidence the plaintiff moved for leave to amend his writ, by filing several amended counts, the second of which was of the form following: "Also, for that the said defendant and one John T. Smith and one N. B. Osgood & Co. of said Biddeford, on the fourteenth day of October, A. D. 1875, by their promissory note of that date by them subscribed, for value received, jointly and severally promised the said plaintiff bank, under the name of the First National Bank, to pay it the sum of fifteen hundred dollars in four months after said date, which time has long since elapsed." The justice allowed the amendments against the defendant's objection.

Notes were offered and received under the amended counts against the defendant's objection. The note under the second amended count was of the following tenor: "$1500. Biddeford, October 14, 1875. For value received, we, N. B. Osgood & Co., as principal, and S. P. McKenney and John T. Smith as sureties, jointly and severally promise to pay the First National Bank, fifteen hundred dollars in four months. (Signed) N. B. Osgood & Co., John T. Smith, S. P. McKenney."

[Indorsements.]

"1876. June 9, Received from John T. Smith on the within note $350. July 18, Received from John T. Smith $400, also interest on $750, to date."

The defendant introduced evidence proving that Thomas D. Locke and Napoleon B. Osgood, each individually, and said Locke

& Osgood as copartners, on the 20th day of November, 1875, each made an assignment in due form of law of all their property and estate, copies of which assignments are to be made. That said assignees duly proceeded under said assignments in conformity to the provisions and requirements of R. S., c. 70, and the subsequent amendments and provisions of law relating thereto, and in due course of proceeding made and returned as required by law inventories of the estates conveyed by said assignments. That by due course of proceeding said assignees in the case of Locke individually and Osgood individually, proceeded to a final settlement of their accounts, and that the same were duly allowed in probate court on the first Tuesday of May, A. D. 1877, and distribution then ordered.

That the plaintiffs within three months, and with the consent and at the request of defendant, as stated in paper marked "A," from the execution of the several assignments became parties thereto and presented the notes now presented in this suit for allowance, and the same were allowed by the said assignees.

That the plaintiffs received their distributive share of the estates of Thomas D. Locke and Napoleon B. Osgood, as settled upon their individual assignments, May 24, 1877, and indorsed the same upon said notes as now appears by said notes and indorsements.

That the estate of Locke & Osgood as copartners has not been finally settled or any order of distribution made.

The plaintiffs introduced in evidence the paper marked "A," dated Biddeford, December 8, 1875, and setting out that the First National Bank of Biddeford holds and is the owner of the following notes; then follows a list of which the $1500 note described above is one. It sets out also the assignments of Locke & Osgood, as individuals, and as copartners, to James T. Smith, Abel H. Jellison and Timothy Shaw, jr., for the benefit of such creditors as may become parties to the assignment, and closes as follows: "And whereas said First National Bank, by our consent and at our request, will become parties to said assignment, now it is understood that by becoming parties to said assignment the said First National Bank release no right as against us on said paper, but

for value received, we each hereby agree with and promise said bank to pay said bank such balance of said notes upon which our names individually appear as may be due and owing on said paper, with interest at the rate of eight per cent. over and above what said bank may receive on said paper as a dividend on the property of said T. D. Locke and N. B. Osgood & Co. from said assignees. (Signed.) John H. Burnham, S. P. McKenney, John T. Smith, Israel K. Smith, S. W. Luques, Jere G. Shaw, by Tim. Shaw, jr., Lewis F. Small."

Upon the foregoing facts the presiding justice ruled as matter of law, that the action was maintained and ordered judgment for the plaintiffs for the amount due on the notes in suit; and the defendant alleged exceptions.

*R. P. Tapley*, for the defendants, contended that the two counts set out different causes of action, each count being perfect in itself for such a contract as it describes; that the note was erroneously admitted because the elements of partnership and suretyship were not stated in the count; that the action of the plaintiffs in the matter of the assignment discharged the surety; and also that the action was prematurely brought.

*J. M. Goodwin & W. F. Lunt*, for the plaintiffs, submitted the following brief:

The amendment allowed is no cause of exception. Both the original and the amended declaration good, and the notes properly received in evidence under either. *Rees* v. *Abbot*, 2 Cowp. 832. Cited also in Oliver's Precedents, 200, in note. 2 Chitty Pl. 220 note, (c.) 16th Am. Ed. *Mountstephen* v. *Brooke*, 1 Barn. & Ald. 224. *Bulbeck* v. *Jones*, 5 Jur. N. S. 1317. *Beecham* v. *Smith*, El. B. & E. 442. (96 E. C. L. Rep.)

The rights of the bank to bring suit and maintain it against defendant on the notes declared upon, not lost or suspended by the facts appearing in the case. *Burrill* v. *Smith*, 7 Pick. 291. *Fiske* v. *Stevens*, 21 Maine, 457.

Even an agreement not to sue on a note until after a certain time, no bar to a suit commenced before that time. U. S. D. Title, Bills & Notes, Sub-div. 10, § 3009. Byles on Bills, 186.

*Thimbleby* v. *Barron*, 3 Mees. & W. 210. *Ford* v. *Beech*, 11 Q. B. 842. (63 E. C. L. Rep.)

BARROWS, J. Under the strictest ancient rules of pleading, the plaintiffs' declaration upon these joint and several notes as the several notes of the defendants must have been held good in these several suits against them. The contract between the parties to the suit was set out according to its legal import and effect, and it mattered not though the instruments produced in evidence showed another and joint contract also. That was not the contract here sued, and there was no occasion to refer to it in these declarations merely because it could be proved by the same instrument which proved the contract declared on.

We find neither reason nor authority to sustain the defendants' objection that the notes relied on ought to have been described in all their legal effect, and that the failure to describe their joint character and import makes them inadmissible to support a several action against one of the promisors.

That this is a proper mode of declaring against a joint and several promisor upon a note which is several as well as joint does not appear to have been doubted.

The courts have gone further, and by a long series of decisions have established the doctrine that where one of several joint contractors is sued alone, the declaration setting out the contract as his, no notice being taken of his co-contractors, is no variance, and his only method of availing himself of the omission is to plead it in abatement. *Cabell* v. *Vaughan*, 1 Saund. 291. *Rice* v. *Shute*, 5 Burr. 2611. *Abbot* v. *Smith*, 2 Black. 947. *Wilson* v. *Reddall*, Gow. 161. *Mountstephen* v. *Brooke*, 1 Barn. & Ald. 224.

The notes to *Cabell* v. *Vaughan*, *ubi supra*, and to *Rice* v. *Shute*, in 1 Smith's leading cases, 796, (*647) furnish many other citations from English and American authorities to this effect.

That this has often been recognized in this state as the correct doctrine may be seen by referring to *Winslow* v. *Merrill*, 11 Maine, 127. *Robinson* v. *Robinson*, 10 Maine, 240. *Hughes* v.

*Littlefield*, 18 Maine, 400. *White* v. *Perley*, 15 Maine, 470. *Reed* v. *Wilson*, 39 Maine, 585, 586. *Hapgood* v. *Watson*, 65 Maine, 510.

An early direct application of this doctrine to cases arising upon negotiable paper is found in *Evans* v. *Lewis*, Exchequer East. Term, 1794, (cited in *Mountstephen* v. *Brooke*, 1 Barn. & Ald. 226), an action against defendant as drawer of a bill which was set forth in the declaration as his bill. On non assumpsit pleaded it appeared that the bill was drawn by defendant and another jointly. The point was saved whether this was a variance, and the court were of opinion that it was not and that the only mode by which the defendant could have made the objection was by plea in abatement. And such plea in abatement can prevail only in cases where all the parties ought to be joined, and not where, as here, the plaintiff may join them all or sue them severally at his election.

The cases rather recognize than decide the propriety of declaring against one of the joint and several promisors upon a note as upon his note, without setting out the joint contract.

In *Beecham et als* v. *Smith*, El. B. & E. 442, (96 E. C. L. R.) 441, a several suit thus brought was sustained, though, owing to a technical difficulty, a joint suit could not have been maintained. See also *Anderson* v. *Hamilton*, 6 Blackf. 94.

So far as this matter was concerned, the amendment was certainly unnecessary and immaterial, the notes being receivable in evidence under the original as well as the amended counts.

But we have no doubt of the power of the presiding judge to allow the amendment. It introduced no new cause of action and only gave a further description of the instrument to be relied on in evidence, though not of the several contract of the defendant which was declared on.

Nor is there any substance in the objection that the notes were not admissible under the original or amended counts because nothing was said of the partnership relation of N. B. Osgood & Co. or the suretyship of the defendants. That was a matter which concerned the principals and sureties as between themselves alone and had nothing whatever to do with the contracts declared on which these defendants made, as several promisors on the notes, with the plaintiff bank as promisee.

If plaintiffs had done any act which would have the effect to discharge a surety it was competent and necessary for defendants to plead it if they would avoid the contract declared on, which was an unconditional several promise of each as an original independent promisor to pay the note.

The notes were not made payable to the plaintiffs by their full corporate name.

The First National Bank of Biddeford is the plaintiff in the record, and there are many First National Banks in the state and country. The notes declared on are not more uncertain on their face than are all notes which are payable to that numerous and ubiquitous individual known to the law as J. S.

But we need not stop to consider whether the defective description of the plaintiffs in the notes was good ground of objection to their reception as evidence under the original counts, for it is clear that the amendment alleging that the defendants promised the plaintiffs by the name of the First National Bank was allowable. *Cooper* v. *Bailey*, 52 Maine, 230. *Cummings* v. *Buckfield, B. R. R.* 35 Maine, 478. *Colton* v. *Stanwood*, 67 Maine, 25.

But the defendants further object that the plaintiffs' right to recover on their notes is barred because the plaintiff bank became party to statute assignments made by the principals for whom these defendants were sureties, and they claim that the discharge of the principals discharges them also.

It appears that the plaintiffs became a party to these assignments and presented and proved the notes here declared on against the property of the principals in the hands of their assignees at the request of these defendants and other sureties upon paper held by the bank, as appears by a written instrument signed by the defendants and other sureties for the same principals, which sets forth the fact that the bank holds certain negotiable paper among which are the notes here sued, and that the principals have made an assignment individually and as a firm for the benefit of such creditors as may become parties to the same, and an arrangement that the bank will at the request of the sureties become parties thereto, and an agreement that "it is understood that by becoming parties to said assignment the said First National Bank release no

right as against us on said paper, but for value received we each hereby agree with and promise said bank to pay said bank such balance of said notes upon which our names individually appear as may be due and owing on said paper, with interest at the rate of eight per cent. over and above what said bank may receive on said paper as a dividend," &c.

In the face of such a memorandum subscribed by themselves the defendants cannot successfully contend that the plaintiff bank released any right of action against the sureties by discharging the principals, at the request of the sureties themselves, whose agent it became, for their mutual benefit, to procure in part payment of the notes, such dividends as might be realized from the assignment, with the distinct stipulation on the part of the sureties that such action on the part of the bank should not affect the rights of action which the bank had against the sureties severally. This is the only reasonable construction of the memorandum of December 8, 1875. See, as to the effect of such an arrangement between the holder of negotiable paper and other parties, *Fiske* v. *Stevens*, 21 Maine, 457; and Bayley on Bills, 2d Am. Ed. pp. 361, 362, and Phillips and Sewall's notes thereon.

Nor can the right of action on the $1500 note against McKenney be regarded as postponed until the final settlement of the assignment of Locke & Osgood as copartners.

If anything should be realized by the plaintiffs therefrom they would simply become trustees of the surety for the amount, subject to an adjustment of the interest account according to the memorandum of December 8, 1875.

Even had there been an agreement not to sue until the final settlement of the company assignment, it would be no bar to this suit. *Ford* v. *Beech*, in the Exchequer Chamber on error from Q. B. 63, (E. C. L. R.) 852. The remedy of the aggrieved party in such case would be by suit for the breach of contract. *Ford* v. *Beech*, above cited. And see also *Young* v. *Jones*, 64 Maine, 563, 570. In both cases *Exceptions overruled.*

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

## JACOB W. COUSENS *vs.* INHABITANTS OF SCHOOL-DISTRICT No. 4 IN LYMAN.

York. Decided December 19, 1877.

*School-district.*

Where the warrant for the meeting of a school-district regularly called and holden, and the votes passed at that meeting, taken as a whole, unmistakably show that the district have designated a certain lot of land adjoining the one occupied by their existing school-house to be used in connection with it as a school-house lot for the erection of a new school-house, and the owner of the land refuses to sell the same, the selectmen may lawfully lay it out for a school-house lot under R. S. c. 11, § 33, and appraise the damages therefor; and on payment or tender of such damages the district may take and hold the same for the purpose of erecting and maintaining a school-house thereon, notwithstanding the vote of the district to which the municipal officers refer in the laying out of the lot speaks of an enlargement of their present school-house lot, and the notice given by said selectmen to the land owner speaks of laying out a lot for school-house and play grounds.

When the district has previously designated the lot by metes and bounds and has applied to the owner to sell the same, and he has refused, the selectmen may appraise the damages at the time they lay out the lot.

The proper place to record the return of such laying out and appraisal is on the district records, and not on those of the town-clerk.

Where the lot is laid out for a school-district, the town has no interest in it, and the provisions of R. S., c. 18, § 20, for a return to the town-clerk, and action thereon by the town as in case of town ways are inapplicable.

ON REPORT.

WRIT OF ENTRY to recover possession of a certain parcel of land containing twenty-five square rods, which, together with their old school lot of about ten square rods, comprises their new school-house lot and on which is erected their new school-house. The plaintiff holds the title and is entitled to judgment, unless the facts disclosed in the report show that the defendants, by the due exercise of the right of eminent domain, have acquired the right to "take such lot to be held and used for the purposes" to which they have appropriated it.

The case as made up consists mainly of copies from the district records and of the following admissions:

That the meeting of November 4, 1871, was duly called, notified and held.

That the plaintiff refused to sell the lot designated and described in the record upon application made to him.

That the municipal officers of the town of Lyman were applied to by the district, as set forth in their notice and return, to lay out and appraise a lot for the purpose described therein.

That said officers gave notice of their intentions by posting the said notices by them signed in two public and conspicuous places in said district, one on the school-house and one at the corner of the roads near Murphy's mill, both being in the district and in the vicinity of the lot designated by the district, and posted seven days before the time appointed in them for the meeting.

That at the time and place appointed the said officers met and gave the parties a hearing, the said Cousens not appearing, and proceeded to lay out and appraise the lot as appears by their certificate and return, dated, November 25, 1871, and recorded on the district records immediately thereafter. The land taken was a field opposite the plaintiff's house.

That, June 8, 1872, a tender was made by the district to said Cousens of the amount appraised ($50) by the municipal officers as damages for the lot taken, and was then and there refused by him.

That the district immediately thereafter proceeded to erect a school-house upon the lot so taken, and have ever since occupied it for a school-house in connection with the lot they before had, and inclosed the whole with a fence and have not otherwise taken or had possession of the plaintiff's land.

That the lot owned by the district before the taking of the land in question, appears upon the plan and is marked thereon "Old Lot" and the lot designated by the municipal officers is marked on said plan "New Lot" and is the same described in the plaintiff's writ, and that the lot is not within fifty feet of any dwelling house.

The call for the meeting of November 4, 1871, contained among others, "Article 3d. To see if said district will vote to build a new school-house and out-buildings and inclose the same, and to sell the old school-house.

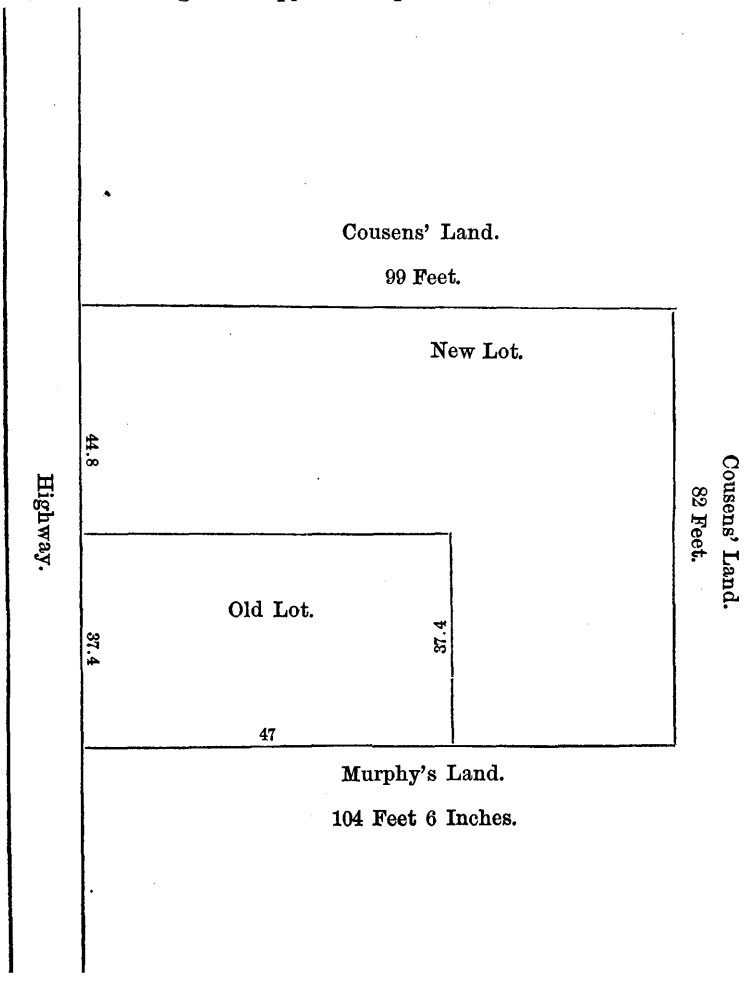
"4th. To see if said district will vote to purchase land to enlarge

their present school-house lot for said school-house and out-buildings and for yards and play grounds."

Then followed other articles for raising money to purchase the land and build the school-house and out-buildings and fencing the grounds, for determining the size and style of the house, &c., for choosing a committee to contract for building, &c., &c.

Under the call the district voted to build the new school-house, and to purchase the land to enlarge the lot.

The following is a copy of the plan referred to:



*J. Dane & E. E. Bourne*, for the plaintiff, contended that the defendants must show a perfect title under the statute; there are no equities; that the district had acted without authority in several particulars; that they had no authority "to enlarge their present school-house lot." R. S., c. 11, §§ 32 and 33, gives no such authority, § 33 limits that right to an incorporated city; the amended act of 1873 inserting the words "town or" before "city" is a legislative construction of how the law stood before; even that amendment does not confer that power upon school-districts; that it was irregular in the selectmen to lay out the lot and assess the damages at one and the same time; (*School-district* in *Norton* v. *Copeland*, 2 Gray, 414, 416); that the municipal officers had no authority to lay out a lot for play grounds; that they should have made their return to the town clerk; the case shows it was "recorded on the district records."

*R. P. Tapley*, for the defendants, contended that the right "to lay out and purchase" included the right to "enlarge" and that though the call for the district meeting and the notice of the selectmen both employed the terms "school-yards and play-grounds," yet no action was taken by the district or the selectmen in that regard; that the land was taken for school-house and out-buildings, and the dimensions of the lot show that no more was taken than was authorized by law for such purpose. But the counsel also contended that school-yards and play grounds are the necessary appendages of school-houses.

BARROWS, J. The defendants claim to hold the possession of the land demanded in this suit because they say it has been legally taken for a school-house lot by virtue of the provisions of R., S. c. 11, § 33.

That the title was previously in the plaintiff is not denied.

The case finds that after the proceedings, the validity of which is here in controversy, the defendants forthwith erected a new school-house on the lot taken, which adjoined the lot upon which the defendants' old school-house stood, and the whole (which does not exceed forty square rods) is now inclosed with one fence and occupied by the defendants as one lot for their new school-house.

The plaintiff alleges three objections to the validity of the proceedings. 1. He claims that the district by their vote undertook merely to "enlarge their present school-house lot," and that they were not authorized by the statute to do this; that the statute as it stood at the time of these proceedings gave no power except to an incorporated city to take real estate for the enlargement or extension of a school-house lot, and for play grounds. If the case showed a mere attempt to add to the grounds about an existing school-house without occupying any part of the land taken with the building to be erected, there would certainly be no little force in this position. But such is not the case before us. The warrant for the meeting and the votes taken together show the object of the proceeding to have been quite different, and in connection with the other agreed facts bring the case within the power conferred in the first part of § 33 upon municipal officers to lay out a school-house lot not exceeding forty square rods and to appraise the damages therefor, and upon the district to take such lot to be used and held for that purpose upon payment or tender of such damages. The essential limitations in the exercise of this power relate to the object for which the land is taken and the size of the lot, and both were duly regarded by the defendants. Their votes and acts clearly designate the object in view. The intermixture in the votes of some of the phraseology used in another part of the section does not affect the character of that object. It was none the less a designation of the land here demanded as a school-house lot for the erection of their new school-house which they then voted and afterwards proceeded to build, because they added their old lot to it, and called it enlarging their present school-house lot. The plaintiff cannot complain that they did not take more of his land, but only so much as with the addition of their old site would make a suitable lot for the new school-house.

It is not reasonable to suppose that, when the legislature authorized the appropriation of a lot not exceeding forty square rods to this public use upon payment of reasonable damages to the owner, they expected the whole of the land so taken to be covered with the buildings, or designed to prohibit the use of some part of it as

a play ground for the children. We must not forget that § 33 is a revision and to some extent a condensation of several previous acts in some of which mention was made of specific uses which might be made of portions of the school-house lot, and in some it was not. The next year by c. 3, Laws of 1872, the legislature increased the size of the lot which might be taken to one hundred square rods, but nothing was said about play grounds or out-buildings. Those are mere incidents to the use of the land as a school-house lot, and mentioning or omitting to mention them in the proceedings for laying out such lot cannot affect the validity of the proceedings.

Nor does the justification of the district fail because in their vote they called what was obviously a designation of a lot for the erection of their new school-house, an enlargement of their present school-house lot.

2. The plaintiff's second objection is that the municipal officers laid out the lot, and assessed the damage at one time; and he relies upon the case of *School-district* in *Norton* v. *Copeland et al.* 2 Gray, 414, 416, as a decision under a similar statute favoring his view.

The case differs essentially from the one at bar. Shaw, C. J., expressly places the decision upon the want of notice from the municipal officers to the owner of the land prior to the laying out. Here, the statute notice was given. But if the dicta respecting the giving to the land owner the opportunity to sell the particular lot to the district before proceeding to assess the damages were to be regarded as having the force of an authority, they would not apply to this case. For, here, the identical lot was designated by the district, and the case finds that the plaintiff refused to sell it. There, the district failed to fix the location, and the selectmen were called upon to determine the location; and after laying out the lot they proceeded to assess the damages without waiting to see whether the land owner would refuse to sell the lot as laid out. Otherwise, here: the admission that the plaintiff "refused to sell the lot designated and described in the record" obviates the objection.

3. The third objection is that the doings of the selectmen in

laying out the lot, were not recorded in the town-clerk's office, and so the selectmen did not proceed "as is provided for laying out town ways and appraising damages therefor," according to the requirement of § 33.

But their return seems to have been duly made to and recorded by the clerk of the district. The remarks of Shaw, C. J., in the case above cited by plaintiff, (2 Gray, 414, 418,) are apposite. Speaking of the requirement of the statute that the laying out of a school-house lot should be conducted in the same way and manner as is provided for laying out town ways, &c., he says: "When one law thus refers to another, we must take care not to follow it into its details beyond the line where the cases are analogous. It would be inconsistent with the true intent of the legislature and with the just and reasonable rules of construction to follow out the course referred to where the reasons of the one are not applicable to the other."

It is plain that the requirement is not that the proceedings in the two cases shall be literally identical; but that the course should be the same so far as the objects to be accomplished are analogous; the same, *mutatis, mutandis.*

We think the proper place for returning and recording the doings of selectmen in the laying out of a school-house lot for a school-district is the record of the district; and that this is according to the spirit of the requirement that the municipal officers shall proceed as in the laying out of town ways, the record of the district being substituted for that of the town because the returning officers are acting in a matter which concerns the district, as they are acting in a matter which concerns the town when they lay out town ways. If by the reference to the course of proceeding in laying out town ways, they are bound to make return to the town-clerk of the laying out of a school-house lot, because by c. 18, § 20, their return of the laying out of a town way is to be made and recorded there, it would seem to follow, under the same § 20, that their action could not be regarded as final until the town had accepted it at a town-meeting legally called afterwards. But, very clearly, no such action by the town is required to confirm the laying out of a school-house lot for a school-district; and we know of

no right of the land owner that is not as well guarded by an entry on the district records, which, as a public record, he has the right at all times to inspect, and which the district in such a case is specially interested to preserve.

We think neither of the objections to the proceedings in the laying out of the lot is tenable. *Judgment for defendants.*

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

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RUSSEL H. WHITE *vs.* LEWIS B. JOHNSON.

Aroostook. Decided April 26, 1877.

*Attorney and Client.*

The authority of an attorney, who has obtained a judgment for his client, continues in force until the judgment is satisfied.

Payment to the attorney is payment to his client, and will protect the officer against a suit by the latter for not enforcing the execution.

Returning an execution to the creditor's attorney of record, at the latter's request, will protect the officer against a suit by the creditor for not returning it into the clerk's office.

Though the attorney abuse his trust and be answerable to his client in damages, such conduct is not to prejudice the officer, who is entitled to regard him as the agent of his client in all the contingencies which may arise in the prosecution of the suit, and all the processes adopted to secure or collect the debt entrusted to his care.

To constitute a revocation of the attorney's authority, notice must be given. The opposite party, and all others interested, have a right to presume that his authority continues, until notified to the contrary.

ON REPORT.

CASE against a sheriff, setting out that the plaintiff recovered judgment against Frederick W. Stimson for $113.73 debt, and $33.61 costs of suit, at the September term, S. J. C. 1874, and sued out an execution therefor, October 8, 1874, returnable January 8, 1875; that the plaintiff delivered the execution at the day of its date to the defendant to be executed and returned according to the command therein given; that the plaintiff at the time of delivering the execution to the defendant requested him to serve, execute and return the same according to the precept thereof, and to

pay over to the plaintiff the sums of money he should recover or collect on the execution, and that the defendant refused to return the execution or to pay over the money.

Plea, not guilty, with a brief statement that when the defendant called upon Stimson to collect the execution, he was notified by Stimson that a settlement thereof had already been made by him, with Chas. M. Herrin and Lewellyn Powers, the attorneys of record of said White, and that said attorneys, at the term of court at which said judgment was recovered, in consideration that Stimson had agreed to pay the full amount within a short time and not to resist judgment any longer, had agreed with Stimson that he should have the time he desired, and that no additional costs should be made thereon. That thereupon he saw one or both of the attorneys, and they said such an agreement had been made by them with Stimson, and demanded of this defendant said execution, and this defendant thereupon delivered it to the attorneys of record of said White, who received the full payment of the said execution and judgment, of said Stimson, and said White thereby obtained all of the sum due to him by virtue of said judgment and execution. And thereafterwards, within the lifetime of said execution, said attorneys of said White returned the same to the office of the clerk of court, for said county of Aroostook, fully satisfied.

And for further brief statement said defendant says that at the time he delivered said execution to the attorneys of record of said White, said attorneys had a lien thereon for services and disbursements in trying the case, and for other services and disbursements in obtaining said judgment.

There was evidence tending to show that on the execution issued October 8, 1874, the plaintiff paid the clerk his fees and took the execution into his own hands, and a few days after delivered it to the defendant with directions to collect the money and pay it over to the plaintiff; that the defendant received the execution and promised to do as directed; that after the return day the plaintiff went to the clerk's office and was by him informed that he could not find the execution on the files of the office. There was also evidence tending to show the truth of the defensive alle-

gations in the brief statement, and that the plaintiff had charged L. Powers on account to the amount collected on the execution $147.

*L. S. Strickland*, for the plaintiff.

I. The sheriff, having received the execution, was bound to serve and execute it according to its command; and for any neglect or misdoings therein he became liable for damages. R. S., c. 80, §§ 9 and 11.

II. The execution creditor, having paid the clerk's fees, had a right to take the execution and interfere in its collection, so long as he did not prejudice the attorney's lien. *Obiter dictum* in *Wilson* v. *Russ*, 20 Maine, 421, 425.

III. White's possession could not prejudice the attorney's lien; for even a discharge by the client, White, could not defeat the attorney's lien. *Gammon* v. *Chandler*, 30 Maine, 152. *Hobson* v. *Watson*, 34 Maine, 20.

IV. The plaintiff is entitled to nominal damages for neglecting to return the execution according to the precept. *Laflin* v. *Willard*, 16 Pick. 64. *Goodnow* v. *Willard*, 5 Met. 517. *Gallup* v. *Robinson*, 11 Gray, 20.

*L. Powers*, for the defendant.

I. Payment to the plaintiff's attorney was in law payment to the plaintiff and he has suffered no damage, not even nominal damage.

II. The officer was relieved from the duty of returning the execution according to its precept, by the plaintiff's accredited agent, the attorney of record. *Thompson* v. *Goding*, 63 Maine, 425.

WALTON, J. This case is before the law court on report. It is an action against the sheriff of the county of Aroostook for not returning an execution put into his hands for collection, and for not paying over to the plaintiff the money collected upon it.

We think the action cannot be maintained. It appears that soon after the execution was put into the officer's hands for collection the debtor voluntarily paid the amount due upon it to one of the plaintiff's attorneys of record in the suit. This, of course, relieved the officer of the duty of collecting the money due upon

the execution. And, as the money was not paid to him, he could not be held responsible for not paying it over to the plaintiff. He had no duty to perform in relation to it. It also appears that the officer afterwards delivered the execution to the attorney, at his request, to enable him to indorse the amount received upon it, and discharge it. This, as it seems to us, relieved the officer of all further responsibility in relation to it.

It may be that for reasons satisfactory to himself, the plaintiff intended to revoke the authority of his attorneys. But no notice of such an intention appears to have been given to them, or to the debtor. Without such notice, an intention to revoke would be of no avail.

The authority of an attorney, who has obtained a judgment for his client, continues in force until the judgment is satisfied; and he may receive the money due upon it, even after the execution has been levied upon real estate, until the debtor's right to redeem has expired. *Gray* v. *Wass*, 1 Maine, 257.

Though the attorney may conduct so indiscreetly, negligently, or ignorantly, or may so abuse his trust as to be answerable to his client in damages, still his conduct is not to prejudice the officer, who has a right to regard him as the agent of his client in all the contingencies that may arise in the prosecution of the suit, and all the processes adopted to secure or collect the debt entrusted to his care. *Jenney* v. *Delesdernier*, 20 Maine, 183.

Payment to the attorney is payment to his client, and will protect the officer against a suit by the latter. *Ducett* v. *Cunningham*, 39 Maine, 386.

To constitute a revocation of the attorney's authority, notice must be given. The opposite party, and all others interested have a right to presume that his authority continues, unless notified of the contrary. *Lewis* v. *Sumner*, 13 Met. 269. Story on Agency, § 470. *Judgment for defendant.*

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

WILLIAM KNIGHT *et als*, petitioners for increase of damages *vs.* AROOSTOOK RIVER RAILROAD COMPANY.

Aroostook. Decided July 3, 1877.

*Railroad.*

The statute of 1873, c. 95, embraces all the subject matter of R. S., c. 51, § 8, so far as it relates to applications for an increase or decrease of damages for land taken for railroad purposes, and is therefore the only statute in force providing for appeals in that respect.

*Held.* The proceedings in this case depending for their validity upon the earlier statute, are without authority in law. The verdict must be set aside and the proceedings of appeal quashed.

ON REPORT.

PETITION for increase of damages for land taken by railroad company. Damages were awarded in favor of petitioners by the county commissioners of Aroostook county, October 12, 1875. A petition for increase was seasonably filed, a jury was summoned and empaneled and met at Fort Fairfield August 29, 1876. E. S. Strickland, esq. was appointed chairman; a view and hearing was then and there had, at which the president and directors attended, and were represented by L. R. King, esq., a counselor of this court, who is also president of said railroad corporation. No objection was made to the proceedings or notice. The jury made a report in due form, and by their finding and report increased the amount of damages from the amount awarded by the commissioners in the case of each of said petitioners; which report, together with the report of the chairman, and the warrant to the sheriff, have been duly and seasonably returned to this court, and are a part of this report.

The application for an increase of damages was made to the county commissioners as authorized by R. S., c. 51, § 8, and not as provided by the act of 1873, c. 95. And the warrant to the sheriff issued from the county commissioners' court, and the venires to the jurors, were issued by the clerk of said court, directed to the selectmen of the towns of Littleton, Monticello, Bridgewater and Blaine, directing them to draw the number of jurors required, and to notify them to meet at the time and place named by the county commissioners.

Said Strickland was selected to preside by A. A. Burleigh, one of the county commissioners, in the absence of the other members of the board, said Burleigh having been authorized by his associates to select a suitable person to preside at said hearing, and the appointment of said Strickland was subsequently ratified by all the commissioners.

Upon the foregoing statement the case is submitted to the law court with power to determine whether the proceedings can be sustained, and what entry shall be made upon the docket of Aroostook county.

The opinion renders it unnecessary to set out the contents of the documents referred to.

*A. W. Paine*, for the petitioners, said that R. S., c. 51, § 8, and the act of 1873, c. 95, differed in the modes provided for trying the appeal from the county commissioners. By R. S. the mode provided was by a direct reference to a jury *in pais* to be summoned by the proper officer; by the act of 1873 it was by appeal to the S. J. C., which would try the case *in curia*. He contended that although different remedies were provided, the later statute, which did not contain any repealing clause, did not operate by implication to repeal the earlier.

*L. R. King*, for the respondents.

DANFORTH, J. This is an application for an increase of damages for land taken by the defendant company under the provisions of R. S., c. 51, § 8. Under that section, "either party has the same right to apply for an increase or decrease of damages as in case of highways." The proceedings in this case are in conformity with the requirements of the statute respecting highways as found in R. S., c. 18, §§ 8, 9 and 10.

By the laws of 1873, c. 95, "any person aggrieved by the decision or judgment of the county commissioners in relation to damages taken for railroad purposes, may appeal therefrom to the next term of the supreme judicial court which shall first be holden in the county where the land is situated," &c.

The proceedings under the latter statute are entirely different in all respects from those under the former, and are complete in

themselves, covering the whole subject matter. In *Commonwealth* v. *Kelliher*, 12 Allen, 480, in the opinion it is said, "whenever a statute is passed which embraces all the provisions of previous statutes on the same subject, the new statute operates as a repeal of all antecedent enactments. This well settled rule of interpretation is founded on the reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law."

This principle of interpretation is as well settled in this state as in Massachusetts, and is especially applicable to the statute under consideration. It may be added in this case that though the two statutes are not necessarily repugnant in their practical operation, they may and would be likely to lead to inconsistent proceedings and opposing results. The provision is that any party may appeal, &c. There are not only two opposing parties in each case who may appeal, but not unfrequently more than one person representing different interests in the land taken having the same right. If therefore the two statutes are in force each party appealing would have his election under which statute to proceed, and if electing different proceedings, the same case at the same time would be pending before different tribunals and subject to very different provisions, which cannot be admissible.

Therefore the proceedings cannot be sustained, and the entry upon the docket must be,

*Verdict set aside and*
*Proceedings of appeal quashed.*

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

JAMES M. BARBOUR *vs.* CITY OF ELLSWORTH.

Hancock. Decided December 22, 1876.

*Town.*

A municipal corporation is not liable for the torts of its officers committed under color of their official capacity.

ON REPORT.

CASE stated thus: The plaintiff came into Ellsworth as a seaman on board of a vessel in which there was a case of small-pox. The municipal officers of Ellsworth caused the plaintiff, together with such sick persons, to be taken from the vessel and carried to a house as a hospital, where the plaintiff became sick with the same disease. The plaintiff contends that he was not suitably and sufficiently cared for during his sickness; by reason of which he suffered exceedingly, and became badly marked from the ravages of the disease. If the defendants would be legally liable to the plaintiff in damages, provided it could be shown that he did not receive such care and attention as he would have received if common care and prudence had been exercised by said officers in taking care of him while confined as aforesaid, then the action may stand for trial; otherwise a nonsuit to be entered.

*G. S. Peters*, for the plaintiff.

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

DICKERSON, J. This case is not distinguishable in principle from *Mitchell* v. *Rockland*, 52 Maine, 118, and the more recent cases of *Brown et ux.* v. *Vinalhaven*, 65 Maine, 402, and *Lynde* v. *Rockland*, 66 Maine, 309.

It has been held in these and other analogous cases that the relation of master and servant, and principal and agent, does not obtain between municipal corporations and their officers, so as to render the former liable at common law for the torts of the latter committed under color of their official authority; and there is no statute creating such liability in the case at bar. *Small* v. *Dan ville*, 51 Maine, 359, 361.

The tortious acts complained of by the plaintiff, if done at all,

having been committed by the municipal officers of the defendant town in the course of their employment, and under color of their offical authority, it is not liable therefor. The plaintiff's remedy, if any he has, is against the individuals who did the damage. *Newell* v. *Ayer*, 32 Maine, 334.

*Plaintiff nonsuit.*

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

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BUCKSPORT & BANGOR RAILROAD COMPANY *vs.* INHABITANTS OF BREWER.

Hancock. Decided May 4, 1877.

*Railroad. Contract.*

An action cannot be maintained upon a subscription to the capital stock of a railroad company, made upon two conditions, one of which is a condition subsequent that has been performed, and the other a condition precedent that has not been performed.

Whether the conditions in a contract be precedent or subsequent is a question of intent to be determined by considering not only the words of the particular clause, but also the language of the whole contract as well as the nature of the act required and the subject matter to which it relates.

Where the subscription to the capital stock of a railroad company is upon condition that the road "be located through the town of Brewer satisfactory to the selectmen of said town;" such location is upon a condition precedent and must be complied with before a recovery can be had against the town for the sum subscribed.

In such case, it is not sufficient for the company, in an action for the amount subscribed, to allege and prove "that the road was located wisely, prudently and judiciously for the interests of said corporation and said town," without showing that it was also satisfactory to the selectmen.

In such case, the mere silence of the defendants cannot be construed as a waiver.

ON REPORT.

CASE to recover $20,000, subscription to the capital stock of the plaintiff company, alleging a completion of the road and a demand and refusal to pay the subscription, which was in accordance with the following vote of the inhabitants of Brewer at a meeting held December 5, 1871: "That the selectmen be and are hereby author-

ized and instructed to subscribe twenty thousand dollars to the capital stock of the Penobscot and Union River Railroad Company, on the following conditions, viz: The road, when built, shall connect with the European and North American Railroad, and shall be located through the town of Brewer, satisfactory to the selectmen of said town. The town shall not be bound for any further sum than that written by the selectmen acting under the instructions of the town." The name of the plaintiff road was afterwards changed but no point was made of that.

The declaration alleged in one count "that the road was located through the town of Brewer, satisfactory to the selectmen" of said town; and in another count "that said road was located wisely, prudently and judiciously, for the interests of said corporation and said town of Brewer, and that the selectmen of said town have hitherto unreasonably and fraudulently refused to approve said location as satisfactory to them."

The principal ground of defense was that the subscription was on conditions, one of which was a condition precedent and had not been complied with.

It was in proof that the first condition, "that the road when built shall connect with the European and North American Railroad," had been complied with; and that the road had been located and built through the town of Brewer; but there was no evidence that the selectmen had expressed satisfaction with the location.

*H. D. Hadlock & L. A. Emery*, for the plaintiffs, to the point that the clause requiring the location to be satisfactory to the selectmen was not a condition precedent, cited the following cases: *North Missouri Railroad* v. *Winkler*, 29 Mo. 318. *McMillan* v. *Maysville & Lexington*, 15 B. Mon. (Ky.) 218. *Ashtabula & New Lisbon Railroad* v. *Smith*, 15 Ohio (St.) 328. *Miller* v. *Pittsburgh Railroad*, 40 Pa. St. 237. *Belfast & Moosehead* v. *Brooks*, 60 Maine, 568, 569.

*E. Kent*, with *J. Hutchings*, for the defendants, after some preliminary and technical objections, devoted his argument mainly to the second condition, that the location should be satisfactory to

the selectmen, and contended it was a condition precedent. He said, *inter alia*: "During the investigation of authorities, I turned to my old favorite, Chitty on Pleadings, first volume—a work containing enough sound law, stated with unequaled perspicuity and condensation, to furnish some of the manufacturers of modern law books materials for a whole library. I will quote a single sentence, but it is to the point. 'If the agreement be that one party shall do an act, and that for the doing thereof the other party shall pay a sum of money, the doing thereof is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed.' Chitty's Pleadings, 1. * 322."

Under various views, counsel cited the following cases: *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 437, 438, 450. *Martin*, appellant, v. *Pensacola & Georgia*, 8 Fla. 370. *Parker* v. *Thomas*, 19 Ind. 213. *Taylor* v. *Fletcher*, 15 Ind. 80. *No. Missouri Railroad* v. *Winkler*, 29 Mo. 318. *McMillan* v. *Maysville & Lexington*, 15 B. Monroe, (Ky.) 218. *Ashtabula & New Lisbon* v. *Smith*, 15 Ohio, 328. *Chamberlain* v. *Painesville & Hudson*, 15 Ohio, 225. *North Missouri Railroad* v. *Miller*, 31 Mo. 19. *N. & N. W. Railroad*, v. *Jones*, 2 Coldw. (Tenn.) 574. *Warner* v. *Callender*, 20 Ohio. 190. *Conn. & P. Railroad* v. *Baxter*, 32 Vermont, 805. *Troy & G. Railroad*, v. *Newton*, 1 Gray, 544, 546. *McCarren* v. *McNulty*, 7 Gray, 139. *Walker* v. *Orange*, 16 Gray, 193. *Chapman* v. *Lowell*, 4 Cush. 378. *Veazie* v. *Hosmer*, 11 Gray, 396. *Smith* v. *Brady*, 17 N. Y. 173. *Smith* v. *Briggs*, 3 Denio, 73. *United States* v. *Robeson*, 9 Pet. 319. *Wyckoff* v. *Meyers*, 44 N. Y. 143. *Dermott* v. *Jones*, 2 Wall. 1. *Veazie* v. *Bangor*, 51 Maine, 509. *Same*, 53 Maine, 50. *Portland & Oxford* v. *Hartford*, 58 Maine, 23. *Belfast & Moosehead* v. *Moore*, 60 Maine, 561. *Conner* v. *Atwood*, 57 Maine, 100. *Leadbetter* v. *Insurance Company*, 13 Maine, 265. *Worsley* v. *Wood*, 6 T. R. 710. *Johnson* v. *Phœnix Insurance Company*, 112 Mass. 49.

VIRGIN, J. Any city or town, by a two-thirds vote, may raise and appropriate a sum of money not exceeding five per cent. on

its valuation, "to aid in the construction of railroads in such manner as it deems proper; and for such purpose may make contracts with any person or railroad corporation." R. S., c. 51, § 80.

The plaintiffs contend that the subscription contract declared on was made by the defendants in accordance with the authority conferred by the foregoing statute.

Passing all questions of consideration, acceptance, or whether the subscription contains a promise to pay money, or whether the selectmen exceeded their authority, and assuming on all such preliminary matters the view most favorable to the plaintiffs, we come directly to the construction of the subscription in respect to the conditions therein contained.

The subscription, whether of money or stock, is conditional. Such is its express language. The terms are not ambiguous like "provided that" and other similar phrases which do not always import a condition, but the subscription is declared to be made "on the following conditions." The declaration alleges the contract was conditional and avers performance in one count in the very terms of the condition, and undertakes to set out an excuse for neglect of a literal performance in the other.

The contract contains two distinct and independent conditions, one pertaining to the connection of the plaintiffs' road "when built" with the E. & N. A. Railroad on the other side of the Penobscot river, and the other to the location of the same through the town of Brewer. It matters naught that they may be of different natures; for if the former be a condition subsequent and had been fully performed (as the defendants admit) before the commencement of this action, and the latter be a condition precedent and have not been actually performed, then the action cannot be maintained. *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 437. *Ticonic Co.* v. *Lang*, 63 Maine, 480. *Porter* v. *Raymond*, 53 N. H. 519.

The controlling question then is: What is the nature of the condition which requires that the road "shall be located through the town of Brewer, satisfactory to the selectmen of said town?" The word "precedent" is not in it; and neither is it essential that it should be to warrant its interpretation as a condition of that

nature. Conditions have no idiom. Whether they be precedent or subsequent is a question purely of intent; and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract as well as the nature of the act required, and the subject matter to which it relates. *Sewall* v. *Wilkins*, 14 Maine, 168. *Robbins* v. *Gleason*, 47 Maine, 259. *Schwoerer* v. *Boylston M. Association*, 99 Mass. 285.

Judged by this rule of common sense, we entertain no doubt that this condition was intended and understood by the parties as a condition precedent, and that it was to be strictly performed before the defendants could be held liable.

The defendants were under no moral or legal obligation to aid the plaintiffs. They simply had the legal authority to do so, if they chose; and for that purpose might make any contract, absolute or conditional, not forbidden by law. Observation demonstrated that the mere fact of a railroad passing through some part of a town did not necessarily enrich it; while the particular business of a town and its locality might be such as to warrant a generous subscription in aid of a road passing through a particular part. We can readily understand, therefore, why the defendants, in consulting their own material interests, did not blindly make an absolute subscription of money to the stock of the road, but might make a conditional one from which they might reasonably anticipate direct returns by way of increased railroad facilities, provided the new road could be located where it would better accommodate their business, while river navigation is closed, than the old roads across the river; and not otherwise.

The acts which the two conditions severally required of the plaintiffs are very different in their nature. The first condition contemplated the construction of a railroad bridge across the Penobscot river, together with the purchase or condemnation of sufficient land in the city of Bangor to form a proper connection with the E. & N. A. Railroad, both necessarily involving the outlay of a large sum of money. Had this been the only condition, a very strong implication would have arisen from its very nature that the parties intended the plaintiffs should have the money sub-

scribed to enable them to perform it. There is a numerous class of cases of conveyances on conditions to which this one bears a strong analogy. Among these are conveyances of farms by fathers to their sons on condition that the grantees shall support their respective grantors during life. *Thomas* v. *Record*, 47 Maine, 500; *Bryant* v. *Erskine*, 55 Maine, 153, 156; and a conveyance of land on condition that a certain institute of learning shall be permanently located thereon. *Mead* v. *Ballard*, 7 Wall. 290. The conditions in such cases are in their nature subsequent because of the implication that the grantee is to have possession and control of the premises granted for the purpose of fulfilling the condition. So in a recent case in this state, where a town subscribed for railroad stock on the condition that the road "shall be built through the town on the line as run by the engineer," the court declared the condition to be subsequent. "The object of the subscription," said Walton, J., "was to furnish the means for building the road. Unless the means were first furnished, the road would not be built. It would be unreasonable to suppose that it was within the contemplation of the parties that the road should be built first and the means furnished afterwards." *B. & M. L. R. Co.* v. *Brooks*, 60 Maine, 568. And if the first condition in the subscription contract now under consideration were the only one, we should consider the case last cited decisive of it; although had it contained a few additional words it might have been a condition precedent. *Portland & Oxford Central* v. *Hartford* 58 Maine, 23.

But as already seen there is another condition entirely distinct from and independent of the other, and which refers to the location only; and not to the location of the whole line even, but to so much only as was to be within the limits of Brewer. The location is very different in its nature from the construction. Location is one of the earliest preliminaries in the natural order of things involved in railroad building. It follows preliminary surveys which are usually made at the private expense of the projectors of the road. Until the directors have determined in good faith and properly designated the precise place where the road bed is to be built—which is location—its construction cannot even

be let out to contractors; nor then, even, until a critical final survey, plan and specifications are made for the information of the directors and parties desirous of contracting for its construction. So that the simple location of the road so short a distance, unlike the construction of it, does not require the expenditure of any such sum of money as to reasonably induce the belief that the plaintiffs really supposed, at the time the subscription proposition was made, that they would be entitled to any part of the subscription prior to such a location as would be satisfactory to selectmen, or that their action was in anywise influenced by it. It was the province and bounden duty of the directors to locate their road where, all things considered, the interests of the road and of the public would, in their judgment, be best subserved. The defendants' proposition, we are bound to presume, was not made for an improper purpose, as an inducement to locate to the satisfaction of the defendants, regardless of and contrary to the interests of all others. On the contrary, the common sense of it seems to be that, if upon viewing all the routes through Brewer, the feasibility of that one where, in the opinion of the selectmen, the defendants would be best accommodated, should induce the directors to adopt it, then, and not otherwise, the defendants would be liable. But it seems from the testimony of the engineers that there were objections to such a location.

The authorities cited on this branch of the case on the exhaustive brief of the distinguished counsel for the defendants, fully sustain our conclusion that the condition relating to the location is a condition precedent.

By the express terms of this condition, the location in Brewer was to be "satisfactory to the selectmen of said town." This clause is a substantive part of the condition; and the plaintiffs can have no right of action until they have strictly performed it. If the evidence satisfied us that the location was in fact made "wisely, prudently and judiciously for the interests of said corporation and said town of Brewer," as alleged in the second count, while we might conclude therefrom that the plaintiffs' directors had performed their duty thus far, it would not follow that they had performed the condition; for the satisfaction of the select-

men would still be wanting. The defendants chose to be governed by the judgment of their board of selectmen instead of that of the plaintiffs' engineers, directors, or of a jury, or any other tribunal. The plaintiffs had the same liberty to accept as the defendants had to propose terms. If they accepted, they must be governed by them as they were made. We cannot change them or substitute others. The authorities requiring strict performance are numerous and pointed. Thus where the plaintiff agreed to keep certain roads in good repair for a specified time "to the acceptance and approval of the mayor and the joint standing committee on streets," this court said: "Their acceptance and approval were a stipulated condition precedent to any right to recover payment. . . The plaintiff never having procured nor attempted to procure such acceptance and approval, the nonsuit was properly ordered." *Veazie* v. *Bangor*, 53 Maine, 50. So where the plaintiff agreed to construct a certain road in the manner specified in the order and "to the acceptance of the county commissioners," he was not permitted to prove that the refusal of the commissioners to accept the road as constructed by him was unreasonable. "Otherwise," said the court, "the plaintiff would be released from that part of his contract which bound him to do the work to the acceptance of the commissioners; and the decision, instead of enforcing the contract as the parties made it, would substitute a new stipulation, namely, that the road should be completed to the acceptance of a jury." *Walker* v. *Orange*, 16 Gray, 193. So an action on an agreement between the plaintiff and a certain society, to make a book-case of a certain kind and specified dimensions, and to finish it in a "good, strong, workmanlike manner, to the satisfaction of the president of the society," is not maintained by proof that it was made and finished according to the terms of the agreement, without proving also that it was satisfactory to, or accepted by the president. "It may be," observed Merrick, J., "that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Hav-

ing voluntarily assumed the obligation and the risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions." *McCarren* v. *McNulty*, 7 Gray, 139, 141. Again, where the plaintiff agreed to make and deliver on a certain day a suit of clothes which were to be made "to the satisfaction of" the defendant, the court said the plaintiff "can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other party to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction." *Brown* v. *Foster*, 113 Mass. 136. To the same purport are numerous cases cited on the defendants' brief. None of these are cases of railroad corporations against subscribers to their stock, but the same in principle and alike decisive. The law is no respecter of persons.

The evidence of the engineers tending to prove that the route actually selected was the most feasible, cheapest and best is entirely immaterial. It has no tendency to show performance, neither does it show any legal excuse for non-performance of the condition on which payment by the defendants was made to depend. There is no pretense that performance was impossible at the time the conditional subscription was made, or that it was subsequently rendered so by the act of God, the law or by the defendants. Co. Litt. 206 *a*. *Blake* v. *Niles*, 13 N. H. 459. *Dermott* v. *Jones*, 2 Wall. 1.

The selectmen took no part in the location which was made. Their opinion was not asked and they did not volunteer any advice. They were a tribunal to decide and not a party whose action or non-action outside of their province could have any influence for or against the defendants. Neither can the mere silence of the defendants be construed as a waiver, since it is consistent with other explanations. *Burlington &c. R. R. Co.* v. *Boestler*, 15 Iowa, 555. *Plaintiffs nonsuit.*

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

CYNTHIA H. ABBOTT *vs.* RANSOM B. ABBOTT *et als.*

Hancock. Decided May 5, 1877.

*Married woman.*

A wife, after being divorced from her husband, cannot maintain an action against him for an assault committed upon her during coverture; nor against persons who confederated with and assisted him in committing the assault.

ON REPORT.

CASE. For that heretofore, to wit, on or about the 5th day of September, A. D. 1869, at Hancock in said county, the said defendants maliciously intending to oppress and imprison the plaintiff and to deprive her of her liberty did then and there conspire and act and agree together with others to charge and accuse the plaintiff with being a crazy and insane person and a fit subject for imprisonment in the insane hospital or asylum situated at Augusta, being an institution for the keeping and restraint of insane persons, and in pursuance of said false and wicked intentions, the said defendant and others did falsely and maliciously charge and pretend that the plaintiff was a crazy and insane person, unfit and unsafe to be permitted to go at large or be at liberty, and said defendant did then and there, to wit, at said Hancock, cause the plaintiff to be violently assaulted and taken in the public highway and with great force and inhumanly bound and put in irons and conveyed to the insane asylum or hospital aforesaid, and there imprisoned as an insane person for a long time against her will and to the great injury of her health and comfort, and thereby depriving her of her rightful home and the society of her children and friends hitherto; and the said plaintiff having escaped from said hospital the said defendants following up their said malicious and wicked purposes, threatened, followed and harrassed said plaintiff and endeavored to seize and take said plaintiff back to said asylum and have her further confined, so that the plaintiff was obliged to secrete and hide to save herself from said defendants, and to go away beyond the limits of the state to preserve her liberty and escape the malicious and wicked wrongs and oppressions of the defendants.

And the plaintiff further says that said defendants at said Hancock, on or about the 5th day of September, 1869, did wickedly and maliciously and falsely accuse the plaintiff with being an insane person, and with force and arms did cause her to be assaulted and taken and conveyed to the insane asylum or hospital at Augusta and there imprisoned for a long time, whereby plaintiff was greatly injured and suffered greatly in body and mind and was subjected thereafter to great hardship and suffering and was greatly harrassed and injured by defendants.

And also for that the defendants on the day and year aforesaid made another assault on the plaintiff and her then beat, wounded and illtreated so that her life was then thereby greatly despaired of, and other wrongs to the plaintiff then did against the peace of the state and to the plaintiff's damage.

Writ dated April 28, 1874. *Ad damnum*, $5000. Ransom B. Abbott, at the time of the acts complained of, was the lawful husband of the plaintiff, and continued to be so until October, A. D. 1872, when she was divorced from him. The plaintiff remained at the hospital in Augusta but a few days and escaped therefrom. The case is reported to the full court to determine the question of law arising upon the facts. If upon the facts as stated in the declaration, together with the above stated facts, the action is barred by the statute of limitations, or if for other reasons, the plaintiff cannot recover against either of the defendants, then the plaintiff to be nonsuit. If maintainable, against either or all of the defendants, the action to stand for trial. The court to indicate whether, upon the foregoing grounds, the action is maintainable against all or any of the defendants.

*H. D. Hadlock*, for the plaintiff.

*A. Wiswell & A. P. Wiswell*, for the defendants.

PETERS, J. The defendants forcibly carried the plaintiff to an insane asylum. The case assumes the act to have been wrongful and wanton. The plaintiff and one of the defendants, at the time, were husband and wife; since then she was divorced. Can an action of tort, for such an injury, instituted after divorce, be sus-

tained by her against her former husband? We have no doubt, that it cannot be maintained.

Precisely the same question was lately before the English court, and the decision and the reasons on which the decision is grounded meet with our unqualified approval. *Phillips* v. *Barnet*, 1 Q. B. D. 436. It is there held that a wife, after being divorced from her husband, cannot sue him for an assault committed upon her during coverture. In the course of the discussion in that case, Lush, J., says: "Now I cannot for a moment think that a divorce makes a marriage void *ab initio*; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case;" Field, J., says: "I now think it clear that the real substantial ground why the wife cannot sue her husband is not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person;" and Blackburn, J., states the objection to be "not the technical one of parties, but because, being one person, one cannot sue the other."

The theory upon which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against her husband. But the error in the proposition is the supposition that a cause of action or a right of action ever exists in such a case. There is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.

The doctrine advocated by the plaintiff finds no support from any of the principles of the common law. According to the oldest authorities, the being of the wife became, by marriage, merged in the being of the husband. Her disabilities were about complete. By the earliest edicts of courts, he had a right to strike her as a punishment for her misconduct, and her only remedy was,

that "she hath retaliation to beat him again if she dare." And Chancellor Kent lays down the doctrine, not contradicted or challenged in any of the editions of his commentaries, that, "as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce." 2 Kent Com. 180. But there has been for many years a gradual evolution of the law going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American states that the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever. See, upon this subject, the cases collected in a learned and instructive note to the case of *Commonwealth* v. *Barry*, in 2 Green's Cr. L. Reports, 286. Still, the state of the old common law serves to show the basis upon which the marriage relation subsisted; and we do not perceive that there has been, either by legislative enactment or by the growth of the law in adapting itself to the present condition of society, any change in that relation which can afford the plaintiff a remedy. So to speak, marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other. As said by Settle, J., in *State* v. *Oliver*, 70 N. C. 60, "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of *habeas corpus*, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way, all matters would be settled in one suit as a finality.

It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assault, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for law suits and speculations, to be wise and salutary and to stand on the solid foundations of the law.

The plaintiff invokes the case of *Blake* v. *Blake*, 64 Maine, 177, as supporting her right to sue. That was a suit in assumpsit. In matters of contract there may be a cause of action during coverture, not enforceable by the ordinary methods until afterwards. The common law has been so far abrogated by the force of various legislative acts as to allow contracts to be made by husband and wife with each other. And, to a certain extent, contracts between man and wife always were upheld in courts of chancery. That case, therefore, differs from this.

Then, if the husband is not liable, the question arises whether the co-defendants are liable in this action. We think it follows from the previous reasoning that they are not. The true test as to their liability is, whether an action could have been maintained against them at the time of the act complained of. It is clear that no action was then maintainable. If the co-defendants had been then sued, the action must have been in the name of the husband and wife, and the husband would have sued to recover damages for an injury actually committed by himself. Husband and wife must declare that the injury was *ad damnum ipsorum*. She cannot, at

common law, sue in her own name alone, nor in his without his consent. She cannot appoint an attorney, ordinarily, but he must do it for her. His conduct and admissions can affect the suit. He can release the cause of action and she cannot. She could do no act to redress an injury to her without his concurrence. Nor has the common law been changed in any of these respects until 1876; which was after this action was commenced. Laws of 1876, c. 112. The damages recoverable in an action would have belonged to him and not to her. And, at the same time, if she had committed a tort, he would have been civilly liable for it. It is very certain, therefore, that no action could ever have been sustained against them in his name. They merely aided and assisted him. But if there was no injury to him there was none to her. They were one. Without doubt, after the death of the husband, a wife may maintain an action in her own name for a wrong committed upon her while her husband was alive, if no action was instituted nor the cause of action released during his lifetime; and undoubtedly the same right follows after a divorce *a vinculo matrimonii*. But she can only recover for such a wrong as she and her husband could have recovered for in their joint names while the marriage relation subsisted. She succeeds after death or divorce to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive. Here there was none. A thing cannot continue after an event which does not exist before. It would not be the survival of a claim, but would be one newly created. *Norcross* v. *Stuart*, 50 Maine, 87. *Marshall* v. *Oakes*, 51 Maine, 308. *Ballard* v. *Russell*, 33 Maine, 196. *Laughlin* v. *Eaton*, 54 Maine, 156. *West* v. *Jordan*, 62 Maine, 484. *Hasbrouck* v. *Weaver*, 10 Johns. 247. *Snyder* v. *Sponable*, 1 Hill, (N. Y.) 567. Bacon Ab., Baron and Feme, K. *Shaddock* v. *Clifton*, 22 Wis. 114.

*Plaintiff nonsuit.*

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

BARROWS, J., concurred in the result.

LEONARD F. E. JARVIS *vs.* CHARLES ALBRO.

Hancock. Decided August 9, 1877.

*Mortgage.*

A mortagee entering the mortgaged premises peaceably and openly under R S., c. 90, § 3, must continue in the possession the three following years to effect a valid foreclosure. c. 90, § 4.

The lapse of twenty years after a debt secured by a mortgage becomes payable is sufficient evidence of payment in the absence of any countervailing considerations.

This presumption of payment may be rebutted.

A lease from a mortgagee received by a mortgager more than twenty years after the maturity of the mortgage debt is not admissible to rebut the presumption of payment to affect the rights of a subsequent mortagee.

Where, in a writ of entry, both parties claim under different mortgages from the same grantor, *held*, that the evidence of the defendant that the mortgage and note, under which he claims, came into his hands as residuary legatee from six to ten years after the note was overdue, and that nothing had been paid on the note after he received it, with the production of the note and mortgage, is not sufficient to rebut the (twenty years') presumption of payment.

ON REPORT.

WRIT OF ENTRY, dated March 4, 1874, demanding a lot of land in Ellsworth containing about 150 rods. No serious question was made as to the identity of the lot. Both parties claimed under Joseph A. Deane. The plaintiff claimed title from three sources.

1. Mortgage from Deane to Wm. Barker to secure a note of $275, March 25, 1842, who quitclaimed to Nathaniel A. Joy, April 10, 1845, who quitclaimed to George W. Brown, March 23, 1846, who quitclaimed to plaintiff July 18, 1848.

2. Mortgage from Deane to plaintiff November 7, 1849, to secure a note of $711.68, foreclosed June 28, 1859.

3. Judgment, plaintiff against Deane for the same premises, at the October term, S. J. C. 1868.

The defendant claimed title under a mortgage from Deane to one Cyrus Lothrop, March 4, 1844, to secure a note of $842.84, which was forclosed September 19, 1873. Lothrop died May 20, 1854, leaving a will probated in Massachusetts, July 4, 1854, making the defendant his residuary legatee. Administration was taken out in Maine.

The plaintiff put in evidence a certificate of the entry of Joy for foreclosure, dated September 23, 1845, under R. S., c. 90, § 3, third way: but Joy did not continue in possession three years.

The defendant, after putting in the mortgage and note under which he claimed, and the foreclosure, testified that on the death of Lothrop, he took possession of his property as devisee and executor; that he found the mortgage and note somewhere between 1854 and 1858; that he never received any money on the note; that he authorized Mr. Deane to put repairs upon the property; and also put in a lease of the premises from himself to Deane, dated August 1, 1870, containing the clause following: "Said premises having been forfeited to me in mortgage by said Deane."

Eugene Hale testified that he was counsel for Jarvis in the original suit by him against Deane on which the judgment was recovered; that a writ of possession issued December 21, 1868, and that he took possession for Jarvis in accordance with talk with Mr. Deane, went into the house and gave a lease to Amory Otis, son-in-law of Deane, dated February 5, 1869, and put into the case, and collected rent while he could and that he maintained possession of the premises from that time. Witness said: "I have a tenant there now who is paying rent to me as the agent of Mr. Jarvis."

Other facts appear in the opinion.

*E. Hale & L. A. Emery*, for the plaintiff.

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

LIBBEY, J. To prove his title to the demanded premises, the demandant relies upon a mortgage deed from Joseph A. Deane to William Barker, dated March 24, 1842, recorded April 1, 1842, to secure the payment of a note signed by Deane and Moore, dated February 1, 1842, for $275, payable on demand with interest.

This mortgage was assigned by said Barker to Nathaniel A. Joy, April 10, 1845; by Joy to George W. Brown, March 23, 1846; and by Brown to the demandant, July 18, 1848. Said Joy made a peaceable entry upon the premises and took possession thereof for the purpose of foreclosure, September 23, 1845, in the presence of two witnesses who made affidavit thereof, which was recorded on the same day.

He also relies upon a mortgage deed of the demanded premises from said Deane to himself, dated Novembor 7, 1849, recorded November 9, 1849, to secure the payment of a note for $711.68, dated November 7, 1849, payable in four equal annual payments, with interest annually. On the 28th of June, 1859, the demandant caused a notice, in due form, of his claim to foreclose said mortgage, to be served on said Deane by the sheriff of the county, which notice and the officer's return thereon were recorded July 12, 1859.

He also relies upon a judgment in a writ of entry against said Deane for the demanded premises rendered by the supreme judicial court at the October term, 1868. On the 5th day of February, 1869, by virtue of said judgment, the demandant took possession of the premises and leased them to one Otis, who took possion thereof under the lease.

In support of his title the tenant relies upon a mortgage deed of the demanded premises from said Deane to Cyrus Lothrop, dated March 4, 1844, recorded March 20, 1844,to secure the payment of a note from said Deane to said Lothrop, of the same date as the mortgage, for $842.84, payable in four annual payments, with interest annually. The tenant acquired title to this mortgage and note as residuary legatee under the will of said Lothrop, probated July 4, 1854.

Both parties claim under Deane. Which has the better title? If the mortgage from Deane to Barker is still outstanding, it is admitted that the demandant must prevail. The demandant claims that it was duly foreclosed, and that he holds the title under it. The tenant claims that the attempted foreclosure was of no legal effect, and that the debt secured by it was paid and the mortgage discharged, November 7, 1849.

The proceedings of Joy, May 23, 1845, for the foreclosure of the Barker mortgage, were ineffectual for that purpose. The taking possession by him was merely formal. He did not retain it for three years thereafter. R. S. c. 90, § 4. *Chase* v. *Marston*, 66 Maine, 271. From the evidence we are satisfied that the debt secured by this mortgage was paid and the mortgage extinguished by the settlement between the demandant and Deane, November

7, 1849, when the new note and mortgage were given. The demandant has no title by virtue of the Barker mortgage.

But he has a good title by virtue of the mortgage from Deane to him of November 7, 1849, unless the tenant shows a better title. The tenant's mortgage was given March 4, 1844. The debt secured by it became fully due March 7, 1848. The mortgager remained in possession of the mortgaged premises for more than twenty years thereafter; and during that time there is no evidence that either the tenant or his devisor in any way asserted any claim under the mortgage; nor that the validity of the mortgage was in any way recognized by Deane, the mortgager. Upon these facts a presumption arises that the mortgage had been paid and ceased to be a subsisting title. This rule is so well settled that no citation of authorities is needed. But this presumption is not conclusive upon the tenant. He may rebut it by proof that the mortgage debt had not been paid, and that the mortgage had not been extinguished. The tenant claims that the evidence is sufficient to rebut this presumption. By the stipulation in the report we are to determine the rights of the parties on so much of the evidence as is admissible. One piece of evidence relied upon by the tenant is the lease from himself to Deane, dated August 1, 1870, which recognizes his mortgage as a subsisting title. This was more than twenty years after the maturity of the mortgage debt, and after the demandant's title had become absolute as against Deane. We think this evidence inadmissible. It was not competent for Deane, at that time, to affect the title of the demandant by his admissions. *New York Life Ins. and Trust Co.* v. *Covert*, 29 Barb. 435. The only evidence in the case to rebut the presumption of payment is the production of the mortgage and note, and the testimony of the tenant, that, as executor of the will of Lothrop he found the mortgage and note among Lothrop's papers sometime between 1854 and 1858; and that nothing had been paid him on the note since that time. We think this evidence is not sufficient to rebut the presumption of payment. The note was from six to ten years overdue when it came into the tenant's hands. He kept the note and mortgage from twelve to sixteen years after they came into his hands without asserting any claim

under them. There is no explanation of this long delay. For aught that appears the note may have been paid to Lothrop before his death. The tenant fails to show an existing title to the demanded premises. *Crooker* v. *Crooker*, 49 Maine, 416. *Cheever* v. *Perley*, 11 Allen, 584.

*Judgment for demandant.*

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

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EVELYN MAYNELL *vs.* INHABITANTS OF SULLIVAN.

Hancock. Decided December 19, 1877.

*New trial.*

A verdict will not be set aside, on the ground that it is against evidence, unless it is clearly so.

A new trial will not be granted, on the ground of newly discovered evidence, unless due diligence was used to discover the evidence before the trial.

A new trial will not be granted, upon the ground that the party moving for it was taken by surprise at his adversary's evidence, unless due diligence was used to guard against the surprise; nor unless relief was sought at the earliest opportunity.

*Thus*, if a party is taken by surprise at his adversary's evidence, his first duty is to move for a postponement or continuance; and if, instead of this, he elects to let the case go to the jury, and thus takes the chance of a verdict in his favor, he cannot afterward make the surprise the ground for a new trial.

ON MOTION of the plaintiff to set aside the verdict, which was for the defendants, as against evidence, also on motion for a new trial on the grounds of surprise at the trial, and of newly discovered evidence.

CASE for injury from defective highway, Sunday, May 28, 1871. The way was a bridge by Smith's carding mill in defendant town. The alleged defect was that the planking of the bridge was some four or five inches higher than the level of the earth in the road. The writ alleges that by reason of the defect, the wheels struck against the end of the plank and the plaintiff was thrown violently forward upon the bridge striking with great force upon her head, whereby she was rendered insensible for several hours, and badly

bruised, and injured externally and internally. There was also an allegation, that the plaintiff while passing over the road on Sunday, was engaged in a work of necessity and charity. The evidence on that point was that she was a wife and mother; deserted by her husband, and was conveying her child, four years of age, from Steuben to Sullivan to her husband's father for support; that she was dependent upon her uncle, who drove the team, for means of conveyance, and he was unable or unwilling to go on any other day.

There was evidence at the trial tending to show that the condition of the planking was as set out in the writ. There was evidence on the part of the defense quite to the contrary, that the planks were beveled off as much as ten inches, beveled to a shim.

The verdict at the April term, 1873, was for the defendants, when the plaintiff filed a motion to set it aside as against law, evidence, and the weight of evidence.

At the April term, 1876, the plaintiff filed a motion for a new trial, on the ground of newly discovered evidence. The motion states that the jury, through their foreman, in reply to a question put them by the presiding justice, whether "the Sunday law stood in the way" said "that they had no trouble about that, but found that there was no defect in the highway or bridge." The motion also states that the plaintiff's counsel, in August, 1873, in passing over the bridge in question, discovered the planking was not beveled near as much as the defendant's witnesses testified; that the planking was the same that was on the bridge at the time of the hurt; that he took careful measurements in presence of one of the witnesses who testified most strongly for the defendants on that point, and that the witness acknowledged that he and others who testified for the town were mistaken.

*W. Freeman, jr.*, for the plaintiff.

*A. Wiswell*, for the defendants.

WALTON, J. This is an action to recover damages claimed to have been received through a defect in one of the highways in the town of Sullivan. The jury returned a verdict in favor of the town. The plaintiff moves for a new trial upon three distinct

grounds; first, because the verdict is against evidence; second, upon the ground of newly discovered evidence; third, because the testimony of some of the defendants' witnesses was false in relation to a material fact, and took her by surprise.

It is settled law that a verdict will not be set aside, on the ground that it is against evidence, unless it is clearly so.

It is equally well settled that a new trial will not be granted, on the ground of newly discovered evidence, unless due diligence was used to discover the evidence before the trial.

It is also a well settled rule of practice that a new trial will not be granted, upon the ground that the party moving for it was taken by surprise at his adversary's evidence, unless due diligence was used to guard against the surprise; nor unless relief was sought at the earliest opportunity. If a party is unexpectedly met by testimony which is false, and the testimony relates to a matter, the truth of which can be readily ascertained, if sufficient time is had, his first duty is to move for a postponement of the trial, or a continuance of the cause; and if, instead of doing this, he voluntarily elects to let the case go to the jury, and thus takes the chance of a verdict in his favor, he cannot afterward make the surprise the ground for obtaining a new trial.

A careful examination fails to satisfy us that the verdict in this case is clearly against the weight of evidence. On the contrary we think it fairly preponderates in favor of the verdict.

Nor are we satisfied that the evidence, which it is claimed has been discovered for the first time since the trial, might not have been ascertained, by the use of reasonable diligence before the trial. It relates to the condition of the planking upon the bridge where the plaintiff was injured; and especially to the length of the bevel or champer upon the ends of the planks. As the planks had been in substantially the same condition for a long time before the accident, and so remained at the time of the trial, no reason is perceived why the plaintiff could not have produced at the trial a sufficient number of witnesses to show what the actual condition of the planking, at the time of the accident, was, and with as much certainty as human testimony could establish any fact.

And if she was taken by surprise by the testimony of the

defendants' witnesses upon that point, she should have moved at once for a postponement of the trial, or a continuance of the cause, to enable her to procure witnesses to contradict them. Not having done so, she is estopped to allege surprise as the ground of a new trial. Having voluntarily elected to take the chances of a verdict in her favor with such evidence, she must abide by the result.

*Motions overruled.*
*Judgment on the verdict.*

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

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JAMES GRINDLE, administrator, *vs.* EASTERN EXPRESS COMPANY.

Hancock. Decided December 28, 1877.

*Carriers.*

The plaintiff's intestate delivered to the defendants' agent at Castine $24.90 to be forwarded to Belfast and there delivered to one Beale, agent of the Continental Life Insurance Company. The money was sent for the purpose of paying the intestate's semi-annual premium on his life-policy, which would by its terms lapse if premium was not paid on or before eight days thereafter; of all which the defendants' agent had notice, but failed to deliver the money.

*Held,* that primarily the defendants would be liable in damages for the net value of the policy on the day it lapsed, both parties having presumably contemplated such damages from knowledge of the circumstances.

Also, *held,* that it was incumbent upon the plaintiff's intestate to use ordinary care and take all reasonable measures within his knowledge and power to re-instate himself with the insurance company or to re-insure, and that he cannot recover damage for such loss as he might have thus prevented.

CASE, for negligence, brought by the plaintiff as administrator of the estate of Emery R. Wardwell against the defendant company for negligence in forwarding the sum of $24.90 which was delivered to one Charles W. Tilden, agent of the defendants at Castine, May 8, 1873, to be forwarded to F. H. Beale at Belfast, Maine, agent of the Continental Life Insurance Company of the city of New York. The said sum of $24.90 was for the semi-annual premium due April 15, 1873, to be paid according to the regulations of the said company within thirty days of that date. It is alleged by the plaintiff:

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That said sum of $24.90 was not forwarded and delivered to the said F. H. Beale, but was delayed by the defendants from May 8, 1873, until September 8, 1874, and in consequence of said delay, said life insurance policy lapsed and became void.

That said policy was dated and sealed April 15, 1870, by which said insurance company "do assure the life of Emery R. Wardwell of Penobscot, in the county of Hancock, state of Maine, for the sole use of Emery R. Wardwell in the amount of one thousand dollars, for the term of sixteen years from the date of this policy or until his decease, in case of his death before that time. And the said company do hereby covenant and agree to and with said assured, well and truly to pay or cause to be paid the said sum insured to the said assured within ninety days after the said Emery R. Wardwell shall have been insured for sixteen years as aforesaid, or in case he should die before that time, then to Edna N. Wardwell (wife) if living, otherwise to the legal representatives of the said assured, within ninety days after due notice and satisfactory evidence of his death."

That August 22, 1874, the said Emery R. Wardwell lost his life by drowning, whereby as the plaintiff alleges, the said Continental Life Insurance Company would have been liable to pay and would have paid said sum of $1000, to the estate of said Emery R. Wardwell, if said policy had not lapsed and become void by non-payment to said company of said semi-annual premium due within thirty days from said 15th day of April, 1873.

The following is a copy of the receipt given by the agent of the defendant company at the time the money was delivered:

"Eastern Express Company. Castine, May 8, 1873. Received of E. R. Wardwell, twenty four 90-100 dollars directed F. H. Beale, agent, Belfast, which the Eastern Express Company agree to forward and deliver at destination if within their route, and if not, to the connecting express, stage or other means of conveyance, at the most convenient point, and to be responsible for such delivery to the amount of fifty dollars only, unless value is stated above. It is further agreed that they shall not be held responsible for any loss occasioned by fire or the dangers of railroad, steam or river navigation, or for the breakage of glass or other fragile

goods, or for money put inside of a box or bundle. For the Eastern Express Co. (Signed) C. W. Tilden."

The plaintiff claims that at the time the money was delivered to Tilden, Tilden was informed and knew for what purpose it was sent to Beale. This claim the defendants deny and they also claim that on the next day after receipt of the money they delivered the same to the usual means of conveyance between Castine and Belfast for transportation to Belfast.

The following questions are submitted for the consideration of the court.

1st. Is an action on the case for negligence the proper form of action?

2nd. Should the action have been brought in the name of the administrator of Emery R. Wardwell's estate, or in the name of Edna N. Wardwell, the widow?

3d. If case is the proper remedy, and the action is correctly brought in the name of the administrator and the action is maintainable on the facts as claimed by the plaintiff, what would be the measure of damages against the express company?

4th. If the money was on the next day after its receipt delivered to the usual means of conveyance, and was afterwards lost or missing, can the defendants be held in any form of action?

If the action is not maintainable by reason of form of said action or by reason of its being brought in the name of the administrator and no amendment can be allowed, then a nonsuit is to be entered. Otherwise the action shall stand for trial.

*A. Wiswell & A. P. Wiswell*, for the plaintiff.

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

VIRGIN, J. On April 15, 1870, the Continental Life Insurance Company assured the life of the plaintiff's intestate for his sole use, in the sum of one thousand dollars, for the term of sixteen years or until his decease in case of his death before that time; and the company, by their policy under seal, of that date, did covenant with the assured, to pay him the sum insured within ninety days after he shall have been insured the term mentioned, or in case he should die before that time, then to his wife Edna, if living, otherwise to the legal representatives of the assured.

Being an endowment policy for sixteen years, it was primarily intended to be for the benefit of the assured himself. And being a covenant under seal, no one but the assured or his legal representative could maintain an action upon it, he being the only party in whom the legal interest was vested. *Hinkley* v. *Fowler*, 15 Maine, 285. *Flynn* v. *North Am. L. Ins. Co.*, 115 Mass. 449.

This is not an action against the insurance company for a breach of any covenant contained in the policy; but an action on the case against the defendants as common carriers of goods, for an alleged violation of their duty in failing to seasonably deliver to one Beale, of Belfast, agent of the insurance company, a certain sum of money sent through them by the plaintiff's intestate on May 8, 1873, for the purpose of paying his semi-annual premium due on his policy May 15, 1873.

The defendants do not deny their receipt of the money in the capacity mentioned. Being such carriers, and their general obligation depending upon their public profession (*Johnson* v. *Midland Railway Co.*, 4 Exch. 367,) they were bound, in the absence of any special agreement, to receive the money and carry and deliver it, within a reasonable time, at whatever place directed within the route which they hold out to the public as theirs, and no further. There, their common law liability ceases. *Perkins* v. *Portland, S. & P. Railroad*, 47 Maine, 573, 589. *Hales* v. *London, & N. W. Railway*, 4 B. & S. Q. B. 66, (116 E. C. L. R.) They might contract to carry further to any point beyond their regular line; or might simply undertake to deliver to a connecting carrier; in which latter event their liability would cease with a safe carriage and prompt delivery; for they would then have done all the law and all their contract required. *Perkins* v. *Portland S. & P. Railroad, supra.* *Skinner* v. *Hall*, 60 Maine, 477. *Plantation No.* 4 v. *Hall*, 61 Maine, 517.

The proof of a contract for carriage beyond their route should be clear. *Nutting* v. *Conn. Railroad*, 1 Gray, 502. But it may be express or by implication; by direct or circumstantial evidence; by words, conduct or usage. *Gray* v. *Jackson*, 51 N. H., 9, 11. *Knapp* v. *U. S. & Can. Exp. Co.*, 55 N. H. 348, and cases *supra.* Receiving goods marked or directed to some point beyond their

regular route is not sufficient evidence of an implied contract to carry them to that place. *Pendergast* v. *Adams Exp. Co.*, 101 Mass. 120. Where the consignor accepts a special contract, it is no answer that he did not know its terms; for in the absence of fraud, imposition or deceit, he is conclusively presumed to understand its terms and legal effect. *Squire* v. *N. Y. Cen. Railroad*, 98 Mass. 239. *Grace* v. *Adams*, 100 Mass. 505. *Belger* v. *Dinsmore*, 51 N. Y. 166. *Snider* v. *Adams Exp. Co.*, 4 Cen. L. J. 175.

The defendants claim that Belfast is not within their route; that they made no contract, and neither by conduct nor usage created any obligation to deliver the money outside of their route; that Castine is the most convenient point on their line whence public communication is had with Belfast, and that they delivered the money the next day after its receipt to the usual means of conveyance between Castine and Belfast. If these facts appear at the trial, they will constitute a good defense. Any special contract in the premises must be shown by the plaintiff.

II. By the terms of the report, if the action is maintainable on the facts as claimed by the plaintiff, what is the measure of damages against the express company? "The plaintiff claims that at the time the money was delivered to the defendants' agent, he was informed and knew for what purpose it was sent to Beale."

Upon this hypothesis we are of the opinion that primarily the defendants would be liable for the net value of the policy on May 15, when it lapsed and became void, qualified as hereinafter mentioned. It had a surrender value which the company would have paid. It could have been assigned by the consent of all concerned. Then the assured—for whose sole benefit it was primarily issued—was alive. The wife was no party to it. She simply had an equitable interest therein depending upon the contingency of her husband's decease prior to May 15, 1886, and the seasonable payment of the semi-annual premiums to the date of his death. When the policy lapsed, the contingency of his death had not occurred, and the assured alone was injured.

The general rule of damages in an action on the case against a common carrier for the non-delivery of goods is their value when and where they should have been delivered, with interest thereon

from that date; and if money be the article transported, the measure of damages is the principal sum with interest. So where the delivery is negligently delayed, the carrier is liable for the diminution in their market value, which occurred during the delay. *Weston* v. *Grand Trunk Railway*, 54 Maine, 376. Although this rule includes such profits as depend upon market values, it excludes all such uncertain, contingent profits as may result merely from a private or special speculation, especially when they are the subject of some collateral undertaking. *Bridges* v. *Stickney*, 38 Maine, 361.

While this is the general rule in the absence of special stipulations, it may be modified by circumstances. The courts in England as well as in this country have adopted substantially the doctrine of the civil law, and applied it alike to breaches of contract and violations of duty. "When the debtor," says Pothier, "cannot be charged with fraud, and is merely in fault for not performing his obligation, . . he is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit. In general the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned by it. . . . Sometimes the debtor is liable for the damages and interest of the creditor, although extrinsic; as when it appears they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly, in case of non-performance." 1 Poth. on Oblig. 161, 162.

Chancellor Kent also declared that "damages for breach of contract are only those which are incidental to, and directly caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties." 2 Kent Com. (12th ed.) 480* note.

So in this state Weston, J., said: "In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct damages, which,

according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof, or deducible from the non-performance, are not allowed." *Miller* v. *Mariners' Church*, 7 Maine, 51. This was reaffirmed in *True* v. *International Tel. Co.* 60 Maine, 9, 25. *Bartlett* v. *W. U. Tel. Co.* 62 Maine, 209.

The leading and famous case upon this subject in England is *Hadley* v. *Baxendale*, (9 Exch. 353, 26 Eng. L. & Eq. 398) decided in 1854. In that case Alderson, B., said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally; *i. e.*, according to the natural course of things from such breach of the contract itself; or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." The action was against a common carrier for negligent delay in delivery; and the rule here enunciated has been followed in numerous English cases against carriers, and of failure to deliver goods on contract of purchase, or to manufacture and deliver personal property, etc. many of which are collected in Field on Dam. 238 note. Blackburn, J., in *Cory* v. *Thames Iron Works, etc. Co.* L. R. 3 Q. B. 181, 186, stated the rule in brief, thus: "Damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of." And Lord Campbell said that the rule in *Hadley* v. *Baxendale*, merely affirmed what was to be found in 2 Kent Com. etc. *Smeed* v. *Foord*, 1 El. & El. 602, (102 E. C. L.)

The latest English case which has come under observation is *Simpson* v. *London & N. W. Railway Co.* (Q. B. Div.) 24 W. R. 294, (3 Cent. L. J. 203). The plaintiff attended agricultural fairs with samples of cattle spice, etc. of which he was the manufacturer. The defendants received these samples from the plaintiff's agent on a certain fair-ground to be forwarded, by a certain day named on the consignment note, to a certain other fair-ground when and where a cattle-fair was to be held. The goods did not

arrive until the fair was closed; and the court held that the plaintiff was entitled to recover the loss of profit he would have gained on the orders received through the exhibition of his samples at the show, and for his loss of time in waiting at the latter place for the arrival of the goods. Cockburn, C. J., said: "I think it is now settled that wherever the prospect of loss of profits was either expressly brought to the knowledge of the carrier, or the goods were received under such circumstances that he ought reasonably to have inferred their nature and destination, so that the use of them might be within the contemplation of both parties, then the plaintiff is entitled to recover damages for the loss of profits he would have made if the contract had been duly carried out."

The general rule in *Hadley* v. *Baxendale*, has been recognized and applied by the courts in most if not all of the states of this Union. *Cutting* v. *Gr. Tr. Railway*, 13 Allen, 381, 384. *Scott* v. *Boston & N. O. Steamship Co.* 106 Mass. 468. *Griffin* v. *Colver*, 16 N. Y. 489. *Hamilton* v. *McPherson*, 28 N. Y. 72. *Booth* v. *S. D. R. M. Co.* 60 N. Y. 487, 492, 493. Field on Dam. 241 *et seq.*, where many of the American cases are collected.

Therefore while the loss of another's money received for transportation by a carrier, without reasonable knowledge of the purpose for which it is sent, will lay the carrier under obligation merely to refund the principal sum with interest; still, when it is seasonably sent for the specific purpose of paying the sender's premium on his life-policy which will lapse if the money be not paid at the particular time, and the carrier is reasonably informed in relation to the premises, and has a reasonable time to perform the duty undertaken, but negligently fails to perform it, the law will justly hold him primarily, at least, for the net value of the policy which lapsed in consequence of his negligence. From their knowledge of the special circumstances, both parties must be presumed to have contemplated such consequences when the money was deposited with the carrier.

We consider *Favor* v. *Philbrick*, 5 N. H. 358, a parallel case, where in consequence of the carrier's unreasonable delay in the delivery of the plaintiff's account against a third person, it became barred by the statute of limitations, the carrier was held

liable for the amount of the account. So where an express company received from the plaintiff a promissory note against a third person which they agreed to collect of the maker, but during the company's negligent delay in pressing the collection the maker failed and the note became worthless, the company were held for the amount of the note. *Knapp* v. *U. S. & Can. Exp. Co.* 55 N. H. 348. To the same purport see also *Parks* v. *Alta Cal. Tel. Co.* 13 Cal. 422. *Bryant* v. *Am. Tel. Co.* 1 Daly, 575.

III. But the law makes it incumbent upon a person for whose injury another is responsible, to use ordinary care and take all reasonable measures within his knowledge and power to avoid the loss and render the consequences as light as may be; and it will not permit him to recover for such losses as by such care and means might have been prevented. *Miller* v. *Mariners' Church*, *supra*. *True* v. *International Tel. Co. supra*. *Bartlett* v. *Western U. Tel. Co. supra*. The principle is illustrated by Shaw, C. J., in *Loker* v. *Damon*, 17 Pick. 284, where in trespass for removing a few rods of fence, the cost of repairing it, and not the injury to the following year's crop caused by cattle passing through the gap in the fence, was held to be the measure of damages in favor of the plaintiff who knew the fence was down. So where the plaintiff's cow was made dangerously sick by eating poisoned hay purchased of the defendant, it was held to be the duty of the plaintiff to employ the best remedies within her reasonable reach, at reasonable trouble and expense, to cure the cow. *French* v. *Vining*, 102 Mass. 132. See also *Eastman* v. *Sanborn*, 3 Allen, 594. *Sherman* v. *Fall Riv. I. Works*, 2 Allen, 524. *Scott* v. *Boston & N. O. Steamboat Co. supra*. *Sutherland* v. *Wyer*, 67 Maine, 69.

Same doctrine is held in New York, in *Hamilton* v. *McPherson*, 28 N. Y. 72, 77. *Milton* v. *Hudson Riv. Steamboat Co.* 37 N. Y. 210. *Baldwin* v. *U. S. Tel. Co.* 45 N. Y. 744, 753. And in Iowa, in *Mather* v. *Butler County*, 28 Iowa, 253. *Simpson* v. *City of Keokuk*, 34 Iowa, 568.

Some insurance companies are accustomed to re-instate the assured without expense in case of accidental lapse, especially when the policy, like the one in question, has run but a short time.

All will re-insure on payment of a premium based on increased age, if, on re-examination, the health of the assured remains unimpaired. Whether or not the assured made any effort of the kind, during the fifteen months he survived the policy, the case does not find. We think, however, it was incumbent on him to use the care and adopt all reasonable means in the premises known to him. And unless he can show some legal excuse for not doing so, such as want of knowledge, failure of health, failing circumstances of the company, etc., he should not recover damage for such loss as he might have thus prevented.

*Action to stand for trial.*

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

LEMUEL CRABTREE *vs.* WILLIAM H. CLAPHAM.

Hancock. Decided January 2, 1878.

*Replevin.*

As a general rule, replevin does not lie by one partner against his copartner for partnership property.

Where the plaintiff in such action is defeated, a return of the property must be ordered, and the defendant is entitled to recover damages for the detention in proportion to the extent of his ownership in the property replevied.

ON REPORT.

REPLEVIN for a horse and pair of oxen valued by agreement of parties at $500. The writ was dated and served September 22, 1875.

PLEA: And the said defendant comes and defends, &c., when, &c., and says that he did not take the said goods in the declaration aforesaid, above mentioned, in manner and form as the plaintiff above against him hath declared, and of this he puts himself upon the country. [Plea joined.]

And for brief statement the said defendant says that, at the time of the taking of said horse and oxen by the plaintiff, the property of the horse and oxen was the partnership property of

the said plaintiff and defendant and owned by them as copartners; that at the time of the taking thereof the said horse and oxen were rightfully in the possession of the defendant; that at that time the said plaintiff and defendant were the owners as partners of another pair of oxen and horses of equal value, and that said last mentioned horse and oxen were at that time in possession of the plaintiff. Wherefore he prays judgment and a return of the said horse and oxen with damages for the detention of the same and for his costs.

The facts stated in the above pleas were admitted to be true, and a question arising whether the defendant would be entitled to damages, the case was reported to the law court, to decide what the judgment shall be, and to determine the amount of damages.

*E. Hale & L. A. Emery*, for the plaintiff.

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

PETERS, J. As a general rule, replevin does not lie by one tenant in common against his co-tenant for the common property. *Witham* v. *Witham*, 57 Maine, 447. The same rule applies to copartners. *Hacker* v. *Johnson*, 66 Maine, 21. In *Witham* v. *Witham*, it was decided that, upon the defeat of the action between co-tenants, the defendant is entitled to a return of the property and damages for the taking and detention. In *Hacker* v. *Johnson*, it was virtually settled that the same consequences follow where the parties in an action of replevin are copartners. The plaintiff, then, must be nonsuit, with an order to return.

What shall the measure of damages be, to be recovered by the defendant? We think the doctrine inculcated in the above named cases and in cases therein referred to is, that, as between co-tenants, the damages should be in proportion to the extent of the defendant's ownership in the property replevied. We do not perceive why the same rule should not apply to this case. Certainly, the plaintiff cannot complain of it, who wrongfully assumes possession of property by an abuse of the forms of law. The presumption is, nothing appearing to the contrary, that the parties were equal owners in the property taken and equally entitled to its profit and possession. If there is occasion for it, either party can go

into equity and there have all partnership matters examined and settled.

The property as a whole is, by agreement, valued at five hundred dollars. Interest on one-half that sum would not be an adequate compensation for the detention of a half interest of the same. The cattle are more valuable for a present than a future use. The plaintiff, being a wrong doer, should not profit by the wrong. The entry to be: Plaintiff nonsuit; judgment for a return; damages for the defendant, for the detention of his interest in the property, to be reckoned from the day of the taking to the date of judgment at the rate of thirty-five dollars per year.

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

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STATE *vs.* EDWARD M. SMITH.

Hancock. Decided February 15, 1878.

*Trial.*

The provisions of R. S., c. 106, § 8, which requires that venires for grand jurors, to serve at the supreme judicial court, shall be issued forty days at least before the second Monday of September annually, is directory merely to the clerk of the court in the matter of time, and not a limitation on his power to issue.

A venire issued after the expiration of the time named in the statute, but in season for service by the proper officer in accordance with the provisions of the statute, is valid.

The attorney general has the power to enter a *nolle prosequi*, to the whole or any part of an indictment, without the consent of the prisoner, either before a jury is empaneled or after verdict. If after verdict, and the indictment is sufficient, it will be a bar to any new indictment for the same offense.

Since the act of 1876, c. 114, which reduces the punishment for murder in the first degree from death to imprisonment for life, in an indictment for murder, the prisoner has the right to challenge but two jurors peremptorily. The right of challenge is regulated by the grade of punishment by R. S., c. 134, § 12.

ON EXCEPTIONS AND MOTIONS.

INDICTMENT for murder, found and tried at the April term, 1877, Peters, J., presiding.

The indictment as found by the grand jury contained two counts, the first of which was of the form following:

"The jurors for the said state upon their oath present, that Edward M. Smith of Bucksport, in the county of Hancock aforesaid, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-six, at Bucksport in said county of Hancock, with force and arms in and upon the body of one Melissa F. Thayer, feloniously, willfully and of his malice aforethought, did make an assault, and her the said Melissa F. Thayer, then and there feloniously, willfully and of his malice aforethought, did kill and murder, against the peace of the said state, and contrary to the form of the statute in such case made and provided."

The second count was of similar purport differing principally in the name of the person murdered, which was stated as Melissa F. Thayer, otherwise called Lizzie F. Thayer.

To this count the attorney general entered a *nolle prosequi*, and went to trial on the first count.

The jury returned a verdict of guilty of murder in the first degree; and the counsel for the prisoner filed the following bill of exceptions:

"The prisoner's counsel on the first day of the term claimed the right to challenge the grand jury, which challenge was then submitted, contained in the transcript of the reporter's notes annexed hereto. The court overruled said challenge.

"The prisoner when arraigned, filed a plea in abatement to the indictment. The state demurred thereto. The demurrer was joined. Thereupon the court sustained the demurrer and overruled the plea, and ordered that the prisoner plead further. The indictment, plea, demurrer and joinder, are a part of these exceptions.

"The prisoner then demurred specially to the indictment. The demurrer was joined by the state. A decision was reserved until the court came in after an adjournment over noon, and before any ruling was made, the counsel for the state moved for leave to withdraw the joinder, stating their purpose to be to enter a *nolle prosequi* to some portion of the indictment, which motion was granted,

the counsel for the prisoner objecting thereto, and claiming that the demurrer should be passed upon by the judgment of the court. Thereupon the attorney for the state, under such leave, withdrew the joinder, and then with leave of court entered a *nolle prosequi* as to the second count in the indictment. Permission was then offered by the court to the counsel for the prisoner, to withdraw the demurrer; if he desired to do so. Not being done, the state's attorney again joined the demurrer; the court overruled it and adjudged the indictment good and ordered the prisoner to plead over. Whereupon the prisoner without objection was arraigned anew upon the indictment, omitting the second count, and he pleaded not guilty thereto, and was tried upon the first count therein, and found by the jury guilty of murder in the first degree. No written order or declaration of *nolle prosequi* was signed and filed by the attorney for the state, but in open court he directed the clerk to enter the *nolle prosequi* as to the second count upon the docket, which was accordingly done. The demurrer and joinders are a part of the case. The prisoner, when the jury were being empaneled, claimed the right to challenge jurors peremptorily as provided for the trial of capital cases, but the court ruled that such challenge would not exceed the number of two, a jury being drawn from the whole number of jurors in attendance not excused for cause, and when during the drawing, the prisoner peremptorily (but not for cause) challenged a third juryman, having previously exercised such peremptory challenge as to two other jurors, who were set aside, such third challenge was not allowed, and the juror called was sworn and placed on the panel.

"The presiding judge, in charging the jury said:

"A word or two as to the different classes of witnesses who have testified. How far shall the testimony of the accused be accepted; he can testify in his behalf; but he is a party accused of a monstrous crime. If he is innocent, of course you can believe him. But you must consider if he is guilty, whether it would not be too much to expect of human nature, that he would tell the truth when falsehood would be more likely to screen him from conviction. Therefore testimony that amounts upon the part of the prisoner, in such an offense as this, to merely a denial, you will judge whether it would amount to much or not.

"Still you have a chance to see and hear him, and obtain impressions from his appearance one way or the other. And he has the opportunity to make explanations, and bear the tests of examination; and truth if spoken may have its weight, coming from any source. It is for you to decide whether you will give any weight to his testimony, either for or against him, and if so, how much.

"To his wife, brother and sister, what credit should be given, on account of their relation to the prisoner? You must bear in mind, gentlemen, that the tie between that class of witnesses and the prisoner is a natural one; that their interest for the prisoner in his peril must be of the strongest kind; that these witnesses are under a tremendous temptation to exaggeration, coloring and falsehood; that in this case it would be an easy departure from the facts, as claimed even by the state, for the wife and sister to date the coming of the husband and brother at an earlier hour than he came.

"Still they may tell the truth, and you may believe all they say, or not a word of it, just as you please, according to your honest convictions as to its truthfulness. Much must depend upon the naturalness and probability of their story, and whether corroborated or not by other proof and the circumstances of the case. But the amount of weight to be attached to their testimony is entirely a matter for you, with which I, or any opinion of mine, can have nothing to do. And this later remark applies to all the testimony in the case from the beginning to the end."

After verdict, the prisoner filed a motion in arrest, to be copied, which was overruled by the court.

A summary of the case and the positions of counsel appear in the opinion.

*H. D. Hadlock*, for the prisoner, contended that R. S., c. 106, § 8, naming the time before which venires should issue, was imperative and not merely directory.

*L. A. Emery*, attorney general, for the state, contended that § 8 was directory and not imperative.

LIBBEY, J. The prisoner was indicted for murder, and was con-

victed of murder in the first degree. Several questions are raised by his exceptions.

I. He raises the question of the sufficiency and legality of the grand jury by whom the indictment was found. On the first day of the term he interposed a challenge to the array, and after the indictment was found and returned into court he presented a plea in abatement which was demurred to, and the demurrer sustained. In both the challenge and the plea the objection presented and relied upon is, that the venires, by virtue of which the grand jurors were drawn, were not issued forty days before the second Monday of September, but on the thirtieth day of August preceding. The challenge to the array was verbal. It does not appear that any record was made of it. While we do not consider such a challenge sufficient, still as it was understood by the court and the counsel at the time it was made that it should be treated as if made in writing, and as the same question is presented by the plea in abatement, it will be considered as if properly before the court.

R. S., c. 106, § 7, makes it the duty of the clerk of the courts to issue venires to the constables of towns from which jurors are to be drawn, for the draft of grand and traverse jurors. By § 8, "venires for grand jurors to serve at the supreme judicial court, shall be issued forty days at least before the second Monday of September annually; and they shall serve at each term for the transaction of criminal business during the year." The counsel for the prisoner claims that this statute requirement is imperative, and that a venire issued by the clerk after the expiration of forty days before the second Monday of September is void. On the other hand, it is claimed by theattorney general that this statute, so far as it relates to the time when the venire shall be issued, is directory merely, and that a venire issued after the time named in the statute, and in season to be executed before the second Monday of September, is valid.

In general where a statute imposes upon a public officer the duty of performing some act relating to the interests of the public, and fixes a time for the doing of such act, the requirement as to time is to be regarded as directory, and not a limitation of the

exercise of the power, unless it contain some negative words, denying the exercise of the power after the time named; or from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the legislature had in contemplation that the act had better not be performed at all than be performed at any other time than that named.

In *Pond* v. *Negus*, 3 Mass. 230, the question involved was the validity of the assessment of a tax voted by a school-district. The statute required the assessors to assess the tax in thirty days from the time the vote was certified to them. It was not assessed till after that time. Parsons, C. J., in delivering the opinion of the court says: "And although the assessors are directed to assess the tax within thirty days after the certificate, yet there are no negative words restraining them from making the assessment afterwards; and accidents might happen which would defeat the authority if it could not be exercised after the expiration of thirty days. The naming the time for the assessment must therefore be considered as directory to the assessors and not as a limitation of their authority." The same principle is affirmed in *Torrey* v. *Millbury*, 21 Pick. 64.

In *The People* v. *Allen*, 6 Wend. 486, the statute under consideration declared that, "the commanding officer of each brigade of infantry shall, on or before the first day of June in each year, appoint a brigade court martial." The appointment was made in July. It was held valid. Marcy, J., in delivering the opinion of the court says: "The general rule is, that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed or the language used by the legislature, show that the designation of the time was intended as a limitation of the power of the officer. . . . . So it may be said of this case, that as there is nothing in the nature of the power showing that it might not be as effectually exercised after the first day of June as before, and as the act giving it contains no prohibition to exercise it after that period, the naming that day was a mere direction to the officer in rela-

tion to the manner of executing his duty. There is nothing in the nature of the power given, or in the manner of giving it, that justifies the inference that the time was mentioned as a limitation."

This rule of construction has been approved in New York in the following cases: *Marchant* v. *Langworthy*, 6 Hill, 646. *Striker* v. *Kelly*, 7 Hill. 9. *People* v. *Cook*, 8 N. Y. 67. *Cunningham* v. *Cassidy*, 17 N. Y. 276. *Matter of the Empire City Bank*, 18 N. Y. 199.

In *Colt* v. *Ives*, 12 Conn. 243, the question before the court was the legality of the selection of the jury. The statute required that they should be chosen on the first Monday of July. They were not chosen till the 8th of August. The court held that the duty which was imposed to select the jury was imperative; but that the time fixed for the selection was directory; and that the selection was valid. In discussing the question the court say: "Where the object contemplated by the legislature could not be carried into effect by another construction, there the time prescribed must be considered as imperative. But where there is nothing indicating that the exact time was essential it should be considered as directory." "There is nothing in the nature of the power given, or in the manner of giving it, that justifies the inference that the time was intended as a limitation."

In *Johnson* v. *State*, 33 Miss. 363, the statute under consideration required that grand jurors "shall be summoned at least five days before the first day of the court at which their attendance is required." It was held to be directory to the sheriff, and that grand jurors summoned less than five days before the first day of the court were legally qualified.

In *State* v. *Lean*, 9 Wis. 279, the court declare the rule of construction as follows: "That when there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before; no presumption that by allowing it to be so done it may work an injury or wrong; nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not be done at all, then the courts assume that the intent was, that, if not done within the time prescribed it might be done afterwards."

In Illinois, the same principle is affirmed. *Wheeler* v. *Chicago*, 24 Ill. 108.

The statute under consideration contains no negative words limiting the power of the clerk of the courts to perform the duty imposed upon him to the time named. There is nothing in the nature of the duty to be performed, in the manner of its performance, or in its effect upon public interests or private rights showing that the legislature intended that, if not performed within the time prescribed, it should not be performed at all. The statute was first enacted in 1821. The duty it imposes upon the clerk is one of public concern. Its performance is essential to the due administration of justice. If the construction claimed by the counsel for the prisoner is correct, then, prior to 1860, if the clerk for any cause failed to issue the venires within the time prescribed, there could be no legal grand jury for the year. The court had no power to order a grand jury to be drawn. *State* v. *Symonds*, 36 Maine, 128. It cannot be presumed that the legislature contemplated such consequences.

Other provisions of the statute tend to support the construction claimed by the attorney general. Section nine provides that the sheriff, on receiving such venires, shall immediately send them to the constables of the towns where directed; and each constable, on receipt thereof, shall notify the inhabitants of the town, &c. But only four days notice of the meeting is required, and the meeting is not required to be held more than six days before the session of the court. If the sheriff should not immediately send the venires to the constables, or the constables, on receipt thereof, should not give notice of the meeting, still if the constables receive the venires and give seasonable notice, so that the draft is had within the time prescribed, it would not be contended that the delay on the part of the sheriff or constable would invalidate the draft.

Again, section eighteen provides that, if the clerk of the court, or sheriff, neglects to perform his duties so as to prevent a compliance with any of the provisions of this chapter, he shall be fined, &c. The penalty is not imposed on the clerk for not issuing the venires forty days before the second Monday of September, but for such neglect of his duty as will prevent a compliance with the provisions of the chapter.

The only reason which we can discover for the requirement that the venires shall be issued forty days at least before the second Monday of September is, that the officers whose duty it is to draw a grand jury, shall have sufficient time in which to comply with the provisions of the statute in making the draft. The object of the statute is to secure the attendance of a grand jury, duly drawn. The venire sets in motion the machinery of the law to accomplish that result. If it is received by the constable in season for service in accordance with the provisions of the statute, and is duly served and returned by him, we do not perceive why the object of the statute is not as effectually accomplished as if he had received it on the day named in the statute.

We feel clear that the time named in the statute for issuing the venires is directory merely, and not a limitation on the exercise of the power.

This construction renders it unnecessary to consider the effect of the act of 1877, c. 156. If, however, there was an irregularity in issuing the venires, we see no reason why it is not cured by that act. The indictment was found after the act took effect. It in terms validates it unless it shall appear to the court that the prisoner has been or may be, injured by the irregularity complained of. There is no suggestion that the prisoner was in any way injured by it. But it is contended by his counsel that this act is in violation of article 1, § 7, of the constitution of this state, which provides that "The legislature shall provide by law a suitable and impartial mode of selecting juries, and their usual number and unanimity in indictments and convictions, shall be held indispensable." The act of 1877 is a general law. It becomes a part of the law provided by the legislature as a suitable and impartial mode of selecting juries. It is not claimed that its provisions are not suitable and impartial as applied to the subject matter affected by them. We see nothing in the act in conflict with this clause of the constitution. This point is fully covered by *Commonwealth* v. *Brown*, 121 Mass. 69.

II. The indictment, as returned by the grand jury, contained two counts. Before pleading to the indictment the prisoner filed a special demurrer to it, specifying as cause, that it contained

two counts setting out the same offense. The demurrer was joined but before the court ruled upon the demurrer, on motion of the attorney general, he was permitted by the court to withdraw the joinder to the demurrer; and he then, under special leave of court, entered a *nolle prosequi* as to the second count in the indictment. This was against the objection of the prisoner. The demurrer was then joined and overruled.

It is well settled that the attorney general may enter a *nolle prosequi* to the whole or any part of an indictment, against the objection of the respondent either before a jury is empaneled or after verdict. If entered after verdict, and the indictment is sufficient, the verdict will be a bar to any new indict ment for the same offense. It may be entered at any time pending a plea in abatement, demurrer, or motion in arrest of judgment. If the indictment was insufficient for the cause specified, the objection was removed by the *nolle prosequi*. *Commonwealth* v. *Tuck*, 20 Pick. 356. *Same* v. *Cain*, 102 Mass. 487. *Same* v. *Holmes*, 103 Mass. 440. *State* v. *Pillsbury*, 47 Maine, 449.

The presiding judge had the power to permit the withdrawal of the joinder to the demurrer. He might permit it or deny it in the exercise of his discretion. To the exercise of his discretion exceptions do not lie.

III. While the jury were being empaneled, the prisoner claimed the right to challenge, peremptorily, ten jurors, as in capital cases. This claim was denied, and he was permitted to challenge peremptorily two only. We think this ruling was correct. By R. S., c. 134, § 12, a person indicted for an offense punishable with death, has the right to challenge peremptorily ten jurors. By § 20, in all indictments for other offenses, the respondent is entitled to but two peremptory challenges. By the act of 1876, c. 114, the crime of murder is not punishable with death, but with imprisonment for life only. By the statute the right of challenge is regulated by the grade of punishment. The legislature by reducing the punishment for murder from death to imprisonment for life, has reduced the right of challenge of the prisoner from ten peremptory challenges to two. If it is desirable that in indictments for murder the prisoner should have the right to ten peremptory

challenges, it is a matter for the consideration of the legislature. The language of the statute is too clear to be disregarded by the court.

IV. Exception is taken to the charge of the presiding judge to the jury on the ground that he expressed an opinion on an issue of fact upon which they were to pass. The charge is not subject to that objection. The presiding judge very properly called the attention of the jury to certain rules and principles proper for their consideration in determining the credibility of the witnesses, and the weight which they would give their testimony. After doing so, he told the jury that the amount of weight to be given to the testimony was entirely for them, with which he, or any opinion of his, had nothing to do. There is nothing in the charge that can be construed as the expression of an opinion upon any issue of fact before the jury.

The motion in arrest of judgment presents no point not already considered. *Exceptions overruled.*

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

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HENRY L. MITCHELL *vs.* WILLIAM H. SMITH.

Penobscot. Decided April 7, 1876.

*Deed.*

Where partition deeds are mutually given of parts of premises, before held in common, the deeds should be construed together.

In such case, if the deeds are free from ambiguity, so that the intention of the grantors, whether clearly expressed or not, can be made certain by an examination of the papers themselves, then extrinsic evidence of such intention, whether consisting of the acts and declarations of the parties at the time of the delivery of the deeds, or the mode of subsequent occupancy under them, cannot be received to modify their legal effect.

Where deeds of partition are mutually given, one of which purports to convey an undivided half part of land and buildings, and in the corresponding clause of the other there is no mention of buildings in terms, the parties at the date of the deeds, owning the buildings in the same proportion as the land, the omission to mention the buildings does not prevent the grantor's interest in them from passing with the conveyance of the lot on which they stand.

Where, in a deed, a divisional line in a partition of land is in terms at right angles with the side line and is also made to pass through the thread of the middle partition of a double house, which is not exactly at right angles with the side line, the partition as a monument must control.

In such case where there is a jog of three feet at the point where the main house joins the ell, *held*, that the divisional line will not diverge in its course to follow the existing partition through the ell.

On report.

Writ of entry, (omitting unnecessary particulars) of a lot of land on the east side of Ohio street, Bangor, beginning at a post in the fence; thence, north 44° 12' east, by the fence to a stake 150 feet at right angles from said street; thence, southeasterly parallel with said street to a point in the rear line of the lot where a straight line shall intersect it drawn through the middle of the double tenement house, the north tenement of which is occupied by the said Mitchell, and the south by Charles Hight, equidistant from either end of said house, and about twenty feet from either end; thence, westerly in a straight line drawn as aforesaid to said street; thence, northerly to the point begun at.

The defendant filed a disclaimer of all that part of the demanded premises lying northerly of the partition wall and the thread thereof, dividing the northerly tenement occupied by the plaintiff from the southerly tenement occupied by Charles Hight, tenant of the defendant, and northerly of a straight line drawn in continuation of the thread of said wall to Ohio street on the one side and the rear line of the lot on the other. And the defendant alleged that he was not in possession and did not claim any interest in such disclaimed portion only an easement or right of possession of that part of the house lying north of said partition which formed a part of the south tenement of said house to continue so long as said house should stand.

The plaintiff's and the defendant's premises formerly composed a single lot owned by a single individual, having upon them a large wooden house with ell and woodshed or stable. In 1851, the lot was conveyed to the two brothers, William and Asa W. Babcock, who thereupon proceeded to remodel or change the structure of the buildings so as to make a double tenement house, with partitions between them, for the convenience of their two

families, with separate front doors and entries in manner hereafter described, to be occupied by their two families. William Babcock having the most northerly and Asa Babcock the most southerly tenement. This construction of the two tenements ever after during the entire lives of the two parties, and from that time to the present, has remained; and each has occupied his tenement quietly and with concurrence of the other, until after the purchase by the plaintiff, the construction still remaining as it was originally made by the Messrs. Babcock in 1851, or about that time. Both brothers subsequently died, when partition deeds were made between their respective families or heirs on April 6, 1866, both deeds being executed and delivered and recorded at the same time.

The descriptive part of the deed of the northerly tenement is as follows: "All that part of the lot and double tenement house thereon, lying northerly of a line drawn from said street to the rear line of the lot in a straight direction through the thread or middle of the partition between said tenements; this deed, and another of the same date, being made for the purpose of making a partition of said lot, so that said grantors may have all south of said line, and said grantees all north thereof."

The descriptive part of the deed of the southerly tenement is similar in form using the word southerly instead of northerly and omitting the words: "and double tenement house thereon."

The defendant subsequently purchased the southerly tenement, of Caroline A. Farnsworth *et als.* heirs of said Asa Babcock, by deed dated November 15, 1866.

The plaintiff subsequently purchased the northerly tenement of Robert B. and Lucinda A. Norman, heirs of said William Babcock, by deed dated April 1st, 1872, the descriptive part of which deed so far as it relates to the premises in dispute, is similar to the description in the writ.

Referring to the partition thus made between the tenements by the two brothers, it turns out that the partition wall between the two tenements is not a continuous straight line from the front of the house to the rear of the buildings, but at the point where the ell joins the main house there is an offset of about three feet northerly, the partition from that point being in a straight line east-

erly, to the rear of the stable, through the ell and stable, and from the line between the main house and ell westerly in a straight line to the front of the house between the front doors, except at the doors there is a slight curved deflection according to the accompanying plan which makes a part of the case. But this refers to first or lower story.

The partition between the tenements in the second story is directly over that in the first story, both in the ell and stable, and in the main house, except that the space over the front entries of both tenements is finished off into a single bedroom, connected and used with the southerly tenement by the defendant, and having no connection whatever with the northerly tenement for use, one-half of said bedroom being northerly of the middle line of the partition running through the lower story of the main house, and the other part of said bedroom being southerly of said partition.

The partition between the cellars under the main house, is about three feet northerly of that between the stories above, the cellar stairs of the southerly tenement going down from the dining-room in the ell immediately in contact with the cellar board partition. Until after the present plaintiff purchased there was no cellar under any but the main part of the house, nor is there now under the southerly tenement of the ell. The plaintiff, however, since his purchase, has extended his cellar back to include the ell. The external cellar wall under the main house is of stone; the partition of boards stood up endwise. In the same manner the external cellar wall which the plaintiff has placed under the ell is of stone, while the inner one is of boards, and not even secured by nails.

The defendant offered proof that it was for a valuable consideration agreed by the parties, that so long as the buildings should stand the whole of the bedroom over the front entries should go to the southerly tenement, to be used by its owners, and also all that part of the cellar south of the partition between the cellars; that such was the design in making the partition deeds, and that both parties ever after acquiesced in that division and understanding until the plaintiff purchased as aforesaid.

To the admission of this testimony the plaintiff objected, and denied the accuracy of the statements.

The plaintiff offered proof that when he purchased, as before stated, the party who delivered the deed to him advised him (plaintiff) that he could at once occupy according to his deed, and move the partition correspondingly; that prior to consummating the purchase he (plaintiff) called upon Charles Hight, tenant of the premises now and ever since the defendant's purchase, who conceded to him the right to have the partition moved to correspond with the line as now claimed by him (the plaintiff). The plaintiff also offered to prove that Hight was at that time, and at the date of the commencement of this action, the real owner of the southerly tenement and lot, and so held himself out with regard to repairing, leasing and selling the premises, and that the same is held in trust for him by the defendant.

To the admission of all the above testimony the defendant objected, and denied the accuracy of the statements.

The case was continued on report for the consideration of the law court, who are to render judgment, or otherwise dispose of the case as the legal rights of the parties require. If the testimony offered and objected to is admissible, and is regarded as important, the case is to stand for trial, as the full court may order.

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

*A. W. Paine*, with *A. L. Simpson*, for the defendant.

VIRGIN, J. The decision of the case depends upon the construction of the two deeds of partition under which the plaintiff and the defendant respectively claim. If the deeds are free from ambiguity, so that the intention of the grantors, whether clearly expressed or not, can be made certain by an examination of the papers themselves, then extrinsic evidence of such intention, whether consisting of the acts and declarations of the parties at the time of the delivery of the deeds, or of the mode of subsequent occupancy under them, cannot be received for the purpose of modifying their legal effect.

The grantors in each of these deeds, prior to their delivery, were the owners of an undivided half of the lands and buildings in controversy. The deeds were executed for the purpose of effecting a division of the estate; and it is conceded in argument

that they were delivered at the same time, and as part of one transaction, and should be construed, not separately but together; in order that each may render aid, so far as may be, in determining the legal effect of the other.

It is apparent from an examination of the two deeds that the grantors in each were equal owners in the property; that one deed formed the consideration for the other; and that they each purport to have been given for the purpose of making partition between persons having an equal interest, and to convey an undivided half of the premises, so that each owner might subsequently hold in severalty as previously he had held in common.

It is true that in the first part of the deeds, the descriptive clause in one purports to convey an undivided half part of land and buildings, and in the corresponding clause of the other there is no mention of buildings in terms. But it being conceded that at the date of these deeds the grantors in each were the owners of the buildings in the same proportion as that in which they held the land, the omission to mention them does not prevent the grantors' interest in them from passing with the conveyance of the lot on which they stand. In this respect, the legal effect of the two forms of expression employed in describing the interest conveyed is precisely the same.

It is further evident by the terms of these deeds that the grantors of the plaintiff were to have all north of a "line drawn from said street to the rear line of the lot in a straight direction through the thread or middle of the partition between said tenements," and that the grantors of the defendant were to have all south of the same line.

If then this partition, the thread of which forms the line of division between the adjacent owners, can be ascertained and its position determined, the problem is solved. Referring to the plan which accompanies the report and makes a part of the case, it is apparent that there is no partition which runs through the entire buildings in a straight direction, nor does the partition in either story of the main house correspond throughout with that in any other story. But notwithstanding this, there is no difficulty in determining which is the principal partition of the main house,

viz: that between the tenements on the first floor. We say there is no difficulty in determining this, because the partition in the cellar is merely of plank placed lengthwise, while that on the second floor corresponds with what we have designated as the principal partition, with the exception of some closets and the room over the front entry.

We find, moreover, that this main partition is about equidistant from the sides of the lot as well as from the ends of the main house, and that its line of direction substantially coincides with, or but slightly varies from, a line dividing the lot into two equal portions from east to west.

We regard it, therefore, as reasonably certain that this principal partition of the main house is the one which under the terms of the deeds determines the position and direction of the central line of division between the adjacent lots, and that the description of this as a straight line is controlled by said partition, as a monument, so far as it extends.

The deeds, then, are free from ambiguity. The line in controversy begins at a point on the street directly opposite the centre of said partition, thence runs in a straight direction to said centre, thence along the thread or middle line of said partition to the point where the main house joins the ell, (being controlled in this last course by the partition as a monument) thence in a straight direction at right angles with said street to the rear line of the lot.

We see no evidence in these deeds of an intention to subject the northerly half of said main house to an easement, in favor of the southerly half, in the cellar, closets or room over the front entry; nor will any legal construction of these deeds allow the straight central line of division between the lots to diverge three feet from its course in order to follow the existing partition through the ell and stable.

As the line drawn through the centre of the principal partition of the main house is not precisely a straight line, but from the street inclines slightly towards the north, it is evident that the description of the demanded premises contained in the writ may be claimed to include a very narrow strip of land south of what we have indicated as the true line.

Upon amendment of the writ, so as to exclude from the description of the premises demanded all that portion south of the true dividing line, as we have described it, the entry will be,

*Judgment for demandant.*

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

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ABIGAIL A. PRENTISS *et als.*, *vs.* DANIEL W. GARLAND *et al.*

Penobscot. Decided May 5, 1877.

*Lien.*

A lien for stumpage due upon logs is not discharged by the fact that the person having the lien takes from the general owner of the logs the negotiable notes of a third party payable to himself (the lien-holder), he giving at the time he took them a receipt containing the provision that the notes should not be regarded as a payment of the stumpage, unless paid.

Although such notes were given by a party in payment of the purchase of a portion of the logs from the general owner, and that fact was known to the person having the lien, his taking such notes conditionally would not be a waiver of his lien upon another portion of the logs not included in the sale of those for which the notes were given.

The person thus taking such notes does not convert them to his own use, so as to make them an absolute instead of a conditional payment of stumpage, by agreeing with the makers of the notes to compromise them for a sum less than the amount due thereon, upon a condition which has not happened; even though the notes were by the holders indorsed and deposited with a third person to be surrendered to the makers when such conditional agreement should be consummated.

ON EXCEPTIONS AND MOTION.

ASSUMPSIT on account annexed for balance due on stumpage of logs, cut by Edward Perry, in 1872-3 on township A, range 5, $1520.11, 17-64 only claimed in this action, $403.77. Also a count for money had and received.

The plaintiffs put into the case a permit, dated August 21, 1872, from Henry E. Prentiss and others, each for his own share only, to Edward Perry, to cut and remove timber with certain conditions and restrictions. The stumpage was to be paid on the first day of June, next, in cash or satisfactory paper on three months

with interest, with a provision for extension. The grantor reserved and retained ownership and control of the lumber wherever and however situated until the sums due for stumpage should be fully paid, and any paper which might be given for it paid.

Under the permit, Perry operated, and February 7, 1873, assigned to the defendants, his suppliers, the permit and all the logs to be cut under it. The plaintiffs also put in a receipt signed Henry M. Prentiss, of the following tenor:

"Received the notes of James Walker & Co., dated October 10th, 1873. One for six hundred seventy-five dollars on three months; one for six hundred seventy-six dollars on four months; and one for six hundred seventy-five and 66-100 dollars on five months, in all for the sum of two thousand twenty-six and 60-100 dollars, as collateral for the above bill, and if paid at maturity to be in payment thereof; but the lien on the logs, and all the remedies thereto belonging, remain in force till the notes are paid."

Also a memorandum of an agreement, dated March 14, 1874, signed S. R. Prentiss, James Walker & Co., Henry M. Prentiss, describing the aforesaid notes, and concluding as follows:

"In all for $2026.66, claimed as collateral only for stumpage on logs marked H Diamond Cross, cut by Edward Perry, under a permit of said proprietors of North Yarmouth Academy Grant, and the north part of No. 1, Range 4, in the winter of 1872-3. Said permit was assigned to D. W. Garland & Co., and the logs sold by them to James Walker & Co. The above notes received of Walker & Co., by said H. M. and S. R. Prentiss as agents were taken as claimed by them as collateral merely, and in the receipt given a lien reserved until the said notes were paid. The said Walker & Co. failed to meet said notes when due, and they still remain unpaid. The said Walker & Co. now offer twenty-five per cent. on the notes to be discharged from all further liability on the same. The said proprietors of North Yarmouth Academy Grant and north part of No. 1, Range 4, claim the right to recover of said D. W. Garland & Co. the amount of the stumpage due on said logs. Now the said proprietors agree that if the said Walker & Co. will deposit with Bowler & Merrill their notes with an indorser, satisfactory to them, on six months, for twenty-

five per cent. of the amount due on said three notes, then in the event of the said proprietors recovering of D. W. Garland & Co. the full amount of the stumpage due on said logs, the said notes or the proceeds of them to be returned to said Walker & Co.; but if the said proprietors fail to recover of said D. W. Garland & Co., then the said note or the proceeds of it to be taken by said H. M. and S. R. Prentiss, agents, in full of said Walker & Co.'s personal liability to them on the said notes taken as collateral, as aforesaid, but not to release any security now held for the payment of said stumpage. But if said Walker & Co. fail to make a general settlement with their creditors at the rate of twenty-five per cent. according to an agreement to that effect now being generally signed by their creditors, then this contract is to be void, and of no effect."

The defendants requested the following instructions:

"1. If Walker & Co., when they gave the plaintiffs the stumpage notes, believed the notes were received in payment of the stumpage, and were not informed and had no knowledge of any agreement between the plaintiffs and Perry that the notes were to be collateral to the stumpage, and if the defendants had no such information or knowledge, and the plaintiffs agreed with the defendants, at the interview at defendants' store, before the sale of the logs, to take Walker & Co.'s notes in payment of the stumpage, and knew of the defendants' ownership of the logs, and the defendants supposed and believed the notes were taken in payment of the stumpage, then as to Walker & Co., and the defendants, the notes must be regarded as taken in payment of the stumpage unless Perry had authority from the defendants to make the agreement with the plaintiffs that the notes should be collateral, or the defendants ratified what Perry did.

"2. If Walker & Co., when they gave the stumpage notes, believed the notes were received in payment of the stumpage and were not informed and had no knowledge of any agreement between the plaintiffs and Perry that the notes were to be collateral to the stumpage, and the defendants had no such knowledge or information at any time, and the plaintiffs promised the defendants to receive the notes in payment of the stumpage, and at the time the

plaintiffs knew of the ownership of the logs by the defendants and of the sale of the logs in July to Walker & Co., then the plaintiffs could not maintain this action for the proceeds of the logs sold in July unless Perry had authority from the defendants to make agreement with the plaintiffs, that the notes should be received as collateral, or ratified what Perry did."

It was admitted on the trial that, under the contract signed by Walker & Co., they deposited with Bowler & Merrill their notes with a satisfactory indorser for the twenty-five per cent. named in the contract, and made the settlement with their creditors named in the contract, and the stumpage notes were also deposited according to the contract, and it was a consummated contract; and the defendants asked the following instructions:

"3. That if said contract was entered into without the consent of either the defendants or Perry, and the defendants at the time of the last sale of the logs to Walker & Co. were the owners of the logs subject to the plaintiffs' lien and claim, and the plaintiffs knew it, then, by the terms of the contract, the plaintiffs adopted the stumpage notes as their own, or it was a conversion by the stumpage owners of the said notes to their own use, and afforded a defense to this action, at least to the value of the plaintiffs' share of the notes."

But the presiding justice refused the instructions, except as is contained in the charge to the jury, which on this part of the case was summed up as follows:

"If Perry was the general owner of the logs, and the plaintiffs had the first lien upon the same for the payment of stumpage, and the defendants had the second lien for their supplies and advances, and the plaintiffs understood the respective relations and rights of the parties at the time, and in the interview with the defendants and Perry (if they had one) agreed with them that they would take Walker & Co.'s notes in payment for the stumpage due, and this agreement was entered into with the understanding and design of the plaintiffs that the defendants would either make a sale, or permit Perry to do so, to Walker & Co., in order to obtain Walker & Co.'s paper, and if the defendants were influenced by such arrangement to allow Perry to sell the logs in order to get

such paper, when they would not have done so but for such arrangement; and if the Walker paper was thus obtained and passed to the plaintiffs without any knowledge or consent on the part of the defendants that it was to be received by them otherwise than in accordance with the arrangements before described; and further, if the defendants would be prejudiced and injured by the transaction—if they are now still to be held responsible to the plaintiffs for stumpage—in such case the plaintiffs cannot recover, although, in fact, the notes subsequently to this agreement, were taken by the plaintiffs from Perry only as collateral security for stumpage instead of payment for it.

"Good faith, if these propositions are made out, would require that the plaintiffs abide by their action; and the law, which is founded in good faith and fair dealing, would not permit them to do otherwise."

A succinct statement of these and other facts, and the points taken by counsel, appear in the opinion. The verdict was for the plaintiffs for $387; and the defendants alleged exceptions.

*W. H. McCrillis & J. Varney*, for the defendants.

*A. W. Paine*, for the plaintiffs.

PETERS, J. The plaintiffs, owners of an interest in a tract of land, permitted in writing to one Perry, the right to cut and remove lumber therefrom, upon the express condition that the title to all lumber taken should be and remain in the permitters until the stumpage should be paid. Perry assigned the permit to the defendants, the assignment having the effect of a transfer of logs afterwards cut, by an indorsement in form absolute and unconditional, but intended by the parties thereto as security for supplies for the intended operation. Perry entered and cut upon the land in the winter of 1872–3, and the logs came down the river during the driving season following.

In July, 1873, a portion of the logs came through the boom, where they were sorted out from the logs of other owners, and the defendants took them and sold them on their own account to Walker & Co., receiving payment therefor, in utter disregard of the rights of the plaintiffs. That act made the defendants liable

to the plaintiffs in trespass for the logs so sold. This action is brought to recover from the defendants the money received therefor. The plaintiffs must recover, unless the action is defeated by some one of the transactions that took place afterwards.

In October, 1873, the balance of the logs were through the boom. Perry sold them to Walker & Co., with the consent of the defendants, giving the plaintiffs notes signed by Walker & Co., payable to the order of the plaintiffs, for stumpage on all the logs cut during the winter's operation, and taking from the plaintiffs their written receipt that the notes should be regarded as a discharge of the stumpage lien on the logs whenever (and not until) the notes were paid.

The defendants contend that the legal effect of plaintiffs' taking the Walker & Co. notes was a payment of the stumpage and not a pledge or security for it, because the notes were made payable to the order of the plaintiffs, without the name of the defendants or of Perry thereon. The answer is, that the notes were only taken as a conditional payment, the jury finding the fact to be so. The notes were received to be a discharge of the lien on the logs, when paid. If the notes had been paid the stumpage would have been paid. Whenever the notes are paid the lien is gone. Should the stumpage be collected by this suit or in any other way, the notes would belong to Perry or the defendants, and can be returned to them as any other kind of property could be which had been held for collateral purposes. We see nothing in the transaction of an unusual character. Suppose Walker & Co. at Perry's request had deeded a house or given a bill of sale of a ship to the plaintiffs, instead of giving the notes, upon an agreement of the plaintiffs to Perry, that the house or ship should be held as security for the claim of stumpage; there could be no pretense that, because the title of the property was in the plaintiffs, they were obliged to keep it for the claim. They could deed it back without covenants, and so can they without recourse indorse the notes to Perry or his assignees if necessary. The counsel for the defendants put much stress upon the circumstance that the notes were not received by the plaintiffs directly from Perry, and the drift of the argument upon this point is, that their taking the notes was a transaction

with Walker & Co., and not with Perry or the defendants. We think it requires a distortion of the facts to obtain such a construction. It is true that the notes were not literally received from the hands of Perry, but they were taken from Walker & Co., in the presence of Perry and on Perry's account. There was no dealing between the plaintiffs and Walker & Co. The case does not disclose that a writing or a word passed between them. Perry sold the logs to Walker & Co. He so swears. His bill of sale, dated October 11, 1873, shows that he did. The defendants directed Perry to sell to Walker. Perry says, "he (defendant Cassidy) told me I might close the trade with Walker." Cassidy himself testified: "I said then to Perry to go and close his logs with Walker." Again, Cassidy says, "I told him (Prentiss) he could have our paper or Mr. Walker would buy Perry's logs, and Perry would give him Mr. Walker's paper." And Perry further says, "I told him (Prentiss) I had an offer for my logs from Mr. Walker and asked him if he would take Mr. Walker's paper for the stumpage." When Prentiss took the notes, Perry signed the bill of sale to Walker & Co., and received from Prentiss the conditional receipt, and also took away the notes of Walker & Co. given for the proceeds of sale exceeding the amount due for stumpage. Although Perry does not own that he got a receipt, the defendants' counsel admitted as a part of the case at the trial that a receipt was given. The notes were not given by Walker & Co. in purchase or payment of stumpage, as between themselves and the plaintiffs. They bought nothing of the plaintiffs nor undertook to. The notes were given as part payment of the logs purchased of Perry. In form they were given to the plaintiffs, but in substance and fact were payments to Perry. In the bill of sale, Perry receipts for these notes (to the plaintiffs) as payments toward the logs by him sold.

Then the defendants claim that the lien on the logs was lost, upon another aspect of the evidence. They contend that, as all the logs of the operation were sold to Walker & Co., by different sales, the plaintiffs approved and ratified such sales by accepting, for the stumpage, notes which were the proceeds of one portion of the sales, and that such approval and ratification are inconsistent

with the continuance of a lien upon any of the logs. It may or may not be, that a land owner will discharge his lien upon logs by permitting a sale thereof and taking for his stumpage some of the notes given for the logs sold, although he only gives a conditional receipt therefor, such as was given in this case. But that is not the case here. The plaintiffs have received none of the fruits of the sale in July, for which this suit is instituted. It must be borne in mind that the sale by the defendants in July, and the sale in October by Perry, with the consent of the defendants, are two entirely distinct and independent transactions. There is no more connection between the different sales than there would have been if the July sale had been made, not to Walker & Co., but to John Doe & Co., or any body else. The notes taken in October do not in any way represent the July sale or have anything to do with it. The plaintiffs have in no way assented to that sale. The most that can be urged in that regard, is, that they have agreed that they will assent thereto when the notes given them for stumpage shall be paid and not before.

Walker & Co. failed before the notes matured and the notes are still unpaid. They desired to compromise their liability thereon for twenty-five cents on the dollar. The plaintiffs were willing to so settle the notes with them, provided the notes were absolutely the property of the plaintiffs, as was contended by Perry and the defendants; otherwise, not. Accordingly the plaintiffs gave to Walker & Co. an agreement to compound the notes with them on that basis, provided they could not recover of the defendants the stumpage for the payment of which the notes had been conditionally taken. The defendants claim that this was on the part of the plaintiffs a conversion or absorption of the notes equivalent to collecting them. We do not accede to this view. What has been said on a previous point applies here. An agreement to settle upon condition is not itself a settlement. A conditional agreement to compromise is not *per se* a compromise. The defendants claim that the point urged by them is strengthened by the fact that the notes were indorsed by the plaintiffs and placed conditionally in the hands of Bowler & Merrill. But the indorsement was not made to pass any present title, but only that the title might

at some after time be passed, if there was occasion for it. Bowler & Merrill were the agents of the plaintiffs as well as of Walker & Co., by becoming the depositary of the papers for the parties.

Finally, the defendants say that, as between Walker & Co. and the plaintiffs, the conditional agreement to settle the notes became an absolute and perfected one on account of the delay in commencing this action against the defendants. This objection can avail nothing. No time is prescribed within which the controversy was to be commenced. No perceivable injury has been caused to anybody by the delay.

We do not feel willing to set the verdict aside as being manifestly against the facts of the case. The rule of law given upon the main point of fact submitted to the jury was acceptable to the defendants. The verdict finds that there were no facts upon which an estoppel as claimed could be founded.

*Exceptions and motion overruled.*

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

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SOLOMON MORRISON *vs.* BUCKSPORT & BANGOR RAILROAD COMPANY.

Penobscot. Decided May 8, 1877.

*Railroad.*

A railroad corporation is not liable for damages in an action by a proprietor, over whose land the road is lawfully located, for an injury to his premises caused by the road-bed preventing the accumulations of surface water from passing where they were accustomed to flow.

The statute which gives a right of action to "those injured" for the neglect of railroad companies to observe the conditions of construction imposed upon them in crossing highways, refers to damages sustained by towns, counties and turnpike corporations and not those suffered by individuals on account of the flow of surface water being obstructed thereby.

ON REPORT.

CASE: For that, whereas, there now is, and for a long time has been, a public highway in the town of Brewer aforesaid, known

and designated as Stone street, and that whereas the county commissioners at, &c., 1873, did, according to the statute provided in such cases, define and say upon what conditions the said Bucksport & Bangor Railroad Company, might lay their track and build a crossing across said street as follows, viz:

"The crossing of Stone street, in Brewer, to be graded twenty-two feet wide, with a true grade from each rail to the surface of the street, sixty feet distant on each side, and planked between the rails; the said Bucksport & Bangor Railroad Company to provide for the drainage of their road at this point, by conveying it within their own limits to the stream."

And, whereas said railroad company, unmindful of said conditions and provisions, have so carelessly and negligently constructed said crossing that the water upon said land instead of flowing in its usual course to the stream, flows under the plaintiff's buildings and into his cellar, causing him great damage and inconvenience thereby.

Also, for that said defendants at said Brewer, on the fourth day of December, 1873, and on various other days and times between that day and the day of the date of this writ, being by law obliged to provide for the drainage of their road at its crossing over Stone street, in Brewer, by conveying the same upon their own lands and within their own limits to the stream, did neglect, and ever since have entirely neglected so to do, and thereby diverted the same on and over the lands of the plaintiff, situate near said street, being the homestead upon which he lives, causing the same to overflow his grounds, fill his cellars under the barn and house thereon, undermine his wall, and otherwise seriously injure the lands, buildings and property of the plaintiff there situate. Yet, &c.

The plaintiff introduced evidence tending to show that he was damaged by surface water, substantially as alleged.

If the action was not sustainable upon the evidence, a nonsuit was to be ordered; otherwise a default.

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

The defendants had no right to build their road or run it till

they had first complied with the terms imposed by the commissioners. 45 Maine, 560. 49 Maine, 119, 156.

The obligation to maintain a good and sufficient drain is continuous. 51 Maine, 313. Shear. and Red. on Neg. c. 25, §§ 444 and 449.

The testimony shows that a culvert under the railroad instead of under Stone street would convey the water in its old course. The railroad have not complied with the terms, and a right of action accrues to the plaintiff under R. S., c. 51, § 15.

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

PETERS, J. It is a fundamental maxim of the law that a man may use his own land, for lawful purposes, as he pleases. He may make erections or excavations thereon to any extent whatever. Within his own limits, he can control not only the face of the earth, but every thing under it and over it. Thereby, the estate of another man may be, in various ways, injuriously affected. Much loss and hardship even might grow out of it. But it is not a legal injury and there is no legal remedy for it. Such results are necessarily incident to the ownership of land. An early case, illustrating the extreme right of land owners in this respect, was *Thurston* v. *Hancock*, 12 Mass. 220, the principle of which has been supported by many subsequent cases. It was there held, that a man might dig down his own land so near the line between him and his neighbor that his neighbor's house would have no sufficient support in its foundations to stand upon; and that the neighbor had no action for the injury to his house, though on that account the house was abandoned and taken down. The very oldest cases are to the same effect.

Among other results from the application of this principle, it is well established that any proprietor of land may control the flow of mere surface water over his own premises, according to his own wants and interests, without obligation to any proprietor either above or below. There may not be an entire coincidence of view in the cases in this country as to the extent of the right of the upper proprietor in this respect, but in all the cases the principle is admitted. He may prevent surface water from coming upon

his land according to its accustomed flow, whether flowing thereon from a highway or any adjoining land. *Bangor* v. *Lansil*, 51 Maine, 521. He may prevent its passing from his land in its natural flow. *Gannon* v. *Hargadon*, 10 Allen, 106. It was said in *Rawstron* v. *Taylor*, 11 Exch. 369, that "one party cannot insist upon another maintaining his field as a mere water table for the other's benefit." He may erect structures upon his own land as high as he pleases without regard to its effect upon surface water, no matter how much others are disturbed by it. *Flagg* v. *Worcester*, 13 Gray, 601. *Bates* v. *Smith*, 100 Mass. 181, 182. And he may dig ever so deep upon his own land for proper purposes, although he thereby deprives his neighbor of the sources of water. *Chase* v. *Silverstone*, 62 Maine, 175. If all this were not so, men could not reconstruct and utilize their landed estates without infinite trouble and suits.

But there must be a boundary to this proprietary right somewhere. Therefore it is, that the principle is limited to the control of surface water and cannot be extended to a water course or brook. A water course cannot be stopped up or diverted to the injury of other proprietors. There is a public or natural easement in such a stream, belonging to all persons whose lands are benefitted by it. The two things, surface water and watercourse, however, are not to be confounded. To constitute a water course, it must appear that the water usually flows in a particular direction; and by a regular channel, having a bed with banks and sides; and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously; but it must have a well defined and substantial existence. It is contended in some cases, that there may be an exception to this description of a water course in the case of gorges and narrow passages in hills or mountainous regions. But there is a broad distinction between a stream and brook, constituting a water course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows, flowing over the entire face of a tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and ravines which are in ordinary seasons destitute of water and dry. *Luther*

v. *Winnisimmet Co.* 9 Cush. 171. *Ashley* v. *Wolcott*, 11 Cush. 192, 195. *Hoyt* v. *Hudson*, 27 Wis. 656. *Bowlsby* v. *Speer*, 31 N. J. 351. Angell on Watercourse, § 1 *et seq.* Wash. Easements, c. 3, § 1 *et passim.*

Now, the same standard of right, which governs the use that individuals may make of their property, also governs all others. What the man may do, may also be done by the town or county or other corporation. If the individual may dig a ditch or erect a barrier, so may the town or county build up a highway, and a railroad company build a road, without liability for the effect it may have upon the accustomed flow of surface water. Lord Kenyon said (4 Term R. 196,) "if this action (for such an interruption) can be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions." This position is well supported by the cases. *Whittier* v. *Portland & Kennebec Railroad*, 38 Maine, 26. *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10; and see cases *supra.*

Applying this doctrine to the facts of the case before us, we think the plaintiff cannot recover. The accumulations of water here were caused by the flow down the side of a valley into a slag or depression of land through which the railroad is located, and which (a portion or all) were cut off by the road-bed from passing where they otherwise would go. But there is no marked stream or brook there, and no water there in the way of anybody but at exceptional seasons of the year. The flow complained of, clearly enough, arose from surface water merely. Undoubtedly the plaintiff was injured, by the taking of his land for a railroad, beyond the value of the mere land taken. But the injury to the land left, by the use that was to be made of the land taken, was included in the damages awarded to him; or should have been. They were recoverable in that form. 103 Mass. 10, before cited. *Bangor & Piscataquis Railroad* v. *McComb*, 60 Maine, 290. See 31 Maine, 215.

Nor can the plaintiff recover in this action, by virtue of § 15, c. 51, R. S., which provides that, in case the railroad corporation neglects to do certain acts in relation to crossing highways as required by county commissioners, "those injured may recover

damages in an action of the case." The answer to this claim is, that the plaintiff was not injured; that is, there was no legal injury. It was *damnum absque injuria*. The defendants were not in fault, so far as the plaintiff was concerned. He must keep the surface water off his premises as best he may. "Those injured", referred to in the statute, are towns, counties, and turnpike corporations. The language of the section in R. S., 1841, (c. 81, § 10) is, "the said turnpike corporation, or the aggrieved town" may recover. Towns have an action for the destruction or obstruction of a road or the conversion of materials belonging to it. *Troy* v. *Cheshire Railroad*, 23 N. H. 83.

*Plaintiff nonsuit.*

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

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NATHANIEL WILSON *vs.* EUROPEAN & NORTH AMERICAN RAILWAY COMPANY.

Penobscot. Decided May 8, 1877.

*Railroad.*

A mortgagee, out of possession, whose mortgage is recorded, should be made a party to proceedings instituted by a railroad company before county commissioners to ascertain the damages of land owners for land taken for its road.

Where no notice is given to the mortgagee, and the damages are awarded and paid to the mortgager, the mortgagee may recover therefor in an action of trespass against the company by virtue of the provision of R. S., c. 51, § 6.

ON REPORT.

TRESPASS on Freeze lot.

At the April term of S. J. C. 1875, the action was referred to John A. Peters, who met and heard the parties December 13, 1875, and returned into court the following award:

"I find that the plaintiff had a mortgage upon the locus, in full force, when the land was taken by the defendants for the extension of a branch of their railroad track; but the plaintiff had no

actual possession of it till after the damages allowed by the commissioners for the taking were paid to the mortgager. The mortgage was given to the plaintiff by D. W Freeze, dated May 25, and recorded May 26, 1869, to secure a note of that date for $112, payable on or before July 1, 1870.

"It is not questioned that all the proceedings of the railroad company and the commissioners were regular and authorized, except that the plaintiff claims that the award of damages should have been made to him (the mortgagee) when they were allowed and paid to said Freeze (the mortgager). Either side to make such reference to any of the proceedings of the commissioners as they may see fit.

"No part of the mortgage debt has been paid, and in January 1871, the plaintiff got possession of the locus (not interfering with the land taken for the track) by a judgment for a foreclosure, and the mortgage stands now by lapse of time foreclosed.

"On July 14, 1870, when the commissioners were upon the road, to take their views and hear the parties upon the questions of damages, the plaintiff was before them as an attorney as to other lots, but not as to this lot, and at that time notified the commissioners and the acting attorney of the railroad company present, who was also a director, that he had a claim on this lot (the locus) by note and mortgage, and 'should claim the damages assessed upon it.'

"Nothing else appeared about it afterward until demands were made for the damages allowed upon the defendants, which were after the damages were allowed Freeze and to him paid.

"Upon these facts and findings the law court will determine whether the plaintiff can recover against the defendants or not. If he can recover at all, then the measure of damages to be settled. If the plaintiff can recover for the easement, the defendants to continue as rightfully in possession, the damages to be seventy-five dollars with interest from July 1, 1870. But if the defendants are trespassers without the right to continue in possession, then the damages to be fifty dollars and interest from such date. The prevailing party to recover costs."

*N. Wilson, pro se*, with whom was *A. Sanborn.*

*C. P. Stetson*, for the defendants.

The defendant company located its railroad over land of one Freeze, who was then the owner in possession. Damages were assessed by the county commissioners, as provided by statute, and the amount awarded paid to Freeze. Wilson, mortgagee, brings this action of trespass. He did not take possession of the premises until after the location, assessment and payment of damages; he cannot maintain this action, because the estimation of damages and payment to Freeze, gave the company the right of possession and title to the locus for the purposes of its railroad. R. S., c. 51. *Breed* v. *Eastern Railroad*, 5 Gray, 470 n. *Parish* v. *Gilmanton*, 11 N. H. 293.

PETERS, J. The question is, whether it is necessary that a mortagee, whose mortgage is recorded, not being in actual possession of the mortgaged premises, should have notice of the pendency of proceedings instituted by a railroad corporation before county commissioners to ascertain the damages of land owners for land taken for the track of its road.

We think a mortagee should be notified and made a party to the proceedings, and that the railroad company takes the risk of a want of notice if none is given. Practically, however, in many cases the necessity of notice is avoided; as where the mortgagee waives the damages, being satisfied with his security upon the land that is not taken; or where the damages are awarded to the mortgager and are paid over to the mortgagee upon his receipt or release therefor. And, we have no doubt, a mortgagee might resort to proceedings in chancery to recover the damages awarded to the mortgager. But the railroad corporation must see that the mortgagee is somehow paid or satisfied for the land taken so far as covered by the mortgage.

The statute (R. S., c. 51, § 2,) provides that "persons having any interest in land (taken for railroad) have the rights and remedies of owners to the extent of their interest." Certainly, a mortgagee whose mortgage is recorded has an interest as an owner within the meaning of this section. The easement taken may despoil the mortgaged land of all its value. Without notice,

a mortgagee might lose his entire security by proceedings carried on without his knowledge or consent. By our law, it is well settled that the strict legal estate passes to the mortgagee, to be defeated only by the subsequent performance of the condition annexed. He has the right to take possession at any time, unless there be an agreement between the mortgager and mortgagee to the contrary. This right is supported by repeated decisions, at the head of which is *Blaney* v. *Bearce*, 2 Maine, 132. He may support an action of trespass *quare clausum fregit* against a stranger for an injury to the freehold. *Frothingham* v. *McKusick*, 24 Maine, 403. And even against the mortgager for such an injury. *Stowell* v. *Pike*, 2 Maine, 387. And in such case he may recover of the mortgager to the extent of the injury to the estate, without proof of the insufficiency of the remaining security. *Byrom* v. *Chapin*, 113 Mass. 308. He may insure the mortgaged estate against fire, and in case of loss collect the insurance without liability to account for it upon the indebtedness of the mortgager, where there is no agreement between them to that effect. *Cushing* v. *Thompson*, 34 Maine, 496. If in possession he may maintain a complaint in his own name for damages caused by flowing under the mill act. *Ballard* v. *Ballard Vale Co.* 5 Gray, 468. If in possession, he cannot be dispossessed by the mortgager (by the common law) in a suit at law, even if the mortgaged debt, after condition broken, has been paid. *Wilson* v. *Ring*, 40 Maine, 116. But by R. S., c. 90, § 28, (see act of 1870, c. 142) a mortgagee may now be ousted by a suit at law brought after condition broken, if the debt be paid. These various decisions are based upon the idea that a mortagee is the legal owner of the property mortgaged. Many questions of a troublesome character arise in respect to mortgaged estates, which can be better adjusted in equity than at law. But the question now presented is in reference to the right at law of the mortgagee.

We find but few adjudications upon the exact question before us. In this state there are none. In New Hampshire (*Parish* v. *Gilmanton*, 11 N. H. 293,) it was held, not to be necessary to make a mortgagee a party in proceedings to lay out a highway over mortgaged land. But our theory of the character of a mortgage

of land does not prevail in that state. It is there regarded as possessing less of the attributes of a common law conveyance of an estate in fee than is accorded to it in this state. In that state a transfer of the debt secured, accompanied by a delivery of the mortgage, constitutes a legal assignment of the mortgage itself, without any writing thereon or deed. In such case the registry of deeds does not disclose the assignee, and there would be great difficulty in giving notice to such a party. The doctrine of that case would not apply with much force here. In New York (47 N. Y. 157,) notice to a judgment creditor is not necessary, in laying out highways; but for the reason that the creditor's statutory lien does not irrevocably attach to the fee of the estate of the debtor, but could be taken away at any time by the legislature. In Massachusetts, the decisions are unimportant and throw but little light upon the subject. It is merely said, in *Breed* v. *Eastern Railroad*, 5 Gray, 470, (reported in a note) that a sheriff's ruling, that a mortgager who was petitioner and whose estate was incumbered with mortgages was entitled to damages under his petition to the same extent as if no mortgages had existed upon the estate, was affirmed by the court. But it does not appear in the report of the case whether the mortgagees appeared or not or objected or not, nor whether any provision was made to protect their interests or not, nor is the ground for the ruling disclosed. Not unlikely the objection came too late, it being held in *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291, that the objection to the want of proper parties should be made to the commissioners before the jury are called in. And in the same case it was also held that notice to a mortgagee was unnecessary, where the mortgagee consents in writing that the proceedings may be in the name of the mortgager. Then, it is well settled law that it is no defense to a suit in the name of a mortgager, that a mortgagee has also a right of action for the same cause. He may never sue. See *Gooding* v. *Shea*, 103 Mass. 360, 363, 364. In *Breed* v. *Eastern Railroad*, *supra*, the mortgager was the petitioner, no one setting up any superior or opposing claim. The doctrine that a mortgagee's estate cannot be affected, where he is not a party in such proceedings, is maintained in Mississippi, in *Stewart* v.

*Raymond Railway*, 7 Smed. & M. 568; and in Iowa, in *Severin* v. *Cole*, 38 Iowa, 463; and in Wisconsin, in *Kennedy* v. *The Milwaukee & St. Paul Railroad*, 22 Wis. 581; though in these cases, being in equity, the railroad companies found total or partial relief in the orders of court, under their systems of foreclosure, that the estate so far as unencumbered by the railroad be first sold, and that, in case of deficiency of amount to pay the mortgaged debt, the portion occupied by the railroad be sold afterwards. The same rule would probably apply in this state, if we had jurisdiction in equity over the question. *Sheperd* v. *Adams*, 32 Maine, 63. Redfield (Railways, vol. 1, p. 286) says, "the only general rule as to parties, perhaps, is, that those having an interest in the question may become parties plaintiff, or be made parties defendant, according to the character and quality of the interest." In England, and in some of the states, the practice has been for the jury to ascertain the *quantum* of the damages merely, the title to the damages being a matter only with the courts. With us all questions, that of title included, are for the jury, questions of law being revisable by the court.

In this case, at this lapse of time, this action is all the remedy the plaintiff can have; and his claim for damages cannot be defeated. The taking the land was legal; the damages for such taking are recoverable in trespass. R. S., c. 51, § 6.

*Defendants defaulted for* $75 *and interest thereon from July* 1, 1870.

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

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WILLARD R. PLUMMER *vs.* PENOBSCOT LUMBERING ASSOCIATION.

Penobscot. Decided May 26, 1877.

*Corporation. Way. Damages.*

**The rule, that a grant of privileges is a grant of the necessary incidents to the enjoyment of those privileges, does not apply so as to embrace as incidental privileges what are expressly excepted or forbidden in the grant.**

Thus: the act of 1832, c. 236, § 2, provides that the Penob. Boom Corporation (lessors of the defendants) may erect and maintain a boom across the Stillwater branch of the Penobscot for the purpose of stopping and securing logs, and branch booms wherever they may think it necessary, (between certain given points) provided said booms be so constructed as to admit of the safe passage of rafts and preserve the navigation of the river and the branches.

*Held*, 1. That the right to the reasonable use of the river to carry out the purposes of the powers granted by the charter does not include the right to exercise the powers therein expressly prohibited.

*Held*, 2. That the corporation have no right to throw a boom across the whole Penobscot, and that such erection is in direct violation of § 2.

The rule which requires one to use ordinary care to lessen the damages of an actual trespass upon him, does not impose upon him the obligation to provide against a threatened trespass or to use such care unless he have knowledge that the trespass is committed as well as threatened.

On exceptions and motion.

Case, in substance, that the plaintiff was possessed of about 700 M. feet of logs in the Penobscot river, fastened to posts and trees; that the river is a public highway; that the defendants on or about July 10, 1873, carelessly and unlawfully obstructed the channel in violation of their charter, at a point just below where the plaintiff's logs were fastened; that the boom remained one month, during which time the plaintiff was prevented from running his logs down; that during the time the market value depreciated; that this detention was to prevent the West Branch logs from coming down the river and perhaps going to sea; but that without this detention, the West Branch logs would have passed safely by and the plaintiff been uninjured; that when the boom was open, the plaintiff's rafts were torn from their fastening and scattered and carried down river, whereby the plaintiff was put to great expense and damage, 1st in looking after his logs, 2nd in the depreciation of the value while the boom was closed, and 3d for logs carried away.

The defendants relied upon their charter and alleged want of care on the part of the plaintiff.

The Penobscot Boom Corporation, was incorporated in 1832 by Special Laws, chap. 236.

By Sec 2, said Corporation may erect and maintain a boom across the Stillwater branch of Penobscot river, between Birch stream and Eber's point, for the purpose of stopping and securing

logs, etc., floating upon said river, and may erect piers and side or branch booms where they may think it necessary. Provided, that said booms be so constructed as to admit the safe passage of rafts and boats, and preserve the navigation of the river. And provided also that all persons shall have the same privilege of landing rafts or logs, boards and other lumber, and fastening the same as they have heretofore enjoyed.

Sec. 3 provides that if any person shall suffer damage by the exercise of the powers herein granted to said corporation, and the amount cannot be agreed upon, the court of common pleas for Penobscot county, shall cause damages to be ascertained by a committee, with right of appeal to jury.

By act of 1854, c. 299, § 10, the defendant company was incorporated and authorized to take a lease of the rights and property of the Boom Company, subject to all the duties and liabilities of said latter company.

There was evidence tending to show that defendant company received about fifty millions of logs which had been driven down the river, and that it had been customary for years to swing a boom at this place for the protection of the logs; that it was necessary to do so; and it was the only manner in which they could safely hold the logs; unless it had been done, the logs would have gone below, and filled up the river and stopped the whole navigation of the river, or would have broken through and gone to sea.

The defendants contended that they had a right to swing the boom in such a manner as was reasonable, under all the circumstances, and if necessary for the purposes authorized by the charter, if they exercised due care in so doing. The presiding justice declined so to instruct the jury; but ruled that the maintaining of the boom, if it obstructed the passage of logs, was unauthorized; and plaintiff, if injured, could recover. He also instructed the jury, at the request of the defendants' counsel, that the plaintiff was not required to exercise any care of the logs unless he had notice that they were in danger, and that the plaintiff could recover the boomage paid.

The jury returned a general verdict for the plaintiff for $1500, and the special findings as follows:

1. What is the amount of expense necessarily incurred by the plaintiff in the protection and preservation of his logs endangered (if they were so endangered) by the defendants' closing and opening the river? Ans. One hundred and fifty dollars.

2. What was the value of the plaintiff's logs unavoidably lost in consequence of the defendants' closing and opening the river, and which loss could not have been prevented by the exercise of common and ordinary care and diligence on his part? Ans. Nine hundred and seven dollars.

3. What was the amount of boomage which the plaintiff was compelled to pay in consequence of the defendants' obstructing the river, and which otherwise would not have been incurred? Ans. Four hundred and forty-three dollars.

*C. P. Stetson*, for the defendants.

*J. Varney* with *W. H. McCrillis*, for the plaintiff.

DICKERSON, J. The charter of the Penobscot Boom Corporation, the lessors of the defendant company, which authorizes it to erect a boom across the Stillwater branch of the Penobscot river for the purpose of stopping and securing logs, masts, spars and other lumber, and to erect piers and side or branch booms where they should think it necessary, at certain other specified places, contained, among other things, the following provisions:

1. "That said booms be so constructed as to admit the safe passage of rafts and boats and preserve the navigation of the river and the branches thereof, and

2. "That all persons shall have the same privilege of landing rafts of logs, boards and other lumber and fastening the same as they have heretofore enjoyed." Special Laws of 1832, c. 236, § 2.

By the act of 1854, c. 299, § 10, the defendant company was incorporated and authorized to take a lease of the rights and property of the boom company, subject to all the duties and liabilities of the latter company. Under that act the defendant company succeeded to their rights, duties and liabilities.

The foregoing provisions are limitations upon the corporate powers of the original corporation; whatever else that corporation might do, as incidental to the powers expressly granted by its

charter, it could not do either of these two things, close the navigation of the Penobscot river, or interfere with the existing privileges of lumbermen in respect to the matters specified. Language could scarcely make this prohibition more imperative and explicit.

To allow the corporation to exercise the powers prohibited by its charter, even to facilitate the use of its granted powers, would be to render these limitations a nullity; it cannot be permitted to do indirectly what its charter expressly prohibits it from doing. The right to throw a boom across the Stillwater branch of the Penobscot river does not include the right to close the navigation of the whole of the river, or to interfere with the ancient privileges of lumbermen excepted in the charter; these privileges and the right of the public to the navigation of that part of Penobscot river, not covered by defendants' charter, must be maintained inviolate.

We do not think that the rule of law, invoked by the defendants' counsel, in respect to the right of persons using a navigable river as a highway, to a reasonable use thereof, applies in this case. That rule applies where there is no statutory prohibition of such use. There can be no reasonable use that is in contravention of the statute. The swinging of a boom across the Penobscot river though done ever so carefully, and in good faith to accomplish the purposes of the defendants' charter, was in fact in derogation of that provision of their charter which requires them "to preserve the navigation of the river." There was no question of reasonable use for the jury to pass upon, and the court very properly instructed them that the maintaining of the boom was unauthorized.

The mode of ascertaining the damages provided in § 3, of the defendants' charter, applies only to cases where the damages are sustained "by the exercise of the powers granted to the corporation." If the defendants are liable at all in this case it is not for damages thus sustained but for damages caused by their usurpation of powers prohibited by their charter.

The plaintiff was not bound to take notice of the declared purpose of the company to swing a boom across the river. Such

declaration imposed no additional duty upon him. *Non constat* that the wrongful act threatened would be committed. It is sufficient for him if he exercised ordinary care in the preservation of his logs after he had knowledge that the wrong was done. The defendants were not in a situation to require of the plaintiff a greater degree of care, nor was he bound to render it. The instructions upon this branch of the case, and, also, in regard to the measure of damages, are unobjectionable; and we do not perceive sufficient ground for sustaining the motion.

*Exceptions and motion overruled.*
*Judgment on the verdict.*

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

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ARTHUR WENTWORTH *vs.* OLIVER H. HINCKLEY.

Penobscot. Decided May 28, 1877.

*Fraudulent Conveyance.*

In an action under R. S., c. 113, § 51, to recover a penalty for fraudulent transfer, where the kinds and quantity of property are specifically described, and more of it than "double the amount of the creditors' demand" is not exempt from attachment and seizure, it is not necessary to allege, *totidem verbis*, that the property is liable to attachment or seizure on execution.

In describing the offense, where the chapter and section on which the action is based is referred to, it is not necessary to conclude "contrary to the form of the statute."

A form of declaration held sufficient on demurrer.

ON EXCEPTIONS.

CASE under R. S., c. 113, § 51.

The declaration set out the parties and the debt due the plaintiff from one Tyler R. Wasgatt, jr., for $41.87 and the items of property alleged to be fraudulently transferred from Wasgatt to the defendant in a form to which no objection was taken, and concluded as follows:

"All of the value of fifteen hundred dollars, and being so indebted to the plaintiff in the sum aforesaid, said Tyler R. Was-

gatt, jr., did with intent to prevent the attachment of said goods and chattels by the plaintiff, and to secure it from the plaintiff, on said thirty-first day of October, 1873, fraudulently convey the same to the defendant by a bill of sale duly executed and delivered; and the defendant did knowingly aid said Wasgatt as aforesaid to secure it from the plaintiff, who was then a creditor of said Wasgatt, as defendant then well knew, and then and there fraudulently accepted said transfer from said Wasgatt, and then and there took possession of the property so as aforesaid described, and knowingly aided said Wasgatt in the same, to secure the same from the creditors of said Wasgatt, and prevent its attachment by the plaintiff, whereby the defendant hath by virtue of section 51 of chapter 113 of the revised statutes of this state, forfeited to the plaintiff the sum of three thousand dollars, being double the value of the property he so as aforesaid aided said Wasgatt in fraudulently transferring as aforesaid, to the damage of said plaintiff, (as he says) the sum of two hundred fifty dollars, which shall then and there be made to appear, with other due damages."

A demurrer was filed to the writ and declaration and joined. The presiding justice overruled the demurrer and adjudged the writ and declaration good; and the defendant alleged exceptions.

*A. Sanborn*, with *S. F. Humphrey* and *F. H. Appleton*, for the defendant, said R. S., c. 113, § 51, was a penal statute and the act sued for was not an offense at common law, and pointed out the following defects in the declaration: That it did not conclude the description of the offense with the words, "contrary to the form of the statute." *Penley* v. *Whitney*, 48 Maine, 351, 352. 1 Chitty's Pl. 373. That it did not declare the property, alleged to be fraudulently transferred, was liable to attachment or to be taken on execution. *Herrick* v. *Osborne*, 39 Maine, 231. That it did not set forth the liability of the defendant in the language of the statute or in the effect and meaning of the statute, R. S., c. 113, § 51.

*T. W. Vose*, for the plaintiff.

VIRGIN, J. The substantive facts essential to the maintenance

of the action are sufficiently set out in the declaration. True, that the property alleged to have been fraudulently transferred is not declared *in totidem verbis*, to be liable to attachment or seizure on execution. But the kinds and quantity of property are specifically described; and the law applicable to these facts informs us that nearly all, possibly the whole, at any rate much more in value of the property than "double the amount of the creditor's demand" is not exempt from attachment and seizure. The allegation is therefore sufficient. Gould's Pl. c. 111, § 12. Steph. Pl. 9th Am. ed. *312.

The conclusion is also sufficient. It expressly refers to the chapter and section of the statute on which the action is based, although it omits the last clause of the statute. *Penley* v. *Whitney*, 48 Maine, 351, 352.

*Exceptions overruled.*

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

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INHABITANTS OF HAMPDEN *vs.* INHABITANTS OF NEWBURGH.

Penobscot. Decided May 28, 1877.

*Pauper.*

R. S., c. 14, § 1, provides for furnishing nurses and necessaries to an infected person, at his charge . . . if able, otherwise, that of the town to which he belongs. *Held*, that the phrase, "at the charge of the town to which he belongs," means the town where he has his pauper settlement and not the town where he might happen to reside at the time. *Held*, also, in a case submitted to the law court, where the charges were $176, and the sick person, a widow, had $600, in available personal securities, that she was "able" within the meaning of the statute.

ON REPORT.

CASE, under R. S. c. 14, § 1, which provides: "When any person is, or has recently been, infected with any disease 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 parent or master, if able, otherwise, that of the town to which he belongs."

The account annexed is as follows: "January 22, 1873—To supplies and medical and other assistance, nurses and other necessaries furnished Mrs. Rebecca Morrill, while sick with small-pox in said Hampden, and paid for by said inhabitants of Hampden, $176; interest to date of writ, (November 2, 1874), $20—$196."

The evidence tended to show that the disease existed, that the municipal officers of Hampden furnished the supplies, that the person furnished had her home at the time in the plaintiff town, but that her legal settlement (derived from her husband, deceased) was in the defendant town; that she had in savings banks and notes some $600.

After the evidence was out, the case was submitted to the law court upon legal principles.

*A. W. Paine* for the plaintiffs.

*C. P. Brown & A. L. Simpson*, for the defendants.

WALTON, J. This case is before the law court on report. It is an action by the town of Hampden against the town of Newburgh to recover expenses incurred for nurses, medical attendance, and other necessaries, furnished Mrs. Rebecca Morrill, while sick with the small pox.

The statute declares that expenses thus incurred shall be at the charge of the person sick, if able, otherwise that of the town to which he belongs. R. S., c. 14, § 1.

One ground of defense is that, when the statutes declare that expenses thus incurred shall be at the charge of the person sick, if able, "otherwise that of the town to which he belongs," the phrase, "the town to which he belongs," means the town where the person sick has an established residence, and not the town where the person happens to have a pauper settlement. We find, on examination, that this precise question was raised and settled in *Kennebunk* v. *Alfred*, 19 Maine, 221.

It was there held that the phrase in the then existing statute,

"at the charge of the town or place whereto they belonged," meant the town or place where the persons sick had their pauper settlements, and not the town where they might happen to reside at the time. We think the present statute must receive the same construction. The change in the phraseology is not material.

Another ground of defense is that, Mrs. Morrill was herself able to pay the expenses incurred for her relief. A careful examination of the evidence satisfies us that upon this ground the defendants are entitled to prevail. The statute declares that expenses thus incurred shall be at the charge of the person sick, "if able." Although Mrs. Morrill does not appear to have been a woman of large means, the evidence satisfies us that she was able to pay the expenses incurred for her own personal relief; and probably she would have been willing to do so, if no more than a just and reasonable sum had been charged, and the amount had been demanded of her at the time, or as soon as she recovered from her sickness. Upon this ground we think the defendants are entitled to judgment.

*Judgment for defendants.*

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

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STATE *vs.* JAMES MCCANN, appellant.

Penobscot. Decided May 31, 1877.

*Intoxicating Liquors.*

R. S., c. 80, relating to sheriffs, coroners and constables, provides in § 52: "No officer aforesaid shall appear before any court or justice of the peace as attorney or advising any party in a suit, or draw any writ, plaint, declaration, citation, process or plea for any other person; and all such acts done by either of them shall be void." *Held*, that this section refers exclusively to civil proceedings, and does not prohibit sheriffs and deputies from drawing complaints under c. 62, § 2, of the acts of 1872.

ON EXCEPTIONS.

SEARCH AND SEIZURE.

The respondent was tried upon his appeal, and the jury found a verdict of guilty.

It appeared in evidence upon the trial that the complaint and warrant were drawn by Erastus B. Thomas, who was at the time deputy sheriff for the county of Penobscot, said complaint and warrant being drawn by him for, and the complaint signed and sworn to by, Danforth L. Clark, as complainant.

The warrant was served by another deputy sheriff, to whom Thomas acted as aid in making the search under the warrant.

The respondent's attorney, upon this evidence, requested the presiding judge to rule that the complaint and warrant were void, and that the respondent could not be convicted thereon. But the judge declined so to rule, and ruled the complaint and warrant so made to be sufficient in law, and valid. The verdict was guilty; and the defendant alleged exceptions.

*W. S. Clark* for the defendant.

The question is whether the complaint and warrant drawn by Thomas, a deputy sheriff, are void, by reason of R. S., c. 80, § 52, relating to sheriffs and deputies, as well as to coroners and constables. It reads:

"No officer aforesaid shall appear before any court or justice of the peace as attorney or advising any party in a suit, or draw any writ, plaint, declaration, citation, process or plea for any other person; and all such acts done by either of them shall be void."

"Plaint" is a special term and applies to the complaint in this case. "Process" applies to a complaint and warrant.

The scope of these words is not confined to civil cases. And the reason applies to criminal as well as civil proceedings. It is the business of officers in both classes to serve processes and not to inaugurate them.

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

Danforth L. Clark was not a party. The state was the party. Clark was no more a party in the eye of the law than was Thomas himself.

If Thomas had signed the complaint, there could have been no question; but no matter who signed it, it was a process in behalf of the state.

By the statute of 1872, Thomas as deputy sheriff was especially charged with the duty of initiating these prosecutions. He was to make complaints where he knew the facts, and to get others to sign the complaints where others knew the facts.

He, Thomas, prepared the complaints in the line of his duty. To prohibit him is to nullify the enforcement law.

The statute of prohibition only refers to civil processes.

APPLETON, C. J. Chapter eightieth of the revised statutes relates to sheriffs, coroners and constables and to their duties.

Section 52 refers exclusively to civil proceedings. The object was to prevent officers of either of the classes mentioned acting as attorneys or advising in any suit or drawing writs, &c., for any other person. But a complaint for a criminal offense is not a suit within the meaning of this section. Criminal proceedings are in the name of the state, not of the party complaining. The complaint is in behalf of the state, not of the complainant. It is by the complainant, not for the complainant. The process issues in the name of the state, not "of any other person." The fine or forfeiture, if there be one, enures to the state, not to the complainant. The judgment is for the state, not for the complainant or "for any other person."

The language of the section relates to civil proceedings. The word "writ" has application to civil proceedings. "Plaint (Fr. *plainte*, Lat. *querela*) is the exhibiting any action, real or personal, in writing; and the party making it is called the plaintiff." Jac. Law Dict. The term declaration is applicable only to civil procedure. Citation is a summons to appear, applied particularly to process in the spiritual court, but adopted in civil procedure from the canon and civil law. "Process" is so called because it proceeds or goes out upon former matter, either original or judicial." Jac. Law Dic. It assumes former matter. The process may be criminal where the "former matter," whence it proceeds or goes out, is criminal. But in the section under consideration there is no reference to any criminal procedure. The words preceding and following have no relation to anything criminal. Its meaning must be determined by the context. *Noscitur*

*a sociis*. The other words refer to civil procedure and so must this.

A complaint under the liquor law is not a suit "for any party," nor a plea "for any other person." No words exclusively applicable to criminal procedure, as complaint, warrant or indictment, are to be found in this section. Nor does the reason for its passage apply to proceedings in behalf of the state. Anybody may draw a writ, but criminal process issues under judicial discretion and by judicial magistrates. It is judicial action for the state, not civil process for "any party" or "any other person."

It is not readily conceived how writing a complaint for a violation of law, which another is to sign and to the truth of which he is to make oath, or inserting the appropriate names in the blank form of a warrant or writing it out, ready for the signature of the magistrate, can be regarded as a violation of the statute.

Officers are specially enjoined by the act of 1872, c. 62, § 2, to see the law enforced, to institute proceedings against offenders, to enter complaints against them, and to inform prosecuting officers of alleged offenses. What was done in the present instance would seem to be much more in accordance with their duty than in violation of law.

*Exceptions overruled.*

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

DICKERSON, J., dissenting. R. S., c. 80, § 52, prohibits sheriffs and deputy sheriffs from "drawing any writ, plaint, declaration, process or plea for any other person." The word "process" is applicable to both criminal and civil proceedings. "Process," says Jacobs in his Law Dictionary, defining that word, "is largely taken for all the proceedings in any action, real or personal, civil or criminal, from the beginning to the end." "In criminal cases," says Bouvier, 2 Law Dic. 387, "that proceeding which is called a warrant before the finding of a bill is termed process."

The act of the deputy sheriff in drawing the complaint obviously comes within the purview of § 52, c. 80, R. S., and must be held to render them void, unless it can be sustained under the enforcement act of 1872, c. 62, §§ 1 and 2, which

makes it the duty of sheriffs and their deputies to institute legal proceedings against violations or supposed violations of law, and particularly against the illegal sale of intoxicating liquors, and certain other laws, in the following manner, to wit: "Either by promptly entering a complaint before a magistrate competent to examine, or try the offense charged, and execute such warrants, as may be issued on such complaints, or by furnishing the county attorney without delay with the names of alleged offenders and of the witnesses."

The acts complained of do not come within either of the modes of "instituting legal proceedings," designated by the statute. The complaint having been signed and sworn to, must be regarded as the complaint of the person who performed these acts, and not as the complaint of the party who drew it. It is not the drawing, but the signing and swearing to the instrument that fixes its paternity. The person who signs and swears to the complaint, in contemplation of law, is the person who "enters" it; and the enforcement act authorizes deputy sheriffs to "enter" complaints, not to draw them to be "entered" by another, as was done in this case. Besides, that act only authorizes officers to "enter complaints;" it gives them no authority whatever to draw warrants, which the officer in this case undertook to do.

If the legislature had intended to remove the disabilities imposed upon sheriffs and their deputies by § 52 of c. 80, R. S., in criminal cases, it would have done so in express terms. It did not do so; and I think that the language it used does not warrant the legal implication of such intention, and that the entry should be, exceptions sustained.

BARROWS and LIBBEY, JJ., concurred in this dissenting opinion.

HARVEY L. WHITNEY *vs.* JOHN A. KELLEY, *et al.*, and JOHN MCCANN, trustee.

Penobscot. Decided May 31, 1877.

*Assignment. Trustee process.*

A bill of sale of all stock in trade and an assignment of debts due to an insolvent firm, given to one who knows of the insolvency for the purpose of enabling the assignee to pay a stipulated percentage to certain creditors of the firm, who agree to receive such percentage in full of their claims, contravenes the policy of R. S., c. 70, regulating assignments for the benefit of creditors, and constitutes a legal fraud upon the creditors who are not parties to the arrangement, and they may reach the property of their debtor in the hands of such assignee by trustee process.

Doubtful and indefinite statements by a trustee as to the quantity and value of property in his hands belonging to the principal defendant, with whom it is his business to keep an exact account, will be construed most strongly against the trustee, and he will be charged unless his disclosure clearly shows him entitled to be discharged.

ON REPORT.

ASSUMPSIT on account annexed for $127.75, the amount of a bill for silk, sold by plaintiff, a resident of Boston, to principal defendants, residents of Bangor, doing business under the name of Kelley & Martin as tailors and dealers in ready-made clothing, furnishing goods, &c. The account was dated, October 22, 1874, and service was made on the trustee, October 22 and 30, 1874, as trustee to the firm and to Kelley individually. The case was submitted to the law court on the trustee disclosure, there being no question as to the liability of the principal defendants; the trustee to be charged or discharged as the court may determine.

*O. Gilmore*, for the plaintiff.

*J. Varney*, for the trustee.

BARROWS, J. The alleged trustee, having a claim of $2200 against the principal defendants, a firm of tailors and clothing dealers, in part for money lent, in part for endorsing their paper not then matured, in July, 1873, knowing that they were insolvent and that their stock had been attached, under an agreement with their principal creditors, representing nearly all their indebt-

edness, that he would pay and they would receive 30 per cent. in full for their claims, took an absolute bill of sale of the entire stock and an assignment of the debts due to the principal defendants and went into possession, (the attaching creditors releasing their attachments) and since that time he has carried on the business, employing both the defendants for some months and one of them, to the time of his disclosure, as his cutter, who receives as compensation half the profits of the concern. The alleged trustee is himself engaged in another kind of business and conducts this entirely through his agents.

He has paid, according to his agreement, to the creditors who were parties to the arrangement their 30 per cent., together with considerable bills of cost, and an additional sum of $300 to one of them who visited Boston and Portland to get the assent of creditors to this disposition of the debtors' property.

The trustee's counsel says that he was "induced to take the assets and make the 30 per cent. payments to the other creditors, if enough of the creditors would agree to take it, so that the outstanding debts would in the aggregate be too small to put the estate in bankruptcy." We see no reason to doubt it; and just as little reason to doubt that it operated a legal fraud upon the creditors, not parties to it, whether actual fraud was intended or not, and that the transaction must be inoperative as against them, and that it constituted an intrusting and depositing of the goods, effects and credits of the principal defendants in the hands and possession of the trustee, so that they could not be come at to be attached.

Chapter 70 of the revised statutes prescribes the course to be taken to make a valid assignment for the benefit of creditors, and calls for a proportional distribution of all the debtor's estate, real and personal, except what is by law exempt from attachment, among all his creditors becoming parties thereto, and makes public notice indispensable, so that all may have an opportunity to become parties if they wish, and provides for a bond to be given by the assignee to secure a faithful and just distribution, and requires the proceedings to be under oath. When these requisites are complied with, the assignee is exempted from

trustee process at the instance of a creditor, not a party, for six months, and for eighteen months provided the judge of probate with whom he is to settle his accounts sees fit to extend the time so far.

In the case before us the requirements of the statute were entirely disregarded. It does not appear that the plaintiff had any notice, or an opportunity to avail himself of the limited dividend which other creditors accepted. His claim to share with the rest was ignored; and the alleged trustee undertook to make a distribution which should be satisfactory to himself and such of the creditors as had agreed to receive 30 per cent. of their claims.

Non-assenting creditors cannot be thus postponed if they seasonably enforce their claims. The scheme is fraught with similar mischiefs and opportunities for fraud to those commented upon by the court in *Hooper* v. *Hills & trustee*, 9 Pick., 435, besides being in contravention of our statute regulating assignments.

It must depend for its perfect success upon securing the assent of all the creditors. If a distribution of a failing debtor's property is to be made it must be done either in conformity to law, or with the assent of all parties interested. The law cannot recognize the right of one of the creditors or any other man to speculate upon the assets of one whom he knows to be insolvent and upon the fears of the insolvent's creditors in this manner.

Non-assenting creditors may pursue their debtor's property in the hands of an assignee thus constituted. See *Wyles* v. *Beals*, 1 Gray, 233. *Edwards* v. *Mitchell*, *id.*, 239. The statements of the alleged trustee as to the actual value of the property which he received from the principal defendants are quite uncertain, and as to the amount in his hands still unsold totally indefinite. The burden of discharging himself by clear and definite statements devolves upon the trustee who has it in his power by keeping proper accounts to show the exact state of affairs between himself and the principal defendants. If, instead of rendering such accounts, he makes only doubtful and indefinite statements, he will be charged. *Lamb* v. *Franklin Manuf. Co.*, 18 Maine, 187, 188. *Toothaker* v. *Allen*, 41 Maine, 324, 325.

Upon the disclosure before us we think the trustee should be charged for an amount equivalent to that of the judgment to be recovered by the plaintiff for debt and costs, and officer's fees on the execution.

*Trustee charged accordingly.*

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

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STATE *vs.* DENNIS REGAN, appellant.

Penobscot. Decided June 1, 1877.

*Process.*

Where a respondent in a criminal process, appears generally and pleads not guilty to the complaint, he thereby waives all objections to matters of form in the warrant.

ON REPORT.

COMPLAINT of John Pratt, of, &c., to the police court of Bangor, September 2, 1875, that he believes on that day, at, &c., intoxicating liquors were deposited and kept by Dennis Regan, &c., closing with a prayer that if the liquors are found they be seized and Regan apprehended. The warrant follows generally the form of the complaint and that prescribed in R. S., c. 27, but interjects words not found in the complaint or in the form prescribed, but found in the act of 1872, c. 63, § 5, commanding the officer to apprehend "if he shall have reason to believe," &c. The warrant, with the interjected words in italics, is as follows:

"You are therefore required, in the name of the state, to enter the premises before named and therein search for said liquors, and if there found, to seize and safely keep the same, with the vessels in which they are contained, until final action and decision be had on the same; *or, if you shall have reason to believe he has such liquors concealed about his person,* also to apprehend the said Regan forthwith, if he may be found in your precinct, and bring him before said court, to be holden at the police court room, in said Bangor, to answer to said complaint, and to do and receive such sentence as may be awarded against him."

The officer's return shows that he found and seized the liquors and arrested the person.

The defendant in the police court pleaded not guilty, was adjudged guilty and appealed to the S. J. C., where a motion was made to quash the proceedings for informality of the mandatory clause of the warrant, because the order is to arrest on the belief of the officer alone and because it did not direct the apprehension for the offense alleged in the complaint.

By agreement of parties, the case was reported to the law court to determine whether the complaint, warrant, return and proceedings thereon are sufficient in law to sustain the complaint; if sufficient, the judgment to be for the state finally, otherwise the proceedings to be quashed.

*W. S. Clark*, for the defendant, contended that the warrant was informal and insufficient because it was repugnant to the complaint; it did not even follow the act of 1872; it was not in the alternative; the arrest was for a cause not stated in the warrant; and the act of 1872, c. 63, § 5, was unconstitutional.

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

The mandatory part of the warrant is not very clearly expressed, but upon reading by the light of the statutes its meaning can be readily learned.

The statute authorizing arrest on such process first authorized it only in case the liquors were found as alleged. If found, the liquors were to be seized, and the respondent apprehended. R. S., c. 27, § 35.

The statute form of warrant, chap. 27, is, "if there found to seize and safely keep the same, &c., and to apprehend the said respondent."

The statute of 1872 enacts a new cause of arrest—the belief of the officer that the respondent conceals liquor about his person. No form of warrant is given. The proper way then is to interject the new clause in the old form. This is what was done in this case. Strike out the words "or if you shall have reason to believe he has such liquors concealed about his person" from the warrant, and it is valid under the old law. Insert the words and it gives a double cause of arrest.

At the most the words inserted are surplusage; for respondent was not arrested under them, but under the old dispensation.

In the Burke case counsel complained because the words were not in. Here he complains because they are in. There is no satisfying him.

Read by the light of the statutes, the warrant clearly means that the officer is to arrest in either contingency. Adding the words of the new statute does not destroy the meaning of the words of the old.

It is not the complainant's belief, but the officer's belief.

Respondent was not arrested on the clause of the belief, and cannot complain of the surplusage.

VIRGIN, J. All the objections raised by the respondent are based upon alleged defects in the warrant by virtue of which he was arrested and taken before the police court. That court had jurisdiction of the offense set out in the complaint, to which no objection is made. If the process, by virtue of which he was brought before that court, did not authorize the officer to arrest him, the respondent should have raised the objection then and there. Having appeared generally and pleaded not guilty to the complaint, as the record shows, he thereby waived all objections to matters of form in the warrant. *Com.* v. *Henry*, 7 Cush. 512. *Com.* v. *Gregory*, 7 Gray, 498. By the terms of the report, therefore, there must be

*Judgment for the state.*

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

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MAINE MUTUAL MARINE INSURANCE COMPANY *vs.* D. R. STOCKWELL AND COMPANY.

Penobscot. Decided June 1, 1877.

*Promissory notes.*

**The maker of a premium note given to a mutual insurance company for the nominal premium upon an open policy executed to cover such risks as may**

be afterwards indorsed thereon, is liable to the company on such note only to the amount of the actual premiums upon risks assumed by the company and indorsed thereon.

Where a premium note for an open policy is given after the organization of the plaintiff corporation and after applications for insurance to the amount required by its charter to authorize the issuing of policies, by one of the original subscribers, who had paid his former note, given for the purpose of starting the company in business and for the better security of those concerned, it is for the jury to determine whether the note thus subsequently given is for an ordinary open policy, or for "the better security of those concerned."

ON MOTION of the plaintiffs to set aside the verdict, which was for the defendant.

ASSUMPSIT on a note of the following tenor: "January 2, 1871. Twelve months after date, we promise to pay to the order of the Maine Mutual Marine Insurance Co., one thousand and one dollars, payable at Bangor, Maine. Value received. (Signed) D. R. Stockwell & Co. (Stamped across the end of the note.) Given for open policy No. 62."

The defendant with fifty one others signed the following agreement, marked A: "We, the undersigned, agree to advance our notes for premiums in advance to the Maine Mutual Marine 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, as did each of the others, and gave a note of $1001, in pursuance of agreement "A," which note matured December 29, 1870. The testimony on the part of the defendants tended to show that they paid the amount of this December note in premiums, took up the note, that it was a completed transaction, and that the note in suit was independent, not given in renewal and not given under agreement "A." There was evidence on the part of the plaintiff that the note in suit, as well as the prior note, was given under agreement A. The verdict was for the defendants, and the plaintiffs moved to set it aside as against law and evidence.

*A. W. Paine* and *C. P. Stetson*, for the plaintiffs. Mr. Stetson also referred the court to his brief in *Maine Ins. Co.* v. *Farrar*, 66 Maine, at page 134.

*W. C. Crosby*, for the defendants.

APPLETON, C. J. This suit is on a note given for an open policy to the plaintiff corporation for $1001 on twelve months, and dated January 2, 1870.

The plaintiffs were incorporated by an act approved March 16, 1870, c. 470.

The defendants signed the agreement marked A, which is copied in the case of these plaintiffs v. *Hodgkins*, 66 Maine, at page 111, by which they agreed to advance their notes "for premiums in advance" to the amount of one thousand dollars. This they did, giving their note for that sum and taking therefor an open policy.

The premiums upon insurances under their open policy exceeded the amount of the note and they paid the balance. The defendants had thus complied with the agreement to advance their note "for premiums in advance," and had paid the note so advanced. They were under no obligation to make any further advance of their notes under their agreement. They might do so, but the option was with them.

In February or March, 1871, and after the payment of the note advanced "for premiums in advance," the defendants gave the note in suit for an open policy. The case is not like that of *Howard* v. *Hinckley & Egery Iron Co.*, 64 Maine, 93, where the note originally given under § 9 had been simply renewed but not paid. Here the note originally given had been paid, and its payment constituted a part of the funds "for the security of those concerned."

The rule of law is well settled. The maker of a premium note given to a mutual insurance company for the nominal premium upon an open policy executed to cover such risks as may be afterwards indorsed therein, is liable to the company on such note only to the amount of the actual premiums upon risks assumed by the company and indorsed thereon. *Elwell* v. *Crocker*, 4 Bosw. 22.

The note in suit was given long after the plaintiffs had obtained the requisite capital and had commenced business. The defendants gave their notes for an open policy. The issue before the jury was whether the note was given under § 9, "for premiums in advance," and for the security of dealers, or whether it was a note

given for an ordinary open policy. The testimony was conflicting. The plaintiff's witness, Howard, and the defendants testified that the note was not given under § 9. There was evidence to the contrary. No exceptions were taken to the rulings of the presiding justice. We must assume that they were satisfactory to the plaintiffs.

The tribunal, upon which the law has imposed the duty of determining controverted facts, has rendered its decision, and the parties must abide by the result. *Maine Ins. Co.* v. *Farrar*, 66 Maine, 133.

*Motion overruled.*

WALTON, DICKERSON and VIRGIN, JJ., concurred.

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

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JAMES N. BUTLER *et ux. vs.* CITY OF BANGOR.

Penobscot. Decided June 1, 1877.

*Way—defective. Exceptions. New trial.*

If one is injured by driving or falling into an excavation in one of the public streets of a city, which is left at night without being sufficiently lighted or guarded, a recovery may be had against the city, although the excavation was made by a company engaged in constructing the public water-works of the city.

A bill of exceptions, although signed by the presiding justice, will not be considered by the law court, unless signed by the excepting party or his counsel, as required by the R. S., c. 77, § 21.

Although a verdict for damages is large, and, as the court fears, too large, it will not be set aside on that ground, unless it is clearly excessive.

ON EXCEPTIONS AND MOTION.

CASE for personal injuries to plaintiff wife in the night time of August 30, 1875, from defective highway, an excavation in the street.

The evidence was that the husband and wife were in an open wagon, that he was driving, and thrown out when the horse stepped into the hole, and that his wife remained in the wagon from which the horse cleared himself; that she was much

wrenched and jarred, attacked with vomiting followed by severe special female troubles. The excavation was made by a company employed by the city to construct its water-works.

The verdict was for the plaintiffs for $4500, which the defendants moved to set aside as against evidence and excessive. The following bill of exceptions was allowed and signed by the presiding justice, but not signed by the defendants or their attorney.

"There was evidence tending to show that the place of the accident was sufficiently lighted by the gas-lights in the vicinity; and defendants offered to prove by Earnest C. Gibson, plaintiffs' witness, the boy employed by the Holly Manufacturing Company to hang lanterns, on cross-examination, that said company directed him not to hang lanterns at certain places, and then to prove by him that this place was one of the places where he was directed not to hang a lantern, and the reason, which evidence the court excluded.

"There was evidence also tending to show that the plaintiffs were not in the use of ordinary care; and to prove that fact, defendants offered William P. Wingate, as an expert to prove that a safe horse with a careful driver, driven at a fair speed, would not jump or throw a pole off in the manner disclosed by the evidence, which evidence the court excluded.

"To which rulings and exclusions the defendants except and pray that their exceptions may be allowed; and refer to the evidence in the case which is before the law court on motion for a new trial, to show its connection with *res gestæ*."

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

*J. Varney*, for the plaintiffs.

*A. Sanborn*, for the Holly Manufacturing Company; vouched in.

WALTON, J. This is an action by husband and wife against the city of Bangor to recover for injuries to the wife occasioned by driving into an excavation in the street while riding in a carriage in the evening. The excavation was made by the company employed by the city to construct its water-works. The plaintiffs

claim that it was left without being sufficiently lighted or guarded. The jury found for the plaintiffs and assessed the damages at $4500. The case is before the law court on motion and exceptions. The exceptions, however, although signed by the presiding judge, do not appear to have been signed by the defendants, or their counsel, as required by law. R. S., c. 77, § 21. Nor has the learned counsel for the defendants pointed out to us any supposed error in the rulings therein reported. We therefore assume that the exceptions are not relied upon, and we shall not notice them further than to say that upon reading them no error occurs to us. Nor do we think the motion can be sustained. True, the verdict is large, we fear too large, but a careful examination of the evidence fails to satisfy us that in this, or in any other particular, it is so clearly wrong as to justify us in setting it aside.

*Motion and exceptions overruled.*
*Judgment on the verdict.*

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

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JAMES C. EMERSON *vs.* EUROPEAN & NORTH AMERICAN RAILWAY COMPANY and trustees.

Penobscot. Decided June 4, 1877.

*Mortgage.*

A mortgage by a railroad company of "all its right, title and interest in and to all and singular its property real and personal, of whatever nature and description, now possessed or to be hereafter acquired, including all its rights, privileges, franchises and easements," cannot be regarded, at law, as including money earned by the road in carrying freight for an express company under a contract entered into by the express company with the railroad company after the mortgage was made.

Nor does it make any difference that the mortgagees took possession of the road and demanded the money of the express company while unpaid.

The mortgagees would be entitled to so much as was earned under the contract after they took possession of the road; and possession having been taken after the services were commenced and before they were completed, for which an instalment would be due from the express company, the payment afterwards due could be apportioned between the railroad corporation and its mortgagees.

ON REPORT.

ASSUMPSIT on an acceptance of the defendant company for $1000, on which a default was entered. The writ was dated October 30, 1875, and served on the trustees, November, 1, 1875.

The question presented was whether the alleged trustees are chargeable as such.

The trustees form a private co-partnership, doing business as expressmen between Boston and St. John, N. B., under the name of the "Eastern Express Co.," and are not incorporated. They disclose that under a contract made with the defendant railway company on January 1, 1873, for 5 years, they were at the time of the service indebted to the company in the sum of $541.66 for the transportation of its express crate over the road from Bangor to St. John, for the month of October, 1875. The sum agreed to be paid for the service was so much per year, to be payable in monthly instalments on the first day of each month for the month previous. The above-named sum was the amount due for the month of October, and was payable on November 1. Payment having been delayed by reason of the attachment, G. K. Jewett, for B. E. Smith, trustee, gave the trustees notice on November 4, 1875, that the fund had been assigned to him, said Smith, as trustee of the railway company, defendants, for the benefit of the creditors of the company.

Said Smith being cited, comes in and makes claim to the fund disclosed, and in support of his claim offers the mortgage deed of the said railway company of its road and property made to Samuel F. Hersey and himself in trust as aforesaid, dated December 5, 1872, said Hersey having since deceased, the mortgage covering the road over the whole distance from Bangor to St. John, and duly recorded. Under the mortgage, at the request of the holders of the bonds secured by it, he entered and took possession of the road on the 27th October, 1875, and at once on the same day gave public notice, by advertisement and posting, of his said entry, and for all persons indebted to pay him. The entry was legally made and for legal cause, coupons having remained unpaid overdue for more than six months after demand. After such entry Smith as

such trustee has continued ever since in possession, and has continued to operate or run the road. And the said express company has continued to have the express crate carried over the road in the same manner and under the same arrangement as before.

The mortgage is made a pa rt of the case. The descriptive part of the mortgaged premises is to be copied, and either party may refer to and make copies of such other parts as they may choose. The disclosure also may be referred to.

Previous to the mortgage to Smith, that part of the road and other property connected therewith lying between Bangor and the state line had been mortgaged to other trustees for the benefit of bond holders, and also that part lying between the state line and St. John, to other trustees for a similar purpose, and in both cases there had been a forfeiture of payments such as authorized the trustees to take possession of the road, but none has as yet ever been taken, and no claim to the fund in question is made by them or either of them. Up to the time of said Smith's entry on the 27th day of October, the road was worked by the consolidated company defendant, and the sum disclosed was proportionately earned as aforesaid while the road was so run by it, no interference by any of the mortgagees having been made except as herein stated.

The case was reported for the decision of the law court, whether the trustees are chargeable, and if so for what sum.

*A. W. Paine*, for the plaintiff.

*C. P. Stetson*, for B. E. Smith, mortgagee and claimant.

The mortgage to Smith was of all the property of the company possessed or hereafter to be acquired, and his claim to the fund disclosed is paramount to plaintiff's attachment. *Woodman* v. *York & Cumberland*, 45 Maine, 207. *Galena & Chicago U. R. R. Co.* v. *Menzies*, 26 Ill. 121. *Pierce* v. *Emery*, 32 N. H. 484. *Morrill* v. *Noyes*, 56 Maine, 458.

The amount disclosed was not due until November 1. Smith, as mortgagee and trustee, took possession Oct. 27, and is entitled to hold all income which became due after he took possession.

*Crosby* v. *Harlow*, 21 Maine, 499. *Gale* v. *Edwards*, 52 Maine, 363, 365. 3 Kent's Com. 471 & note a. 1 Wash. R. Est. (3d Ed.,) 113, 114, 452, 458.

PETERS, J. The consolidated European and North American Railway Company, on December 5, 1872, mortgaged to B. E. Smith (the surviving trustee) and another, for the security of certain bondholders. On January 1, 1873, the railroad company contracted with the Eastern Express Company to carry their freight for five years for a price therefor to be paid by monthly instalments. On October 27, 1875, the mortgagee Smith took possession of the road for condition broken, in the manner provided in the mortgage. On November 1, 1875, the Eastern Express Company were indebted under their contract for a month's service performed by the road. On that day they were summoned in this suit as trustees of the railroad company. On November 4, 1875, the express company were notified to make payment to B. E. Smith. The plaintiff claims to hold the monthly payment by his attachment, and the mortgagee (in trust) claims that it becomes assigned to him, under a clause in the mortgage describing the premises mortgaged to him, as follows: "All its (Deft. Co.'s) right, title and interest in and to all and singular its property real and personal, of whatever nature and description now possessed or to be hereafter acquired, including its railway, equipments and appurtenances between said Bangor and said St. John, all its rights, privileges, franchises and easements, together with its branches, all buildings used in connection with said railway or the business thereof, and all lands and ground on which the same may stand, or connected therewith; also all locomotives, tenders, cars, rolling stock, machinery, tools, implements, fuel, materials, and all other equipments for the construction, maintaining, operating, repairing and replacing the said railway, or its appurtenances, or any part thereof."

The question presented is, whether this mortgage conveys or assigns to the mortgagee the future earnings of the road (this kind of earnings), as against the attaching creditors of the mortgagers. We think not. This must be regarded as a contest where legal and not equitable rules are to prevail. We have before us an action at law.

In equity, many, if not most, of the courts of the present day decide that, under some circumstances, a man may mortgage what does not at the time exist. Late opinions of Judge Lowell in the district court and Mr. Justice Clifford in the circuit court of the United States for the district of Massachusetts, in cases in equity, strongly assert the doctrine. The cases referred to are *Brett* v. *Carter*, 2 Low. 458, and *Barnard* v. *Norwich & Worcester R. R. Co.*, which has not yet appeared in any volume of reports. *Mitchell* v. *Winslow*, 2 Story, 630, and *Pennock* v. *Coe*, 23 Howard, 117, are perhaps the leading cases in this country advocating the same view. In *Moody* v. *Wright*, 13 Met. 17, decided in 1847, the court of Massachusetts came to an opposite conclusion. In our own state, the question whether equity would uphold such a mortgage, and, if so, under what conditions, has not been much discussed or ever decided. See remarks of Justice Davis upon the subject in *Morrill* v. *Noyes*, 56 Maine, 458, on page 472.

But at common law it is not possible for such a rule to prevail. The common law maxim is conclusive upon the point. *Nemo dat quod non habet.* The reason that it may be different in equity, is not that a man conveys *in presenti* what does not exist, but that what is in form a conveyance operates in equity by way of present contract merely, to take effect and attach to the things assigned as soon as they come *in esse;* to be regarded before that time as only an agreement to convey, and after that time as a conveyance.

There are many instances in the decided cases where there may be some appearance of a departure from or a modification of this general principle of the common law, but where the results are produced by other principles not inconsistent with it. As where property has been added to property by way of accession natural or artificial, the greater taking to itself the lesser thing after the connection becomes inseparable without much injury. As where a house is built upon mortgaged land; or a fixture is added to a house; or rolling stock is put upon a railroad, and becoming a necessary part and parcel thereof. Domat clearly defines it, thus: "The mortgage will extend to all that shall arise or pro-

ceed from that thing which is mortgaged, or that shall augment it and make a part of it." And it is frequently held that a man may sell property of which he is potentially but not actually possessed. He may make a valid sale of the wine that a vineyard is expected to produce, or the grain a field may grow, in a given time; or the milk a cow may yield during a coming year; or the wool that shall thereafter grow upon sheep; or what may be taken at the next cast of a fisherman's net; or fruits to grow; or young animals not yet in existence; or the good will of a trade, and the like. The thing sold, however, must be specific and identified. It must be, for instance, the products of a particular vineyard or field, or the wool from particular sheep. These must also be owned at the time by the vendor. A person cannot sell the products of a field which he does not own at the time of sale, but which he expects to own. *Farrar* v. *Smith*, 64 Maine, 74, 77.

Tested by these definitions and rules, we do not see how the contract with the express company could be considered as assigned by the mortgage. We do not perceive how it can in any sense be regarded as accessory to the road or its franchise or any of its property. To be sure, the use of the road was necessary to the performance of the contract; but a larger part of the cost of performance was represented by labor and the expenses. As before said, the thing sold or assigned must be specific and identified. In the mortgage this contract is not named. No contracts, with any class of subjects or persons, are named. Even in equity, an assignment of claims not then existing, to be upheld, must be of such claims as both parties expected would exist; as for work to be done and materials to be furnished for a particular party. *Field* v. *Mayor*, &c., *of New York*, 2 Selden, 179. The expectancy of an heir to an estate may be sold, but it must be a particular estate. Story Eq. Jur. § 1040. A seaman may assign his share of the profits of a voyage, but it must relate to a particular voyage of a particular vessel upon which the seaman has engaged his services. A laborer may assign his expected wages, but the expectation must be founded upon some special engagement at labor, or some employment already entered upon by the laborer.

The assignment of a mere expectation of earning money, if there is no contract of any kind on which to found the expectation, is of no effect. There must be some subject for the contract of assignment to attach to. Here, when the mortgage was made, there was no contract and no expected contract with any express company for the carriage of freight. *Farnsworth* v. *Jackson*, 32 Maine, 419. *Brackett* v. *Blake*, 7 Met. 335. *Mulhall* v. *Quinn*, 1 Gray, 105. *Wallace* v. *Walter Heywood Chair Co.*, 16 Gray, 209. *Twiss* v. *Cheever*, 2 Allen, 40. *Low* v. *Pew*, 108 Mass. 347.

It is to be noticed that, if an assignment of a contract like this is covered by the mortgage at all, it is included in it only by the most general terms. The mortgage does not include the assignment of a contract or money earned under a contract, unless by the use of the words "all and singular its property real and personal . . . . to be hereafter acquired." But these general words would seem to refer to the kinds of property thereafter enumerated. If money or earnings had been in the minds of the parties, it is likely that they would have been more specifically mentioned. Judge Story says, "language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter." Story's Agency, §§ 21, 62. In *Kendall* v. *Almy*, 1 Sumn. (C. C. R.) 278, where a firm made an assignment of "all the goods, wares, merchandise and personal property of every kind; and also all notes, books, accounts and debts of every kind due," it was held that the words "personal property of every kind," in the connection, signified visible, tangible property, *ejusdem generis*, as goods, &c., and that an interest in a contract would not pass thereby. *Parish* v. *Wheeler*, 22 N. Y. 494, cited by plaintiff, supports the same view.

The decisions in this state, in a class of cases resembling this, add weight and authority to the opinion we express in this case. In *Abbott* v. *Goodwin*, 20 Maine, 408, it was held that a mortgage of a stock of goods might cover goods purchased after the date and delivery of the mortgage, under the somewhat peculiar circumstances of that case. But the authority of that case was

weakened by the case of *Goodenow* v. *Dunn*, 21 Maine, 86, if not in effect overruled by it. It is a noticeable fact that no member of the court sat in both of those cases. In *Head* v. *Goodwin*, 37 Maine, 181, the doctrine of the last named case was fully affirmed, although neither of the former cases was noticed therein by counsel or court. *Head* v. *Goodwin* was approved in *Pratt* v. *Chase*, 40 Maine, 269, 272, and also by *Morrill* v. *Noyes*, 56 Maine, 458, 466. In *Chapin* v. *Cram*, 40 Maine, 561, it was directly determined, that a mortgage of a stock of goods would not transfer to a mortgagee goods afterwards purchased and put in with the stock by the mortgager, although the mortgage had a clause containing an agreement to that effect. These were all decisions at law.

In *Woodman* v. *York & Cumberland*, 45 Maine, 207, relied on by the claimant in the case at bar, the court held that money on hand belonged to the mortgagees "of all the property of the railroad corporation." But the money there in question was already earned and in the possession of the treasurer of the railroad company when the mortgage was made. The case does not disclose fully what the terms of the mortgage were. But in *Noyes* v. *Rich*, 52 Maine, 115, it was decided that a receiver, appointed under proceedings in equity to enforce a mortgage upon the same railroad, was not entitled to the possession of money already earned and on hand when he took possession of the road.

It is evident, that the fund in question, or that portion of it earned before possession of the road was taken by the mortgagees, cannot be regarded, in a suit at law at least, as any part of the *corpus* or property mortgaged. It is rather the earnings or profits derived from the use of such property by the mortgager in possession. Rents and profits of mortgaged property, accruing while the mortgager is in undisturbed possession, belong to him. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, 460. *Gilman* v. *Telegraph Co.*, 91 U. S. 603. See numerous citations in *Cook* v. *Corthell*, 11 R. I. 482.

As the monthly instalment was payable on November 1, 1875, and Smith (the trustee) took possession four days before that time, a

question arises whether the monthly payment can be apportioned or not. The railroad company did nothing towards performing the contract after the mortgagee took possession. The contract was then broken by them on account of their inability to carry it out. What was done afterwards was by the mortgagee, and he should have the benefit of any subsequent part performance. The ordinary rule applies. Having acted in good faith, the railroad company are entitled to recover what their services were worth, not exceeding the contract price, less the damages caused by such failure. *Veazie* v. *Bangor*, 51 Maine, 509. *Powell* v. *Howard*, 109 Mass. 192. There being no suggestion to the contrary, the trustees should be charged for 27/31 of the monthly instalment due for October.

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

BARROWS, J., concurred in the result.

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L. A. BOWLER *vs.* EUROPEAN & NORTH AMERICAN RAILWAY COMPANY and trustees.

Penobscot. Decided June 4, 1877.

*Trustee process.*

A writ of foreign attachment is not illegally altered, by changing the name of an alleged trustee from Azro Jones to Azro H. Jones after service on other parties, and then attempting to serve upon him as a new name under the statutory provision allowing the names of new trustees to be inserted under certain circumstances, the service proving ineffectual, and the plaintiff claiming only to hold another distinct and unconnected trustee.

Where, under a trustee process, a person discloses that he is indebted for the carriage of freight, the transportation of which was performed in part by the defendant corporation and in part by another company over another and connecting road, it being the custom for the former company to collect the whole freight and pay to the other company its proportion of the same, such alleged trustee can be charged only for such proportion of the whole freight due from him as would belong on settlement to the defendant road.

ON REPORT.

ASSUMPSIT on a note of the defendant company.

The question was whether the alleged trustees were chargeable. Writ was dated October 21, 1875, served on Maxfield & Smith, trustees, October 22, and on principal defendants, October 23. The next day, the letter H. was inserted in the writ, making the name of one of the trustees Azro H. Jones instead of Azro Jones, as it was originally; and service was then made on Azro H. Jones. October 27, service was made on the principal defendants.

Maxfield appeared and disclosed. There was due from him $418.30, to wit: $375 for transportation of fifteen cars of sheep from Houlton, over the New Brunswick and Canada Railroad to McAdam Junction, and thence by railroad of defendant company to Bangor; and $43.30 for three cars of sheep from Mattawamkeag, on line of defendant company, to Bangor. It was the custom of defendant company to collect the whole of the freight from Houlton to Bangor over the N. B. & Canada road, and its own road, and to pay to said N. B. & Canada R. R. Co., thirty-seven hundredths (37-100) of whole freight.

B. E. Smith duly appeared and claimed amount due from said Maxfield, and offered a mortgage deed from said Consolidated E. & N. A. Railway Company to himself and S. F. Hersey as trustees, for security of certain bonds. Said mortgage is dated December 5, 1872, and covers the railroad from Bangor to St. John, and all the property of defendant company, subject to a mortgage to the city of Bangor, of the railroad from Bangor to Winn, and to another mortgage of the railroad from Bangor to east line of the state to secure certain bonds. Hersey having deceased, the title of mortgaged property by terms of mortgage vested in Smith. Under this mortgage, at the request of the holders of the bonds secured by it, Smith, October 27, and before the last service of plaintiff's writ on the company, entered and took possession of the property covered by the mortgage, and at once, on same day, gave public notice by advertisement and posting of his entry, and for all persons indebted to pay him, and has since continued in possession of the railroad and property named in the mortgage, and it is admitted that he legally took possession under the mortgage.

Up to the time of entry by Smith, the railroad was worked by the consolidated company, and neither the city of Bangor nor the trustees, under the mortgage of part of the road from Bangor to east line of state have ever taken possession, or interfered or claimed earnings of road.

The case was reported for the decision of the full court, whether Maxfield the alleged trustee is chargeable; and, if so, for what amount.

*A. Sanborn*, for the plaintiff.

*C. P. Stetson*, for B. E. Smith, claimant.

The alteration of the writ was not authorized by R. S., c. 86, § 6.

The mortgage to Smith of all property of every nature and description possessed or hereafter to be acquired, transferred to him the above claim, and gave him the right to take possession and claim the earnings, which right is paramount to plaintiff's attachment. *Woodman* v. *York & Cumberland*, 45 Maine, 207.

Plaintiff cannot hold the amount of freight earned by the New Brunswick & Canada Railroad Company. *Gould* v. *Newburyport Railroad*, 14 Gray, 472. *Chapin* v. *Conn. R. Railroad*, 16 Gray, 69.

PETERS, J. This is an action of foreign attachment. It is claimed that there has been an alteration of the writ. The names of Maxfield and Smith and Azro Jones were originally inserted in the writ as trustees. Service was made on Maxfield and Smith, but not on Jones; and service was then made on the principal defendants. Afterwards, Azro Jones and Azro H. Jones being the same person, the letter H. was inserted in Jones' name, and service then made on him and renewed on the principal defendants. We can see no wrong in this. The plaintiff, at the most, did no more than to attempt to avail himself of the privilege of inserting in his writ the name of a new trustee, as allowed by § 6, c. 86, R. S. His effort, however, proved ineffectual. The name must be inserted "before" the process is served on the principal and not after. It does not help the matter that the service was afterwards renewed on the principal. It may

be renewed upon the principal after "further" service on any trustee. But here the service on Jones was an original and not a "further" service, because there was no service on him before. Nor could the writ be regarded as a new writ from the date of service on Jones, because there was no after service on Maxfield or Smith. In any view, there was no legal service on Jones, nor does the plaintiff claim to hold him. All this seems to be immaterial so far as the trustee Maxfield is concerned. He has no connection with Jones, and discloses only an individual liability of his own.

Maxfield's disclosure shows that he was indebted for freight transportation from Houlton to Bangor; that the transportation was performed in part by the defendant corporation and in part by another company over another road, the roads being so connected as to permit a continuous passage of the cars between the two places; that it was the custom of the defendant company to collect the whole freight due for transportation from Houlton to Bangor, accounting to the other railroad company according to the portion of the distance carried by them, for their share of the same. There can be no doubt that Maxfield cannot be charged for that portion of the freight which was earned by the New Brunswick & Canada Railroad Company. Even if it had been collected by the E. & N. A. R. Company, it would have been in their hands, as agents and trustees, as the property of the other road. *Gould* v. *Newburyport Railroad Co.*, 14 Gray, 472. *Chapin* v. *Conn. R. Railroad*, 16 Gray, 69. *Hartan* v. *Eastern Railroad*, 114 Mass. 44. *Williams* v. *Williams*, 23 Maine, 17.

The other question raised is settled in another case, argued with this, where a similar state of facts is presented. *Emerson* v. *E. & N. A. Railway*, *ante*, p. 387.

*Trustee charged.*

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

HENRY LORD *et als. vs.* WILLIAM B. HAZELTINE *et als.*

Penobscot. Decided June 5, 1877.

*Shipping.*

United States statute rules for avoiding collisions between steamships and sailing vessels applied.

If two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel.

Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.

When by the rules one of two vessels shall keep out of the way, the other shall keep her course.

The common law rule of contributory negligence applied to an action for collision between vessels.

If the collision is the fault of the plaintiff or of both parties or of neither, the plaintiff cannot recover. If it happens by the fault of the defendant and without any contributory fault of the plaintiff, he can recover, provided he sustains the burden of proof which the law imposes on him.

ON MOTIONS.

CASE by the owners of the schooner Bloomfield against the owners of the steamer Cambridge to recover damages for loss of the schooner by collision with the steamer July 2, 1874, on the Penobscot river.

The evidence on the part of the plaintiffs, coming from those in the schooner and those who saw the collision from the shore, was that the schooner kept her course, as by the rule she should. The evidence on the part of defendants, coming from officers and passengers on the steamer, was that as the steamer changed her course to avoid the collision, the schooner changed hers the same way and thus the collision. The steamer ran squarely over the schooner, breaking her in two.

The verdict was for the plaintiffs for $1,612.50, which the defendants moved to set aside as against law and evidence. They also filed a motion for a new trial on the ground of newly discovered evidence from other witnesses, passengers, who saw the collision from the steamer.

*C. P. Stetson*, for the plaintiffs.

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

VIRGIN, J. The rules of navigation prescribe the conduct of vessels towards each other while traversing the natural highway of ocean and river. They are founded in common sense and experience. They were established for the general security of commerce, for the prevention of collisions and the consequent protection of life and property, and for the ascertainment of the rights of parties when collisions occur through the violation of rules applicable thereto. The general principle is that when collision may result from the continued directions of two vessels, that one which can the more readily vary her course, is bound to do so. Hence one sailing before the wind or with a fair wind, must for the reason mentioned, give way to another close hauled to the wind. And a steamboat, which can be moved at will in any direction—forward, backward, or stopped altogether—having her movements more under immediate control than any sailing vessel, which can go only when and where the winds and currents permit, always has the power to avoid collision when managed with ordinary skill and prudence. These rules have become settled by repeated adjudication and they are now embodied in the statutes of the United States. Those applicable to the case at bar are as follows: "If two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel.

"Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.

"When by rules 17, 19, 20 and 22 one of two vessels shall keep out of the way, the other shall keep her course," &c. R. S. of U. S., c. 5, § 4233.

The rules of admiralty on the subject of collision do not concur in all respects with those of the common law. This being an action at common law, tried by a jury, the presiding justice properly instructed them, in substance, that if the collision were the fault of the plaintiff, or of both parties, or of neither, the plaintiff could not recover. If it happened by the fault of the defendants and without any contributory fault of the plaintiff, then he could

recover, provided he had sustained the burden of proof which the law imposed on him.

We now pass to a consideration of the motions.

The western bank of that reach in the Penobscot river extending from "Pulpit Rock" down to and including "Stubb's Point," is very high, the Point rising more than one hundred feet above the water. Between the Rock and the Point the course of the river is S. E. by E.; and when the Point is turned the river flows due south. In this lower reach some two to three thousand feet below the Point and about three hundred feet from the eastern shore, is "Buck's Ledge," between which and the western shore is the channel about seven hundred feet in width.

At about noon on July 2, 1874, near high water, with a flood tide and a six knot breeze "south a little easterly," the plaintiffs' schooner, Bloomfield, of forty-five tons, with no cargo on board, manned by a master, one able bodied seaman and a boy of sixteen years, was sailing up the lower reach under a mainsail, foresail and gaff-topsail on the port side, and a jib, with the captain at the wheel and the seaman near him on the port side of the wheel. At the same time, defendants' steamer "Cambridge," of about thirteen hundred tons, on her regular trip from Bangor to Boston, with the captain, one helmsman and a passenger in the wheelhouse, was steaming down the upper reach, at her usual speed of twelve knots. She rounded the Point with helm hard to port and in attempting to pass the Bloomfield on the latter's port side struck her on her starboard quarter, a little aft of her fore rigging, cut her in two and passed between the severed portions some distance.

The plaintiffs contended before the jury that they were in no fault; but that the collision was caused by the negligence of the defendants' servants, in that both pilots were off duty at the time, taking their dinner, that the speed of the steamer was not slackened, that she neither stopped nor reversed; and that there was not room enough for the steamer to pass, as she attempted to, between the schooner and the western shore, but that she should have passed on the other side where the channel was open and free. On the other hand, the defendants contended that as soon

as they had cleared the point sufficiently to discover the schooner, they instantly gave the whistle signal of danger and stopped her engines; that the steamer was rightfully swinging westerly with her helm aport for the purpose of turning the point and to pass on the schooner's port quarter, between which and the western shore there was ample room; and that they would have safely done so, had not the schooner, after the steamer had resolved upon her course, jibed her sails, changed her course, headed towards the western shore and thus caused the collision. The plaintiffs absolutely denied any change of course on the part of the schooner; but on the contrary contended that their master well knew and strictly observed and adhered to the rules of navigation, denying, as did also the defendants, the existence of any special circumstances which called for any departure from the general rules.

This question of fact was the principal and most important one in controversy, and was distinctly submitted to the jury. The rules of law applicable to the case were lucidly, fully and forcibly explained. If the jury followed the law of the charge, (and we perceive no reason for believing otherwise), they must have found the issue for the plaintiffs. We are now asked to set aside the verdict based on such finding, on the ground that it is against the weight of evidence, and on the ground of newly discovered evidence reported.

But after a very careful examination and consideration of the evidence reported, we do not feel at liberty to disturb the verdict. The evidence is in dire conflict, and the witnesses on each side quite numerous. The two vessels were approaching each other in opposite directions, and were, therefore, "proceeding in such direction as to involve risk of collision," and it was the steamer's bounden duty, under the rules of navigation, "to keep out of the way of the sail-vessel," "slacken her speed, or, if necessary, stop and reverse." She did not keep out of the way of the Bloomfield, but collided with her; and she is therefore *prima facie* at fault. *The Carroll*, 8 Wall. 302. Neither did she stop and reverse, although it would now seem that the collision might possibly have been avoided by such action. The captain of the steamer,

the helmsman and passenger in the pilot-house, two witnesses standing on the upper deck, two others in the extreme bow, and three others on the main deck near the pilot-house, most of whom possessed more or less nautical experience, and having a clear and unobstructed view of the schooner from the moment she was uncovered, testified that she changed her course after the steamer had chosen hers with reference to the schooner's.

On the other hand, the crew of the schooner, having full and absolute knowledge of the real fact, assert positively and unequivocally that she kept her course, and that her sails did not jibe, although the wind being so nearly dead aft, the mainsail may have taken the wind from the foresail so that it did not fill and the fore-boom may have swung in. Seven other witnesses at various places on the eastern shore, residents in the vicinity of the occurrence, some with more or less nautical experience, and all frequent observers of the passing and repassing of vessels there, testified,—some positively that the schooner did not change her course, and others that with their attention directed to the vessels approaching each other, they observed no change. But notwithstanding the defendants' opposing testimony and the negative character of some portion of the plaintiffs', the jury, upon a full consideration of the whole evidence, were convinced that the plaintiffs had sustained the burden imposed upon them. They seemed to be of opinion that (as was said in the case of the *Neptune*, quoted approvingly in *The Fannie*, 11 Wall. 238, 242), "What a witness asserts he did, or did not do, on his own vessel at the time, is generally more satisfactory evidence of the facts than the opinion and belief of a dozen others formed from what they supposed they saw or heard on another vessel;" and that the landsmen standing still and having fixed points of observation, were not subject to any illusion as to the movement of the vessels; while those on the steamer might, as the cross-examination of some of them shows they evidently did unconsciously and unwittingly impute the steamer's change of course to the schooner. If the schooner, as many testified, was nearer the western shore than Buck's Ledge, sailing north so as to clear Stubb's Point, her port side would be first seen by those on the bow of the steamer; and

when the latter was farthest west from the Point in turning it, she would have crossed the schooner's course and the latter's starboard quarter would be seen. To an inexperienced person, at least, standing upon the bow of the steamer, and unconscious of his own motion, these appearances might naturally indicate a change of the schooner's course to the westward.

The alleged declarations of the captain and one of the crew of the schooner are substantially denied by them.

If the schooner kept her course, it was all the steamer had a right to require; and whether she had a proper lookout or not becomes entirely immaterial. If she had, or had not, a sufficient lookout, she did precisely what her duty required. *The Fannie, sup.*

The newly discovered evidence comes from three residents in Bangor who were on the steamer at the time of the collision, which fact the books of the defendants contained, and proper diligence would have secured their attendance as witnesses at the trial. Their testimony is simply cumulative upon the main issue. One of them (Pond) testified, on cross-examination, "The collision took place as we rounded Stubb's Point—just below it. I don't think the bow of the steamer swung around before the collision. I did not notice any swinging of her bow. Sails of the vessel changed two or three points so that they fluttered. . . I saw no change in steamer." The two others testified, substantially, the same. Such evidence could not have changed the result.

*Motions overruled.*

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

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WALDO T. PIERCE, petitioner for review, *vs.* JOHN P. BENT.

Penobscot. Decided July 3, 1877.

*Review.*

A review will not be granted for the mere purpose of affording a judgment debtor time and opportunity to prosecute a cross-action to final judgment.

The power of the court to grant reviews given in R. S., c. 89, § 1, is limited to the causes therein enumerated.

ON REPORT.

PETITION FOR REVIEW, as follows:

"Waldo T. Pierce of Bangor, respectfully represents that at the April term of the said court, A. D. 1875, judgment was rendered against him, in favor of John P. Bent of said Bangor, for $1389.19 debt, and $35.04 costs of suit, as by the records of said court appears, on which judgment execution has been issued, which is at present in the hands of his attorneys, Brown & Simpson, or the sheriff of the county, or some of his deputies, wholly unsatisfied.

"And your petitioner further avers, that said judgment was rendered in a suit on a verdict rendered against him at the April term, 1874, by a jury before whom the case was tried on the question of copartnership between him and said Bent, that there is, and then was, a large amount due him, said petitioner, on account as existing between them, which sum your petitioner had right to have settled as a copartnership matter, but that upon the rendition of the verdict unfavorable to the existence of such copartnership, he at once commenced a suit on his said claim, in order that an offset might be made of the judgments, in the two cases, notice of which suit was given to the court with the request that in case judgment should be ordered on the verdict, it might be so ordered during the term time, to the end that the action might be continued to await the decision of the new suit. But so it is, that such judgment has been rendered as aforesaid, during the pendency of said new suit in vacation, to the entire loss of the whole of his claim, inasmuch as the said Bent is utterly worthless, and no judgment is or will be of any value which may be recovered against him, unless the same be off-set against the judgment and execution already rendered as aforesaid. Wherefore, inasmuch as by said proceeding, great injustice has been done your petitioner by the judgment rendered as aforesaid, to your petitioner's great misfortune, and as he alleges by accident and mistake; therefore your petitioner, in order that justice may be done, prays that a review of said judgment may be granted, to the end that the action may stand to await the decision of his

case against said Bent, so that the two may be set off as provided by law, and as may be just and equitable.

"And plaintiff avers, that the amount due him from said Bent, is very much larger than his, said Bent's, execution aforesaid.

"Wherefore, he prays that a review of said case may be granted, and a supersedeas may be issued against the collection of said execution. (Signed) Waldo T. Pierce."

Sworn to June 14, 1875.

The respondent objected that the case is one not coming within the provisions of the law, and that the court has no power to grant its request.

The court below granted a temporary supersedeas to abide the opinion of the full court whether the case is one provided for by law.

*A. W. Paine*, for the petitioner, urged as matter of law that the court had the power to grant his petition under R. S., c. 89, § 1, and especially under clause seventh of § 1, which reads as follows: "A review may be granted in any case where it appears that justice has not been done, through fraud, accident, mistake or misfortune; and that a further hearing would be just and equitable."

*C. P. Brown & A. L. Simpson*, for the respondent, represented the facts to be, that Pierce wrongfully seized notes which belonged to Bent; that in an action of trover the jury had so found and the court had sustained the verdict; they said it would be vexatious to compel their client to wait the result of an action which Pierce could only sustain by proving that his own testimony as to partnership in a former suit was untrue; and contended as matter of law that the proper action of the court in announcing their decision on the motion as soon as made was not the kind of accident or mistake in the purview of the statute.

DICKERSON, J. The petitioner seeks a review of an action in which a verdict has been rendered, and affirmed by the law court, against his motion to set it aside as against evidence, &c., and on account of newly discovered evidence. A review is claimed, not upon the ground that there was a mistrial of the case, but because

upon the rendition of the verdict the petitioner commenced an action on a claim he had against the plaintiff, in order that he might offset the judgment he might therein recover against the plaintiff's judgment. The petitioner further represents that he gave the law court notice of the pendency of his suit; that should judgment be rendered against him on the verdict, it might be rendered in term time, to the end that the action might be continued to await the result of the subsequent suit.

The "accident or mistake" relied upon as cause for review is alleged to consist in the fact that the law court allowed judgment to be rendered on the verdict in vacation, pending the second suit, notwithstanding the petitioner's notice and request. The particular grievance alleged is that on account of this action of the law court, execution has been issued in the action against the petitioner, that he has been deprived of the opportunity of offsetting the judgment he might recover against the plaintiff's judgment, and has thereby been subjected to the loss of his whole claim on account of the impecuniosity of the plaintiff.

It must be conceded that the application is one of novel impression, and that if a review may be granted in such a case it is difficult to conceive of a case where one would be denied. The statute makes provision for rendering judgments, in vacation, in such cases, and we are not aware of any law or practice that authorizes or requires the law court to construe and administer that statute so as to suit the convenience or necessities of either party to the suit. Certain we are that there can be no "mistake" or "accident" in administering a statute according to its true intent and meaning, as was done in the case under consideration. The law court overruled the motion and affirmed the verdict in vacation, and the statute gave the plaintiff a right to judgment and execution. There was no "accident" or "mistake" in that, nor was it competent for the defendant in the first suit to interpose in the manner stated in the petition, and thereby delay the rendition of judgment. *Non constat* that the plaintiff in the cross action would recover judgment to be offset in the mode suggested; to allow him to keep his adversary in court for such a cause, when he is entitled to judgment, would be to subject him to delay, expense and hardship that the law does not sanction.

As there was no "accident or mistake" in the purview of § 1, clause 7, c. 89, R. S., of course it does not appear "that justice has not been done through accident or mistake." But if it was shown that there had been "accident" or "mistake," it does not appear "that justice has not been done" by reason thereof. It is the failure of justice actually experienced in the case sought to be reviewed, and not future conjectural inconvenience or loss in another case, that the statute contemplates. In other words, it is a mischief accomplished and not one apprehended that this provision of the statute affords a remedy for. "Boiled down," so to speak, the petition asks for a review, not because the verdict is wrong, or is expected to be reversed by the review prayed for, but to give the petitioner time to recover a judgment against the plaintiff with which to satisfy, wholly or in part, the judgment the plaintiff now holds against him. It is, perhaps, difficult to determine which is the more singular, the ingenuity or the audacity of the petitioner.

The petitioner has no valid claim to a writ of review, as a matter of right under the first paragraph of § 1, chap. 89, R. S., as the words "civil actions" are limited by the subsequent words, "and in the special cases following."

*Writ denied.*

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

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WILLIAM A. FRYE *vs.* JOSEPH U. BURDICK *et al.*

Penobscot. Decided July 3, 1877.

*Bailment. Contract.*

The receipt of property to be safely kept and returned at a specified time, unless paid for, no price being fixed, is a bailment of the property so received and not a sale.

A contractor with the government of the United States, to transport the mail within the same, may contract with or hire another to transport the mail according to the terms of his contract.

Such agreement is not in contravention with R. S. of U. S. § 3963, which prohibits the assignment of mail contracts.

ON REPORT.

ASSUMPSIT upon two written contracts. Writ dated December 30, 1873. The first count sets out that the defendants, one as principal and the other as surety, agreed that Joseph U. Burdick, the principal, would carry the U. S. mail on the mail route between Dexter and Bangor according to the terms, &c., setting out substantially the agreement contained in paper A, which is dated July 1, 1873, signed by Joseph U. Burdick, as principal, and V. Mason Burdick as surety, and is of the following tenor:

"Memorandum of an agreement made by and between William A. Frye, of Newport, of the one part, and Joseph U. Burdick, of Dexter, of the other part.

"For the consideration hereinafter stipulated to be paid by the said Frye, the said Burdick agrees with the said Frye to carry the United States mails, on route between Dexter and Bangor, according to the terms of contract made therefor between said Frye and the United States, and in accordance with all orders, directions, and regulations, now existing, or hereafter to be made on the part of the United States, and in all things to do and perform whatever may be required of said Frye, by the United States, concerning the carrying of said mails over said route, and to hold and save said Frye harmless and free from all expense concerning the fulfillment of said contract, orders, directions and regulations; it being expressly understood that the contract above referred to and the liability of the said Burdick to execute the same, shall not extend or continue beyond the first day of July, A. D. 1877.

"And the said Frye agrees with said Burdick that, in consideration of the performance by said Burdick, of the condition above named, commencing the first day of July, A. D. 1873, and continuing to the first day of July, A. D. 1877, unless the mail should be discontinued before that time, he, the said Frye, will pay said Burdick eight hundred dollars per year in quarterly payments, on the first days of October, January, April and July, of each year, or as soon thereafter as said Frye shall receive payment for the transportation of said mail from the United States.

"If any part of said route be curtailed, then said Burdick, shall receive pay in same proportion as to the number of miles cut off."

The count assigned breaches.

Of this agreement the defendants had a counterpart, signed by the plaintiff, as a consideration for the promise on their part.

The defendants contended that the agreement was invalid for reasons of public policy.

The second count sets out a delivery of two horses and other property, substantially in the terms of paper B, dated July 1, 1873, signed by the defendants, and of the following tenor:

"This day received of W. A. Frye, two black horses, called Hiram and Indian, two bay horses, called Fairbrother and Jenkins, two two-seated wagons, two single harnesses, the above property valued at eight hundred dollars, which I agree to keep in good order and condition and return the same to W. A. Frye at the end of two years, unless paid for."

The declaration closes as follows: "Yet the said defendants have not paid the plaintiff for said property, nor have they kept the same in said condition; but have so negligently and carelessly kept and used said property, that by reason of such negligent and careless keeping and using, the same has been greatly damaged, injured and rendered of much less value; and part of said property, to wit: one horse and one wagon, said defendants have not kept, but suffered and permitted them to go out of their possession, and to be wholly lost to the plaintiff; and other of said property said defendants have not kept, but have sold, exchanged and delivered the same into the custody of other persons having no right thereto, by reason of which the plaintiff has been put to great cost and expense to recover the same. To the damage," &c.

Under the second count, the plaintiff offered in evidence the paper marked "B," and claimed damages of the character described in that count. But the defendants claimed that, by this paper, the title in the articles described in it, passed to them, and that the plaintiff was entitled to no action upon it at the date of suing out of plaintiff's writ.

Paper marked "B," is of the same date as paper marked "A," written on the same sheet of paper, and was made as part of the same transaction, to enable the defendant to perform the agreement contained in paper "A," and the defendant contended that paper "B," was also invalid for reasons of public policy.

The case was taken from the jury and reported for the law court to determine upon the case thus stated, whether the action can be maintained upon both or either of the counts in the writ. If it can, then the action to stand for trial according to such decision; otherwise a nonsuit to be entered.

*G. W. Whitney*, for the plaintiff.

*J. Crosby*, for the defendants.

APPLETON, C. J. The law seems well settled that where one receives goods and chattels of another on a contract, by which he has a right to return them or pay a stipulated price for them, the property passes and he is regarded as the purchaser.

And in all the cases to which we have been referred, the contract was in the alternative, to return or pay the stipulated price. In *Dearborn* v. *Turner*, 16 Maine, 17, the contract was to return or pay. "We are very clear," observes Weston, C. J., "that the security of the plaintiff vested in contract; and that Nason having the alternative to return or pay, the property passed to him, and he was at liberty to sell the cow." In *Buswell* v. *Bicknell*, 17 Maine, 344, it was decided, when an election is given to the party receiving a chattel to return it or pay a sum of money, by a given day, the property in the chattel vests in him. "It is the option conceded to the party receiving," observes Weston, C. J., "which produces this effect. He may do what he will with the article received. If he pays, he fulfills his contract. If he neither pays nor returns, he is liable to an action." In *Holbrook* v. *Armstrong*, 10 Maine, 31, the cows were to be delivered at the end of two years or their value in money. In *Perkins* v. *Douglas*, 20 Maine, 317, the contract was to return the oxen or pay the stipulated price. "It is in the alternative," observes Shepley, J., "and permitted Burton to return the oxen, or pay the money, at his election." To the same effect is the case of *Hurd* v. *West*, 7 Cow. 752.

In the present case the defendant, Joseph U. Burdick, received horses and other property of the plaintiff, for which he and the other defendant gave the following receipt: "Dexter, July 1, 1873. This day received of W. A. Frye two black horses, called Hiram

and Indian, two bay horses, called Fairbrother and Jenkins, two two-seated wagons, two single harnesses, the above property valued at eight hundred dollars, which I agree to keep in good order and condition and return the same to W. A. Frye, at the end of two years, unless paid for. (Signed.) Joseph U. Burdick, V. Mason Burdick, surety."

Here no bargain for the sale of property is shown. The property is "received" not "bought." No price for each or all of the articles is agreed upon. They are only valued. There is no promise to pay.

The contract between the parties, embodied in the writings was one of bailment, not of sale. It is not in the alternative. It is to keep the property in good order and condition and return the same at a stipulated time "unless paid for." The principal in the contract is not absolved from his promise to keep and return except upon payment. He is bound to return the articles received unless paid for. The principal has no title unless on payment. V. Mason Burdick is surety—for what? That the property received shall be kept in good order and condition and returned unless paid for. The promise then to return the goods is obligatory unless something else is done, that is, unless it is paid for. The surety is not liable for the price, for none has been made. He is surety only that the contract should be performed, and he is not to be relieved except upon its performance.

The contract contains no words of sale. In *Sargent* v. *Gile*, 8 N. H. 325, it was decided that, where one receives goods upon a contract by which he is to keep them a certain period, and if he pays for them, he is to become the owner, but otherwise, he is to pay for the use of them, he receives them as bailee and the property in the goods is not changed, until the price is paid. In *Porter* v. *Pettengill*, 12 N. H. 299, one Russell gave the plaintiff the following contact. "Received of Porter and Rolf one cooking stove and furniture, at twenty-eight dollars, for which I am to pay $3 per month or return the same, if I do not comply as above." Parker, C. J., in delivering the opinion of the court says: "Russell signs an agreement by which he acknowledges the receipt of the stove, the value is fixed, and he is to pay so much a month, or

return it. If he failed to pay, it became his duty to return the property, and there are no words of transfer, or any thing to indicate that the parties intended any thing more than a bailment, until the price was paid." In *Billings* v. *Tucker*, 6 Gray, 368, 369, in a lease of a farm and stock, including a yoke of oxen and several cows, the lessee covenanted to take good and prudent care of the stock and to faithfully return said stock in quantity and quality to the lessor, or the value of the same in money, as the lessee may elect; said property, if retained, to be appraised by disinterested persons at the close of the contract." The lessee sold the oxen and two cows and substituted others in their stead; Held that he had no right, before the expiration of the lease, to sell the oxen and cows so substituted.

There can be no reasonable doubt as to the meaning of the parties. The one did not intend to part with his title. The other did not suppose he was acquiring one. If the title to the property has changed, the change has taken place without the knowledge or expectation of either party and against the intention of both. But no such change has taken place. The contract to safely keep and return was explicit. The defendants cannot be relieved from their liability, unless upon payment. But payment has not been made. The contract, then, is in full force to keep in good order and condition and return, and the defendants are liable in damages for its violation.

By the Revised Statutes of the United States, § 3963, it is enacted that "no contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void."

What the contract of the plaintiff was no where appears in the evidence. The contractor has the right to employ others to aid him in the performance of his contract. The statutes of the United States do not debar him from having the assistance of servants. No assignment or transfer of the plaintiff's contract is shown. *The case is to stand for trial.*

WALTON, BARROWS, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

WILLIAM A. FRYE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Decided September 5, 1877.

*Damages.*

"Frye agrees to run a stage line from Dexter to Greenville, for the conveyance of travel coming from or going to the Maine Central Railroad; the time of leaving and arrival to be as follows:— . . . The Maine Central Railroad Company, in consideration of the above, agrees to give Frye the exclusive right of ticketing between Dexter and Greenville for five years from July 1, 1872, at rates now being settled by." Annexed to the plaintiff's agreement was a table of time of leaving and returning to Dexter, Greenville and Kineo.

*Held*, 1. The tenor, terms and subject of the contract between these parties, and the business carried on under it are not such that the plaintiff is entitled to the damages which he suffered in the steamboat business between Greenville and Kineo by reason of its breach. The transportation of the passengers by the boat was not so connected with that stipulated for in the contract by the reference thereto in the contract itself or by the natural course of business, that the profits accruing on that part of the line, and the damages likely to result there, as well as between Dexter and Greenville from a breach of the contract can be deemed to have been in the contemplation of both parties at the time they made the contract.

*Held*, 2. Upon such a contract as this, the measure of damages is not the difference between what plaintiff was to receive as the contract price for carrying the through passengers and what it would actually or probably cost to carry each passenger without reference to any other contract or any other business, but is the profits which the plaintiff was in fact able to make upon their transportation, taking into account the situation and use of his property in the transportation of other passengers, and the carrying on of other business over the same route.

ON EXCEPTIONS.

ASSUMPSIT.

The jury returned a general verdict for the plaintiffs for $7,758.50, with special findings of damages by reason of wrongful termination of contract between Dexter and Greenville, $5,424; for wrongful termination of contract between Greenville and Kineo, $2,260; balance on account, $74.50.

The defendants alleged exceptions, which in the opinion appear.

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

*D. D. Stewart*, with *A. Sanborn*, for the plaintiff.

BARROWS, J. The plaintiff, having been engaged since 1868 in running a stage between Dexter and Greenville, carrying railroad passengers on through tickets as well as local passengers, and having a contract for carrying the mail which was to expire July 1, 1873, and being agent for the Eastern Express Company, from which business and the transportation of freight he realized considerable sums annually, and being the owner of stage property on the line to a considerable amount, and having purchased, in the fall of 1871, a steamboat to run on the lake between Greenville and Mt. Kineo, on the 18th of June, 1872, made a written contract with the defendants whereby he agreed "to run a first class stage line from Dexter to Greenville by the most direct line for the conveyance of travel coming from or going to" the defendants' railroad, according to a certain time table, the details of which were inserted in the contract and made subject to changes in the time table of the R. R. Co., in consideration of which the defendants agreed to give him "the exclusive right of ticketing between Dexter and Greenville for the term of five years from the first day of July, 1872," at a fixed rate. The time table provided that he should leave Dexter at a certain hour, arrive at Greenville at a certain time, and leave Greenville for Kineo, and arrive at Kineo at the times mentioned in the schedule.

"Round trip tickets were issued by the defendants from Boston and points east of Boston to Kineo and return by Frye's stages from Dexter and by steamboat." The plaintiff was to receive $2.50 per passenger each way for passengers carried on through tickets. Dissatisfaction arose between the parties. Defendants claimed that there was a failure to perform on the part of the plaintiff, and notified him, May 5, 1873, that for that reason they had contracted with other parties to do the work from July 1, *prox.*, and that he must discontinue operations under the contract at that time. His contract for carrying the mail expired at that same date. Another party secured it for the next four years, and he lost the express business because by the rule of the express company that was always given to those who had the mail contract, to whom also the defendants under a contract bearing a

general similarity to the one previously made with the plaintiff, gave the exclusive right of ticketing between Dexter and Greenville. Hence this suit.

The jury, under instructions of which the defendants do not complain, found that the defendants had no justification for rescinding the contract. There is no motion to set aside the verdict as against evidence, nor because the damages were excessive. We are to presume that the verdict settles the rights and obligations of the parties correctly, unless there was substantial error in certain instructions given by the presiding judge upon the question of damages.

The defendants claimed (1) that the contract did not extend to business between Greenville and Kineo and that no damages for loss of business and profits between those places could be allowed, and (2) that the measure of damages was the difference between what plaintiff was to receive, which was $2.50 each, for carrying the through passengers and what it would actually or probably cost to carry each passenger, and this without reference to any other contracts or any other business. The judge ruled *pro forma* that the contract did cover the distance between Greenville and Kineo, and instructed the jury to find specially what amount of damage, if any, the plaintiff had sustained between Greenville and Kineo, if the defendants had wrongfully and without sufficient cause terminated the contract, and include it with the other damages in their general verdict; all which the jury did, thus adding the sum of $2,260 to their verdict.

Touching the second position taken by the defendants, with regard to the assessment of damages, the exceptions state that the jury were instructed as follows by the presiding judge: "What was the plaintiff to do? Of what was the plaintiff deprived? The plaintiff is deprived of the exclusive right of ticketing between Dexter and Greenville for the term of four years from July 1, 1873. The plaintiff had the exclusive right to transport passengers from Dexter to Greenville at a specified rate of compensation. Now the loss the plaintiff has sustained is the profits upon the carriage of passengers between the points indicated." The judge then referred to the situation of the plaintiff with

regard to his preparation and equipment for the transaction of this business in connection with his other business, as we have above seen, remarking among other things that "the plaintiff had obviously the right and the expectation of passengers from other sources, such as way passengers, express profits, &c. Now bearing this in mind, what are the elements of damage? The number of passengers; the price of carriage; the cost of carriage; if profits, the gains which would have been made are the losses which have been sustained. If Frye was so situated that he in connection with other business at little relative cost could carry passengers cheaply, more cheaply than anybody else, it is his good fortune of which he is entitled to reap the benefits. The measure of damages then is the loss of profits which would have been made by carrying the passengers under the contract as stipulated in the contract."

The stenographer's report of the charge, which comes up with the exceptions, shows that the judge further charged the jury that "while the bargain of itself might not be valuable to him, yet it might be of value to him in connection with his other business situated as he was;" that, upon the evidence produced, "the loss upon the coaches and horses, if sold, would not be an element of damage;" nor would the loss of the plaintiff in attempting to carry on the contract after notice from the defendants that they had terminated it; nor the loss of the way travel by means of the competing line to which the defendants transferred their contract. "The only loss is his being deprived of the carriage of passengers from Dexter to Greenville and back. That is all the company agreed to give him; it is all he has lost. . . . The measure of damages is just what he has lost by not being permitted to perform the contract which he made; that is what the gains would have been after deducting the expenses. Whatever the cost was, that should be deducted from the receipts whatever that was; and the balance is the gain; and the gain only is that to which he is entitled. He is entitled likewise to interest, not as interest, but by way of damages from the date of the writ."

We think the defendants have no just cause to complain of the substantial overruling of the second position which they took.

If, by reason of its connection with the other business in which he was engaged, the plaintiff could transport passengers to and from the defendants' cars without largely increasing his necessary outlay, the legitimate profits of the contract to him were proportionally increased, and the wrongful termination of it by the defendants, which the jury have found, necessarily occasioned to him a greater loss; and the matters to which reference was made by the presiding judge were so obvious in their nature that it cannot but be supposed that both parties entered into the contract with an eye to them as existing facts. The contract did not contemplate the exclusive devotion of the plaintiff's time and property to the transportation of the defendants' passengers, nor would there be any propriety in measuring the plaintiff's profits in the performance of the contract and his consequent loss in being deprived of it by the standard that the defendants claimed to set up. The nature of the contract was such that its terms would inevitably be affected by the other contracts and business to be carried on in connection with it; and the claim that damages for its breach should be estimated "without reference to any other contracts or any other business" cannot be sustained.

The defendants complain particularly of the reference made in this connection by the presiding judge to the steamboat business, mail contract, express profits and way passengers, and claim that the jury were liable to be misled by the mention which the judge made of them, inasmuch as the mail contract and the express business ceased to be sources of income to the plaintiff at the same time that the defendants rescinded their contract with him. But they existed during the year, from the operations and results of which the jury were called upon to calculate the damages for the remaining four years over which the defendants' contracts extended; and their existence or non-existence had a bearing upon the amount of profits which the plaintiff could realize from the carriage of passengers under this contract. The jury could hardly fail to remember the time when they ceased, or to infer, from the significant inquiry put by the judge, whether the contract would be of any value to the plaintiff or of little value unless taken in connection with the situation of other property,

that when they ceased it would tend to diminish the profits of the plaintiff upon the carriage of passengers under the contract, and the loss which he sustained by the defendants' breach of the agreement. Or if there was danger of misrecollection or misapprehension by reason of the manner in which the judge alluded to such a piece of evidence, it was the duty of counsel to call the judge's attention to it on the spot in order that it might be rectified. We find in it no just ground of exception.

Whether the contract was such that the plaintiff was entitled to damages for the loss of passengers by his boat from Greenville to Kineo, is a question not so readily answered.

A majority of the court think that, inasmuch as by its terms the defendants stipulated to give the plaintiff an exclusive right only between Dexter and Greenville, and as he in terms bound himself only to furnish the transportation between these points, no failure on his part, to arrive at or leave Kineo at the prescribed hours or to furnish suitable transportation thither, could be imputed to him as a breach of his contract with them, and that it is equally beyond the scope of any legitimate rule of construction to hold that the reference in the contract to the hours of reaching and leaving Kineo carried with it an agreement, on the part of the railroad company, to give the plaintiff the exclusive right of transportation over that part of the route.

Nor is the majority of the court prepared to hold that the loss between Greenville and Kineo falls within the principles that authorize and regulate the recovery of consequential damages in actions, upon contract, or that it can properly be said that it arose according to the usual course of things from the breach of the contract itself, or was such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. They are of the opinion that the profits which the plaintiff might make on that part of the route must be excluded under the rule laid down in *Fox* v. *Harding*, 7 Cush. 516, 522, as profits accruing from another independent and collateral undertaking, and therefore too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in question.

As those damages were separately assessed, it will not be necessary to send the case to a new trial, if the plaintiff will remit the amount added to his verdict by the erroneous ruling.

*Exceptions sustained, unless the plaintiff remits* $2,260 *as of the date of the verdict. If he so remits, exceptions overruled.*

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

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HORACE P. STORER *et als. vs.* JAMES H. HAYNES.

Penobscot. Decided October 19, 1877.

*Amendment. Bankruptcy.*

An officer by leave of court may amend his return by certifying that he kept the execution to a date later than the date named in his first return.

The Rev. Stat. of the United States, § 5044, dissolves an attachment on mesne process only. It does not relate to proceedings on final process. It does not dissolve the lien created by seizure of the property of the debtor on execution.

After judgment of this court charging a trustee, a demand by an officer on the trustee by virtue of an execution issued on such judgment within thirty days from its rendition, is equivalent to a seizure of the property of the debtor on execution, and the creditor's lien by virtue thereof is not dissolved by the statute above cited.

ON EXCEPTIONS, stated in the opinion.

SCIRE FACIAS.

*H. L. Mitchell*, for the plaintiffs.

*L. Barker, T. W. Vose & L. A. Barker*, for assignee.

LIBBEY, J. This is *scire facias* against the defendant as trustee of Henry O. Perry. On the 18th of March, 1876, these plaintiffs commenced a suit against said Perry and the defendant as his trustee, returnable to the April term of this court, Penobscot county. The writ was served on the trustee, March 19, 1876. The action was duly entered at said April term, and judg-

ment was rendered against the principal defendant and the trustee on default, May 16, 1876, and execution was duly issued on the judgment, May 19, 1876; and was put into the hands of a deputy sheriff for said county, who made due demand on the trustee, May 25, 1876. The execution remained in the hands of the officer during its life, and he made due return of the demand, and *nulla bona*. The first return of the officer was dated August 16, 1876, but at the trial he was permitted by the court, against the objection of the defendant, to amend his return by certifying that he kept the execution till the second day of September, 1876.

The only grounds of defense set up by the defendant were, the objections to the officer's return, and that he was notified by Joseph B. Hutchinson, December 30, 1876, that he claimed the funds in his hands as assignee in bankruptcy of said Perry. Said Hutchinson asked leave to appear and claim the funds in the hands of the defendant, as assignee in bankruptcy of said Perry, and was permitted to do so. Perry filed his petition to be declared a bankrupt, in the office of the clerk of the district court of the United States for the district of Maine, July 17, 1876; was duly adjudged a bankrupt, and on the 8th of November, 1876, said Hutchinson was appointed his assignee, and the estate of said Perry was duly conveyed to him by the register in bankruptcy.

Upon these facts the presiding judge rendered judgment against the defendant, and said claimant excepted. We think the rulings correct.

The amendment of the officer's return was properly allowed. *Woods* v. *Cooke*, 61 Maine, 215.

The principal ground relied upon by the claimant is that the proceedings in bankruptcy, having been commenced within four months from the service of the writ on the trustee, by virtue of the Rev. Stat. of the United States, § 5044, the attachment of the goods, effects or credits of the bankrupt in the hands of the trustee, by the trustee process, was dissolved, and that the title thereto passed to him as assignee absolutely as of the 17th of July, 1876. The statute relied upon reads as follows: "As soon as an assignee is appointed and qualified, the judge, or when there is no opposing interest, the register, shall, by an instrument under his hand,

assign and convey to the assignee, all the estate real and personal of the bankrupt, with all his deeds, books and papers, relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." The attachment referred to in this section is an attachment on mesne process. It is such attachment, made within four months, &c., that is dissolved by bankruptcy. It does not relate to proceedings on final process. It does not dissolve a lien created by seizure of the property of the debtor on execution, issued to enforce the judgment of the court. *Wilson* v. *City Bank*, 17 Wall. 473. In that case judgment was rendered against the debtor in the state court by default, execution issued, and on the same day the goods of the debtor were seized by an officer on the execution, and after the seizure, and before the sale, the debtor was adjudged a bankrupt, on petition of his creditors, filed after the seizure. The bankruptcy was within four months of the seizure. The officer afterwards sold the goods on the execution, and the court held that the proceeds of the sale belonged to the creditor, and not to the assignee of the bankrupt.

If at the time of the commencement of the proceedings in bankruptcy the plaintiffs' lien on the goods, effects or credits, in the hands of the trustee, existed by virtue of the attachment on mesne process only, then it was dissolved, and the property passed to the assignee.

But we think it did not exist by virtue of such attachment only. Judgment had been rendered charging the trustee. Execution had been issued against the goods, effects or credits of the debtor in the hands of the trustee. It had been put into the hands of an officer and demand had been duly made on the trustee within thirty days next after the rendition of judgment, and before the commencement of the proceedings in bankruptcy. The execution remained in the hands of the officer during its life and was duly

returned. The judgment charging the trustee is a determination by the court that he had goods, effects or credits of the debtor in his hands and possession, and that they were duly attached. If not demanded of the trustee by an officer, by virtue of an execution, within thirty days next after final judgment the attachment of them on the original process is dissolved; if so demanded the attachment becomes absolute and the creditor's lien is perfected. The demand by the officer by virtue of the execution is a seizure, on final process, of the goods, effects or credits in the hands of the trustee. It is equivalent to a seizure by an officer, by virtue of an execution, of goods attached on the original writ, within thirty days from the rendition of judgment. If the execution remains in the hands of the officer during its life, so that he may receive the goods, effects or credits if delivered to him by the trustee, and apply them in satisfaction thereof, and is duly returned unsatisfied, the personal liability of the trustee becomes fixed, unless he can show some legal defense; but this personal liability results from his refusal to deliver the goods, effects or credits in his hands, to which the creditors' lien had become absolute by the demand by virtue of the execution.

The result is that the bankruptcy of the debtor, upon the facts of this case, did not dissolve the plaintiffs' lien on the goods, effects or credits of the debtor, in the hands and possession of the trustee. *Exceptions overruled.*

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

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STATE *vs.* DANIEL W. GARLAND, appellant.

Penobscot. Decided October 19, 1877.

*Trial.*

A person charged with a misdemeanor, either by complaint or indictment, can be tried in his absence only at his request and by leave of court.

ON EXCEPTIONS.

SEARCH AND SEIZURE PROCESS.

The respondent was arrested upon a search and seizure process, and brought before the police court of Bangor. Upon arraignment, he pleaded not guilty, and, being adjudged guilty, appealed to this court, and recognized with sufficient sureties to prosecute his appeal at the February term thereof, A. D. 1877. The appeal was duly entered, and the respondent appeared in person ready for trial. Subsequently, the respondent being personally absent, but his attorney being present in court, the county attorney called the case for trial, and the respondent, by his attorney duly authorized, moved that the case proceed to trial in the respondent's absence, claiming that he was legally entitled to appear by attorney at the trial of said cause; the county attorney objecting, but not asking to have the bail defaulted, nor was the principal or bail defaulted.

Whereupon, the court overruled the motion, ruling that the respondent must appear in person, and was not entitled, as matter of right, to appear by attorney, and be tried in his absence; to which ruling the respondent excepted.

*S. F. Humphrey & F. H. Appleton*, for the defendant.

*J. Hutchings*, county attorney, for the state.

DANFORTH, J. The exceptions in this case have been prematurely presented to this court, as the result, even if they are overruled, does not make a final disposition of the case. But as the question raised has been fully argued, we proceed to consider it.

The question is whether a person accused, by complaint, of a misdemeanor, tried and convicted before a magistrate can, on appeal, appear by an attorney and as matter of right demand a trial in his absence. This right is certainly not given him by any statute, or the constitution of this state.

It would also seem to be in violation of the fundamental principles of the common law as applied to the prosecution of criminal cases.

In order to punish crimes, whether large or small, it is necessary that the court should not only have jurisdiction of the party charged, but control of his person. This must be conceded in a case where the punishment is, or may be, imprisonment; but

under our law it can hardly be less so where a fine only can be imposed. In such case no way is provided for the collection of the fine but by imprisonment; and hence in all cases it is a part of the sentence that the convict stand committed until the fine be paid. In the case at bar the statute expressly provides that, in default of payment of the fine, there shall be an imprisonment of thirty days, or instead of the fine the sentence may be three months imprisonment. R. S., c. 27, § 35.

Hence, by positive provisions of law, when a complaint is made or an indictment found, the court may at once issue its warrant for the apprehension of the accused, and when arrested and brought before the court, he can be released only by giving bail for his appearance at such time as the court shall order. Thus, by well established rules of law, the personal attendance of the the defendant may be compelled, with no provision by which he can avoid it. The result is, the purpose to be accomplished and the means provided to secure its accomplishment, are inconsistent with the right of absence claimed.

There may be, and often are, cases where it is both safe and convenient to proceed with the trial in the defendant's absence. Therefore, by a long course of practice and in some cases by statute authority, a discretionary power has been exercised in this respect. We think the authorities relied upon in the argument are susceptible of an explanation consistent with this view and will not sustain the right claimed, except perhaps in a few instances where they refer to prosecutions criminal in form, but partaking of the nature of a civil remedy. Some will be found upon examination to be cases where the defendant was urging objection to proceedings had in his own voluntary absence, others where the appearance by attorney was by the express or implied consent of the court.

In this state and in Massachusetts the courts will decline to hear the attorney of one who has escaped from its control. *Anonymous*, 31 Maine, 592. *Commonwealth* v. *Andrews*, 97 Mass. 543. It is true in these cases it does not appear whether the crime charged was a felony or otherwise, but no notice is taken of any such distinction and the rule laid down is sufficiently

broad to include both. In Comyn's Digest, Attorney B. 5, it is said that in the trial of a misdemeanor the accused may appear by attorney as a matter of favor.

Bacon in his Abridgment, vol. 1, Attorney B., says for any "crime under the degree of capital, the defendant may, by the favor of the court, appear by attorney." In *Rex* v. *Hann*, 3 Burrow, 1786, where the question was argued upon a motion addressed to the discretion of the court, asking that the respondents might be excused from appearing, the motion was refused, and "the general doctrine laid down by the court, and agreed by the counsel on both sides, was that though such a motion was subject to the discretion of the court, either to grant or refuse it, where it was clear and certain that the punishment would not be corporal; yet, it ought to be denied in every case where it was either probable or possible that the punishment would be corporal."

Such doctrine under such circumstances could not have been laid down, if there had been any law, statute or otherwise, inconsistent with it without some recognition of such law. This matter was carefully considered by Curtis, J., in *United States* v. *Mayo*, 1 Curt. 433, and the conclusion reached that "it is in the discretion of the court to allow one indicted for a misdemeanor to plead and defend, in his absence, by an attorney." In 1 Bennett and Heard's Leading Criminal Cases, 439, a large number of cases are cited to show that in prosecutions for misdemeanors, or crimes not punishable by imprisonment, the respondent may appear by attorney, the author adding that "it is undoubtedly discretionary with the court, whether they will allow a defendant to be absent during the trial of even a misdemeanor." Thus, by all the authorities, while it is held discretionary with the court to permit the trial to proceed in the defendant's absence, it is only a matter of discretion and will be permitted only for urgent reasons, especially when, as in this case, the punishment may be by imprisonment.

Nor does it change the case that the prosecution is before the court upon appeal. It is true that the defendant has pleaded in the court below, and is not called upon to plead anew. It is not

the plea that is wanted so much as the person himself, that in case of conviction his punishment may be sure. Besides there is much force in the suggestion of Justices Wilmot and Aston in *Rex* v. *Hann*, "that even where the punishment would most probably be only pecuniary, yet in offenses of a very gross and public nature the persons convicted should appear in person, for the sake of example and prevention of like offenses being committed by other persons; as the notoriety of their being called up to answer criminally for such offenses would very much conduce to deter others from venturing to commit the like."

But in this matter it is hardly necessary to look for authority beyond our own statute. R. S., c. 134, § 22, provides that persons indicted for an offense less than felony, "at their own request and by leave of court, may be tried in their absence by their attorney." This provision covers the whole ground involved in the question under consideration and is of course decisive of it, so far as relates to indictments. It is more liberal, perhaps, than the common law, as it allows the trial in the defendant's absence, even though the punishment may be by imprisonment. Still it allows it only as matter of discretion. It is however claimed that it refers to cases of indictment only and not to those begun by complaint. But we must consider it applicable to the latter as well as the former. It is in, and part of, the chapter entitled "proceedings in court in criminal cases." The subdivision under which it is found is entitled "Bail, arraignment and trial of prisoners." All the proceedings apply as well to appealed cases as indictments, and no other proceedings are prescribed in court for appeals so far as relates to the trials. This would seem to be sufficient authority for the guidance of the court, at least until something more binding is shown. Certainly we can admit the opposite doctrine only upon authority which could not be opposed; for, while it may be safe to trust the court with a discretion in this matter, it would be disastrous in the extreme, if not subversive of all force and effect of trials in cases of misdemeanor, to give the defendant a right to be tried in his absence.

*Exceptions overruled.*

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

STATE *vs.* WILLIAM MORSE.

Penobscot. Decided October 25, 1877.

*Witness.*

Evidence is not admissible to prove the general reputation of a witness to be bad.

ON EXCEPTIONS.

INDICTMENT for an assault on Marietta Snow with intent to commit a rape.

The respondent introduced testimony to prove that the reputation of said Marietta Snow for truth and veracity was bad. He also offered testimony to prove that her general reputation was bad. The presiding justice ruled that this testimony was inadmissible, and rejected it; but ruled that testimony might be received to show that her general reputation for chastity was bad, but none was introduced. The verdict was guilty; and the defendant alleged exceptions.

*D. Sanborn & A. Sanborn*, for the defendant.

*J. Hutchings*, county attorney, for the state.

APPLETON, C. J. The question presented by the exceptions is whether inquiries as to the character of a witness as affecting his testimonial trustworthiness are limited to his reputation for truth and veracity or whether they may be extended to his general reputation. In judicial proceedings the character of a witness for truth and veracity are primarily important. No particular crime or immorality can be proved against a witness. If it could be done, the issues might be as numerous as the witnesses; and the attention of the jury would be diverted from the consideration of the question submitted to their determination. Accordingly it has been held in this state that the general reputation of a witness is not a proper subject of inquiry for the purpose of impeaching his veracity. *Phillips* v. *Kingfield*, 19 Maine, 375, 378. *State* v. *Bruce*, 24 Maine, 71. So in Massachusetts, the question what is the reputation of a witness for integrity cannot be put for

the purpose of discrediting him, but only the question what is his general reputation for truth. *Quinsigamond Bank* v. *Hobbs*, 11 Gray, 250.

Nor was the evidence receivable to affect the character of the complainant upon whom the rape was charged to have been committed. Because a woman may have a bad reputation, it is no reason why an offense should be committed upon her person or why an offender committing it should escape with impunity. Such is the rule here. It was held not competent on an indictment for murder to prove that the deceased was well known to be a drunken, quarrelsome, savage and dangerous man. *State* v. *Field*, 14 Maine, 244. *Com.* v. *Hilliard*, 2 Gray, 294. *Com.* v. *Mead*, 12 Gray, 167, 168. The court, gave the defendant permission to introduce evidence that the complainant's character for chastity was bad, but none was offered. The defendant has no just ground of complaint. *State* v. *Forshner*, 43 N. H. 89. *State* v. *Knapp*, 45 N. H. 148. *Exceptions overruled.*

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

INHABITANTS OF LEVANT, petitioners for certiorari, *vs.* COUNTY COMMISSIONERS OF PENOBSCOT COUNTY.

Penobscot. Decided October 31, 1877.

*Certiorari. County Commissioners.*

A writ of certiorari lies to correct proceedings of county commissioners.

Generally, a writ of certiorari is grantable only when it appears that otherwise some injustice would be done; but the court will not refuse the writ on petition of a proper party where the tribunal has no jurisdiction.

The practice is to hear the whole case on the petition for certiorari; but where the case is before the court on the writ, all evidence extrinsic to the record is excluded.

If the original record of the county commissioners be defective, it may be amended in accordance with the facts at any regular session.

The answer of the county commissioners to a petition for certiorari should contain a full detailed statement of the facts proved and the rulings thereon, so far as the points complained of in the petition are concerned. The answer, when completed, signed and sworn to, is conclusive on all matters of fact within their jurisdiction.

The application to the assessors for abatement of taxes need not be in writing unless they require it.

Where, on a petition for certiorari against county commissioners for their action in the abatement of a tax, the question put by the assessors and the answers thereto became material and did not appear in the record, this court discharged the petition for further hearing at *nisi prius*, to the end that the commissioners make a return under oath stating therein what inquiries in writing, if any, were put by the assessors at the time the applicant handed in his list, together with the applicant's replies thereto and the rulings of the commissioners upon the inquiries and answers.

Practice in cases of certiorari stated.

On report.

Petition for certiorari representing as follows:

"That at a court of the county commissioners, for said county, held at Levant, by adjournment on November 17, 1875, the petition of Daniel Hall of said town, was presented, praying for an abatement of the taxes assessed to him by the assessors of said town, for the year 1875, and a hearing was had thereon; and the said county commissioners upon said petition, undertook to abate said tax, and adopted certain proceedings for that purpose, which are recorded and fully appear in the records to be adduced and exhibited herein.

"And your petitioners represent and show that said county commissioners had no jurisdiction of said petition, and their acts in making said abatement were erroneous, and the records thereof are erroneous and illegal in the several particulars, and for several causes, which are recited and annexed to this petition and made a part thereof, upon which your petitioners rely for its support.

"Wherefore, your petitioners pray that this court will issue its writ of certiorari, ordering the said county commissioners to certify their records relating to the abatement of said tax, that they may be presented in court, to the end that the same or so much thereof as may be illegal, may be quashed."

The causes of error assigned were as follows:

"1st. Because it does not appear in said county commissioners' records that said Daniel Hall made true answers to all proper questions, in writing, which were put to him by the assessors of said town in relation to his list or inventory there produced by

him. Nor, is it true, in fact, as will be seen by the following questions put by said assessors and the answers thereto made by said Hall:

"Ques. 1st. Has your wife, or any member of your family, any money not included in your schedule? Ans. They have not.

"Ques. 2nd. Have you any money in savings banks? Ans. I gave in all liable to taxation.

"Ques. 3d. Who owes you the two hundred dollars given in in your schedule? Ans. I will not answer that question.

"Ques. 4th. Do you object to tell who owes you and whom you owe? Ans. I do.

"Ques. 5th. Did you strike any balance in your accounts when you got the two hundred dollars, given in by you? Ans. It is no matter, sir.

"Ques. 6th. I think you had better answer these questions or we may tax you with more? Ans. I expect it, sir.

"Ques. 7th. Then you will answer no questions as to the situation of your money? Ans. No, sir; it is not proper. I have sworn to my inventory and that is enough for you, sir.

"2nd. Because it does not appear in said county commissioners' records, nor is it true, in fact, that any written application was made to said assessors to abate said tax, or that they gave judgment not to abate from which an appeal would lie to said commissioners."

The following is a copy of the record:

"Having fully heard the parties, examined the testimony of their witnesses, and listened to the arguments of counsel, and having duly and carefully considered the same, we find that the assessors of said town for the tax year beginning on the first day of April, A. D. 1875, gave notice to the inhabitants as required by section 65 of the revised statutes of this state.

"We find that Daniel Hall, the petitioner in this case, was an inhabitant of said town on the first day of April, A. D. 1875.

"We find and adjudge that the said petitioner, at the time and place designated by the assessors in their said notice, made and personally brought into them, a true and perfect list of all his estate, real and personal, not by law exempt from taxation, which

he was possessed of on the first day of April of that year, and that he produced said list to the assessors, and at their request duly swore to its truth.

"We find and adjudge that said petitioner, then and there answered certain proper inquiries as to the nature and situation of his property, made of him by the assessors, and that he was not required to reduce his answers to writing, or to subscribe and make oath thereto.

"We find and adjudge that said petitioner was assessed and taxed a state, county and town tax in said town for said tax year by the assessors thereof, on property that he was not possessed of on said first day of April, or liable to taxation for, and which was not on the list by him made, brought into the assessors and sworn to as aforesaid, to wit: the sum of eight hundred dollars, money, on hand and at interest, and to that extent he was overrated.

"We find that the rate per cent. of said taxation was, in all two cents and three and one-half mills on each and every dollar, and that the total of said state, county and town tax on said eight hundred dollars, was eighteen dollars and eighty cents.

"We find and adjudge that the petitioner after said assessment, and before he applied to us, duly made application to said assessors within the time required by law to abate the tax on said eight hundred dollars and that they refused so to do.

"We therefore adjudge and order that the petitioner, the said Daniel Hall, be relieved from the tax upon said eight hundred dollars, and that said tax be abated and that he be reimbursed from the treasury of the town, aforesaid, the amount of the tax on said sum, to wit: eighteen dollars and eighty cents; and that said town pay into the county treasurer within sixty days, the incidental charges arising under our action, amounting to fifty-one dollars and seventy-two cents, taxed as follows: [Items omitted.] (Signed) William H. Chesley, B. B. Thomas, W. B. Ferguson, Commissioners of Penobscot county.

"And thereafterwards, on the 28th day of December, the said inhabitants of Levant, by their attorneys, Barker & Son, filed their objections in writing to the report of said county commissioners, and the petition was thence continued to this term.

"And now said objections having been considered by the county commissioners are overruled.

"And now all proceedings thereon are closed."

A true copy. Attest: James H. Burgess, clerk.

The substance of other documents and proofs, so far as they are material, appear in the opinion.

*L. Barker*, *T. W. Vose & L. A. Barker*, for the petitioners.

*J. Hutchings*, county attorney, for the respondents.

VIRGIN, J. By the provisions of R. S., c. 77, §§ 3 and 4, this court "has the general superintendence of all inferior courts for the prevention and correction of errors and abuses, where the law does not expressly provide any remedy; and it may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all writs and processes necessary for the furtherance of justice or the execution of the laws." The law not having "expressly provided any remedy" for correcting the errors of the board of county commissioners in their adjudications relating to the abatement of taxes, parties aggrieved by their decisions in matters of law, may, under the general authority contained in the above provisions, seek redress in this court.

A writ of certiorari is, in some respects, similar to a writ of error, and in others, dissimilar. The former, unlike the latter, is not a writ of right and it lies where the proceedings sought to be revised, like those now under consideration, are not according to the course of the common law. R. S., c. 102, § 13.

Generally a writ of certiorari is grantable only at the sound discretion of the court, when it appears that otherwise some injustice would be done. *Rand* v. *Tobie*, 32 Maine, 450. If the tribunal whose record is sought to be quashed had jurisdiction and the error assigned mere matter of form and substantial justice was done, a denial of the writ is no violation of the party's essential rights. *West Bath* v. *Co. Com.* 36 Maine, 74. *Furbush* v. *Cunningham*, 56 Maine, 184. If, however, the tribunal had no jurisdiction in the premises, the court, on petition of a proper party, (*Bath B. & T. Co.* v. *Magoun*, 8 Maine, 292) will not

refuse the writ, the wrong and injury in such cases consisting in the assumption and exercise of an authority not conferred by law. *Bangor* v. *Co. Com.* 30 Maine, 270. *Goodwin* v. *Co. Com.* 60 Maine, 328, 330. *State* v. *Madison*, 63 Maine, 546, 550. *Fairfield* v. *Co. Com.* 66 Maine, 385. *Winslow* v. *Co. Com.* 37 Maine, 561, so far as it is inconsistent with the last proposition, is not sound law.

The statute leaves the practice in matters of this kind as "heretofore established, and subject to such further regulations as may from time to time be made by the court." R. S., c. 102, § 13. An examination of the reported cases in this state shows that the course of procedure has not been so uniform in some respects, as is desirable; and we have found much hesitation and uncertainty in the proceedings at *nisi prius*. It has been the invariable practice, however, to hear the whole case upon the petition; and from this fact, the judgment on the petition granting the writ, has in some instances been erroneously deemed by the parties, *ipso facto*, a quashing of the record. *State* v. *Madison*, 63 Maine, 546. All the authorities concur in excluding all evidence extrinsic to the record when it is before the court on the writ. But it is otherwise in the hearing on the petition for the writ. As the petition for a writ to quash the record, in cases within the jurisdiction of the inferior tribunal, is addressed to the discretion of the court, in the hearing on the petition the court is not limited by the record with its infirmities in matters of form; but will enlighten its discretion by inquiring into so much of the proceedings under revision as will enable it to deal with the substantial justice of the case. And to this end we consider the proper procedure and the better practice to be, in general terms, as follows:

The petitioner should have a direct interest in the proceedings sought to be quashed. The petition should set out, among other things, such of the proceedings as the petitioner desires to have revised, bearing in mind that the writ deals only with errors in law, and not with the evidence unless some question of law is raised in relation thereto. Notice must be served upon the tribunal to which the writ if granted will be addressed. Such tribunal is the only real party respondent; although other parties may

appear to maintain or object to the proceedings and be subject to costs. R. S., c. 102, § 14.

The respondent tribunal should file an answer under oath, setting out therein (when not annexed to the petition) a copy of the record. If the original record be defective, it may be amended by the tribunal in accordance with the facts, at any regular session. *Dresden* v. *Co. Com.* 62 Maine, 365. *Lapan* v. *Co. Com.* 65 Maine, 160. If it do not contain a full detailed statement of the facts (not evidence) proved, and the rulings thereon so far as the points complained of in the petition are concerned, so as to enable this court to determine the questions of law raised, such omissions should be supplied in the answer. When completed and signed and sworn to by the members of the tribunal whose proceedings they are, the answer, being in the nature of a return, is conclusive in all matters of fact within its jurisdiction. If the tribunal does not appear and file their answer so that the case may be decided upon its merits; or willfully refuse to make a full statement of facts and rulings; this court having full power to correct "abuses" as well as "errors," may require such statement to be certified together with the record R. S., c. 77, § 3. *Mendon* v. *Co. Com.*, 2 Allen, 463.

Whenever the case was within the jurisdiction of an inferior tribunal, it is not competent for the petitioner to contradict the record or return; but when extrinsic evidence is introduced by the respondents, tending to show that substantial justice does not require the proceedings to be quashed, then the petitioner may introduce like evidence in rebuttal. Such is the well established practice in Massachusetts. *Farmington Riv. W. P. Co.* v. *Co. Com.* 112 Mass. 206. *Great Barrington* v. *Co. Com.* 112 Mass. 218. *Tewksbury* v. *Co. Com.* 117 Mass. 563. *W. & N. R. R. Co.* v. *R. R. Com.* 118 Mass. 561.

The petition sets out two alleged errors, the second of which is that the application to the assessors for abatement was not in writing.

The statute does not in terms require either the application to the assessors (c. 6, § 68) or the one to the commissioners (§ 69) to be in writing. The latter board, however, is a *quasi* court of

record, having the same clerk in the respective counties as the judicial courts, keeps a record of its official proceedings, renders judgments, and issues legal processes, etc. R. S., c. 78, §§ 7 *et seq.* The application to this board, making a part of its record, must necessarily be in writing. It is altogether different with the board of assessors. It is not required to keep any record of its doings in relation to abatement. And while a written application to the assessors might be convenient, and may properly be required by the assessors, especially where large amounts or numerous items of property are involved, still, in ordinary cases, we perceive no controlling reason why, when not expressly requested by the assessors, the application to them need be in writing. In this case the assessors did not request it; and notwithstanding the inexcusable conflict as to what item of property abatement was claimed, the commissioners found and adjudged that the applicant seasonably and "duly made application to the assessors to abate the tax on said eight hundred dollars, and that they refused so to do."

The other alleged error is, substantially: That the applicant (Hall) did not "answer all proper inquiries in writing, as to the nature and situation of his property;" and that he absolutely refused to answer some of them.

The record recites that the commissioners found and adjudged that the petitioner (Hall) answered "certain proper inquiries," etc. This is obviously insufficient. It is not enough that he answered "certain proper inquiries" unless they comprised "all" such as were put to him by the assessors. R. S., c. 6, § 67.

Instead of amending their record (as they would have a right to do, at any regular session, if the facts warranted it) or supplying the facts upon this point, together with their ruling thereon, by way of an answer or return to this petition, as hereinbefore mentioned, it is attempted to show them by the testimony of two of the commissioners. Commissioner Thomas testified: "We considered this controversy" (whether Hall refused to answer certain specified questions, etc.) "and the statements and feeling that existed between them," (Hall and the assessors) "and we came to the conclusion from the slight acquaintance that we had

with the law and law decisions, that he had answered all proper questions; and we so decided." Commissioner Ferguson testified: "Mr. Barker moved that the case be dismissed for want of jurisdiction, for the reason that the questions were not properly answered; and we retired and overruled that, and decided that we had jurisdiction, and that he had answered the questions sufficiently to entitle him to an appeal." The third commissioner did not testify.

The assessors testified in substance, that they read to Hall certain specific questions in writing, and took his answers in writing as he gave them. Hall testified that some of the questions as testified to by the assessors and his answers thereto, were correct, and others not; but denied that he refused to answer any question.

While this conflicting testimony may account for the peculiar language of the record—"that he answered certain proper inquiries," etc.,—the supplement to the record furnished by the foregoing testimony of two of the commissioners is quite as defective as the record itself, in not stating the facts upon which the commissioners based their ruling. This is matter which goes to the jurisdiction of the commissioners. From the conflicting testimony of Hall and the assessors, it was the duty of the commissioners to find the real facts; what specific questions, if any were put, and the respective answers by Hall thereto. This court can only pass upon the law of the case; and the law cannot be tested until the facts to which it was applied by the commissioners, are before us. If the assessors did make the inquiries in writing and receive the answers as they have testified, the ruling of the commissioners was clearly erroneous, and they had no jurisdiction. *Lambard* v. *Co. Com.* 53 Maine, 505.

Our conclusion, therefore, is that the report must be discharged and the case stand for further hearing at *nisi prius*, to the end that the commissioners may make a return under oath, stating therein what inquiries in writing, if any, were put by the assessors to Hall at the time he handed in his list, together with Hall's answers thereto and the ruling of the commissioners upon such inquiries and answers. Until such return is made no question of

law upon this jurisdictional branch of the case is properly before us, as we cannot know upon what facts our judgment is to be founded. *Tewksbury* v. *Co. Com.* 117 Mass. 563, 565–6.

*Case to stand for hearing.*

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

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NANCY DORR, administratrix, *vs.* THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

Penobscot. Decided December 19, 1877.

*Insurance.*

Where by the terms of an endowment policy it is agreed that in case, after a payment of two premiums, the assured ceases to make the payment of additional premiums at the stipulated time, the company shall "only be liable for the payment of a part of the sum insured proportionate with the annual payments made, for which a new policy shall be issued if applied for within twelve months," the company are liable during such twelve months for such proportionate sum and in case of death within said twelve months, the administrator of the assured may sue for and recover such proportionate sum upon due proof of death and notice to the company.

It is not required in such case to surrender the policy and demand a new one; for no policy upon the life of a dead man can properly issue.

ON REPORT.

ASSUMPSIT.

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

*S. C. Andrews*, for the defendants.

APPLETON, C. J. The defendants on June 29, 1872, in consideration of . . . and of the sum of fifty-three dollars and seventy-two cents to them duly paid by William H. Dorr, and of the annual payment of a like amount on or before the 29th day of June, in every year during the continuance of the policy, assured the life of said Dorr, in the sum of one thousand dollars payable at the defendants' office in Hartford, Conn., to said Dorr, his executors, administrators or assigns on June 29, 1892, when

he should attain the age of sixty-five years; or should he die previous to that age, in ninety days after due notice and proof of his death, to his executors, administrators or assigns after deducting any indebtedness to the company on account of the policy.

"It being understood and agreed that, if, after the receipt by this company of not less than two or more annual payments, this policy should cease in consequence of the non-payment of premiums, then upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums, that is to say, if payments for two or more years have been made, it will issue a policy for 2-20 of the sum originally insured; if, for three years, for 3-20, in the same proportion for any number of payments, without subjecting the insured to any subsequent charge, excepting the interest annually in advance on all premium notes unpaid on this policy."

The policy was issued and accepted by the assured upon the following express conditions and agreement:

"2d. If the said premiums shall not be paid, at the office of the company in the city of Hartford, or to an agent of the company on his producing a receipt signed by the president or secretary on or before the date above mentioned, then if interest has been regularly paid in advance on all premium notes given by the assured, in every such case the said company shall only be liable for the payment of a part of the sum insured proportionate with the annual payments made, for which a new policy shall be issued, if applied for within twelve months, as above specified, and this policy shall cease and determine."

It is admitted that William H. Dorr paid two annual premiums in accordance with the terms of his policy: one, as of June 29, 1872, and one, as of June 29, 1873; that he failed to pay the premium due June 29, 1874; that he died on March 4, 1875; that neither Dorr nor his administratrix applied for a paid-up policy during the time in which the assured would have been entitled to it under the terms of the policy; that the policy was

not surrendered within two years from the time of the last annual payment, and that all the requirements of the policy in regard to notice and proof of death have been complied with by the plaintiff.

Is then the plaintiff entitled to recover "a part of the sum insured proportionate with the annual payments made?"

It is apparent that to a certain extent the policy is non-forfeitable.

By the second condition under which the policy was issued and accepted, the provision is inserted that "the said company shall only be liable for the payment of a part of the sum insured proportionate with the annual payments made, for which a new policy shall be issued if applied for within twelve months," &c. This language is restrictive, limiting the amount of liability, but implying liability within the limitation imposed.

By the third condition, it is provided "in every case when this policy shall cease and determine or become or be null and void for any cause other than non-payment of premiums, then all payments thereon shall be forfeited to the company." It is obvious that payments are not to be forfeited to the company merely because there may have been non-payments. When the forfeiture is for cause other than non-payment, all payments are forfeited. When the policy ceases and determines for non-payment, the assured still is protected in "a part of the sum insured, proportionate with the annual payments."

The rule is well established, that in the interpretation of a policy, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which it was his object to secure, in making the insurance.

Now Dorr, having failed to pay the annual premium due on June 29, 1874, had a right to a new policy, if applied for at any time within twelve months after that date, upon the surrender of his policy. No further payment was required. Nothing more was to be done but to apply for his new policy. Dorr then up to June 29, 1874, was insured for the full amount specified in his policy. After that date to the time of his death on March 4, 1875, he was insured for "a part of the sum insured proportionate

with the annual payments made." *Mound City M. L. Ins. Co.* v. *Twining*, 4 Bigelow, Life & Accident Ins. Rep. 75.

The insured had certain rights up to the day of his death. Had he applied for a new policy and obtained it, there would have been no question of the defendant's liability. Had the policy been refused, a court of equity would have afforded an adequate remedy. *Gerrish* v. *German Ins. Co.* 55 N. H. 355.

Upon the death of Dorr, the contingency provided against by the policy occurred. The demand of the company for a new policy by the administratrix would have been an idle ceremony, for a policy cannot issue upon the life of a dead man. The company has received all which it was entitled to have, if made liable for 2-20 of its original liability. All else was of form rather than of substance.

The main difference between this case and that of *Chase* v. *Phœnix Mut. Life Ins. Co.* 67 Maine, 85, is that that was labeled "a non-forfeitable life policy" in capital letters; but the terms and conditions of the policy are almost verbally identical with the one under consideration; and the reasoning, upon which that decision rests, is equally applicable to the policy before us. The doctrine of that case is fully sustained by other decisions in analogous cases. *Ohde* v. *Northwestern Mutual Life Ins. Co.* 5 Bigelow L. & A. Ins. Rep. 145. *Hull* v. *Northwestern M. L. Ins. Co.* 39 Wis. 397.

*Judgment for plaintiff for* $100 *and interest from Feb.* 4, 1876, *as by agreement.*

WALTON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

JOSEPH W. HARRIMAN, by next friend, *vs.* EUGENE F. SANGER.

Penobscot. Decided December 20, 1877.

*Trial. New trial. Exceptions.*

It is within the discretion of the presiding judge to admit answers to leading questions.

An exception that "objections to" a specified interrogatory "as defective in substance, were made before the answer was read to the jury" cannot be sustained. Objections should be specific and not general.

The fact that irrelevant testimony was admitted against seasonable objections, does not entitle the excepting party to a new trial, unless it appear that he was aggrieved thereby.

A general exception to an entire charge, or to a series of propositions therein contained, cannot be sustained where any independent portion excepted to is sound law and applicable to the case.

ON EXCEPTIONS.

CASE against the defendant, a physican and surgeon, for malpractice in the treatment of congenital club-foot or *talipes varus*, brought by the plaintiff, seven years old, by next friend. The defendant cut the heel cord, the *tendo achillis* of each of the feet, May 22, 1871, when the plaintiff was 13 months old. The subsequent treatment was in bringing the toes and fore part of the feet round to their natural position and the heels down, applying modified Scarpa's shoes, giving directions to the plaintiff's mother to rub the feet, and subsequent calls to see the shoes fitted; and November 30, 1871, fitting to the plaintiff's feet another pair of retentive shoes less costly and less complicated than the former, for the reason, as the defendant alleged, of the inability of the parents of the plaintiff to pay for better shoes. The alleged acts of malpractice consisted in unnecessarily and unskillfully severing the heel cords; in furnishing shoes not the most approved for such a case; in not giving the case the proper after treatment to cure the defective muscles; and in not visiting and giving attention to the case when called upon so to do. There was testimony in support of all the positions taken by the plaintiff and of all the positions taken by the defendant.

The defendant testified that January 18th, 1871, he was called

to see another child, and his attention was then called to this club-foot child; that, April 3, he was called to see the children, and that he could not tell the reason of this call; May 10th or 11th, was next called, and measured the club feet for shoes; that, May 18th, he delivered the shoes; that, May 22d, he performed the operation, another physician being present; that, May 23d, he called to see how the shoes fitted; that, up to May 23d, inclusive, he had been there four times on account of this child; that he called again June 4th or 5th, and that June 12th, he made charge for the shoes; that he called again June 17, when his active duties in this case ceased; that he called again November 26th or 27th, and that November 30th, he fitted the second pair of shoes, and did not afterwards see the child; that he paid for first pair of shoes, $10.00, expenses on same, 30 cts.; second pair, $2.81; that he received only $10.00 in all; that no complaint was made to him by parents of his treatment until 1876, when he put his bill for services and disbursements into the hands of his attorney for collection.

The defendant took deposition of Nathaniel Green of Boston. The interrogatories became, in some way unknown to the counsel on either side, detached from the answers and lost, and the defendant's counsel took the original interrogatories from the files of the court, and read them to the jury in connection with the answers; this was not known to the plaintiff's counsel until after trial and verdict returned and affirmed. All the objections minuted on the interrogatories, were renewed at the trial, and also objections to such interrogatories, as defective in substance, were made at the trial, and before the answers were read to the jury. All objections to the interrogatories were overruled by the court. One copy of said deposition is to be made part of the case, and may be referred to by either party.

The charge of the presiding justice, containing fourteen printed pages, is given in full.

The verdict was for the defendant.

"To the above rulings and to the charge of the justice presiding, the plaintiff excepts."

*B. H. Mace*, with *O. Gilmore*, for the plaintiff.

*C. P. Stetson*, with *J. R. Mason*, for the defendant.

VIRGIN, J. "To the above rulings and to the charge of the justice presiding the plaintiff excepts" is the language of the plaintiff's bill of exceptions.

1. No ruling relating to the reading to the jury of the original interrogatories together with the deposition having been made or requested, the objection thereto is not covered by the bill of exceptions; and therefore it cannot be considered. Moreover, if the objection were properly before us on motion, we cannot conceive how, in the absence of any suggestion of fraud, or of mistake in the copy, the plaintiff could be prejudiced by the act complained of. The answers would be unintelligible without the interrogatories; and if the copy which had become detached from the deposition was a correct transcript of the original, the answers would speak the same whichever set of interrogatories should be read in connection with them.

2. Assuming the sixth interrogatory to be leading in form as contended, it was within the discretion of the presiding justice to admit the answer; and its admission is not subject to exception. *Blanchard* v. *Hodgkins*, 62 Maine, 119.

The further exception to this interrogatory, found in the bill of exceptions, expressed in the following general terms: "Objections to such interrogatories, as defective in substance, were made at the trial, and before the answers were read to the jury," cannot be sustained. The language is too general. The excepting party can test the ruling made at *nisi prius* and none other. What the objection raised there was, if other than a general one, the bill of exceptions fails to disclose. It would seem but fair and just that objections to any particular question or answer, to be available on exceptions, should be specific, in order that the party offering it, may on hearing the objection, withdraw the proffered testimony if he choose, rather than suffer the delay and expense of going to the law court to settle it. *Glidden* v. *Dunlap*, 28 Maine, 379. At any rate, if the interrogatory was admissible upon any ground, the plaintiff was not aggrieved (R. S., c. 77, § 21); unless it was used for some purpose for which it was not admissible, which

these general exceptions utterly fail to show. But it was clearly admissible on several grounds and among them that of identification.

3. The same objections are made to interrogatory seven. The plaintiff now contends that it was irrelevant. Assuming this to be true, the plaintiff does not show that he was aggrieved by it; and the exception cannot be sustained. *Millett* v. *Marston*, 62 Maine, 477.

4. The ninth, eleventh and thirteenth interrogatories called for facts and were clearly admissible.

5. The plaintiff alleges a general exception to the entire charge, comprising thirteen printed pages; and thus brings before us the whole body of the law involved in the case without specifying a single error in his bill of exceptions. The unfairness of such a course, both to the court and the other party, is too palpable to require anything more than a simple statement of it. It is not the design of a bill of exceptions to draw the whole matter of a trial again into examination, but only such specific points as the excepting party considers illegally prejudicial. This mode of practice, long ago condemned by several of the most respectable courts of the land, and properly characterized by this court in *State* v. *Reed*, 62 Maine, 129, 135, will be tolerated no longer. On the contrary, we hold as it has been held in other jurisdictions, that a general exception to the charge, or to a series of propositions therein contained, cannot be sustained when any independent portion excepted to is sound. There is no pretense, that the principles of law laid down in the charge are not sound, that is sufficient under this general exception.

This practice of spreading out the whole charge on a bill of exceptions was discountenanced by the U. S. supreme court in the early cases of *Evans* v. *Eaton*, 7 Wheat. 356, 426; *Magniac* v. *Thompson*, 7 Pet. 348; *Gregg* v. *Sayre's Lessee*, 8 Pet. 244; in the later case of *Johnston* v. *Jones*, 1 Black. 209, 220; and condemned in the recent cases of *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 Wall. 328; *Beaver* v. *Taylor*, 93 U. S. 46, 54.

So in New York as appears in *Lansing* v. *Wiswall*, 5 Denio, 213, 218, where the court say: "An exception can only be taken

on some particular point of law, for a mere general exception to a general charge amounts to nothing." "A general exception to the whole charge and to each part of it, when the charge involves more than a single proposition of law, and is not in all respects erroneous, presents no question for review on appeal," say the same court in *Jones* v. *Osgood*, 6 N. Y. 233. See also *Hunt* v. *Maybee*, 7 N. Y. 266, 273. *Decker* v. *Mathews*, 12 N. Y. 313, 320. *Caldwell* v. *Murphy*, 11 N. Y. 416. *Walsh* v. *Kelly*, 40 N. Y. 556.

"A general exception to the entire charge," (say the court in *Thrasher* v. *Tyack*, 15 Wis. 258) "will not avail a party unless the entire charge be erroneous." See also *Tomlinson* v. *Wallace*, 16 Wis. 224. *Morse* v. *Gilman*, 18 Wis. 373.

Same doctrine is held in Michigan. *Geary* v. *The People*, 22 Mich. 220.

And in Iowa, *Mershon* v. *National Ins. Co.* 34 Iowa, 88.

In Vermont the court say: "This court, sitting in error, can only try such errors as are specified and brought up on exceptions. The habit that has sometimes obtained, of "dragging" a case in this court, as for something lost, to find a fault that was undiscovered and unheeded in the trial of the cause, is ever unavailing to the client, and a deviation from professional propriety and duty." *Sequin* v. *Peterson*, 45 Vt. 255, 258.

*Exceptions overruled.*

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

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HOLDEN STEAM MILL COMPANY *vs.* WILLIAM H. WESTERVELT *et al.* and trustee.

Penobscot. Decided December 20, 1877.

*Evidence.*

In an action for goods furnished under an express contract it is not competent for the plaintiff to abandon such contract so long as it remains in force and recover on an implied one.

If the plaintiff elects to proceed on the common counts, the written contract

being admitted, he must produce it, or prove its contents by competent testimony, in order to show that it has been fulfilled on his part, or that a departure from its terms was without intention on his part or by consent of the defendant, and that the defendant has received some benefit. Until it is proved no recovery can be had.

ON EXCEPTIONS.

ASSUMPSIT for a balance due on shooks, furnished under a written contract, not produced at the trial nor its absence accounted for or waived, $465.20.

The verdict was for the plaintiffs, for the amount claimed; and the defendants alleged exceptions.

*A. W. Paine*, for the defendants.

*C. N. Hersey*, for the plaintiffs.

DANFORTH, J. The writ in this case contains three counts, 1st, on a special contract for the sale and delivery to the defendants of a certain quantity of fruit box shooks; 2d, account annexed; 3d, *quantum meruit*. The case finds that all the counts are for the same cause of action, for shooks furnished under one and the same contract. It further appears that the contract was reduced to writing in three parts, each of which was signed by both parties. The plaintiffs had one, the defendants one, and the other was delivered to the broker. The writing was not produced by either party. The plaintiffs offered some proof of the loss of their part, and then proposed to prove its contents. This was not permitted by the court and such ruling was clearly unobjectionable; for though one copy might be lost parol proof of its contents would not be admissible until the absence of the other parts were duly accounted for. *Poignard* v. *Smith*, 8 Pick. 272, 278. *Dyer* v. *Fredericks*, 63 Maine, 173, 592. There was therefore no proof of the express contract and the court ruled that the action could not be sustained under the first count.

The plaintiffs then proved under the second and third counts, "that after the execution of the contract they proceeded to furnish shooks; that the quantity sued for had been furnished, and the value of the same; that a large part of the amount due had been paid, leaving a balance due with interest $2,579.75, which they

claimed to recover." This evidence was objected to by the defendants, but received, the court at the same time "excluding all evidence of the terms of the written contract at the defendants' instance." Some further testimony having been introduced by each party in relation to the quality and value of the shooks, the jury were instructed to return "a verdict for the plaintiffs for the shooks delivered at their fair market price; if they were of inferior quality, at their actual value."

If the testimony objected to and received, was legally admissible, the instruction to the jury was right, as there was no testimony in the case upon which the jury could fix the amount of their verdict except that which shew the market price, or actual value of the shooks delivered. Hence the admissibility of the testimony objected to is the real question involved in these exceptions. We think the testimony should have been excluded. Under the written contract it was plainly incompetent for the reason already referred to that no sufficient foundation had been laid for the admission of secondary evidence, and for the additional reason that it did not purport to give the terms or conditions of the contract as it was made by the parties. Under well settled rules of law, the writing was the only legal evidence of the contract, and by rules of law equally well settled, parties must abide by the contract made, unless waived by the same authority which made it. There is no pretense here that the defendants intended to waive their rights under the agreement entered into by them, nor do we see any evidence from which an inference can be drawn, that they have legally become liable under any contract different from that shown by the writing. Yet by the evidence received and the consequent ruling they are made liable under an implied contract for the market price or actual value of the shooks delivered, when in fact the contract was an express one and as appears for a specified price. How far in other respects the two contracts may have differed does not appear, nor is it material for the difference which is apparent is sufficient, and even if none were apparent the defendants had a right to the legal proof of all the terms of their agreement. It is said the defendants should have produced the part in their hands and thus

availed themselves of its provisions. It is true they might have done so if it was still in their possession, and it may perhaps be difficult to give any good reason why they did not. But as their reason for withholding it is not apparent, we need not inquire into its propriety. It is enough that they were not bound legally to produce it even if they had it, which does not appear. The plaintiffs are bound to make out their case by the proper testimony, and where the admission is made that the goods were delivered under an express contract in writing, it is sufficient to compel the production of the writing or legally account for its absence. But for this admission it would undoubtedly have been necessary for the defendants to prove the fact, otherwise the recovery of the plaintiffs would have been proper. Without this material fact the plaintiffs' testimony was proper and adapted to, and sufficient under the common counts; with it, for the reasons already given, it became incompetent and insufficient.

It is undoubtedly true as a general proposition that a plaintiff presenting his case with several different causes of action, or the same cause in different forms, failing to sustain one count may recover upon any other in his writ to which his testimony may be adapted and sufficient. But it can hardly be said that testimony is properly adapted to sustain an implied contract when all the acts proved by it are shown by the same or part of the same testimony to have been done under an express contract. When the express contract is shown, it follows, as one of the fundamental principles of the law, that none can be implied. Broom's Legal Maxims, 7 Am. ed. 651.

Nor can the acceptance of the shooks by the defendants, if any were proved, be taken as a waiver on their part of their rights under the express contract. The jury were instructed that they might return a verdict for such as were delivered. It does not appear that the delivery was to the defendants in person. They were shipped to a foreign country, but by whom received, by what authority, or under what circumstances the case does not show. It does not appear that the delivery was to any one having knowledge of the terms of the contract. Besides if a waiver is claimed, whether there is such, is a question for the jury.

It is true, as contended, that in certain cases a recovery may be had under the common counts for the price of goods sold under an express agreement. But this can only be done when the plaintiff has fully executed the agreement on his part and nothing remains for the defendant but the payment of the price in money. In such cases the obligation resting by virtue of the contract, upon the plaintiff, is a condition precedent, and until it is performed he can have no claim upon the other party for the stipulated price. 1 Chitty on Pleading, 340. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299. *Canal Co.* v. *Knapp*, 9 Pet. 541, 566. *Richardson* v. *Smith*, 8 Johns. 439. *Raymond* v. *Bearnard*, 12 id. 274. *Morse* v. *Potter*, 4 Gray, 292. *Marshall* v. *Jones*, 11 Maine, 54–7. These and other similar cases are authority as to the form of action only and not as to the nature of the testimony. That must be the same whichever form is chosen. It could not be otherwise; for in either case the contract is the foundation of the action and is the only proof by which it can be sustained. It is only from that, that we can ascertain the plaintiff's obligation, so that we may know whether it has been fulfilled.

There is another class of cases, quite numerous, in which the plaintiff is permitted to recover under the proper common count, for services rendered, or goods furnished under a special contract. 1 Chitty on Pleading, 340. 2 Green, En. § 104. *Keyes* v. *Stone*, 5 Mass. 391. *Jewett* v. *Weston*, 11 Maine, 346. *Hayden* v. *Madison*, 7 id. 76. *White* v. *Oliver*, 36 id. 92. *Veazie* v. *Bangor*, 51 id. 509. *Linningdale* v. *Livingston*, 10 Johns. 36. *Hayward* v. *Leonard*, 7 Pick. 181. *Snow* v. *Ware*, 13 Met. 42. *Gleason* v. *Smith*, 9 Cush. 484. *Bassett* v. *Sanborn*, id. 58. *Veazie* v. *Hosmer*, 11 Gray, 396. *Bee Printing Co.* v. *Hichborn*, 4 Allen, 63. *Cardell* v. *Bridge*, 9 id. 355. *Thompson* v. *Purcell*, 10 id. 426.

Though these cases relax somewhat the rigid rule of holding the plaintiff to the exact fulfillment of his part of the contract before he can recover, yet none of them go so far as to permit him to abandon it without the consent of the other party. On the other hand, all of them hold him to it upon the question of

damages and make, as in the other cases, the contract the foundation of the action and put upon him the burden of showing some good reason for a departure from it. The principle upon which these cases rest is well stated by Greenleaf in his work on Evidence above cited; from which it appears, that the election to sue on the common counts, where there is a special agreement, is allowable only where the contract has been fully performed by the plaintiff, or though partly performed has been either abandoned by mutual consent, or rescinded by some act of the defendant, or the work done or goods furnished were not in accordance with the contract and yet were beneficial to the defendant and accepted and enjoyed by him.

In *Jewett* v. *Weston*, *ubi supra*, in the opinion it is said; "It came out in evidence, that the labor was performed under a special contract, and consequently, it became necessary for the plaintiffs either to show that they had performed their contract, so that nothing remained to be done on their part; or that there had been a deviation by the assent of the defendant at the time, or subsequently assented to, either expressly or impliedly, by his acts. How could either of these alternatives be shown, except by the production of the special contract? . . . As soon as it came out in the evidence that the labor was performed under a special agreement, the defendant might securely rest, until the plaintiff had removed this obstacle in one or the other of the modes above suggested."

In *Champlin* v. *Butler*, 18 Johns. 169, 173, and in *Robertson* v. *Lynch*, id. 451, it is held that the plaintiff cannot abandon the special agreement and resort to the general counts, if the goods were, in fact, sold under the special agreement. In the latter case the court remark: "A contrary rule would enable the plaintiff, in every case, by his mere volition, to convert a special contract into a general *indebitatus assumpsit*."

Thus it is clear, both from the authorities, as well as upon principle, that though the plaintiff may in certain cases recover under the general counts for goods furnished under an express contract, yet in all cases the contract is the foundation of the action and the burden is upon the plaintiff to show that it has been fulfilled

on his part, or if not, some good reason for his departure and a benefit received by the defendant.

In order to do this the contract is the starting point, and its existence having been shown, it must be produced, or its contents proved by competent testimony.

*Exceptions sustained.*

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

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ADOLPHUS J. CHAPMAN *vs.* JOHN A. EAMES, and

EMMA J. STOCKMAN *vs.* SAME.

Penobscot. Decided December 30, 1877.

Eames delivered J. S. his horse with this bill of sale: "In consideration of . . . dollars paid me by J. S. I have sold him one-half of my horse. Said J. S. to keep and handle the horse; I to pay one-half the expenses and to receive one-half the profits. My part of keeping to be $2.50 per week."

*Held*, 1. That this bill of sale made them part owners, but not partners.

2. That in addition to the stipulated price for keeping, Eames was liable *pro rata* for the expense of "handling."

3. That neither party had the right to sell the animal, mortgage him or incur expense for his support upon the credit of both, as he might if there had been a partnership.

4. The stipulated sum for keeping was payable absolutely, profits or no profits, and recoverable in assumpsit.

ON REPORT of two actions tried together.

ASSUMPSIT for board and expenses of the stallion, Eames Knox. The first action covers the time from April 30, 1873, to August 6, 1875; and the second from August 6 to November 25, 1875. There were long lists of items of debts and credits, the justice of some of which was disputed, and of others, not; and the cases were sent to F. H. Appleton as auditor. The defendant contended before the auditor that the actions were not maintainable because there was a partnership in the horse; that the plaintiffs, being assignees of his copartner, could not maintain these actions at law; and relied upon the bill of sale which appears in the opinion. The auditor ruled that the bill of sale did not constitute

a partnership, and stated the debts and credits and struck the balances in favor of the plaintiffs; in the first case for $319; in the second for $41.50.

The cases were reported to the full court for their determination of questions of law, and of final judgment accordingly.

*W. S. Clark*, for the defendant.

*D. F. Davis*, for the plaintiffs, with *A. J. Chapman, pro se.*

DICKERSON, J. The objection made by the defendant in both of these cases to the finding of the auditor, as matter of law, that John Stockman, the plaintiffs' assignor, did not become a partner but a part owner with him of the horse, under the defendant's bill of sale of one-half of the horse to said Stockman, calls for the construction of that bill of sale, which was as follows, to wit:

"Bangor, April 30, 1873. In the consideration of four hundred dollars, paid to me by John Stockman, I have this day sold to the said John Stockman one-half of my stallion, known as the Eames Knox, ten years old, being the same I raised from a colt, color black; said Stockman is to take the horse and keep him and handle him, and I, the said Eames, am to pay one-half of the expenses and keeping of said horse, and am to receive one-half of the profits which said horse may earn; the said Eames' part of said horse's keeping shall be two dollars and fifty cents per week. (Signed) J. A. Eames."

As Stockman accepted this instrument as evidence of his title to one-half of the horse, and acted under it, he is bound by it as effectually as if he had signed it. This instrument is to be construed according to its subject matter, the particular purpose of the parties to be affected by it, the acts to be performed under it, and the general intention of the parties. These are to be primarily determined by the language of the instrument itself. The subject of the transaction was a single article of personal property, not then fit or intended for sale, but to be "kept and handled" by the vendee, so as to be rendered suitable for the use it was intended it should eventually be put to; the defendant was to pay one-half of the expenses and keeping of the horse, the price of the latter being fixed at $2.50 per week, and the profits

were to be divided equally between the parties. It is obvious that the defendant confided in Stockman's skill "to handle the horse," and that both intended that he should be paid for "the expense" of such training. The control of the horse for the time being was committed to Stockman for that purpose. It would be contrary to the express terms of the agreement included in the bill of sale, as well as subversive of the objects and purposes of the parties, to hold that the defendant might at any time deprive Stockman of the custody of the horse by selling him, or that Stockman might sell him, or mortgage him, or incur heavy expenses for the animal's support and discipline upon the credit of both parties, as might be done if they were partners. The provision for the division of the profits, after payment of the expenses, does not make the parties partners any more than the part owners of vessels become partners for the same cause. The instrument is to be construed as a whole, and the single provision in regard to profits cannot control its obvious purpose and effect, and change the rights, powers and liabilities of the parties under it. We think the finding of the auditor was right.

The legal effect of the bill of sale was to make the parties to the sale part owners of the horse, to vest the custody of the horse in Stockman for the purpose named, to provide for his compensation, and, also, to establish a rule for the division of the profits, if any, after payment of the expenses. Each party had a distinct and independent interest in the horse, and neither could dispose of the whole of him, or act for the other in respect thereto, but only for his own share, except as provided in the contract of sale. The law imposes no disability upon part owners of personal property to make such a contract with each other.

This doctrine is expressly laid down and applied in *Converse* v. *Ferre*, 11 Mass. 325, 326, where the court—while recognizing the doctrine of the common law that in general no action lies by one tenant in common who has expended more than his share in repairing the common property against the deficient tenants—held that it was competent for tenants in common to make special contracts among themselves with respect to the common property,

and that such contracts may be enforced at common law like contracts between parties who do not sustain the relation of tenants in common. In that case it was decided that the tenant in common, who had made repairs upon the common property beyond his proportion on account of the neglect of the other tenant to do his part according to the agreement between them, could recover such deficiency of the defaulting tenant. We place our decision in this case upon the ground stated by the court in that case that "the mutual promises between the parties were lawful and obligatory." *Hitchings* v. *Ellis*, 12 Gray, 449.

The decisions of the court in this state are in harmony with this doctrine. *Marshall* v. *Winslow*, 11 Maine, 58. *Dyer* v. *Wilbur*, 48 Maine, 287. *Buck* v. *Spofford*, 31 Maine, 34.

There was no occasion for a bill in equity to adjust the accounts and strike the balance between the parties; it does not appear that the horse ever earned a dollar, and the contract furnished the rule for the adjustment of the accounts between the parties; the stipulation of the defendant to pay the plaintiff's assignor for the board of the horse was an independent one and the sum affixed was payable absolutely, profits or no profits. The defendant's account against the plaintiff was moreover a legitimate subject of set-off, and he availed himself of his right to a set-off before the auditor.

*Judgment for the plaintiff in each of these cases for the amount found by the auditor.*

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

DELIA L. ROGERS *vs.* THOMAS B. ROGERS.

Penobscot. Decided January 14, 1878.

*Ex orbitant claims. Insolvent estates.*

The report of commissioners on exorbitant claims appointed under R. S., c. 64, § 51, is final unless appealed from.

Neither can such claims, when rejected by the commissioners, be filed in set-off in a suit by the estate, as in cases of claims against insolvent estates, under the provisions of R. S., c. 66, § 18, that section not being applicable to exorbitant claims, as are nine other sections of c. 66.

ON EXCEPTIONS at the October term, 1876.

ASSUMPSIT, on promissory note, dated November 10, 1869, for $100, payable to plaintiff on demand. Writ, dated December, 1875. Plea, general issue. Verdict this term for plaintiff, $60.50. No question was made as to the validity of the note the verdict upon which was reduced by defendant's account in set-off.

At a former trial, January term, 1876, there was a verdict for the plaintiff, which the full court set aside on the defendant's motion as against evidence, the report of which makes part of this case. At the former trial, the defendant's counsel testified that the note in suit had been sued before in an action returnable at the October term, 1871; that he then filed the account in set-off of $62.25, and had in his hands against the estate of the plaintiff's husband, of which she was administratrix, a claim of $46.70, allowed by commissioners on exorbitant claims, and also a claim of a note of $70 and interest, dated June 1, 1867, not allowed by the commissioners; that he proposed to the plaintiff's attorney to call all the demands between the plaintiff and the defendant—including the note then in suit, the account in set-off, and the note and account against her husband's estate—square, and enter the suit, neither party; that the plaintiff's attorney assented to the proposition, and to the entry of "N. P." made on the docket. The verdict at the January term was for the plaintiff; but there being no sufficient countervailing evidence against that of the defendant's attorney, the full court set aside the verdict.

At the second trial, the deposition of the plaintiff's former

attorney was in evidence, and tended to prove that as he understood the agreement, the action agreed to be entered N. P. was not the one upon the present note, but another; and that the note agreed to be given up was not the note in suit, but another, which he understood his client had against the defendant, belonging to her husband's estate, and that he did not intend to settle this note now in suit. Evidence was also introduced tending to show to the contrary, that there was no other suit to which the agreement could apply, and no other note.

The report of the commissioners on exorbitant claims makes part of the case, and shows that this defendant on December 23, 1871, presented claims against the estate of the plaintiff's husband under dates May, 1866, to September, 1869, for sundries $87.70, also a claim for note dated June 1, 1867, for $70, and interest $17, making $87. With his claim was presented a credit, by horse $100. The commissioners allowed $46.70, disallowed the note, and did not pass upon or consider the $100 credit for the horse.

The plaintiff testified in her own behalf, that the consideration of the note in suit was money received on a note belonging to her husband's estate, which money was paid after her husband's death, and before her appointment as administratrix; that she was charged with the full amount of the note, and the defendant took the money and gave this note for it; that she left the note for collection with J. F. Godfrey, at first interview before it was sued, as her attorney, and that he kept it until just before he left for California, when he gave it back to her; and that she never authorized any settlement of the note in the manner now contended for by the defendant.

1. The presiding justice, besides other rulings, to which no objection was made, charged the jury, that the $70 note mentioned in the commissioners' report, and charged in the account submitted to them, was barred by the report, it having been accepted and no appeal therefrom; but that the $100 item credited in same account and report, was not barred, but remained intact and unaffected by the decision of the commissioners, if that sum was actually due from the defendant as credited.

The defendant asked the following instruction:

"If the attorneys made an agreement which by its terms fairly entitled defendant's attorney to understand that the note in suit was included, and defendant acted on such understanding by permitting his claims to be outlawed, then the plaintiff is bound by the agreement."

The presiding justice gave the instruction with this addition: 2. "But if it, by its terms, fairly entitled the plaintiff's attorney to understand that it was not included, and he did so understand, then it could not be included in the agreement."

The defendant alleged exceptions.

*A. W. Paine*, for the defendants, said that his client had suffered a wrong in this; that the plaintiff had waited till his claim of the $70 note was outlawed, and then renewed her suit which had before been settled and compromised by the allowance of the $70 note. He contended that the requested instruction should have been given in the terms asked, and without the addition which neutralized its effect, and invoked a second rule that the construction is to be taken most unfavorably against the party whose acts or language raises the doubt. Other legal positions of his are also covered by the opinion.

*L. Barker*, *T. W. Vose & L. A. Barker*, for the plaintiff, said that the defendant had suffered no wrong; that as matter of law, the claim for the $70 note, having been before the commissioners, and by them disallowed, was no proper subject of set-off or compromise; that his right to recover on the $70 note was barred, not by the statute of limitations, but by the adjudication of the commissioners.

VIRGIN, J. The instruction relating to the effect of the report of the commissioners is clearly right.

The report of commissioners on exorbitant claims and that of commissioners on claims against insolvent estates, not appealed from, are governed by different statutes.

Prior to 1870, claims against insolvent estates disallowed without appeal taken, were forever barred; and they could neither be recovered by suit, nor filed in set-off, except in case of further assets after distribution. R. S. of 1857, c. 66, § 18. But the

legislature of that year changed the law so that while now, as before, a disallowed claim cannot be the subject of a suit, it may be filed and proved in set-off, to the amount only of the claim which the estate may establish against the claimant. St. 1870, c. 113, § 11, incorporated into R. S., c. 66, § 18. In other words, it now seems that if the claimant would obtain his dividend from an insolvent estate, he must try out his claim disallowed by the commissioners and establish it before a jury on appeal. If, however, he does not care to make a substantive claim against the estate, but simply desires to use it as a protection against any one which the estate may set up against him, and the commissioners reject his, he need not be at the trouble and expense of an appeal, but may bide his time until sued by the estate and then file his claim in set-off and have its merits tried by the jury.

On the other hand the commissioners on exorbitant claims are appointed under R. S., c. 64, § 51. They deal with claims against solvent estates. Their duty is "to determine whether any and what amount shall be allowed on each claim and report," &c. And the statute expressly and peremptorily declares that "their report shall be final, saving the right of appeal." If no appeal is taken to their report, then every item passed upon by them becomes *res adjudicata* unless we legislate another exception to the finality of their report.

It will be observed that while nine sections of the statute governing proceedings in insolvent estates are expressly made applicable to exorbitant claims and proceedings thereon, (R. S,. c. 64, § 51), § 18 relating to disallowed claims being filed in set-off is not one of them. R. S., c. 66, § 18.

2. Neither do we entertain any doubt of the correctness of the "addition" to the defendant's request for instruction. The second rule invoked by the defendant's counsel, viz: "that the construction is to be taken most unfavorably against the party whose acts or language raises the doubt," is not applicable. (1) For the request is based on an agreement made by "the attorneys" without disclosing which used the language; and (2) by referring to the former report which (by the terms of the bill of exceptions) makes a part of this case, we find it was the defendant's proposi-

tion, assented to by the plaintiff, which constituted the agreement.

The defendant has had two verdicts against him; and we see no cause for giving him another trial.

*Exceptions overruled.*

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

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CHARLES H. BARTLETT, *et als.*, appellants, *vs.* CITY OF BANGOR.

GILBERT ATWOOD, *et als.*, appellants, *vs.* SAME.

Penobscot. Decided January 15, 1878.

*Damages. Dedication. Way.*

When land taken for a public way is already burdened with a private right of way and an incipient dedication to the public, the owner is entitled to no more than nominal damages.

When the owner of land within or near to a growing city or village divides it into streets and building lots, and makes a plan of the land, marking thereon the streets and lots, and then sells one or more of the lots by reference to the plan, he thereby annexes to each lot sold a right of way in the streets, which neither he nor his successors in title can interrupt or destroy.

The location or platting of streets by the owner of land, and the sale of building lots abutting upon such streets, constitute an incipient dedication of the streets to the public, which neither the owner nor his successors in title, can afterwards revoke, although the dedication does not become complete, so as to impose upon the municipality the burden of making or keeping the streets in repair, till they have been accepted by competent authority, or been used by the public for at least twenty years.

A *cul de sac* may become a public way by location or dedication as well as a street open at both ends.

ON AGREED STATEMENT.

APPEALS from decisions of the city council of Bangor, on the question of damages for laying out a street in extension of First street.

The proceedings are all admitted to be correct. The title of the appellants, as tenants in common, of the premises taken, is not called in question, except as hereinafter stated. All claim under the will of the late Wm. Emerson, who died in 1860. The premises were formerly the property of Isaac Davenport, and con-

stituted a part of the lot which contained in all nearly two hundred acres, bounded upon Penobscot river on the east, and extending back about one mile. While owned by him he caused the front part of the whole lot, extending back about half way to the rear line, to be laid out into house lots, with streets to accommodate, the streets being two extending back to the river, one on the northern side known as Union street; and the other very nearly through the centre of the lot, and known at first as Centre street, and afterwards as Cedar street. At right angles with these, and crossing the whole lot, were several streets known respectively as Pleasant, Summer, Main, First, Second, Third, Fourth and Fifth streets. A plan of the laying out was made by Z. Bradley, in 1829, (recorded July 20, 1849, in Penobscot registry of deeds, vol. second, page 21 and 22 of plans,) and sales of the lots immediately commenced; so that prior to 1850, the principal part of all the lots were sold lying between the river and Fifth street. Among the lots thus sold prior to 1850, were all the lots on First street except one, all the lots on both sides of said street south of Centre or Cedar street, and four of the lots north of Centre street being so sold to Wm. Emerson and Isaac Farrar in 1835; and Farrar in 1836, conveyed his part to Emerson. In 1850-'51, an extension of the lotting of the Davenport lands so as to embrace all the balance of the whole was made, and a plan of the whole dated March 24, 1851, was made, adopting the Bradley plan so far as it went, and the latter plan, (being known as Z. Bradley's, extended by Wm. Coombs) was recorded November 7, 1854, in said registry, vol. second, pages 33 and 34 of plans. On both plans, First street was laid down alike, and conforming with the location and laying out as adopted by the city in the proceedings appealed from in these cases.

Wm. Emerson having paid one-half the consideration for the purchase made in 1835, and being unable to pay the balance, was released from further payments, and reconveyed one-half the lots to the Davenport heirs, every alternate lot being reconveyed. In 1851, by deed dated May 7, delivered July 12, 1851, the Davenport heirs reconveyed to Emerson the lots which he had conveyed back to them lying south of Cedar street, so that he again

became owner of all the lots on both sides of that street, south of Cedar or Centre street, the lots on both sides of the same street, north of Cedar street being owned and occupied by different parties as they still are, the lots being most of them occupied as residences. First street, from Union street to Cedar or Centre street, was laid out and adopted by the city as a legal street in 1836, the laying out being in accordance with the Bradley plan, and proceedings in 1835 and 1836, being made a part of the case.

In 1854, by deed, dated May 8, and delivered on twenty-fifth, the Davenport heirs conveyed by quitclaim deed to Emerson all their right, title and interest in and to First street, as laid down on the plan.

On April 13, 1875, proceedings were commenced to lay out First street from Cedar street southerly, and by due course of proceedings, the laying out was completed on May 13, 1875, and street established, the appellants being allowed one dollar damage for the taking of their land; and this appeal was thereupon taken.

It appeared by testimony introduced by appellants, that as early as 1835, and until opening of street in 1875, a fence was erected on the south side of Cedar street, extending continuously from the corner of Second street down to Main street; thence down Main street to the Barker & Davis lot, crossing First street, and also enclosing that part of Davenport square which lies south and west of these lines, that part of Davenport square thus enclosed having been conveyed by the city to Emerson, deed dated May 8, 1856, the land enclosed being used as a pasture, also that there was a large gravel bank upon the lot thus enclosed, through which First street, as laid out in 1875, runs.

The plan makes a part of the case, and that part of them copied that lies east of Fifth street. All the lots conveyed by Davenport and by his heirs were conveyed by numbers, as laid down on plan.

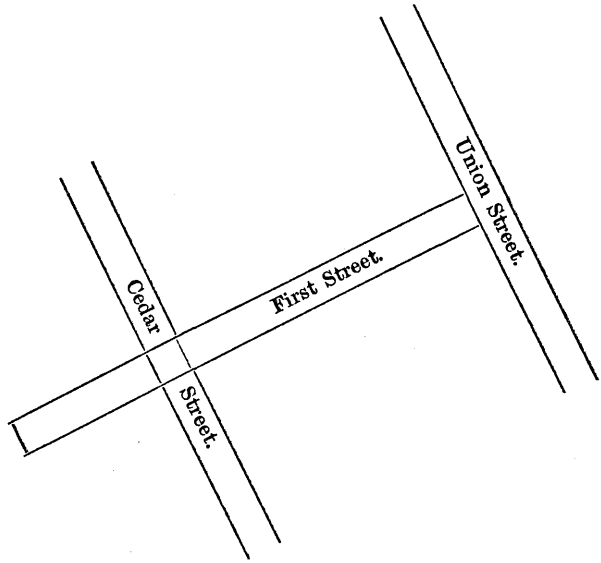
Sometime after 1856, Emerson being then the owner of all the Davenport land in the plot between Main and Second streets, south of Cedar street, excepting the lot at the corner of Second and Cedar streets, caused said plot to be relotted, and a street laid out through the centre thereof, from Main to Second streets, and said relotting was adopted in the map of the city of Bangor

made under the direction of the mayor and committee on streets, by order of the city council, in 1862, and then and now publicly exposed as the city plan in the city hall, and so much of said plan is to be copied as embraces the plot referred to and adjoining streets and lands.

A. W. Paine, called by defendants, testified, subject to objection, that he was agent for Davenport heirs since 1850, and has made all the sales since made of their lands in the city; also that he was appointed as special guardian to sell and convey the fractional shares belonging to the minor heirs; that soon after his appointment he sold the lots in 1851 to Emerson, as already detailed. Afterward, in 1854, Emerson desired to know the terms on which the heirs would convey or release their interest in First street, south of Cedar or Centre street. He remarked in substance that he owned all the lots on both sides of the street, and would like to have that. I told him the fee of the land was valueless, as every one who owned a lot on the plan had a right of way over it, and when the city saw fit to lay it out for a street, we could get no damage for it, but as there was a valuable gravel bank upon it, that was worth something, as we could work it until the city took the street. We finally agreed upon $100, as the price for which he should have the deeds, and the heirs and myself as guardian, executed the deeds already introduced. According to the rates at which the other lands were sold, the land embraced by the street would have been worth some $1000 or $2000. All the streets named above have been adopted by the city, and laid out according to the plan, except Union street, which slightly varies in its course from the plan. The fences spoken of were built after Emerson and Farrar first bought the land, and were never varied with any change of the title, thus remaining the same through all the changes of the title, the land being generally used as a pasture.

The cases submitted to the full court were whether upon so much of the foregoing statement and proof as is legally admissible, the appellants were entitled to more than nominal damage. If so, the cases were to be set down for hearing at *nisi;* otherwise the appeals to be dismissed with costs.

The following diagram is referred to in the opinion.




*F. A. Wilson & C. F. Woodard*, for the appellants.

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

WALTON, J. First street in the city of Bangor, as originally laid out, in 1829, by the then owner of the land, extended southwesterly from Union street to Cedar street, and across Cedar street into the adjoining territory, as indicated upon the diagram.

That portion of First street lying between Union and Cedar streets was laid out and accepted by the city in 1836. That portion of it lying southwesterly of Cedar street was laid out and accepted by the city in 1875. The only question is whether the owners of the land thus taken for the extension of First street, in 1875, are, under the circumstances stated in the report, entitled to more than nominal damages. We think they are not.

When the owner of land within or near to a growing village or city divides it into streets and building lots, and makes a plan of the land thus divided, and then sells one or more of the lots, by reference to the plan, he thereby annexes to each lot sold a right of way in the streets, which neither he nor his successors in title

can afterwards interrupt or destroy. And we think reason and the weight of authority are in favor of holding that such a platting and selling of lots constitute an incipient dedication of the streets to the public, which the owner of the land cannot afterward revoke. The dedication is not complete, and will impose no burden upon the public, till the streets are accepted by competent authority, or the public has used them for at least twenty years. But so far as the owner of the land is concerned, such acts constitute a proposition to dedicate, which he cannot afterward withdraw. Platting alone will have no such effect; but platting and selling will. There are dicta to the contrary, but the later and better considered cases hold to this view.

"Having sold lots and bounded the purchasers by the street as it is laid down upon the map, he has adopted the map, and dedicated his land in the site of the street to the public use; he could have intended nothing less by his deeds than a declaration that the street was, and, so far as he was concerned, should remain, a public highway." Judge Bronson, in the *Matter of 29th Street*, 1 Hill. 189, and *39th Street*, 1 Hill. 191. It is not important that the street has not been opened. *Matter of 32d Street*, 19 Wend. 128. And the right of way cannot be released by purchasers, because the public have a vested interest. *Wyman* v. *Mayor, etc. of New York*, 11 Wend, 486, 487.

"The general rule is that, where the owner of land in a city lays out a street through it and sells lots on each side of the street, the public have an easement of way or right of passage, although it may not become a public highway in the ordinary sense of that term until the dedication is accepted and the street adopted by the corporation; and the grantees of the lots are entitled as purchasers to have the interval or space of ground left open forever as a street, and to the right of using the way for every purpose that may be usual and reasonable for the accommodation of the granted premises. Neither the city, nor the state, nor the grantor, can do any act to impair this right, or restrict the grantees in the enjoyment of it." Opinion of the court in *White's Bank of Buffalo* v. *Nichols*, 64 N. Y. 65.

"While a mere survey of land, by the owner, into lots, defin-

ing streets, squares, etc., will not, without a sale, amount to a dedication, yet, a sale of lots with reference to such plat, or describing lots as bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding upon both vendor and vendee. . . . As against the proprietor, a dedication of land for streets and highways may be complete without any acts of acceptance on the part of the public; but in order to charge the municipality or local district with the duty to repair, or to make it liable for injuries for suffering the street or highway to be or remain defective, there must be an acceptance of the dedication; and this acceptance must be by the proper or authorized local public authorities." 2 Dill. Mun. Corp. §§ 503–5, citing numerous authorities.

And such a right of way is not lost by mere non-use. An adverse use, such as placing upon the land buildings or other permanent obstructions to all possible travel over it, if acquiesced in for a sufficient length of time, might have that effect. But using the land for pasturage, or the growth of crops, or other purpose, which does not indicate an intention that it shall never be used as a street, will not have that effect. Such a use of the land is not adverse. It is seldom within the contemplation of the parties that all the streets marked upon a plan of a considerable extent of territory, or that the whole of any one of them, if of considerable length, shall be at once opened. And, until such time as the growth of the place requires them to be opened, the owner has a right to use the land for any of these temporary purposes. And such a use is not adverse, but according to strict right. It will not, therefore, bar the rights of the grantees, or the public, to have the streets opened, whenever, in the opinion of the public authorities, they are needed. Thus, the streets in South Boston were located and delineated upon a plan in 1803; and a portion of one of them (First street) was not ordered to be opened till 1851; and in the mean time those claiming title to the land, and for more than twenty-five years before the order was passed for opening the street, fenced it and openly and continuously used and occupied it, without interruption; and yet the court held that the right to have the street opened to the full extent laid down

upon the plan, was not thereby lost. The court said that the rights of the parties were such that it was impossible that there should be any adverse possession, until an official order was made that the street should be completed. *Henshaw* v. *Hunting*, 1 Gray, 203.

Nor will it make any difference that the street in question is a mere *cul de sac*—a street open at one end only. True, in *Holdane* v. *Cold Spring*, 23 Barb. 103, two of the three judges held that such a street could not be a highway. They based their decision on what they supposed to be the common law. But they were mistaken. It had been laid down by Lord Kenyon in *Rugby Charity* v. *Merryweather*, 11 East. 376, note, that a mere *cul de sac* might be a highway; that otherwise such places would be traps to catch trespassers. And in *Bateman* v. *Bluck*, 14 Eng. Law and Eq. 69, the question was fully considered, and the court held that it was no objection to a highway that it was a mere *cul de sac* and not a thoroughfare. And in *People* v. *Kingman*, 24 N. Y. 559, the court of appeals very pointedly condemned the decision in *Holdane* v. *Cold Spring*, 23 Barb. 103, and held that upon principle as well as authority, it is no objection to a highway, or public street, that it is a *cul de sac;* that public ways with an outlet at one end only, may and often do exist; that they are quite common in some parts of the country; that in many cities and villages there are short streets leading to ravines, and to cliffs, whence there can be no outlet, and where they must necessarily stop; that the same thing is true of streets running to unnavigable waters, or to points on the sea shore, where there cannot be a harbor or landing place; that in new settlements many of the public ways extending into the wilderness, have outlets at one end only. In fact, we cannot see why it should have ever been doubted that such roads and streets are as much public highways as roads and streets open at both ends.

And where one sells building lots by reference to a plan, the purchasers obtain an interest in all the streets marked upon it, and the right to have them converted into public streets as soon as the public authorities can be induced to do so. To the contrary is the decision in *Badeau* v. *Mead*, 14 Barb. 328. It was

there held that the purchasers obtain an interest in only so much of the streets as will enable them to reach the highway. And in the *Matter of 29th Street*, 1 Hill. 189, Judge Bronson said: "I do not mean to say that this dedication will extend to all the grantor's lands in the site of the street; but it will, I think, extend to all his lands in the same block; or, in other words, to the next cross street or avenue on each side of the lots sold; the parties must have contemplated an outlet both ways." But in the *Matter of Lewis Street*, 2 Wend. 472, the court held that such a conveyance carried with it an implied covenant that the purchaser should have an easement or right of way in the street, to the full extent of its dimensions. And in a recent case in Massachusetts, *Fox* v. *Union Sugar Refinery*, 109 Mass. 292, the court held that a conveyance of land bounded by a street not defined in the deed, but shown upon a plan therein referred to, estopped the grantor to deny the existence, not only of that street, but of all the connecting streets laid down on the same plan, as far as the grantor's land extended; that where a plan is referred to in a deed, for a description of the estate conveyed, not only the courses and distances, but all other particulars, appearing upon the plan, are to be regarded as if they had been expressly recited in the deed. And Judge Dillon says the purchasers' rights extend to all the streets marked on the plan. 2 Dill. Munic. Corp. § 503, note, citing numerous authorities.

And it has been decided in this state, as well as other states, that when the owner of land makes a plan of it, delineating thereon a street, with building lots adjoining, and then sells one of these lots by a reference to the plan, he thereby secures to the purchaser a perpetual and indefeasible right of way in the street; and that when the land thus already burdened with a perpetual and indefeasible right of private passage over it, is taken for a public street, the owner is entitled to no more than nominal damages. *Sutherland* v. *Jackson*, 32 Maine, 80. *Stetson* v. *Bangor*, 60 Maine, 313.

In fact, there is no reason for allowing him even nominal damages. Where there is nothing in the deed, nor upon the plan, showing the contrary, the presumption that the streets marked

upon the plan, are intended for public streets, as soon as the municipal authorities can be induced to locate and accept them as such, is as strong as that the grantee shall have a private right of way over them. If such is not the intention of the grantor, it is no hardship to require him to say so in his deed. And we find upon examination that the doctrine of nominal damages originated with respect to streets in the city of New York, where, by force of a statute to that effect, the fee in the streets vests in the city as soon as they are laid out and accepted as public ways. To compensate the owner for this worthless fee, it was considered necessary to allow him at least nominal damages. But where, as in this state, the owner is not divested of the fee when his land is taken for a public way, and the land taken is already incumbered by a perpetual and indefeasible right of private passage over it, there is no reason why he should be allowed even nominal damages. He gets his pay by the increased value of the adjoining land.

In the case now under consideration, it appears that First street in the city of Bangor, was originally marked upon a plan, by the then owner of the land, in 1829; that numerous building lots have since been sold abutting upon the street, and by reference to the plan for a description of them; that in 1836, a portion of the street was laid out and accepted as a public way; that in 1875, the remainder of it was so laid out and accepted; and that, for this latter location, the owners of the fee were allowed nominal damages. We think they are entitled to no more.

*Appellants entitled to only nominal damages. Appeal dismissed with costs for respondents.*

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

## PENOBSCOT RAILROAD COMPANY *vs.* GIDEON MAYO.

Penobscot. Decided January 21, 1878.

*Limitations, statute of.*

The defendant procured the surrender of his note by fraud without payment.

*Held*, 1. The plaintiff can maintain an action of tort for the fraud, and the statute of limitations commences to run from the discovery of the fraud or the time when the plaintiff may discover it in the use of due diligence.

2. If the defendant by the fraud, procured money or its equivalent, the plaintiff may waive the tort and maintain an action for money had and received, and the same rule of limitation applies that is applicable to an action of tort.

3. Procuring the surrender of his note for money then overdue without payment was procuring the equivalent of money.

ON EXCEPTIONS.

ASSUMPSIT. The writ was dated January 3, 1870, and contained three counts stated in 60 Maine, 306. A statement of the case is also given with the findings of the referee in 65 Maine, 566. The case was recommitted to the referee, who reported certain facts and rulings at the January term, 1877, and closed his report and award as follows:

"Upon the foregoing facts and findings I rule

"1. That upon the first count in this writ, being on the account annexed for $40,400, the plaintiffs are not entitled to recover; and this ruling I make upon the authority of the opinion of the court in this case contained in the 60th volume of the Maine Reports.

"2. That on the third count in the writ, being the direct count on the $4000 note, the plaintiffs are not entitled to recover, for the reason that the recovery thereon is barred by the statute of limitations; and this ruling I render upon the authority of the opinion of the court in this case contained in the 65th volume of Maine Reports.

"3. The second count in the writ is for money had and received, with the specification, in substance, that plaintiffs would prove under it the procuring of said $4000 note July 13, 1864, by defendant, by his false representations that he had received no consideration or payment for the bonds for which he had given said note.

"And it remains only to determine whether this count is to be regarded as a count upon the note itself, which would be barred by the statute of limitations, or as such a count as can bring the case within R. S., c. 81, § 92, and would not be so barred.

"Upon this point (as matter of law) I rule that this count is not such as can bring the case within said provision of R. S., but that it is in substance a count upon the note itself and is therefore barred by the statute of limitations.

"I do therefore make this my final award and determination in the premises, that the said defendant recover of said plaintiffs the costs of reference, taxed at fifty dollars, together with the costs of court, to be taxed by the court.

"(Signed) S. F. Humphrey, Referee."

The plaintiff in interest, N. Wilson, filed objections to the acceptance of the report and to the rulings of the referee in matters of law, and particularly to the third ruling in substance that, although he had found concealment and fraud and that the facts had not come to the knowledge of the plaintiffs prior to January 7, 1868, yet he had found that the action, commenced January 3, 1870, was barred by the statute of limitations; that in an action for money had and received by a payee against the maker of a note who procures it to be given up to him through fraud without payment, the statute of limitations begins to run at the maturity of the note, as in account on the note itself, though the fraud was not discovered till long afterwards.

The presiding justice, *pro forma*, overruled the objections and accepted the report and award of the referee; and the plaintiffs alleged exceptions.

*A. Sanborn*, with *N. Wilson*, for the plaintiffs.

*C. P. Stetson*, for the defendant.

I submit this case on the authority of 60 Maine, 306, and 65 Maine, 566. It has been very fully argued and carefully considered in these two cases, and further comments are unnecessary. "*Interest reipublicæ ut sit finis litium.*"

LIBBEY, J. This action is brought by N. Wilson, in the name of the plaintiff, as assignee or pledgee of the claim in suit. It

has twice before been before this court. *Penobscot Railroad* v. *Mayo*, 60 Maine, 306. *Same* v. *Same*, 65 Maine, 566. By the exceptions either party may refer to the former reports. The nominal plaintiff has no interest in the subject matter of the suit. So far as it had any interest it has been discharged. *Penobscot Railroad* v. *Mayo*, 60 Maine, 306, *supra*. The suit is prosecuted for the benefit of Wilson only. The writ contains three counts. 1. On an account annexed. 2. Money had and received. 3. On a promissory note for $4000 given by defendant to plaintiff dated May 28, 1862, payable in one year with interest. The action was commenced January 3, 1870. Defendant pleaded and relies upon the statute of limitations. The case was referred under a rule of court on legal principles, the referee to report any facts and questions of law that either party might desire with right of exceptions. So far as is material for the consideration of the questions involved, the following facts appear from the reports of the referee: On the 28th of May, 1862, the plaintiff sold to the defendant $68,700 of its bonds for $4000, the defendant giving his note therefor, payable in one year with interest. The plaintiff corporation by vote of the same date, pledged the note to the directors as security for the several amounts by them advanced to the company and then due them, and when collected to be divided among them in proportion to the sum actually due to each. When the defendant gave the note it was verbally agreed between the parties that if he did not sell the bonds or receive any compensation for them, his note should be canceled and given up to him without pay. On the 13th of July, 1864, the defendant falsely and fraudulently represented to the directors of the plaintiff corporation that he had turned over the bonds to the European and North American Railway Co., which had become the purchaser of all the property of the plaintiff, without pay or compensation therefor, suppressing the fact that he had previously sold the bonds and received therefor $22,900 in the bonds of the European and North American Railway Co., and thereby procured the surrender of his note without payment. The fraud was concealed by the defendant and did not come to the knowledge of the plaintiff till January 7, 1868. The account annexed to the

writ contains the following item: "1864, July 13: To your note of $4000, on interest from May 28, 1862, given up by reason of your false representation that you had surrendered the bonds for which it was given without consideration or payment, and it was therefore to be given up and canceled, whereas you had sold and received pay for said bonds in October, 1863, long prior to getting it up, $6,400." In the writ the plaintiff specified that, under the second count, it will prove "the account annexed and that the money was received by the defendant to the use of the plaintiff." Upon these facts the referee finds, as matter of law, that the action can only be maintained on the note declared on in the third count, and that the action is barred by the statute of limitations. If the first finding is correct, it follows that the action is barred. This court so held in 65 Maine, 566, *supra*. That decision is invoked by the counsel for the defendant as decisive of the case as now presented. We think it is not.

Undoubtedly the plaintiff can maintain an action for the fraud of the defendant in procuring the surrender of the note without payment. It might maintain an action of case for the fraud, or of trover for the note. In either case the statute of limitations would commence to run from the time the fraud was discovered, or might have been discovered in the use of due diligence by the plaintiff. And if by the fraud the defendant procured money, or its equivalent, the tort may be waived by the plaintiff, and assumpsit for money had and received maintained.

Did the defendant by procuring the surrender of his own note then overdue without payment receive the equivalent of money?

It has been repeatedly held that where a debtor procures a discharge of his debt by payment, in whole or in part, in counterfeit money, an action for money had and received may be maintained for the amount of the payment thus made, the plaintiff first tendering back the counterfeit money received. So an agent who discharges a debt due to his principal by taking a note payable to himself, may be held for money had and received, though the note is unpaid. *Floyd* v. *Day*, 3 Mass. 403. *Hemenway* v. *Bradford*, 14 Mass. 121. *Hemenway* v. *Hemenway*, 5 Pick. 389. *Fairbanks* v. *Blackington*, 9 Pick. 93.

There is stronger reason for holding one who has procured the surrender of his own note, for money had and received, than where he has received the note of another. So where the defendants procured the plaintiffs, who were agents of the defendants' creditors, to procure the discharge of their debt, and the plaintiffs did so by giving their principals credit therefor, and charged the amount to the defendants, it was held equivalent to the payment of money by the plaintiffs, and the receipt of money by the defendants, and an action for money paid or money had and received might be maintained. *Emerson* v. *Baylies*, 19 Pick. 55.

In *Perry* v. *Swasey*, 12 Cush. 36, the maker of a note released to a third person a claim against him to an amount equal to the note, upon the promise of such third person to pay and take up the note. In discussing the question whether the holder of the note could maintain an action for money had and received against such third person, Shaw, C. J., in delivering the opinion of the court says: "We are strongly inclined to the opinion that the plaintiff is entitled to recover on the money counts, as for money had and received. *Hall* v. *Marston*, 17 Mass. 575. Mrs. Harvey placed money in the hands of the defendant for the use of the plaintiff. . . . . The discharge of a debt due in money is, for many purposes, equivalent to a payment in cash. One who has collected the debt of another, by taking a note in his own name, is liable as for money had and received."

In *Stuart* v. *Sears*, 119 Mass. 143, the plaintiff was induced to allow the defendant in part payment of the sum due from him, a credit of $1000 in the settlement of their accounts, by the presentation by defendant of a false voucher therefor. It was held that the plaintiff might recover the $1000 under a count for money had and received, the court treating the allowance of the credit by plaintiff as money paid by him and received by the defendant. See *Ames* v. *York National Bank*, 103 Mass. 326. *Baxter* v. *Paine*, 16 Gray, 273.

In *Hall* v. *Huckins*, 41 Maine, 574, the defendant was indebted to the States of Maine and Massachusetts for the stumpage of certain timber. He claimed that the plaintiffs should pay him the amount, and in a settlement with them charged them the amount

claimed, and gave them an agreement to account to and allow them any and all deductions which he might obtain in settlement with those states. He obtained a certain deduction by Massachusetts. In discussing the question whether the plaintiffs could recover under the count for money had and received, Appleton, J., in delivering the opinion of the court, says: "To enable the plaintiff to recover under the money counts, it has not been held necessary in all cases to show that money has actually been received. If anything has been received in lieu of money, it equally entitles the plaintiff to recover," citing several authorities. In applying the rule to the case then under consideration he says: "Whatever reduction might be obtained would be for the eventual benefit of the plaintiffs. Had the stumpage been paid to the commonwealth of Massachusetts, the reduction would have been by repayment to the defendant of the amount discounted. Whether the reduction were made by passing a specified sum to the credit of the defendant, or whether the stumpage, having been paid, the amount discounted were repaid to the defendant, would make no difference to him nor to the plaintiffs who were to have the benefit of whatever allowance might be made." In this case the defendant had received no money, but the court held that the reduction by Massachusetts from the amount due from him was equivalent to money, and sufficient to maintain the action for money had and received.

After a careful consideration of the question, we feel clear, both on principle and authority, that fraudulently procuring the surrender and cancellation of the note by the defendant, without payment, was equivalent to the receipt by him of the money due upon it. The note was for money. It was overdue. If the defendant had paid it, and then by the same fraud had procured the money to be paid back, there could be no question. But to both parties it would be substantially the same as procuring the note.

The action is maintainable under the count for money had and received for fraudulently obtaining the note without payment, and the same rule of limitation applies that is applicable to an action for the fraud. Upon the report of the referee the plaintiff

is entitled to recover the sum of $4,260.50 and interest from August 26, 1873.

*Exceptions sustained.*
*Report recommitted.*

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

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

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HORATIO P. BLOOD *vs.* MANUEL S. DRUMMOND.

Penobscot. Decided January 24, 1878.

*Contract. Words, stumpage.*

The defendant (by written agreement) promised to convey to the plaintiff an interest in certain timber land when he had received his advances and certain costs and expenses "from the stumpage cut on the land."

*Held,* That "stumpage cut on the land" meant money received or expected to be received from the sale of licenses to cut and remove timber from the land.

*Held,* also, that the defendant would be liable to account for cuttings made by himself, or himself jointly with others, at the value upon the land of what was cut and taken by him and them therefrom.

*Held,* further, that the criterion of value, where the defendant was the operator himself alone or with others, would be the market rates; or, if there were no definite market prices for licenses to cut, the actual value thereof may be ascertained from other considerations; such as proximate market rates, the market value of the logs at their place of destination, or at the nearest point to the township where logs had a market value, and the costs and risks of getting them there.

ON REPORT.

ASSUMPSIT to recover damages for breach of a written contract, signed by the defendant, dated December 19, 1867, and of the following tenor:

"I, Manuel S. Drummond, of Bangor, in consideration of services performed by Horatio P. Blood, of said Bangor, at my request, in exploring part of Township No. 5, in Ninth Range in county of Piscataquis, and north of and adjoining the town of Brownville, and the same part of said township conveyed to me by two deeds dated December 19, 1867, one of which is from

Preserved B. Mills, and the other from Asa Pingree and others, trustees of David Pingree, said deeds conveying to me a parcel of land across the easterly end of said township, and about three miles and two rods wide, do promise to, and agree with the said Blood, that whenever I, or Stephen F. Barton, to whom I have given an obligation to convey one undivided third of said land on the performance of certain conditions, shall have received from the stumpage cut on said land, money enough to pay all the consideration paid for said land, and all expenses and taxes heretofore paid by me, and that shall hereafter be paid by me or him, the said Barton, and all reasonable charges and contingencies pertaining to, or incidental to said land and the management of the same, and annual interest on the whole of said sums at the rate of ten per cent. per annum, I will make and execute, or cause to be made, executed and delivered to said Blood, or his assigns, a quitclaim deed of one undivided sixth part of all said lands and interest I acquired by said two deeds," &c.

The plaintiff contended that the defendant was accountable for stumpage money from the date of the contract to date of writ, September 16, 1876, sufficient to pay for the land and all expenses chargeable to it, and that the plaintiff was entitled to his deed. The defendant contended to the contrary.

No question was made but the defendant should credit the amount of stumpage received from third parties, but he resisted the claim of the plaintiff that in his own operations, whether they were successful on the whole or not, he should first account for the stumpage at its market value.

The parties desiring that this and other legal questions, which in the opinion appear, should be settled before submitting the case to the jury, the presiding justice ruled, *pro forma*, that the plaintiff's construction of the contract was correct. The case was submitted to the law court to stand for trial on questions of fact after the contract has had a construction on questions of law.

*J. Varney*, for the plaintiff.

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

PETERS, J. This controversy relates to the interpretation and

effect of a written agreement. The defendant was to convey to the plaintiff an undivided sixth of certain land, when he received what he had advanced therefor, and certain costs and expenses, "from the stumpage cut on the land." The parties anticipated that the stumpages would pay for the land within some reasonable time. The word "stumpage" has in this state a definite signification. It means the sum by agreement to be paid an owner for trees standing (or lying) upon his land, the party purchasing being permitted to enter upon the land and to cut down and remove the same away. In other words, it is the price paid for a license to cut. Usually, the price is measured according to the thousand feet cut in an operation, but it may be by the tree or the cord or the like. As a general thing, the practice is for the owner in some form of agreement to retain a lien upon the lumber cut for payment of the stumpage due thereon. Stumpage on lumber is somewhat of the nature of a percentage paid on copyright, or of a royalty for the use of a patent, or a duty paid on mineral productions

By the terms in the agreement, "stumpage cut upon the land" was intended stumpage received for operations permitted to be carried on upon the land. It is clear to us, that the plaintiff is entitled to a conveyance whenever lumber enough has been taken from the land the stumpages upon which are sufficient to pay for the land and all the costs, profits and expenses provided for by the contract. Of course, the defendant would not be held to allow for stumpages which he has failed to collect of other persons, where the loss is in no way attributable to a want of proper care and caution on his part. But he must account for the value of the stumpages when he has carried on the operations himself. Stumpage in the sense of the agreement accrues, whether the defendant sells the permits or licenses to cut to other persons or uses the privilege himself. The plaintiff is interested in the profits and losses incident to the business of selling rights to cut, but not in the business of operating upon the land itself. Otherwise, the plaintiff would be a partner with the defendant and his business associates. The defendant must account for his own cuttings at a reasonable price therefor, no price being agreed

upon. He sells the permits to himself where he operates, and to himself and partners where they jointly carry on the operation.

How shall prices and values be ascertained where the defendant and his partners have taken the lumber from the land? The ordinary rules apply. If there was a fixed market price for stumpage, that must govern. But market rates cannot rule as certainly with respect to rights to cut lumber as with much other property, because townships of land are so variously and differently situated. One township may afford much better facilities for lumbering thereon than another. In such case, several things may be considered; such as proximate market rates, the value of logs at their place of destination, and the costs and risks of getting them there. The rule laid down in *Berry* v. *Dwinel*, 44 Maine, 255, and approved in subsequent cases in this state, might apply with more or less force according to circumstances. It was there held that, where goods have no market value at the place of delivery, the value at such place may be determined at the nearest place where they have a market value, deducting the extra expense of delivering them there.

These are all the points which we think the necessities of the case require us to consider. Upon this interpretation and construction of the written contract,

*The action stands for trial.*

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

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STATE *vs.* CONSOLIDATED EUROPEAN & NORTH AMERICAN RAILWAY COMPANY.

Penobscot. Decided February 6, 1878.

A railroad corporation is not liable to the forfeiture imposed by statute for the benefit of the widow and children of a person whose life is lost by the negligence of servants or agents employed in operating the road, if, at the time of the accident, the mortgagees of the corporation were in possession of the road and had its exclusive management and control.

On agreed facts.

Indictment found at the August term, 1876, against the defendant company under § 36, c. 51, R. S., for causing the death of Jasper A. Roberts, at Bangor.

It appeared that the acts alleged in the indictment were committed November 20, 1875; that one Benj. E. Smith, in October 27th, then last past, took possession of the railroad and all its property, and ever after had been in possession and had the management of said defendants' railroad as trustee, under a mortgage given by said defendant company, to him and another as trustees; and all persons in the management and charge of the railroad, engine and train were acting under and employed by him as such trustee. The indictment and mortgage were in the case, and the question presented to the court was, whether upon these facts the defendant company could be liable.

If the court should be of opinion that it may be, the case was to stand for trial, otherwise a "*Nolle Prosequi*" to be entered.

*J. Hutchings*, county attorney, & *T. W. Vose*, for the state.

*C. P. Stetson*, for the respondents.

Peters, J. The Consolidated European and North American Railway Company is indicted for causing the death of Jasper A. Roberts through the alleged negligence of its servants and agents in operating the road. It is conceded, that, at the time of the accident occasioning the death, the railroad corporation was not in the possession of the road. The mortgagees of the road were in the possession of it, having the entire management and control. The question is, whether under such circumstances, the railroad corporation can be made responsible for the forfeiture or damages which the statute imposes for such loss of life. Our judgment is that the indictment cannot be sustained.

The statute is this: "Any railroad corporation, by whose negligence or carelessness, or by that of its servants or agents while employed in its business, the life of any person, in the exercise of due diligence, is lost, forfeits not less than five hundred nor more than five thousand dollars, to be recovered by indictment

found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally; if neither, to his heirs."

Obviously enough, these provisions do not touch the respondents. They then had no business upon the road. They had no servants or agents connected with the road. The employees engaged in running the road were entirely independent of the corporation and free from its control. The corporation had no more participation in the affairs and direction of the road than the deceased had. Certainly, the mortgagees were not the agents of the mortgagers. Here the mortgagees were principals. An agent is presumed to be under some control of his superior. The mortgagees were under no control, of any kind, of the corporation. The word "agent," coupled with the word "servant," is presumed to have a meaning somewhat *ejusdem generis*. In the earliest statute on the subject, (c. 70, Laws of 1848) the servant or agent is declared to be "the person having charge of the locomotive engine . . . or the conductor or other person having charge of any car or train of cars on the road."

By the act of 1855, (c. 161, §§ 1 and 2) the statutory provision was remodeled and its terms extended so as to embrace other common carriers, and imposing upon railroad corporations precisely the same liability it did upon the proprietors of steamboats and stage coaches. Would any one contend that a mortgager of a steamboat or stage coach was liable for the negligence of a mortgagee in the management of the property, the mortgagee having the entire direction and control?

In strictly civil suits, it would not now-a-days be pretended that a mortgager, out of possession and control of property real or personal, could be held for the acts of the mortgagee who is in the possession of such property and has an independent control of it. The maxim *respondeat superior* does not apply. This doctrine is well illustrated in many modern cases. We cite a few pointed cases which are particularly pertinent to the positions assumed in the case at bar. *Eaton* v. *Eu. & N. A. R. Co.* 59 Maine, 520, 526. *Mahoney* v. *At. & St. Law. R. R. Co.* 63 Maine, 68. *Fletcher* v. *Boston & M. Railroad*, 1 Allen, 9. *Ballou*

v. *Farnum*, 9 Allen, 47. *Conners* v. *Hennessey*, 112 Mass. 96. *Sprague* v. *Smith*, 29 Vt. 421. Why should a different rule fix the rights of the parties under this indictment? It is admitted, in all the discussions upon this and similar statutes, that the remedy here sought for, although criminal in form, is in all its incidents a civil process. Massachusetts, New Hampshire and Maine furnish the remedy in the form of an indictment. New York and other states allow essentially the same prosecution to be carried on by means of a special action of the case in the name of an administrator of the deceased. The case *State* v. *Grand Trunk Railway*, 58 Maine, 176, decides, for very satisfactory reasons, that the same rules of evidence and the same rules of law should be applied in prosecutions of this kind as in analogous civil actions for damages. The forfeiture is recoverable rather as damages than punishment. There would be no forfeiture where the deceased leaves no widow nor children nor heirs. See *State* v. *Gilmore*, 24 N. H. 461, 472.

This corporation cannot be held. And, for the act alleged, as the statute stands, we do not see how any person or party can be.

*Indictment, by agreement, to be quashed.*

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

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GUSTAVUS S. BEAN *vs.* ARIEL S. AYERS, *et als.*

Penobscot. Decided February 7, 1878.

*Exceptions. Trial. Words, "thereupon." Pleading.*

A party in whose favor a ruling has been made at *nisi prius*, exceptions thereto having been taken by the other side, may, upon his own motion and with the permission of the court, waive the ruling in his favor and have the exceptions sustained at *nisi prius*, without carrying them to the law court.

After a demurrer to a declaration has been filed and sustained and a new declaration by leave of court filed upon payment of costs, the case is then ready for further proceedings or trial, and neither side is entitled to postponement or delay except in the discretion of the court.

A venue is sufficiently alleged in a declaration where the agreement in suit with the prefix of "Penobscot ss." is declared upon *in hæc verba*, the count upon it

alleging that the property sued for was situated, (when attached and delivered to the defendants as keepers for the plaintiff as an officer) in Penobscot River, "in Penobscot county."

The word "thereupon" in a declaration may be taken to mean "in consideration thereof," where the connecting matter would seem to require such an interpretation.

The declaration alleges that the plaintiff, an officer, attached property and delivered it to the defendants, and that thereupon the defendants executed and delivered to the plaintiff an agreement, the declaration then setting out the agreement in its exact words and figures, but not according to its legal effect, and it is then averred that the defendants became liable thereby to return the property on demand or to indemnify the plaintiff. *Held*, on special demurrer, that the declaration was bad in point of form. No promise, but only the written evidence of a promise, is alleged.

The error is not cured by the allegation that the defendants thereby became liable to return the property. This is an averment of law and not of fact. It is the plaintiff's conclusion or inference of law from the facts previously alleged.

Special demurrers are not practically abolished by our statute of amendment, which provides that no process shall be abated, arrested or reversed for want of form. Bad pleadings are not thereby to stand as if good, but they are to be corrected and made good by amendment.

On Exceptions.

Case upon the defendants' accountable receipt for 1945 spruce and hemlock logs attached by the plaintiff, as a deputy sheriff, upon certain writs, of which that in *Sheridan* v. *Ireland*, 66 Maine, 65, was one. The writ in this case is dated November 23, 1876, and was entered at the January term, 1877, when the defendants filed a general demurrer to the declaration, which was joined by the plaintiff and overruled by the court. The defendants filed exceptions.

Under the entry of the exceptions on the docket, the court ordered the entry: "To be argued in thirty days by the defendants or else judgment for the plaintiff." Arguments were furnished accordingly, but were not sent around to the justices of the law court.

On the first day of the April term, 1877, upon the consent of the plaintiff's counsel that the exceptions be sustained, and without the consent of the defendants' counsel, the presiding justice ordered the entry to be made on the docket: "Exceptions sustained." On the second day, against the defendants' objection,

the justice allowed the plaintiff to amend his writ by filing a second count, setting out that the plaintiff was a deputy sheriff; that as such by virtue of seventeen certain writs, dated August 14, 1872, returnable to the supreme judicial court then next to be held, &c., on the first Tuesday of October, 1872; in which writs the following named persons were plaintiffs and Daniel E. Ireland of, &c., and certain logs then in Penobscot river in said county were defendants, giving the names, the first of which was John Sheridan. The declaration then sets out that the plaintiff attached the logs, and at the request of the defendants delivered the logs to them, "and thereupon the said defendants executed under their hands and delivered to the plaintiff an agreement in words and figures as follows, to wit: "Penobscot ss. August 23, 1872." Then follows the receipt, *ipsisimis verbis*, closing with the signatures. Then follows: "Whereby the said defendants then and there became liable to return said logs to said plaintiff on demand, or on failure so to do, indemnify and save harmless," &c., but not alleging any promise. Then follows an averment of the entry of the writ, the recovery of the judgments, the demand and refusal to return the logs and failure to save harmless, to the damage, &c.

To this new declaration, the defendant demurred specially, assigning for causes:

"First, that no venue or place is alleged in the said new declaration, where the said agreement therein set forth, was made by the said defendants with the said plaintiffs, or where the said causes of action therein stated, or any of them, are supposed to have accrued.

"Second, that no consideration is alleged in said new declaration, according to the settled and established form of expression and practice, or in any way alleged therein, for said agreement therein set forth as made by the said defendants, with said plaintiff, or for the said causes of action or any of them set forth in said new declaration, and claimed by said plaintiff therein against said defendants.

"Third, that the legal purport and effect of said agreement set forth in said new declaration as made by said defendants with said

plaintiffs, is not directly alleged in said new declaration, but that the said agreement is therein improperly set forth in words and figures, and that the liability and promise of said defendants thereon, by recital and reference, is in form and manner improperly, circuitously, indirectly, argumentatively and insufficiently alleged and set forth. And also that the said new declaration is in other respects uncertain, informal and insufficient."

The presiding justice after joinder overruled this demurrer and adjudged the new declaration or second count good; and the defendants alleged exceptions.

*W. S. Clark*, for the defendants.

*L. Barker*, *T. W. Vose & L. A. Barker*, for the plaintiff.

PETERS, J. The two questions first presented in the exceptions arose in this way: A demurrer was filed to the plaintiff's declaration and overruled. The defendants excepting to the ruling, the case was marked law. At the next term of the court, (at *nisi prius*) and before the case was considered by the law court, at the instance of the plaintiff and with the consent of the justice presiding, an entry was made upon the docket that the defendants' exceptions were sustained and the declaration adjudged bad. The plaintiff then amended his declaration upon the payment of costs, and at his request the cause was ordered to be in readiness for trial or further proceedings at the same term, both rulings of the court being objected to by the defendants.

We think the plaintiff had the right to have the entry made, the court assenting. The act was no more nor less than a waiver by the plaintiff of a previous ruling in his favor. There was no possible use in going above to have exceptions sustained when the same result was tendered below. This point places the defendants in the inconsistent attitude of opposing the doing of that which they were seeking to have done.

To our minds, the other objection is not well taken. The statute provides that, "at the next term of the court in the county where the action is pending, after a decision on a demurrer has been certified, by the clerk of the district to the clerk of such

county, and not before, judgment shall be entered on the demurrer, unless the costs are paid, and the amendment or new pleadings filed on the second day of the term." This provision does not apply in favor of these defendants. It only reaches the condition of the plaintiff. The section of the statute allowed the plaintiff time and opportunity to amend his declaration upon payment of costs. He could take all the time allowed or not as he pleased. It is the defeated party only who needs the grace extended by the statute. Judgment shall be entered "on the demurrer" if he does not comply with the conditions imposed upon his right to proceed. Here no certificate had come or was to come from the law court. The necessity of it had been obviated. The conditions having been complied with by the plaintiff, the cause was then in a position for further trial, neither side being entitled to delay as a matter of strict legal right.

The plaintiff having amended his declaration, and the defendants being ordered to again proceed, they demurred specially to the new declaration. This, as amended, counts upon a receipt given to the plaintiff, an officer, for the safe keeping of property attached by him on certain writs. The objections set down for demurrer are: That no venue is alleged; that no consideration for the undertaking of the defendants is set out; that the operation and effect of the written contract is not directly averred in the declaration; and that reciting (as here) a written contract in its precise words and figures instead of declaring upon its legal force and effect is improper pleading.

Is a venue alleged? In the contract, recited in the declaration *in hæc verba*, the prefix "Penobscot ss." appears at its head, signifying the official character of the document. The count declares that the logs were attached in Penobscot river in "Penobscot county" by an officer of the county. No other place is named therein. This is enough. The objection is of only a formal and most technical kind. A venue was originally employed to indicate the county from which the jury was to come. With us that is a matter regulated by law. In the early days of the law it was not the practice to aver a venue in Massachusetts. (See 5 Mass. 96). Still, it is to be confessed that the allegation of the venue

gives symmetry and dress to the forms employed by the pleader, and its use is to be commended.

The necessity of stating a venue, even as a matter of form, is rather reluctantly confessed by the authorities. It is enough to name a place in the county without naming the county. *Martin* v. *Martin*, 51 Maine, 366. Or the county only may be named without naming any place within the county, whenever, as here, the jurors are to be awarded *de corpore comitatus*. Bac. Ab. Visne or Venue; and cases there collected. The statement of only the county is not enough, however, where the place at which the alleged act is done gives to a particular plaintiff or against a particular defendant the right of action. *Vide* authorities already cited. When a venue is once stated, all matter following is drawn to it and qualified by it. And it may be laid upon the margin of the declaration or be stated in the body of it. *Slate* v. *Post*, 9 Johns. 81. Many cases to this effect may be found in the later editions of Chitty's Pleadings, in the notes. In *State* v. *Corson*, 10 Maine, 473, 476, it was held a venue was sufficiently stated in a declaration in *scire facias* on a recognizance in a criminal case, by an allegation therein that the respondent was ordered by the magistrate to appear before the court of Common Pleas for "Penobscot county."

The next objection is, that no consideration is alleged. If this defect exists, the objection is fatal as a matter of substance. The consideration need not be directly averred, if necessarily implied from all the averments. The plaintiff declares that he delivered the logs attached to the defendants at their request and that "thereupon" the defendants delivered their agreement to the plaintiff. The word "thereupon" undoubtedly has different meanings. The defendants contend that in this declaration it is used merely to mark the succession of facts in the order of time. We think, however, it may fairly be considerered as referring to the reason of the promise of the defendants.

We find more difficulty upon the more prominent point of objection, that the contract is set out in its entire words and figures and not according to its legal effect. No doubt, it is much the better practice to set out an instrument, not by its form and

its terms, but according to its legal operation and effect. But there is no imperative rule against reciting an instrument *in hæc verba* in pleadings. A declaration will not be rejected on that account, provided that upon all the averments and recitals taken together a good cause of action is sufficiently stated. It is an objectionable mode of pleading where it involves a needless and unnecessary statement of facts. A demurrer, however, does not reach that difficulty. A demurrer complains of too little and not too much matter in a declaration. The maxim *utile per inutile non vitiatur* applies. The remedy may be to move to strike out or reduce useless and redundant allegations. Upon inspection, the court may order it to be done.

But the point here urged is, that the recital of the contract is not accompanied with averments enough to constitute a legal declaration. The weakness in the declaration is that, although an action of assumpsit, no promise is directly and positively asserted therein, but it is stated argumentatively and only inferentially, if at all. The plaintiff declares that the defendants executed under their hands and delivered to him an agreement. He does not say that they made any promises in accordance with such agreement. He does aver that thereby the defendants became liable to perform the agreement described in the declaration. But that is an allegation of law and not of fact. It is the pleader's inference of law from the facts previously stated. Gould Pl. c. 9, § 29. *Millard* v. *Baldwin*, 3 Gray, 484. Nor does a demurrer admit a mere statement of a conclusion of law from the facts averred. Chitty Pl. 2 vol. 18th Am. ed. 694, and notes. *Chapin* v. *Curtis*, 23 Conn. 388. *Craft* v. *Thompson*, 51 N. H. 536. The contract itself should have been averred, and not merely the written evidence of the contract. The facts are not averred, but the written evidence of the facts only is averred. The writing is a matter of evidence, and not a matter of allegation. It is evidence, but not conclusive evidence, of an undertaking and promise. It may have been obtained by fraud or mistake; in which case it contains no legal promise. The general issue in assumpsit is that the defendant never promised. That plea would not strictly raise an issue here, for the plaintiff does not assert that these defendants ever

did promise. The plaintiff avers that he has a written evidence of promise, and a general denial would be that he has not.

The authorities are many that support this view. We quote from a few of them. Chitty says: "The principal rule, as to the mode of stating the facts, is, that they must be set forth with certainty; by which term is signified a clear and distinct statement of the facts which constitute the cause of action or the ground of defense." All the writers upon the subject of pleading at common law say the same thing. Here a material fact is not affirmatively stated. Chitty Pl. Declaration.

In *Watriss* v. *Pierce*, 36 N. H. 232, it was decided that a replication was bad which traversed no fact alleged in a plea, but which was mostly a statement of facts which would in evidence tend to prove a point had it been properly pleaded, because it offered no issue by the finding of which the case could properly be determined. Bell, J., says: "The facts essential to a defense must in general be expressly and substantially alleged. The statement of mere evidence tending to prove a material fact is not sufficient. Such a mode of pleading, if admitted, would refer the matter of fact in question to the court instead of the jury. Thus, if in trover the plaintiff alleges a demand and refusal, but omits to aver a conversion, the declaration is ill, the demand and refusal being only evidence of a conversion, which is the gist of the action." See the numerous cases cited in the opinion in that case.

In *Hughes* v. *Wheeler*, 8 Cow. 77, it was held that a plea by a defendant that he had given the plaintiff his (defendant's) note for the demand in suit, which he accepted, was bad in substance. He should have given the note in evidence under the general issue. *Church* v. *Gilman*, 15 Wend. 656, was a case calling for the decision of a similar question. There the rejoinders recited the facts at large. The opinion declares that "facts, and not the evidence of facts, must be pleaded, or the pleading will be held bad as argumentative." It is further said: "The rejoinders are all argumentative. The defendant has pleaded the evidence of the fact of delivery, instead of the fact itself, and for that cause the rejoinders are bad." In *Fidler* v. *Delavan*, 20 Wend. 57, the court say: "Another defect is, that the evidence of the facts charged is

spread out in the plea instead of the facts themselves. This is a violation of one of the first rules of pleading, which requires a statement of the facts constituting the plaintiff's cause of action or the defendant's ground of defense. A plea should be direct and positive and not by way of rehearsal or argument, which leads to prolixity and expense."

In *Palister* v. *Little*, 6 Maine, 350, the question here presented was virtually decided favorably to the present defendants; and in *McLellan* v. *Codman*, 22 Maine, 308, the decision of a similar question was the other way, upon the ground that the demurrer there was general and not special, the court admitting the principle. *Vide*, also, the following authorities: *Steuben Co. Bank* v. *Mathewson*, 5 Hill, 249. *Colvin* v. *Burnet*, 17 Wend. 564. *Dyett* v. *Pendleton*, 8 Cow. 727. *Willard* v. *Williams*, 7 Gray, 184. Story Eq. Pl. § 241.

Special demurrers are not practically set aside by § 9, c. 82, R. S., which provides that no process shall be abated, arrested, or reversed for want of form only, and allowing amendments liberally. The idea of the statute is, not that bad pleadings shall stand as good, but that they may be corrected and made good by amendment. Special demurrers have been often entertained, although the statute has been in existence ever since we were a state. We concur with the opinion expressed by the court of Connecticut, (*Andrews* v. *Thayer*, 40 Conn. 156) upon a statutory provision substantially like our own. The opinion there states: "That statute was never designed to affect demurrers. It has been in existence nearly two hundred years, and has been preserved unaltered during this long period of time, though revision after revision of the statutes has been made and scores of cases have been tried in the higher courts upon special demurrers, no question being made but that such pleas were proper."

The objection of reciting the evidence instead of stating its effect in a declaration, of course, does not present the practical difficulty in this case that it might in other cases; but the principle is the same. No amendment is moved for. Whether we could allow an amendment before decision upon a special demur-

rer or not, we need not now determine. Section 19, c. 82, applies in terms to a general demurrer.

*Demurrer sustained.*

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

INHABITANTS OF SEBEC *vs.* INHABITANTS OF FOXCROFT.

Penobscot. Decided May 4, 1877.

*Pauper.*

The Act of 1873, c. 119, declares "that to constitute pauper supplies, under the laws of this state, such supplies shall be applied for in case of all adult persons of sound mind, by such persons themselves, or by some person by them duly authorized; or such supplies shall be received by such persons, or by some person duly authorized by them, with a full knowledge that they are such supplies." *Held*, that the wife is a competent person to make application for supplies for herself and children, without previous authority from, or a subsequent ratification by, her husband.

ON EXCEPTIONS.

ASSUMPSIT. The verdict was for the plaintiffs; and the defendants alleged exceptions.

*A. M. Robinson*, with whom was *A. W. Paine*, for the defendants.

*C. A. Everett*, for the plaintiffs.

WALTON, J. This case is before the law court on exceptions. It is an action by the town of Sebec against the town of Foxcroft to recover for supplies furnished the family of one Peter Fern, then residing in Sebec, but whose settlement, it is admitted, was, at the time the supplies were furnished, in Foxcroft. The supplies were applied for by Mrs. Fern; and the presiding judge instructed the jury that if Fern and his wife were living together in their marital relations, she could not, during his temporary absence, and without his authority, apply to the overseers of the poor for relief, so as to bind the town; but he added that subsequent ratification would be equivalent to prior authority.

To the ruling that subsequent ratification would be equivalent to previous authority the defendants except.

We think the exceptions cannot be sustained. The ruling, as a whole, was more favorable to the defendants than they were entitled to. It required the plaintiffs to prove either previous authority or subsequent ratification. We think they were under no obligation to prove either. Neither the act of 1873, c. 119, (defining what shall constitute pauper supplies,) nor any other act, limits the right to apply to the overseers of the poor for relief for a suffering family to the husband alone. The wife is as likely to know what her own and her children's necessities are as the husband; and if an application for relief for herself and children is made by her in good faith, and the case is one of actual destitution and suffering, neither the want of previous authority from the husband, nor the absence of a subsequent ratification by him, will prevent the supplies furnished in pursuance of such application from being pauper supplies. In such a case the application is not made for the husband; it is made by a destitute mother, in behalf of herself and children; and such an application is not only within the letter of the act of 1873, but it is clearly within its spirit and intent. We agree with the learned counsel for the plaintiffs that it would be cruelly inconvenient if relief could not be furnished a starving and freezing family of innocent children, till the consent of an absent, or, it may be, a heartless father could be obtained.

The rulings excepted to were not independent rulings—they were modifications of a previous ruling—and, as the defendants were not entitled to the previous ruling, they could not be prejudiced by its modification. In its modified form it was more favorable to the defendants than they were entitled to.

*Exceptions overruled.*
*Judgment on the verdict.*

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

DAVID R. STRAW, jr., executor, *vs.* TRUSTEES OF THE EAST MAINE CONFERENCE OF THE METHODIST EPISCOPAL CHURCH, *et als.*

Piscataquis. Decided May 8, 1877.

*Will. Costs.*

A bequest to the "Methodist Episcopal Missionary Society of Maine" may be taken by the "Trustees of the East Maine Conference of the Methodist Episcopal Church," there being no society of the former name, and the latter being an incorporated institution created for the purpose of maintaining the cause of domestic missions in Eastern Maine, within which territorial section the testatrix resided at the time of her death.

The costs of a suit in equity, including counsel fees on both sides, instituted to ascertain the meaning of an ambiguous clause in a will, may be charged to the general assets of the estate, as having been occasioned by a want of care and precaution on the part of the testator himself.

BILL IN EQUITY, asking the construction of the will of Bial Edes, a widow, who died at Guilford, August 15, 1874, without parents or issue. The will, dated July 8, 1874, duly proved at the October term of the probate court, 1874, contains three items. The first names the plaintiff executor and provides for debts and funeral expenses. Then follows:

"Second—I give and bequeath to each of my sisters, Betsey Mitchell, Lucretia West and Phebe Soule, and each of my brothers, Cornelius Soule and Isaac Soule, if living, the sum of one dollar.

"Third—I give, devise and bequeath all the rest and residue of my estate, real and personal, to the Methodist Episcopal Missionary Society of Maine, to be paid to them as soon as may conveniently be done after my decease."

The bill states that there is no society so named; but there is one corporation named "Trustees of the East Maine Conference of the Methodist Episcopal Church," and another named "Missionary Society of the East Maine Conference," and asks the construction of the will in this: Whether the devise under the circumstances of the case is valid and will justify the plaintiff in delivering the residue of the estate to either of the corporations, and if to either, which.

Other facts appear in the opinion.

*A. W. Paine*, for the plaintiff.

*J. M. Goodwin & W. F. Lunt*, for the heirs-at-law.

PETERS, J. The testatrix made a bequest to "The Methodist Episcopal Missionary Society of Maine." This is, no doubt, a charitable bequest. *The Maine Baptist Missionary Convention* v. *City of Portland*, 65 Maine, 92. And it is to be sustained, if either the trustee or the *cestui que trust* can be ascertained. *Howard* v. *The American Peace Society*, 49 Maine, 288.

There is no society answering literally the description in the will. There are four societies which, by possibility, might compete for the bequest; to one of them it evidently belongs. They are:

1. The Missionary Society of the East Maine Conference.
2. The Maine Conference Missionary Society.
3. Trustees of the Maine Annual Conference of the Methodist Episcopal Church.
4. Trustees of the East Maine Conference of the Methodist Episcopal Church.

The state of Maine is divided territorially by the Methodist denomination into two general conferences, the Kennebec river being mainly the dividing line; that west of the river including therewith a portion of New Hampshire. These conferences are neither of them legal corporations, but are merely assemblies composed of ministers and delegates from the churches, and presided over by the bishop.

Connected respectively with these conferences, are the two societies first and secondly named in the above list. Neither can be entitled to the bequest. They are not incorporated. They are merely associations, organized under the rules and discipline of the Methodist church, for the purpose of collecting and forwarding to the parent society in New York such funds as may be gathered for the use of foreign missions; such parent society disbursing its funds anywhere in or out of the United States and the territories. It is reasonably certain, we think, that the testatrix designed her contribution for a missionary society operating within the state of Maine.

The societies thirdly and fourthly named in the above list are both incorporated by the state of Maine; and their purpose is, to receive and hold funds for the general conferences, to be disbursed for domestic missionary purposes within the territory of the conferences with which they are respectively attached. The thirdly named is the legal trustee of the western conference, and the fourthly named (or last named) bears the same relation to the eastern conference, so to call them. Of these two societies, we are of opinion that the last named is the one entitled to receive the bequest. It is a Methodist missionary society. It is situated, and its work is done, in Maine. The testatrix resided within its territorial limits. She was more likely to have this institution in mind than any other. It is more strictly a state of Maine missionary society than the other, because the other has a portion of New Hampshire annexed. There is no clash between any of the four societies in their claims upon this fund. They are represented in this litigation by single counsel. They do not object to, but rather seek, the result we arrive at. We think there should be a decree in favor of the "Trustees of the East Maine Conference of the Methodist Episcopal Church."

The costs of this suit, including counsel fees on both sides, are to be paid from the general assets of the estate; as having been occasioned by the want of care and precaution on the part of the testatrix herself. The ambiguity in her will made the suit necessary. *Deane* v. *Home for Aged Colored Women*, 111 Mass. 132, 135. If not amicably adjusted, the counsel fees may be determined by a judge at *nisi prius* or by a master.

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

CAROLINE M. WALKER *vs.* JESSE B. TEWKSBURY, and the INHABITANTS OF ATKINSON, trustees.

Piscataquis. Decided July 3, 1877.

*Trustee process.*

The general rule, that a writ against an individual which may be fully served fourteen days before one term of the S. J. court is not properly returnable at a subsequent term, does not apply where the date of the writ and the service on a corporation named as trustee therein, are less than thirty days prior to the return day of the earlier term.

*Thus*, where a trustee writ was dated February 7, 1876, served on the inhabitants of a town as trustees the next day and on the principal defendant, February 12, and made returnable to and entered at the September term instead of the preceding February term, which commenced its session February 29: *Held*, that a motion to dismiss was properly overruled.

ON EXCEPTIONS.

ASSUMPSIT on note. On the second day of the return term, Tewksbury filed a motion to dismiss the action, because the writ, which was dated February 7, 1876, served upon trustees February 8, 1876, and upon the principal defendant February 12, 1876, was made returnable to and entered at the September term, instead of the preceding February term for said county, which commenced its session on February 29, 1876, the said writ having been made and fully served more than fourteen days before the February term.

The presiding justice overruled the motion; and the defendant alleged exceptions.

*A. G. Lebroke*, for the principal defendant.

*W. P. Young*, for the plaintiff.

APPLETON, C. J. The time in which service is to be made and the mode and manner of serving process are regulated by statute.

The statute authorizes trustee process and prescribes the service when individuals are defendants and trustees.

By R. S., c. 81, § 18, process upon corporations must be served "thirty days before the return day thereof."

By c. 131 of the acts of 1873, an amendment is made of the

eighth section of R. S., c. 86, and it is therein provided that "all corporations may be summoned as trustees, and the writs served on them as other writs on such corporations."

The creditor may sue out trustee process and attach the property of his debtor in the hands and possession of a corporation. He can only make a valid service on such corporation by giving thirty days notice. There is no time in which he has not a right to such process when process can be legally sued out and served. The writ cannot have different return days—one for the defendant and another for the corporation sued as trustee. As the right to sue out trustee process is given to all and at all times in which process may be sued out, it follows that the service to be made upon the defendant must correspond to that upon the trustee, else there will be periods of time each year in which no suit against a corporation as trustee can be sued out and served. Nor does the defendant suffer any harm thereby, as there is no rule of the common law or provision of the statute which forbids his payment of what he may owe before the return day of the writ.

*Exceptions overruled.*

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

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CHARLES A. EVERETT, administrator, *vs.* JOSEPH W. HALL.

Piscataquis. Decided January 3, 1878.

*Sale.*

Property, in the possession of a vendee who is not to become the owner of the title until he has fully paid for the same, may, at any time before the price is wholly paid, be mortgaged by the vendor to another person, and such person will acquire a title to the property thereby superior to that of the conditional vendee.

ON EXCEPTIONS.

TROVER for a shingle machine.

Verdict for the plaintiff for $226.10; and the defendant alleged exceptions.

*A. G. Lebroke*, with whom was *A. M. Robinson*, for the defendant.

*C. A. Everett*, for the plaintiff.

PETERS, J. One Pearson purchased a shingle machine, giving the seller a note therefor and a mortgage on the machine to secure the same. The plaintiff is the assignee of the note and mortgage. On the day of the purchase, before the mortgage was recorded, Pearson sold the machine to the defendant under an agreement that the title should remain in Pearson until the machine was paid for, the defendant taking and keeping possession. In a few days thereafter the mortgage was recorded, before which something was paid towards the machine by the defendant, and he had fully paid Pearson therefor when this action of trover was instituted to recover its value. On the trial it was ruled, we think correctly, that the title to the machine was in the plaintiff, and that he could recover its full value. The mortgage became effectual to pass the title as soon as it was recorded.

Whether the defendant would have any lien for advances made before the mortgage was recorded, in a court of equity, would depend upon facts and circumstances the weight of which we cannot now determine. *Foss* v. *Haynes*, 31 Maine, 81. *Bragg* v. *Paulk*, 42 Maine, 502.

At law, the defendant has no title. It is not material that payments were made towards a title before the title of the plaintiff attached, as long as the payments were not in full. It matters not how near the defendant came to the title, falling short of it. There is no more logic in holding that the defendant got a title when the last dollar only of the consideration was unpaid, than when the first dollar only was paid. Shepard's Touchstone says: "It is a general rule, that when a man hath a thing he may condition with it as he will. The condition doth always attend and wait upon the estate or thing whereto it is annexed." The transaction was not strictly a sale, but rather a contract for a sale. The condition unperformed stood in the way of the defendant's title when the plaintiff's title accrued. Property situated as this was could not be attached as the property of the conditional

vendee, nor could he sell it. If it could not be sold by the vendor nor attached as his, it could neither be sold nor attached at all. To admit exceptions to the common law rule upon this subject, subverts the rule altogether.

The authorities in this state bear out the doctrine asserted by us, fully. *Tibbetts* v. *Towle*, 12 Maine, 341. *Leighton* v. *Stevens*, 19 Maine, 154. *Sawyer* v. *Fisher*, 32 Maine, 28. *Brown* v. *Haynes*, 52 Maine, 578, carries the principle in its practical application further than perhaps any previous case. There one-half the purchase money had been paid by the purchaser, and the seller was allowed to recover the full value of the property of a third person, who had bought it of the conditional vendee in good faith and for value received. The same view is taken by several New England courts, while the doctrine of the New York court is the other way. *Coggill* v. *H. & N. H. R. R. Co.* 3 Gray, 545. *Porter* v. *Pettengill*, 12 N. H. 299. *Davis* v. *Bradley*, 24 Vt. 55. *Smith* v. *Lynes*, 1 Seld. 41. 1 Parsons Con. 537; and note. No other questions which can be considered as raised under such a generality of exceptions as is presented in the case, require discussion.

*Exceptions overruled.*

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

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ALVIN BLODGETT *et al. vs.* GEORGE R. SLEEPER.

Waldo. Decided July 3, 1877.

*Partnership.*

A partner has no right to draw a firm order on a debtor to the firm in payment of his own private debt, without the assent, express or implied, of his copartner.

But the money received on such order cannot be recovered in the name of the firm.

Whether, in such case, an action at law could be maintained in the name of the innocent partner; and, if it could, whether the writ could be amended under Stat. 1874, c. 197, *quære.*

ON REPORT.

ASSUMPSIT for money had and received, to recover for two orders, one of $25 and another of $35, drawn by one of the nominal plaintiffs, De Proux, in the firm name of Blodgett & Co. on two debtors to the plaintiff firm in payment of De Proux' private debt to the defendant. Plea, never promised.

Blodgett testified that the order was drawn and the money applied without his knowledge or assent; De Proux testified to the contrary.

*Emery Boardman*, for the plaintiffs.

*W. H. Fogler*, for the defendant.

VIRGIN, J. De Proux had no right to draw the orders on the debtors of the firm of which he was a member, in favor of the defendant, without the assent, express or implied, of his copartner. By so doing he applied the effects of the partnership in payment of his own private indebtment, in fraud of his copartner. *Stearns* v. *Burnham*, 4 Maine, 84. And we are not satisfied by the reported evidence that he ever had any such assent, or that his copartner ever adopted or ratified the transaction. To be sure there were some instances of both partners paying their small individual debts from the assets of the firm. But while the law does not require such payments to be so frequent and uniform as to amount to a usage before assent can be rightfully inferred therefrom, (*Darling* v. *March*, 22 Maine, 184) the rule is too important to the commercial world to allow its practical nullification by drawing such an inference from slight and inconclusive facts.

But this action cannot be maintained in the name of both of these plaintiffs to recover the money received on the orders, because of the necessity of setting up the fraudulent misapplication of the partnership assets on the part of one of the plaintiffs. *Homer* v. *Wood*, 11 Cush. 62. *Farley* v. *Lovell*, 103 Mass. 387. These cases we consider decisive of the case at bar.

Whether an action at law could be maintained in the name of the innocent partner without the joinder of De Proux, is not now before us. Or, if it could, whether the writ could be amended under Stat. 1874, c. 197, by striking out the name of

De Proux, we are not called upon to decide, since no such motion was submitted at *nisi prius*.

*Plaintiffs nonsuit.*

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

LIBBEY, J., concurred in the result.

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JOHN B. HILL, administrator of the estate of Waldo T. Peirce, *vs.* WEBSTER TREAT, admistrator of the estate of Robert Treat.

Waldo. Decided July 3, 1877.

*Trust. Executors and administrators.*

The title of one who purchases of a testamentary trustee is defeated by the insolvency of the testator's estate and a sale of the property by the administrator for the payment of debts.

The sale of property by the survivor of an insolvent partnership, though made in accordance with the will of the deceased partner and for the purpose of paying partnership debts, is void unless he first qualify himself to administer upon the partnership estate by giving the bond required by law and obtaining a license to make the sale from a court of competent jurisdiction.

ON REPORT.

ASSUMPSIT upon the following contract, dated October 12, 1857, and signed by Robert Treat: "Received of Waldo T. Peirce, by hand of George A. Peirce, a deed signed by said Waldo T. Peirce, as surviving partner of Hayward Peirce, all the interest which the said Hayward Peirce had in township No. 2, in eleventh range, Piscataquis county, said deed dated October 9, 1857, also a deed dated October 9, 1857, conveying to me and George A. Peirce, trustee of Catharine Peirce, by said Waldo T. Peirce, of all his own interest and his late partner, Hayward Peirce, had in township No. one, in the eleventh range, Piscataquis county.

"Now, I hereby agree to account to Waldo T. Peirce and Hayward Peirce, their heirs or assigns on demand, at the rate of one and 50-100 dollars per acre for all the land that comes to me by said deeds when I receive a good title of the same, with the understanding that my accounts against the firm of W. T. & H. Peirce

shall be paid from the above, and I also agree that the accounts referred to above against Waldo T. Peirce and W. T. & H. Peirce are and shall be such as I now hold against them."

The declaration alleges a demand and a refusal to account.

The plaintiff put in the contract, the deeds referred to, also the will of Hayward Peirce made immediately before his death in December 1854, the first item of which provides for the payment of his private and partnership debts and for that purpose, in addition to the control and rights which the law gives a surviving partner, gives his brother and partner Waldo T. Peirce, full power to sell and convey any real estate held by the testator and brother in common, in order to pay copartnership liabilities of the firm, with certain immaterial exceptions.

In order to present certain questions for the determination of the court it was admitted:

"That the estate of Hayward Peirce was insolvent. It was represented insolvent in the probate court, June 28, 1858. That the copartnership named in the will was also insolvent, and that the lands sold, now in question, were sold to pay the debts of the firm and were needed for that purpose.

"That said Robert Treat held the land during his life; that since his death, and a division of his real estate among his heirs, the heirs have sold and conveyed the whole of the lands in question in different parcels and by each heir separately, some by quit-claim deeds and some by deeds of warranty.

"That the administrator of Hayward Peirce's estate, under a decree and order of court of probate, sold, January 8, 1868, all the right and interest of said estate in these lands to W. T. Peirce."

Waldo T. Peirce, the plaintiff's intestate, died in April, 1858.

If in the opinion of the law court this action can be sustained for any amount, the defendants demanded the allowance of their account in set-off, which question of amounts is to be referred to some proper person to be appointed by the court at *nisi prius*, and the same person is to determine the actual number of acres which were conveyed by the deed to Robert Treat from Waldo T. Peirce.

*A. W. Paine*, with *J. Williamson*, for the plaintiff.

*N. H. Hubbard*, for the defendant.

WALTON, J. The principal question is whether the title of one, who purchases of a testamentary trustee, is defeated by the insolvency of the testator's estate and a sale of the property by the administrator for the payment of debts.

We think it is. All testamentary titles are liable to be thus defeated. The title of a devisee is defeated by such a sale. So must be the title of one purchasing of him. The same must be true of the title of a testamentary trustee, and of one holding under him. This is a necessary result of the rule of law that the testator's property is primarily holden for the payment of his debts, and may be sold by his administrator for that purpose. Such a sale necessarily defeats all testamentary titles. The right to dispose of property by will is subject to this express statutory provision, that no part of the estate can be exempted from liability for the payment of debts, if required. R. S., c. 74, § 7.

The title of Robert Treat must therefore fail, unless it can be supported upon some other ground than the power of sale contained in Hayward Peirce's will. The sale by the administrator under license from the probate court rendered that source of title inoperative.

It is suggested that perhaps the sale may be sustained upon the ground that it was made by Waldo T. Peirce, as surviving partner, as well as by virtue of the authority contained in his brother's will. We think not. Such a sale could not legally be made unless the surviving partner first qualified himself to administer upon the partnership estate by giving the bond required by law; nor unless he first obtained a license to make the sale from a court of competent jurisdiction. *Cook* v. *Lewis*, 36 Maine, 340. *Buffum* v. *Buffum*, 49 Maine, 108. No such bond appears to have been given in this case; nor is it claimed that any such license was obtained.

The result is that Robert Treat's title to so much of the land attempted to be conveyed to him by Waldo T. Peirce, as formerly belonged to Hayward Peirce, must be regarded as having failed;

and to this extent the right to maintain this action to recover the price agreed to be paid for it has also failed; but for the balance of the land conveyed the action is maintainable; and the amount to be recovered must be determined by some proper person to be appointed by the court at *nisi prius*, as agreed by the parties in the report of the case.

*Action maintainable in part, amount to be determined by a person to be appointed by the court at nisi prius, as agreed in the report, upon the principles stated in the opinion.*

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

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STATE OF MAINE, by W. W. Rice, warden, appellant, *vs.* F. O. HICHBORN, administrator.

Waldo. Decided July 28, 1877.

*Insolvent estates.*

Commissioners of insolvency have no jurisdiction over preferred claims.

Their adjudication that a preferred claim is a non-preferred one does not deprive the creditor of any right to maintain a suit.

An appeal of a creditor from an adjudication of commissioners of insolvency that his claim is a non-preferred one will not be sustained.

ON REPORT.

APPEAL from the decree of the judge of probate, under R. S., c. 63, § 21.

Nathan G. Hichborn died testate. The defendant was appointed his administrator with the will annexed. The plaintiffs' agent, the warden of the state-prison, presented to the defendant for payment a claim against the estate, consisting of an account for sleighs manufactured at the state-prison and a note given to the selling agent for other articles manufactured there and by him indorsed to the warden. The defendant neglected and refused to pay, represented the estate insolvent, and commissioners were

appointed by whom the plaintiffs' claim was allowed and placed on the list of non-preferred claims. On a hearing on the commissioners' report, the judge of probate overruled the motion of the plaintiffs to place this claim with the list of priority or preferred claims against the estate and decreed that it be classed with non-preferred claims, and that distribution be made accordingly. From which decree and order the plaintiffs appealed.

*W. H. Fogler*, with *W. P. Harriman*, for the appellant.

I. Money due the state is a preferred claim. R. S., c. 66, § 1. "Fourth." R. S., c. 64, § 33.

II. The claim named in the report is due to the state. R. S., c. 140, §§ 8, 12, 21, 27.

*J. Williamson*, for the appellee.

I. The appellant should have moved the judge of probate for a recommitment of the report of the commissioners, for the correction of the alleged error, as provided by R. S., c. 65, § 8, and if aggrieved by the denial of such judge, an appeal from his denial would lie. The judge had no authority to amend the report, or to entertain the motion made by the appellant. Or an appeal should have been taken from the decision of the commissioners, and the claim determined in an action for money had and received, according to the provisions of R. S., c. 66, §§ 11, 13. These are the only methods of appeal prescribed.

II. But the commissioners had no jurisdiction over any preferred claim, and it should not have been brought before them.

III. If the claim was a preference, the rights of the appellant might have been adjudicated upon by the commencement of an action against the appellee, without even waiting a year after his appointment as administrator, and regardless of the insolvency of the estate. *Huse* v. *Brown*, exr. 8 Maine, 167, 168. R. S., c. 66, § 17. R. S. 1872, c. 85, § 11.

IV. By R. S., c. 63, § 21, it is provided that "any person" aggrieved, &c., may appeal, &c. In all other cases in the statute, where the right of appeal is allowed, except in criminal proceedings, the words "any party" are used. *Prima fronte*, the word

person means a natural person, and it is only by statute that it is made applicable even to a corporation. I maintain that the state is not "a person."

V. Even if the proceedings were correct, this claim is not of that nature which should make it a preferred one. If a state engages in trade or manufacturing, its contracts should be governed by the same rules of law which are applicable to those of private individuals. Under the United States bankrupt law, U. S. Statutes, § 5101, "All debts due to the state in which the proceedings of bankruptcy are pending, and all taxes and assessments made under the laws thereof" have a priority over other claims. In West Virginia, the state has a prior lien for taxes on all realty. It has been held there, that if the lien is for a debt other than taxes, the state is not entitled to any preference over other creditors of the same class. *In re* Brand, 3 B. R. 324.

APPLETON, C. J. The claim in controversy is for a debt due on state-prison account. By R. S., c. 66, § 1, "public rates and taxes and money due the state" have priority over the general creditors of an insolvent estate. If this is to be regarded as a preferred claim, then the commissioners of insolvency have no jurisdiction over it. *Flitner* v. *Hanley*, 19 Maine, 261. *Bulfinch* v. *Benner*, 64 Maine, 404. Nor does their adjudication deprive the appellant of any right to maintain a suit for the claim, if a preferred one.

If not a preferred claim, the appellants have no ground of complaint.

*Appeal dismissed.*

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

## DAVID L. HUNTER *vs.* FRANCIS E. HEATH *et al.*

Waldo. Decided October 25, 1877.

*Real action. Estoppel. Trial. New trial.*

In a real action the demandant can recover only on the strength of his own title and not on the weakness of that of the tenant.

The declarations of a party adverse to his own interest, though entitled to grave consideration, do not constitute an estoppel. They may be strong evidence of a boundary, but do not pass a title.

Where an instruction of the presiding justice, though correctly stating the law, is not sufficiently full, an exception thereto will not be sustained, unless further instruction is asked for and refused.

The question as to the actual place of the division line on the face of the earth was referred. The demandant, after one of the referees had partially surveyed a line, proposed to agree upon the line as claimed by the tenants, and to pay for what he had cut on the land, if the tenants would pay the costs of the referees; the terms were acceded to and complied with, and the agreement as to the line reduced to writing and signed by the demandant. *Held*, that the settlement of the line and the agreement signed by the plaintiff in reference thereto, were on a good and valid consideration and binding as any other contract for such consideration.

A new trial was not granted, where the evidence was conflicting and the cause left to the determination of the jury under a clear and impartial charge.

A new trial, on the ground of newly discovered evidence, which, though important, would not be likely to change the result, will not be granted where the evidence if sought for could have been as readily obtained before the trial as after.

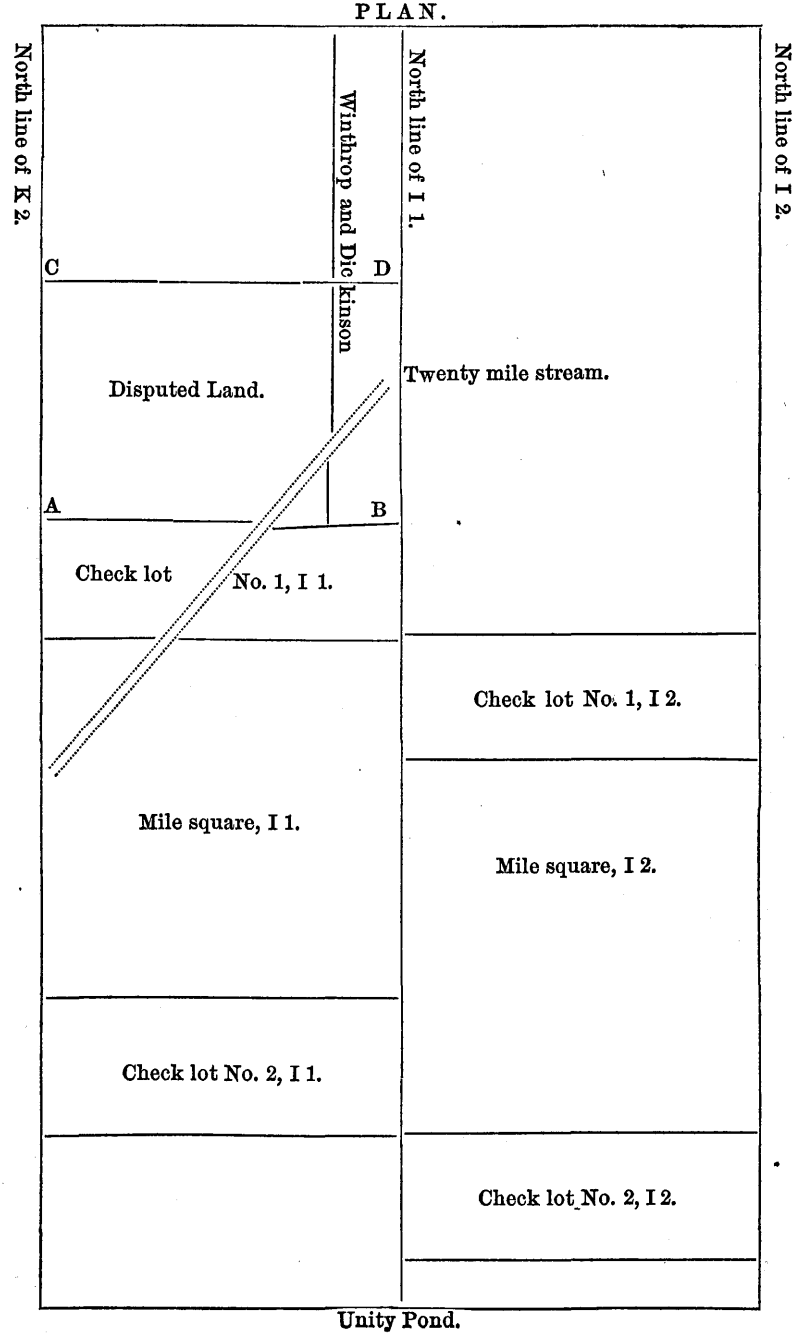
ON EXCEPTIONS.

WRIT OF ENTRY, dated July 16, 1875. The premises claimed are nearly triangular and described substantially as follows: Beginning at a hemlock tree in the south line of I 1, marked with the survey mark of Charles Hayden, for the southeast corner of the Eaton tract and the southwest corner of Check lot No. 1, I 1; thence northerly, at right angles with the south line of I 1, to the north line of said I 1; thence easterly on said north line to the twenty-five mile stream, so called; thence by the centre of said stream southerly to the south line of said fifteen mile lot I 1; and thence westerly on said south line of I 1, to the point begun at.

Plea, general issue, with a disclaimer of one portion and a claimer, so to speak, of another portion, making the whole rectangular, as follows:

71 Me. 348
80 " 112

PLAN.


North line of K 2.
Winthrop and Dickinson
North line of I 1.
North line of I 2.
C
D
Disputed Land.
Twenty mile stream.
A
B
Check lot
No. 1, I 1.
Check lot No. 1, I 2.
Mile square, I 1.
Mile square, I 2.
Check lot No. 2, I 1.
Check lot No. 2, I 2.
Unity Pond.

Beginning in the southerly line of the fifteen mile lot I 1, according to Hayden's survey, at a hemlock tree supposed to be marked with the survey mark of Charles Hayden, surveyor, as and for the corner of the Eaton tract, so called, and the plaintiff's lot, thence running north and at right angles with said southerly line of the fifteen mile lot to the southerly line of the Carver lot, being the old Winthrop and Dickinson tracts, on I 1, thence easterly on the south line of the last named lot to the west line of Check lot No. 1, I 1; thence southerly on the west line of Check lot No. 1, I 1, to the southerly line of fifteen mile lot I 1; thence westerly on the southerly line of the fifteen mile lot, I 1, to the point begun at; and as to the residue of the land described in the plaintiff's writ the defendants disclaim all title or possession.

It was conceded at the trial that the western boundary of Check lot No. 1, as shown by the plan, was the division line between the parties. The contention was as to the position of this line on the face of the earth, the plaintiff contending that C. D. was this line; and that it would give the defendants more by some twenty-four rods in length than all the land their deeds called for, referring to the ancient Hayden plan of 1812 and applying the scale thereto, from Sebasticook river easterly. The defendants, without denying this, also relied upon the Hayden plan, which appears to have been based upon a sufficiently liberal survey to give all parties the quantities called for and leave a larger surplus than the disputed strip, and contended that the early deeds under which the plaintiff claimed, admitted to have been loosely drawn, must depend for their location upon the Hayden plan to which they refer, and that applying the scale from Unity pond westerly, the line A. B. answered all the calls of the plaintiff's deeds as to quantity and derived support from the lines of occupation, which correspond not only with the lines on the check lots in range I 1, but with the extension of such of those lines as extended through range I 2, and formed opposite sides of check lots in that range as shown on the plan.

There was among much documentary and oral evidence introduced on each side, evidence of admissions of defendants' grantors

tending to show that the line was as the plaintiff claimed; and also evidence, on the part of the defendants, of an attempted reference and consequent settlement of the line between the parties in 1871. The verdict was for the defendants; and the plaintiff alleged exceptions, which sufficiently appear in the opinion.

*J. Baker*, for the plaintiff.

*E. F. Webb*, for the defendants.

APPLETON, C. J. This is a real action, in which the demandant can only recover on the strength of his title and not on the weakness of that of the tenant.

The case comes before us upon exceptions and upon motions to set aside the verdict as against evidence, for newly discovered evidence and for tampering with the jury.

(1) The first exceptions alleged relate to the effect of the declarations of the grantors of the tenants. After alluding to them, the presiding justice proceeds as follows: "Before you will give any effect to these declarations, you will see that they are not the declarations of these defendants; they are the declarations of their grantors; they are not conclusive in the matter, but they are evidence tending, as it is claimed, if true, really to establish or confirm the claim made by the plaintiff; but you must be satisfied that those statements were made, that you have a true account of them, because the law acts upon the presumption that a party would not make false statements in disparagement of his own title."

The declarations of a party adverse to his own interest are obviously entitled to grave consideration. But they may be made under mistake. They are not conclusive. They do not constitute an estoppel. The declarations of a party may be strong evidence of a boundary, but if erroneous, they do not pass a title.

This instruction is favorable rather than adverse to the demandant. If true, the jury were told, the declarations proved tended "really to establish or confirm the claim made by the plaintiff." The instructions are unobjectionable. If not sufficiently full, further instructions should have been requested. The exceptions

are to the instructions given, not for the absence of additional instructions that might properly have been given, but which were not asked for.

(2) It seems there had long been a controversy as to the boundaries of the tract of land in dispute. To settle this controversy a reference was entered into, submitting the whole matter to the determination of a justice of this court and two surveyors. The parties met on October 25, 1871. The two surveyors were present and Mr. Garland, an old surveyor, who had been long acquainted with the line in dispute.

One of the referees, Noah Barker, commenced running and had proceeded some distance when the demandants proposed to agree upon the line as claimed by the tenants and to pay for all he had cut upon their land that year, if the tenants would pay the costs of the referees. These terms were acceded to and the tenants paid the referees some fifty dollars. It was further agreed that Garland should complete the running of the line which had been commenced by Mr. Barker. The next day the agreement as to the disputed lines was reduced to writing and signed by the demandant. In it he agreed "on examination of the premises that said line is where it was claimed to be by the late Joseph Eaton, who while he was alive, owned the land on the west of said line. . . said westerly line being the same which Noah Barker on the 25th day of October, 1871, partially run out and which David Garland is to finish by agreement between me and the present owners of said Eaton land, and to establish it by suitable monuments." There is a further agreement as to the Flye lot.

In accordance with this agreement, the residue of the line was run out by Garland and suitable monuments established. This is the line claimed by the tenants, and found by the jury to be the true line.

The settlement of the line and the agreement signed by the plaintiff in reference thereto was upon a good and valid consideration and binding as any other contract for such consideration.

In reference to this, the instruction given was as follows: "I do not understand that it is denied by the plaintiff that there was any settlement; I understand he admits there was a settlement

made at the time, an agreement to abide by line "A B" as designated upon Hersey's plan. If that was so, that would be an end of this case, if it was binding. The parties had a right, if there was a matter in dispute, to agree upon a certain line, and if they did do that under the circumstances testified to by the defendants and not substantially controverted by the plaintiff, it would be competent for them to do so and the parties must be bound by the arrangement thus made."

The last sentence is one which the counsel for the demandant claims to be erroneous. The contract reduced to writing, for a sufficient consideration and signed by the party to be charged is assuredly binding. It is one which a court of equity would enforce. It would be unreasonable to hold that a contract of such a description voluntarily entered into in good faith was of no avail.

But the rights of the demandant were amply protected in a subsequent part of the charge, where the following instruction was given in relation to the settlement of the line between the parties: "If he (the plaintiff) was mistaken, if he was misled and mistaken in regard to material facts and actually did enter into that under a misapprehension of his own rights, then the arrangement made between him and the defendants would not be binding between the parties."

The whole question as to the settlement was thus submitted to the jury with as favorable instructions for the demandant as he could reasonably ask. The settlement was not even declared to be conclusive, but only binding as any other contract, provided the demandant was neither misled nor mistaken in entering into it. The force and effect of the evidence was left to the jury.

(3) The motion for a new trial as against evidence cannot be sustained. There was much conflicting evidence; and the cause was left to the determination of the jury under a clear and impartial charge. No sufficient reason has been shown for interfering with their conclusion.

(4) The controversy as to the boundaries of the Eaton tract has been of long continuance. It resulted in a settlement in 1871. It has been renewed by the institution of this suit. Since

the verdict it is claimed there has been a discovery of new and material evidence. That discovery consists in the production of certain deeds, which if sought for, could have been as readily obtained before as after the trial, and in a new survey by Mr. Abbott of the disputed lines, which the plaintiff might have had whenever he chose.

The new evidence might have been had with the same efforts before as were made after the verdict. If it had been seasonably procured we do not think it would have been likely to have changed the result.

(5) It is alleged that one of the defendants' witnesses made certain remarks before one of the jury—as that he knew all about the case, and that Hunter knew where the line was as well as he did. But these remarks are immaterial. Besides, the name of the juryman is not disclosed, so that the tenants could not contradict the testimony, if it were deemed of sufficient importance to require contradiction, without calling all of the jury, which would be very burdensome. Indeed the whole evidence is too shadowy and indefinite to justify judicial interference. The counsel for the plaintiff knew what was said and done while the case was on trial and did not interfere or disclose what he knew to the court. As for the tenants, there is not the slightest evidence of any misconduct on their part. No sufficient grounds are disclosed why the court should disturb the verdict.

*Motions and exceptions overruled.*

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

MARY GOODELL, in equity, *vs.* WILLIAM G. BUCK *et al.* administrators. R. P. BUCK in equity *vs.* SAME.

Waldo. Decided October 31, 1877.

*Evidence.*

To maintain a bill in equity against an administrator of an insolvent estate, for property received by him, on the ground that it was held by his intestate in trust for the plaintiff, the burden is on the plaintiff to identify the property claimed as held by the intestate in trust for him.

BILL IN EQUITY, submitted upon the following agreed statement of facts:

The complainant, Richard P. Buck, of Brooklyn, New York, is, and has been for some years past, the owner of 3-16 of the ship Mary Goodell. During the five years next prior to March 9, 1876, William McGilvery, late of Searsport, deceased, was agent of the ship Mary Goodell, and in that capacity received the earnings for the owners.

McGilvery received March 6, 1876, the sum of $5578.82, as the earnings of the ship, and declared the same a dividend, and there was due the complainant on said March 6, as his share in the dividend, as declared by McGilvery, the sum of $1046.02, which sum McGilvery received and held in his capacity of agent for the ship, and said sum was not in any other manner entrusted to or held by the said McGilvery.

The following in relation to the dividend aforesaid is from the dividend book kept by McGilvery.

March 6, 1876. By balance of ledger account, $5578.82

To paid owners, viz:

| | | | |
|---|---|---|---|
| Wm. McGilvery, | 1-8 | $697 35. | |
| R. P. Buck, | 3-16 | 1046 02. | |
| Mary Goodell, | 1-8 | 697 35. | |
| James McGilvery, | 1-8 | 697 35. | Credit in account. |
| T. H. Buck, | 1-8 | 697 35. | " " " |
| Jere. Sweetzer, | 1-8 | 697 35. | " " " |
| Bridge, Lord & Co. | 1-16 | 348 67. | " " " |
| Simon Ross, | 1-16 | 348 67. | " " " |
| T. M. Hichborn, | 1-16 | 348 67. | " " " |
| | | $5578 82. | |

The sum of $5578.82, the dividend received and declared, March 6, 1876, for the ship Mary Goodell, was deposited in the Searsport bank, in Searsport, by McGilvery as other money was deposited, as he kept an open account with the bank.

McGilvery at the time of his death had the following sums on deposit: $4528.90 at the Searsport bank in Searsport; $1375 at the 1st National bank in Bangor; $2400 at the Maverick bank in Boston, all of which said several sums from said banks came into the hands of said administrators.

McGilvery died March 9, 1876. His estate was duly rendered insolvent, and commissioners of insolvency were appointed.

The defendants are his legal administrators, and since their appointment as such, the complainant before filing this bill, demanded of the administrators the sum of $1046.02, the amount due him from the dividend received from the said ship Mary Goodell, by said McGilvery, on March 6, A. D. 1876, and the defendants have refused and do refuse to deliver said sum of money to him, unless so ordered to do by this court. The prayer of the bill is, that the defendants in their capacity as administrators may be decreed to deliver to him said sum of $1046.02, held by McGilvery, in his capacity as agent for the ship Mary Goodell, at the time of his death. There is also a prayer for general relief. The answers of the defendants maintain that there is an adequate remedy at law.

*H. D. Hadlock*, for the plaintiffs.

*J. Williamson*, for the defendants.

LIBBEY, J. Undoubtedly a bill in equity may be maintained against an administrator of an insolvent estate for property held in trust by his intestate, which has come into his hands, if the trust property can be identified. *Thompson* v. *White*, 45 Maine, 445. *McLarren* v. *Brewer*, 51 Maine, 402.

It may be maintained for money so held as well as for other property if it can be identified. *McLarren* v. *Brewer*, *supra*. *Taylor* v. *Plumer*, 3 M. & S. 562.

But the administrator of an insolvent estate represents all the creditors, and to maintain a suit for money that has come into his

hands and withdraw it from the assets of the estate, on the ground that the intestate held it in trust, the burden is upon the plaintiff to identify the money as the trust fund so held.

If the money was mixed and confounded in the general mass of his property by the trustee, the bill cannot be maintained. Story's Eq. Jur. § 1259.

By the facts agreed the complainant fails to identify any money received by the defendants as the trust fund held by their intestate. McGilvery was a part owner of the ship Mary Goodell, and acted as ship's husband. He received the earnings of the ship, amounting to $5578.82, and deposited the whole sum to his private credit in his general account in the Searsport bank. On March 6, 1876, he made, in his book, a dividend to the owners of the ship, but no money was set apart as belonging to each. He died March 9, 1876, having to his credit in said bank a deposit of $4528.90, less than the dividends due the other owners of the ship. It does not appear by the facts agreed that this credit was made up, in any part, of the money received as the earnings of the ship. Acting as agent for the owners, he received money belonging to his principals, and mixed and confounded it in the general mass of his estate. Failing to identify any money received by the respondents as money held in trust by their intestate, the complainant stands no better than other creditors of the estate.

*Bill dismissed.*

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

## MARY F. GILMORE *vs.* WILLIAM H. MATHEWS.

Waldo. Decided December 19, 1877.

*Pleading.*

Every traversable fact in the declaration should be set out as having occurred on some particular day, month and year, and directly and clearly, leaving nothing to inference.

Under the statute of 1872, c. 63, § 4, giving actual and exemplary damages to a wife for injuries by an intoxicated husband, against persons contributing to the intoxication, actual damages to person or property or means of support, must be alleged and proved before the plaintiff can recover for exemplary damages; and without such actual damages, the action cannot be sustained.

ON EXCEPTIONS, arising on a demurrer to the declaration.

CASE: "For that the said plaintiff was duly married to Edward Y. Gilmore, her late husband, thirteen years prior to the date of this writ, and lived with him till the twenty-third day of September last past, on which day he died of delirium tremens caused by excessive and habitual liquor drinking of a poisonous character, sold and furnished him principally by the said defendant, in and at his hotel situated in said Searsport, and that during her said marriage she had by him two sons and one daughter; that at the time of her said marriage, her husband was a gentleman of cultivated manners, good character, liberal education, good business habits and capacity, robust in health, full of hope and promise for the future, and in all respects a delightful and desirable husband, and so remained for several years after their said marriage, but being of social habits and an agreeable companion among gentlemen, and residing near the defendant's hotel and being frequently invited and tempted to go therein and to drink there intoxicating liquors by the said defendant and others, he gradually became intemperate and a spendthrift and drunken to an excess that destroyed his capacity to do business and to maintain his wife and family,—and also destroyed his bodily health, his mental sanity and finally his life, on the said twenty-third day of September last past.

"And the plaintiff avers that for the last six to eight years of his life the said defendant supplied and sold to him the worst

kind of intoxicating liquors to be drank by him daily in his hotel and to bring home to his house in bottles there to drink, and that very much of the intoxicating liquors that her husband so used and drank he obtained of the said defendant, during the last six or eight years of his life, and so made him terrible to look upon and dangerous in the extreme to his wife and children, so much so that the plaintiff was obliged to leave her house frequently, hide herself and seek protection of her neighbors, and to abandon his room and bed altogether for the latter year or two of his life, during which time he had two terrific attacks of 'delirium tremens,' in the last of which he died.

"And the plaintiff further avers that during said years she was obliged to seek and receive support for herself and family from his and her relatives and other friends, solely on account of the said intoxication of the said husband, and that in his moments of intoxication, her said husband destroyed and disposed of four cows of the value of two hundred dollars sent to her by the brother of her said husband for the use and benefit of herself and family, and spent the same mostly for liquor so sold him by the defendant, (one of which was given to her by the donor) and some other property so given to the use of the family, and that during the whole of said period, she lost the society, companionship and much of the love of her said husband by reason of the intoxication and consequent insanity of her said husband, and suffered several severe attacks of sickness from the same cause, and that all of which was well known to said defendant during the whole of said period and protested against to him by this plaintiff and others in behalf of herself and children.

"And the plaintiff further avers that her said husband some years prior to his death had procured an insurance upon his life for the plaintiff's benefit in the Etna Life Insurance Company of Connecticut, so called, which was in full force, and value of $2,000, when her said husband died, but that she lost twelve hundred dollars of the said two thousand so insured by reason of the said intoxication by defendant of her said husband and of his death in consequence thereof as aforesaid,—and was compelled to receive only eight hundred dollars for the same or to lose the

whole, which she had so to accept and did so accept in full discharge of said insurance company on the professional advice of her legal counsel in the case.

"And the plaintiff further avers that the said intoxication became so habitual and dangerous that she was obliged to keep hired help, man or woman, all the time, day and night, for the protection of herself and children from the violence of her said husband, thereby adding largely to the daily expenses of the family, and that in consequence of this and other expenses and losses caused by his said habits of intoxication this plaintiff lost her house and home and became solely dependent on her friends and relatives for a house and home for herself and children, both before and since the death of her said husband, and has not had any house or home of her own, and that but for said habits of intoxication her said husband was capable and inclined to accumulate sufficient property and means to live handsomely during his lifetime and to have left an ample competence to support this plaintiff and their children after his decease, and would have done so and left her and her children independent—and that the defendant's continuous sale daily of said intoxicating liquors to her said husband to be drank by him was the great and almost the sole cause of all her sufferings, losses, sickness and distress of both body and mind as aforesaid during the period aforesaid, and of her present dependent condition, widowhood and ill health and mental anguish—and that by virtue of the statute in such case made and provided she claims to recover damages of said defendant to the amount of ten thousand dollars actual and exemplary; to the damage," &c.

The presiding justice overruled the demurrer to the declaration; and the defendant alleged exceptions.

*H. D. Hadlock*, with whom was *W. H. McLellan*, for the defendant.

*A. G. Jewett*, for the plaintiff.

DANFORTH, J. This action is founded upon c. 63, § 4, of the acts of 1872, and comes before the law court upon a general demurrer to the declaration.

An indispensable rule of pleading requires that every traversable fact must be alleged as having occurred on some particular day, month and year. *Platt* v. *Jones*, 59 Maine, 232, 240.

In this case there are no such dates, and in this respect the declaration is defective.

It is equally true that every fact necessary to sustain the action should be not only stated, but be set out distinctly and with certainty, leaving nothing to inference.

In both these respects there is a defect in the declaration. If, as we may infer, the plaintiff relies upon an injury to her means of support, it nowhere appears what means were taken from her. True she alleges a marriage, and the liability of the husband to render her a support follows as an inference of law and need not therefore be stated. But whether as a matter of fact he ever did render any support, or that she was in any way dependent upon him or he upon her is not set out. If she did not rely upon him, or if in fact he did not or could not assist in her maintenance without any habits of intoxication, then his drunkenness would hardly be an injury to that which she never had, or which she was deprived of by other causes. If the injury was to means of support which she had independent of him, it should be so stated and the omission would be equally fatal.

We meet with a somewhat similar difficulty if the claim for damages rests upon an alleged injury to property. In the second averment neither the title to, or value of, the cows claimed to have been destroyed and disposed of is set out. If the cows belonged to the husband or his brother, their destruction would be no ground for an action in favor of the wife. If furnished for the use of the family, the plaintiff could have no cause of action except so far as her own interest in the property, or means of support coming out of it, may authorize; the other members of the family having a right of action so far as necessary to protect their own interests. If the cows were the property of the plaintiff and were destroyed by her husband while in a state of intoxication, the rule of damages would rest upon a very different ground from what it would if they were not hers and the destruction diminished her means of support.

What the other property alluded to in the same averment was does not appear and hence cannot be the foundation of an action or of damages.

The next averment relates to the policy of insurance, and perhaps sufficiently sets out the plaintiff's title, but fails to show the injury. It does state that there was a loss of twelve hundred dollars of the sum insured by reason of the intoxication, but the ground of the loss does not appear. It may have been a condition of the policy, or it may have been in consequence of some act of the deceased claimed to have been prompted by his intoxication or for some other cause. What might have been reasonably certain in this respect, is made uncertain by the addition of the fact that the claim was settled by a compromise. Whatever the ground of the loss the defendant had a right to be informed of it before he could be required to answer.

There are other allegations of damage, but none on which the action can rest. Some of them may be useful as tending to show an aggravation of damages and some are worse than useless, as they tend to render obscure and uncertain the grounds on which the plaintiff relies to sustain her action. But whatever is useless and can be separated from the useful, though objectionable as tending to undue prolixity and almost necessarily rendering that which otherwise might be plain and certain, obscure and uncertain, is to be rejected as surplusage, and cannot be taken advantage of on demurrer.

But for an omission of such facts as go to the grounds of the action a demurrer will be sustained. Ordinarily an omission in setting out damages does not go to the foundation of an action, but simply reduces the damages to be recovered to that extent. The violation of a right usually carries with it a claim for some damages. But this action is founded upon the statute and must stand or fall in accordance with its provision.

The act is 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, shall have a right of action against any person or persons who shall . . . have caused or contributed to the intoxication of such person or per-

sons, and in any such action the plaintiff shall have a right to recover actual and exemplary damages."

Here, then the right of the plaintiff alleged to have been violated is not simply by a contribution to the intoxication of the husband, but connected with it an injury to her person, property or means of support as the result of such intoxication. It is as necessary to make out the injury as the intoxication and the contribution. The action must fail if there is a failure in the allegation and proof of either.

From this view, it follows that the death of the husband alone as the result of intoxication is not a cause of action. There must be connected with it an injury to person, or property, or means of support; and the allegations must show distinctly and directly that such an injury occurred to the plaintiff.

It equally follows that actual damages must be shown before those which are exemplary can be recovered. Hence, the allegations as to the death of the husband and of such matters as may increase the exemplary damages are not sufficient ground for the action, even if well pleaded. As the allegations of actual damage are defective on account of the omissions referred to, as well as for the indefinite manner in which they are set out, the demurrer must be sustained. But under the statute the plaintiff may amend upon the payment of costs, as her declaration shows a cause of action, defectively set out.

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

OSCAR H. SAMPSON *et al.*, in equity, *vs.* HANNAH ALEXANDER *et al.*

Waldo. Decided December 20, 1877.

*Equity.*

The legal title to land was in the defendant wife, and the equitable interest in the plaintiffs, except a portion of a certain value to be assigned to her by a master. *Held*, that the barn erected on the premises in controversy, during the pendency of the suit, became a part of the realty, and, it not appearing that it was erected by the wife, was properly included in the appraisal by the master, of the premises set off to the plaintiffs.

ON EXCEPTIONS.

BILL IN EQUITY, stated in 66 Maine, 182, wherein the complainants claimed certain real estate possessed by one of the respondents; and the decree of the court was as follows:

"Bill 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."

Whereupon N. H. Hubbard was appointed master, and at the January term, 1877, he filed a report stating that he had set off to Hannah Alexander three parcels of land valued at $275, and concluding as follows:

"The value of the balance of the premises described in the complainants' bill is $1500; the amount of the complainants' debt, on the first day of November, A. D. 1876, is $3151.95. I have therefore set off to the said complainants the whole of the balance. I have included in the value of the balance of the premises not set off to Hannah Alexander a barn built upon the premises by the respondents since the filing of the complainants' bill, the value of which barn I find to be $300, and submit

the question of the ownership of the barn to the court. If, in the opinion of the court, the complainants do not own the barn, then I report the balance of the premises described in the complainants' bill not assigned and set off to Hannah Alexander to be $1200."

Whereupon the presiding justice ordered that the report be accepted and that the ownership of the barn be adjudged to be in the complainants, and the amount equivalent to the amount of the appraisal to be paid or secured to complainants, within thirty days from the adjournment of the court; and the defendants alleged exceptions.

*W. H. Fogler*, with *W. P. Harriman*, for the defendants.

*J. Williamson*, for the plaintiffs.

LIBBEY, J. The barn erected by the respondent, on the premises in controversy, during the pendency of the suit, became a part of the realty. *Bonney* v. *Foss*, 62 Maine, 248. It does not appear that it was erected by the wife. It was properly included in the appraisal, by the master, of the premises set off to the complainants. *Exceptions overruled.*

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

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ABBIE E. C. WRIGHT *et al. vs.* JOSEPH WILLIAMSON.

Waldo. Decided December 26, 1877.

*Will.*

The title of a devisee under a will, to whom an immediate estate is given, dates from the death of the testator and not from the probate of the will.

And this is so where the will is made and proved in another state and a copy is filed and recorded in this state.

Where an estate is devised, the rents and profits belong to the devisee.

ON AGREED STATEMENT.

ASSUMPSIT for money had and received.

*P. Hersey*, for the plaintiffs.

*N. H. Hubbard*, for the defendant.

Two parties claim the money which the defendant collected as the attorney of the plaintiffs' brother. He is ready to pay it to him or to the plaintiffs, as the court adjudge.

APPLETON, C. J. This is an action of assumpsit to recover certain moneys paid the defendant for the rent of real estate belonging to the plaintiffs.

The plaintiffs are daughters of Abigail Cunningham, who died in Baltimore, Md., April 20, 1857, leaving a will by which the real estate, the rents of which are in controversy, is devised to these plaintiffs, and naming their brother, T. A. Cunningham, as executor. The will was duly proved in Baltimore, April 10, 1858, and was admitted to probate in this county, January 12, 1875.

On October 1st, 1856, Abigail Cunningham, by an instrument under seal, leased the land for a period of ten years. T. A. Cunningham was appointed administrator in this county upon his own petition and collected the rents due under the lease given by Mrs. Cunningham.

The estate of Mrs. Cunningham has never been declared insolvent in this state and no portion of the land devised has been sold to pay debts.

The defendant acted as the attorney of T. A. Cunningham, by whose directions he leased the lands devised, executing the lease in the name of his principal and collecting under the same the amount sought to be recovered in this action. For this amount, the plaintiffs made a demand September, 1872.

T. A. Cunningham claims the funds in controversy. The defendant is ready to pay the amount to parties entitled legally to receive the same.

An immediate estate was given to the plaintiffs by the will of Mrs. Cunningham. The title of the devisees dates from the death of the testator and not from the time of the probate of the will. This rule applies though the will was made and proved in another state and a copy filed and recorded in the probate court of this state. *Spring* v. *Parkman*, 12 Maine, 127.

The real estate devised vested in the devisees. The rents consequently belonged to them. The administrator has no right to them. *Heald* v. *Heald*, 5 Maine, 387. *Stinson* v. *Stinson*, 38 Maine, 593. *Kimball* v. *Sumner*, 62 Maine, 305.

Although Cunningham had no right to lease the premises, yet leasing them and receiving the rents, the plaintiffs may affirm his wrongful acts. Their affirmance may be by suit. Were the rents in the hands of T. A. Cunningham, the plaintiffs would be entitled to recover them from him. The defendant cannot justify their detention as his agent. *Judgment for the plaintiffs.*

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

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PHILO HERSEY *vs.* CHARLES ELLIOT.

Waldo. Decided January 8, 1878.

*Promissory notes.*

If a bankrupt, who is the payee of a negotiable bill or note, sells the same without indorsement before and indorses it after bankruptcy, such indorsement will enable the holder of the note to maintain an action upon it in his own name.

ON REPORT.

ASSUMPSIT, by the indorsee of the following order: "Belfast, November 10, 1875. To Charles Elliot. Please pay to Henry Wyman, one hundred dollars in three months from date, and eighty-five dollars in six months from date, and interest on same. (Signed) J. C. Withee." On the back of the order were the following indorsements: "Accepted when government pays me. Charles Elliot." "Be it known that I, Henry Wyman, within named, for a valuable consideration, do hereby make over and assign to Philo Hersey all my right and interest in the within written order, together with the right of action and recovery in his own name. Henry Wyman. Witness, Israel Cox."

The property in the order passed and the order was delivered to the plaintiff in January, 1876. A petition in bankruptcy was filed against Wyman, March 15, 1876. The assignment was not written on the back of the order until April 18, 1876.

*Philo Hersey, pro se.*

*J. Williamson*, for the defendant.

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PETERS, J. But a single point is presented by the facts of this case. Can a bankrupt, the payee of a negotiable bill or note, who before bankruptcy sells and delivers the same without indorsing it, indorse the note after bankruptcy, so that the holder may maintain an action thereon in his own name? It is well settled, on many authorities, that he can. *Smith* v. *Pickering*, Peake (N. P. C.) 50. *Anonymous*, 1 Camp. 492, notes. *Lempriere* v. *Pasley*, 2 T. R. 485. *Mowbray*, *exparte*, 1 Jac. & Wal. 428. *Watkins* v. *Maule*, 2 Jac. & Wal. 237. *Greening*, *exparte*, 13 Ves. 206. *Wallace* v. *Hardacre*, 1 Camp. 46. *Smoot* v. *Morehouse*, 8 Ala. N. S. 370. *Valentine* v. *Holloman*, 63 N. C. 475. 3 Par. Con. 470, 494; and notes.

The reasons given for the rule appear to be satisfactory and conclusive. The indorsement in such case is but a mere form. The property in the note passed by the sale. The bankrupt had no actual interest in it afterwards. At most, he was to be regarded as merely a trustee of the legal title for the benefit of the vendee. In general, only such right, title and interest as the bankrupt himself has in law and equity in any estate or property, passes by bankruptcy to the assignee. That the assignee does not take a beneficial interest therein belonging to another person, is well settled in the cases cited and many more. *Sawtelle* v. *Rollins*, 23 Maine, 196. *Baker* v. *Vining*, 30 Maine, 121. *Smith* v. *Chandler*, 3 Gray, 392. *Nichols* v. *Bellows*, 22 Vt. 581. *Streeter* v. *Sumner*, 31 N. H. 542. *Mitchell* v. *Winslow*, 2 Story, 630. *Goss* v. *Coffin*, 66 Maine, 432. *Vide*, 111 Mass. 532.

The principle, contended for by the plaintiff, has been applied in analogous cases. It is admitted in proceedings under state insolvent laws. *Norcross* v. *Pease*, 5 Allen, 331. 3 Par. Con. 495, and notes. A negotiable note, transferred by the payee before his death by delivery only, may be endorsed by his administrator with the same effect as if done by himself in his lifetime. *Malbon* v. *Southard*, 36 Maine, 147. And when a woman assigns by delivery a note payable to her order, and afterwards marries the maker, her indorsement of the note after such marriage transfers the legal title. *Guptill* v. *Horne*, 63 Maine, 405. The case

relied on by the defendant (100 Mass. 18) does not sustain an adverse position to the other cases cited. That case only maintains that, if a note is not indorsed at the time it is sold, a subsequent indorsement will only carry such legal and actual title to the note as the indorser had when he sold the same. If he had indorsed it earlier, the indorsement might have transferred, by the operation of the principle of estoppel applying to negotiable paper, more than such title and right. *Defendant defaulted.*

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

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PERMELIA A. JOHNSON *vs.* SAMUEL KINGSBURY, administrator.

Waldo. Decided January 15, 1878.

*Executors and Administrators.*

Where the plaintiff made a contract with the defendant's intestate by which she agreed to properly maintain him during his life, and after his death give him proper burial, and in consideration thereof was to have all of his estate after his decease, although she has fully executed the contract on her part, she cannot maintain an action at law thereon before the estate is settled.

In such case the plaintiff's remedy is an application to the probate court for a decree requiring the administrator, after the settlement of the estate, to pay over to her what there may be remaining in his hands.

ON REPORT.

ASSUMPSIT on account annexed as follows:

Estate of Edward Hilton to Permelia A. Johnson, Dr. To keeping and maintaining said Edward Hilton from 1874 to the time of his death, November 27, 1874, according to contract with said deceased, the whole of said estate, supposed to be $1000.

The declaration also contained several other counts, the substance of which is stated in the opinion.

The administrator returned an inventory amounting to $860.59. The estate was afterwards represented insolvent and commissioners were appointed.

*J. W. Knowlton*, for the plaintiff.

*W. H. Fogler*, for the defendant.

LIBBEY, J. The plaintiff claims that she made a contract with defendant's intestate by which she agreed to properly maintain him during his life and after his death give him proper burial; and in consideration thereof she was to have all of his estate after his decease; and that she fully executed the contract on her part. Admitting that the contract between the parties was as claimed by the plaintiff, and that she fully performed it on her part, we feel clear that this action cannot be maintained. By the contract the plaintiff is entitled only to the net assets of the estate after it is settled in the probate court. This is admitted by her attorney. There was no breach of the contract by the intestate during his life. Nor was there by the defendant prior to the commencement of the suit. The estate had not been settled. The time when the plaintiff would be entitled to receive it had not arrived. Again, there are now no means of ascertaining the amount to which the plaintiff is entitled. For aught that now appears there may be nothing remaining after payment of debts and costs of administration.

We think the plaintiff's proper remedy is an application to the probate court for a decree requiring the administrator, after the settlement of the estate, to pay over to her what there may be remaining in his hands. *McLean* v. *Weeks*, 65 Maine, 411.

*Plaintiff nonsuit.*

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

## CITY OF BELFAST *vs.* COUNTY COMMISSIONERS OF WALDO COUNTY.

Waldo. Decided February 6, 1878.

*Appeal.*

When, in case of an appeal from the decision of county commissioners, a committee has been appointed, one of whom has resigned, diligence is required in applying to the court to fill the vacancy. It should be filled at the term when it occurs.

ON EXCEPTIONS.

APPEAL from the decision of the county commissioners, locating a highway in Belfast, on petition of F. W. Banan and others. The appeal was entered at the April term, 1875. A committee was then appointed and afterwards gave notice of time and place of hearing and view; but on account of the unavoidable absence of Asa Thurlough, one of the committee, no hearing or view was held, an adjournment for which was had to October 13, 1875. October 12, 1875, Thurlough placed his resignation in the hands of the clerk of the court, in consequence of which no hearing was then had. The October term, 1875, was held by a justice not an inhabitant or tax payer of Belfast; but not so, the January and April terms, 1876. At the October term, 1875, an attempt was made by the appellants and petitioners to agree upon a person to be appointed to fill the vacancy; but no agreement was made and none appointed. At the October term, 1876, the petitioners moved to dismiss the appeal, because the appellants had not exercised due diligence in its prosecution. Afterwards, at the same term, the appellants moved the court to appoint a suitable person to fill the vacancy caused by the resignation of Thurlough.

The presiding justice ruled that the appellants had not used due diligence in prosecuting their appeal, refused to appoint a suitable person to fill the vacancy on the committee, and ordered the appeal dismissed with costs, and the proceedings of the county commissioners appealed from, affirmed; and W. H. Fogler, for the city alleged exceptions.

*A. G. Jewett*, city solicitor, for the appellants.

*J. E. Johnson*, for the petitioners.

APPLETON, C. J. This is an appeal from the decision of the county commissioners of Waldo county locating a highway in the city of Belfast. The appeal was seasonably taken and entered at the April term, 1875, of this court when a competent committee was appointed and a warrant duly issued. On October 12, 1875, Asa Thurlough, one of the committee, resigned and placed his resignation in hands of the clerk of this court, who, at the October term, 1875, entered upon the docket the fact of his resignation without the date of the day of the term when the entry was made. It is, however, apparent that the petitioners had knowledge of such resignation, for they attempted to agree with the counsel of the petitioners for the road in question upon a successor to Mr. Thurlough and failed. It was then their duty to have applied to the court to appoint some suitable person in his place. R. S., c. 18 § 39. This they neglected to do. The same degree of diligence is required in filling vacancies as in the original appointment of the committee. The vacancy should have been filled at the term when it occurred. The committee must be appointed at the term when the appeal is entered. *French* v. *County Commissioners*, 64 Maine, 583.

*Exceptions overruled.*

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

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DANIEL SULLIVAN *et ux vs.* JOHN CARBERRY *et al.*

Washington. Decided July 21, 1877.

*Trespass.*

Where a tenant at will occupies a house of his own on the land of another and does not remove it within a reasonable time after his tenancy terminates, and after notice and request to do so, the owner of the land will not be a trespasser for entering and taking possession of the house.

ON REPORT.

TRESPASS.

*A. McNichol*, for the plaintiffs.

*W. Freeman, jr.*, for the defendants.

APPLETON, C. J. The female plaintiff having purchased a house, moved it on to the land of William Freeman, but without his consent. The placing the house on the land of another, without consent, was a trespass. The building, therefore, *prima facie*, became the property of the owner of the soil. *Bonney* v. *Foss*, 62 Maine, 248. *Thayer* v. *Wright*, 4 Denio, 180. *Ritchmeyer* v. *Morss*, 3 Keyes, 349. *Cleaver* v. *Culloden*, 15 Up. Can. Q. B. 582.

William Freeman conveyed the premises upon which the house stood to the defendant Carberry, who brought an action for use and occupation against plaintiff on which he recovered judgment June 12, 1869. After the recovery of judgment he repeatedly requested the plaintiffs to remove the house, offering, if done, to discharge the judgment recovered. The plaintiffs declining or refusing to remove the building, the defendants took possession of the same, for doing which this action of trespass was brought.

The plaintiffs must be regarded as having been the tenants of Carberry, as he owned the premises and recovered judgment for rent. When the right to remove fixtures exists in the person erecting the same, this right must be exercised during the term of the tenant, and if this is not done, the right to remove is lost. *Davis* v. *Buffum*, 51 Maine, 160. Such is the general rule.

In the case at bar the plaintiffs at best were tenants at will or for an uncertain period. Not knowing when their rights would terminate, they would have a reasonable time after such termination in which to remove any fixtures they might have erected upon the land. *Howard* v. *Fessenden*, 14 Allen, 124. *Burk* v. *Hollis*, 98 Mass. 55. *Talbot* v. *Whipple*, 14 Allen, 177.

The plaintiffs have been repeatedly urged to remove the building in question after the defendants had terminated any supposed right of the plaintiffs. Ample time has been given them in which it might have been done. The defendants were under no obligation to remove it for them or to find a place upon which to place it after such removal. Nor were they obliged to permit the plaintiffs to occupy their land indefinitely.

*Plaintiffs nonsuit.*

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

INHABITANTS OF EAST MACHIAS *vs.* INHABITANTS OF BRADLEY.

Washington. Decided July 30, 1877.

*Pauper.*

For every new action for pauper supplies fur nished by a town, a new preliminary notice must be given.

This rule held to apply where a former action for other supplies, between the same parties, after notic e, was settled by payment therefor and an entry of neither party.

ON REPORT.

ASSUMPSIT for pauper supplies.

*J. C. Talbot*, for the plaintiffs.

*G. P. Sewall & J. A. Blanchard*, for the defendants.

APPLETON, C. J. On June 10, 1874, William Trafton, jr., became chargeable as a pauper to the plaintiffs. On August 7, 1874, the defendants were duly notified that he had become so chargeable and were requested to remove him, to which they returned an answer denying their liability.

On November 19, 1875, the plaintiffs commenced their action against the defendants for the "amount of expense paid for board, clothing, attendance and medical aid furnished William Trafton, jr., a pauper from June 10, 1874, to October 25, 1875, amounting to $312.24."

This action was entered in the supreme court at the January term, 1876, held in this county, and continued to the following October term, when the amount claimed having been paid in full the action was entered neither party.

The present suit was commenced August 2, 1876, to recover for supplies furnished said Trafton from October 25, 1875, to the date of the institution of this suit, amounting to $191.00. It is admitted that no notice was given prior to the commencement of this action.

It is claimed that this action may be maintained by virtue of the notice given the defendants on August 7, 1874. A second suit having been commenced within two years from the date of that

notice, the question is whether a new notice must be given previous to such second suit or whether one notice will suffice for a series of consecutive suits, if commenced within the two years allowed by the statute.

We think a new notice was necessary. Such is the result of the decisions. A new notice must be given for every new action, even though a previous action between the same parties for the support of the same pauper may be pending. *Sidney* v. *Augusta*, 12 Mass. 316. *Walpole* v. *Hopkinton*, 4 Pick. 358. *Uxbridge* v. *Seekonk*, 10 Pick. 150. *Hallowell* v. *Harwick*, 14 Mass. 186. *Cummington* v. *Wareham*, 9 Cush. 585. These decisions have been regarded as affording the true construction of R. S., c. 24, § 24, by the decisions of this court. In *Veazie* v. *Howland*, 53 Maine, 39, 40, it was held that for every new action for supplies furnished by a town a new notice must be given, even though a former suit between the same parties may be pending.

The defendants after the first suit had been commenced could not know that further and additional expenses were being incurred without a new notice, to which they were clearly entitled. The notice given referred to the supplies furnished in the first suit. No notice has been given of the expenses stated in the declaration in the present suit. *Gilford* v. *Newmarket*, 7 N. H. 251, 252.

*Plaintiffs nonsuit.*

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

## WARREN BROWN *vs.* ROBERT BURNS.

Washington. Decided October 24, 1877.

*Payment.*

In the absence of any agreement or understanding to the contrary, the items of an account annexed to a writ are not regarded as an entirety; and if the verdict includes no part of an illegal item, but is based wholly upon such as are legal, it will not be against law.

*Goodwin* v. *Clark*, 65 Maine, 280, affirmed.

The consent of the debtor once given to apply payments to an illegal item cannot be revoked by the defendant, after the application is so made, without the consent of the plaintiff.

*Phillips* v. *Moses*, 65 Maine, 70, affirmed.

ON MOTION of the defendant to set aside the verdict, which was for the plaintiff.

ASSUMPSIT on account annexed as follows:

ROBERT BURNS TO WARREN BROWN, DR.

| | | |
|---|---|---|
| Aug. 7, 1871. | To Balance due on settlement, | $295.81 |
| 31, | Paid duties on Merchandise at St. Pierre, | 17.55 |
| Sept. 22, | Freight on Cargo of Merchandise per Schooner Investigator from St. Pierre to Indian Island, N. B. Amount as per agreement, | 400.00 |
| | Freight on 260 galls. liquors from St. Pierre to Indian Island, N. B., at 20 cents per gal., per agreement, | 52.00 |
| | 1 Quintal Cod fish, | 6.00 |
| | | $771.36 |

CR.

| | | | |
|---|---|---|---|
| Aug. 30, 1871. | By draft on you, on account, | $226.00 | |
| Sept. 22, | Cash on account, | 25.00 | |
| Oct. 17, | Cash on account, | 205.82 | $456.82 |
| | Balance due, | | $314.54 |

The plea was the general issue, with a brief statement that the defendant paid the plaintiff all he owed him; that the plaintiff's claim was for intoxicating liquors and could not be recovered by law.

The plaintiff put in the following memorandum of settlement,

dated Eastport, August 7, 1871, which he testified was in defendant's handwriting:

| | |
|---|---|
| 78 Cases of Gin, | $312.00 |
| 16 " " Brandy, | 136.00 |
| 59½ gallons of Brandy, | 148.75 |
| 37 " " Gin, | 55.50 |
| 30 " " Rum, | 45.00 |
| | $697.25 |

Cr.

| | | |
|---|---|---|
| By bill of goods, | $193.13 | |
| Cash, | 150.00 | |
| $52 in Gold, equal to | 58.31 | $401.44 |
| Balance due, | | $295.81 |

*A. McNichol*, for the defendant.

*J. M. Livermore*, for the plaintiff.

VIRGIN, J. The defendant contends that the verdict against him for $232 is against law and the weight of evidence.

Against law, for the reason that the first item in the account annexed, being for a balance due for intoxicating liquors sold in violation of law, is illegal. But in the absence of any agreement or understanding to the contrary, the items of the account are not to be regarded an entirety. The action is upon these items as so many distinct and independent demands of different natures and dates; and if the verdict include no part of the illegal item, but is based wholly upon the others, it cannot be held, on the ground claimed, to be against law. *Goodwin* v. *Clark*, 65 Maine, 280.

2. Against law and evidence, for the alleged reason that the three barrels of liquor left at the store of the defendant, at Indian Island, N. B., were never bought or paid for by him.

The plaintiff testified in substance that he sold and delivered to the defendant the ninety-four cases and three barrels of liquors specified in (the paper which he styles) "the memorandum of settlement," received the several items of credit mentioned therein in payment *pro tanto*, leaving a "balance due of $295.81," the first debit item in the account annexed. And to convince the

jury that the defendant expressly agreed to the sale and appropriation as there itemized, the plaintiff testified and the defendant admitted that the mem orandum was written by the defendant and delivered to the plaintiff as evidence of the standing of the account, at that time, between the parties. To be sure the defendant also testified: "Plaintiff said he was going on a voyage and might be lost, and he wanted me to make out a statement how the account would st and providing I had this additional liquor, to leave to his wife in case he was lost." But the proviso not being in the written statement, the jury considering the deliberate manner in which, and the avowed purpose for which, the memorandum was made, evidently relied upon it as containing the real truth both as to the unconditional character of the sale and the appropriations in part payment thereof. And if the defendant did purchase the liquors and consent that the goods and cash items mentioned in the memorandum should be appropriated in payment *pro tanto*, he cannot revoke the adjustment without the consent of the plaintiff. *Phillips* v. *Moses*, 65 Maine, 70.

The plaintiff also testified in substance that soon after the above named settlement, and just before starting upon a voyage to St. Pierre, he called upon the defendant for the balance of the account; that the defendant said he was short and could not pay then, but that he would, and did honor a draft, during the month, for $226. This sum the plaintiff appropriated *pro tanto* in payment of the $295.81 "balance," and it is the first item of credit in the account annexed.

From the fact that the defendant agreed to, and did pay the draft when called upon to pay the balance of the account as it then stood; that the only indebtment to which it could be applied was this balance; that there is no intimation that either party intended it as a loan—these facts, together with the other settlement and former dealings of the parties, might well lead the jury to the conclusion that the defendant impliedly consented to the appropriation which the plaintiff made.

If the jury, therefore, had thrown out of the account the first item on each side of it—*i. e.* on the debit side, the $295.81, because so much as was not paid by the draft, was not recover-

able; and on the credit side the $226 because already appropriated in payment of the other item—and based their verdict on the balance of the remaining undisputed items, the verdict would be well grounded both in law and fact. *Phillips* v. *Moses*, 65 Maine, 70. But the verdict is in fact less than such balance; and being less, the defendant has no legal right to complain.

*Motion overruled.*

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

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THOMAS KENNEDY *vs.* PHILIP B. JONES.

Washington. Decided October 25, 1877.

*Sale. Lien.*

When a sale once made and perfected is to be rescinded, the same formalities are required to revest the property in the original vendor, as were necessary to pass the title from him to the vendee.

When one has a lien on logs for supplies until paid, and the debtor pays them with his own means, taking a receipt in full, the creditor's lien is thereby discharged and a subsequent transfer of his extinguished interest will convey no rights.

ON EXCEPTIONS.

ASSUMPSIT. The verdict was for the plaintiff for $937.33; and the defendant alleged exceptions, which are stated in the opinion.

*G. Walker*, with *F. B. Bailey*, for the defendant.

*F. A. Pike & G. A. Curran*, for the plaintiff.

APPLETON, C. J. According to the plaintiff's statement, he owned a mark of logs, subject to a lien for stumpage and for supplies furnished by one Foss, while the logs were being cut and hauled. Having this general ownership, he went to Bangor in May, 1870, with written authority from Foss to sell the logs, subject to an agreement on the part of the purchaser to him. He there made an absolute sale of the logs to Messrs. Hodgkins & Co., they agreeing to pay Foss the amount due him. No resale from Hodgkins & Co. to the plaintiff is shown or alleged.

Subsequently, the plaintiff testifies he made an arrangement with Hodgkins & Co. by which they were to pay him the $900 due Foss on condition of his paying Foss and procuring from him a receipt for the amount due; that he paid Foss by deeding his farm to him and took a receipt from him; that Hodgkins & Co. refused to pay the sum of $900; that he sold his interest in the logs and in the claim Foss had upon the same to the defendant, first procuring from Foss an assignment of his claim.

The defendant's counsel requested the presiding justice to instruct the jury that if they should "find the contract between Kennedy and Hodgkins & Co. to be a sale of the logs to them, then Kennedy had no right to sell the logs to Jones and could make no sale of them to Jones as claimed in the first count of the plaintiff's writ." This request the court declined to give.

The sale to Hodgkins & Co. divested the plaintiff of all title to the logs. There is no allegation of a rescission of the contract of sale or of any resale to the plaintiff. If there was a sale, there must be the same formalities to revest the plaintiff with the title as were required to transfer the title from him to Hodgkins & Co. *Quincy* v. *Tilton*, 5 Maine, 277. Having no title to the logs, he had none to sell, and if his statement was believed he had no right to recover on the first count. The instruction requested should therefore have been given.

The second requested instruction was "that the payment by Kennedy of the Foss claim of nine hundred dollars was an extinguishment of that claim, and Kennedy could not be subrogated to the rights of Foss."

By the contract between Foss and Kennedy the control of Foss over the logs cut and to be cut by Kennedy was to continue "until all the money and supplies furnished by said Foss and all demands paid by said Foss in connection with said logging operation are paid and satisfied." The plaintiff testifies the amount was ascertained and paid by him long before any negotiations between him and the defendant. Foss then had ceased to have any claim upon the logs or any debt against the plaintiff. It may be that Hodgkins & Co. refused to pay the plaintiff the $900 as they agreed; but that would not affect Foss or enable him to re-

assert a claim which had been discharged by the party whose duty it was to discharge it. The second requested instruction should have been given.

The defendant, from the evidence of the plaintiff, has acquired no title to what he purchased; nor does it appear that he has ever received anything in consequence of his bargain or is ever likely to receive anything. It may be, as the counsel for the plaintiff claims, that correct instructions as to other aspects of the case may have been given; but that will not avail if those requested were material and relevant and should have been given.

*Exceptions sustained.*

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

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HENRY F. EATON *vs.* FREDERIC BOISSONNAULT.

Washington. Decided December 17, 1877.

*Interest.*

A note payable at a future day with interest greater or less than six per cent, in which nothing is said about the rate of interest after maturity, will draw the stipulated rate till maturity only, and after that the usual or statutory rate of six per cent.

When it is expressly stated in a note that if it is not paid at maturity, it shall thereafter bear interest at a rate named, the rate named is recoverable, although it is much larger than the usual or statutory rate.

When a note is made payable at a future day, with interest at the rate of three per cent per annum, and nothing is said therein about the rate of interest which it shall draw thereafter, if not paid at maturity, it will draw the interest named till maturity, and after that the usual or statutory rate.

A note payable at a future day, with interest at two per cent a month, in which nothing is said about the rate of interest after maturity, will draw that rate of interest till the note matures, and after that only the usual or statutory rate.

ON EXCEPTIONS.

WRIT OF ENTRY on a mortgage given to secure six similar notes payable in six successive years, the first of which was of the following tenor: "$252.60. Calais, October 8, 1869. One year from date, for value received, I promise to pay Henry F. Eaton

or order two hundred and fifty-two dollars and sixty cents, with interest at eight per cent, payable annually. (Signed) Frederic Boissonnault. Witness, S. H. Hutchings."

The defendant was defaulted; and the plaintiff moved that the conditional judgment should be rendered for the amount of the notes secured by the mortgage with interest at eight per cent per annum from the date to which it is paid to the date of the judgment, deducting the payments indorsed thereon. But the presiding justice ruled that interest should be cast at eight per cent only to the day of the maturity of each note, and thereafter at six per cent; and the plaintiff alleged exceptions.

*E. B. Harvey*, for the plaintiff.

*C. B. Rounds & N. M. McKusick*, for the defendant.

WALTON, J. The question is what rate of interest shall be allowed on notes after they have matured.

When it is expressly stated in a note that if it is not paid at maturity, it shall thereafter bear interest at a rate named, the rate named is recoverable, although it is much larger than the usual or statutory rate. So held in *Capen* v. *Crowell*, 66 Maine, 282.

When a note is made payable at a future day, with interest at the rate of three per cent per annum, and nothing is said therein about the rate of interest which it shall draw thereafter, if not paid at maturity, it will draw the interest named till maturity, and after that the usual or statutory rate. So held in *Ludwick* v. *Huntzinger*, 5 Watts & Serg. 51.

A note payable at a future day, with interest at two per cent a month, in which nothing is said about the rate of interest after maturity, will draw that rate of interest till the note matures, and after that only the usual or statutory rate. So held in *Brewster* v. *Wakefield*, 22 Howard, 118, and in *Burnhisel* v. *Firman*, 22 Wall. 170.

The same rule was acted upon in the house of lords in England in a recent case. *Cook* v. *Fowler*, L. R. 7 H. L. 27.

The reason given by Lord Selborne, in the case last cited, is that interest for the delay of payment, *post diem*, is not given on the principle of implied contract, but as damages for a breach of

contract; that while it might be reasonable, under some circumstances, and the debtor might be very willing to pay five per cent per month for a very short time, it would by no means follow that it would be reasonable, or that the debtor would be willing to pay, at the same rate, if, for some unforeseen cause, payment of the note should be delayed a considerable length of time.

Similar views were expressed by Chief Justice Taney, in *Brewster* v. *Wakefield*, 22 Howard, 118. He says that when the note is entirely silent as to the rate of interest thereafter, if it is not paid at maturity, the creditor is entitled to interest after that time by operation of law and not by virtue of any promise which the debtor has made; that if the right to interest depended upon the contract, the holder would be entitled to no interest whatever after the day of payment.

In a recent case in Massachusetts, the court held that when a recovery is had upon a note bearing ten per cent interest, the plaintiff is entitled to interest at the same rate till the time of verdict. *Brannon* v. *Hursell*, 112 Mass. 63. The reason given is that "the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract." This reasoning is at variance with the reasoning in the house of lords in the case cited; and with the reasoning of the supreme court of the United States, in the cases cited; and with the reasoning of the Massachusetts court itself, in *Ayer* v. *Tilden*, 15 Gray, 178. It is there said that the interest after maturity "is not a sum due by the contract; that it is given as damages for the breach of the contract, and must follow the rule in force within the jurisdiction where judgment is recovered."

We think the rule laid down by the supreme court of the United States, and by the house of lords in England, is the correct one. It has been followed in Connecticut. *Hubbard* v. *Callahan*, 42 Conn. 524. And in Rhode Island. *Pierce* v. *Swanpoint Cemetery*, 10 R. I. 227. In the last case the court say that if the parties to the note or other contract for the payment of money, intend that it shall carry the stipulated rate of

interest till paid, they can easily entitle themselves to it, by saying so, in so many words. The practice in this state has been in accordance with the rule laid down by the supreme court of the United States, in *Brewster* v. *Wakefield*, 22 Howard, 118; and we see no reason for departing from it.

*Exceptions overruled.*

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

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GEORGE W. KILPATRICK *vs.* JUDSON HALL *et al.*

Washington. Decided December 19, 1877.

*Exceptions.*

The court cannot sustain exceptions, unless it affirmatively appear that the party alleging the exceptions was aggrieved by the ruling excepted to.

ON EXCEPTIONS.

TRESPASS, specifying damages $39.

The verdict was for the plaintiff for $17.07; and he alleged exceptions.

*J. H. French*, for the plaintiff.

*G. Walker*, for the defendant.

VIRGIN, J. Trespass for taking and carrying away twenty-eight spruce logs of the alleged value of $24, and five cords of wood, of the value of $15. The jury returned a verdict for $17.07. There is no motion to set aside the verdict; but the case comes up on exceptions to the instruction that, if the jury should find certain facts specified, the defendants, being minors, would not be liable for taking the wood provided they acted by the direction of their mother.

Minors are answerable for their own torts although in the commission thereof they act by the express authority of their parents. *Scott* v. *Watson*, 46 Maine, 362, and cases there cited.

The instruction was clearly erroneous. But to authorize the

court to sustain the exceptions, it must affirmatively appear that the plaintiff was aggrieved by the instruction. *Soule* v. *Winslow*, 66 Maine, 447. This does not appear by the bill of exceptions. The only evidence there was in the case in relation to the trespass, so far as the exceptions show, related to the wood. No mention is made of any evidence relating to the spruce logs. And if the verdict was based upon the taking of the wood, and nothing appears to the contrary, the plaintiff has a verdict equal to the alleged value of that with interest; and therefore has no cause of complaint. *Exceptions overruled.*

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

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CAROLINE E. TOOLE *vs.* JOHN G. BECKETT.

Washington. Decided January 3, 1878.

*Landlord and tenant.*

An action lies by a tenant of a store, being the lower story of a building, against a landlord who has the care and control of the upper stories, for an injury to his goods, caused by the rain descending through the roof down upon the store below, if the accident happens through the negligence of the landlord in his management of the part of the building under his own control.

ON REPORT.

CASE, stated in the opinion.

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

*J. G. Beckett, pro se*, submitted without argument.

PETERS, J. The facts are these: The plaintiff hired the lower portion of a building of the defendant for a store, the upper portion remaining in the possession of the defendant and under his care and control. A rain storm poured a great volume of water between the roof and the chimney down upon the plaintiff's goods, causing some injury. The charge is that the defendant was guilty of negligence, either on account of the original construction of the roof or in the way and manner of maintaining it. The case, both of law and fact, is referred to the court.

It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation. *Libbey* v. *Tolford*, 48 Maine, 316. But that is not this case. Here, the plaintiff had no care or control of the roof and had no right to intermeddle with it. The defendant had such care and control, for the benefit of himself and all his tenants. By implication, he undertakes so to exercise his control as to inflict no injury upon his tenants. If he does not exercise common care and prudence in the management and oversight of that portion of the building which belongs to his especial supervision and care, and damages are sustained by a tenant on that account, he becomes liable for them. He is responsible for his negligence. *Priest* v. *Nichols*, 116 Mass. 401. *Kirby* v. *Boylston Market Ass.* 14 Gray, 249. *Gray* v. *Boston Gas Light Co.* 114 Mass. 149. *Norcross* v. *Thoms*, 51 Maine, 503.

We think the facts warrant a finding against the defendant. The storm, though a severe one, was not so extreme that it might not have been reasonably anticipated as likely to occur; nor was it so overpowering and unusual that the cause of the accident should be regarded, according to the definition adopted by writers, as an act of God or *vis major*.

*Defendant defaulted for* $150 *and interest from date of writ.*

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

## PHEBE MASON *vs.* JAMES MASON.

Washington. Decided February 6, 1878.

*Mortgage.*

An agreement that a mortgager may retain possession of the mortgaged property until breach of condition, is not implied from a conditional clause in the mortgage, which requires the mortgager to furnish a comfortable home for the mortgagee and to furnish him necessaries and support during his natural life.

An action for the possession of land by a mortgagee cannot be defeated by showing that nothing was then due upon the mortgage, unless the entire conditions of the mortgage have been satisfied and performed.

ON EXCEPTIONS.

WRIT OF ENTRY, on mortgage of house and lot in Calais, dated September 29, 1873. The condition of the mortgage is:

"Provided nevertheless that if the said James Mason, his heirs, executors or administrators, shall provide a comfortable home, with sufficient food and clothing and medical attendance, nursing and all other things necessary to make the said Hugh and Phebe Mason comfortable during their natural life, then this deed, as also a promissory note for twelve hundred dollars, bearing even date with these presents, signed by the said James Mason, whereby he promises to pay the said Hugh and Phebe as conditioned aforesaid, shall be absolutely void to all intents and purposes."

The plea was *nul disseizin*, with a brief statement, under which the defendant offered to prove that the plaintiff and her husband, who was also a mortgagee, both at the time of the mortgage and after, selected the mortgaged premises as their home, and remained in possession and with the defendant, until the death of the husband; that she declared she had been well used and was perfectly satisfied; that she left the premises without any substantial reason and against the remonstrance of the defendant; that the defendant was and has been ready and willing to perform the condition of the mortgage; that there would be great and unnecessary expense in providing a home and complying with the conditions at any other place than that originally selected by the plaintiff; that the place where she now lives

is five miles distant from the place first selected, and that to furnish a home and support there would cause great and needless expense.

The presiding justice ruled that this evidence would not be sufficient to constitute a defense; and the defendant alleged exceptions.

*A. McNichol*, for the defendant.

*E. B. Harvey*, with *F. B. Bailey*, for the plaintiff.

PETERS, J. Every mortgagee may recover possession of the mortgaged property before a breach of the condition in the mortgage, when there is no agreement to the contrary. R. S., c. 90, § 2. Such agreement, inasmuch as it affects the title to real estate, must be evidenced by some writing. *Norton* v. *Webb*, 35 Maine, 218.

The tenant contends that such an agreement is clearly implied from the words of the mortgage itself. The conditional clause requires that the mortgager shall provide a comfortable home for the mortgagee, and furnish her sufficient food and clothing, medical attendance and nursing, and other necessaries during her natural life. The deed admits of no such construction. The mortgager is under no necessity to support the mortgagee upon the mortgaged premises, nor can the mortgagee require that she shall be supported there. There is no intimation in the mortgage that the use of the land mortgaged is to be enjoyed by the mortgager to enable him to furnish the required support there or elsewhere. The opinion and reasoning of the court in *Allen* v. *Parker*, 27 Maine, 531, must be conclusive of this case, unless overruled. As to the place where the support may be provided, see: *Wilder* v. *Whittemore*, 15 Mass. 262; *Hubbard* v. *Hubbard*, 12 Allen, 586, 590. 126 Mass. 437-8

All the cases in this state, wherein it has been held that a mortgager may retain the possession, are clearly distinguishable from this. In *Lamb* v. *Foss* (21 Maine, 240) the mortgager was to render a share of the crops, or support the mortgagee upon the farm. In *Brown* v. *Leach* (35 Maine, 39) he was to maintain the mortgagee on the farm and keep it in good order.

In *Norton* v. *Webb*, *supra*, he was to support the mortgagee in the house upon the premises if he chose to do so, and he so elected. In *Bryant* v. *Erskine* (55 Maine, 153, 156) the court say, *arguendo*, that the mortgager was entitled to possession; but there the mortgage prescribed that a particular portion of the premises should be occupied by the mortgagees. Some other courts, we are aware, have given a more liberal interpretation to this class of mortgages than this court has, but we think it best to adhere to our own well established rule. There is really no more hardship in a dispossession of the mortgager in this case, than there is in ordinary cases where there has been no breach of the condition of the mortgage. If the mortgagee holds possession of the premises here (presumably a house and not a farm, from the description), the rents received by her or their value must be accounted for towards the support required to be rendered. Parties must stand by their agreements deliberately entered into.

Section 9, c. 90, R. S., does not apply here. It is therein provided that, if it appears that nothing is due on the mortgage, judgment shall be for the defendant. This is intended for a case where a mortgage has been fully satisfied or paid. That defense is made out when it appears that nothing is due or is ever to be due. "Nothing due," does not mean nothing payable merely.

Under the case as presented, the demandant is not entitled to a conditional judgment; nor does she ask it. She is entitled to possession.

*Judgment for demandant.*

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

## ALEXANDER STUART *vs.* JAMES MORRISON and logs.

Washington. Decided March 25, 1878.

*Evidence.*

Where several lots of logs of different marks are described in a writ as one lot, having all the marks, evidence *aliunde* will not be received to explain the marks.

*Thus:* Where the plaintiff had a labor lien on only one mark of logs belonging to the defendant, which in the driving became mingled with other marks of logs belonging to other owners, and his writ was made to cover all the marks, with nothing in the description by which the several characters used could be separated: *Held*, that it was not competent for the plaintiff to explain the marks by parol; that the court would take the description of the logs as they found it in the writ.

ON REPORT.

ASSUMPSIT on account annexed, for 79 days labor, for personal services driving logs on the St. Croix waters marked (here follow several characters difficult to print, but read by a witness as in his testimony appears) at $2.50 per day, $237.50. There was also an averment of a claim of a lien on the logs for personal services at driving and that the action was brought to enforce the lien according to the statute.

The plea of the defendant, Morrison, was that he never promised, with a brief statement that the parties were residents and citizens of New Brunswick, where the logs were destined for manufacture; that the labor of the plaintiff was performed on other logs belonging to other owners; that no particular or special labor was performed on defendant's logs; that the description of the logs in the return of the officer as a quantity of spruce and hemlock logs, not designating the quantity of each kind, was not sufficient to sustain a lien.

The several owners of logs of the marks mentioned in the return of the officer, appeared and filed their brief statements in defense.

The plaintiff testified that he belonged in Miramachi, had made his home in Calais for four years past; that in April, 1874, he went up river to work for James Morrison, of St. Stephens, driv-

ing logs; that he worked on logs of Eaton Brothers, Henry F. Eaton, Copeland, Duren & Co., William E. McAllister & Son and Charles F. Todd; that the logs were marked Reel S Cross Notch Saddle-bags Two crosses J E Cross-back. On cross-examination he testified that the mark on McAllister's logs was S Cross Notch; on Eaton Brothers was Reel; on H. F. Eaton's was J E Cross Notch.

*A. McNichol*, for the plaintiff.

*J. Granger*, *G. F. Granger & E. B. Harvey*, for the claimants.

LIBBEY, J. The description in the writ of the logs on which the plaintiff claims a lien must be held as embracing one lot of logs and one mark only. There is nothing in the description by which we can separate the several characters used, and determine that they constitute several marks of different lots of logs. To establish his right to judgment against the logs for the lien claimed, the plaintiff must show that he performed labor in cutting, hauling, rafting or driving the logs described in the writ, and that the same logs are attached in the suit. He admits that he performed no labor on logs marked with all the characters contained in his writ, but claims to show by parol evidence that the description in the writ contains four distinct marks, and that he performed labor on logs of each of those marks. It is not competent for him to explain the mark by parol. We must take the description of the logs as we find it in the writ. The logs attached are not of that description. The variance between the description in the writ and the proof is fatal to the plaintiff's claim against the logs attached.

The view we have taken of this point in the case renders it unnecessary to consider the other points raised.

The claims of Copeland, Duren & Co., of Henry F. Eaton, and of George McAllister, must be dismissed without cost. The attachments of the logs severally claimed by them were released before the return of the writ. No notice was given to owners of logs of the marks claimed by them. By the docket entries it does not appear that they were permitted to come in as parties. They have no standing in court.

The plaintiff is entitled to judgment against the defendant for $151.45 and interest from the date of the writ.

*Judgment against the logs attached denied.*

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

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DAVID B. BOLSTER *vs.* INHABITANTS OF CHINA, appellants.

Kennebec. Decided May 31, 1877.

*Amendment.*

The power to grant amendments upon terms which are left to the unlimited discretion of the presiding justice is equivalent to a power to grant any amendment that is by law allowable without imposing any terms, if in his opinion justice does not require that he should impose any. And the exercise of his discretion in so doing will not be revised by this court on exceptions.

As to the imposition of terms upon the allowance of amendments, the whole matter is committed by the statute and rules of court to the discretion of the presiding justice, except in cases of demurrer, when his discretion is controlled by R. S., c. 82, § 19.

The original declaration in favor of the physician against the town was on account annexed for attendance upon S. H., pauper of said town. After an appeal from the judgment of the trial justice to this court, the presiding judge allowed an amendment by inserting a count under R. S., c. 24, § 32, without terms. *Held*, that the amendment was legally allowable and that the presiding judge had the power to allow it without terms. R. S., c. 82, § 9. *Reg. Gen. V.*

ON EXCEPTIONS.

ASSUMPSIT originally before a trial justice, on account annexed, for medical attendance, $16.50 "being for his professional services as a physician, and taking care of, attending and furnishing to Seth Hallowell, pauper of said town of China," etc.

The judgment before the trial justice was for the plaintiff; and the defendants appealed.

At the trial in this court the plaintiff moved to amend by inserting a count, under R. S., c. 24, § 32, as follows:

"Also for that one Seth Hallowell at said China, to wit, at said Augusta, in the county of Kennebec aforesaid, on the 27th day of April, A. D. 1873, a pauper, had his legal settlement in said

China, and fell into distress and stood in need of immediate relief and medical attendance and medicine, of which the selectmen and overseers of the poor of said town were then and there duly notified and requested to provide for said pauper and to pay the expense of necessary nursing, medical attendance and medicine; and the said medical attendance and medicine in the account annexed were then and there necessary for the immediate relief and comfort of said Hallowell. And the said plaintiff then and there, at the instance and upon notice to the selectmen and overseers as aforesaid, rendered his professional services as a physician and furnished necessary medicine to said Hallowell, for which services and medicine sixteen and 50-100 dollars is a reasonable compensation. Whereby said town became liable and in consideration thereof then and there promised the plaintiff to pay him the same on demand."

The judge ruled as matter of law that the amendment could be allowed without terms and it was so made. To which ruling the defendants alleged exceptions.

*W. S. Choate*, for the defendants, cited authorities under various positions taken. *Rowell* v. *Small*, 30 Maine, 30. Rules of Court, V. *Maberry* v. *Morse*, 43 Maine, 176. *State* v. *Folsom*, 26 Maine, 209. *Rand* v. *Webber*, 64 Maine, 191. *Matthews* v. *Blossom*, 15 Maine, 400. *Frye* v. *Atlantic & St. Lawrence*, 47 Maine, 523.

*O. D. Baker*, for the plaintiff.

The amendment was rightly allowed. R. S., c. 82, § 9. *Brewer* v. *East Machias*, 27 Maine, 489. *Solon* v. *Perry*, 54 Maine, 493.

Where a court has power to allow an amendment upon terms in their discretion, that includes the power to say what terms, and when they have passed upon the terms, even if they say there shall be no costs, it is not reviewable.

The amendment, we say, was of form; but if of substance the ruling was right.

BARROWS, J. The amendment sets out with somewhat more

formality the grounds of a claim, the nature and amount of which were distinctly made known to the defendants by the writ as it was originally made. Its allowance was clearly within the power of the presiding judge as defined by our statutes, rules of court, and decisions respecting amendments. *Brewer* v. *East Machias*, 27 Maine, 489. *Solon* v. *Perry*, 54 Maine, 493.

The burden of the defendants' complaint seems to be that the presiding judge ruled as matter of law that he had the power to allow it without imposing terms upon the plaintiff, and thereupon did so. The defendants say this is an infringement of Rule V (Reg. Gen.); that this amendment is matter of substance, and, if allowed, must be allowed only on special terms. But after all, the power which the presiding judge has in this particular under Rules IV and V, does not essentially differ from that conferred by R. S., c. 82, § 9, to grant amendments "when the person and case can be rightly understood . . . on motion of either party on such terms as the court orders."

Under this statute, it has been held that an amendment proposed after motion to dismiss filed may be allowed without terms. *Harvey* v. *Cutts*, 51 Maine, 604.

The whole matter is committed to the discretion of the presiding judge, and the power to allow amendments upon terms substantially includes a power to dispense with the terms if, in the opinion of the presiding judge, justice requires it.

There is no limit upon the judge's discretion as to terms. If the rule, literally construed, could be held to require the judge to impose special terms of some sort, it would be literally complied with by ordering the amending party to pay one cent, costs. But, *de minimis non curat lex.* The object of the rule is simply to call the judge's attention to the question, what, if any, terms shall be imposed, as liable to be affected by the character of the proposed amendment, and the progress the case has made. The exercise of his discretion will not be examined, on exceptions, by this court. Where a demurrer is sustained, the judge's discretion as to terms is controlled by R. S., c. 82, § 19. But there was no demurrer. *Exceptions overruled.*

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

GEORGE E. HEWINS *vs.* DAVID CARGILL.

Kennebec. Decided June 27, 1877.

*Promissory notes.*

An alteration of a note for $500, to one for $400 is a material alteration, and if made without the consent of the signer or indorser, will constitute a good defense to his liability on the note.

The defendant, taking upon himself the burden of proof, may defend by proving a material alteration of the contract declared on without making the affidavit and giving the notice prescribed by Rule X of this court.

ON EXCEPTIONS.

ASSUMPSIT against the defendant as one of the signers on the back of a promissory note for $400.

The plaintiff introduced in evidence, the note described in his writ with protest of the notary.

The defendant then offered evidence tending to show that the note, since it was signed by him, had been materially altered. The plaintiff objected on the ground that no notice had been given as required by Rule X of this court. The presiding justice admitted the evidence.

It appeared in evidence that the defendant signed his name on the back of a note for $500, made by Kaler Brothers—that the $500 note was altered to the $400 note in suit, without the defendant's knowledge or consent, and with the knowledge of the plaintiff. Upon this point the presiding justice instructed the jury as follows, viz:

"The plaintiff admitting that the note was altered in the manner alleged, takes upon himself the burden again to satisfy you that it was done by previous consent of the defendant, Cargill, or by a subsequent ratification. To constitute a valid ratification of the alteration of the note, it must be shown that the defendant consented to it, and agreed to be holden upon the note after it was altered, having full knowledge of all the facts in regard to it."

And the court further instructed the jury as to interest to be allowed as follows: "If you find for the plaintiff, you may cast

interest at the rate of 12 per cent until the note became due, one year; after that time 6 per cent. The note reads 'interest at 12 per cent.' The construction I put upon it is 12 per cent until maturity, and after that the plaintiff is entitled to interest at the rate of 6 per cent down to the present time."

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

*E. W. Whitehouse*, for the plaintiff, contended, in substance, that by the terms of Reg. Gen. X, the defendant was not permitted to call for proof of the execution of the paper declared on, because he had not made the affidavit of belief of its alteration; that a fair construction of the rule was that he should not be permitted to deny the execution of the paper; that it should be taken as true without proof; and that no proof should be admitted to the contrary.

*E. F. Pillsbury*, for the defendant, contended in substance, that by waiving his right to put the plaintiff to proof of the execution of the paper, he had not thereby waived his right to prove affirmatively that there had been a material alteration.

LIBBEY, J. Undoubtedly the change of a note for $500 to a note for $400 is a material alteration of it; and, if made without his consent, will discharge a signer or indorser. True, the change is not disadvantageous to one who is holden to pay it, since it only reduces the amount for which he would otherwise be liable; but it makes another and a different contract of it; and any signer or indorser has a right to say, and can say truly, that the note in its altered form, is not his contract. This question was fully examined in *Chadwick* v. *Eastman*, 53 Maine, 12, and *Lee* v. *Starbird*, 55 Maine, 491.

It is contended by the counsel for the plaintiff that this defense is not open to the defendant, because he did not make the affidavit and give the notice required by Rule X of this court. But it seems to us that the whole prohibitory force of the rule, as it stands, is to prevent the defendant from calling upon the plaintiff to prove in the outset the signature of the defendant, on the execution of the contract declared on; and that it does not preclude

the defendant from taking the burden upon himself of proving an alteration which would avoid the contract. If he offers evidence of such alteration which is a surprise to the plaintiff, the presiding judge, in the absence of any previous notice that such defense was intended, would doubtless order a postponement, on the application of the plaintiff, to enable him to meet it. Cases are liable to arise where the first knowledge that the defendant has of any alteration is when the instrument is produced at the trial in evidence. If we construed the rule as precluding the defendant from proving an alteration without previous affidavit and notice, no judge would hesitate to allow a defendant, thus surprised, time to prepare his affidavit and give notice of his intention to make the defense, and this would necessitate the same delay which it was the object of the rule to avoid. If the defendant's affidavit of his confidence in such defense and his design to make it is desirable, the rule can be amended so as to require it; but as it reads we think it only dispenses, in the absence of the affidavit, with the formal proof of execution which the plaintiff would have to make in order to get the instrument before the jury as evidence.

As the verdict was for the defendant, the instruction as to the rule for computing interest on the note becomes immaterial.

*Exceptions overruled.*
*Judgment on the verdict.*

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

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ROBERT PORTERFIELD *vs.* CITY OF AUGUSTA.

Kennebec. Decided July 21, 1877.

*Tax.*

The wife cannot change the domicile of the husband against his will.

Where a ship-master sailed from his home in Brooklyn, December, 1866, and his wife shortly after came on a visit with her children and trunks to Augusta, and there lived with her mother till summoned by her husband to meet him at Brooklyn, whither he returned July, 1867; *Held*, that he was not meanwhile taxable in Augusta.

ON REPORT.

*D. C. Robinson*, for the plaintiff.

*W. P. Whitehouse*, city solicitor, for Augusta.

APPLETON, C. J. This is an action to recover back a tax of $130.50, assessed upon Allen Alexander, the plaintiff's intestate, in 1867, and paid by him under protest.

It is in evidence that in 1863, Alexander purchased a house in Brooklyn, N. Y., where he resided with his family. Being a master mariner, he sailed from New York, December 1, 1866, on a voyage to the coast of Africa, from which he returned in July, 1867. Some three or four weeks after he sailed, his wife with her children and trunks containing their clothing came to Augusta to visit her mother, and remained with her until she received a telegram from her husband advising her of his arrival at the home port, when she returned to New York. Mr. Alexander was not in Augusta during the year 1867. While Mrs. Alexander was visiting her mother, the house and furniture were left in the charge of a friend, who occupied the house free of rent.

There is no proof that Alexander owned any real or personal estate in Augusta, or that he had any intention whatever to change his domicile. He had done no act indicating in the most remote degree such intention. The wife could not change the domicile of her husband against his will had she desired to do so, and the evidence negatives any such desire on her part. *Parsons* v. *Bangor*, 61 Maine, 457.

The plaintiff having paid the taxes duly assessed against him in Brooklyn, may well object to the payment of taxes in a place where he had no domicile whatever.

*Judgment for plaintiff.*

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

STATE *vs.* REDINGTON J. KENNISTON, appellant.

Kennebec. Decided September 5, 1877.

*Intoxicating liquors.*

When in a search and seizure process, the officer to whom the warrant is directed makes a return of a specific search and seizure in pursuance of its mandate, evidence is not admissible to show that the search and seizure were made by others in his absence and without his knowledge or direction. The state cannot thus contradict the return of its officer.

The proof of a search and seizure by strangers will not suffice as proof of the search and seizure returned by the officer as made by him, when in fact he made none nor directed the making of any.

EXCEPTIONS.

COMPLAINT on search and seizure process, from the police court of the city of Gardiner. S. W. Siphers, constable of Gardiner, made return on the warrant. "I have entered the within named premises and therein searched for intoxicating liquors and found and seized the following described liquors," &c.

It appeared in evidence that Siphers was away on an excursion, when the search was made by Wing, Williams and Atkins, policemen, at about nine o'clock in the evening; that Siphers returned at about eleven o'clock and met the policemen on the street, who told him of the search and seizure, and he then went to the lock-up and took possession of the liquor seized, and afterwards made his return upon the warrant.

The defendant seasonably objected to the admission of evidence of a search and seizure made by other persons than the officer who made the return, and not made in his presence or under his direction, as proof of the alleged search and seizure, but the presiding justice overruled the objection and admitted the evidence.

The verdict was guilty; and the defendant alleged exceptions.

*H. Farrington* for the defendant.

*E. F. Webb*, county attorney, for the state.

APPLETON, C. J. This is a search and seizure process. It was directed to an officer, by whom a return was made, that he had entered "the within named premises and therein searched for

intoxicating liquors and found and seized the following described liquors,"—stating them.

"The officer's return," remarks Peters, J., in *State* v. *Howley*, 65 Maine, 100, 101, "is a part of the allegations to be proved, but is no part of the proof itself. *State* v. *Stevens*, 47 Maine, 357. *State* v. *Lang*, 63 Maine, 215." The allegations in the complaint, warrant and return are not established by reading the same. The truth of the facts alleged and asserted must be established by proof *ab extra*.

The evidence introduced shows that no search nor seizure was made by the officer by whom the return was made, he being absent at the time, but that the search was made by strangers to the process in the absence of the officer and not under his direction. The evidence completely negatives the truth of the officer's return. The question then is can the truth of a return be established by an entire disproof of all the facts therein contained. We think not. The evidence was not admissible to contradict the return.

*Exceptions sustained.*

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

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JOSEPH W. PATTERSON, petitioner for partition, *vs.* THADDEUS SNELL.

Kennebec. Decided December 17, 1877.

*Deed.*

A quitclaim deed of all the grantor's "right, title and interest in and to all the real estate situated in the town of V. of which my late father, T. S. of said V., was seized at the time of his decease," is sufficient in its terms and furnishes a description sufficiently precise to convey whatever estate the grantor had in lands in V. as heir of his father.

The possession and production of a deed by the grantee is *prima facie* evidence of delivery; but the presumption is the other way, where it remained in the possession of the grantor during his life time, though it has been recorded since his death.

The appearance of a deed upon the record does not operate as a delivery nor supersede the necessity of proof of delivery.

A deed intended by the grantor to take effect only as a testamentary disposition of his property, and retained by him in his own possession without delivery until his decease, passes no title from him to the grantees named in it.

On report.

Petition for partition.

*S. & L. Titcomb*, for the petitioner.

*W. S. Choate*, for the respondent.

Barrows, J. The petitioner, claiming to be seized of an undivided half, seeks partition of a parcel of land containing thirty acres upon which the respondent in 1842 or 1843 erected a house and barn, and of which he has ever since been in possession, claiming to be sole seized.

Prior to 1834, the land with other parcels of real estate in Vassalboro' belonged to Thaddeus Snell, senior, father of the respondent.

The petitioner claims title under a deed from the administrator of Wm. W. Snell, the respondent's brother, who died in 1873, having lived in Vassalboro', a neighbor to the respondent, for more than thirty years while the respondent had sole possession of the premises. No question is made but what the probate proceedings touching the administration of Wm. W. Snell's estate and the sale of his property by his administrator are all regular, and we consider it proved that whatever title Wm. W. Snell had at his death the petitioner now holds. To show title in Wm. W. Snell, the petitioner produces from the records a copy of a deed dated September 9, 1834, purporting to be a conveyance, by Thaddeus Snell, senior, to his two sons, the respondent and Wm. W., in consideration of love and affection, and one thousand dollars paid by them, of a parcel of land in Augusta, this thirty-acre piece in Vassalboro', also the grantor's home farm there, and half of the saw-mill and privilege and of a grist-mill privilege, "including all the lands, buildings, privileges and appurtenances of every description which I own and of which I am seized and possessed."

The deed seems to have been witnessed by three subscribing witnesses, and was not recorded until July 11, 1839, nearly a month after the grantor's death.

The administrator's deed and these records make the petitioner's case. The respondent produces and proves the execution

of a deed of quitclaim, from his brother, Wm. W. Snell, to him dated October 21, 1841, and recorded the same day, of "all my right, title and interest in and to all the real estate situated in the town of Vassalboro' of which my father the late Thaddeus Snell of said Vassalboro' was seized at the time of his decease, being one undivided half of his property," and also an undivided half of a parcel owned by said grantor in common with Elias Craig. The consideration named in this deed is $1200. The grantee seems to have taken sole possession of the premises shortly after its execution. Its terms are sufficiently formal and the description of the estate sufficiently precise to convey whatever estate Wm. W. Snell had in lands in Vassalboro' as heir of his father. R. S., c. 73, § 14. *Field* v. *Huston*, 21 Maine, 69. *Marr* v. *Hobson*, 22 Maine, 321. *Libby* v. *Thornton*, 64 Maine, 479.

But the petitioner contends that the premises passed by the deed of September 9, 1834, from Thaddeus Snell, senior, to Wm. W. and the respondent, and that it was not land of which Thaddeus Snell, senior, "was seized at the time of his decease." If the deed of September 9, 1834, was ever delivered by Thaddeus Snell, senior, with the intention that the title to the premises therein described should pass, this would follow. Are the circumstances such that such a delivery may be presumed, or inferred? "The possession and production of a deed by the grantee is *prima facie* evidence of its having been delivered; and for like reasons in the absence of all contradictory testimony the presumption arises, when found in the possession and produced by the grantor, that it has not been delivered," says Shepley, J., in *Hatch* v. *Haskins*, 17 Maine, 391, 397.

The deed in question is not produced by the petitioner nor by the administrator of Wm. W. Snell, nor is there any evidence tending to show that it was ever in the possession of said Wm. W. in the life time of the grantor. The respondent, who is the other grantee named in it, denies all knowledge of its existence until within the last few years. He brings evidence from which we think it may fairly be inferred that it remained in the custody of Thaddeus Snell, senior, the grantor, at all events for some time after it was executed, and was kept by him in a chest where he

kept his own valuable papers, in the house on the homestead, which seems at one time towards the last of his life to have been occupied by him and Wm. W. Snell. It was placed on record by somebody within a month after his decease. There is no testimony that Wm. W. Snell ever mentioned it or set it up as operative and valid. On the contrary, two years after his father's death, he makes this conveyance to his brother, the respondent, which so far as appears could take effect upon nothing if the deed of September 9, 1834, is to be regarded as a good subsisting conveyance. No change in the possession of the property appears to have followed the execution of the deed of September 9, 1834, during the life time of the grantor. Looking at the number of the attesting witnesses, unusual for a deed, but appropriate for a will, and the fact that one of them, who also took the acknowledgment of the deed, was the register, who afterwards recorded it, in connection with the facts above recited, it seems probable that Thaddeus Snell, senior, designed to have it take effect only as a testamentary disposition of his property, and retained it in his own possession while he lived, accordingly.

But this deprived it of all force as a deed, which can take effect only when delivered, and, if not delivered before the death of the grantor, never can be. *Brown* v. *Brown*, 66 Maine, 316.

In view of the circumstances under which this deed makes its appearance, we think there is neither proof nor presumption of its delivery. That its appearance upon the record does not operate as a delivery nor supersede the necessity of proof of delivery, was distinctly held in *Parker* v. *Hill*, 8 Met. 447, and *Hawkes* v. *Pike*, 105 Mass. 560, where the registration occurred during the life time of the grantor. *A fortiori*, it could not in a case like the present. See also *Stilwell* v. *Hubbard*, 20 Wend. 44.

The deed of September 9, 1834, not having been delivered by the grantor, he died seized of the premises therein described, and a conveyance made in the terms used by Wm. W. Snell in his deed to the respondent, dated October 21, 1841, would pass said Wm. W.'s interest therein.

It is not to be presumed that Wm. W. Snell when he made

that deed did not intend to convey anything. The reverse is true. He may have erroneously supposed that the reception and registration of the deed of September 9, 1834, by one of the grantees after the death of the grantor, would make it operative from that date. He may have been instructed by counsel that for want of delivery in his father's life time it could not take effect; but there is no occasion to impute to him an intention to perpetrate a fraud on his grantee by making his own conveyance in terms which would render it nugatory if his father's deed had been duly delivered. Such an imputation is inconsistent with his apparent acquiescence for more than thirty years in the occupation of the premises by his grantee. It is urged that his conveyance of an undivided half can be explained only upon the hypothesis that the deed had been delivered. But it is equally consistent with a mistaken supposition which may have been entertained by both the brothers that the provision otherwise made by Thaddeus Snell, senior, for his granddaughter, left his sons undisputed owners of the realty. Where the question is whether we shall impute positive fraud or a mistake in the law to a party to a conveyance, we prefer, in the absence of convincing proof, to infer the latter.

The remaining ground taken by the petitioner is that Wm. W. Snell's conveyance to the respondent was fraudulent and void.

But the case is very far from furnishing the proof which would enable the grantee of an administrator to defeat a deed of the intestate, made so long before his death, on the ground that the property was fraudulently conveyed. There is hardly enough to excite a suspicion.

The burden was on the petitioner to show either that the deed of September 9, 1834, was duly delivered, or that that of October 21, 1841, produced by the respondent, was tainted with fraud; but the preponderance of evidence is against him on both points.

We have no occasion to consider the respondent's claim of title by adverse possession.

*Partition denied. Petition dismissed.*

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

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

STATE *vs.* LEVI LASHUS.

Kennebec. Decided January 10, 1878.

*Evidence.*

It is not competent to introduce evidence, in support of an indictment charging the respondent with maintaining a nuisance "in a store on the Plains so called," that the respondent maintained a nuisance on "Silver street," a third of a mile distant from "the Plains" but in the same town.

ON EXCEPTIONS.

INDICTMENT for nuisance, wherein the verdict was against the defendant, and he alleged exceptions, which in the opinion appear.

*F. A. Waldron*, for the defendant.

*E. F. Webb*, county attorney, for the state.

DICKERSON, J. The allegation in the indictment is that the respondent "kept and maintained a common nuisance, to wit: A certain building occupied by him as a store and shop on the Plains, so called, in Waterville."

The evidence shows that there is a settlement in Waterville, known as the "Plains" where the respondent's residence was, but at least a third of a mile distant from his place of business, which was on Silver street in the village of Waterville.

It was objected, on behalf of the respondent, that it was not competent to admit evidence of any other nuisance kept by him than that kept at the "Plains," as alleged in the indictment; but the court overruled the objection and admitted evidence tending to show that the respondent kept and maintained a nuisance at his store on Silver street.

We think this ruling is wrong. The indictment locates the alleged nuisance upon the "Plains," a well known locality in Waterville, entirely distinct from and independent of the village of Waterville, where Silver street is located. The indictment, therefore, gives the respondent no notice to defend himself against a charge of keeping a nuisance at his store on Silver street. Locality is an essential element of the offense denominated a common nuisance. There can be no such nuisance described without a

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designation of the place where it is alleged to exist. "The Plains" was as much a place as was Silver street; neither implied or included the other. The respondent may have been guilty of maintaining a common nuisance at both, or either, or neither of these places. The government, having designated the place of the nuisance, must be restricted in its evidence to that locality. To allow the government to substitute another place for that alleged in the indictment would be to change the issue and try the respondent upon a charge other than that found by the grand jury. An acquittal or conviction, moreover, upon this indictment would be no bar to a second indictment charging the respondent with maintaining a nuisance on Silver street.

*Exceptions sustained.*

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

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BERIAH L. WOODWARD *vs.* JOSEPH ROBINSON, 2d.

Kennebec. Decided January 10, 1878.

*Exceptions. Pleading.*

In an action of trespass *q. c.*, if the defendant would sustain exceptions on the ground that the instructions allowed plaintiff to prevail when the locus was not covered by the description in the writ, he must present enough of the case to the law court to show that such a position was taken at the trial and to enable the law court to say that the locus was not well described in the writ.

If one, who has title by deed to a part of a lot designated by a certain number and range, includes in his close surplus land adjoining and holds possession of it long enough to acquire an absolute title, either by agreement with coterminous proprietors as to the location of the line, or otherwise, such land becomes to all legal and practical intents and purposes a part of the lot, and a trespasser upon it cannot complain that it is so described.

ON EXCEPTIONS.

TRESPASS: For that the said defendant at, &c., on, &c., with a *continuando*, with force and arms broke and entered the plaintiff's close situate in said Sidney, bounded and described as follows: Part of lot No. 38, on the 4th range of lots, on the east side of the road leading from Augusta to Waterville; being one-

half of all the land on the east side of the road formerly owned by Timothy Woodward, commencing at the north line next to land owned by Joseph Robinson, second, going south to a double wall intended to be in the centre of the lot. And said defendant being so entered, then and there with force as aforesaid, having no privilege or right, without leave or excuse, cut down and carried away eleven large trees of the plaintiff there growing of the value of twenty-five dollars, and other injuries, &c.

Plea, general issue.

The defendant claimed and introduced testimony tending to prove that the west line of the third range and the east line of the fourth range were not identical, but that there was a gore between said third and fourth ranges not included in lot 38, upon which gore the alleged trespass was committed. The act claimed as a trespass was admitted by the defendant, and the only question in issue was the title to the premises where the trespass was alleged to have been committed.

The court instructed the jury: "If the title is in the plaintiff, he is entitled to recover. If the title is not in the plaintiff, your verdict must be for the defendant," with other instructions, all of which, so far as stated in the printed exceptions, appear in the opinion. But the whole charge was referred to. The verdict was for the plaintiff; and the defendant alleged exceptions.

*E. F. Pillsbury & L. Titcomb*, for the defendant, submitted the following brief:

The point upon which the defendant in his exceptions relies, is that the alleged trespass was not committed on the premises described in the plaintiff's writ, which alleges trespass on lot 38, fourth range, and nowhere else.

It appears that the place on the face of the earth where the alleged trespass was committed was admitted; that there was no dispute that plaintiff had title to lot 38, fourth range, by deed; that the west line of defendant's land is the westerly line of range 3, and the easterly line of the plaintiff's land is the easterly line of range 4; that defendant claimed and introduced testimony tending to prove that there was a surplus between the ranges; that there was a gore between said third and fourth ranges not

included in lot 38, upon which gore the alleged trespass was committed—a piece of land not covered by either deed.

If it was not covered by plaintiff's deed, it was not covered by location in his writ, and the instructions of the court were erroneous.

As the defendant states in his exceptions, "the only question in issue was the title to the premises where the trespass was alleged to have been committed."

If the plaintiff had title to the land by virtue of his deed, he can maintain his action; if he had title to it by possession, or not by deed, he cannot maintain his action; as the defendant admitted that the plaintiff had title to lot 38 by deed, but claimed that the alleged trespass was committed on the gore between the ranges outside of lot 38, fourth range, the plaintiff must show that it was covered by his deed, or in other words, covered by location in his writ; and the instructions of the court making title in the plaintiff sufficient grounds for maintaining his action were erroneous.

*D. C. Robinson*, for the plaintiff, submitted the following brief:

1. The question to be settled is the location of the line.

2. The plaintiff introduced testimony to show that, more than twenty years prior to the commencement of the action, the line which marks the eastern boundary of the plaintiff's land, the same line now in dispute, was settled by agreement.

3. Where a number of persons settle in the same neighborhood, and their tracts if extended in certain directions would overlap each other, they may agree and determine upon dividing lines. Such agreements are conclusive upon all parties to them, and upon all claiming under them. 3 Serg. & R. (Pa.) 323. 5 *id.* 273. 17 *id.* 57. 9 Watts & S. (Pa.) 66.

BARROWS, J. The plaintiff declares for a trespass upon his lot in Sidney, which he describes as part of lot No. 38 in the 4th range.

The defendant owned the corresponding lot in range 3, east of 38, and contended that his acts were done not upon any part of lot 38, but upon a gore of surplus land between ranges 3 and 4,

where his lot and the plaintiff's should have come together, but did not, and he introduced testimony tending to prove that there was a surplusage of land there. The plaintiff claimed that the line between the parties had been so long established by agreement as to become binding upon them; and the presiding judge gave instructions not excepted to as to what is necessary to establish a line between adjoining owners.

The exceptions state that "the only question in issue was the title to the premises where the trespass was alleged to have been committed." The judge told the jury that "if the title is in the plaintiff he is entitled to recover, and if it is not in the plaintiff their verdict must be for the defendant; that if there was a line established by an agreement and established so long that it becomes binding upon the parties, then it is of no consequence about the lines claimed east or west of this; that if they found the line to be established by agreement where the plaintiff claimed it was, it being conceded that that was farther east than the place where the trees were cut, it would give the case to the plaintiff; that if they did not find the line established by agreement, then the next question was where the original line was; that if they found the line so as to include the location where the trees were cut within the lines of the plaintiff, and upon his land, their verdict must be for him."

The defendant excepts to these instructions, claiming that the jury were thereby allowed to give the plaintiff a verdict for a trespass upon land not covered by plaintiff's deed nor described in his writ.

We do not perceive that the defendant was injured by the instructions or that he can justly complain of them. A reference to the plaintiff's declaration shows that his close was further described as being "one-half of all the land on the east side of the road formerly owned by Timothy Woodward, commencing at the north line next to land owned by Joseph Robinson 2d, (defendant) and going south," &c. Wherever the line was it seems to be conceded that the parties were coterminous proprietors. If the plaintiff did not own the land where the cutting was, the defendant was to prevail. It does not appear that the

presiding judge had his attention called in any manner to the sufficiency or correctness of the description in the writ. There is not enough in the case presented to enable us to say that the locus is not well described in the plaintiff's writ.

If he had a valid title to the land or a possession rightful as against the defendant, it was sufficient to enable him to maintain this action. It mattered not whether the title was by deed or by long continued possession under an agreement establishing the line between his lot and that of the adjoining proprietor on the east.

If he or his predecesssors, by a valid agreement with the defendant or his predecessors, had included in his close more or less of the surplus land which the defendant supposes the former liberal system of admeasurements had left between ranges 3 and 4, and had held the possession long enough to give him a good title, it became to all legal and practical intents and purposes a part of lot 38, and the defendant cannot complain that it was so described. The trial seems to have proceeded upon an understanding, express or tacit, that either the plaintiff or defendant had a legal title to the locus. The line of the lot was the subject of the agreement if there was one. If the jury did not find the agreed line, then under the instructions they must have found that the place of the cutting was within the original line of the plaintiff's lot, and for aught that appears here the original and agreed lines may have been coincident.

*Exceptions overruled.*

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

WINTHROP SAVINGS BANK *vs.* THOMAS S. JACKSON.

Kennebec. Decided January 10, 1878.

*Set-off.*

The plaintiffs lent the defendant money and took his note therefor with a United States bond as collateral security. After the note was payable and before it was paid, the bond was stolen from the bank. *Held*, that the defendant could not legally file his claim for the value of the bond in an action against him upon the note, nor could he avail himself of the claim as a defense by way of recoupment.

ON REPORT.

ASSUMPSIT on a promissory note, given for one hundred dollars by the defendant to the plaintiffs, October 5, 1874, for money lent him, and payable three months after date, with interest. Payment of the note was duly demanded, but no payment was made on it, except the interest to July 8, 1875, as indorsed thereon.

The defendant seasonably filed the account or claim in set-off:

One United States 5-20 bond No. 241,895 of the par value of $100, and worth at the time $120. This bond was left as collateral security to the note and never accounted for by the bank or redelivered to the defendant.

On July 23, 1875, the bank was entered by robbers in the night time, and the safe in which their moneys, papers and securities were deposited and kept, was forced open and a large part of the securities and property of the bank was stolen and carried away, the bond pledged by the defendant, as before stated, being with and one of such securities. The bond was never recovered by the bank or the receiver.

The plaintiffs claimed that due care was exercised in the custody of the bond, but this was denied by the defendant.

The trustees of the bank filed a bill in equity in this court for Kennebec county, August 27, 1875, praying for the sequestration and equitable distribution of its assets. Upon due proceedings had a decree of sequestration was passed, September 27, 1875, Emery O. Bean appointed receiver, and commissioners were appointed.

The receiver took possession of the assets, October 2, 1875, and the commissioners made final report, April 24, 1876. Proceedings under the bill were not closed, but pending.

The defendant did not file or offer proof of his claim described in the account in set-off before the commissioners.

On March 6, 1876, the defendant offered to the receiver the amount then due on the note in suit with costs, at the same time demanding his note and the bond. The receiver offered to take the money and give up the note, but the defendant declined and refused to let him have the money without the delivery to him of both the note and bond.

It was agreed that the full court should render such judgment on the foregoing statement of facts as the law requires; that if the claim of the defendant could be legally filed, adjudicated upon, and allowed under the law applicable to accounts in set-off, the action should stand for trial; otherwise, judgment to be for the plaintiff for the amount due on the note.

*E. F. Pillsbury & E. O. Bean*, for the plaintiffs.

*J. H. Potter*, for the defendant.

DANFORTH, J. The only question arising in this case is whether the account filed in set-off can be legally allowed. The account is for the value of a United States bond left with the plaintiffs as collateral security for the note sued and which was stolen from the bank on the night of July 23, 1875.

By R. S., c. 82, § 58, the plaintiff is "entitled to every defense against such set-off, that he might have, by any form of pleading, to an action against him on the same demand." Whatever may be the contract, express or implied, on the part of the bank, growing out of the pledge of this bond, under the facts agreed there can be no liability on the part of the bank to return the bond until the note has been paid. Its lien must continue so long as the note remains in its possession unpaid. There is no pretense of payment and the tender made was a conditional one and therefore of no effect. As, therefore, the defendant could not under existing facts maintain an action for the bond, the demand filed founded upon the same claim cannot be allowed. *Houghton* v. *Houghton*, 37 Maine, 72. *Robinson* v. *Safford*, 57 *id.* 163.

Nor does the law of recoupment apply. To make that available it must appear that there is some stipulation in the contract sued which the plaintiffs have violated. "A defense by way of recoupment denies the validity of the plaintiff's cause of action to so large an amount as the plaintiffs allege he is entitled to." Waterman on Recoupment, §§ 465, 466. *Harrington* v. *Stratton*, 22 Pick. 510. This can only be when the liability of both parties arises out of the same transaction or from mutual and dependent covenants or agreements. Neither of these appears in this case. The depositing of the bond was perhaps a part of the transaction of giving the note, but it was not the same transaction. The note is a contract independent of the pledging of the bond, and is complete in itself. There is no stipulation in it for the plaintiffs to perform and none which they can violate. The consideration is an executed one, and there is no want or failure in that respect. The claim set up in defense in no degree denies the validity of the plaintiffs' cause of action, but admits the whole. And whatever may be the agreement on the part of the bank as to the safe keeping of the bond, it is independent and not a condition of the promise in the note. If there had been any agreement of sale in default of payment of the note and an attempted sale, as in *Potter* v. *Tyler*, 2 Met. 58, and in *Howard* v. *Ames*, 3 Met. 308, a different question would have been presented. In these cases it was properly held that such facts might be proved as tending to show a payment. In this case no such facts appear.

Besides in recoupment, as well as in set-off, the defendant can only be allowed for what he could maintain an action for. It, as well as set-off, is allowed for the purpose of preventing circuity of action, and in all cases where it is applicable the defendant has his election to pursue his remedy by recoupment or cross-action.

We have thus considered the legal rights of the parties on the ground that the bank may have been guilty of negligence in the custody of the bond, and perhaps the parties intended so to present the case. But there is no proof of negligence nor any offer of any. The statement of facts shows that the bond was lost by larceny by persons not connected with the bank, and the plaintiffs claimed "that due care was exercised in the custody of said bond, but this is denied by the defendant."

In such case, it is a sufficient justification, *prima facie*, for the plaintiffs to show the loss by robbery, and the burden of proof to show negligence, is on the defendant. *Mills* v. *Gilbreth*, 47 Maine, 320. Hence upon the facts reported independent of the non-payment of the note, the defendant would have no claim upon the plaintiffs for the bond.

*In accordance with the agreement of the parties, judgment is to be rendered for the plaintiffs for the amount of the note declared upon.*

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

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JOHN F. TORREY *vs.* EBENEZER OTIS.

Knox. Decided December 8, 1877.

*Attachment.*

An officer, having attached property on a writ and delivered the same to a third party upon his own responsibility, and, for his own convenience, taken an accountable receipt therefor, is still liable to the parties, by virtue of the attachment, for the safe keeping and legal disposition of such property.

Such receipt is a contract between him and the signer alone, and, so long as his liability to either party continues, can be discharged only by his consent.

The attaching creditor, having obtained judgment in his action and taken the steps necessary to perfect the lien under his attachment, cannot release the receiptor's obligation to the officer, so long as he retains his judgment against the debtor, even though in the writ made before the attempted release, the officer declares as his ground of action his liability over to the creditor.

ON REPORT.

ASSUMPSIT on the following receipt, dated March 27, 1871, and signed by the defendant:

"Received of J. F. Torrey, deputy sheriff, for safe keeping, the goods and chattels following, viz:—a certain lot of soft wood now on board the schooner Maria, of Rockland, which wood was taken on board of the property of O. Long, H. D. Byard and F. Knight, of the supposed value of $150, which property the said officer has taken by virtue of a writ against Henry D. Byard,

Owen Long and Francis Knight, favor of William J. Fogg, and in consideration of one dollar paid by the above named officer, the receipt whereof I do hereby acknowledge, and I hereby promise and agree safely to keep and to redeliver all the property above mentioned to the said officer, to his order, or to his successor in office, on demand, to be delivered at Rockland, in like good order and condition that the same is now in, free from all charge and expense to the above named officer, or the creditor aforesaid; and agree that a demand on me shall be considered as binding; and I further agree that if no demand be made I will within thirty days from the rendition of judgment in the action aforesaid, redeliver all the above described property as aforesaid, that the same may be taken in execution."

The plea was the general issue. Judgment was recovered in the action *Fogg* v. *Byard et als.* and trustees, December 15, 1874, for $200 and costs of suit, $29.43. Execution issued thereon January 13, 1875, on which was the following return, dated January 14, 1875, and signed by the plaintiff.

"The personal property attached on the original writ in this suit, having been delivered to Ebenezer Otis and his receipt taken therefor, on the fourteenth day of January, 1875, the same being within thirty days after judgment was rendered in said suit, I demanded of the said Otis the said property so attached, but the said Otis neglected and refused to redeliver the same to me. I therefore return this execution in no part satisfied."

The demand of the wood was admitted. The defendant offered in defense, the following receipt, dated December 23, 1875, and signed by William J. Fogg, the judgment creditor in the action in which the wood was attached.

"Received of Ebenezer Otis, $55.86, net proceeds of sale of wood attached on writ William J. Fogg against Henry D. Byard and others, in April, 1871, and in full discharge of all costs and of the receipt given John F. Torrey, deputy sheriff, by said Otis on attachment of the said wood."

The case was thereupon withdrawn from the jury, and submitted to the law court for decision. If the receipt of Fogg is admissible and constitutes a defense the action to stand for trial, if not, it is to be defaulted.

*A. P. Gould & J. E. Moore*, for the plaintiff.

I. The discharge was not admissible under the plea of the general issue. The defense of settlement, after action brought, should be by a special plea to the further maintenance of the action, if before issue joined; or *puis darrein*, if afterwards. *Rowell* v. *Hayden*, 40 Maine, 582, 585. *Fiske* v. *Holmes*, 41 Maine, 441.

II. The creditor had not the power to discharge the officer from his liability to the debtor for the wood attached, or to the attorney for his lien.

III. Judgment should be entered for the plaintiff for $150 and interest, the value stated in the officer's receipt; no evidence having been offered to show a less value.

*A. S. Rice & O. G. Hall*, for the defendant.

A deputy sheriff, having made an attachment of property, is answerable for it, either to the creditor or the debtor, and unless he is answerable to one or the other, he can maintain no action against a receiptor. *Moulton* v. *Chapin*, 28 Maine, 505, 507.

In this case no liability over to the debtor is either alleged or disclosed; but the officer declares, as his ground of action, that he is answerable to the creditor, who has recovered judgment for damages exceeding the value of the property receipted for, that execution duly issued, and that the property was seasonably demanded of the receiptor, to be taken on said execution. The creditor is, therefore, the plaintiff in interest, and if he discharges the officer from liability, he acquires an equitable title in the receipt, founded on a sufficient consideration, which authorizes him to maintain an action thereon in the name of the officer, but for his own benefit, and, by the same reasoning, to release and discharge the receiptor from his contract. *Farnham* v. *Gilman*, 24 Maine, 250. *Hapgood* v. *Fisher*, 30 Maine, 502.

The receiptor's obligation, being only an indemnity to the officer, is discharged when the officer is released. *Plaisted* v. *Hoar*, 45 Maine, 380. *Harmon* v. *Moore*, 59 Maine, 428.

The release offered in defense operates as a discharge of the officer from liability, so far as the creditor is concerned, which is the sole cause of action relied on.

The officer being liable over to the creditor at the time this suit was commenced, is entitled to maintain it; but his liability having been discharged since action brought, he can recover nominal damages only. *Norris* v. *Bridgham*, 14 Maine, 429, 431.

DANFORTH, J. March 27, 1871, the plaintiff attached a quantity of wood, valued at $150, on a writ in favor of William J. Fogg against Henry D. Byard *et als.* and on the same day delivered it to the defendant for safe keeping, taking from him the instrument upon which this action is brought. That writ went to judgment and such proceedings had thereon as to hold the officer accountable for the property attached; and it is conceded that such accountability, and, in consequence thereof, the liability of the defendant, continued up to and for some months subsequent to the date of the writ in this suit. December 23, 1875, the present action pending in court, the attaching creditor in the original suit gave to the present defendant a writing acknowledging the receipt of $55.86, net proceeds of the sale of wood attached "in full discharge of all costs and of the receipt given John F. Torrey, deputy sheriff, by said Otis on attachment of said wood."

The only question raised is as to the admissibility of this paper as testimony and its effect in defense of the present action.

As the defendant was liable at the time this suit was commenced, it is not claimed that it is admissible otherwise than in mitigation of damages. But waiving any objection to its reception on the ground of insufficiency of pleading, we see no principle of law upon which it is competent for any purpose, even if it had been given before the commencement of this action.

It does not appear, as in *Farnham* v. *Gilman*, 24 Maine, 250, 254; and in *Hapgood* v. *Fisher*, 30 Maine, 502, that the receipt for the wood attached was taken at the request or with the approval of Fogg, the attaching creditor, or that he subsequently ratified the act. Nor does it appear that the property attached was returned to the owners. On the other hand, it does appear by the officer's return on the execution that it was delivered to Otis and his receipt taken therefor. It follows that neither the

creditor nor debtors were in any sense a party to the receipt, or had any interest in or control over it. It was taken by the officer upon his own responsibility and for his own benefit. It could therefore be discharged only by him. *Clark* v. *Clough*, 3 Maine, 357. *Whittier* v. *Smith et als.* 11 Mass. 211. The liability of the officer growing out of the attachment remained in full force, and to that and that alone are the parties to the suit to look to enforce such rights as they may have. He was liable to the attaching creditor so long as the attachment continued in force, and to the debtor for the return of the property when the attachment should be dissolved.

It is true that, if the officer were discharged from both these liabilities, his right and interest in the property attached would cease, and, having no longer any interest, he could not recover upon the receipt. But, until he is thus discharged, the liability of the signer of the receipt can only be released by his consent.

In this case, there is no pretense that the original debtors have done anything to relieve the officer from any claim they may have, if any such there may be.

It is quite probable that the paper given by the creditor might release the officer from any suit in his favor, but how can it affect the debtor. True the creditor's judgment is sufficiently large to cover all the property attached, and his demand having been seasonably made, he is entitled to have the property applied to it. So the debtors have the same right. They are interested that the judgment against them should be paid and have a legal claim upon the officer that the property attached should be so applied, unless it is restored to them, neither of which has been done. The receipt given purports to discharge that given for the attached property, but it does not discharge the debt or any part of it, or purport to do so.

It was given for an amount very much smaller than the estimated value of the property and for the net proceeds of its sale, while there is no evidence whatever tending to show that the wood was not worth its estimated value, or that it was sold by consent of the parties in interest, or in pursuance of any provisions of law.

The judgment stands against the debtors and they have received no benefit from their property, nor has it been disposed of with their consent or by authority of law. Their claim then, against the officer for its value, or to have it applied in payment of the judgment, remains unimpaired.

It is however said in the argument, that "no liability over to the debtors is alleged or disclosed; but the officer declares, as his ground of action, that he is answerable to the creditor." What the allegations may be we are not informed, as no copy of the writ has been furnished. But the report informs us that the action is "assumpsit upon an officer's receipt," which would be sufficient to hold the defendant if the officer is liable either to the creditor or debtor, as we have seen he is.

But assuming that the writ places the officer's liability upon the ground supposed, it would be literally correct as the facts were at its date and substantially correct as they now are. The judgment is not discharged, the property has not been applied in its payment and it is the duty of the officer to see that it is so applied. If the defendant has taken a receipt from one not authorized to give it and has neglected to see that the property was properly disposed of, the officer is not relieved from his duty of making such application, and if the writ is not now technically applicable to a change of facts illegally made, it is not for the wrongdoer to complain.

The report of the case makes no provision for the assessment of damages, but only for a default if the receipt is not admissible or does not constitute a defense. As it is not admissible a default must be entered, but as there is good reason, as shown by the report, to suppose that the officer may have been in part at least relieved from his liability resulting from the attachment, as would be the case if the property has in whole or in part been legally applied in payment of the judgment, and as the defendant's liability is commensurate with that of the officer, there should be a hearing in damages.

*Defendant defaulted to be heard in damages.*

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

## INHABITANTS OF APPLETON *vs.* CITY OF BELFAST.

Knox. Decided February 19, 1878.

*Evidence. Pauper.*

In a case between towns, upon an issue whether a pauper had a settlement in a third town by a residence there on March 21, 1821, testimony is not admissible to show that the latter town furnished supplies to the pauper after that time.

The fact that after the pauper was furnished with supplies by the plaintiffs she recovered a judgment for wages due her at the time from the person with whom she was then living, is not admissible in evidence to show that she was not in distress and need of relief when the supplies were furnished.

The statutory provision, that the settlement of a person shall not be affected by a marriage procured by town agents or officers for the purpose of changing such settlement, applies to all cases where the suit is for supplies furnished after the statute was passed, although the marriage took place before the date of the statute; and the statute is not, on that account, unconstitutional.

ON EXCEPTIONS AND MOTIONS.

ASSUMPSIT for pauper supplies to Augusta Nickerson, alias Campbell, 23 weeks board, from September 23, 1873, and medical aid and clothing, $56.39. At the first trial, the jury did not agree. At the March term, 1876, the verdict was for the plaintiffs, $62.44. The defendants alleged exceptions stated in the opinion, and also moved to set aside the verdict as against evidence and for a new trial on the ground of newly discovered evidence, mainly that of Abigail Campbell, of Pownal, the mother of John Campbell, the pauper's husband, tending to show that on March 21, 1821, she and her husband resided and had their home in Belmont, now Morrill, and that neither of them had received supplies as a pauper within one year before that date.

*D. N. Mortland*, for the defendants.

*A. P. Gould & J. E. Moore*, for the plaintiffs.

PETERS, J. The suit was for supplies furnished by the plaintiffs to Augusta Nickerson. The plaintiffs proved that she had a derivative settlement, under her father, in the city of Belfast. To avoid this proof, the defense relied upon a marriage of the pauper

to John Campbell, contending that his settlement was in the town of Morrill. The plaintiffs then set up that the marriage was procured by fraud upon the part of the agents and officers of Belfast, in order to relieve the city from the liability of supporting the female pauper.

The defendants undertook to show that John Campbell had a settlement in Morrill derived from his father Robert Campbell, and that Robert had his settlement there by a residence upon the territory of that town on March 21, 1821. The defendants complain of the exclusion of evidence going to show that in 1852, Robert was living in Belmont (now Morrill), and that in that year the town supplied his wife to some extent as a pauper. The testimony offered was immaterial. The contention was admitted to be whether or not Robert resided there in 1821; it mattered not where he resided in 1852. And if the fact, that the town rendered assistance to Robert's wife during the latter year, was any admission by them that her husband resided there in 1821, it was not an admission the correctness of which the plaintiffs in this suit were called upon to disprove or explain.

The proof of the recovery by the pauper of a small judgment for wages against the person with whom she was living in Appleton, was properly excluded. The defendants were not, however, precluded from showing, as matter of fact, any property or claims she had from which anything could be realized, as bearing upon her poverty or distress at the time the supplies were furnished. To show that she afterwards recovered such a judgment would involve too many questions foreign to the issue, to render such a mode of proving the fact of her wants admissible.

This disposes of all the exceptions taken that are now relied on, save the ruling as to the effect of the alleged fraudulent and collusive marriage. Here, too, we think the ruling was right. The provision of the statute is this: "When it appears in a suit between towns involving the settlement of a pauper, that a marriage was procured to change it by the agency or collusion of the officers of either town, or any person having charge of such pauper under authority of either town, the settlement is not affected by such marriage." The marriage was before the statute (in its

present form) was passed. The supplies were furnished after the date of the statute. The instruction was that the statute would apply to a case like the present, if the proof warranted it.

We have no doubt, that the statute was intended by its terms to apply to any and all future causes of action, whether such marriages existed at the date of the passing of the statute or not. No other construction would be so sensible or satisfactory.

This effect gives the statute really a prospective and not a retrospective operation. It is aimed at fraud in future causes of action, although the fraud may have been previously concocted. Nor do we doubt the constitutionality of the statute as applying to already existing marriages. It affects no contract or anything of the nature of a contract, or any vested right. The legislature have the right to prescribe what may constitute a settlement, or, within reasonable limits, what shall be evidence of a settlement, and may alter the law upon the subject from time to time. They may declare that marriages shall confer settlements or the reverse of it, and upon what conditions it may be so. The burdens thus imposed are deemed to be of a general character, upon an average and in the long run operating with equal fairness upon all the cities and towns in the state. Were it not so, then all the original pauper laws passed in 1821, when we commenced to legislate as a state, might have been challenged for their unconstitutional tendency and effect, for in many instances they changed settlements of inhabitants as already existing and transferred them from one town to another, but by fixed and general rules.

This view of the law is, we think, directly and precisely maintained in an early case in this state. *Lewiston* v. *North Yarmouth*, 5 Maine, 66. It was there decided, that a legislative resolve, rendering valid a certain class of marriages, so far as it had a bearing upon questions of settlement under the pauper laws, for expenses incurred subsequent to its passage, was constitutional. Here the result is just reversed. Here a valid marriage is rendered invalid for a certain purpose. There, an invalid marriage was held valid for a certain purpose. The point involved in each case is the same. The same principle was enunciated in *Brunswick* v. *Litchfield*, 2 Maine, 28. So it is admitted in

*Goshen* v. *Stonington*, 4 Conn. 209. And strongly asserted in several Massachusetts cases. *Goshen* v. *Richmond*, 4 Allen, 458. *Monson* v. *Palmer*, 8 Allen, 551. *Bridgewater* v. *Plymouth*, 97 Mass. 382, 390.

Upon the motions, we think the verdict should not be disturbed. No doubt, the evidence alleged to be newly discovered is important; but, with any sort of reasonable diligence, it could have been known before.

*Exceptions and motions overruled.*

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

DICKERSON, J., did not sit.

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GEORGE H. CABLES, appellant from decree of judge of probate,

*vs.* PRISCILLA PRESCOTT.

Knox. Decided April 1, 1878.

*Descent. Insurance.*

When a minor unmarried dies leaving no issue, father, mother, brother or sister, the estate of the minor not inherited from her father descends to the maternal grandmother as next of kin rather than to an uncle on the father's side or to the children of such uncle. R. S., c. 75, § 1, Rule 5.

When a father effects an insurance on his life, payable to a trustee in trust for his minor child, and dies, the proceeds of the insurance vest in the trustee and constitute no portion of the paternal estate.

ON REPORT.

*T. P. Pierce*, for the appellant.

*A. S. Rice & O. G. Hall*, for the appellee.

APPLETON, C. J. Carrie E. Cables, a minor and unmarried, died intestate, leaving the unexpended portion of the proceeds of a policy of life insurance effected by her father on January 1, 1866, on his life and payable by its terms to Stephen N. Hatch, in trust for said Carrie. The father died August 7, 1866.

Carrie E. Cables died leaving no issue, father, mother, brother,

sister, nor issue of any deceased child of her parents or either of them. She left Priscilla Prescott, the appellee, who was the mother of her mother. The appellant was a brother of her father, who appealed in behalf of himself and Lewis H. Cables and John H. Cables, two sons of a deceased paternal uncle.

The judge of probate ordered the proceeds of the estate of Carrie E. Cables remaining in the hands of her guardian to be paid to the appellee, from which decree an appeal was duly taken.

The decree must be affirmed. By R. S., c. 75, § 1, Rule 5, "If no such issue, father, mother, brother or sister, it descends to his next of kin in equal degree." This is the rule applicable to real estate, and by § 8, it is equally applicable to the personal estate, subject however to certain exceptions, which do not affect the case under consideration.

Carrie E. Cables had no issue, father, mother, brother or sister. The grandmother therefore would take the estate as next of kin in preference to uncles or aunts or their children. "In the mode of computing the degrees of consanguinity, the civil law, which is generally followed in this country upon that point, begins with the intestate, and ascends from him to a common ancestor, and descends from that ancestor to the next heir, reckoning a degree for each person as well in the ascending as descending lines." 4 Kent, 412. The grandmother would take before uncles or their children. 4 Kent, 407. *Kelsey* v. *Hardy*, 20 N. H. 479.

The sixth rule does not apply, because the minor did not have any estate "inherited from either of his parents." The insurance constituted no portion of the paternal estate. The contract vested in the trustee for the benefit of the *cestui que trust.* The father had no inheritable estate. *Libby* v. *Libby*, 37 Maine, 359. *Swan* v. *Snow*, 11 Allen, 224. The policy and its proceeds passed to the trustee by contract. The minor inherited nothing by descent from her father. *Cragin* v. *Cragin*, 66 Maine, 517.

*Decree of the judge of probate affirmed with costs.*

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

ALBERT L. SOULE *vs.* JOSIAH BRUCE.

Lincoln. Decided October 25, 1877.

*Evidence. Amendment.*

In an action of assault and battery, evidence of the peaceable character of the defendant is not admissible.

The plaintiff, after he opened his case to the jury and put in much evidence, was allowed to amend his declaration by striking out the following words: "Hath suffered great humiliation in his feelings and great degradation and disgrace in the estimation of the good people of this state." *Held*, that the amendment was a matter of judicial discretion and was allowable at any stage of the trial.

ON EXCEPTIONS by each party. The verdict was for the plaintiff for $200.

I. DEFENDANT'S EXCEPTIONS. Trespass: For that the said Josiah Bruce, at said Somerville, on the twenty-seventh day of May, A. D. 1875, with force and arms assaulted the plaintiff, and then and there struck, beat, kicked, bruised, wounded and ill-treated him, and then and there caught the plaintiff by his shoulder and arm, and with great force, violence and power threw said plaintiff from the platform of his store into the highway, striking upon his left arm and shoulder, thereby breaking and dislocating the same and then and there struck the plaintiff divers grievous blows upon, across and over his head, face, eyes, shoulders and other parts of his body, and then and there with his feet kicked said plaintiff divers times in his side and other parts of his body, and thereby greatly cut and wounded the face, head, eyes, shoulders, legs and arms and side of the plaintiff, and made divers large and deep cuts, gashes and wounds therein, the said defendant then and there with his feet and hands violently and grievously did kick, strike and beat, giving to the plaintiff in and upon his head, breast, shoulders, back, sides and other parts of his body divers bruises, hurts and wounds by means whereof the plaintiff hath suffered and still does suffer great pain in body and mind, by means whereof the plaintiff hath not only suffered great pain both of body and mind but he hath from thence hitherto been deprived of the use of his left shoulder and arm, and hath suffered much pain and weakness in his side, shoulders and arms, occasioned by

the injuries aforesaid, and is not likely to be a well man again, by means whereof the plaintiff hath not only suffered great pain both in body and mind, but [hath suffered great humiliation in his feelings and great degradation and disgrace in the estimation of the good people of this state] by means of all said wrongs and injuries the plaintiff was put to great cost and expense in care, nursing and medical attendance on account of the injuries to his person caused thereby; and other wrongs, injuries, outrages and enormities defendant then and there committed, against the peace, to the damage of the said plaintiff, (as he saith) the sum of five thousand dollars. The plea was the general issue.

In the opening of the plaintiff's counsel, he claimed damages for the public humiliation and disgrace as set forth in the writ, and also that the assault was willful and malicious and he claimed punitive damages. After he put in evidence a half day, he moved to amend by striking out the following words: "Hath suffered great humiliation in his feelings and great degradation and disgrace in the estimation of the good people of this state."

This amendment was objected to by the defendant at that stage of the case, because it shut out the provocation. Afterwards when the plaintiff's evidence was all closed, and while the defendant was introducing his evidence and offered evidence of the provocation, the plaintiff abandoned his claim for punitive damages.

To this amendment, under the circumstances and at the time it was allowed, the defendant excepted.

II. PLAINTIFF'S EXCEPTIONS. All claim for punitive damages was waived. Evidence of the defendant's good character as a peaceable man was introduced under objection; and the plaintiff alleged exceptions.

*A. P. Gould & J. E. Moore*, for the plaintiff.

*J. Baker*, for the defendant.

APPLETON, C. J. This is an action of trespass for an assault and battery.

The defendant offered evidence to show that the defendant was a man of peaceable character, that he was a very peaceable man,

&c. To the reception of this and similar evidence seasonable objections were made. The question in issue was whether the defendant committed an assault or not. However peaceable and orderly he may have been heretofore is of no consequence, provided he committed the assault in controversy.

The general character of the defendant was not put in issue. It is only when it is so in issue that evidence of general character becomes admissible. "Although in criminal cases good character may be proved by the defendant, as tending to substantiate the plea of not guilty, yet in civil cases such evidence has been held to be irrelevant." 1 Wharton on Evidence, § 47. So in 1 Greenleaf on Evidence, § 54. "In civil cases, such evidence is not admitted, unless the nature of the actions involves the general character of the party, or goes directly to affect it. . . Nor is it received in actions of assault and battery; nor in assumpsit; nor in trespass on the case for malicious prosecution; nor in an information for a penalty for violation of the civil, police or revenue laws; nor in ejectment, brought to set aside a will for fraud committed by the defendant."

These views are sustained by the decisions of this court in *Potter* v. *Webb*, 6 Maine, 14, and in *Thayer* v. *Boyle*, 30 Maine, 475, as well as by the repeated adjudications of the highest tribunals of many of the states.

An amendment may be allowed in any stage of the trial. It was a matter of judicial discretion to allow it or not. It reduced the plaintiff's claim for damages, if it had any effect, and of that the defendant cannot complain.

*Plaintiff's exceptions sustained.*
*Defendant's exceptions overruled.*

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

ORRAN E. BOYNTON, in equity, *vs.* ROXANNA P. PAYROW, *et als.*

Lincoln. Decided December 8, 1877.

*Equity.*

A bill in equity to direct the disposition of a pledge affords a more complete remedy to the pledgee than his common law right to sell the pledge, after notice; it concludes all the parties.

The delivery of a savings-bank book to a third person for delivery to a creditor as security for a debt will create a valid pledge of the book and deposit.

The heir cannot create a lien on the book or deposit as against the administratrix.

Such a pledge will not be sold. Unless the administratrix, within a time fixed, tenders the amount of the pledge, with interest to the date of the tender, and the costs of process, the court will appoint an officer to receive the deposit, and make proper disposition thereof.

BILL IN EQUITY, to procure the direction of the court in the disposition of a pledge of a savings-bank book, praying that the savings institution be directed to pay to the petitioner or his order all the moneys so deposited, and for further relief and costs.

*R. K. Sewall*, for the plaintiff.

*J. Baker*, for Roxanna Payrow.

BARROWS, J. Where there is a general pledge of personal property, neither the time of redemption nor the manner and time of sale being specified in the contract, it has long been held that the appropriate remedy of the pledgee, when his rights or powers are in any manner questioned or denied, is by process in equity, in which the court can make the trust available with due regard for the rights of all concerned. 2 Kent's Com. 4th ed. 581, 582, 583. 4 *id.* 138, 140. 2 Story's Eq. Jur. 9th ed. §§ 1030, 1033.

Chancellor Kent says that "where no time was limited for the redemption the pawner had his own lifetime to redeem, unless the creditor in the meantime called upon him to redeem, and if he died without such call the right to redeem descended to his personal representatives;" that the pledgee has the election of two remedies upon the pledge itself, one of which is to file a bill in chancery and have a judicial sale; and that "the law especially

in the equity courts is vigilant and jealous in its circumspection of the conduct of trustees."

The pledgee, holding the property in trust for the benefit of himself and whomever else it may concern, may rightfully resort to the court sitting in equity to make the proper orders respecting its disposition and thereby relieve himself from ulterior questions as to the propriety of his course, to which he might subject himself if he proceeded to sell without judicial process, upon reasonable notice to the debtor to redeem.

In the present case the plaintiff claims that the savings-bank book which is the subject of controversy was pledged to him by his sister, Clara Boynton, to secure certain promissory notes which she gave him for money lent and which he still holds; that a few months before her death, upon her return from Massachusetts to her old home in Lincoln county, in ill health, he redelivered it to her to enable her to draw such sums from the deposit as she might need; that during her last sickness she recognized his claim upon it to secure the payment of her notes, and gave it to her mother to be delivered to him with directions to take what was due him, and use some of the money in fitting up a family burial lot with suitable monuments, and distribute the remainder to her heirs. The case shows that it was accordingly delivered to him by their mother shortly after Clara's decease, and is now in the custody of his counsel in Lincoln county. All the heirs of Clara subsequently united in a request to the savings institution to pay the money to the plaintiff in trust for them, but he did not draw it and it still remains in the savings institution. And the plaintiff claims a further lien to secure certain advances of money which he made to several of the heirs (notably to the respondent Payrow) on the strength of his possession of their order on the savings bank for the money.

The respondent, Payrow, a niece of Clara, in January, 1875, took out administration upon Clara's estate, in Lincoln county. This process was commenced returnable at the next term of this court in that county against her as administratrix, and the savings institution is made a party defendant.

The respondent, Payrow, denies the jurisdiction of the court in

Lincoln county, and the right of the plaintiff to maintain this process on the ground that he has an adequate remedy at law; and finally she denies the lien claimed by the plaintiff, or his right in any manner to withhold the possession of the bank-book and deposit from herself as the administratrix of Clara. She questions the jurisdiction of the court in Lincoln county upon the strength of her sworn answer and testimony that her residence is and has been in Boston, where the plaintiff also lives, and hence that the only party in this state is the Saco and Biddeford savings institution located in York county. But we think this objection is not maintained in point of fact, and that the plaintiff properly complained against her as resident in Jefferson. She, herself, while testifying that she has lived most of the time in Boston for twenty years past, says also that while residing in Maine, her home was at her grandmother's in Jefferson, and she describes herself as of that town in her petition for administration on Clara's estate and in her administration bond filed in probate court but a few weeks prior to the commencement of this process, and under that description she was then and subsequently prosecuting her claim to administration upon an appeal taken by this complainant.

All things considered, we think the court may well take jurisdiction of this controversy in Lincoln county.

It is clear, however, that the plaintiff can sustain no claim upon the funds deposited in the savings-bank by Clara Boynton, as against her administratrix, to secure his advances made to her heirs on the strength of their order in his favor upon the savings-bank. If he would have made that order available for such a purpose he should have acted promptly under the order, and settled his transactions with the heirs without compelling them by his delay to resort to an administration. As against an administratrix duly appointed he cannot sustain any claim to the bank-book or the money it represents by virtue of any order or assignment from the heirs.

Nor is the testimony sufficient to establish the creation of any trust for the purpose of fitting up a family burial place and distribution of residue among the heirs by the plaintiff, without the

intervention of probate proceedings. As construed by the plaintiff himself, the amount to be expended for the family cemetery and the manner of its expenditure were left to depend upon the concurrence of the heirs, and there is absolutely nothing to show a legal appropriation of the money to this object by Clara Boynton.

But we think there is a preponderance of evidence to show a renewal of the pledge of the bank-book to the complainant to secure the amount due to him from his sister for money lent. We must set aside the testimony of the complainant so far as it relates to matters occurring prior to the decease of his sister as incompetent in this suit against her administratrix. *Trowbridge* v. *Holden*, 58 Maine, 117. *Burleigh* v. *White*, 64 Maine, 23. But in the testimony of his mother and his sister, Harriet Boynton, we find enough to satisfy us that, during Clara's last illness, she gave the bank-book to her mother to be delivered to the complainant for his security. While there are some inconsistencies in the statements of the mother in her second deposition taken at the instance of the defendant, they are nothing more than might be expected from a person of her great age when plied with leading questions after a considerable lapse of time since the transactions to which her testimony relates. We think the account first given by the mother, and confirmed by Harriet, and by existing documents and the acts of the parties concerned, is the more reliable. The delivery of the bank-book by Clara to her mother for the purpose avowed by her, makes it a good pledge to the plaintiff; and as pledgee he has the right to get the direction of the court in regard to its disposition, so as to protect the interests of all who have an interest therein. The bill is sustained with costs for complainant.

Unless the parties agree as to the amount due from Clara's estate to the plaintiff, a master will be appointed to ascertain and report it to the court.

The peculiar nature of the pledge makes a sale unnecessary. If, within three months after the amount due the complainant is ascertained, either by agreement of parties or the acceptance of a master's report, the respondent shall tender the sum fixed with

interest (if any accrues) and costs of this process, the complainant shall thereupon surrender the bank-book to the administratrix of Clara thenceforth discharged of the pledge and all claim on the part of the plaintiff thereon, except as heir of Clara. If not so tendered, an officer of the court will be appointed to receive the money from the savings-bank and dispose of it as above.

Costs of the savings institution, if any, in this process, to be paid out of the estate.

*Bill sustained. Case remanded for further proceedings in conformity herewith.*

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

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JAMES M. KNIGHT, petitioner for partition, *vs.* RICHARD H. T. TAYLOR *et als.*

Lincoln. Decided January 10, 1878.

*Amendment.*

The return of an officer levying an execution upon real estate, may be amended as against a subsequent purchaser with knowledge of the facts, or when the record shows that all the requirements of the law were probably complied with, if it is satisfactorily shown to the court that they were actually complied with.

ON FACTS AGREED.

PETITION FOR PARTITION.

The respondents contested the title of the petitioner, who claimed an undivided fourteenth part of the premises, and also 19-120 undivided parts, in all, 193-840, by virtue of the levy of two several executions in his favor against one Babson. If the proceedings in making the levies were valid and legally operative to give the petitioner title, he is to recover; otherwise, otherwise.

The respondent, Ingalls, claimed under a deed of quitclaim from Babson, of his entire undivided part of the premises described in the petition; which conveyance, dated April 4, 1871, was subsequent to the record of the levies, which levies were duly and seasonably recorded.

The officer making the levies made application to amend his returns, by adding to each, above his signature, as follows: "The said John Babson, the debtor, could not be found in the said county, and had no residence therein, having removed his residence from the state. I therefore gave notice to the said Ingalls, who neglected to select an appraiser."

If the amendment is permissible, it is to be considered as made. The respondent, Ingalls, if called to testify, would admit that Babson had no residence in Lincoln county at the time of making the levies; that he was of counsel for Babson in the cases in which the petitioner recovered the judgments; that he knew of the levies and had examined the record of them before Babson's conveyance to him, and that he took the conveyance to secure him in part for the indebtedness of Babson to him existing before the levies were made; the indebtedness still continues and is of much larger amount than the value of the property.

It was admitted that the petitioner recovered judgments as described in the several executions.

Ingalls does not defend this proceeding for his own benefit, but allows the assignee of Babson, who is now in bankruptcy, to do so in his name, as the assignee proposes to pay Ingalls, Babson's indebtedness to him and redeem the property which Ingalls holds as security for such indebtedness.

*W. Hubbard*, for the petitioner.

Babson was owner and tenant in common of the premises. The petitioner having two executions against him, satisfied them by levies on a portion of his undivided part, 1-14+19-120=193-840.

After the record of the levies, Babson released to Ingalls all his interest in the premises. The levies did not cover all of Babson's undivided part, so that Ingalls takes by his deed that part not levied on.

The officer making the levy applies for leave to amend his return, to conform to the fact.

Ingalls does not defend, but allows the assignee of Babson to do so in his name.

The assignee can stand in no better position than Babson, and

as against him, the levy is well enough. But clearly he can not object to the correction of the officer's return.

The amendment is allowable even against a third party.

*B. Bradbury*, for the respondents.

Babson has no interest in the property, only his creditors. He is not here to resist the amendment. It is immaterial who appears here to object to this amend ment.

The only question is, have other rights to this property intervened before the amendment of the officer's return has been made. If so, the amendment should not be allowed.

DANFORTH, J. The petitioner claims title under John Babson, by virtue of two levies of the same date. The respondent, Ingalls, claims under the same person by a deed subsequent to the record of the levies. Therefore the only question presented is the sufficiency of the title under the levies.

The officer in his return states that on the day of the seizure of the land, he gave "notice thereof to Henry Ingalls, attorney of record for the within named debtor, and having allowed him a reasonable specified time within which to choose an appraiser," he caused three disinterested men to be sworn, one of whom was chosen by himself for the debtor. It seems to be assumed that this return, (and it is the same under each levy) is defective in not sufficiently showing the authority of the officer to appoint an appraiser for the debtor. The officer asks to amend his return by adding the facts, that the debtor could not be found in the county and had removed his residence from the state, and that he "therefore gave the notice to said Ingalls who neglected to select an appraiser." The first part of this proposed amendment would seem to be unnecessary. True it was formerly necessary that the notice should be given to the debtor residing in the county; but by R. S. of 1857, c. 76, § 1, under which this levy was made, notice is to be given to the "debtor or his attorney, residing in the county where the land lies." The attorney residing in the county, notice to him would seem to be sufficient wherever the debtor himself might have his residence.

Whether the omission of the other fact is not a fatal defect

if not remedied by an amendment, may admit of more serious doubt. If the amendment is allowable no question is made to its truth; but the objection is that the contesting respondent is not a party to the record to be amended but is a subsequent purchaser. The general rule undoubtedly is, that any change in the record shall not effect a previous *bona fide* purchaser without notice. But is the respondent such a purchaser? The levies were upon the record and examined by him before he took his deed. In the language taken from *Whittier* v. *Varney*, 10 N. H. 291, and adopted by our court in *Fairfield* v. *Paine*, 23 Maine, 498, 508, "when the subsequent purchaser or creditor, being chargeable with constructive notice of what is on the record, if he has sufficient to show him, that all the requirements of law have probably been complied with, and he will, notwithstanding, attempt to procure a title under the debtor, he should stand chargeable with notice of all the facts, the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the court." The same rule is laid down in *Fitch* v. *Tyler*, 34 Maine, 463, 471. *Glidden* v. *Philbrick*, 56 Maine, 222. *Haven* v. *Snow*, 14 Pick. 28.

In this case the records show that notice was given, a reasonable specified time allowed in which to choose, and the appraiser chosen by the officer. Here would seem to be a sufficient indication that there was at least a neglect on the part of the debtor or his attorney to make the selection, enough being stated to show a "probability" that, in this respect, "all the forms of the law had been complied with."

But the case does not stop here. It appears that the attorney notified and the subsequent purchaser were one and the same person. He admits "that Babson was not a resident of the county at the time of making the levies; that he was counsel for said Babson in the cases in which the petitioner recovered his judgments, and that he knew of the levies." It follows that the inference, if any is necessary, is clear and irresistible that the respondent had not only such notice as the record affords, but aside from that, actual notice of all the facts proposed to be supplied by the amendment, and sufficient not only to show a levy

but to show that all the requirements of law were not only probably but actually complied with. He is not therefore a subsequent purchaser without notice. Nor does it change the result that the respondent does not defend this proceeding for his own benefit but allows the assignee in bankruptcy of Babson, to do so in his name. If the assignee defends in the name of Ingalls he must do so by virtue of his title. He can stand no better than Ingalls. Standing upon his title he must fall with it.

*The amendment, if necessary, is allowable; and, as provided in the report, is considered as made, and the petitioner must have judgment for partition as claimed.*

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

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JOSEPH A. WICKERSHAM *et al. vs.* THOMAS J. SOUTHARD *et al.*

Sagadahoc. Decided August 5, 1877.

*Shipping.*

Though the owners of a vessel let on shares to the master are not liable for disbursements on its account, when the master by the terms of the letting has the entire control and management of the same; yet to exonerate the owners it must affirmatively appear that the master has such entire control.

ON REPORT.

ASSUMPSIT on account annexed, $223.75, on account of the schooner Walton, embracing the following items: 1871, July 7. To commissions on coal freight for Charleston, S. C., $441.50, at 5 per cent, $22.00. Paid stamps on lumber charter party, $1.75. Paid Captain Gardiner for disbursements, $50.00. August 30. Paid custom house fee, $3.22. Paid warden fee, $1.00. Paid protest, $1.50. Paid health fee, $1.00. Paid towage, $1.00. Insurance by order of Gardiner, $4.50. Extending protest by order of underwriters, $15.30. Commissions on lumber charter from Bucksville, S. C., to Philadelphia, $70.00. Interest, $52.48.

The defense was that the master, Captain P. B. Gardiner, had the control and not the owners.

The evidence tended to show that the master sailed the schooner on shares, and that the owners settled up with him in October, 1871, and discharged him, and that they allowed him in their final settlement many of the items charged in the account annexed, some half or more of the account.

Charles Southard, one of the defendants, testified that there was no written contract with Captain Gardiner. To the question, what was the contract, he answered: "He sailed her on shares." He testified further that his settlement showed that Gardiner sailed the schooner from about the last of June to October, 1871; that the accounts in Gardiner's handwriting showed all the transactions with the schooner while he sailed her. "I purchased of him the stores he had left." In cross-examination, witness testified: "I wrote Captain Gardiner once or twice while he was in Philadelphia; I wrote him to come to Richmond with a cargo of coal, after he came from Bucksville. That was just before I settled with him."

*J. W. Spaulding*, *J. Millay & F. J. Buker*, for the plaintiffs.

*C. W. Larrabee*, with *W. T. Hall*, for the defendants.

APPLETON, C. J. The defendants are the owners of the schooner Walton of which one Philip B. Gardiner was master. This suit is for disbursements and services rendered the schooner, at Philadelphia, by the plaintiffs at the instance of the master and on the credit of the owners, to whom the charges were made.

It appears from the testimony of one of the defendants that the vessel was let on shares to the master. As to the important question, whether the master was to have the entire control and management of the vessel, the witness was silent and there was no other evidence on the subject. The master was not called to testify. In a charter party introduced in evidence Capt. Gardiner describes himself as master and agent. The defendant further testified that he "wrote him (the master) to come to Richmond with a cargo of coal" just before he settled with him. In the settlement between the master and the owners his receipt is as follows: "Received payment of T. J. S. & Co. as above in full for my services and wages and all bills."

To relieve the owners of a vessel let on shares to the master, it must affirmatively appear that the master has the entire control and direction of the vessel, with no right of interference on the part of the owners. It is not enough merely to show that the vessel is let on shares. In *Emery* v. *Hersey*, 4 Maine, 407, it was in proof that the vessel was let on shares, but it appeared that the owners, notwithstanding, interfered with the management of the vessel and they were held liable. "In this case," observes Weston, J., "he was to victual and man the vessel and to have one-half of the freight money, and five dollars on each trip, for his compensation; but it is nowhere testified that he was to have control of the vessel. . . His right to a portion of the freight, was only the stipulated mode of compensation." In *Thompson* v. *Snow*, 4 Maine, 264, the master had the entire control of the vessel without interference from the owners. Consequently they were not liable. In *Lyman* v. *Redman*, 23 Maine, 289, Tenney, J., says: "The cases are numerous, which show that the taking the vessel by the master, victualing and manning her, and paying a portion of the port charges and having a share of the profits, do not of themselves constitute him the owner *pro hac vice*. It is the entire control and direction of the vessel, which he has the right to assert, and the surrender by the owners of all power over her for the time being, which will exonerate them from the liability of the contracts of the master, relating to the usual employment of the vessel in the carriage of goods. The expense of victualing and manning the vessel and receiving compensation for his services and disbursements in a share of the profits by the master, are by no means inconsistent with the right of the employer or owner, to have the general direction of the business in which she is engaged." In *Sims* v. *Howard*, 40 Maine, 276, the master sailed the vessel on shares, but it did not appear that he had control over her. It was held, consequently, that the owners might recover for freight. "If," remarks Tenney, J., "he was to pay one-half of the gross earnings of the vessel to the owner, he was entitled, under the agreement, to receive the other half for his services and disbursements. This is substantially the same as a right to one-half of the gross earnings for his services

and expenses in sailing the vessel; and confers no authority to control her. The master was still the servant of the owners, and his right to a part of the earnings of the vessel was no more than a mode of compensation agreed upon with them." In *Bonzey* v. *Hodgkins*, 55 Maine, 98, the court say: "The mere fact that the vessel was taken on shares does not discharge the owners. Their control must cease." In *Hall* v. *Barker*, 64 Maine, 339, and in *Somes* v. *White*, 65 Maine, 542, as well as in the other cases to which our attention has been called, it will be found that wherever the owners were exonerated from liability, the master had the entire control and direction of the vessel without interference or the right to interfere on the part of the owners.

The defendants are liable unless they can transfer their liability to the master. This they have not so done. It does not affirmatively appear that the master had the entire con trol and direction of the vessel. It does appear that the owners gave directions as to the movements of the vessel and settled with the master for his "services and wages." The silence of the owners as to the point upon which their liability turns is suggestive.

*Judgment for plaintiffs.*

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

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STATE *vs.* WILLIAM H. HESELTON.

Somerset. Decided May 31, 1877.

*Abatement.*

A plea in abatement which tenders an issue upon two or more separate, distinct, and independent matters of fact, is bad for duplicity.

*Thus*, where a plea in abatement to an indictment by the grand jury, averred that the county had not been legally divided into jury districts; that two of the towns had in their jury-boxes more names than the law allowed; that in two other towns no notice of the drawing of the jurors was given: *Held*, that the plea was bad for duplicity.

ON EXCEPTIONS.

INDICTMENT for keeping a drinking house and tippling shop.

The defendant pleaded in abatement "that the body of men who found the indictment [at, &c.] were not a legally authorized body, and had no authority to act in the capacity of grand jurors for the following reasons, to wit:

"1st. Because the county of Somerset has not been divided into jury districts since the last census by the county commissioners, or by any other authorized body, or person as required by law.

"2d. Because the towns of Anson and Palmyra in said county of Somerset, and from each of which towns one grand juror was sent, and composed a part of the panel which found said indictment, had in the jury-box, at the time of the drawing of said jurors, more names than the law allows.

"3d. Because in the towns of Madison and St. Albans in said county of Somerset, and from each of which towns one person, composing the panel which found said indictment, was drawn, no notice was given to the inhabitants of said towns to assemble and be present at the draft of jurors called for, as required by law." [All of which, &c.]

The county attorney filed a general demurrer, which was joined by the defendant and sustained by the court; and the defendant alleged exceptions.

*L. Clay*, for the defendant.

*L. L. Walton*, county attorney, for the state.

WALTON, J. The plea in abatement is bad for duplicity. It tenders an issue upon at least three separate, distinct and independent propositions of fact. First, it avers that the county of Somerset had not been legally divided into jury districts. Second, that the towns of Anson and Palmyra had in their jury-box more names than the law allows. Third, that in the towns of Madison and St. Albans, no notice of the drawing of the jurors was given. Such a plea is clearly bad. *State* v. *Ward*, 63 Maine, 225. *State* v. *Ward*, 64 Maine, 545. Bacon's Abridgment, Abatement, (P). Stephen on Pleading, 253.

*Exceptions overruled.*

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

# SUPPLEMENT.

## IN MEMORIAM.

PROCEEDINGS OF THE CUMBERLAND BAR IN RELATION TO THE RECENT DEATH OF

### Hon. JOSEPH HOWARD,

FORMERLY A JUSTICE OF THE SUPREME JUDICIAL COURT, HAD BEFORE THE COURT AT THE JANUARY TERM, IN PORTLAND, ON FRIDAY, JANUARY 11, 1878.

HON. N. S. LITTLEFIELD'S REMARKS.

*May it please your Honor:*—Since the last term of this court in this county, death has removed from this bar one of its most distinguished, and its oldest member, the late Joseph Howard, an ex-member of this court. Custom, as well as inclination, requires that we should pause in the transaction of the ordinary business of this session of the court, and pay our tribute of respect and affection to the memory of our much beloved friend and associate, as well of the court as of the bar.

The Cumberland bar association have adopted a series of resolutions pertinent to the occasion, which will be presented in the proper order, with a request that they be extended upon the records of the court.

The duty assigned me in the proceedings of this occasion is performed by this announcement of the decease of our late brother; but my long acquaintance and intimacy, and uninter-

rupted friendship with our late associate, if not requiring anything more of me, will I hope excuse me for a few words in relation to him personally and professionally. The common saying that "Death loves a shining mark," has been confirmed by the late calls made on ex-members of this court.

Less than two years ago seven of those members were living: Chief Justice Shepley, Associate Justices Rice, Kent, Cutting, Howard, May and Tapley. Only three of these now remain, Rice, May and Tapley. Appropriate notices of those deceased, except the last, have been had at the proper times and places, and this is the time and place to notice in a proper manner the last call from our ranks.

The circumstances of the death of Judge Howard were peculiar. On an early day in the month of December last he left his home in this city with the intention of spending the balance of that day with his only brother and family, on the old homestead in Brownfield, and of spending the next day at Fryeburg, where the Oxford county December term of this court was being held by Judge Virgin. Arriving at Brownfield about noon he went to his brother's home, and after dinner, it being pleasant, he went out alone and went over the farm on which he was born. Failing to return as soon as expected, search was made, and his lifeless body was found not far from the dwelling house. It was evident that death overtook him while on his return from his excursion. He had in his hand a bunch of evergreen, emblematical of his memory, which will twine around our hearts until they cease to beat.

Intelligence of his death and its circumstances reached the court at Fryeburg, in an hour or two after its occurrence. I was attending the court there at the time, and several others of the Cumberland bar, nearly all the members of the Oxford bar, and several of the York bar. A member of the York bar informed us that he rode in a car an hour or so with Judge Howard, within two or three hours of his death; that he conversed with him all the way, and he appeared in his usual health, and in his long acquaintance with him he never saw him more cheerful and in better spirits than he was at that interview.

Judge Howard was born in Brownfield, Oxford county. At the time of his death he was seventy-seven years of age. His preliminary education was obtained at Fryeburg academy. He graduated at Bowdoin college in 1821, taking a high rank in his class, and immediately commenced the study of the law in the office of Judge Dana, who was a judge prior to the separation of Maine from Massachusetts. He completed his law studies in the office of the late Hon. Daniel Goodenow, and was admitted to the bar in 1824. He first opened an office at Bridgton, in this county. Within a year John Burnham, a successful lawyer in Limerick, in York county, died suddenly, and Mr. Howard immediately removed there, where he remained in successful practice for twelve or fifteen years. While quite young, he received the appointment of county attorney for York county, and very ably performed the duties of that office for about ten years.

In 1837 he removed from Limerick to Portland, and soon afterwards formed a partnership with Henry B. Osgood, his brother-in-law, their wives being the accomplished daughters of Judge Dana and sisters of the late Governor, John W. Dana. After the decease of Mr. Osgood he and George F. Shepley, now judge of the U. S. circuit court, formed a partnership, which continued till 1848, when the senior partner was appointed an associate justice of this court. Prior to that time he filled the office of U. S. attorney for Maine district for several years. When his term of office expired as justice of this court he was in the prime of life, and soon after formed a partnership with our genial and talented brother, Sewall C. Strout, which firm continued several years, when it was dissolved to enable the judge to associate with him in business his son-in-law, Nathan Cleaves, now the popular judge of probate for Cumberland county. Afterwards Henry B. Cleaves, esq., now the efficient solicitor for the city of Portland, was admitted as a member of the firm, which was dissolved by the death of the senior partner, the event we are called upon to notice.

I first became acquainted with Judge Howard when he came to Alfred, my native town, and entered the office of Judge Goodenow as a student. I was then seventeen years old, he

twenty-one. I was engaged in the office of clerk of courts for York county, and in what leisure I could command making preparation to commence the study of the law.

I was reciting my Latin lessons to Judge Goodenow, who first started the idea of making a lawyer of me, and after Mr. Howard came he assumed the place of Judge Goodenow, so far as my lessons were concerned. From that time to the day of his death, more than half a century, we have been on terms of intimate friendship and confidence. I think I am able to speak correctly in relation to the prominent traits of his character.

As a son, as a brother, as a husband, as a father, as a friend, as a man and as a gentleman, he was all that could be desired; he was as near perfection as humanity will allow. As a counselor, he was in all respects perfectly reliable and safe. As a prosecuting officer, he was energetic and thorough. As a judge, he was patient, affable, untiring, and an earnest seeker after the truth. He would rule a point against counsel in so kind and conciliatory a manner, that the disappointment would be shorn to a great extent of its unpleasantness. His opinions on questions of law are models of conciseness, not at the expense of perspicuity. He never buried his ideas in words.

One remarkable trait of Judge Howard's character was that he was never angry. In all my intercourse with him, I never knew him to show the least appearance of anger. He had a keen sense of right and wrong, and knew well when he was wronged, but an angry word never escaped him so far as I know. I have seen him disgusted, but never angry.

In the early days of my practice in this county no young practitioner had the temerity to contest cases to the jury, until he had practiced many years. If he did, he must meet such men as Benjamin Orr, Simon Greenleaf, Stephen Longfellow, Samuel Fessenden, Thomas A. Deblois, Nicholas Emery, and Charles S. Daveis, who were the legal giants of those days. The young lawyers must have senior counsel.

I have had all of those above named, except the first, at different times associated with me in the trial of my cases. After Judge Howard came to Portland, he and I together occasionally

ventured to contest cases with the old members of the bar in this county, and after a long while I ventured to go alone and it came about that myself and my good friend, Judge Howard, would take opposite sides and for the last twenty years we have been placed many times in this and other counties, in that position. The object of this is to say that I have always found him the same magnanimous and honorable opponent in such cases as I found him faithful and true when we were associated together.

He was always willing to aid the young members of the bar and encourage them to rely upon themselves in the prosecution of their professional duties.

If any one aims to be the perfect man and gentleman and all that the term implies, whenever he reaches the point to which our beloved and deceased friend arrived, he may be assured that there is but little chance to go higher in that direction.

He is gone. We shall see his manly form no more. We shall see his pleasant face no more. We shall grasp his friendly hand no more. We shall hear his friendly and cheerful voice no more. His example is left to us. If we cannot attain to his standard, may we get as near it as we can.

MR. S. C. STROUT'S REMARKS.

*May it please your Honor:*—I am charged with the duty of presenting to your Honor the resolutions adopted by this bar upon the death of our late brother, Judge Howard, which has now been announced.

In speaking of a man like him, there is very little danger of fulsome eulogy; for his was a character so fully rounded and complete, that it is a fit model for the emulation of the young. Of a commanding figure and elegant presence, he united with the graces of person the more admirable qualities of a strong and vigorous intellect, harmonized and softened by a geniality of disposition and gentleness of manner, that won the regard and love of all who knew him.

I had the pleasure of his intimate acquaintance for thirty years, nine of which I was his partner in the practice of law. This association taught me to revere his character, and to love the man

as a father. Few men possess the power of self-control which he habitually exercised. Amid all the vexations of a lawyer's practice, I never saw him out of temper. While his high sense of right made him indignant at dishonesty, he never permitted any passionate denunciation to escape him. He judged all charitably, and was slow to believe in another's depravity.

His wit was ready and keen, and he enjoyed its indulgence; but his arrows were never poisoned, and were not permitted to wound the feelings of the most sensitive. He never forgot to be courteous and kind in all relations of life. Sunny himself, he diffused a genial radiance all around him.

His tastes were pure and elevated, and they withheld him from amusements indulged in by many; but his sanguine temperament led him to the fields, the forests, the mountains and the streams for recreation. In these he reveled. A fine landscape or a delicate wild flower, modestly blossoming in some unfrequented nook, afforded him keen delight. His soul was in communion with nature. Each flower of the wild wood seemed to catch a brighter tint at his coming, and each tree of the forest was to him as a familiar friend. His greatest delight was to spend his leisure hours amid these favorite scenes, and in this pursuit he gained that mental and physical vigor which largely sustained and nourished his benignant spirit.

If the manner of his death had been under his own control, I think he would have chosen, as the event happened, at the scene of his birth-place, fresh from the woods, bearing in one hand a cluster of evergreen, and in the other a spray of club moss.

At the ripe age to which he attained, his form still remained erect, his eye clear, his intellect undimmed, the buoyancy of his spirits unabated, and his whole nature warm, fresh and beaming, as in early manhood.

In his friendships he was tender and unselfish. His charities were numerous. He never gave carelessly nor ostentatiously, but always responded cheerfully to the needs of the deserving; concealing if possible, from the recipients of his bounty, knowledge of its source.

Judge Howard was learned in his profession, and regarded its

practice as an honorable pursuit. The law, to him, was never a snare to the unwary, nor a web of technicalities calculated to accomplish results at the expense of justice, but a noble science which sought to protect and enforce the right under all circumstances, to guard the weak and ingenuous from the frauds and machinations of the dishonest and cunning, and to clothe the citizen and his property with those safeguards which, while protecting them, jealously guarded the rights of all others.

As an advocate, he was earnest and convincing, sometimes eloquent, but never allowed himself to employ rhetoric to mislead. He possessed a clear, discriminating and strong mind, and always seized and presented the salient points in his cause, and did not waste his strength on immaterial matters. He often employed successfully both wit and anecdote, to place in a strong and favorable light the weakness of his adversary's position or the solidity of his own. In his intercourse with his brethren he was always courteous and kind, happy to lend a helping hand to a young member struggling for success and eminence in the profession.

He was a cautious man, preferring to investigate a question thoroughly before he advised action, and preparatory to entering the forensic arena, he armed himself carefully for the contest by principle and authority. He was eminently a safe lawyer. He never sought to magnify himself or to gain applause in his efforts, but sunk his own individuality in the cause of his client, and did and said only what he felt would aid in reaching a result favorable to his client, whose cause he believed to be just.

As a judge, he worthily maintained the dignity of the bench; and its ermine, while borne by him, was never sullied. As a *nisi prius* judge, he deserves to be regarded as a model. His rulings were prompt, not impulsive, always clear to the comprehension and announced courteously and even kindly toward the losing party. He was a patient and attentive listener to the arguments of counsel and never failed to obtain a clear understanding of the case before him. But whatever might be his convictions as to its merits, he did not intrench upon the province of the jury.

As a law judge, his published opinions are terse, vigorous and

sound, and furnish abundant evidence of patient thought and careful research, and rank among the best which have emanated from the eminent judges that have adorned the bench of Maine. They are the honorable and enduring record of an able, faithful and upright judge.

He has passed from us, at the age of more than 77 years. His commanding form we shall not again see. His genial presence will be greatly missed by all who knew him, but we shall cherish his memory, and it will ever continue green and fragrant.

With the permission of your Honor, I now present the resolutions of this bar, and request that they may be entered of record in this court:

RESOLUTIONS.

*Resolved*, That, while regretting the sudden loss in the fulness of his mental powers of our late distinguished associate, Judge Joseph Howard, the members of the Cumberland bar can but esteem him happy in the manner of his disappearance from us, and happy in the record he has left behind him of a well-spent and blameless life.

*Resolved*, That the legal profession will not be likely to lose the honorable respect in which it has been hitherto held in the community, while it can point to members, who, like our deceased brother, have been industrious and faithful in the discharge of high official trusts, and just and upright in their business relations with their clients and with the public.

*Resolved*, That those of us who have enjoyed the society and friendship of Judge Howard, can never forget the venerable and attractive presence, the graces of a courtesy which a few like him have handed down from an earlier generation, and the gentle manners expressive of a refined character and an affectionate heart; and we regret that we cannot depict in words for the admiration and imitation of the young, that too rare type of the incorruptible magistrate, the patriotic citizen, and the accomplished gentleman, which all who knew him acknowledged him to be.

*Resolved*, That the foregoing resolutions be presented to the supreme judicial court now in session.

MR. G. F. TALBOT'S REMARKS.

*May it please the Court.*—Occasions like that, which brings us together to-day, seem to recur with sad frequency. It is one of the compensations of those whose lives are prolonged, that they must reconcile themselves as best they may, to painful partings with friends and associates. It is, however, rather to give expression of our respect for an estimable man, and of our affection for a lost companion, than of our regret for the manner or time of his departure, that we assemble today in the place where his voice, now silent forever, was most frequently heard, and where his attractive presence gave additional dignity to this sanctuary of justice. For he passed suddenly from our midst, as we hope and believe, with little suffering, and by a euthanasy well fitted to the simplicity and kindness of his nature, which would have prompted him to ask forgiveness for a prolonged weakness and infirmity, that should make large demands upon the care and watchfulness of affectionate friends.

He had passed the allotted period of human life. His success, worthily won, had filled the measure of a reasonable ambition without making him arrogant or self-conscious. He had enjoyed in his domestic life, all the experience of happiness which is given to men of pure and affectionate hearts. A pious gratitude and the consolation of sacred memories kept the blessedness of his lot present in his affections after it had been taken from his sight. He had borne the heaviest domestic sorrows with a noble patience. And then, at the end of a rarely prosperous career, he lingered with an unbroken spirit—the sweetness of an amiable disposition, refined and intensified alike by the joys and the sufferings, of which he had received so large a measure—he lingered to make old age venerable, and to show that a well-spent and pure life has its pleasures and rewards clear up to its close.

"The good gray head that all men knew," all men honored and many loved. His senses were unimpaired, his zest of life was keen and hearty, and his love of nature and of human companionship was unabated, so that his society was eagerly sought, and highly enjoyed by the youngest and most sympathetic persons. The hardy plant which he plucked and held in his hand on that last

solitary walk in the genial autumn weather prolonged far into winter, was a fit emblem of the perennial youthfulness of impulse and feeling, which he had preserved far into the winter of his years. Upon his person time had laid his hand with an artistic tenderness. His eye was not dim nor his natural force abated.

The outward lineaments, the features and form, over which age had but thrown a silvery lustre, were but emblems of the harmony, symmetry and natural refinement of his character. He was beloved by his friends, esteemed by his associates and honored by all men because he had avoided the two besetting weaknesses of prolonged life,—egotism and petulance. There was an innate modesty, which kept self-love and self-assertion repressed. He was never the hero of the pleasant anecdotes of earlier times, with which he sometimes delighted his friends. His gentle spirit, expressing itself in the characteristic grace of courtly manners, that opposed a serene patience to all disappointment, all opposition and all contradiction, enabled him to retain his self-control amid all excitement, and made him a peace maker and mediator among men of more impetuous temper. It followed from these traits of disposition, that kept his heart young, that he was never assigned those social seats, where age sits venerable indeed but drearily isolated; and his companionship was sought by the young, and his presence added new cheer to the hilarity of childhood.

I have avoided speaking of the leading incidents of his life, with which I am little familiar, or of his professional character and the mental excellenci es so much better known to the court of which he was once a distingui shed member, and to many eminent lawyers, who have enjoyed the privilege of an intimate association with him in business. I have only wished to give some fitting expression to my affection for a friend I have lost, and to the general respect in which the entire community where we live entertain for the memory of a good citizen, a faithful public servant and an amiable man.

JUDGE BARROWS' REMARKS.

Only one term of this court has gone by in this county since, sitting here, I heard him whose loss we now lament pronounce a feeling and appropriate eulogy upon a late venerable ex-chief-jus-

tice of this court whose associate upon the bench he was, and with whom he had been intimate for many years.

If his lip quivered or his voice trembled as he spoke, it was with tender emotion, and not at all with the weakness of advancing years; for his form was as erect and his step as light as most men show who were his juniors by a quarter of a century. To human vision at that time, his prospect of being here today, as a tried and trusted counselor, to protect the interests of his numerous clients, was as good as that of any one then present who had passed the prime and vigor of life, but not, like him, the allotted span of man's existence. I miss his presence and his cordial greeting; and in their stead, I receive the funeral garland which your affectionate respect devotes to decorate his tomb; and I listen to the tribute which you pay to departed worth, and strive to recognize the fact that in these scenes where he has so long been busy he will appear no more forever.

Coupled as it often is with pain, bodily and mental, and as it always is, with a sense of loss, long parting, and bereavement, and regarded as it generally is as a penalty imposed upon the human race by our Creator for a transgression of his laws, death is to most of us a subject of aversion if not of terror; and when our friends are its victims, however gently it may come, we fail to recognize the sweet rest which God has mercifully decreed for his creatures after a life of trial and of toil.

Our partial and erroneous views respecting the true significance of this stage of existence has so wrought upon us that we fail to rise

> "Above the smoke and stir of this dim spot
> Which men call earth; but with low-thoughted care,
> Confined and pestered to this pinfold here,
> Strive to keep up a frail and feverish being
> Unmindful of the crown which virtue gives,
> After this mortal change, to her true servants."

Your first resolution suggests a consolatory truth that we shall do well to regard.

In the home of his childhood, surrounded by objects and scenes made dear to his sight by the memories of his early days, toward nightfall of a day of rational and tranquil enjoyment

> "God's finger touched him and he slept."

When the life has been made to conform to the Maker's grand design there are surely no terrors in such a painless and peaceful close.

The story of his life has been fitly told in your resolutions and the remarks which have accompanied them. There is little for me to add, beyond the expression of my concurrence in what has been already well said.

His tenure of judicial office was brief—hardly long enough to test his capacity for it. Not more than one or two who were his associates on the bench and best knew his real worth survive him, and neither of them is here today to bear witness to his services. Of one thing I feel sure: and that is his duties were never made more difficult by any collision between court and counsel, and that his own unvarying courtesy was never ruffled, seldom tested, by any exhibition of peevish disrespect on the part of those who differed from him. Herein his own kindly temper was a perfect protection.

> "The wind that beats the mountain blows
> More softly round the open wold
> And gently comes the world to those
> That are cast in gentle mold."

Much of the asperity, bad blood and positive discomfort growing out of litigation might be saved, with results quite as favorable to substantial justice, if the example of urbanity which he set during his long professional career were well followed. There was nothing in his nature akin to the human bramble, nor to the "wild beast that trode down the bramble."

His name first appears as counsel in the fifth volume of the Maine Reports, and his record is found thenceforward, as counsel or as judge, in nearly all of the series to the sixty-seventh. Let his own works praise him. As senior member of the well known firms of Howard & Osgood, Howard & Shepley, Howard & Strout and Howard & Cleaves, he enjoyed and never forfeited to his latest day the confidence and respect of a host of clients, a fact which of itself, furnishes ample proof of his fidelity and ability.

Eminently fortunate in his domestic relations, death spared his household for many years, apparently only to remind him at last by repeated blows that he and his, though highly favored, were not

exempt from the common lot; and in his latest years, (the once happy family circle entirely broken up) he stood almost alone, his surviving children living at a distance in other states. Yet to one of his refined character and never failing courtesy and lively social instincts, the doors of congenial friends were always open; and had his life been still prolonged for many years, it is safe to say that he never would have occupied the forlorn position of a solitary old man. He carried in his breast an inexhaustible fountain of pleasure and content, in his love for nature and all that is beautiful in her works. His last hours were passed in the pursuits that for years had been his favorite recreation. He had all the fondness for flowers and for botany as a science that characterized a distinguished chief-justice of the king's bench half a century ago, and with him he would say:

*Sit mihi floribus*
*Mulcere me fessum, senemque*
*Carpere quos juvenis solebam.*

Had there been nothing but his pure morals and gracious manners to commend in him, for these, my brethren, we would cherish his memory, and keep it green in our hearts like the sprig found in his dead hand, just plucked, when God's messenger came to conduct him into the unseen world.

The clerk will enter your resolutions upon the records of the term, and in token of respect for his memory the court stands adjourned for the day.

# INDEX.

## AMENDMENT.

1. A demurrer to a declaration on a note or bond in which the name of the plaintiff varies from that of the payee in the instrument, will be sustained, but an amendment will be allowed on proper proof by the plaintiff that he is the payee named. *Colton* v. *Stanwood*, 25.

2. The plaintiffs, Colton, Z. and R. declared on a poor debtor bond given by the defendants to them in the ordinary form. One of the defendants prayed oyer and demurred for variance, the names of the obligees in the bond being given as Carlton, Z. and R. The presiding justice sustained the demurrer, but allowed the plaintiffs to amend without terms, by describing the bond as given to the plaintiffs by the names of Carlton, Z. and R. The defendants excepted to the allowance of the amendment.

   *Held*, that the declaration was amendable and that the plaintiffs, on proper averments and on proof that they, though misnamed, were the parties really intended, might maintain the action.

   *Held* also, that it was no good ground of demurrer, that the bond though several as well as joint was not so described; this being a joint action, was sustained by the production of a bond in which the defendants bound themselves jointly and severally.

   But, *held*, that R. S., c. 82, § 19, is imperative as to the terms on which the plaintiffs may amend their declaration when adjudged insufficient on demurrer, and that it was erroneous to permit the plaintiffs to amend here, except on the statute terms. *Ib.*

3. An officer by leave of court may amend his return by certifying that he kept the execution to a date later than the date named in his first return. *Storer* v. *Haynes*, 420.

4. If the original record of the county commissioners be defective, it may be amended in accordance with the facts at any regular session. *Levant* v. *County Com.*, 429.

5. The power to grant amendments upon terms which are left to the unlimited discretion of the presiding justice is equivalent to a power to grant any amendment that is by law allowable without imposing any terms, if in his opinion justice does not require that he should impose any. And the exercise of his discretion in so doing will not be revised by this court on exceptions. *Bolster* v. *China*, 551.

## APPEAL.



## ARBITRATION.



## ASSAULT AND BATTERY.



## ASSESSORS.



## ASSIGNMENT.

## BASTARDY.

When the declaration in bastardy states the time, as between two dates, when the child was begotten, the jury are authorized to find the defendant guilty on sufficient proof, though the child was begotten outside of the dates stated. The particulars of time and place are only material as bearing upon the credit of the complainant as a witness. *Holbrook* v. *Knight*, 244.

## BILL OF SALE.

See Assignment. Partnership, 1.

## BOND.

It is not good ground of demurrer that a bond, though several as well as joint, is not so described. The action, being joint, is sustained by the production of a bond in which the defendants bind themselves jointly and severally. *Colton* v. *Stanwood*, 25.

See Amendment, 1, 2. Executors and Administrators, 2, 5. Intoxicating Liquors, 2. Mistake, 3, 4. Probate Court, 5.

## BOOMS,

See Corporation, 2.

## BOUNDARIES.

The question as to the actual place of the division line on the face of the earth was referred. The demandant, after one of the referees had partially surveyed a line, proposed to agree upon the line as claimed by the tenants, and to pay for what he had cut on the land, if the tenants would pay the costs of the referees; the terms were acceded to and complied with, and the agreement as to the line reduced to writing and signed by the demandant. *Held*, that the settlement of the line and the agreement signed by the plaintiff in reference thereto, were on a good and valid consideration and binding as any other contract for such consideration. *Hunter* v. *Heath*, 507.

See Deed, 1—3, 6—10. Estoppel, 2.

## BRIDGE.

See Forcible Entry and Detainer.

## CARE.

See Carriers. Damages, 2.

## CARRIERS.



## CASE.



## CERTIORARI.

## CONSTITUTIONAL LAW.

See PAUPER, 6. TAX, 1.

## CONTRACT.

## CORPORATION.

1. The rule, that a grant of privileges is a grant of the necessary incidents to the enjoyment of those privileges, does not apply so as to embrace as incidental privileges what are expressly excepted or forbidden in the grant. *Plummer* v. *Penobscot Lumb. Ass.* 363.

2. Thus: the act of 1832, c. 236, § 2, provides that the Penob. Boom Corporation (lessors of the defendants) may erect and maintain a boom across the Stillwater branch of the Penobscot for the purpose of stopping and securing logs, and branch booms wherever they may think it necessary, (between certain given points) provided said booms be so constructed as to admit of the safe passage of rafts and preserve the navigation of the river and the branches.

*Held*, 1. That the right to the reasonable use of the river to carry out the purposes of the powers granted by the charter does not include the right to exercise the powers therein expressly prohibited.

*Held*, 2. That the corporation have no right to throw a boom across the whole Penobscot, and that such erection is in direct violation of § 2. *Ib.*

See TRUSTEE PROCESS, 5.

## COSTS.

1. Costs must be allowed on amendment on demurrer where the pleadings are insufficient, under R. S., c. 82, § 19; the court has no discretion to allow the amendment without costs. *Colton* v. *Stanwood.* 25.

2. The costs of a suit in equity, including counsel fees on both sides, instituted to ascertain the meaning of an ambiguous clause in a will, may be charged to the general assets of the estate, as having been occasioned by a want of care and precaution on the part of the testator himself. *Straw* v. *Societies*, 493.

See BANKRUPTCY, 1. EQUITY, 5. TAX, 5. TRIAL, 15.

## COUNTY COMMISSIONERS.

See AMENDMENT, 4. APPEAL. CERTIORARI, 3, 6, 7.

## COVERTURE.

See HUSBAND AND WIFE, 5.

## CROSS ACTION.

See REVIEW, 1.

## CROSSING.

See RAILROAD, 8.

## DAMAGES.

1. The plaintiff contracted with the defendants to play first old man and character business for thirty-six weeks. At the close of the nineteenth week, the defendants discharged the plaintiff without fault on his part, who commenced an action for breach of the contract during the next week. *Held*, that the action was not premature; *held*, also, that the plaintiff was entitled to recover as damages for the remainder of the term at the stipulated rate, less what he actually earned or might have earned by the exercise of reasonable diligence, with interest; that having obtained another contract within the line of his profession within the time of his original contract with the defendants, the sum which he might have earned thereby to the time when his contract with the defendants expired, should be deducted from the contract price with the defendants. *Sutherland* v. *Wyer*, 64.

2. The rule which requires one to use ordinary care to lessen the damages of an actual trespass upon him, does not impose upon him the obligation to provide against a threatened trespass or to use such care unless he have knowledge that the trespass is committed as well as threatened.

*Plummer* v. *Penobscot Lumb. Ass.*, 363.

3. "Frye agrees to run a stage line from Dexter to Greenville, for the conveyance of travel coming from or going to the Maine Central Railroad; the time of leaving and arrival to be as follows:— . . . The Maine Central Railroad Company, in consideration of the above, agrees to give Frye the exclusive right of ticketing between Dexter and Greenville for five years from July 1, 1872, at rates now being settled by." Annexed to the plaintiff's agreement was a table of time of leaving and returning to Dexter, Greenville and Kineo.

*Held*, 1. The tenor, terms and subject of the contract between these parties, and the business carried on under it are not such that the plaintiff is entitled to the damages which he suffered in the steamboat business between Greenville and Kineo by reason of its breach. The transportation of the passengers by the boat was not so connected with that stipulated for in the contract by the reference thereto in the contract itself or by the natural course of business, that the profits accruing on that part of the line, and the damages likely to result there, as well as between Dexter and Greenville from a breach of the contract can be deemed to have been in the contemplation of both parties at the time they made the contract.

*Held*, 2. Upon such a contract as this, the measure of damages is not the difference between what plaintiff was to receive as the contract price for carrying the through passengers and what it would actually or probably cost to carry each passenger without reference to any other contract or any other business, but is the profits which the plaintiff was in fact able to make upon their transportation, taking into account the situation and use of his property in the transportation of other passengers, and the carrying on of other business over the same route. *Frye* v. *Maine Central*, 414.

See ESTOPPEL, 1, 2. EVIDENCE, 3.

## EXCEPTIONS.

See AMENDMENT, 5. TRIAL, 14.

## EXECUTION.

## EXECUTORS AND ADMINISTRATORS.

See ASSIGNMENT. FRAUDULENT CONVEYANCE, 1—4. LIMITATIONS, STATUTE OF, 3. MISTAKE, 2. PROMISSORY NOTES, 1. TRIAL, 1. TRUSTEE PROCESS, 1.

## FRAUDULENT CONVEYANCE.

1. A voluntary gift by a husband to his wife, if he be indebted, or by a father to his son, is *prima facie* fraudulent as to creditors. This may be rebutted by the circumstances of the case and by proofs. *French* v. *Holmes*, 186.
2. The question whether the gift or conveyance is fraudulent or not is a question of fact to be determined by the jury. *Ib.*
3. The value of the gift is material as to the question of fraud. It must at least be of sufficient value to pay for the expense of its sale by an officer on execution. *Ib.*
4. The wife stands in no worse relation to a gift from her husband as to creditors than would any other donee from him of the same gift. *Ib.*

See PLEADING, 2. SALE, 2. TRUSTEE PROCESS, 1.

## GENERAL ISSUE.

See PLEADING, 1.

## GRANT.

See CORPORATION, 1. DEED, 4.

## HEIR.

See PROBATE COURT, 1, 2. DEED, 11. DESCENT.

## HORSE-RACING.

See WAY—DEFECTIVE, 1, 2.

## HUSBAND AND WIFE.

1. The husband is liable for necessaries furnished a wife, who for good and sufficient cause has left his bed and board. *Thorpe* v. *Shapleigh*, 235.
2. One cannot furnish articles which are not necessaries and recover a fraction of their value because they might have answered the purpose of other articles which would have been necessaries. The articles furnished must be necessaries, suitable and proper, regard being had to the condition of the parties, else no recovery can be had. *Ib.*
3. Where an action is against husband and wife for a tort committed by the wife, the liability of the husband necessarily follows from the existence of

## INSURANCE.

## INTEREST.

## INTOXICATING LIQUORS.



See EVIDENCE, 4. PLEADING, 8. TRIAL, 8.

## JOINT LIABILITY.

See BANKRUPTCY, 1. BOND. PROMISSORY NOTES, 3.

## LIEN.



See ATTACHMENT, 5. BANKRUPTCY, 3, 4. EVIDENCE, 8. PROMISSORY NOTES, 2.

## LIMITATIONS, STATUTE OF.

## PATENTS.



## PAUPER.



See AMENDMENT, 7. EVIDENCE, 10.

## PAYMENT.

## PRINCIPAL AND SURETY.



## PROBATE COURT.



## PROCESS.



## PROMISSORY NOTES.

justice instructed the jury "that the mere magnifying of the injuries would not of itself defeat the note, but if the defendant falsely, fraudulently, deliberately, misrepresented as to the extent of his injury, and as to the magnitude of his claim, it would discharge the defendant;" *Held*, on exception, that the instruction correctly stated the law.

*Thompson* v. *Hinds*, 177.

2. The plaintiff having property of a third person in his hands subject to a lien in his favor, at the request of said third person, passed it over to the defendant, taking his note therefor, payable to himself, to secure the same lien. *Held*, that the note takes the place of the property for which it was given, and that when the lien is discharged it becomes absolutely the property of such third person, and that the plaintiff cannot maintain an action on it for his own benefit. *Bean* v. *Dolliff*, 228.

3. It is proper to declare upon a joint and several note signed by the defendant as surety for an individual or a copartnership, as the note of the defendant, in a several action against him, without setting out the joint contract also, and without taking notice of the suretyship, or copartnership between the principals. *Bank of Biddeford* v. *McKenney*, 272.

4. After the general issue pleaded and joined it was competent for the presiding justice in his discretion to allow the plaintiff leave to amend without terms by describing the note as a joint and several note, and averring that the defendant promised the plaintiff by the name of the First National Bank. *Ib.*

5. The bank became a party to the statute assignments made by the principals for the benefit of their creditors, at the request of the defendants, and under a stipulation that the bank should not be held thereby to release any right as against the defendants, the defendants at the same time agreeing to pay the balance of the notes over and above the amount of dividends received under the assignments with eight per cent. interest.

*Held*, that by such an arrangement the notes are not discharged as against the sureties, nor the right of action suspended, but suits thereon may be maintained against them without waiting for the adjustment of the assignment accounts. *Ib.*

6. The maker of a premium note given to a mutual insurance company for the nominal premium upon an open policy executed to cover such risks as may be afterwards indorsed thereon, is liable to the company on such note only to the amount of the actual premiums upon risks assumed by the company and indorsed thereon. *Maine Ins. Co.* v. *Stockwell*, 382.

7. Where a premium note for an open policy is given after the organization of the plaintiff corporation and after applications for insurance to the amount required by its charter to authorize the issuing of policies, by one of the original subscribers, who had paid his former note, given for the purpose of starting the company in business and for the better security of those concerned, it is for the jury to determine whether the note thus subsequently given is for an ordinary open policy, or for "the better security of those concerned." *Ib.*

## QUITCLAIM.



## RAILROAD.

## REAL ACTION.



## REAL PROPERTY.

## SEARCH AND SEIZURE.

See INTOXICATING LIQUORS, 6, 7.

## SEIZURE.

See BANKRUPTCY, 3, 4.

## SERVICE.

See LIMITATIONS, STATUTE OF, 1. TRUSTEE PROCESS, 4, 6, 7.

## SET-OFF.

The plaintiffs lent the defendant money and took his note therefor with a United States bond as collateral security. After the note was payable and before it was paid, the bond was stolen from the bank. *Held*, that the defendant could not legally file his claim for the value of the bond in an action against him upon the note, nor could he avail himself of the claim as a defense by way of recoupment. *Winthrop Bank* v *Jackson*, 570.

See EXECUTORS AND ADMINISTRATORS, 4. PROBATE COURT, 8, 9.

## SEWERS.

1. Under R. S. 1857, c. 16, §§ 2 and 3, as amended by chap. 153 of the public laws of 1860, the municipal officers of the city of Portland had the right to construct the sewer in question with an outfall in the public dock, below low water mark, to be used for collecting rubbish and filth and conducting and depositing them there. *Franklin Wharf* v. *Portland*, 46.

2. As this right must necessarily be exercised conjointly with the public right of navigation, and the rights of the owners of wharves lawfully erected in such waters, it should be so exercised that such rights shall be no further limited or impaired than is reasonably necessary to accomplish the purpose of the statute which gave it. *Ib.*

3. That purpose was to enable the city to collect and deposite refuse matter in the public dock where it would ordinarily be so distributed and dissipated by the elements as not to create a nuisance, public or private. *Ib.*

4. The right of the defendants under the statute is not a right to create a nuisance in the public dock; it is rather to make deposits there temporarily, and not to obstruct navigation permanently. *Ib.*

5. If such deposits accumulate in such quantities as to obstruct navigation, or cause special and particular damage to the owners of the wharves there, not common to the public, it is the duty of the defendants to cause them to be removed. *Ib.*

6. If they unreasonably neglect or refuse to do so, they will be guilty of creating a public nuisance, and liable to indictment in the one case, and of creat-

## SHIPPING.



## STATUTES CITED.

### English Statutes.



### Statutes of the United States.—Revised Statutes.



### Constitution of Maine.

STATUTES OF THE STATE.—REVISED STATUTES.

PUBLIC LAWS OF MAINE.

## STATUTES, CONSTRUCTION OF.

The re-enactment of a statute after a judicial construction of its meaning, is to be regarded as a legislative adoption of the statute as thus construed. *Tuxbury's Appeal*, 267.

## STATUTES HEADNOTED.



## STOLEN PROPERTY.

STUMPAGE.

See LIEN, 1, 3.

SUBLET.

See CONTRACT, 6.

SURPRISE.

See NEW TRIAL, 3, 4.

TAX.

1. It is within the constitutional authority of the legislature, to empower the city council of the city of Portland, to exempt from taxation for a term of years property belonging to the Portland Water Company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes.
*Portland* v. *Water Company*, 135.

2. Under an act of the legislature, authorizing an exemption of property from taxation for six years, a vote of the city council to exempt for five years, is valid. *Ib.*

3. The term of exemption does not necessarily commence running from the passage of the act by the legislature, but may begin when the exemption is voted by the city council, if the vote is passed within a reasonable time afterwards. *Ib.*

4. The legislative act allowed the exemption to extend to property of the company not in existence when the act was passed. *Held*, that this would include, as taxable, all real estate at a value according with the condition it was then in, and would exclude all personal property acquired after that time. *Ib.*

5. "In addition to the methods now provided by law for the collection of taxes legally assessed in towns against the inhabitants thereof, or parties liable to taxation therein, an action of debt may be commenced and maintained in the name of the inhabitants of any town to which a tax is due and unpaid, against the party liable to such tax; provided, however, that no defendant in any such action shall be liable to costs of suit, or any part thereof, unless it shall appear by the declaration in the writ and proof, that payment of said tax had been duly demanded prior to the commencement of such suit." Pub. Laws, 1874, c. 232.

*Held*, 1. That as a remedy this is a retroactive act.

2. That the "collector" is the proper person to make the demand.

3. That if an action be brought under this act, it must be regarded as a waiver of procedure by arrest or distraint; that resort cannot be had to both processes at the same time, and that this is an additional, not a concurrent remedy. *York* v. *Goodwin*, 260.

## TRIAL.

## TROVER.



## TRUST.



## TRUSTEE PROCESS.

## WARRANTY.

See USAGE, 1.

## WATER.

See CORPORATION, 2. LANDLORD AND TENANT, 2. RAILROAD, 7, 8.

## WATER-WORKS.

See TAX, 1, 2. WAY—DEFECTIVE, 3.

## WAY.

A *cul de sac* may become a public way by location or dedication as well as a street open at both ends. *Bartlett* v. *Bangor*, 460.

See CORPORATION, 2. DAMAGES, 4. DEDICATION, 1, 2.

## WAY—DEFECTIVE.

1. An action does not lie against the town in favor of a person who receives an injury from a defective highway, while using such highway for the express purpose of horse-racing, and matching his horse for speed against other horses. *McCarthy* v. *Portland*, 167.

2. *Semble: Aliter*, if the fast driving was merely incidental to traveling upon the highway for any of the legitimate purposes for which a highway is designed to be used. *Ib.*

3. If one is injured by driving or falling into an excavation in one of the public streets of a city, which is left at night without being sufficiently lighted or guarded, a recovery may be had against the city, although the excavation was made by a company engaged in constructing the public water-works of the city. *Butler* v. *Bangor*, 385.

## WHARF.

See SEWER, 1—6.

## WILL.

1. A bequest to the "Methodist Episcopal Missionary Society of Maine" may be taken by the "Trustees of the East Maine Conference of the Methodist Episcopal Church," there being no society of the former name, and the latter being an incorporated institution created for the purpose of maintaining the cause of domestic missions in Eastern Maine, within which territorial section the testatrix resided at the time of her death. *Straw* v. *Societies*, 493.

2. The title of a devisee under a will, to whom an immediate estate is given, dates from the death of the testator and not from the probate of the will. *Wright* v. *Williamson*, 524.

## WITNESS.



## WORDS.

# ERRATA.

Page 36, line 20. Substitute "not" for "was."

## Error Noted in Vol. 66.

Page 450, line 8. Transpose "plaintiff" and "defendant."