REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSEPH WHITMAN SPAULDING,
REPORTER TO THE STATE.

MAINE REPORTS,

VOLUME LXXII.

PORTLAND, MAINE :
DRESSER, McLELLAN & COMPANY.
AUGUSTA:
CHARLES E. NASH.
1881.

CHARLES E. NASH, PRINTER, AUGUSTA.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN APPLETON, LL.D., CHIEF JUSTICE.
HON. CHARLES W. WALTON.
HON. WILLIAM G. BARROWS, LL.D.
HON. CHARLES DANFORTH.
HON. WILLIAM WIRT VIRGIN.
HON. JOHN A. PETERS.
HON. ARTEMAS LIBBEY.
HON. JOSEPH W. SYMONDS.

Judges of the Superior Courts.

HON. PERCIVAL BONNEY, CUMBERLAND COUNTY.
HON. WM. PENN WHITEHOUSE, KENNEBEC COUNTY.

ATTORNEY GENERAL.

HON. HENRY B. CLEAVES.

TABLE

OF CASES REPORTED.

TABLE OF CASES

CITED BY THE COURT.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

INHABITANTS OF STETSON

vs.

COUNTY COMMISSIONERS OF PENOBSCOT COUNTY.

Penobscot. Opinion December 30, 1880.

Costs in certiorari.

In certiorari to county commissioners, costs may be allowed against the respondents at the discretion of the court, but not if they do not oppose the proceedings.

Costs in such cases do not go against the county.

ON REPORT.

Original petition for certiorari, dated August 12, 1879, entered at October term, 1879, alleging that the proceedings of the county commissioners were finally closed one term earlier than is provided by statute.

October term, 1879. Writ granted, by consent of Jasper Hutchings, then county attorney.

Writ of certiorari issued November 10, 1879. Entered in court January term, 1880.

January term, 1880. "Proceedings quashed, con. as to costs."

April term, 1880. Costs allowed, case to be marked law, and reported by defendant.

The question to be submitted to the court, was whether costs should be allowed in this case against the county or county commissioners, and if allowed whether to be taxed from the date of the petition or the date when the writ was issued.

Barker, Vose and Barker, for the plaintiffs, cited: R. S., c. 82, § 104; 3 Bouvier's Inst. § 2639, p. 128; R. S., c. 102, § 14; *Burr* v. *Bucksport and Bangor R. R. Co.* 64 Maine, 130; *Levant* v. *Co. Com'rs*, 67 Maine, 429.

B. H. Mace, county attorney, for the defendants, cited: *Cushing* v. *Gay*, 23 Maine, 11; *Booth* v. *Smith*, 5 Wend. 108; *Eastburn* v. *Kirk*, 2 Johns. Ch. 317; *Bank* v. *Osborn*, 13 Maine, 51; *Mudgett* v. *Emery*, 38 Maine, 255; R. S., c. 18, § § 3, 6, 9, 13; *Abbott* v. *Penobscot*, 52 Maine, 584; *Ham* v. *Ham*, 43 Maine, 286; R. S., c. 82, § 110; c. 102, § 14; *Rex* v. *Floyd*, Cald. 309; 1 Harr. Di. 1490; *Longfellow* v. *Quimby*, 29 Maine, 201; *Mitchell* v. *Rockland*, 41 Maine, 363.

PETERS, J. The statute which gives costs "in all actions" to the prevailing party, does not apply to this case. Certiorari is not an action at law. The writ is not one of right. Nor does it comport with the nature of the proceeding that costs should always be allowed. *Ex parte Cushman*, 4 Mass. 565; *Hopkins* v. *Benson*, 21 Maine, 399.

Costs in certiorari are regulated by R. S., c. 102, § 14, which provides that "upon every application for certiorari, and on the final adjudication thereof, the court may award costs against any party, who appears and undertakes to maintain or object to the proceedings." Substantially this provision has existed ever since the statutes were revised in 1841.

By this section a limit is imposed upon the discretion of the court. Costs cannot be awarded against a party who appears

and does not defend against the proceeding. This is because a person who has acted in a judicial capacity ought not to be subjected to costs, in cases where his errors are corrected without any opposition on his part. He stands in the position of a respondent in equity, who puts in a disclaimer. In equity, the complainant having had probable cause to proceed against a respondent who disclaims, neither party recovers costs. 1 Barb. Ch. Pr. 172.

If the petition be refused, costs may be awarded to the respondent then; but if allowed, costs may be awarded to the petitioner recoverable when the proceedings are closed. There should be but one judgment for a party for costs, as is ordinarily the practice in equity.

This writ was granted without opposition or objection. Complainants should have no costs on the petition. It does not appear to us whether the writ was contested or not. The judge who tried the case, whose exercise of discretion governs, allowed costs.

Judgment for costs must be against the commissioners. The county is not a party. The commissioners can charge the judgment against the county, no obstacle being interposed, and obtain indemnity in that way.

Costs allowed upon the writ.

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

EBENEZER SPROUL *vs.* EBEN F. PILLSBURY.

Penobscot. Opinion December 30, 1880.

Libel. Pleadings.

In a declaration for publishing a libelous article in a newspaper it is not necessary to aver that the publication was made to divers persons or to any third person; it is enough to aver that the libel was printed and published in a newspaper.

ON EXCEPTIONS.

Case, to recover damages for an alleged libel. The defendant demurred to the declaration. The court overruled the demurrer and held the declaration good.

The opinion states the case.

Barker, Vose and Barker, for the plaintiff, cited: *Bailey* v. *Myrick*, 50 Maine, 181.

Mace and Robinson and *J. H. Potter*, for the defendant.

In civil suits for libel the gist of the action is publication. It is the material part and must be alleged. Publication is an ambiguous term, employed sometimes to signify the matter published, sometimes the act of publishing only, and sometimes an act of publishing such as may subject the publisher to legal liability. Townshend on Slander and Libel, § 96, p. 137.

The declaration in either count merely states that defendant printed and published the libel in a newspaper, called the Daily Standard. The word "published" as here used is synonomous with the word "printed" or inserted, and simply means the act of "putting in print," "inserting in the paper."

No possible form of words can confer a right of action, for slander or libel unless there has been a publication to some third person. Townshend on Slander and Libel, § 75, p. 138; 2 Starkie on Libel, citing 1 W. Saund. 132, note 2; *Phillips* v. *Jansen*, 2 Esp. 624; *Rex.* v. *Wegener*, 2 Starkie, case 245; *Weir* v. *Hoss*, 6 Alabama, 881; 3 Yeaton, Penn. 128.

The precedents require it to be stated that the publication was to divers and sundry third persons. Oliver's Prec. New Edition, pages 606, 608.

Writing and publishing (printing) a libel and publishing (reading) it only to the person libeled does not subject the writer and such publisher to a civil action for damage. *Phillips* v. *Jansen*, 2 Esp. 624; *Delacroix* v. *Thevenot*, 2 Starkie, case 63; *Fonville* v. *Nease*, Dudley (S. C.) 303; *Rix* v. *Payne*, 5 Mod. 165.

The above rule is of substance and not merely of form.

PETERS, J. The declaration avers that the defendant "printed and published a libel" in a certain newspaper named. The declaration is objected to, because it does not aver that the libel was published by the defendant "to divers and sundry persons or to any third person."

Such an averment is unnecessary. None of the forms in either civil or criminal cases require it. To publish is to make public. A publisher is one who makes a thing publicly known. Had the allegation been merely that the defendant "printed" a libel, that would not have been enough. But to aver that a defendant "published" a libel, does declare that he circulated it or caused it to be circulated "among divers and sundry persons." The degree of notoriety given to the publication is matter of proof and not of pleading. *Com.* v. *Blanding*, 3 Pick. 304; *Com.* v. *Varney*, 10 Cush. 402; *State* v. *Barnes*, 32 Maine, 530; *Rex.* v. *Burdett*, 4 Barn. and Ald. 95; *Bailey* v. *Myrick*, 50 Maine, 171.

Exceptions overruled.

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

STEPHEN O. PURINTON

vs.

THE SECURITY LIFE INSURANCE AND ANNUITY COMPANY.

Androscoggin. Opinion January 5, 1881.

Principal and Agent. Contract. Demurrer.

Where a sealed instrument is executed by an agent, with authority therefor, and it appears by the whole instrument that it was the intention of the parties to bind the principal, that it should be his deed and not the deed of the agent, it must be regarded as the deed of the principal, though signed by the agent in his own name.

Where two persons, constituting a firm, are made agents, and the power conferred upon them is joint and several, the execution of any instrument within the scope of their authority by one or both would be a valid execution.

Thus, upon an agreement commencing, "This agreement made between Fletcher & Bonney of Boston, Superintendents of New England Agencies for the Security Life Insurance and Annuity Company, of New York, of the first part, and Stephen O. Purinton, of the second part," and ending, "In witness whereof the said parties have set their hands and seals. John W. Fletcher, Supt. N. E. Agen. (seal), Stephen O. Purinton (seal)," everything in the body of the instrument being appropriate to an agreement with the company, and inappropriate to an agreement with the agents of the company, an action may be maintained by Purinton against the company, if the agreement is authorized by the company, for a breach of the covenants of such agreement.

Where the declaration alleges an instrument to be the deed of the defendant, it must be so regarded upon a demurrer to the declaration, if it could be, legally, the deed of the defendant.

ON EXCEPTIONS.

Covenant broken. The declaration recited the agreement given below, and alleged it to be the deed of the defendant company, and that they had not kept the covenants of the same on their part, in that they had prevented him from acting as agent, from March 1st, 1876, and had not paid him since that time. The defendants filed a demurrer to the declaration which was duly joined and overruled, and the defendants alleged exceptions.

(Agreement).

No. 1. "This agreement, made this first day of December, A. D. 1874, between Fletcher and Bonney, of Boston, Mass.

Superintendents of New England Agencies for the Security Life Insurance and Annuity Company, of New York, of the first part, and Stephen O. Purinton, of Lewiston, Maine, of the second part, witnesseth: That the said parties, in consideration of the mutual covenants and agreements hereinafter mentioned, hereby mutually covenant and agree each with the other, as follows, to wit: The said party of the first part hereby appoints the said party of the second part its General Agent, with authority to do business in the district or territory hereinafter specified.

"It shall be the duty of said party of the second part, to solicit and procure persons to be insured with said Company and to employ agents; and the said party of the second part accepts said appointment as General Agent, and agrees to use due diligence, and exercise his best skill and energies in advancing the business and promoting the best interests of said Company, and agrees to devote his whole time and attention to said service. The district hereinbefore mentioned shall be as follows: The entire State of Maine, with the privelidge [privilege] of working in the State of New Hampshire.

"The compensation for the services so to be rendered to said Company by said party of the second part is to be one thousand dollars per annum, payable monthly, and the sum of six hundred dollars per annum for expenses of office and traveling, and a commission upon the premiums which shall be paid to, and received by said Company on all policies of insurance effected with said Company by or through the procurement of said party of the second part; which said commission shall be at and after the following, viz: five per cent. upon the first annual premium on life and endowment policies, and five per cent. on the annual renewals of the same, collected by the said party of the second part under this contract. And five per cent. on renewals of all business now existing in the State of Maine. And the said party of the first part agrees to advance to said party of the second part, the sum of eighty-four dollars monthly, and fifty dollars monthly for office and traveling expenses, which advances shall be in full payment of such service with five per cent. commissions as stated above. It is also understood and agreed that the said

party of the second part shall keep regular and accurate statements of all his transactions for account of said Company, and that all monies he may or shall receive for premiums as aforesaid, and all other monies paid to and received by him while or as the agent of said Company in any transaction in which said Company shall be interested, shall be so received and held as a fiduciary trust for said Company, to whom the same shall be forthwith accounted for, and paid to over as soon as collected, and in no case shall the same be considered as payment for services or disbursements, or be appropriated by, or used for the personal convenience, accommodation or benefit of said party of the second part. And the said party of the second part, shall, on the first day of each and every month, (and whenever required by said Company, or by its General Agent for said territory), transmit to said Company or General Agent a report, in detail, embracing every item of business done by or through him, and of all monies collected or received by or through him for said Company, and remit the ascertained balance due to said Company, to its branch office in the city of Boston, Mass. No. 22 School Street. It is also understood and agreed that this contract, or any commission or compensations arising therefrom, shall not be assignable without the written consent of the said Company.

"Also, that said Company reserves the right after a reasonable time, to supply with agents any unoccupied portion of the above-named territory. Said Company will furnish at its own expense, to said party of the second part, all such publications of said Company, comprising blanks, circulars, and other printed matter, as may be requisite for the due prosecution of the business of said Agency, and also pay all necessary expenses for medical examinations, postage and expressage; but no other expenses, unless specially authorized in writing, shall be chargeable to, or paid by said Company. And said party of the second part agrees to comply with and adhere to all the published instructions, rules and conditions of said Company, and such special written or printed instructions, as may from time to time be communicated to him by said Company.

"It is also understood and agreed that this contract is made for the term of five years from date.

"Also, the party of the first allows the party of the second part the same contract to employ agents as he has used since May 1st, 1874.

"In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written.

John W. Fletcher, Sup't N. E. Agen. [L. S.]

Witness, C. L. Holt.

Stephen O. Purinton. [L. S.]"

L. H. Hutchinson, to S. O. P."

Hutchinson, Savage and Sanborn, for the plaintiff, cited: R. S., c. 73, § 15; c. 1, § 4, rule 21; *Porter* v. *Androscoggin and Kennebec Railroad Co.* 37 Maine, 349; *Chipman* v. *Foster*, 119 Mass. 189; and *Tucker Manf'g Co.* v. *Fairbanks*, 98 Mass. 102; *Metcalf* v. *Taylor*, 36 Maine, 28; *Chapman* v. *Seccomb*, 36 Maine, 102.

Wm. P. Frye, John B. Cotton and *Wallace H. White*, for the defendants.

The contract declared on was not in law or in fact the contract of the company. It is a well settled rule of the common law that an authority to bind a principal by a contract under seal can only be executed in the name of the principal by the hand of the authorized agent. 7 Mass. 19; 16 Mass. 42; 1 Maine, 231; 4 N. H. 102; 11 Maine, 269; 2 Cush. 337; 5 Pet. 319; 8 Pet. 165.

Revised Statutes, c. 73, § 15 adopts this common law rule and provides another method of effecting the same object, i. e. that an agent may execute a paper in his own name for his principal.

But the whole clause used at the commencement of this contract and the words following Fletcher's signature are simply *descriptio personarum*, and do not show that the agents acted *for* the company. The seal was the agent's seal. Ang. and A. on Corp. § 217; 19 Johns. 65; 30 Barb. 218; 4 Mass. 597; 7 Cranch, 304; 4 Wend. 285.

Another fatal defect to this contract is that it was signed by but one of the joint agents.

A delegated authority cannot be executed by one of two joint agents. Story on Agency, § 42; 6 Pick. 198; 2 Pick. 345; 21 Conn. 635; 18 Conn. 197; 57 Ill. 180; 53 N. Y. 342; Dunlap's Paley on Agency, 177.

If the agents were partners then the firm name should be used and sealed instruments must be executed by both. One cannot bind the firm in a sealed instrument in his name alone. 12 Gray, 38; 109 Mass. 73; 6 Gray, 204; 11 Pick. 405; 4 Met. 548. No more could a member of a firm of agents bind the principal.

PETERS, J. In *Nobleboro'* v. *Clark*, 68 Maine, 87, LIBBEY, J., upon an extensive examination of the authorities, lays down this rule: "Applying the principles settled by the courts and the provisions of our statutes to the question under consideration, we think the true rule in this State is, that where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent, that it should be his deed and not that of the agent or attorney, —it must be regarded as the deed of the principal or constituent, though signed by the agent or attorney in his own name. In determining the meaning of the parties, recourse must be had to the whole instrument— the granting part, the covenants, the attestation clause, the sealing and acknowledgment, as well as the manner of signing. If signed by the agent in his own name, it must appear by the deed that he did so for his principal. This may appear in the body of the deed as well as immediately after the signature."

It is our belief that the persons concerned in drafting the instrument before us, intended that the defendants should be bound by it. We think that the instrument taken as a whole is appropriate for that purpose. The names of the principals are disclosed. The persons acting for them are denominated superintendents, implying an agency on their part. The business to be performed by the plaintiff is for the company and not for the agents of the company. The plaintiff is to receive his instructions from and make his reports to the company. His compensation comes from the company.

"The said party of the first part appoints the said party of the second part its general agent." Does this mean that the plaintiff was to be an agent of the company, or merely an agent of the agents of the company? The plaintiff "agrees to use due diligence in advancing the business and prosecuting the best interests of said company."

The compensation for his services, "to be rendered to said company," is to be one thousand dollars per annum. He has "a commission upon all premiums paid to and received by said company" upon policies obtained by him. He is to keep regular and accurate accounts for the company, and "all monies received by him while or as the *agent of said company*," "shall be received and held as a fiduciary trust for said company." He cannot "assign this contract . . . without the written consent of the said company." "The said company reserves" to itself certain rights in case the plaintiff does not occupy all the territory his undertaking covers. The company furnishes printed matter to the plaintiff, and pays some of his expenses, "but no other expenses, unless specially authorized in writing, shall be chargeable to or payable by said company."

"The said parties" have set their hands and seals. The only parties named as being concerned in the different provisions of the agreement have been the plaintiff and the company. The only company named or alluded to is the insurance company. "The party of the first part" and "the company" seem to be identical.

The agreement purports to be made "between Fletcher and Bonney, superintendents of New England Agencies for the Security Life Insurance and Annuity Company," and the plaintiff. The plaintiff contends that the meaning is, that Fletcher and Bonney "for" the insurance company enter into the contract. The defendants render it as merely describing themselves as superintendents "for" the New England agencies "of" the insurance company. The words alone could be construed either way. But with the aid of the light that is shed upon this part of the contract from its other parts, we think it may well be supposed that both ideas are involved in the expression, and that Fletcher and

Bonney meant to say that they were the agents of and were also contracting for the insurance company.

Another point is made. The agreement is signed and sealed by only one of the agents named, and this is not regarded by the defendants as a sufficient execution, to make the instrument a valid agreement of the company under seal. That depends upon the nature of the power conferred upon the agents by the company. If the power was a joint and several one, it could be executed by one or both. Story on Agen. § 42, and cases. It is enough upon demurrer that the execution could be valid. The allegation, which the demurrer admits, is that the defendants did make and execute the agreement. The point is one of evidence and not of pleading. Possibly, too, some principle of ratification or estoppel may apply to the execution of the agreement.

Exceptions overruled.

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

HENRY S. JEWETT *vs.* FIFIELD MITCHELL.

Somerset. Opinion January 6, 1881.

Forcible entry and detainer. Equitable mortgages.

The process of forcible entry and detainer lies by an equitable mortgagee against the equitable mortgagor; although otherwise, where the parties to the suit are parties to a legal instead of an equitable mortgage.

A grantee may maintain forcible entry and detainer against his grantor, the grantor not defending under any other title, the deed purporting to convey the whole, but in fact conveying only an undivided half of the described premises.

ON REPORT.

Forcible entry and detainer.

The law court to render judgment in accordance with the legal rights of the parties.

The facts sufficiently appear in the opinion.

Folsom and Merrill, for the plaintiff, cited: 69 Maine, 302; *Jewett* v. *Bailey*, 5 Maine, 87; *French* v. *Sturdivant*, 8 Maine, 246; *Purrington* v. *Pierce*, 38 Maine, 447; 43 Maine, 206; *Reed* v. *Sewall*, 46 Maine, 278; *Dunning* v. *Finson*, 46 Maine, 546; *Bennock* v. *Whipple*, 12 Maine, 346; 2 Smith's Leading Cases, 655; 3 Wash. R. P. 93; 34 Maine, 304; 45 Maine, 447; 56 Maine, 9.

J. H. Webster and *J. B. Barrett*, for the defendant.

Our action of forcible entry and detainer is regulated entirely by R. S., c. 94, § § 1, 2, which provides for its use in three cases. Neither of them are applicable to this case.

It is claimed only to maintain it under the provision for terminating a tenancy at will. No tenancy at will ever existed. There is no pretense that any rent was ever paid or payable. *Dunning* v. *Finson*, 46 Maine, 546.

As to one half undivided, there is no pretense that plaintiff has anything but a mortgagee's interest. As to the other the court have found that defendant has a right to redeem, which must be to redeem from a mortgage.

The plaintiff recognized that the relation of mortgagee and mortgagor existed between them at the time of the commencement of this suit.

Mortgagee cannot maintain forcible entry and detainer against mortgagor. *Reed* v. *Elwell*, 46 Maine, 270.

PETERS, J. This is a proceeding under the forcible entry and detainer act.

The respondent and another, being the owners of the premises sued for, mortgaged them to Scammon Burrill, who assigned the mortgage to the complainant. The respondent afterwards gave to the complainant a quitclaim deed of the entire premises, receiving back an agreement, not under seal, for a reconveyance when certain conditions were performed.

It is contended that the process does not lie, because the complainant is not the possessor of the absolute title to all the premises, being an owner of one half and a mortgagee (by assignment) of the other half. Such a defence cannot be set

up by the respondent. His grantee can expel him from the premises which he has a deed of from him. The respondent does not defend under any title held by any person other than himself.

It is contended that the parties to the suit stand in the relation to each other of mortgagor and mortgagee, and that the complainant must fail on that account. There is no doubt, under our present statutes, that the quitclaim deed and the unsealed agreement to reconvey constitute an equitable mortgage. But the respondent's right cannot be recognized in any proceeding at law. It is a mortgage in equity and not in law. His remedy is in equity and not at law. There are various kinds of equitable mortgages, and it would lead to many embarrassments, under our system of jurisprudence, to admit equitable defences to actions in courts of law. The only reason that a process of forcible entry and detainer does not lie by a mortgagee against the mortgagor, is, that a conditional judgment cannot be rendered in such a case, and the right to a conditional judgment is allowed in all actions between such parties by statute. Here the objection is not in the way. *Walker* v. *Thayer*, 113 Mass. 36; *Reed* v. *Elwell*, 46 Maine, 270; *Dunning* v. *Finson*, *Id.* 546; Jones on Mort. (2d ed.) § 720.

The respondent, after his deed to the complainant, was removable under the process sued out against him. *Larrabee* v. *Lumbert*, 34 Maine, 79.

Judgment for complainant.

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

RUTH A. BENSON, executrix of WILLIAM H. BENSON, deceased, testate, *vs.* FRANK W. TITCOMB.

Aroostook. Opinion January 6, 1881.

Negligence. Burden of Proof. Practice.

The burden is on the plaintiff, in an action on the case for an injury arising from the negligence or want of care of the defendant, to show that he was in the exercise of ordinary care, or that the injury was in no degree attributable to want of proper care on his part.

When a party is surprised by new and unexpected evidence, he should at once move for delay, and not await the chances of a verdict.

ON MOTION to set aside the verdict.

TRESPASS on the case.

The facts sufficiently appear in the opinion.

J. Burnham, for the plaintiff, cited: 55 Maine, 438; 57 Maine, 117; 58 Maine, 384.

William M. Robinson, and *J. B. Hutchinson*, for the defendants, cited: *Call* v. *Allen*, 1 Allen, 142; *Cole* v. *Sprowl*, 35 Maine, 168; *Sutherland* v. *Jackson*, 32 Maine, 84; *Saltonstall* v. *Banker*, 8 Gray, 196; *Dickey* v. *Maine Tel. Co.* 43 Maine, 496; *Kennard* v. *Burton*, 25 Maine, 39; *Moore* v. *Abbot*, 32 Maine, 46; *Farrar* v. *Greene*, 32 Maine, 574; *Raymond* v. *Lowell*, 6 Cush. 535; *Libbey* v. *Greenbush*, 20 Maine, 47; *Lake* v. *Milliken*, 62 Maine, 243; *Enfield* v. *Buswell*, 62 Maine, 128; *Jennings* v. *Wayne*, 63 Maine, 468; *Blake* v. *Madigan*, 65 Maine, 522; *Maynell* v. *Sullivan*, 67 Maine, 314.

APPLETON, C. J. This is an action on the case in which the plaintiff seeks to recover damages for an injury to the testator, her husband. The ground of her claim is, that on September 28, 1877, as her husband was passing by the defendant's steam mill, his horse being frightened by the steam and noise proceeding from defendant's unlicensed steam engine, started, and threw the testator from the wagon, and injured him so severely that he died in the course of a few days.

The defence was, that the deceased was sitting on the end of an empty barrel in his wagon, without any support to his feet, with four or five other empty barrels in the wagon not well secured, that the barrel on which he was sitting, tipped before he reached the mill, and that when he came near and opposite the mill, his horse shied at a mud puddle in the road, and that having no rest for his feet when he endeavored to pull up his horse, the barrel tipped and he drew himself off. In other words, while denying all agency of the steam engine in producing the unfortunate result, he says that if there was any cause for the starting of the horse, other than the puddle by the road side, it was the rattling of the barrels, and the injury was the result of the starting of the horse, and the insecure and dangerous seat of the deceased, and his effort to save himself.

The steam engine situated, as it was, near the road, may have been a nuisance, but that affords no excuse for carelessness or negligence on the part of the plaintiff's husband. If the rattling of the barrels, and the carelessness of the driver were efficient and contributory causes to the disaster, there cannot be a recovery. If the deceased so far contributed to the misfortune by his own negligence or want of care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened, the plaintiff cannot recover. *Dickey* v. *Maine Telegraph Co.* 43 Maine, 496. The plaintiff must show that he was in the exercise of due care, or that the injury was in no degree attributable to any want of common care on his part. *Murphy* v. *Deane*, 101 Mass. 455. The jury must have found by their verdict, that the injury was attributable to the want of care of the deceased, or to causes for which the defendant was in no way responsible.

The motion to set aside the verdict as against evidence, cannot be sustained. The instructions, as no exceptions have been filed, must be assumed to have been correct. The plaintiff claimed that the injury resulted from only one cause, the unlicensed engine. The defendant denied its agency in producing the injury, and set up the negligence of the deceased, and other causes, as causing the result. The able counsel for the plaintiff had the

close—no slight advantage. The plaintiff had the prepossessions of the jury in favor of her sex, and their sympathy for her misfortune. The evidence was conflicting. The jury were the judges of its force and effect. The case has been twice tried. The first time without a verdict. The jury, under favorable conditions for the plaintiff, have found a verdict against her, and no sufficient reasons are perceived for disturbing it.

Another ground for a new trial, is, that she was surprised at the testimony of Merchant Philbrick, a witness first called at the last trial, and that she had since discovered new evidence tending to impeach it, the discovery being made on the Monday after the verdict rendered on Saturday before.

If the testimony of Philbrick was a surprise when delivered on the stand, the motion for delay should then have been made. It was not for the plaintiff to take the chance of a verdict in her favor, and if against her, to move for a new trial on the ground of such surprise. *Maynell* v. *Sullivan*, 67 Maine, 315; *Woodis* v. *Jordan*, 62 Maine, 490. The newly discovered evidence, consists only of the statement, that they did not hear what the witness Philbrick testifies he heard as coming from the lips of the deceased. One might have attended and heard what another not noticing, did not hear, or hearing, did not remember.

Motion overruled.

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

WILLIAM K. LANCEY and another

vs.

MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion January 7, 1881.

R. S., c. 81 § 84. Limitations. Mutual dealings.

When parties make out what they believe to be a correct itemized account of their mutual dealings, and the balance is thereupon ascertained and paid, the items can no longer be considered unsettled within the meaning of R. S., c. 81, § 84, although one item was omitted by mistake.

And if in such case, six years thereafterwards, on discovering the omission an action declaring on the entire account is brought to recover the real balance, the statute of limitations will bar the recovery.

ON EXCEPTIONS.

Assumpsit on account annexed.

Plea, general issue and brief statement setting up the statute of limitations.

The facts appear in the opinion.

D. D. Stewart, for the plaintiffs.

The plaintiffs' books of account show a continuous and unbroken line of charges and credits, not only every year, but nearly every month in the year from the commencement to the close, from 1863 to 1870.

The defence is R. S., c. 81, § 84.

The history of this statute of limitations dates back to 21 James I, c. 16, § 3, which became a part of our statute of 1821. It was modified in R. S., 1841, c. 146, § 9, which was re-enacted by R. S., 1857, c. 81, § 99. After the decision *Theobald* v. *Stinson*, 38 Maine, 149, the law was changed, stat. 1867, c. 117, § 1, which was further changed by R. S., c. 81, § 84.

The case at bar came within the strict rigor of the rule of *Theobald* v. *Stinson*, *supra*, for both parties here kept the accounts. It is within the rule laid down in *Catling* v. *Skould-*

ing, 6 T. R. 189; *Davis* v. *Smith*, 4 Maine, 340; and *Baker* v. *Mitchell*, 59 Maine, 223.

But the learned judge was of the opinion that because the defendants at different times made payments and at such times took receipted bills of a part of plaintiff's accounts, the whole account could not be regarded "mutual dealings between the parties, the items of which are unsettled" within the meaning of the statute.

If this ruling is correct then a party can never safely receive "part of his pay" upon a mutual account without losing the protection of the balance under this statute.

All the plaintiffs did was to draw off at two or more times the items of part of their account, and, when paid, receipt them as paid. This was very far from an "account stated." *Bass* v. *Bass*, 8 Pick. 193; *Charman* v. *Henshaw*, 15 Gray, 293; *McLellan* v. *Crofton*, 6 Maine, 337; *Chace* v. *Trafford*, 116 Mass. 532.

That the ruling was erroneous is clearly shown by *Penniman* v. *Rotch*, 3 Met. 216; *Dickinson* v. *Williams*, 11 Cush. 258; *Safford* v. *Barney*, 121 Mass. 300; *James* v. *Clapp*, 116 Mass. 358; *Baker* v. *Mitchell*, 59 Maine, 223; *Hagar* v. *Springer*, 63 Maine, 506; *Benjamin* v. *Webster*, 65 Maine, 171; *Sibley* v. *Lumbert*, 30 Maine, 253; *Walker* v. *Butler*, 6 El. and Bl. 506.

H. and W. J. Knowlton, for the defendants, cited: R. S., c. 81, § 84; *Dyer* v. *Walker*, 54 Maine, 18; *Benjamin* v. *Webster*, 65 Maine, 170; stat. 1867, c. 117; R. S., c. 81, § 93; *Bell* v. *Morrison*, 1 Peters, 351; *Clementson* v. *Williams*, 8 Cranch, 72; Angell on Limitations, page 244; *Long* v. *Grenville*, 10 E. C. L. 5; *Collyer* v. *Willock*, 13 E. C. L. 447; *Mills* v. *Fowkes*, 35 E. C. L. 175; *Burn* v. *Boulton*, 52 E. C. L. 474.

VIRGIN, J. When parties make out what they believe to be a correct itemized statement of their mutual dealings and the balance is thereupon ascertained and paid, "the items" can no longer be considered "unsettled" within the meaning of R. S., c. 81, § 84, although one was omitted by mistake. And if, six

years thereafter, on discovering the erroneous balance, an action counting on the entire account is brought to recover the real balance, the statute of limitations will bar the recovery. This is made apparent from a history of the statute, its amendments and various decisions thereon.

The stat. 1821, c. 62, § 7, which excepts from the statute of limitations "such accounts as concern the trade of merchandise between merchant and merchant," is a transcript of the Massachusetts stat. of February 13, 1787, § 1, which in turn is a copy of the stat of James I, c. 16, § 3.

The leading English case upon the subject of mutual accounts between parties other than merchants is *Catling* v. *Skoulding*, 6 T. R. 189, in which it was held that, if there be a mutual account of any sort between the parties for any item of which credit has been given within six years, that is evidence of acknowledgment of there being such an open account current between them and of a promise to pay the balance, so as to take the case out of the statute. Lord C. J. Kenyon said: "Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is to be afterward ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. Daily experience teaches us that if this rule be now overturned, it will lead to infinite injustice." This case does not seem to place its decision upon a construction of the statute, but rather upon an independent ground that, the items within six years are admissions of an unsettled account and is equivalent to evidence of a new promise which takes the other items out of the statute.

The Massachusetts court cited and followed that decision, *Cogswell* v. *Dolliver*, 2 Mass. 217, and the court in this State adopted the same doctrine, citing the above cases and calling it a reasonable judicial construction of the statute. *Davis* v. *Smith*, 4 Maine, 337.

The later decision in this State defined the word "accounts" in the statute of 1821, as "open or current accounts" as distinguished from "stated accounts;" and "stated accounts," those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct. *McLellan* v. *Crofton*, 6 Maine, 307, 337. And the reason for giving a different construction to open and stated accounts was stated by MELLEN, C. J. as follows: "While an account remains open, each party is depending, for the recovery of the balance he may consider due him, upon the promise which the law raises on the part of him who is indebted, to pay that balance; but when the parties have stated, liquidated and adjusted the account, and thus ascertained the balance, it ceases to be an account; it has lost the peculiar character and attributes of an account; what was before an implied promise to pay what should be found to be a reasonable sum, by such liquidation and stating of the account at once becomes an express promise to pay a sum certain. . . Such balance is a result in which previously existing accounts become merged and lose their character and existence."

In the revision of 1841, the statute of limitations was redrafted. The clause relating to merchants' accounts was dropped. The provision relating to accounts no longer retained the form of an exception, but adopted the decision of the court in the terms used by the court by providing that, "in all actions brought to recover the balance due upon "mutual and open accounts current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account," c. 146, § 9. The same provision was transcribed into the revision of 1857, c. 81, § 99.

In *Theobald* v. *Stinson*, 38 Maine, 149, followed by *Dyer* v. *Walker*, 51 Maine, 104, the court held that to constitute "mutual accounts" each party must have one or more written charges against the other. Thereupon the legislature added to the section the clause: "And it shall be deemed a mutual and open account current, when there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both." Stat. 1867, c. 117.

In the revision of 1871, the definition was substituted for the terms defined. The phrase "mutual and open account current" has given way to "mutual dealings the items of which are unsettled, whether kept or proved by one party or both." That is mutual dealings whether kept or proved by one party or both, now constitute a "mutual account;" and "mutual dealings," the items of which are unsettled "constitute an open account current" as distinguished from a stated account, or one that has been adjusted, liquidated and a balance struck after examination by the parties.

And now, as before the amendment in 1867, when the items of the mutual dealings have been examined, the respective sums fixed and the balance agreed upon by the parties and it has been paid, there is no longer an open account current between them, as stated by MELLEN, C. J. *supra;* or, in the language of the statute, there are no longer mutual dealings between the parties, the items of which are unsettled. The settlement changed the character of the account. The items became discharged by the payment of the agreed balance which resulted from setting off against each other the counter items. The discharge of the items is a consideration to sustain a promise to pay the balance. *May* v. *King*, 12 Mod. 538; S. C. 1 Ld. Raym. 680; *Callander* v. *Howard*, 10 C. B. (70 E. C. L.) 290. And if one of the items of the account was overlooked, the settled account, after six years can afford no aid in taking it out of the statute of limitations. *Union Bank* v. *Knapp*, 3 Pick. 96, 113.

Neither does it make any difference that a new account runs on from the date of the last item in the settled account, and is begun even before the balance in the former is paid. Parties may settle frequently or otherwise. If the items are drawn off from one certain date to another, and in due time settled and paid, the running on of a new account from the latter date can have no effect upon the former one which is settled, and neither can the settled account have any effect upon the new one. On the contrary the settled account drops out as if it never had existed.

An application of these principles to the facts in the case at bar sustains the ruling.

The plaintiffs had furnished the Portland and Kennebec Railroad Company large quantities of lumber nearly every month from July 31, 1863 to November 18, 1870, of which by the act of consolidation the defendant company became liable for any unpaid balance. August 11, 1864, the plaintiffs rendered to the Portland and Kennebec Railroad Company, an itemized bill for lumber delivered between May 7, and August 11, amounting to $712.28, which was settled and paid January 25, 1865, and receipted by the plaintiffs. The plaintiffs continued to deliver to the Portland and Kennebec Railroad Company, lumber on and after August 11, as before. On the last of December, 1864, they rendered a bill which had accrued from August 11, to December 31, 1864, amounting to $10,029.66, which was paid and receipted April 24, 1865, and the plaintiffs continued to deliver lumber and render bills therefor, sometimes monthly and other times at longer periods, down to March 7, 1870, which were all paid and receipted in due time. It was afterwards discovered that four items of lumber delivered on July 31, 1863, amounting to $240.66 and one of 1492 sleepers, delivered July 26, 1865, had been overlooked. On March 2, 1876, the plaintiffs sued on their whole account from July 31, 1863 to November 17, 1870, including the omitted items, and contended that they had a right to recover upon the ground of mutual unsettled dealings within the provisions of R. S., c 81, § 84. But the presiding justice ruled that the items which accrued more than six years before the date were barred by the general statute of limitations; and we think the ruling was correct.

We are also of the opinion that the exclusion of the several receipts offered by the plaintiffs was correct, as the money represented by them had been allowed by the parties upon specific bills rendered and settled.

Exceptions overruled.

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

WILLIAM SIMPSON *vs.* AMASA S. GARLAND and others.

Penobscot. Opinion January 18, 1881.

Principal and agent. Promissory notes.

The rule laid down in *Nobleboro'* v. *Clark*, 68 Maine, 87, and *Purinton* v. *Ins. Co. ante* p. 22, applies with full force to simple contracts as well as to deeds and sealed instruments.

Thus, upon a note reading "1000, Carmel, April 22, 1876, for value received, we, the subscribers for Carmel Cheese Manufacturing Co. promise to pay William Simpson, or order, one thousand dollars in six months from date with interest. F. A. Simpson, Rufus Work, A. S. Garland;"

Held, that the note was the note of the Carmel Cheese Manufacturing Co. and not that of the signers, it appearing that the signers were directors of the company and authorized to make the note for the company and that it was given for money appropriated for the use of the company.

ON EXCEPTIONS.

Assumpsit upon the promissory note hereinafter mentioned.

Plea, the general issue, with brief statement that the note declared upon was that of the Carmel Cheese Manufacturing Company.

(Note.)

"$1,000. Carmel, April 22, 1876.

For value received, we, the subscribers for Carmel Cheese Manufacturing Co. promise to pay William Simpson, or order, one thousand dollars in six months from date with interest.

F. A. SIMPSON,
RUFUS WORK,
A. S. GARLAND."

The defendants offered to prove that at the time the note was given, there was such a corporation as Carmel Cheese Manufacturing Company, that the defendants were the directors of said corporation and authorized to make the note for the corporation, and that the note was for money, and that the money was appropriated for the use of the corporation.

But the presiding judge, being of the opinion that the note was that of the defendants, and not that of the corporation, refused to admit the evidence.

Whereupon the defendants submitted to a default, with an agreement of parties that the case be reported by the defendants, and if in the opinion of the law court the presiding judge erred in his ruling or opinion, the default to be taken off and the case to stand for trial; otherwise the default to stand.

A. L. Simpson, for the plaintiff.

The note in suit is that of the defendants. They promised, the company did not, and their liability is to be fixed by the note itself and not by outside testimony. *Sturdivant* v. *Hull*, 59 Maine, 172; *Mellen* v. *Moore*, 68 Maine, 390; *Hancock* v. *Fairfield*, 30 Maine, 302; *Fiske* v. *Eldridge*, 12 Gray, 474; *Packard* v. *Nye*, 2 Met. 47; *Bradlee* v. *Boston Glass Mf'y*, 16 Pick. 347.

W. H. McCrillis and *Chas. P. Stetson*, for the defendants, cited: *Barlow* v. *Congregational Society in Lee*, 8 Allen, p. 464; *Winship* v. *Smith*, 61 Maine, 121, 123; *Rogers* v. *March*, 33 Maine, 106; *Carpenter* v. *Farnsworth*, 106 Mass. 561; *Hewitt* v. *Wheeler*, 22 Conn. 562; *New England Ins. Co.* v. *DeWolf*, 8 Pick. 56, 61, 62; *L. & G. Manufacturing Co.* v. *Russell*, 112 Mass. 387; *Chipman* v. *Foster*, 119 Mass. 189; *Nobleboro'* v. *Clark*, 68 Maine, 87; *Andrews* v. *Estes*, 2 Fairfield, 267; *Fogg* v. *Virgin*, 19 Maine, 352; *Nichols* v. *Frothingham*, 45 Maine, 220; *Atkins* v. *Brown*, 59 Maine, 90; *Sturdivant* v. *Hull*, 59 Maine, 172; *Sheridan* v. *Carpenter*, 61 Maine, 83; *Ballou* v. *Talbot*, 16 Mass. 461; *Tucker Manufacturing Co.* v. *Fairbanks*, 98 Mass. 105; *Gadd* v. *Houghton*, *L. R.* 1 Ex. Div. 357; *Draper* v. *Mass. H. Co.* 5 Allen, 338.

LIBBEY, J. The question involved in this case is, whether the note in suit is the note of the defendants or of the Carmel Cheese Manufacturing Company.

The common law rule, as declared by the earlier decisions, upon this question, has been, to some extent, modified by our statute (R. S., c. 73, § 15,) and the more recent decisions of the courts. In *Nobleboro'* v. *Clark*, 68 Maine, 87, this court, after an examination of decided cases and our statutory provisions,

declared the rule as follows: "Applying the principles settled by the courts, and the provisions of our statutes to the question under consideration, we think the true rule in this State is, that where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent, that it should be his deed and not the deed of the agent or attorney, it must be regarded as the deed of the principal or constituent, though signed by the agent or attorney in his own name. In determining the meaning of the parties, recourse must be had to the whole instrument, the granting part, the covenants, the attestation clause, the sealing and acknowledgment, as well as the manner of signing. If signed by the agent in his own name, it must appear by the deed, that he did so for his principal. This may appear in the body of the deed, as well as immediately after the signature."

This rule applies with full force to simple contracts, as well as to deeds; and applying it to the note in suit, it remains to be determined whether it appears by the terms of the note, that it was the intention of the parties to bind the Carmel Cheese Manufacturing Company, and not the defendants. In determining this question, we must assume that the defendants were duly authorized to make the note for the company. They offered to prove it, and as the statute cited, makes the authority of the agent an essential element to be considered, we think the evidence offered to prove the authority, was admissible. *Nobleboro'* v. *Clark*, 68 Maine, 93; *Draper* v. *Mass. Steam Heating Co.* 5 Allen, 339.

The defendants sign their own names only; but in the body of the note they say, "we, the subscribers, for the Carmel Cheese Manufacturing Company, promise to pay." If the words "for the Carmel Cheese Manufacturing Company," had been omitted from the body of the note, and had been written against the defendants' signatures, the authorities are quite uniform that the note would be the note of the company, and not of the defendants. *Sturdivant* v. *Hull*, 59 Maine, 172; *Atkins* v. *Brown*, 59 Maine, 90; *Sheridan* v. *Carpenter*, 61 Maine, 83; *Winship* v. *Smith*, 61 Maine, 121; *Ballou* v. *Talbot*, 16 Mass. 461; *Tucker Man'f'g Co.* v. *Fairbanks*, 98 Mass. 101; *Morrell* v.

Codding, 4 Allen, 403; *Draper* v. *Mass. Steam Heating Co.* 5 Allen, 338.

By the rule laid down in *Nobleboro'* v. *Clark*, *supra*, the words used in the body of the note tending to show the meaning of the parties, should have the same force and effect as if following, or written against the defendants' signatures. Their meaning is as significant in the one case as in the other. We are aware that the Massachusetts court in *Morrill* v. *Codding*, *supra*, held differently, and in discussing the question of the effect of the language used in the body of the note, say: "Had these words immediately preceded or followed the names of the signers, with the 'by' or 'for,' it would have been the promise of the Baptist Church of Lee;" but it was held that they did not have the same effect in the body of the note. This case, in this respect, is neither in harmony with the later decisions in Massachusetts nor with our own. *Carpenter* v. *Farnsworth*, 106 Mass. 561; *L. & G. Manufacturing Co.* v. *Russell*, 112 Mass. 387; *Chipman* v. *Foster*, 119 Mass. 189.

In the note the defendants say: "We . . for the Carmel Cheese Manufacturing Company, promise." "For his principal" are the words used in our statute above cited, in regard to the proper execution of a contract by an agent; and "for" when so used, means "in behalf of." *Ballou* v. *Talbot*, and *Tucker Man'g Co.* v. *Fairbanks*, *supra*. The language used discloses the name of the principal, and is equivalent to a declaration by the defendants, that they promise in behalf of their principal, and not for themselves; and we think both parties must have so understood it. Upon the evidence reported, the defendants are not personally liable.

Default off. Action to stand for trial.

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

JOHN B. FOLSOM *vs.* WILLIAM CLARK.

Penobscot. Opinion January 18, 1881.

Betterments. Forcible entry and detainer.

By R. S., c. 104, § 23, when an action is brought by a reversioner or remainder man, or his assigns, after the termination of a life estate, against the assigee or grantee of the tenant of the life estate, or against his heirs or legal representatives, such assignee, or grantee, heir, or legal representative, is entitled to the increased value of the premises by reason of improvements made by the life tenant.

That statute did not affect the rights of parties where the improvements had been made before it was enacted; but it does apply to all cases where the improvements have been made since its passage.

Forcible entry and detainer cannot be maintained against a disseizor who is entitled to betterments.

ON REPORT.

Forcible entry and detainer.

The facts sufficiently appear in the opinion.

Josiah Crosby, for the plaintiff.

A tenant can have no claim for betterments unless he has been at least six years in open, notorious, exclusive and adverse possession. This defendant was in adverse possession only from death of the life tenant, and that was less than six years. Seizin of the tenant while the particular estate continues is not adverse to the reversioner or remainder man. *Treat* v. *Strickland*, 23 Maine, 234; *Pratt* v. *Churchill*, 42 Maine, 471; R. S., c. 104, § 38; *Wales* v. *Coffin*, 100 Mass. 177; *Plimpton* v. *Plimpton*, 12 Cush. 458; R. S., c.73, § 5.

Forcible entry and detainer is the proper remedy in this case. *John* v. *Sabattis*, 69 Maine, 473.

E. Walker, for the defendant, upon the questions considered in the opinion, cited: R. S., c. 104, § 23; *Reed* v. *Reed*, 68 Maine, 571; *Poor* v. *Larrabee*, 58 Maine, 563; *Austin* v. *Stevens*, 24 Maine, 520; R. S., c. 94, § 1.

LIBBEY, J. By R. S., c. 94, § 1, a process of forcible entry and detainer may be maintained against a disseizor, who has not acquired any claim by possession and improvement.

The defendant was in possession of the demanded premises as a disseizor. He claims that he is entitled to the increased value of the premises by reason of the improvements made by the life tenant, whose claims he represents by purchase.

By R. S., c. 104, § 23, in any action brought by a reversioner or remainder man, or his assigns, after the termination of a life estate, against the assignee or grantee of the tenant of the life estate, or against his heirs or legal representatives, such assignee or grantee, heir or legal representative, shall be entitled to the increased value of the premises by reason of improvements made by the life tenant.

Mrs. Bailey was tenant for life of the premises under the will of Edmund Knight. While she lived the defendant carried on the farm under a parol agreement by which he was to have it after her death, in consideration of her support during her life, and they lived on the farm together, and while so living and carrying on the farm the improvements were made. Before her death she conveyed to the defendant.

Upon this state of facts we think it clear that the defendant is entitled to the improvements. *Reed* v. *Reed*, 68 Maine, 568.

But it is claimed by the plaintiff that, as Edmund Knight died in 1840, and the title under his will then vested, and the statutory provisions under which the defendant claims were first enacted in 1843, they cannot apply to this case. The statute did not affect the rights of the parties where the improvements had been made before it was enacted, but it does apply to all cases where the improvements have been made by the tenant for life after its passage. *Austin* v. *Stevens*, 24 Maine, 520.

As the defendant is a disseizor and entitled to improvements, this process does not lie against him.

Plaintiff nonsuit.

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

SAMUEL A. HOWES and another

vs.

INHABITANTS OF BELFAST.

Waldo. Opinion January 18, 1881.

R. S., c. 18, § 8. Stat. 1875, c. 25, § 9. Ways. Increase of damages. Judgment of county commissioners.

Upon a petition for an increase of damages for land taken in widening a way, pending before the county commissioners, the mayor, by the authority of a vote of the city council, agreed with the petitioners to a reference as to the appraisal of the damages, and then by the authority of a subsequent vote of the city council, after the award of the referees, the mayor agreed with petitioners to have the sums awarded by the referees entered upon the records of the commissioners, *as the sum agreed upon by the parties.* It was so entered and judgment was duly entered in favor of the petitioners, *Held:*

1. That the judgment was not upon the award, but upon the agreement of the parties entered upon the record as provided by R. S., c. 18, § 8, as amended by stat. 1875, c. 25, § 9.
2. That the stat. 1875, c. 25, applies to the parties in interest, and by its provisions, the defendants were authorized to agree upon such an increase of damages.
3. That the agreement for an increase of damages entered upon the record, gave the commissioners power to render the judgment, and it is binding upon the parties.

ON REPORT.

Action of debt brought under the provisions of R. S., c. 18, § 31. Writ dated September 16, 1879.

The opinion states the case.

Philo Hersey, for the plaintiffs, cited: R. S., c. 18, § 31; 45 Maine, 419; 31 Maine, 267; 32 Maine, 566; *Noble* v. *Merrill*, 48 Maine, 140; 34 Maine, 148; 31 Maine, 117; 32 Maine, 17; 37 Maine, 21; 40 Maine, 442; Wharton Ev. § 783; 3 Mass. 406; 7 Mass. 158; 17 Pick. 315; 13 Pick. 102; 9 Gray, 187; 8 Allen, 21; 100 Mass. 165.

R. F. Dunton, city soliciter, for the defendants.

The records of the county commissioners' court as they appear in evidence, are not judgments. R. S., c. 18, § § 8, 13, 25, 31;

c. 78, § § 15, 16; stat. 1875, c. 25, § 9; *State* v. *McIntyre*, 53 Maine, 214; 3 Blackstone's Com. 395-401; *Nobleboro'* v. *Co. Com'rs*, 68 Maine, 548.

The county commissioners' court is a court of special and limited jurisdiction, and such court must act in the manner prescribed by statute, otherwise its acts are void. *Mathewson* v. *Sprague*, 1 Curt. 457.

The county commissioners' court had no jurisdiction or authority to enter judgment, and this may be shown by plea and proof, or by the record. The jurisdiction must appear from inspection of the record. *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456; *Small* v. *Pennell*, 31 Maine, 267; *Scarborough* v. *Com'rs, of Cumberland Co.* 41 Maine, 604; *Nobleboro'* v. *Co. Com'rs*, 68 Maine, 548; *Thompson* v. *Blackhurst et als.* 28 E. C. L. 313.

The amendment of 1875, to § 8, of c. 18, R. S., does not affect the city charter of the city of Belfast, or authorize the city council to agree to increase the damages. City Charter of Belfast, § 7; Dillon on Mun. Corp. § 54.

The city council had no authority to submit the question of increase of damages to referees, and the city is not bound by their award. *Auyusta* v. *Leadbetter*, 16 Maine, 45; *Griswell* v. *Stonington*, 5 Conn. 367; *Gillis* v. *Bailey*, 21 N. H. 149.

The submission to referees being void, no ratification of their award by the city council can bind the city. *Peterson* v. *Mayor*, &c. of N. Y. 17 N. Y. 449; Dillon on Mun. Corp. § 387.

The statute has fixed the mode of procedure on petition for increase of damages, and that mode must be strictly pursued. Dillon on Mun. Corp. § § 482, 478; *Mason* v. *Kennebec & Portland R. R. Co.* 31 Maine, 215; *Stowell* v. *Flagg*, 11 Mass. 364; *Stevens* v. *Middlesex Canal*, 12 Mass. 466; *Dodge* v. *Co. Com. of Essex*, 3 Met. 380.

LIBBEY, J. On the seventh of May, 1877, the city of Belfast, by proceedings duly had therefor, changed the location of High street, taking a certain quantity of the plaintiffs' land therefor, and appraised their damages at two thousand one hundred and fifty dollars. On the second day of June, 1877, another change

in the location of said street was duly made by said city, by which another portion of the plaintiff's land was taken, and their damages thereby were appraised at three hundred and twenty-five dollars.

The plaintiffs, feeling aggrieved by said appraisals of damage, filed petitions before the county commissioners of Waldo county at their April term, 1878, for an increase of damages. The petitions were duly entered, and notices ordered thereon, returnable at their August term, 1878. The notices were duly served on the city.

On the third of June, 1878, the city council, by concurrent vote, passed an order by which the mayor was ordered and directed, for and in behalf of the city, to agree and arrange with the parties interested adversely to the city, for the submission to one or more referees, to be selected by said parties and the mayor, of the question of increase of damages, on account of land taken by the city, to widen and straighten High street, and to bind the city to abide by the decision of the referees.

On the first day of July, 1878, the plaintiffs, and the mayor, in behalf of the city, entered into a statutory submission of the questions of increase of damages claimed by the plaintiffs to three referees.

On the second day of July, 1878, the referees, after hearing the parties, made their award, by which they appraised the damages by the first taking, at three thousand nine hundred and forty-nine dollars, and by the second taking, at four hundred and fifty-one dollars; and they awarded that the city pay the fees of the referees, taxed at seventy-five dollars.

On the fifth day of August, 1878, the city council, by a concurrent vote, passed an order by which the mayor was authorized and instructed to join with the plaintiffs, in the petitions pending before the county commissioners, for increase of damages, for the lands taken for High street, in having the award of the committee, (referees) who sat upon that question, entered upon the records of the county commissioners *as the sum agreed upon by the parties.*

At the August term of the commissioners, said sums were entered on their docket in each case respectively, as the sums

agreed upon by the parties, as the amount of damages for which judgment was to be rendered; and the proceedings were closed, and judgments were duly entered up accordingly.

The action is brought upon the judgments, and the only question really raised is, whether they are binding upon the parties.

We think they are valid and binding judgments. The county commissioners had jurisdiction of the subject matter, and of the parties. Proceedings were duly had, and the agreement of the parties to increase the damages was made and entered of record, and judgment duly entered in accordance with R. S., c. 18, § 8, as amended by act of 1875, c. 25, § 9.

The defendants raise several objections to the validity of the judgments, but they may all be disposed of under two heads.

1. It is claimed that the city council had no power to authorize or direct the reference, and therefore the reference and award are void. The answer to this point is, that, admitting it to be well taken, it in no way affects the judgments, or the plaintiff's right of action. The action is not on the awards, nor were the judgments rendered upon them. The reference was only a mode adopted by the parties for the appraisal of the damages. After that was done and the result known, the parties agreed that the damages should be increased accordingly, and the agreement was entered of record. The agreement was the basis of the judgment, and not the award.

2. It is claimed that the city council had no power to agree, or to authorize and instruct the mayor to agree, to an increase of damages as provided in the statute cited. This objection is based upon section seven of the city charter, which gives the city council power over the location and alteration of streets, and provides as follows: "And any person aggrieved by the decision or judgment of the city council, may, so far as relates to damages, have them assessed by a committee or jury as now by law provided." It is maintained in argument by the counsel for the defendants, that the true construction of this clause of the charter, limits the rights of any person aggrieved, to have his damages assessed by a committee or jury, to the provisions of law existing at the time

when the charter was granted. We think this construction too strict. It could not have been the intention of the legislature, that, while the rules of procedure on a petition for an increase of damages for lands taken for a highway or town way, might, by general statute, be changed as to all other towns and cities in this State, they must remain the same in Belfast. Applying the language used to the subject matter to which it relates, we think the legislature intended that a person aggrieved by the action of the city council in appraising his damages, should have the right on his petition therefor, to have them assessed as provided by the general law of the state for the time being.

But if the defendants' construction is correct, the legislature has the power to amend their charter at pleasure; and this may be done by a general law applicable to them as well as by a special act. It certainly had power to authorize the city of Belfast, as well as all other parties in interest, to agree upon an increase of damages rather than incur the delay and costs of an assessment by a committee or jury. The act of 1875 is general. It applies to all parties in interest, and by its provisions, the defendants were authorized to agree upon an increase of damages with the plaintiffs. Such agreement gave the county commissioners power to render the judgments between the parties.

Defendants defaulted.

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

CHARLES A. SMITH *vs.* BENOICE LOOMIS and another.

Somerset. Opinion January 18, 1881.

Contract — collateral and original. Guarantor. Stat. 1874, c. 201.

Where C. H. signed a contract with L. the concluding paragraph of which was: "I C. H. hereby agree to be responsible that said L. shall faithfully perform and keep this agreement on his part," *Held.* 1, that C. H. was a guarantor only; 2, that an action upon that contract against L. and C. H., jointly, cannot be maintained; and stat. 1874, c. 201, does not authorize such a joinder. But under that statute, judgment can be entered against one of the defendants, although the joint liability is not proved.

The case of *Norris* v. *Spencer*, 18 Maine, 324, considered.

ON REPORT.

This was an action against Benoice Loomis and Chas. H. Loomis upon the contract given below for use of the mill, referred to in the contract, to saw two hundred thousand feet of lumber, and one hundred and fifty thousand shingles, from January 19, 1878, to June 1, 1878.

Writ was dated August 28, 1878.

(Contract.)

"This agreement made this nineteenth day of January, A. D. 1878, between Charles A. Smith, of Skowhegan, of the first part and Benoice Loomis of the second part, witnesseth: that the party of the first part does hereby lease to the party of the second part, the saw-mill situate on the west side of the Wesser Runsett stream, including the shingle mill therein, at Malbon's mills, so called, in said Skowhegan, including all implements, tools, apparatus, and fixtures used in said saw and shingle mill, and about the same in the manufacture of shingles, boards, and other lumber during every alternate two weeks, beginning on the twenty-eighth day of January, A. D. 1878, and to continue until the first day of June, next, which time is fixed for the termination of this lease. It being understood that Joseph P. Adams has the right to occupy said mills every alternate two weeks, which are not embraced in this lease. And the said party of the

second part, hereby agrees to hire and run said mills in a proper manner, with care, prudence and diligence, to the best possible advantage, making all of the ordinary repairs, furnishing files, oils, &c., and to leave the same in as good condition as they now are, ordinary wear excepted, and to yield and pay a rent for said mill, one dollar per thousand feet, for all lumber sawed by said party of the second part, in said saw mill, and one shilling per thousand for all the shingles sawed by him in the shingle mill, said rent to be paid on the first day of April, next, so far as it may have accrued, and the balance on the first day of June, A. D. 1878. If any extraordinary repairs are required on said mills or machinery, without the fault of said Loomis, said Smith is to make them at his own expense, if with or by the fault of said Loomis, he is to make said repairs.

"I, Charles H. Loomis, hereby agree to be responsible, that said Benoice Loomis shall faithfully perform and keep this agreement on his part.

CHARLES A. SMITH,
BENOICE LOOMIS,
CHARLES H. LOOMIS.

February 16th, 1878.

"For value received I hereby agree to lease to Chas. A. Smith, all my right to the saw and shingle mill, leased to me by his lease of January (19) nineteenth, 1878, on condition that I have the mill the said alternate two weeks mentioned in said lease, until I saw what lumber Chas. Loomis may have at said mill, or may haul of his own, between now and the time said lease expires. Also to saw six thousand lumber for E. A. Withee, and three or four thousand for Bradbury Loomis, and two thousand for Sumner Smiley also, and what shingle stuff and lumber I may haul during the life of said lease, by my paying the same for the use as stipulated in said lease and agreement, by and between Chas. A. Smith and me, Benoice Loomis.

BENOICE LOOMIS."

Attest: E. N. Merrill."

Folsom & Merrill, for the plaintiff.

In construing this contract, effect must be given to the intention of the parties, and that is gathered from the whole instrument, the situation and acts of the parties, and the time, place, and manner of performance. *Merrill* v. *Gore*, 29 Maine, 348; *Chapman* v. *Seccomb*, 36 Maine, 104; 2 Cush. 283.

This was the joint contract of the defendants. *Norris* v. *Spencer*, 18 Maine, 324; *Hunt* v. *Adams*, 5 Mass. 358.

Charles H. Loomis signed this contract at its inception, and thereby made himself a joint and original promisor, or contractor, as to the plaintiff. *Duval* v. *Trask*, 12 Mass. 154; *Castner* v. *Slater*, 50 Maine, 212; *Staples* v. *Wheeler*, 38 Maine, 375; see stat. 1874, c. 201.

Walton & Walton, for the defendants, cited: *Wallis* v. *Carpenter*, 13 Allen, 19; *DeRidder* v. *Schermerhorn*, 10 Barb. 638; *Tibbitts* v. *Percey*, 24 Barb. 39; *Hall* v. *Farmer*, 5 Denio, 487; *Mowery* v. *Mart*, Cent. Law J. March 18, 1880; *Reed* v. *Cutts*, 7 Maine, 189; *Norton* v. *Eastman*, 4 Maine, 521; *Babbock* v. *Bryant*, 12 Pick. 133; *Dole* v. *Young*, 24 Pick. 250; *Bickford* v. *Gibbs*, 8 Cush. 156; *Protection Ins. Co.* v. *Davis*, 5 Allen, 54; *Vinal* v. *Richardson*, 13 Allen, 521; *Whiton* v. *Mears*, 11 Met. 563; 2 Pars. Contr. 519, 10; *Clark* v. *Baker*, 5 Met. 452; *Dows* v. *Swett*, 120 Mass. 322; *Curtis* v. *Brown*, 5 Cush. 491; R. S., c. 82, § 21; *Wentworth* v. *Lord*, 39 Maine, 71.

SYMONDS, J. The claim of the plaintiff that the defendant, Charles H. Loomis, was an original promisor, jointly with his brother, in the contract of January nineteenth, 1878, cannot be sustained. Whether the engagement was original or collateral, must be determined by the contract itself; although, if doubt remains, the particular words which import the promise, may be interpreted in the light of attending facts, the nature of the contract, the acts agreed to be done, the time, place and manner of performance, the situation and relations of the parties, and sometimes even by the aid of the subsequent conduct of the parties showing a practical construction put upon doubtful terms by themselves.

"We may safely assume, then, that it is settled by the recent cases in this State, Massachusetts and Connecticut, and in the Supreme Court of the United States, first, that guaranties are governed by the same rules of construction as other contracts; secondly, that in case of ambiguity, the language is construed most strongly against the guarantor; thirdly, that it is the duty of the court to ascertain and give effect to the intention of the parties. . . . . In order to arrive at the intention of the parties, the circumstances under which, and the purposes for which, the contract was made, may be proved, and must be kept in view in its construction." *Crist* v. *Burlingame*, 62 Barb. 357.

It is true there are circumstances in evidence here, which would account for both defendants assuming a joint obligation, and make it, perhaps, as reasonable and probable that they should do so as the contrary would be. The case of *Norris* v. *Spencer*, 18 Maine, 324, too, is cited by the plaintiff as tending to declare the joint liability of the defendants on such a contract.

But this defendant has a right to stand upon the terms of his agreement, and the only question is one of construction; what in view of all the facts were the understanding and intention of the contracting parties, as declared in the contract. The language employed, seems to us to preclude the possibility of an interpretation, which would make the undertaking of Charles H. Loomis original and joint, without doing violence to clear and express terms. He only agrees "to be responsible, that said Benoice Loomis shall faithfully perform and keep this agreement on his part." Neither as principal, nor as surety, nor in any capacity, does he agree to do the things required by the contract. It is not a direct agreement in general terms that the contract shall be performed, nor an engagement on his part as surety, or security, to that end, which possibly, under certain circumstances, might be regarded as an undertaking on his part to do them, and therefore charge him with a joint liability. There is no expression of joinder with Benoice Loomis, as surety or otherwise, in the promises made. But it is an engagement that another, who signs the contract and is described as the party of the second

part, shall keep it. This must be a collateral undertaking, unless a construction is employed which not only explains, but changes, express and clear terms. No liability could fairly arise, under this language, against the defendant, Charles, until the other defendant had failed to perform the contract. From the fact that he signed at the same time with the principal contractors, he is presumed to have participated in the original consideration, but the extent of his liability is not otherwise affected thereby. *Tenney* v. *Prince*, 4 Pick. 386; *D' Wolf* v. *Ribaud*, 1 Peters, 476; *Gillighan* v. *Boardman*, 29 Maine, 79.

The case of *Norris* v. *Spencer*, cited *supra*, marks a limit, beyond which we think the authority of adjudged cases does not go. We do not question the correctness of the decision, but the cases are numerous in which the courts have held language, differing but slightly from that of the contract in that case, to import a collateral, rather than an original undertaking. The case of *Prentiss* v. *Garland*, 64 Maine, 155, is more like this, and the agreement there was regarded as a guaranty only.

The result, then, being that one of the defendants was a principal in the contract declared on, and the other a guarantor only, it follows that the action cannot be maintained against them jointly. They are each liable, but upon distinct agreements. *Reed* v. *Cutts*, 7 Maine, 189; *Wallis* v. *Carpenter*, 13 Allen, 19.

It is obvious that our act of 1874, c. 201, would no more authorize the joinder in one action of parties to contracts so different in their nature and terms, than the general statute of Mass. c. 129, § 4, under which *Wallis* v. *Carpenter*, *supra*, was decided. But under the act of 1874, judgment may be entered for the plaintiff as to one of the defendants, although the joint liability is not proved.

The case is upon report, and the plaintiff is entitled to judgment against Benoice Loomis. Under the two contracts, of January 19th, and February 16th, he is liable at the same rates for the rent of the mill; the later contract having only the effect to terminate the tenancy at an earlier date, than that first agreed upon, or to diminish the time of his occupation under the lease.

The rent of the mill for lumber and shingles sawed by Benoice Loomis, amounted to one hundred and fifty-six dollars and thirty-three cents. The second contract being in effect, as we have seen, only a release of a part of the time to which Benoice Loomis was entitled under the first, the amount due under both might properly be charged in one item.

As it appears that by arrangement between the plaintiff and Adams, the rent to February sixteenth belongs to the plaintiff, and after that to Adams, the defendant, upon proper motion, under R. S., c. 82, § 115, may require the interest of the assignee, Adams, to appear of record; so that the record may bar any suit that might be brought in Adams' name for his share, under the law of 1874, c. 235.

Judgment for the defendant, Charles H. Loomis. Judgment for plaintiff against Benoice Loomis, for $156.33, and interest from the date of the writ.

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

JAMES HOWARD *vs.* JOSEPH W. PATTERSON.

Kennebec. Opinion January 21, 1881.

Trust. Trustee. Liability of. Auditor's report. Evidence.

When a trust has been determined by the accomplishment of the purposes for which it was created, and the trustee's bond has been surrendered and he has been practically discharged by a performance of all the trusts, he is not thereby necessarily released from responsibility. When the trustee has performed all the trusts, reconveyed the balance of the trust property, and rendered his accounts to the *cestui que trust*, which are by the latter received in final settlement, subject to rectifications in relation to interest and compensation, assumpsit for money had and received may be maintained by the *cestui que trust* against the trustee to correct the accounts and receive any balance in his favor upon a proper restating of the accounts.

A party is not aggrieved by the exclusion of a part of the report of an auditor which expresses the opinion of the auditor that the accounts of the parties have been fully settled, when the same opinion is expressed in another part of his report which was not excluded.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL from superior court, Kennebec county.

Assumpsit for money had and received.

Plea, general issue. Verdict for plaintiff for $2261.85.

At the trial the presiding judge instructed the jury that,

1. "This substantially and in brief represents the position of the two parties here before you. In the first place it is unnecessary for me to give you the principle of law in general applicable to trusts of this character, because I have already ruled in answer to a motion of the defendant, that this action is maintainable, being of an equitable character, for any balance which upon the rules and principles I shall give you, may be found due upon the accounts as they are now presented here; that this was an executed trust and that any balance which might be found justly and equitably due upon striking the balance of the accounts rendered, might be recovered in this action of assumpsit, an action for money had and received."

2. The following auditor's report was offered by the defendant, and the concluding portion, embraced within brackets, the court held to be inadmissible and excluded.

"Pursuant to the foregoing commission I met the parties on the 31st day of March, last, and occupied that day and the next in hearing their allegations, proofs and arguments, and now on this third day of April, A. D. 1880, after carefully considering the whole case, I submit the following report:

"I find that on the first day of July, A. D. 1854, the plaintiff, then bearing the name of James Howard Patterson, being somewhat embarrassed, conveyed to Samuel Titcomb, Joseph W. Patterson and Larkin M. Leland, certain parcels of real estate in Augusta, some of which had been mortgaged, and the mortgage on one parcel was nearly foreclosed, in order that they might take charge of his business, sell real estate, pay mortgages and taxes, collect rents, and do whatever they deemed necessary for the proper care and management of the property. That they afterwards gave a bond to the plaintiff, which required them to reconvey to him any land that might remain unsold, at any time of settlement, and to pay him any money that might remain in their hands from the sale of land after their bills were severally paid. This is the legal effect of the deed to them and their bond to him.

"That they accepted the deed and entered, at once, upon the care and management of the property. That Joseph W. Patterson took the sole charge of the property, hired money to pay debts, collected rents, paid taxes and insurance, and conducted the business in what he deemed the most beneficial manner, in all respects, apparently, the same as he did his own business, keeping an exact account of all he did.

"In 1863 he sent his account to the plaintiff up to that time, and in 1867 he sent the plaintiff another account up to that time. These bills showed how interest was charged, and what the defendant had charged for his services. That defendant continued in the management of the business up to October 26, 1875, when a deliberate settlement was made, the unsold land reconveyed, two law suits then pending, discontinued, the bill of Joseph W. Patterson receipted, and the bond surrendered, the business completed and the papers delivered November 1, 1875."

["That this settlement was fairly and understandingly made, and is a bar to the plaintiff's action, so I have no occasion to

audit the plaintiff's account, that I find the above named transaction to have been a fruitful source of litigation, and that the interest of these parties, and that of the public alike require that here should be an end to all controversy in relation to matters embraced in that statement."]

3. The attorneys for defendant requested the court to instruct the jury that, "If the jury find that the plaintiff conveyed property by deed to defendant and others, and took back a bond providing for the accounting for rents and income, and proceeds of sales, and for its reconveyance to him, if the bond was surrendered by the plaintiff, he cannot maintain an action for money had and received in which he seeks to recover said rents and income and proceeds of sales," which request was not granted.

The defendant excepted to the foregoing and also moved to set aside the verdict.

Herbert M. Heath, for the plaintiff, upon the questions presented by the exceptions, cited: *Arms* v. *Ashley*, 4 Pick. 71; *Harrington* v. *Curtis*, 13 Met. 469; 8 Taunt. 263; Holt's N. P. Cas. 500; *Jones* v. *Stevens*, 5 Met. 373; *Holmes* v. *Hunt*, 122 Mass. 515; 3 Redfield on Wills, 547; *Moorecroft* v. *Dowding*, 2 P. Wms. 314; 61 Maine, 462; 38 Maine, 566.

S. and L. Titcomb, for the defendant, contended that this action could not be maintained. It was an executed trust, executed by both parties, and neither could maintain an action against the the other.

The conclusion of the auditor's report was improperly excluded. R. S., c. 82, § § 62, 64; *Howard* v. *Kimball*, 65 Maine, 328; *Holmes* v. *Hunt*, 122 Mass. 515; *Lazarus* v. *Commonwealth Ins. Co.* 19 Pick. 97; *Locke* v. *Bennett*, 7 Cush. 451.

The Gen. St. of Mass. c. 121, § 46, under which the decision in *Holmes* v. *Hunt* was rendered is substantially the same as our R. S., c. 82, § 62.

VIRGIN, J. The only exception taken to the charge is to that portion of it whereby the jury were instructed, in substance, that assumpsit for money had and received was maintainable for the recovery of any balance, which, under the rules of law given, might be found due on the accounts as presented.

We think the exception cannot be sustained. The case shows that the trust had been determined some considerable time before the action was brought, by the accomplishment of the purposes for which it was created, to wit, the payment of the debts of the *cestui que trust*; and the performance of all the trusts and a reconveyance of the balance of the trust lands practically discharged the trustee. 2 Perry Tr. § § 920, 921, and notes. But this did not necessarily release him from responsibility; for the *cestui que trust* might, nevertheless, even in the absence of any agreement to that effect, inquire into the prior administration, § § 922, 923 and notes. For a formal release by the *cestui que trust* to the trustee may be set aside on any misapprehension as to the basis on which the accounts were made up, although the *cestui que trust* has had ample time for deliberation, they being only *prima facie* valid, § 923. And in order that a release, confirmation, waiver or acquiesence may have any effect, the *cestui que trust* must have full knowledge of all the facts and circumstances of the case, § 851. But in the case at bar there was evidence tending to show, and the jury must have found, that the alleged settlement was made subject to a rectification by subsequent suit if necessary. The bond had been surrendered against the express injunction of the plaintiff; and we have no doubt that the accounts rendered were subject to revision and would be corrected by this action, provided the finding of the jury upon this issue was correct. *Arms* v. *Ashley*, 4 Pick. 71; *Harrington* v. *Curtis*, 13 Met. 469.

2. The auditor seems to have acted as a referee instead of auditor; and instead of stating the account in the alternative, he gave it as his opinion that it had been deliberately settled by the parties. Even if *Holmes* v. *Hunt*, 122 Mass. 515, and the cases there cited are authorities to sustain the auditor in expressing the opinion in relation to settlement, the defendant was not aggrieved by the exclusion of the last paragraph of the report; for the preceding paragraph was admitted, and that contained an affirmative statement of the same opinion, together with the substance of all that was in the last omitting the homiletic reflections on the subject.

3. The third exception is substantially disposed of under and by the first. If the requested instruction had been given, it would have taken from the jury the right to pass upon the issue relating to the condition of the settlement, and was therefore rightly declined.

Motion. We have carefully weighed all the evidence bearing upon the issue of conditional or full settlement on November 1, 1875. And while it is very conflicting, there is positive evidence on the part of the plaintiff, which, if true, is sufficient to sustain the finding for him. The jury had greater facilities than we for intelligently passing upon the credit to be given to the testimony on both sides; and, without needlessly lumbering this opinion with a critical analysis of the testimony, it is sufficient to say that the preponderance in behalf of the defendant is not sufficient to warrant us in disturbing the verdict on that account.

The jury, without any aid from an auditor, examined this account extending over a period of twenty-five years, returned a verdict for the sum of $2261.85. We have invoked the aid of one of the most experienced and intelligent accountants in the State, and after an elaborate and critical examination of the defendant's accounts, including his private account, we find his disbursements and interest thereon so long as any balances existed in his favor, together with the sum charged by him for services and commissions, amounted, on November 1, 1875, when, as he says, a final settlement took place, to $11,491.69. His receipts, including interests thereon so long as balances existed against him, amount to $13,342.87, leaving a balance due to the plaintiff, at the date of the alleged settlement, of $1851.18. This sum with interest thereon to the time of trial, amounts to $2341.74, which is more than the verdict. It appears, therefore, that saying nothing of the defendant's purchase of the Clark equity of redemption (on which the plaintiff had previously paid $392), and the payment of the mortgage from the funds of the *cestui que trust*, the defendant has no cause for complaining of the amount of the verdict.

Motion and exceptions overruled.

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

HANNIBAL HAMLIN and WILLIAM B. HAYFORD, Trustees,

vs.

SIMON G. JERRARD.

Penobscot. Opinion February 4, 1881.

Mortgage. Railroads — consolidation of companies. Trustees.

Under the mortgage to the plaintiffs, purporting to convey to them as trustees, all the right, title and interest of the European and North American Railway Company 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; all the rights, privileges, franchises and easements; all buildings used in connection with said railway or the business thereof, and all lands and grounds 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 constructing, maintaining, operating, repairing and replacing the said railway or its appurtenances, or any part thereof;"

Held 1, that the lien of the mortgage was not lost upon rolling-stock withdrawn, under circumstances stated in the opinion, from present use upon the then broad gauge and changed to meet a contemplated narrowing of the gauge; notwithstanding the stock upon the road was kept up or improved at the same time that these materials for the narrow-gauge use were withdrawn;

Held 2, that repairs and improvements made upon such rolling-stock by the Consolidated European and North American Railway Company, which had acquired the right to control the road subsequently to the plaintiffs' mortgage, were in the nature of accessions to a mortgaged chattel, and subject first to the mortgage that had priority of date;

Held 3, that there can be no loss of identity of the original companies in the consolidation to the prejudice of the rights of prior creditors, or to the destrucion of prior liens, and that such increased values do not belong to the consolidated company as a distinct entity;

Held, further, that the plaintiffs, being in possession of other rolling stock, to which their own mortgage does not apply, purchased by the New Brunswick company, which consolidated with the E. and N. A. Railway Company, or the consolidated company, and mortgaged by them to other trustees; the plaintiffs, having the right to use and consume it in the performance of the duties the corporation owed to the public, and being liable to the mortgagees for their interest, under the facts stated, may recover its full value of the attaching creditors of the mortgagor, or the attaching officer; holding any part to which their own mortgage does not apply, in trust, or subject to their liability to those from whom they received possession, as they held the property before the attachments were made.

ON REPORT.

TRESPASS against the defendant, as sheriff of Penobscot county for entering plaintiffs' premises at Oldtown, September 1, 1877,

and taking and carrying away one narrow gauge locomotive engine, of value of three thousand dollars; four and a half set of wheels and truck frames, of value of four thousand dollars; one hundred and twenty pairs of wheels with axles, of value of five thousand dollars; and one hundred iron truck frame sides, of value of one thousand five hundred dollars, and twenty-six platform cars, of value of seven thousand two hundred dollars.

Writ is dated September 18, 1877. Plea is general issue, with brief statement as follows:

And for brief statement and further defence, the defendant says that by virtue of a certain writ which issued out of the clerk's office of the Supreme Judicial Court of Maine, in and for Penobscot county, in favor of James H. Haynes *et als.* and against the Consolidated European and North American Railway Company, one Jesse Prentiss, of Milford, in said county, in his capacity as a deputy sheriff in and for said county, attached the whole or a part of the property specified in plaintiffs' declaration as the property of the said Consolidated European and North American Railway Company, whose property it there and then was, and not the property of Hamlin and Hayford, trustees, as alleged in their said writ; nor was said property then and there in the possession and keeping of said Hamlin and Hayford, trustees, nor in or upon the premises of said Hamlin and Hayford, trustees, as alleged in said writ. That all the property described in said plaintiffs' writ and declaration, is not now, nor ever was, the property of said Hamlin and Hayford, trustees, and was never, before the attachment aforesaid, in the possession of said Hamlin and Hayford, trustees.

The facts sufficiently appear in the opinion.

The law court to enter such judgment as the evidence requires. The matter of damages to be hereafter determined at *nisi prius* unless the parties otherwise agree.

Charles P. Stetson and *William L. Putnam*, for the plaintiffs, cited: R. S., c. 51, § § 28, 47–56; *Morrill* v. *Noyes*, 56 Maine, 458; *Shepley* v. *A. & St. L. R. R. Co.* 55 Maine, 407; *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 59 Maine, 9; *Pierce* v. *Emery*, 32 N. H. 484; *Shaw* v. *Bill*, 5 Otto, 10; *Phi. W. & B. R.*

R. Co. v. *Woelpper*, 64 Penn. St. 366; *Meyer* v. *Johnston*, 53 Ala. 467; *Dillon* v. *Barnard*, 1 Holmes R. 386, 394; *Farmers L. & T. Co.* v. *S. Jo. & Denver R. R. Co.* 3 Dillon, U. S. C. C. R. 412; *Wilson* v. *Boyce*, 2 Dillon, 539; *Pierce* v. *Mil. & S. P. R. R.* 24 Wis. 551; *Farmers L. & Tea Co.* v. *Fisher et al.* 17 Wis. 114; *Scott* v. *C. & S. R. R. Co.* 6 Bissell, 529, 534; *Pennock* v. *Coe*, 23 Howard, 117; *Dunham* v. *R. &c. Co.* 1 Wallace, 254; *Galveston Railroad Company* v. *Cowdrey*, 11 Wallace, 459; *Foster* v. *Saco Manufacturing Co.* 12 Pick. 454; *Rowley* v. *Rice*, 11 Met. 333, 336; *Moody* v. *Wright*, 13 Met. 17; *Cook* v. *Corthell*, 11 R. I. 482; *Williams* v. *Briggs*, 11 R. I. 476; *Palmer* v. *Forbes*, 23 Ill. 300; *Henshaw* v. *Bank of Bellows Falls*, 10 Gray, 568.

Henry W. Paine and *Barker, Vose and Barker*, for the defendant.

It is admitted that this road was broad gauge till the fall of 1877.

This narrow gauge property was all prepared and purchased by the Consolidated European and North American Company.

It is proved, (and not denied) that this old stock narrowed, was replaced by new stock, and that the road was kept up to its accustomed efficiency, and more, that the rolling stock of the then broad gauge road was very materially benefited in 1874 and 1875.

It is provided—article seven, of the land grant mortgage, that the "party of the first part, may in its discretion, sell, exchange, or otherwise dispose of any locomotives, tenders, cars," and "all other personal property which may become impaired by use, or require renewal" "and convey the same free and clear of all lien of this mortgage," "but all property of whatsoever kind, obtained in place of the property sold or disposed of, shall be subject to, and bound by the lien of this mortgage." When, then, the rolling stock is broken up, and ceases to be rolling stock, it ceases to be bound by the lien, and more especially if other stock has been substituted for it.

Forty-five pairs wheels and axles, which were put on to the road by the old European and North American Railway Company,

and which came into the possession of the consolidated road at and by consolidation, having been replaced by the said consolidated company by new stock, and the mortgage of the old European and North American Railway Company, (Hamlin and Hayford, trustees,) having been made good and complete, and the same (forty-five pairs) entirely eliminated from said Hamlin and Hayford's mortgage by its own terms and agreements, the right and title to the said forty-five pairs wheels and axles is clearly in the consolidated company. More especially since the same (the forty-five pairs) was narrowed by, and the cost thereof, paid by the consolidated company.

Therefore Hamlin and Hayford, trustees, have no title to the said forty-five pairs old wheels and axles, under or by their mortgage, they being the property only of the consolidated company, the title being complete in the same.

The six pairs in paper A, manufactured by Eddy, the one pair manufactured by McDugle, and the one pair manufactured by Acadian Iron Works (per Angell's testimony, page 67,) came from the "western extention branch from St. John, westward to Vanceboro', Maine," at and by consolidation, and were narrowed by the consolidated company, the title of which is fully vested in the consolidated company, by reason of the same (old stock, not in use &c. &c.) having been replaced by said consolidated company, and thereby entirely eliminated from the lien of the mortgage of the "western extension branch from St. John, westward."

Certainly Hamlin and Hayford, who bring this suit, have no right, title or claim to the said western extension wheels and axles under their mortgage, nor ever had, neither in law nor equity.

The balance of wheels and axles, including trucks, sides, &c. was all new narrow gauge stock, and bought by the consolidated company.

Now, the consolidated corporation prepared and purchased, and was the owner of all the property when the sheriff took it.

This is neither property (the forty-five pairs wheels and axles excepted) possessed by the Maine corporation, when it made its

transfer to the trustees, Hamlin and Hayford, nor was it afterwards acquired by that corporation.

In fact, before this property (excepting the forty-five pairs old E. & N. A. and the eight pairs western extension wheels and axles) was acquired, the Maine corporation had ceased to exist; it had been merged in the consolidated company, and by and through said consolidation, and the subsequent replacement with new stock, as above stated and proved, by said consolidated company, the title to all the property sold on this execution is fully vested in said consolidated company.

The intention of the two companies, and the act of confirmation by the legislature, was a dissolution of the two companies, and a new corporation formed. *State* v. *M. C. R. R. Co.* 66 Maine, 488.

The agreement between Smith, trustee, and Hamlin and Hayford, trustees, dated Bangor, September thirtieth, 1876, (page 35) does not give said Hamlin and Hayford any right or authority to bring or maintain a suit in their names for the recovery of this property, to which Hamlin and Hayford have no title.

It is a maxim of the common law, that a person cannot grant what he has not. And it is a familiar principle that words in a deed importing a transfer *in presenti*, of goods which the mortgagor does not own, will not vest a title in the mortgagee, when the mortgagor subsequently acquires them. But if after the property has come into the possession of the mortgagor, he delivers it to the mortgagee, with the intention to ratify the mortgage, the title will vest.

It is provided in said Consolidated European and North American Railway mortgage deed to Smith and another, as follows:

"Eighth. It is further agreed that the said party of the first part, shall at the request of said trustees, (Smith and Hersey) execute and deliver such further deeds of conveyance of all the property now possessed, or to be hereafter acquired by said party of the first part, herein conveyed or intended to be conveyed, and upon the trust herein set forth, as may be necessary for the better security of said bonds."

No "such further deeds of conveyance" of the property they possessed, or thereafter acquired, have been made.

Smith took possession, as trustee under the mortgage, of the entire road and the property embraced in the deed, in October, 1875, and remained in possession till October, 1876. Did that vest a title in him to this property? In an elaborate opinion in *Jones* v. *Richardson*, 10 Metcalf, 493, it was decided that the mere taking possession of after-acquired property by the mortgagee, is not enough. It is necessary to prove that the mortgagor had delivered possession of the goods to hold under the mortgage with the view of carrying the former grant into effect.

And even that, says the court, would not be sufficient as against creditors, unless the mortgagee retains possession, or records the mortgage with the town clerk.

Smith did not retain possession, neither did he record the mortgage with the town or city clerk.

Therefore Smith could not maintain an action at law against the sheriff. The legal title to this property is still in the consolidated corporation, it is not covered by Smith's mortgage, and if Smith has no legal title, he certainly cannot pass the title of this property to Hamlin and Hayford, as he has attempted to do.

They have none, neither under their mortgage, the "agreement," nor the "bill of sale," and cannot maintain this action.

As to the equitable lien of mortgagees on after-acquired property, see: *Mitchell* v. *Winslow*, 2 Story Rep. 630; *Pennock* v. *Coe*, 23 Howard, 117; *Dunham* v. *Peru*, *&c. Railway Co.* 1 Wallace, 254; *United States* v. *New Orleans Railroad*, 12 Wallace, 362; 2 Redfield on Railways, 455.

The questions raised in this case are fully discussed in Redfield on Railways, and in Jones on Mortgages, and Jones on Railroad Securities, and the authorities are therein fully cited upon the one side and the other. We refer to them as follows, viz: "After acquired property", Jones on Railroad Securities, c. 4, 5, § § 121, 132, 133, 154; 1 Jones on Mortgages, c. 4, § 149 to c. 5, Rolling Stock; Personal Property. Also, to: *Hoyle* v. *P. & M. R. R. Co.* 54 N. Y. 314 (Am. vol. 13, 595); *Randall* v. *Elwell*, 52 N. Y. 521 (Am. vol. 11, 747); *Strickland* v. *Parker*, 54 Maine, 263; 1 Jones on Mortgages, c. 11, § 452; *McCaffrey* v. *Woodin*, 65 N. Y. 459 (Am. vol. 22, 644.)

SYMONDS, J. In this action of trespass against the sheriff of Penobscot county, damages are demanded for the acts of his deputy in taking upon writs, and selling upon executions, against the Consolidated European and North American Railway Company, certain pieces of narrow-gauge rolling-stock, to which the plaintiffs claim title superior to that of the judgment debtors.

The twenty-six platform cars, mentioned in the declaration, were replevied by the plaintiffs from the possession of the officer. The locomotive engine was never removed or sold by him, but was either replevied or abandoned. As to these, therefore, no claim for damage arises here. The subjects of the present action are the four and a half sets of wheels and truck frames, one hundred and twenty pairs of wheels with axles, and one hundred iron truck-frame sides, of the alleged value of four thousand dollars, five thousand dollars and one thousand five hundred dollars, respectively. These were attached, January 13, March 7, and March 31, 1877, and sold, January 9, 1878, by the defendant's deputy, as the property of the consolidated company. The question is upon the plaintiffs' right to them at the date of the attachments; and this is the only question, as the terms of the report reserve a further hearing at *nisi prius*, for the assessment of damages, if the plaintiffs prevail.

The European and North American Railway Company, was a corporation chartered by this State, August 20, 1850, to build a railroad from the city of Bangor to the eastern boundary of Maine, so as best to connect there with a railroad from the city of St. John, to be constructed to that point under a charter from the province of New Brunswick. This railroad in Maine, then in process of construction, together with the timber lands which it had received from the State, on March first, 1869, was conveyed to two trustees, of whom the plaintiff, Hannibal Hamlin, is one, and the other is represented in regular succession by the plaintiff, William B. Hayford, to secure the payment of the principal and interest of two thousand bonds of one thousand dollars each, issued by the corporation. The provisions of this deed to the plaintiffs, in mortgage and in trust, will be more fully considered. It is enough at present that under it they claim title to the property in controversy.

The corporation, organized under the province charter, was called the European and North American Railway Company for extension from St. John westward, and constructed its road to the point of connection with the road built under the charter from Maine, so that the two made a continuous line of railway of the same gauge from Bangor to St. John. The New Brunswick road was conveyed to trustees in a similar way, July first, 1867, to secure an indebtment of two millions of dollars in mortgage bonds.

These two roads, built and equipped under different charters, by the authority of different states, and by the use of distinct funds, appear to have been controlled by separate management, as independent lines, until October 19, 1872, when articles of union and consolidation between them were drawn, which were adopted and ratified by the corporations, to take effect, we judge, on the first day of December, 1872. Legislative authority from the state and the province for making the union, is recited in the articles of agreement, and a special act of confirmation was passed by the legislature of Maine, March 3, 1874. By the terms of these articles, the two companies were to become one corporation, under the name of the Consolidated European and North American Railway Company.

On December fifth, 1872, a conveyance to trustees was made by the consolidated company of the whole line, and all its property, to secure the payment of six millions in new bonds; five millions of which were to be issued only for the redemption and payment of the earlier bonds of the companies composing the consolidated line; "the proceeds of the residue of said consolidated bonds to be used by the directors to provide for further and additional way and tracks, rolling stock, equipments, and railway improvements, and to provide for the purchase of and consolidation with other connecting railroads, and to pay the debts of said New Brunswick company and said Maine company, existing at the time this agreement takes effect, and for no other purposes whatever."

The consolidated company continued in the possession and control of the road till October, 1875, when formal application

was made by bondholders to the surviving trustee under this last named mortgage, to take possession of the mortgaged estate for breach of condition, and thereupon, upon request from the trustee, a majority of the directors in writing on October 27, 1875, surrendered and delivered to him "the premises and property named and described in the mortgage deed. . . . . and all the property used and provided for operating the railroad of said company for the uses and purposes named in said mortgage deed;" and appointed an agent to go over the road with the trustee and put him in possession thereof. This was done.

This action of the majority was approved at a meeting of the directors held on the second of December, 1875; and the trustee under the consolidated mortgage continued in the possession and operation of the road until, in September, 1876, a bill in equity was filed by the present plaintiffs to recover possession of the road in Maine under the prior mortgage to them in trust. Pending this bill in equity, an agreement was made and entered upon the docket by which Benjamin E. Smith, the trustee under the consolidated mortgage, delivered to the plaintiffs, "to hold as provided in paragraph third, in said land grant mortgage to them, the railroad from Bangor to the east line of the State of Maine, and all property connected therewith, rolling-stock, fuel, equipments, and all the railroad and property belonging thereto from Bangor to the State line, in his charge and possession as said trustee; and if there is any property not covered by said land-grant mortgage taken or used by said trustees, or to which said trustees are not entitled by the terms of said mortgage to them, or by law, the rights of said Smith shall not be impaired by said transfer of possession. . . . . ."

Under this agreement, and by virtue of their mortgage, the plaintiffs on October 2, 1876, went into possession of the road from Bangor to the east line of the State, and continued to operate it until, and after, the date of the attachments under which the defendant justifies. Precisely what was the property connected with the railroad, of which the plaintiffs then took and subsequently retained the possession, will be the subject of later inquiry.

It is in evidence that in 1873, while the consolidated company was operating the road, a change of the gauge, from broad to narrow, was contemplated. Nothing appears upon the records of the stockholders or the directors relating to it, nor was the change effected till the summer and fall of 1877, but that it was intended by those in charge of the road, and that certain preparations were made for it, as early as 1873, is apparent. In this way and for this purpose, during that year the narrow gauge rolling-stock, which is the subject of the present controversy, was accumulated upon and near the grounds of the company at Oldtown. The change of gauge being delayed, it remained there till the time of the attachments, except that, lying so long idle, some parts of it which could be easily changed over were taken, when convenient, and used upon the then broad gauge. The purpose of the consolidated company, however, in purchasing and preparing it was undoubtedly to meet the anticipated change of gauge. It was not obtained with a view to use it upon the road as it then was, nor could the property attached, as a whole, have been so used without change.

It is probable and, we think, proved by the testimony that there were three sources from which this narrow gauge stock came. Some of it was changed from stock originally belonging to the Maine corporation, some from stock which the province company owned, before the consolidation; and some was new. The purchases of the new, and the repairs upon the old, were made at the order and expense of the consolidated company.

This property, so situated, the plaintiffs claim to hold under the broad provisions of the mortgage to them of the road in Maine. They gave the defendant the written notice required by R. S., c. 81 § 42, in due time before commencing this action; claiming therein to hold it under the mortgage to them, and also as bailees of the property embraced in the consolidated mortgage.

We understand the grounds of defence to be, *first*, that this stock was embraced in neither mortgage, and was open to attachment and seizure on execution against the consolidated company; *secondly*, that, as to so much of it as was new, it was the property of the consolidated company, purchased by them, and never

subject to any lien in the plaintiff's favor, so that as to their claim it is immaterial whether the consolidated mortgage to other trustees included it or not; in other words, that it was not embraced in the mortgage to plaintiffs, which is their only source of title; that, as to so much as was at first the property of the province company and was changed to narrow gauge by the consolidated company, the plaintiffs are equally without pretense of title; the original purchase having been made by one company, and the repairs by another, neither of which has given the plaintiffs any mortgage; that, as to so much of it as once belonged to the Maine company, if it was then subject to the mortgage to the plaintiffs, it had been relieved of that lien under the seventh section of the trusts declared in the mortgage, to the effect, in substance, that the railroad company may sell, exchange, or otherwise dispose of rolling stock, or other personal property impaired by use or requiring renewal, and convey the same free from all lien of the mortgage, the property substituted therefor being held and bound in its place; that this right of the Maine company passed to the consolidated company, when formed, and that inasmuch as the stock upon the road was kept up or improved at the same time that these materials for the narrow gauge use were withdrawn, such a disposition of them discharged the mortgage, *sub modo*, transferring its force and effect from them to the stock supplied and set upon the road in their stead.

The last branch of the second ground of defence is distinct and independent, and may be considered at once by itself. It assumes that the plaintiffs once had a right under their mortgage to a part of the property attached, which they have lost; and relates only to that part.

We cannot assent to the proposition that the gradual changing of such parts of the broad gauge stock, as needed repair and could be withdrawn from immediate use without detriment, into narrow gauge stock, in view of an expected change of gauge, was such a disposition of it as under the clause of the mortgage cited would release and transfer the mortgage lien. This was neither a sale, exchange nor disposition of the property by the road. It was, on the contrary, the retention of it, of its title

and possession, at the same time fitting it to serve new uses, which the requirements of the road, its management in a new and legal way, were expected to demand. A change of gauge cannot be made at once, nor without preparation. We see no more reason why, under the clause cited, the lien of the mortgage should be lost upon stock taken off from the road to be changed to fit a new gauge, expected to be made, than for its being lost upon any piece of rolling stock, not required for the present operation of the road and removed for the purpose of repair. In neither case does the company dispose of it. In both instances, it remains the property of the corporation and, although unused for the time, it does not lose its character as property connected with the use of the franchise and designed to serve the purposes of the charter. Had there been a failure to change the gauge, it is apparent from the statements of the witnesses that the materials of the stock attached, and certain parts of it even without change, were of use and value on the broad gauge. Whether it be regarded as new narrow gauge stock procured under an expectation of change, or as mere materials that the broad gauge road might make available, it still pertained to the road and its franchise, and, if the mortgage to plaintiffs held it when in use as broad gauge stock on the Maine road, the mortgage upon it was not discharged nor the security of the bondholders in whose behalf the plaintiffs' act impaired, under the seventh clause, by the changes made in it under such circumstances, nor by its temporary disuse, awaiting the narrowing of the gauge.

The result, then, is, that this claim in defence is not tenable; that if that part of this stock which came into the consolidation from the Maine road, about forty-five pairs of wheels and axles, according to the testimony of Mr. Angell, was once subject to the plaintiffs' mortgage, the facts of the case were not such as to discharge the mortgage, *pro tanto*, by the substitution of new for old, sold, exchanged, or otherwise disposed of.

It remains to inquire whether at the date of the attachments the mortgage to plaintiffs as trustees gave them a valid lien upon either, or all, of the three classes of property attached; distinguishing the classes only by the sources from which the property came, or the title was derived.

The question may perhaps conveniently be divided into two.

I. Overlooking for the moment the fact of consolidation and the relations of the uniting roads, suppose all that was done in purchasing and preparing the stock attached had been done by the old European and North American Railway Company, which mortgaged to the plaintiffs, would the mortgage have covered the same property as the attachments, and been valid against them?

II. What was the effect of the consolidation, and what are the intervening rights of the consolidated company, or its other constituent?

I. The first question assumes, it will be seen, that the Maine company had been in possession of its road, subject to the mortgage to the plaintiffs, had intended a change in gauge and with that view had altered some old, and bought some new stock, to fit the new gauge, the change had been delayed, the plaintiffs had taken possession for condition broken, and the stock so collected had remained idle, deposited on or near the railroad grounds, till the attachments were made. It assumes facts as nearly parallel as possible with the facts of the case at bar, except that, instead of having three companies to deal with, the plaintiffs' mortgagors are the only actors on that side of the transaction.

The mortgage to the plaintiffs, after describing the timber lands granted, purports to convey all the company's "right, title and interest in and to all and singular its property, real and personal, of whatsoever nature and description, now possessed or to be hereafter acquired; including its railway, equipments, and appurtenances; all its rights, privileges, franchises, and easements; all buildings used in connection with said railway or the business thereof, and all lands and grounds 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 constructing, maintaining, operating, repairing and replacing the said railway or its appurtenances, or any part thereof."

The validity of mortgages of the property, and even of the franchises, of railroads in this State is recognized both by statute and by decision. R. S., c. 51, § 47; *Shepley* v. *Atlantic and*

St. Lawrence R. R. Co. 55 Maine, 407; *Kennebec and Portland R. R. Co.* v. *Portland and Kennebec R. R. Co.* 59 Maine, 9, 23.

The road was in the process of construction when the vote of the stockholders was passed, directing the issue of the bonds and the mortgaging of the whole line from Bangor to the eastern terminus, part of which only was completed, to secure them. We think the vote contemplated and authorized such a mortgage as the directors gave.

We regard it as settled by the weight of authority that any property connected with the use of the franchise of a railroad corporation for the purposes intended by its charter, to be subsequently acquired, may be effectually mortgaged. The validity of such a lien upon after acquired property is distinctly held by this court in *Morrill* v. *Noyes*, 56 Maine, 458, 471, at least against a later mortgage given after the property was in existence and in the possession of the company; and the language of the court is quite as applicable to the case of a subsequent attaching creditor. "That a mortgage of a railroad and the franchises of the company with all the rolling stock then owned and to be afterwards acquired and placed upon the road, will create a valid lien upon cars and engines subsequently purchased, there would seem to be no longer any doubt."

"It may therefore be regarded as judicially settled, with little or no divergence of opinion, that in equity a mortgage of a railroad will be held to apply to after-acquired rolling-stock, and other personal property, if the terms of the mortgage cover such future acquisitions; with the qualification, however, that the mortgage will attach to such property subject to the liens existing upon it when it comes into the hands of the mortgagor."

The authorities upon this point are freely cited in the elaborate briefs in this case. The following are important cases, illustrating the principles involved: *Pennock* v. *Coe*, 23 How. 117; *Dunham* v. *Railway Co.* 1 Wall. 254, 266; *Galveston Railway* v. *Cowdrey*, 11 Wall. 459, 481; *United States* v. *New Orleans Railroad*, 12 Wall. 362; *Shaw* v. *Bill*, 5 Otto, 10; *Meyer* v. *Johnson*, 53 Ala. 237, 324; *Scott* v. *Railroad*, 6 Biss. 529,

535; *Maryland* v. *North Central*, 18 Md. 193; *Pullan* v. *Cen. and Chi. Railroad*, 4 Biss. 35, 43; *Brett* v. *Carter*, 2 Lowell, 58; *Barnard* v. *Nor. and Worc. Railroad*, 4 Clifford, 351; *Mitchell* v. *Winslow*, 2 Story, 630; *Pierce* v. *Emery*, 32 N. H. 484; *Cook* v. *Corthell*, 11 R. I. 482; *Hope* v. *Hayley*, 5 Ellis and Bl. 829; *Holroyd* v. *Marshall*, 10 House of Lords, 191, 220.

There can be no doubt that, on the hypothesis on which we are now proceeding, namely, that the plaintiffs' mortgagors accumulated this stock, it would have been embraced within the description of the property mortgaged. It certainly was property, real or personal, connected with and intended for the use of the road as a railroad; not for its present, immediate use, but for its use in the event of an expected change, for which it was necessary to prepare. It was covered by the general and by the specific designation of property in the mortgage.

It is not necessary to enter upon the vexed question of what is the precise legal nature of railroad rolling-stock. Whether it is to be regarded as a fixture, or a mere accession acquired under the franchise as a necessary incident, and so indispensable to its exercise, and to the operation of the road, as to become a part of it; whether there may be other considerations which include it within the entirety of the road and affect it with the characteristics of realty; or whether on the contrary the fact that there is neither annexation, immobility from weight nor localization in use—*Hoyle* v. *Plattsburg and Montreal Railroad*, 54 N. Y. 314—is decisive, under all the circumstances, of its character as personal estate, are questions on which the courts are at variance. They do not necessarily arise here. For the present purpose, we shall treat this rolling-stock, which was prepared with reference to a change of gauge that did not take place till after the attachments, and so had not been placed upon the rails nor fitted to them as they then were, as personal property. But, if this is conceded, it is still personal property of a distinctive character and of a kind that, supposing it to have been acquired by the plaintiffs' mortgagors, we think the mortgage intended and was effective to convey. It is not like the State claims against the

federal government, assigned in trust for the benefit of this railroad, and which it is not pretended were included in the mortgage; nor like the earnings of the road in carrying freight acquired after the date of the mortgage, the legal title to which, with entire reservation as to what the result might be in equity, was held in *Emerson* v. *European and North American Railroad*, 67 Maine, 387, not to pass to the trustee under the consolidated mortgage till his possession began. The rents and profits of the mortgaged estate usually go to the mortgagor, till reduced to the possession of the mortgagee. The mortgage does not purport specifically to convey such earnings nor claims against the government. But all rolling-stock to be acquired, as well as materials and equipments for constructing, maintaining, operating, repairing and replacing the road and its appurtenances or any part thereof, are within the specific statement of property mortgaged.

"If the engines and cars are not fixtures, they are so connected with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property not *in esse* cannot be conveyed. We do not mean to intimate that rolling-stock to be subsequently acquired could be mortgaged without the railroad. But when the railroad itself is mortgaged with the franchise, the rolling-stock to be acquired for the purpose of completing or repairing it is so appurtenant to it, that the company have a present, existing interest in it sufficient to uphold the grant of both together, the one as incident to the other. Their title to the railroad is the foundation of an interest in the cars and engines to be acquired for its use."

We think that such property as this, of a class specially mentioned in the mortgage, acquired for lawful railroad purposes, on hand for present use, or to meet expected requirements, is held by the mortgagors subject in equity to the mortgage from the time their title and possession accrued, and that when the trustees become actually possessed of it under the mortgage, they may hold such possession at law against the attaching creditors of the corporation. "At law, property, non-existing, but to be acquired

at a future time is not assignable; in equity it is so. At law, although a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it." *Holroyd* v. *Marshall*, *supra*.

The mortgage under which the plaintiffs claim does not appear to have been recorded as a chattel mortgage. The attachments would therefore take precedence of it but for the fact appearing in evidence, that the plaintiffs were in possession when the attachments were made.

It is true that in one notice given to the officers and employees by the trustee under the consolidated mortgage, when he took possession, he declares that he has taken possession of the railroad and "all property used in operating the same;" which description might not include the property in controversy. Substantially similar language is used by the plaintiffs in one notice given by them of the fact of their having taken control. But, as we have already seen, the consolidated company in writing surrendered to their trustee "the premises and property described in the mortgage deed . . . . and all the property used and provided for operating the railroad." In another public notice, Smith describes himself as taking "possession of all the property named in said mortgage, for condition broken," and this language is also followed by the plaintiffs in one notice given by them of the fact of their possession. By the docket entry, under the bill in equity, we have seen, Smith delivered to the plaintiffs the railroad from Bangor to the State line, "and all property connected therewith and . . . . belonging thereto," with the reservation before stated; and the notice there given by him, October 2, 1876, conforms very nearly to the docket entry.

But, independently of these proceedings in writing, the testimony of witnesses satisfies us that Smith, while he had charge of the road as trustee, had actual possession of this narrow gauge stock, and that it was delivered by him to the plaintiffs and by them retained till the attachments. At both times, we

think it was included in the inventories of corporate property taken by the trustees; checked and marked as it was set down therein. It was under the charge of their servants. The journals were painted twice by their order to protect them from rust. It was all upon railroad premises and adjacent grounds. We have little hesitation in finding from the report the fact that it was in the plaintiffs' possession under their mortgage at the date of the attachments.

With this fact established, under our statute which declares such a mortgage void, except between the parties, "unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded," the unrecorded mortgage of personalty, takes precedence of the attachments. The New York statute, unlike ours, seems to require "an immediate delivery, followed by an actual and continued change of possession," to make the unregistered mortgage effectual. Under our law, if the mortgage is in force between the parties, and the mortgagee takes possession under it before the attachment and is in possession then, the mortgage holds. In other words, there may be a taking of possession by the mortgagee at a later date than the mortgage, just as it may be recorded later, and with the same effect. The want of immediate delivery of property at the date of the mortgage does not render it void. It is valid against attaching creditors from the time of record, or of possession taken. *Beeman* v. *Lawton*, 37 Maine, 544–5; *Wheeler* v. *Nichols*, 32 Maine, 233, 241.

We reach the conclusion, then, that if only the funds of the old European and North American company had gone into the stock attached, and it had been procured and kept by them in the same manner and under the same circumstances, as it was by the consolidated company, it would have been held by the plaintiffs' mortgage, and that the want of record, they being in possession, would have given the attachments no validity against them.

II. It would be an important question, if it were directly presented, whether the net income of the property of the Maine company, so far as it became invested in property such as is

described in that mortgage, even if the investment were made by a new corporation that had acquired the right to run the road, could ever rightfully be diverted from its legitimate use in lending additional security to the first mortgage bondholders. It is clear that all accessions to the road and its appurtenances in Maine, after consolidation as before, were accessions to a mortgaged estate, and subject first to the mortgage that has priority of date. If the consolidated company increased the value of mortgaged property by the avails of a later mortgage, such mortgage must be postponed to the earlier one on each part, just as if each company separately had put a second mortgage on its own line of road. The consolidated company assumed the debts of its several parts, and recognized the prior liens upon them. It assumed also, by force of law, the burden of having any increased value of the road and its appurtenances, go as security, first, for those prior liens. It cannot claim that its duty was merely to keep them *in statu quo*, in as good condition as when received, and that, as against the first mortgagees, additions and improvements belong to itself as a distinct entity. If such a claim were sustained, the very income of the property of the Maine road might go to swell its value, and the clauses conveying future acquisitions become void of effect; although the newly acquired property made part of the value of the road itself. The first mortgage on the Maine road, and the first mortgage on the New Brunswick road, remain the first liens on all acquisitions of the consolidated company, which issue from, and become part of the estate to which those mortgages applied. A due regard for vested interests imperatively demands such a legal conclusion and effect. To reach this result, if the original companies have ceased to exist, or to be capable of organization and action, the consolidated company, notwithstanding the articles of union declare it one, must still be regarded, to save the rights of prior creditors, as two, one in Maine, and one in New Brunswick, having the same name and officers, and each representing the original company to whose rights and liabilities it succeeded; with which it has a unity of interest and of obligation. There can be no loss of identity of the original companies in the consolidation, to the

prejudice of the rights of prior creditors, or to the destruction of prior liens. See *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665.

Whether the principles of equity proceeding would in any case go further than this, and not only retain for the security of the first mortgagees all accessions to the road and its appurtenances made by the consolidated company, but also give them the right to hold, when reduced to their possession, articles not accessory, purchased by the net income of the mortgaged property, meaning by the net income, strictly the value of the use of the property itself; whether, in this case on such ground as that, the plaintiffs could claim a lien upon the new stock and that which came from the New Brunswick road to the extent of their interest, as above stated, in the expenditure thereon by the consolidated company; whether the mortgage gave them a right to the income of the mortgaged estate, so invested and reduced to their possession, that could not be lost upon consolidation, is a question that need not now be considered.

The plaintiffs, at the date of the attachments, had a valid lien under their mortgage upon that part of the stock attached, which came originally from the Maine road to the extent of its value, the repairs upon it being mere accessions to a mortgaged chattel. They were in possession of the new stock, and that which came from the province road, the directors of the consolidated company having put their trustee in possession of it, and he having yielded to the plaintiffs, with the reservation that his legal rights were not to be prejudiced by such transfer of possession. The plaintiffs had the right to use and consume it in the performance of the duties the corporation owed to the public, on the fulfillment of which the interests of all depended. The whole was subject to the consolidated mortgage, and that was the first lien upon it, except as the Maine or province mortgage took precedence. The attachments are not justified. The mortgagee in possession under these circumstances, might recover its value against the attaching creditor of the mortgagor. One in possession for the mortgagee, and liable to him for his interest, should recover the same. The

plaintiffs held the part to which their own mortgage applied in trust for their bondholders at the date of the attachment. They held all besides this, in trust for the bondholders under the other mortgages to the extent of their several interests, and under the terms of the report, are entitled to recover the value of the whole, at the date of the trespass, holding any part to which their own claim does not attach in trust, or subject to their liability to those from whom they received possession, as they held the property before the attachments were made.

Judgment for the plaintiffs.
Damages to be assessed at
Nisi Prius.

APPLETON, C. J., DANFORTH, VIRGIN and PETERS, JJ., concurred. BARROWS, J., did not sit.

HANNIBAL HAMLIN and another, trustees, in equity,

vs.

EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY and others.

EGERTON R. BURPEE and another, in equity,

vs.

HANNIBAL HAMLIN and another, trustees, and others.

Penobscot. Opinion February 4, 1881.

Mortgage. Railroad securities. After-acquired property. Collateral security.

A mortgage of a railroad company to trustees for the security of its bondholders of "all its right, title and interest in and to all and singular its property, real and personal, of whatsoever nature and description, now possessed or to be hereafter acquired, including its railway, equipments and appurtenances, all its rights, privileges, franchises and easements," &c. operates upon the inchoate right of the company to a conveyance of lands under contracts subsequently made as soon as the contracts are made and the company is in possession under them for the purposes of the charter. Such a mortgage will take effect upon lands subsequently contracted for or purchased to secure adequate facilities and space for engine and car houses and other railroad accommodations, to which the company at the time of the purchase had a right and expected to build their road; and such incumbrance will continue though the road is not built to such land, and the right to use them in direct connection with the road, without further legislative authority, has expired. The case of a railroad holding more property for its own purposes than its present needs demand is entirely different from one in which the company buys other property distinct from the road or its appurtenances, not intended or necessary for the present or prospective exercise of its franchise and therefore not within the purview of the mortgage.

The mortgage attached to the right to a deed of such lands under contract and continued to attach to it as the right grew in value, whether the increased value arose from payments and improvements made by the company or by a new consolidated company which took the entire property and assumed the debts of the first company.

The interest conveyed by an assignment to secure the assignee against loss from liability as an indorser is commensurate only, in degree and duration, with the liability it secured.

BILLS IN EQUITY, heard upon bills, answers and proofs.

The first is a bill brought by the trustees of the bondholders of the European and North American Railway Company against

the company, and certain creditors (E. R. Burpee, F. A. Wilson and James W. Emery,) of the consolidated company, who had levied upon lands of the company, purchased or contracted for subsequent to the mortgage to the trustees, and called the Crosby lot in Hampden, and the Hinckley lot, Lord lot, and Lord and Veazie lot in Bangor, to restrain the defendants from disputing the title and possession of the trustees to such lots, &c.

The second is a bill by the levying creditors, who were parties defendant in the first bill, against the same trustees and the consolidated European and North American Railway Company, and others, for relief and to remove the cloud upon their title to the lands levied upon.

The following are extracts from the mortgage of the European and North American Railway Company to Hannibal Hamlin and another, trustees, dated March 1, 1869:

"Now, therefore, the said party of the first part, in order to secure the payment of the principal and interest of said two thousand bonds, issued or to be issued as hereinbefore provided, and in consideration of the premises, and of one dollar to it paid by said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed, and transferred, and by these presents does grant, bargain, sell, convey and transfer unto said parties of the second part, their successor or successors in the trusts herein created . . . . also, all its right, title and interest in and to, all and singular, its property, real and personal, of whatsoever nature and description, now possessed, or to be hereafter acquired: including its railway, equipments and appurtenances; all its rights, privileges, franchises and easements; all buildings used in connection with said railway or the business thereof, and all lands and grounds 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 constructing, maintaining, operating, repairing and replacing the said railway or its appurtenances, or any part thereof. . . ."

"To have and to hold the aforegranted premises, with all the rights, privileges, easements and appurtenances thereto belong-

ing, hereby conveyed or intended to be conveyed, to the said parties of the second part, their successors, in the trusts hereof, and their heirs and assigns, to their use and behoof, but only upon the trusts hereinafter set forth."

* * * * * * *

"*Eighth.* It is further agreed, that the said party of the first part shall at the request of said trustees, execute and deliver such further deeds of conveyance of all the property now possessed, or to be hereafter acquired, by said party of the first part, herein conveyed or intended to be conveyed, and upon the trusts herein set forth, as may be necessary for the better security of said bonds."

Other material facts appear in the opinion.

Charles P. Stetson and *William L. Putnam*, for Hamlin and Hayford, trustees, cited, in addition to authorities cited by them in *Hamlin et al.* v. *Jerrard*, *ante* p. 62; *Blake* v. *Rollins*, 69 Maine, 156; *Emerson* v. *E. & N. A. Ry. Co.* 67 Maine, 393; *Coverdale* v. *Aldrich*, 19 Pick. 395; *Gue* v. *Tide Water Canal Co.* 24 How. 257; *Eldrich* v. *Smith*, 34 Vt. 484; *Willink* v. *Morris Canal Co.* 3 Green's Ch. 377; *Shamokin R. R. Co.* v. *Livermore*, 47 Pa. St. 468; *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 59 Maine, 22; *Holroyd* v. *Marshall*, 10 H. of L. Cas. 193; *The Key City*, 14 Wall. 653; *Clark* v. *Flint*, 22 Pick. 237; *Muer* v. *Berkshire*, 52 Mich. 149; *Cobb* v. *Dyer*, 69 Maine, 498; *Barnard* v. *N. & W. R. R. Co.* 14 N. B. R. 469; *Palmer* v. *Forbes*, 23 Ill. 300; *Buck* v. *Seymour*, 46 Conn. 156; *Hinckley* v. *Haines*, 69 Maine, 76; *Raymond* v. *Clark*, 46 Conn. 129; *Hooper* v. *Bourne*, 3 L. R. 2 B. D. 258; *Betts* v. *G. E. Ry. Co.* L. R. 3 Ex. D. 182; N. Y. C. & H. R. R. Co. 77 N. Y. 245; *Clouston* v. *Shearer*, 99 Mass. 209; *Gerry* v. *Stimson*, 60 Maine, 189; R. S., c. 51 § § 53–56; Jones' Railroad Securities, 416.

James W. Emery, *Woodward Emery*, and *Wilson and Woodward*, for Burpee, Emery and Wilson.

The question is between creditors,—bond-holders and judgment creditors. Equity is no more favorable to one set than the other.

The contract for purchase of the three lots of land were made with the European and North American Railway Company and assigns, in September and October, 1870.

The consolidation of the "Maine" company, and the "New Brunswick" company, took place December 1, 1872, and by § 6, of the articles of agreement, the franchises, property, and "causes in action" of the two old companies, were assigned to the "new corporation" as the consolidated company is called in the agreement, ratified by the legislature of Maine, laws of 1874, c. 609. These contracts being causes in action, were then assigned to the consolidated company, which entered into possession of the entire property at that time, to hold, own, and enjoy the same, and from that time until the attachment and seizure and sale on execution, the legal and equitable title in and to those contracts, was fully in the consolidated company. *Bath* v. *Miller*, 53 Maine, 308; *Emerson* v. *E. and N. A. R'y*, 67 Maine, 387.

Hamlin and Hayford, trustees, under the first mortgage, claim that said contracts are covered by their mortgage as "after-acquired" property, or as an "accretion" to the property originally mortgaged. We reply that upon scrutiny of the language of the mortgage, the European and North American Railway Company mortgaged its property, "now possessed or to be hereafter acquired," and by no possibility could it cover property not acquired by itself. *R. R. Co.* v. *Maine*, 6 Otto, 499; *State* v. *M. C. R. R. Co.* 66 Maine, 488; Bouvier's Law Dict. "Accretion;" *Young* v. *Northern Illinois Coal and Iron Company*, U. S. C. C. N. D. Ills. 1880; The "Reporter," March 3, 1880.

This levy was extended more than a year since, and we claim title under the levy, the proceedings being regular. *Brackett* v. *McKenney*, 55 Maine, 504.

The trustees under both said mortgages claim under their respective mortgages. It cannot be claimed that this property was covered by either mortgage. It is not essential to its business, nor is it held by the Company's trustees, now, for any legitimate railway purposes. *Seymour* v. *Canandaigua and N. F. R. R.* 25 Barb. 284; *Western Penn. C. C.* v. *Johnston*, 59

Penn. 290; *Calhoun* v. *Paducah and Memphis R. R. Co.* U. S. C. C. W. D. Tenn. April 7, 1879; "Reporter," September 24 1879.

The criterion is necessity and essentiality for railway purposes, and not what, in the opinion of a sanguine railway official, would be gratifying to him to have at hand for future use of a railway in case it increased its business and manufactured new wants. *Parish* v. *Wheeler*, 22 N. Y. 494; 1 Jones on Mortgages, § 156.

As the company never have and never can, without an additional franchise, use that property, it cannot be considered as included or embraced by the mortgages.

Counsel in an additional brief cited: *Pierce* v. *Emery*, 32 N. H. 484; R. S., of 1857, c. 51, § § 31, 33; *Commonwealth* v. *Smith*, 10 Allen, 448; *Milw. & Minn. R. R. Co.* v. *Milw. & West. R. R. Co.* 20 Wis. 187; *Brainard* v. *Peck*, 34 Vt. 496; *Holbrook* v. *Finney*, 4 Mass. 566; *Burns* v. *Thayer*, 101 Mass. 428, and cases cited; *Brown* v. *Tyler*, 8 Gray, 135; *Smith* v. *Eastern C. Co.* 124 Mass. 154; *Noyes* v. *Rich*, 52 Maine 115; *Galveston Railroad* v. *Cowdry.* 11 Wall. 459; R. S., 1871, c. 76, § § 29, 30; *Virginia* v. *Ches. & Ohio Canal Co.* 32 Md. 501; *Swan* v. *Patterson*, 7 Md. 164; *Brown* v. *Chesterville*, 63 Maine, 241; *Bacon* v. *Bacon*, 17 Pick. 134; *Forbes* v. *Appleton*, 5 Cush. 115; *Crompton* v. *Anthony*, 13 Allen, 33; *Barry* v. *Abbot*, 100 Mass. 396; *Anthracite Ins. Co* v. *Sears*, 109 Mass. 384; *Powell* v. *North Miss. R. Co.* 40 Mo. 63; *Racine & Miss. R. Co.* v. *Farmers' Loan & T. Co.* 49 Ill. 331; *Selma, Roam & D. R. Co.* v. *Harbin*, 40 Geo. 706; *McMahan* v. *Morrison et als.* 16 Ind. 172; *State* v. *Bailey, Id.* 51; *Paine et als.* v. *Lake E. & L. R. Co.* 31 Ind. 283; *Lauman* v. *Lebanon Valley, R. Co.* 30 Penn. St. 42; *Tagart et al.* v. *Northern R. R. Co.* 29 Mary. 559; *N. J. Midland C. Co.* v. *Strait*, 35 N. J. Law, 325; *Ohio* v. *Sherman*, 22 Ohio, 428; *Clearwater* v. *Meridith*, 1 Wall. 25; *Shields* v. *Ohio*, 26 Ohio, 86; *Shaw* v. *Norfolk Co. R. Co.* 16 Gray, 407; *Shields* v. *Ohio*, 95 U. S. 319; *Seymour* v. *Canandaigua & Niagara Falls R. R. Co.* 25 Barb. 284; *Walsh* v. *Barton*, 24 Ohio St. 28; *Shamokin Valley R. R. Co.* v. *Livermore*, 47 Pa. St. 465;

Farmers' Loan and Trust Co. v. *Commercial Bank*, 11 Wis. 207; *Same* v. *Cary*, 13 Wis. 110; *Same* v. *Commercial Bank of Racine*, 15 Wis. 424; *Dinsmore* v. *Racine & Mil. R. R. Co.* 12 Wis. 649; *Meyer* v. *Johnson*, 53 Ala. 237; *State* v. *Commissioners of Mansfield*, 3 Zab. (23 N. J. Law), 510.

Henry W. Paine and *Barker, Vose and Barker*, for Edward Cushing, furnished very able briefs, contending that the title to the lands in question, was in Cushing as trustee of the consolidated European and North American Railway Company. See their brief in the preceding case.

SYMONDS, J. The three parcels of real estate in Bangor referred to as the Hinckley, Lord, and Lord and Veazie lots, the European and North American Railway Company, in the fall of 1870, contracted in writing to purchase. Possession was then taken by the corporation, and has been retained by those in charge of the railroad from that time to the present. The payments required by the contracts were made by that company, and afterwards by the consolidated company, and by the trustees under each mortgage during the period of their possession. The premises have been used and improved at considerable expense for depot grounds; the principal improvements having been made before consolidation.

The contracts were assigned by the European and North American Railway Company, September 12, 1870, to Jewett, Woods and Emery, to secure them against liability as indorsers on the first three of the notes given in each instance for the purchase money. But those notes were paid at maturity, the liability of the indorsers was at an end, and their right to hold the collateral ceased. The assignment had served its purpose. The interest it conveyed was commensurate only, in degree and in duration, with the liability it secured.

The course of reasoning employed in the previous case, *Hamlin et al. Trustees*, v. *Jerrard*, leads directly to the conclusion, that the mortgage to the complainants in the first of these bills in equity, as trustees, operated upon the inchoate right of the

Maine company to a conveyance of these lots under the contracts, as soon as they were executed and that company was in possession under them for the purposes of the charter. Their right to a conveyance, became at once subject in equity to the mortgage. The mortgagees, upon possession taken, were subrogated to the rights of the mortgagors. By our statute, such a right to the conveyance of lands, may be taken and sold on execution. R. S., c. 76, § 29. Such a mortgage may apply to it as well. At the date of a mortgage like this, given to obtain funds to complete construction, the corporation might be in possession of considerable portions of its road-bed under similar contracts to purchase; or it might subsequently acquire title to parts of its line in that way, instead of pursuing the statutory method. In either case, such after-acquired property, when in pursuance and upon performance of the contract the full title to it vests in the corporation, becomes part of a mortgaged estate. Any intermediate interest or right gained, is equally subject to the mortgage. The manner of acquiring the right of way, or depot grounds, cannot be important. It is upon the right acquired that the mortgage acts. Possession of lands under such circumstances and for such purposes, with the right on certain terms to perfect the title, may be as valuable an incident to the railroad itself, as necessary a part of it, as any lease-hold interest or higher estate it may have in another part of its line. See *Barnard* v. *Norwich and Worcester Railroad*, *supra*, where an after-acquired lease-hold interest was held to pass to the trustees under the mortgage.

Nor do we think a different rule applies, as to the payments made by the consolidated company upon these contracts during the period of its possession. Such payments stand upon the same footing as improvements made by that company upon the buildings and grounds. Its position, in reference to the plaintiffs as trustees and to the mortgaged property, is in some respects more truly defined by saying that it *is* its predecessor in title under a new name (and something more), than by regarding it merely as the assignee of the original company. It took the entire property, subject to incumbrances, and assuming the debts.

Five millions of the consolidated bonds were to be used only to redeem and pay the first mortgage claims. If the exchange of bonds had been completed, the whole consolidated property, with all future additions, would still have been incumbered by substantially the same debt as that secured by the plaintiffs' mortgage, under a new form, and in its own name. If, at the date of consolidation, the Maine company had obtained a clear title to the depot grounds in Bangor, but was in debt for them, had received the deed, but had not paid the purchase money, it is clear that the grounds would have been subject to the plaintiffs' mortgage, while the debt would have been one the consolidated company must pay. Or, if there had been a mortgage on the same real estate when the Maine company received its deed, supposing for the sake of illustration the deed to have been delivered and under such circumstances, and consolidated funds had paid it, the payment would have been of a debt it was the duty of that company to pay, that mortgage would have been discharged, and the plaintiffs' mortgage would have become the first incumbrance upon the land. The mortgage to the plaintiffs attached to the right to a deed of the station-grounds as a part of the road itself, and it continued to attach to it as the right grew in value. The consolidated company, under the articles of union, was not an assignee of these contracts, discharged from the mortgage. The increased value of the right to a conveyance of real estate, which was in the occupation of the company and essential to the road, remained subject to the mortgage as an accession to the road, just as the increase of values along any part of the line, arising from improvements made by the consolidated company in its road-bed, track, or stations, added to the security of the first mortgage bondholders. If the consolidated company, taking the entire property of its predecessor in Maine, subject to mortgage, increased the value of the railroad, and the rights that go with it, by making payments or expending money, that gives it no equitable interest as against the mortgagees. If, at the consolidation, the title of the Maine company to a part of its road-way or yards was imperfect, and payments by the consolidated company perfected it, the mortgage holds the completed title. In

regard to these three contracts for the real estate at the station in Bangor, it should be observed, also, that the interest in them which passed to the consolidated company at the consolidation, not only was subject to the mortgage in the sense already indicated, but it was also in its essence, a right, and nothing more, to acquire a thing, which, when acquired, as to these plaintiffs, was a part of the road mortgaged to them.

It is not doubted, that an interest in these contracts passed to the consolidated company by the terms of the articles of union. It would be to that company that the conveyances should be made, when the terms were fulfilled on which the contractors were obliged to give the deeds, unless a legal foreclosure of the plaintiffs' mortgage had changed their interest as mortgagees into an absolute title. But a conveyance to the consolidated company, prior to foreclosure, would inure to the benefit of the plaintiffs, to the extent of their mortgage.

The Crosby lots were purchased and paid for by the European and North American Railway company, and the deed was delivered to them, before consolidation. The object of the purchase was to secure adequate terminal facilities and space for engine and car houses, and other railroad accommodations. The road was located to and upon them, but was built only to within about four hundred and seventy yards, and the time for building under the charter, has expired. For all that appears, they were bought in good faith, in the exercise of the best judgment of the officers then, and for railroad purposes, at a time when the company had a right and expected to build to them. The mortgage took effect upon them. That the expectations of business have not been realized, that the right to use them in direct connection with the road, without further legislative authority, has expired, does not relieve them from the incumbrance. They are claimed still, on grounds that the evidence would scarcely enable us to deny, to be necessary for the future development of the railroad. We could not say from the testimony, that the purchase was, at the time, an extravagant and unreasonable one. The case of a railroad holding more property for its own purposes than its present needs demand, is entirely different from one in which the company buys

other property, distinct from the road and its appurtenances, not intended or necessary for the present or prospective exercise of its franchise, and therefore not within the purview of the mortgage. We think there is nothing in the case to exclude the Crosby lots, or any part of the three lots in Bangor, from the effect of the mortgage, as property not therein intended to be acquired and conveyed.

The complainants in the first bill are entitled to an injunction against all the respondents named therein and in the amendment, restraining them from any interference with the complainants' possession and control, as mortgagees, of the real estate therein described, and from any resistance of the complainants' title to the same, to the extent of the trusts declared in the mortgage; the injunction to be made perpetual and without the limitation just stated, if the interest and title of the complainants has or shall become absolute by a legal foreclosure. The second bill is dismissed.

Decree accordingly.

APPLETON, C. J., VIRGIN, PETERS and LIBBEY, JJ., concurred. WALTON and BARROWS, JJ., did not sit.

ASA LOW *vs.* SAMUEL D. TIBBETTS.

York. Opinion February 10, 1881.

Deed — bounded by a highway. Monuments.

The well settled doctrine in this State is, that a grant of land bounded on a highway, carries the fee in the highway to the centre of it, if the grantor owns to the centre, unless the terms of the conveyance clearly and distinctly exclude it, so as to control the ordinary presumption.

The mere mention of a monument on the side of the road, or on the bank of a stream, as the place of beginning or end of a line in the description, is not of itself sufficient to control the ordinary presumption, that the grantee will hold to the centre of the road, or the thread of the stream where the road or stream is made the boundary.

ON REPORT.

TRESPASS for hauling certain loads of stone upon the locus which is within the limits of a town way, and the plaintiff claimed

to own the fee. The question presented, called for the construction of a deed from the plaintiff to the defendant, dated June 26, 1857. The description is given in the opinion.

At the trial, the presiding justice was of the opinion that the fee was in the defendant, and a nonsuit was ordered "which is to be set aside, if such construction of the deed was erroneous."

Asa Low, for the plaintiff, contended that the deed from the plaintiff to the defendant excluded the way. The boundary line in the deed commences at the side of the road, "on the northeasterly side of the new road," "at the southerly corner of the school house lot as now fenced—not the southerly corner of the lot, but the southerly corner "as now fenced." *Sibley* v. *Holden*, 10 Pick. 249; *Tyler* v. *Hammond*, 11 Pick. 193; *Olinda* v. *Lothrop*, 21 Pick. 292; *Phillips* v. *Bowers*, 7 Gray, 24; *Smith* v. *Slocomb*, 9 Gray, 36; *Revere* v. *Leonard*, 1 Mass. 91; *Oxton* v. *Groves*, 68 Maine, 371; *Cottle* v. *Young*, 59 Maine, 105.

R. P. Tapley, for the defendant, cited: *Oxton* v. *Groves*, 68 Maine, 371, and cases there cited. *Perkins* v. *Oxford*, 66 Maine, 545.

BARROWS, J. The question is, whether the fee in the locus (which is a strip about twelve rods in length, by forty-four feet in width, being a section of a duly located street in the village of Spring Vale, running along the bank of Mousam river, cutting a lot formerly owned by the plaintiff very unequally, and leaving the largest part of it on the side farthest from the river, and a little irregularly shaped land between street and river) is in the plaintiff, or in the defendant.

After the street was built, plaintiff conveyed his lot to defendant, describing first the more important part, as "situate in the village of Spring Vale . . . beginning on the north easterly side of the new road leading from the Province Mills Bridge to the cotton mill, and at the southerly corner of the lot as now fenced belonging to school district number one, . . and running (course given) by said road . . . to a stake," and thence around the rear of the lot, "to the place begun at; also the land now owned by said Low between said road and Mousam river."

The well settled doctrine in this State is, that a grant of land bounded on a highway, carries the fee in the highway to the centre of it, if the grantor owns to the centre, unless the terms of the conveyance clearly and distinctly exclude it, so as to control the ordinary presumption. *Oxton* v. *Groves*, 68 Maine, 372. Here the principal piece is bounded by the road as a monument or abuttal. So is the land lying opposite "between the road and the river."

Is there enough in the language used, to exclude the street from the conveyance? The mere mention in the description of a fixed point on the side of the road as the place of beginning or end of one or more of the lot lines, does not seem to be of itself sufficient. *Cottle* v. *Young*, 59 Maine, 105, 109; *Johnson* v. *Anderson*, 18 Maine, 76; nor will similar language, with reference to monuments standing on or near the bank of a stream, in lines beginning or ending at such stream, prevent the grantee from holding *ad medium filum aquae*. *Pike* v. *Monroe*, 36 Maine, 309; *Robinson* v. *White*, 42 Maine, 210, 218; *Cold Spring Iron Works* v. *Tolland*, 9 Cush. 495, 496. The case of *Sibley* v. *Holden*, 10 Pick. 249, cited by plaintiff, was commented on by this court, in *Bucknam* v. *Bucknam*, 12 Maine, 465, and that of *Tyler* v. *Hammond*, 11 Pick. 193, in *Johnson* v. *Anderson*, 18 Maine, 78; and the apparent force of these decisions is somewhat restricted and explained, by the learned court which pronounced them, in *Newhall* v. *Ireson*, 8 Cush. 598, and *Phillips* v. *Bowers*, 7 Gray 24; although it is apparent from the last case and from *Smith* v. *Slocomb*, 9 Gray, 36, that the Massachusetts court lays less stress upon the ordinary presumption, and requires less distinctness in the terms of the deed to obviate it, than we have done in the cases above cited from the 18th, 59th and 68th of our own reports. See also, Perkins' note to *Sibley* v. *Holden*, in the second edition of Pickering's Reports, vol. 10, p. 251.

Had the plaintiff run his first line "by the north easterly side line of said road," instead of "by said road," and conveyed the land "lying between the southwesterly side line of said road and Mousam river", instead of that "lying between said road and Mousam river," a different question would have been presented.

In the absence of the very few words which were necessary to make plain an intention on the part of the plaintiff to reserve the fee in the land covered by the street to himself, we think the ordinary presumption and construction must prevail.

Nonsuit confirmed.

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

WILLIAM PERKINS, administrator of WILLIAM R. GAY,

vs.

MAINE CENTRAL RAILROAD COMPANY.

CHARLES GAY *vs.* same.

Kennebec. Opinion February 11, 1881.

Railroad location. Land damages. Waiver.

Without a deed a railroad location can never become legal except on payment or waiver of the land damages, or by prescription. In no other way can the company acquire legal, permanent possession.

While the lapse of six years from the time an action accrued for land damage might, unexplained, constitute a waiver of damage, yet where the circumstances show that there has been no waiver, and no title acquired by prescription, simple lapse of time would not bar the land owner's right to bring suit against the road for an obstruction which was a continuing trespass, though there would be a limitation of damages to the period of six years, immediately preceding the date of the writ.

ON REPORT.

Trespass. The law court to render such judgment in each case as the law and admissible evidence require.

The opinion states the case.

H. S. Webster, for the plaintiff, cited: *Cushman* v. *Smith*, 34 Maine, 247; *Davis* v. *Russell*, 47 Maine, 443; 1 Chitty Pl. 544; *Burnham* v. *Ellis*, 39 Maine, 319; *Franklin Bank* v. *Cooper*, 39 Maine, 542; *Cook* v. *Stearns*, 11, Mass. 533; 1 Wash. R. P. c. 12 § 2, and cases cited.

G. C. Vose, for the defendant.

"Private rights, not under the shield of the organic law, must yield when they come in conflict with public necessity, or the general good. The maxim, *salus populi suprema lex*, has an important meaning in its application to private rights, and in limiting the absoluteness of any possible ownership of private property." 2 Dillon Mun. Corp. 552.

It is incident to the sovereignty of every civilized government that it may take private property, for public uses; of the necessity or expediency of which the government alone must judge. *Cooper* v. *Williams*, 4 Ham, (Ohio), 253; *Perry* v. *Wilson*, 7 Mass. 395; *Boston Mill Dam* v. *Newman*, 12 Pick. 467; *Spring* v. *Russell*, 7 Greenl. 273; 1 Baldwin, 220; 1 U. S. Dig. 560.

This power of the legislature is limited only by the constitution, which in our State simply provides that private property shall not be taken for public uses without just compensation.

"If the organic law of the State does not prescribe the mode of procedure, in estimating land damages, for the use of a railroad company, or other public work, it is competent for the legislature to do so." Red. Railways, 2d ed. 139, 140. This our legislature did by the general railroad law of 1876.

The building of a railroad by a private corporation under authority of the legislature for the accommodation of the public, is a public use for which private property may be taken. *Walton* v. *Warren et al.* 25 Mo. 277.

The road was legally located, and by the location and subsequent acts the company, we contend, took a perpetual easement for the purposes authorized by their charter. The language of the statute clearly implies that the compensation is not a condition precedent to the right of taking actual possession of the land for the purposes authorized by the charter. *Smith* v. *Holmes*, 7 Barb. 426; *Bloodgood* v. *M. & H. R. R. Co.* 18 Wend. 17; *Rogers* v. *Bradshaw*, 20 Johns. 735: *Davis* v. *Russell*, 47 Maine, 446.

Seth Gay was a resident of Gardiner and knew of the construction of the road over his land as it progressed. He suffered the company to proceed and expend large sums of money in

constructing the road without interference or objection, and thus waived such claim, if any, as he might have had. *Barre Turnpike Cor.* v. *Appleton*, 2 Pick. 430; *Ipswich* v. *Essex*, 10 Pick. 519; *Merrill* v. *Berkshire*, 11 Pick. 269.

Seth Gay or his executor might have sued and recovered all the damages which were sustained by the property (if any) whether at the time or in the future. This being so, the right of action was in him for the recovery of all damages, and this right of action would not pass to one who takes by purchase. *Chicago & Alton R. R.* v. *Maher*, 8 Law Reporter, 495; *Ill. Central R. R.* v. *Grabill*, 50 Ill. 241.

Twenty-five years have elapsed since the expiration of the three years within which an application for assessment of damages might have been made before the commencement of these actions. *Forester* v. *Cumberland Vaelly R. R.* 23 Penn. 371.

Judge Redfield in his work on railways, 2d edition, page 183, says, "when neither the general statutes nor the special act contain any specific limitation in regard to claims upon railway companies, for land damages, it is held that the general statute of limitations of actions, for claims of a similar character, will apply. One who is disseized can maintain trespass for no act subsequent to that which ousted him from the premises, until he re-enters." *Taylor* v. *Townsend*, 8 Mass. 415; *Shephard* v. *Pratt*, 15 Pick. 34; *Starr* v. *Jackson*, 11 Mass. 519; *Brown* v. *Ware*, 25 Maine, 411.

The company have had possession in fact of this location since 1849, and this action cannot be maintained against one for acts done on premises of which he has been in possession more than six years. *Bradford* v. *Cressey*, 45 Maine, 15; *Abbott* v. *Abbott*, 51 Maine, 575; *Allen* v. *Thayer*, 17 Mass. 299.

The plaintiff, to maintain this action, must have possession *in fact.*

SYMONDS, J. The location of the Kennebec and Portland railroad across the land in controversy was filed in the office of the commissioners for Kennebec county on January 5, 1848. Seth Gay then owned the land, and till his death in March, 1851.

Thomas Gay and Wm. R. Gay were the devisees of his real estate. Thomas Gay died in September, 1852, leaving his lands by will to William R. who thereby became sole owner of the *locus in quo;* and on his death, September 4, 1874, his will gave to Charles Gay a life estate therein.

The railroad was located within the time and substantially according to the description in the charter. It was in process of construction at this place in 1849, and was open for travel in the fall of 1851.

It is conceded that the defendant corporation for the purposes of this case may be regarded as representing the companies which preceded it in the occupation of the road, having succeeded by consolidation, and by lease, to all their rights and liabilities. The case presented, then, is as if the defendant company, having located its road over the premises in dispute in 1848, and built it 1849–1851, had maintained and used it from that time to the date of the writ, without payment of land damages; the land owners until these actions never having pursued any legal remedy to recover them.

It will be observed that the administrator of William R. Gay claims to recover damages for the trespasses alleged from August 25, 1870, to September 4, 1874; that is to say, for that part of the period of six years, immediately preceding the date of the writ, during which his intestate, the sole owner, was living. Charles Gay, to whom a life estate came on the death of William R. claims to recover the damages for trespasses, occurring from the death of William R. to the date of the writ; the trespasses in both instances being alleged as continuing during the whole periods stated. The two actions are included in one report.

The plaintiffs are, or represent, the land owners. Their lands have been taken, or at least the defendants have assumed to take and use them, for public purposes. No compensation has been made. Are the plaintiffs in position to invoke the constitutional guaranty, or have rights been lost by the extraordinary delay in resorting to legal remedy?

It is undoubtedly true that "where a constitutional provision is designed solely for the protection of the property rights of the

citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will."

"The right to compensation, when property is appropriated by the public, may always be waived; and a failure to apply for and have the compensation assessed, when reasonable time and opportunity and a proper tribunal are afforded for the purpose, may well be considered a waiver." Cooley's Const. Lim. 181, 562, and cases.

"When neither the general statutes nor the special act contain any specific limitation in regard to claims upon railway companies for land damages, it is held that the general statute of limitations of actions for claims of a similar character will apply." 1 Redf. Rail. 351.

The general limitation for actions of trespasses on lands in this State is six years. The right of action in cases of this character does not accrue till the expiration of the three years, from location filed, during which the county commissioners have jurisdiction. *Davis* v. *Russell*, 47 Maine, 446. The lapse of that time, three years for the special mode of proceeding, and six years thereafter limited for the common law form of action adopted, without resort to either, we should say would be sufficient evidence of waiver, in any case in which the evidence disclosed nothing to remove the inference naturally to be drawn from the delay. This would be such a neglect to apply for the damages during the whole period of general limitation as, unexplained, "might well be considered a waiver."

It is true that the acts complained of in such case may constitute a continuing trespass, for which, without such waiver, remedy might be sought at any time before a prescriptive right accrued; the maintenance of the obstruction constantly renewing the liability, and the limitation only restricting the damages to six years prior to the date of the writ. But the right to recover the full compensation is complete when the location is filed. A special and adequate method of obtaining an estimate and payment of the damages within three years is provided. When, after that, an action of trespass is brought, and it is found that

the general period of limitation applicable to that action has passed since the acts of trespass began, we think an explanation is required, else the facts imply a waiver of the claim. In this case the three years expired January 5, 1851. Thereupon the liability of the corporation to an action at common law, which had been suspended during the period of the commissioners' jurisdiction, accrued or revived, and might be enforced by any appropriate process; the statutory methods of procedure being cumulative and not exclusive. R. S., c. 51, § 10; *Davis* v. *Russell*, 47 Maine, 446.

Notwithstanding the features of a continuing trespass which the case presents, we think the presumption of waiver arose at the expiration of six years from January 5, 1851, without action brought, unless something appears to show that such delay was consistent with an intention to demand the damage.

But the evidence in this case shows that from the time of the location down to about the date of the writ, there were constant negotiations between the owners of the lot and the companies running the railroad in regard to compensation for the part taken by the location. No application to the commissioners for an estimate of the damages, nor request for the corporation to be required to deposit security therefor, appears to have been made; nor were the damages ever adjusted. But the validity of the plaintiffs' claim was never denied. It was never urged that Seth Gay in his life, nor his successors, had waived it. The acts of the officers of the companies within the scope of their duty and authority, were repeated admissions of liability. No question was ever made except about the amount of the damages, the demands of the land owners in this respect being regarded as exorbitant by the companies.

Under such circumstances, the railroad was a continuing obstruction of the plaintiffs' land without right, in regard to which they only held their action in suspense. The preliminary right of possession, as a step towards acquiring title, became extinct upon unreasonable delay to perfect the proceedings, by an actual payment or tender of compensation for the land taken. For three years to pass without application to the commissioners,

was unreasonable delay, and thereupon the corporation was liable in trespass. *Cushman* v. *Smith*, 34 Maine, 247, 265; *Nichols* v. *S. & K. R. R. Co.* 43 Maine, 356; *Davis* v. *Russell*, *supra*.

During the long delay that has since intervened, the corporation has not been asserting an adverse possession, or an adverse right. They have only been disputing about damages. The owners have not been waiving rights. In the protracted effort to settle the amount of damage by agreement, they have simply delayed to bring a suit against the road for an obstruction which was a continuing trespass upon their lands and the maintenance and use of which, without waiver by the land owners, was a constant renewal of liability. We do not perceive that such a state of facts could ever bar the plaintiffs' action, or afford the defendants any benefit, except what they derive from the limitation of the damages to the period of six years immediately preceding the date of the writ. Without deed, the location never could become legal, except on payment or, waiver of the land-damage, or by prescription. In no other way could the company acquire legal, permanent possession. There was no payment. The evidence removes the presumption of waiver that might arise from the lapse of time. Upon the facts proved, the character of the defendant's occupation was not such as to mature into a prescriptive right.

The plaintiffs are not seeking in these actions to recover the damages which Seth Gay in his life sustained. The administrator claims, and is entitled to recover the damages which accrued to his intestate during his life, and within the period of limitation, by the permanent obstruction of his lands without legal right. Charles Gay is entitled to recover for similar damage to his life-estate during the period stated in his declaration.

Defendants defaulted. Hearing in damages at Nisi Prius.

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

DANIEL MAYBERRY *vs.* EPPS G. H. BRACKETT and others.

Cumberland. Opinion February 12, 1881.

Pleadings. Demurrer. Repleader.

After a demurrer to the defendant's plea in bar is sustained, the court at *nisi prius* has power to allow the defendant to plead anew. The power is to be exercised in the discretion of the presiding justice, and only in the furtherance of justice.

EXCEPTIONS from superior court, Cumberland.

Debt on a bond.

The presiding judge sustained the plaintiff's demurrer (filed at the second term) to defendants' plea in bar, and, against the objections of plaintiff, allowed the defendants to plead anew on payment of costs.

M. P. Frank, for the plaintiff.

In *Endicott* v. *Morgan*, 66 Maine, 456, where the defendant was allowed to plead anew, the question of his right to do so, was not before the court.

There is no question but that at common law, judgment upon a demurrer to a plea, is final. The defendants rely upon R. S., c. 82, § 19. That relates to demurrers to the declaration, filed at the first term. This was a demurrer to the defendants' pleadings, and filed at the second term, and judgment upon it was final. *Poor* v. *E. & N. A. R. R. Co.* 59 Maine, 270; *Stilphen* v. *Stilphen*, 58 Maine, 517; *Calais* v. *Bradford*, 51 Maine, 414; *Shelden* v. *Call*, 55 Maine, 159; *Fryeburg* v. *Brownfield*, 68 Maine, 145.

Clarence Hale, for the defendants.

LIBBEY, J. Two questions are raised by the exceptions.

1. Whether, after the demurrer to the defendants' plea in bar is sustained, the court has power to allow the defendants to plead anew?

2. If such power exists, can it be exercised by the judge at *nisi prius?*

By the common law as administered in this country, courts having common law jurisdiction, have power, after the defendant's plea in bar, or the plaintiff's replication is adjudged bad on demurrer, to allow the defendant to replead, or the plaintiff to reply anew. *Andrews* v. *Beecker*, 1 Johns. Ca. 411; *Seaman* v. *Haskins*, 2 Johns. Ca. 284; *Service* v. *Heermance*, 1 Johns. R. 91; *Furman* v. *Haskins*, 2 Cai. 369; *Miller* v. *Heath*, 7 Cow. 101; *Bolton* v. *Lawrence*, 7 Wend. 461; *Patten* v. *Harris*, 10 Wend. 623; *Perkins* v. *Burbank*, 2 Mass. 81; *Aiken* v. *Sanford*, 5 Mass. 494; *Gerrish* v. *Train*, 3 Pick. 124.

A like power exists to allow a plea or replication to be amended after it has been adjudged bad on demurrer. *Cruger* v. *Cropsey*, 3 Johns. R. 240; *Hartwell* v. *Hemmenway*, 7 Pick. 117; *Hutchinson* v. *Brock*, 11 Mass. 119.

The power is to be exercised in the discretion of the court, and only in furtherance of justice. *Miller* v. *Heath*, 7 Cow. 101; *Patten* v. *Harris*, 10 Wend. 623; *Perkins* v. *Burbank*, 2 Mass. 81.

We think the power may be exercised by the judge at *nisi prius.*

In *Strout* v. *Durham*, 23 Maine, 483, this court held that the judge of the district court had power to award a repleader.

In *Bank* v. *Blake*, 66 Maine, 285, where the demurrer was filed at the second term, it was held, that the defendant could not claim leave to plead anew as matter of legal right, that the motion was addressed to the discretion of the presiding justice, and that to the exercise of that discretion, exceptions did not lie.

In equity, when good cause is shown, the court, at *nisi prius*, has power to allow a repleader upon terms. *P. S. & P. R. R. Co* v. *B. & M. R. R. Co.* 65 Maine, 122.

In *Gerrish* v. *Train*, 3 Pick. 124, a repleader was ordered by the Chief Justice of the C. C. P. and the court, on exceptions, affirmed the order.

The motion for leave to plead anew, is addressed to the discretion of the court. It is not a matter of legal right. It must

be made at the term when the demurrer is passed upon, and before exceptions. *Furbish* v. *Robertson*, 67 Maine, 35. It does not raise a question of law to go to the law court, as matter of course, under R. S., c. 77, § 13. The conclusion to which we have come, is consistent with the provisions of R. S., c. 82, § 19. *Endicott* v. *Morgan*, 66 Maine, 456.

Exceptions overruled.

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

ASA LOW, Administrator of the estate of HENRY S. LONG,

vs.

WILLIAM F. HANSON.

York. Opinion March 2, 1881.

Rules of U. S. Treasury. Judicial knowledge. U. S. Navy — arrears of pay due deceased sailor.

The rules adopted by the treasury department of the United States government for the payment of arrears of pay due to deceased officers, seamen and mariners in the United States navy, have the force of law, and courts will take judicial knowledge of them.

Money paid in accordance with such rules, to the guardian of the minor children of a deceased officer, seaman or mariner, belongs to such minors, and not to the administrator on the estate of the deceased.

On agreed statement of facts.

The opinion states the case.

Asa Low, for the plaintiff.

R. P. Tapley, for the defendant.

LIBBEY, J. The question involved in this case is, whether the money received by the defendant from the government of the United States, as guardian of the minor children of Henry S. Long, deceased, legally belongs to said children, and is properly held by the defendant as their guardian; or to the estate of said Long and should go into the hands of the plaintiff as administrator of said estate, to be administered by him.

Long died in the naval service of the United States, February 28, 1878, where he was serving as first class fireman, leaving two minor children, but no widow. The money for which this action is brought, was paid to the defendant, as guardian, as the balance due to said Long, at the time of his death, for services previously rendered.

The plaintiff, as administrator on his estate, first applied to the United States government for pay; and payment to him in his said capacity, was refused, as the parties agree, "because the same under the rules of the government, in said case, was to be paid only to the minor children of the deceased."

By R. S., U. S. § 161, "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property appertaining to it."

Rules and regulations of one of the departments, established in accordance with the statute, have the force of law. *Gratiot* v. *United States*, 4 How. 80; *Ex Parte Reed*, 100 U. S. 13; and courts take judicial notice of them.

By the rules adopted by the treasury department, which are made a part of the case, "Payment of balances due to deceased officers, seamen, and mariners, will be made to administrators, who are heirs, or appointed with the consent of the heirs; that is, to the widow, child, or children, father, mother, brother, or sister, in their order of preference, and lastly to the heirs general." "If the heirs be minors, guardians should be duly appointed."

This rule of the department is reasonable and proper, not inconsistent with law, tends to encourage enlistments, and provides, to some extent, for the wants of the widows and minor children of those who die in the service. It is the same rule established by congress for payment for the personal effects of seamen and mariners, when the vessel in which they are serving is lost. R. S., U. S. § § 288 and 289. It had the force of law and became a part of the contract of enlistment, between the

United States and Long, and by it, the government agreed with him, that, if he should die in the service, it would pay the arrears of his pay for his services, to his minor children. *Reed* v. *Reed*, 53 Maine, 527. It paid to the defendant as guardian for those children, according to its undertaking, and because they were legally entitled to it; and upon those grounds, the defendant received it. The rule under which the money was paid to the guardian, is the paramount law by which the rights of the parties are to be determined; and by it, the money belongs to the minor children of Long, and not to the plaintiff, as administrator of his estate. The case is the same, in principle, as *Shirley* v. *Walker*, 31 Maine, 541; and *Reed* v. *Reed*, *supra*.

Judgment for the defendant.

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

ALBERT H. RICKER *vs.* CHARLES E. JOY and dwelling house, S. P. HUNTRESS, claimant.

York. Opinion March 3, 1881.

Evidence. Certified copy from town clerk's record. Lien claim. Nonsuit. Exceptions. R. S., c. 91, § 29. Practice.

A duly certified copy of the record of a lien claim filed and recorded by one who performs labor or furnishes materials for the erection or repair of a building, as required by R. S., c. 91, § 29, is legally admissible in evidence in an action to enforce the lien.

It is a sufficient compliance with the requirement of the statute, in the statement of a lien claim, filed in the town clerk's office, if it give the amount due for which the lien is claimed, without stating the items making up such amount.

A motion for a nonsuit after the evidence is all out, on both sides, is addressed to the discretion of the judge and to his refusal exceptions do not lie.

Where the exception is to the ruling of the judge upon all the evidence in the case the whole evidence must be made a part of the bill of exceptions.

ON EXCEPTIONS.

Assumpsit to enforce a lien for materials.

The case is stated in the opinion.

The following is the statement of the lien claim filed in the town clerk's office:

"State of Maine.

"York, ss. I, Albert H. Ricker, on oath depose and say that there is due me from Charles E. Joy the sum of one hundred and nineteen dollars and forty cents ($\$119\frac{40}{100}$) for labor and materials furnished for and which entered into the dwelling house of Simeon P. Huntress, situated on land owned by Simeon P. Huntress on the easterly side of Portland street near the 'Corner,' so called, in South Berwick village, and owned by said Huntress; that I claim a lien upon said land and dwelling house to the extent of the debt aforesaid."

ALBERT H. RICKER."

"Subscribed and sworn to this third day of January, 1879, before me,

G. C. Yeaton, Justice of the Peace."

G. C. Yeaton, for the plaintiff, cited: 1 Greenl. Ev. 91, 484; *Oakes* v. *Hill*, 14 Pick. 442; *Commonwealth* v. *Chase*, 6 Cush. 248; R. S., c. 91, § 29; *Fairbanks* v. *Davis*, 50 Vt. 251; *Wilson* v. *Hopkins*, 51 Ind. 231; *Tarr* v. *Smith*, 68 Maine, 97; *Stewart* v. *Belfast Foundry Co.* 69 Maine, 17; *Hatheway* v. *Reed*, 127 Mass. 136; *Reed* v. *Acton*, 120 Mass. 130; Ewell's Evans, Agency, 379, 402; *Colburn* v. *Phillips*, 13 Gray, 64; *Burr* v. *Wilcox*, 13 Allen, 269; *Boody* v. *Goddard*, 57 Maine, 602; *Carleton* v. *Lewis*, 67 Maine, 76.

Ira T. Drew and *Wells and Burleigh* for the claimant, contended that Ricker was a clerk or agent and could not sue in his own name. Story on Agency, § 406; *Garland* v. *Reynolds*, 20 Maine, 45.

The copy of the clerk's record was inadmissible. It was not the best evidence. A lien claim should be proved the same as a mortgage, by the original paper. *State* v. *Gray*, 39 Maine, 353.

The statement of the lien claim filed in the clerk's office is defective. The records should show the whole truth relating to the claim—its items, nature, amount, date, from whom due and to whom due.

LIBBEY, J. The claimant's first exception is to the admission of a duly certified copy of the record of the town, of the plaintiff's claim filed in the town clerk's office as required by R. S., c. 91, § 29.

The object of the statute requirement, that the person claiming the lien shall file a statement of his claim in the office of the clerk of the town where the building is situated, and that it shall be recorded, is to give notice to the owner of the property, and to all persons having occasion to acquire any interest in it, of the lien claimed.

When the statement required by the statute is recorded, the record becomes the notice, and we think such record, or a duly certified copy of it is competent evidence of the filing and recording of the claim. It is similar, in principle, to the record of a notice of foreclosure of a mortgage, or to the record of an attachment of real estate.

The second exception is to the sufficiency of the statement of claim filed by the plaintiff. We think it a sufficient compliance with the provisions of the statute. It states the amount due the plaintiff for which he claims the lien; that it is due for labor and materials furnished for and which entered into the building; a sufficient description of the property; the name of the owner; and it was signed and sworn to by the plaintiff, and filed and recorded.

It is claimed by the counsel for the claimant that the statute, properly construed, requires that the statement filed should contain a detailed statement of the items of the claim. We think it does not require such a statement. It requires only a statement of the amount due for which the lien is claimed.

The third exception is to the refusal of the presiding judge to order a nonsuit. A motion for a nonsuit after the evidence is all out, is addressed to the discretion of the judge, and to his refusal exceptions do not lie. *Boody* v. *Goddard*, 57 Maine, 602; *Carleton* v. *Lewis*, 67 Maine, 76.

And for another reason the exception upon this point cannot be sustained. It does not contain all the evidence in the case. Where the exception is to the ruling of the judge upon all the

evidence in the case, the whole evidence must be made a part of the exception.

Exceptions overruled.

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

HENRY Q. SAMPSON and another, in equity,

vs.

HATHERLY RANDALL and others.

Sagadahoc. Opinion March 4, 1881.

Will. Income for life, and perpetual — real estate, personal estate. Practice.

The gift of the perpetual income of real estate is a gift of the fee; a gift of the income for life is a gift of a life estate.

The same rule applies to personal estate, and the donee for life has the actual possession of the property, unless the will otherwise provides.

The court may require security from the donee for life, that the property shall be forthcoming, intact, at the expiration of the life estate, in a case of real danger.

BILL IN EQUITY to obtain the construction of the following will:

"Be it hereby known that I, Albion Q. Randall, of Bowdoinham, county of Sagadahoc and State of Maine, being of sound mind, do hereby make my last will and testament.

"Unto my mother, Lucy Randall, of Bowdoinham, I will and bequeathe the income of one-third of my property during her natural life.

"Unto my sister, Sarah F. Mariner, I will and bequeathe the income of one-sixth of my property during her natural life and children forever. But should she have no children, then the money will go as described.

"Unto my sister, Margaret White, of Richmond, I will and bequeathe the income of one-sixth of my property during her natural life.

"Unto the children of Samuel W. Randall, I will and bequeathe the income of one-tenth, in equal shares, to each during their

natural lives. To the towns of Bowdoinham and Richmond I will and bequeathe the perpetual income of one-tenth to each, to be used by the selectmen in providing for poor aged people, as they in their kindness may from year to year devise.

"To the son of Rewel, one hundred dollars I will and bequeathe in consideration of their naming him for me.

"Unto Louisa Small, daughter of Elizabeth Temple, I will and bequeathe the income of the remainder, during her natural life —the remainder being nearly one-thirtieth—at her decease the same to her child or children, and so on. At the decease of my mother, I will and bequeathe the income of one-sixth, being one-half whose income was bequeathed my mother, unto Harriet C. Ring, of Lubec, Maine, during her natural life. I will and bequeathe the income of the other sixth to Samuel W. Randall during his natural life, and at his death the income is to be divided in equal shares—to his children and theirs—perpetual. At the decease of Harriet C. Ring, if her mother be living, she shall receive the same during her natural life. At the decease of both, the children of Rewell and Merrilla Webber, of Richmond, shall have the same income during their natural lives and their children in perpeal.

"Should in any of the contingent remainders herein named—there be any doubt as to the disposition of said remainder, it is my will that the general course of the law be followed.

"I hereby appoint Henry Q. Sampson and Samuel W. Randall, both of Bowdoinham, Maine, to be my lawful administrators.

SEAL. A. Q. RANDALL."

"Witnesses: Edward P. Bond.
Albert H. Shedd.
Leigh R. Worcester.

Executed in Boston, December 21, 1877."

J. W. Spaulding and *F. J. Buker*, for the executors and for Samuel W. Randall, Ellen R. Randall; Samuel W. Randall as guardian *ad litem* of Charles B. Randall, Annette A. Randall and Humphrey P. Randall; Reuel S. Webber, guardian *ad litem* of Quincy R. Webber and Dexter G. Webber; and for the town of Richmond.

W. T. Hall, for Hatherly Randall, Elizabeth Temple, Margaret White and Louisa Small.

E. J. Millay, for Lucy Randall, Sarah F. Mariner and the town of Bowdoinham.

Powers and Powers, for Mrs. J. Ring and Harriet C. Ring.

WALTON, J. This is a suit in equity praying for the construction of the will of Albion Q. Randall. The facts stated in the bill are to be taken as true. The first question is whether all the provisions of the will can be sustained. They cannot. The testator has in some of the provisions attempted to create perpetuities. These provisions must of course be rejected. All the other provisions may be sustained. The life estates which are certain to vest within a life or lives in being, and twenty-one years and the period of gestation thereafter, are valid. What will become of the testator's property when all these life estates shall end is a question which in no way affects the executors and will not now be considered. The facts stated in the bill are not sufficiently full to enable us to do so. The application of a few well settled rules of law will determine the rights of the parties now before the court, and relieve the executors of all doubt as to the course to be pursued by them.

I. Of the real estate. It is a settled rule of law that a gift of the income of real estate is a gift of the real estate itself. A gift of the income for life is the gift of a life estate. A gift of the perpetual income is a gift of the fee. The effect of this rule upon the will in question is obvious. Those to whom the testator has given the income for life will take a life estate, and those to whom he has given the perpetual income will take a fee-simple estate. The towns of Bowdoinham and Richmond will take fee-simple estates in trust for the purpose named in the will as tenants in common with the other owners. This is all which it is necessary to say of the testator's real estate. In support of the rule here stated, see *Andrews* v. *Boyd*, 5 Maine, 199; *Butterfield* v. *Haskins*, 33 Maine, 392; *Earl* v. *Rowe*, 35 Maine, 414.

II. Of the personal estate. It is the duty of the executors to reduce the personal assets to money, and, after the payment of

the debts, if any, and the costs of administration, to distribute the residue among the immediate donees in the proportions named in the will. True, the testator has given the income only to the immediate donees, except a small legacy of a hundred dollars to a boy in consideration of his having been named for him. But the same rule applies to personal estate as to real estate, namely, the gift of the income is in contemplation of law equivalent to a gift of the property itself. If the gift is of the income for life the donee takes a life estate; and if the gift is of the perpetual income, then the donee becomes the absolute owner of the property. So held in *Stone* v. *North*, 41 Maine, 265.

And the rule adopted in this State is to allow the donee for life to have the actual possession of the property, unless the will otherwise provides. *Starr* v. *McEwan*, 69 Maine, 334; *Warren* v. *Webb*, 68 Maine, 133.

It is said to have been at one time held that there could be no gift over of personal property; that a gift for life made the donee the absolute owner of the property. But it is now settled both in England and in this country that personal property may be limited over by way of remainder, after the expiration of a life interest. And it was formerly held that the remainder-man might exact security from the donee for life that the property should be forthcoming intact at the expiration of the life estate. But that practice, says Chancellor Kent, has been overruled, and the modern practice is to require nothing more than an inventory of the property, although the court may still require security in a case of real danger and where the relations of the parties are such as to render such a course expedient. 2 Kent's Com. 454. We think no security should be required in this case, except a receipt, to be filed in the probate office when the executors settle their final account. If the donees for life can have the use and possession of their several shares of the testator's estate, it will be a substantial benefit to them; otherwise probably of very little benefit. If testators do not desire to have the remainders provided for in their wills thus endangered they can easily guard against the danger by the appointment of trustees, and declaring

that the income only shall be paid to the donees for life. Most wills creating remainders contain such provisions. The will now under consideration contains no such provision.

The court is asked to ascertain and decree who the testator meant by the "son of Rewel," to whom he bequeathed a hundred dollars. There is no evidence before the court on which to found such a decree. The executors say they are informed and believe that Quincy Randall Webber, is the person intended; but mere information and belief is not evidence on which the court can act. But if no one else appears to claim the legacy, no reason is perceived why the executors may not safely pay it to the person named; or, if he is a minor, to his guardian.

This is an amicable suit. All the parties appear to be equally desirous of obtaining the judgment of the court. No costs are, therefore, allowed to either of them. The executors may charge such expenses as have been necessarily incurred by them in the prosecution of the suit in their administration account, and the judge of probate will allow for such items and such amounts as he deems just and reasonable.

Bill sustained, and a decree may be entered in accordance with the principles herein stated.

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

CHARLES T. GRAY *vs.* MILES SIDELINGER.

Knox. Opinion March 5, 1881.

Pleadings. Declaration.

In personal actions the pleadings must allege the time, that is, the day, month, and year, when each traversable fact occurred.

ON EXCEPTIONS to the ruling of the court in overruling the defendant's demurrer.

The opinion states the case.

H. Bliss, Jr. for the plaintiff.

There are two counts in the writ; if either are good the demurrer cannot be sustained. *Blanchard* v. *Hoxie*, 34 Maine, 377; *Concord* v. *Delaney*, 56 Maine, 201.

It may have been better practice for the plaintiff to have more elaborately set forth his cause of action, but, as the person and case can be rightly understood, it is sufficient. *Wood* v. *Decoster*, 66 Maine, 544.

Rice and Hall, for the defendant.

WALTON, J. This is an action to recover damages for an alleged libel upon the plaintiff. The action is before the law court on demurrer to the plaintiff's declaration. The plaintiff says that the defendant wrote to the commissioner of pensions representing that the plaintiff was not injured in the service of the United States, whereby he was prevented from obtaining a pension; but he has omitted to state when the supposed letter was written, or when it was sent to the commissioner; and this omission is urged as one ground for sustaining the demurrer. "In personal actions," says Mr. Stephen, "the pleadings must allege the time, that is, the day, month, and year, when each traversable fact occurred." Stephen on Pleading, 292. And such is the adjudicated law of this State. *Platt* v. *Jones*, 59 Maine, 232; *Gilmore* v. *Mathews*, 67 Maine, 517. And see 1 Chitty, 257.

Exceptions sustained.

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

JENETTE CARLTON *vs.* JOSEPH CARLTON.

Kennebec. Opinion March 5, 1881.

Married women. Divorce.

A woman who is divorced can maintain an action against her former husband for personal services performed for him before their marriage.

ON EXCEPTIONS from superior court, Kennebec.

Assumpsit for personal services of plaintiff, performed prior to the marriage of the plaintiff with defendant.

Action commenced subsequent to a divorce decreed upon libel of the wife. Verdict for plaintiff.

The presiding judge instructed the jury, that "if any just claim existed in favor of this plaintiff prior to the date of this marriage, if she then had any right to maintain an action to recover for her services for which she has not been paid, at most the marriage only suspended the remedy or right of action. After the bands of matrimony were dissolved the disability arising from the marital relations necessarily ceased, the right which she had before marriage was revived, and this action can be maintained now, precisely as it might have been maintained before the marriage was contracted." To this instruction the defendant excepted.

Pillsbury and Potter, for the plaintiff, cited: *Webster* v. *Webster*, 58 Maine, 139; *Blake* v. *Blake*, 64 Maine, 177; *Tunks* v. *Grover*, 57 Maine, 586.

S. and L. Titcomb, for the defendant.

Marriage is a release at law of all contracts existing between husband and wife before marriage. *Boatwight* v. *Wingate*, Treadw. (S. C.) 521; *Smiley* v. *Smiley*, 18 Ohio St. 543; *Abbott* v. *Winchester*, 105 Mass. 115.

Revised Statutes, c. 61, § 3 only authorizes a married woman to maintain an action against a person other than her husband. *Crowther* v. *Crowther*, 55 Maine, 358; see *Abbott* v. *Abbott*, 67 Maine, 306; *Pittman* v. *Pittman*, 4 Oreg. 298.

WALTON, J. The question is whether a woman who is divorced can maintain an action against her former husband for personal services performed for him before their marriage. We think she can. "A woman, having property, is not deprived of any part of it by her marriage." Such is the statute law of this State. R. S., c. 61, § 2. The word "property" includes choses in action as well as choses in possession. It includes money due as well as money possessed. It includes money due for personal services as well as money due for any thing else. In its broadest sense it includes every thing which goes to make up one's wealth or estate. We cannot doubt that this is the sense in which it is used in this statute. It follows, therefore, that a woman, by her marriage, can no more be deprived of money due to her than she can of money actually possessed by her, of money due from the man she marries no more than of money due from any one else. It may be that while the marriage relation subsists no action of any kind can be maintained by her against her husband. But when this relation ceases, this impediment is removed, and no reason is perceived why she can not then sue him as well as any one else. We think she can. *Webster* v. *Webster*, 58 Maine, 139; *Blake* v. *Blake*, 64 Maine, 177.

Exceptions overruled.
Judgment on the verdict.

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

THOMAS F. MILLETT *vs.* FANNY S. MILLETT, Administratrix on the estate of THOMAS MILLETT.

Somerset. Opinion March 5, 1881.

Executor and administrator — claim against. Demand for payment. Stat. 1872, c. 85.

The claim against an executor or administrator presented as required by the stat. 1872, c. 85, need not be signed by the party making it, and the demand of payment need not be in writing.

The claim must be in writing but the demand of payment may be oral.

ON AGREED STATEMENT OF FACTS.

More than thirty days before suit was brought the plaintiff's attorney delivered to the defendant a bill, headed — "Pittsfield, January 25th, 1876 — Estate of Thomas Millett to T. F. Millett, Dr." and containing sundry items all in the handwriting of the plaintiff's attorney and demanded payment of the amount claimed in the bill as attorney for the plaintiff. The plaintiff was not present, and the paper was not signed.

If this was a sufficient presenting of claim and demand of payment the action is to stand for trial; if insufficient, judgment to be entered for defendant.

J. B. Peakes, for the plaintiff.

D. D. Stewart, for the defendant.

WALTON, J. The act of 1872, c. 85, — which declares that "no action against an executor or administrator, ... on a claim against the estate, shall be maintained, . . . unless such claim is first presented in writing, and payment demanded, at least thirty days before the action is commenced, and within two years after notice is given by him of his appointment,"— being in derogation of the common law, must be strictly construed. Its burdens must not be extended by implication, unless the implication is clear and unmistakable. It will be noticed that the statute does not in express terms require the "claim" to be signed by the party making it. We think it does not by necessary implication. We

therefore hold that such claim need not be signed by the party making it. Nor does the statute require that the demand of payment shall be in writing. The "claim" must be in writing, but the demand of payment may be oral. We think the "claim" in this case was legal in form, and that payment thereof was legally demanded. As agreed by the parties,

The action is to stand for trial.

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

ALBERT H. DUREN and another *vs.* JAMES C. GAGE, and trustees.

Somerset. Opinion March 5, 1881.

Wood and bark—measurement of. R. S., c. 41, § 2.

R. S., c. 41, § 2, requiring fire wood and bark to be measured by a sworn measurer before it is sold and delivered, unless otherwise agreed to by the purchaser, does not apply to trimmings of lumber consisting of pieces from one to two inches to one to two feet long, when sold under a contract with the purchaser to take all that should be made at the seller's mill at fifty cents a cart-load.

ON EXCEPTIONS.

Assumpsit for seventy-two loads of wood at fifty cents a load.

The defendant, who was engaged in running a stationary engine, made a bargain with the plaintiffs to have all the trimmings from the lumber sawed at plaintiffs' mill to use as fuel for the engine. The trimmings consisted of pieces of wood and bark of different small sizes from one or two inches up to from one to two feet in length, and was known as refuse wood. The bargain was that the defendant was to pay therefor fifty cents a cart-load. Nothing was said about any survey of the same by either of the parties.

The court ruled that the statute did not apply to wood of this description thus sold and received, so as to prevent a recovery by the plaintiffs.

Brown & Howard, for the plaintiffs.

S. S. Chapman, for the defendant.

WALTON, J. The R. S., c. 41, § 2, requires fire wood and bark to be measured by a sworn measurer before it is sold and delivered, unless otherwise agreed to by the purchaser. The question is whether the statute applies to the trimmings of lumber, consisting of pieces from one or two inches to one or two feet long, when sold under a contract with the purchaser to take all that should be made at the seller's mill at fifty cents a cart-load. We think not. Such a contract clearly implies an agreement on the part of the buyer to take the wood without the statute survey. It is purchased by the cart-load and not by the cord. And, although the term used in the section cited is "fire wood," we cannot doubt that it means cord-wood of the usual length, and the dimensions of which are described in the preceding section of the statute. It never could have been the intention of the legislature that chips or the trimmings of lumber, which is sold by the load and not by the cord, should be surveyed. The judge so ruled at *nisi prius*, and we think the ruling was correct.

Exceptions overruled.

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

J. J. CARR and others *vs.* REBECCA C. BARTLETT.

Waldo. Opinion March 7, 1881.

Contract. Subscriptions in voluntary associations.

The defendant, with others, signed an agreement to enter into an association for the purpose of erecting and operating a cheese factory, agreeing severally and individually to pay their regularly appointed building committee the sums set against their names; the building committee was chosen from the subscribers; the associates paid in their subscriptions; the committee contracted for the erection of the building; the money was expended and the common enterprise established, without any disclaimer or dissent of the defendant.

Held, 1. That the agreement was not binding while it remained wholly unexecuted; it was then inchoate and without consideration.

2. That it became binding when liabilities were assumed and action taken under it; that a consideration was supplied thereby.

3. That an action for defendant's subscription may be maintained in the name of the building committee; the agreement makes them payees or promisees by description.

4. That it is not a defence to the action, that the associates were afterwards incorporated for the purpose of carrying on the enterprise, whether the defendant was included or excluded, among the persons incorporated. If injured by the action of her associates, she has a remedy by action or suit in equity.

5. That it is not a defence to this action, that the associates voted to release the defendant's subscription, the vote being without consideration, and having been reconsidered and annulled before acted upon.

ON REPORT.

Assumpsit by the building committee of a cheese factory association in Montville to recover a subscription of twenty-five dollars made by the defendant upon the following agreement:

"We, the undersigned, residents of the town of Montville and vicinity, hereby agree to enter into association for the purpose of erecting and operating a cheese factory, to be located within one-half mile of McFarland's corner in said town, and we severally and individually bind ourselves by these presents, on or before the first day of May, 1874, to pay to our regularly appointed building committee, the several sums set opposite our names, for the purpose of building and furnishing said factory.

"And it is understood and agreed that when said factory shall have been completed and opened for work, each member of the association is to patronize it by delivering milk for one year in proportion to the number of cows set opposite our names.

"The manufactured product of said milk is to be sold by the regularly appointed agent of the association, and each member to receive his share of the sales in proportion to the quantity of milk delivered less than the cost of manufacturing, etc. the above not to be binding unless the sum of $2000 is subscribed."

Signed by the defendant and others, the defendant putting down $25, and the total subscriptions being $2125. The factory was erected within the specified limits.

The court to render such judgment as the law and evidence require.

Wayland Knowlton, for the plaintiffs, cited: *Babcock* v. *Wilson*, 17 Maine, 372; *Appleton* v. *Chase*, 19 Maine, 74; 1 Bouv. Law Dict. 331, Item 10; Story on Contr. § § 447, 449, 453; *Farmington Academy* v. *Allen*, 14 Mass. 172; *K. & P. R. R. Co.* v. *Jarvis*, 34 Maine, 360; 4 U. S. Dig. 424, § 74.

J. A. Lamson, for the defendant. Contended that this action could not be maintained by these plaintiffs, if at all; that defendant's subscription was without consideration and that nothing was done under the agreement, but all the business was done after incorporating, under charter from the legislature, granted in 1874. *Foxcroft Academy* v. *Favor*, 4 Maine, 382; *Richmond Factory Association* v. *Clark*, 61 Maine, 351.

And if the defendant was ever liable to the corporation she had been released by a vote of the stockholders.

PETERS, J. The defendant, with others, signed an agreement of association containing the following clauses: "We, the undersigned, residents of the town of Montville and vicinity, hereby agree to enter into association for the purpose of erecting and operating a cheese factory. . . . and we severally and individually bind ourselves, by these presents, on or before the first day of May, 1874, to pay to our regularly appointed building committee the several sums set opposite our names for the

purpose of building and furnishing said factory. . . . The above not to be binding unless the sum of $2000 is subscribed."

This undertaking, while it remained inchoate and incomplete, was not binding upon the defendant. It was without consideration. It was not a sufficient consideration that others joined in the same promise, relying upon her promise. *Foxcroft Academy* v. *Favor*, 4 Maine, 382; *Cottage St. E. Church* v. *Kendall*, 121 Mass. 528. The latter case is the subject of an instructive note, citing and discussing a mass of authorities, in the Amer. Law Reg. (Phila.) Sept. No. 1877.

At this stage of the undertaking the defendant could have withdrawn from it, or she could continue a party until the same became a completed agreement and binding upon her. She took the latter course. The subscription became completed. Her associates paid in their subscriptions, made purchases and entered into contracts necessary for the consummation of the common enterprise. She is presumed to have assented to all that was done. Those facts furnished a sufficient consideration for the liability which by her subscription she assumed. The authorities are agreed upon this point, as the cases cited and those to be cited clearly show.

It is denied that the plaintiffs are competent parties to sue for the subscription. They are the regularly appointed building committee of the subscribers. They are themselves subscribers. In their name for the benefit of the associates they contracted for the erection of the factory. Under the agreement, they are the payees or promisees by description, in whose names the subscriptions are collectible for the benefit of all concerned. They are the association by representation. Therefore the objection is avoided, that sometimes is presented in this class of contracts, that the mutual promises of subscribers do not afford a consideration for a contract with a third person, for a want of privity between the subscribers and such person. *Thompson* v. *Page*, 1 Metc. 565; *Ives* v. *Sterling*, 6 Metc. 310; *Fisher* v. *Ellis*, 3 Pick. 323; *Watkins* v. *Eames*, 9 Cush. 537; *Athol Music Hall* v. *Carey*, 116 Mass. 471; *Curry* v. *Rogers*, 21 N. H. 247. There can be no valid objection to a suit in the name of the plaintiffs for the benefit of themselves and associates.

It is further objected, that the property and business became absorbed into a corporation subsequently formed. But this was after the defendant's liability became fixed. It seems that all the subscribers were incorporated into a company with a corporate name, without any change in the purposes of the association or adding any liabilities to those before assumed. It gave them little more than "a local habitation and a name." Whether the defendant became thereby legally a member of the incorporated body or not, it is not a reason why her subscription cannot be enforced by the committee to whom the payment by the agreement was to be made. No right can be taken from her. For any loss or injury caused by others she can commence an action or resort to a remedy in equity. *Thompson* v. *Page*, *supra*; *Fisher* v. *Ellis*, *supra*; *Mirick* v. *French*, 2 Gray, 420; *Machias Hotel Co.* v. *Coyle*, 35 Maine, 405.

The corporation voted to release the defendant from the payment of her subscription. The vote was without any consideration, and before the vote was acted upon it was reconsidered and annulled. That affords no defence to the action.

Defendant defaulted.

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

GEORGE JEWELL *vs.* ATWOOD W. HARDING.

Waldo. Opinion March 7, 1881.

Deed, equitable and legal. Real actions. Mesne profits. Demand.

An instrument purporting to be a deed, not under seal, will not operate as a declaration of a dry, naked, or passive trust, such as will prevent a recovery for possession in an action at law by the trustee against the *cestui que trust.*

Such an instrument is an equitable but not a legal deed. In equity the seller can be made to reform the deed unless sufficient cause is shown to excuse it.

In a real action by the equitable grantor against his grantee, *mesne* profits are not recoverable, the grantee being in possession, by the permission of the grantor, without any agreement or expectation to pay rent.

The action for possession is maintainable without a demand for possession. Commencing the suit is demand enough.

ON motion to set aside the verdict and exceptions.

At the trial the defendant relied upon a deed from the plaintiff to him of the demanded premises, executed and delivered December 9, 1873. The writ was dated December 21, 1878. The plaintiff denied that the instrument was his deed, because, he said, at the time of the delivery there was no seal upon it. The deed was of the ordinary form of a warranty deed.

The presiding justice instructed the jury as follows:

"The question for you to determine is whether this deed, when it was delivered to the defendant, — the first deed to Harding,— had upon it a seal. If it had, the plaintiff cannot recover. If it had not, why then, for the purpose of this case, I instruct you, the plaintiff may recover without notice. Then, if he recovers, inasmuch as he is entitled to rents and profits, they might as well be settled now, and for the purpose of this case I instruct you, he is entitled to the back rents, that is, during these six years."

The verdict was for the plaintiff and the damages were assessed at $448.80.

The defendant moved to set aside the verdict and filed exceptions to the foregoing instructions of the presiding justice, and his exceptions state that he had commenced proceedings in equity

against the plaintiff and his wife to compel them to seal the deed above referred to.

Don A. H. Powers, for the plaintiff, cited: 3 Wash. R. P. 4th ed. 472.

The provisions of R. S., c. 104, § 23, do not apply to this case. Here there was no agreement upon which assumpsit for use and occupation can be maintained, and the plaintiff is deprived of a remedy if he cannot recover in this action. *Larrabee* v. *Lumbert*, 36 Maine, 440.

R. W. Rogers, for the defendant.

The deed for want of seal did not carry the legal title to the land but it did the right of possession. *Clark* v. *Gellerson*, 20 Maine, 18. In equity he is the owner of the land itself.

The contract and the acts of the parties in pursuance of it vested an equitable title in the defendant and the legal title remained in the plaintiff in trust for him. An instrument which is in form a deed but without a seal is a sufficient declaration of a trust. *Linscott* v. *Buck*, 33 Maine, 530; *Bragg* v. *Paulk*, 42 Maine, 502; *Blake* v. *Collins*, 69 Maine, 156; *Perkins* v. *Nichols*, 11 Allen, 542; 2 Wash. R. P. 3d ed. 438, 470; Perry on Trusts, § § 95, 168, 240; *Faxon* v. *Folvey*, 110 Mass. 392; 2 Bouv. L. Dict. 615. And where the trust is a mere naked, passive one the trustee cannot maintain a writ of entry against the *cestui que trust* [citing cases stated in the opinion.]

In Mississippi and Iowa it has been decided under similar circumstances that an action like the one at bar cannot be maintained. *Tibeau* v. *Tibeau*, 19 Mo. 78; *Warren* v. *Crew*, 2 Iowa, 315.

PETERS, J. The defendant claims title to the land in question by an instrument purporting to be a deed, not under seal.

He contends that the instrument contains a declaration of a dry, naked or passive trust, such as will prevent a recovery for possession by the trustee against the *cestui que trust*. He relies upon the following cases: *Warren* v. *Ireland*, 29 Maine, 62; *Sawyer* v. *Skowhegan*, 57 Maine, 500; *French* v. *Patterson*, 61 Maine, 203. *Blake* v. *Collins*, 69 Maine, 156. We do not

assent to the proposition. The doctrine of the cases cited is not admitted by many courts. It should be cautiously applied by ourselves. There was no design to declare such a trust. It was merely an attempt to transfer a title by an uncompleted deed. The purchaser has, at law, no right to possess and enjoy the property longer than the seller permits. If the point prevails, it virtually abolishes the distinction between sealed and unsealed instruments. It was held in *McLaughlin* v. *Randall*, 66 Maine, 226, that land in this State cannot be conveyed by a written instrument without a seal. The reason for requiring seals to deeds is forcibly stated in an early case in New York, thus: "This venerable custom of sealing, is a relic of ancient wisdom, and is not without its real use at this day. There is yet some degree of solemnity in this form of conveyance. A seal attracts attention, and excites caution in illiterate persons, and thereby operates as a security against fraud. If a man's freehold might be conveyed by a mere note in writing, he might more easily be imposed on, by procuring his signature to such a conveyance, when he really supposed he was signing a receipt, a promissory note, or a mere letter." Other reasons could be added. Probably less errors occur in writing deeds than in other agreements, for the reason that the forms are so much followed and well known. *Jackson* v. *Wood*, 12 Johns. 73.

The defendant is not without remedy. He has an equitable right. The instrument he claims under is in equity a deed. In equity, the seller can be made to reform the deed, unless sufficient cause can be shown to excuse it. *Wadsworth* v. *Wendell*, 5 Johns. Ch. 224. Jones Mort. (2d ed.) § 166, and cases there cited.

The defendant, however, was not liable for mesne profits before he had notice by suit or otherwise to quit. He went into possession under an instrument which the parties at the time supposed to be a valid deed. It is a general rule, that where ejectment lies mesne profits are recoverable. The rule does not always apply. There is a class of cases where a person is in possession of land by the consent or sufferance of the owner, who may at any moment enter and oust him; but until that is

done the owner cannot have trespass for the occupation. The defendant went into possession by consent, without agreement or expectation to pay rent. In one sense he became a disseizor. *Jewett* v. *Hussey*, 70 Maine, 433. But the owner was disseized by his own consent. He put the defendant into possession, and went himself voluntarily out of possession. There was no attempt to oust the defendant before the date of the writ. Mesne profits accruing after the date of the writ cannot be recovered in this action. *Larrabee* v. *Lumbert*, 36 Maine, 440. It is every where held that a claim for mesne profits is subject to equitable defenses. There are both equitable and technical reasons why they are not recoverable in this suit. *Larrabee* v. *Lumbert*, 34 Maine, 79; *Patterson* v. *Stoddard*, 47 Maine, 355; *Shaw* v. *Mussey*, 48 Maine, 247.

No notice or demand prior to the action was necessary. Commencing the action is demand enough.

Motion overruled. Exceptions sustained, so far as to allow judgment on the verdict for possession, without any recovery of mesne profits.

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

WILLIAM L. HAYFORD

vs.

OSCAR P. CUNNINGHAM, Administrator of the estate of FREDERICK J. PARKER, deceased, and Schooner LADY OF THE OCEAN

John Holyoke *et al.*	*vs.*	Same.
Francis G. Genn	*vs.*	Same.
Arthur D. Snowman	*vs.*	Same.
David Brown	*vs.*	Same.
Nahum T. Hill	*vs.*	Same.
William H. Genn *et al.*	*vs.*	Same.
Oliver P. Dorr	*vs.*	Same.
Austin Saunders	*vs.*	Same.
Sewall B. Swazey *et al.*	*vs.*	Same.
Thomas Trim	*vs.*	Same.
William W. Parker	*vs.*	Same.
Frederick Spofford	*vs.*	Same.
George T. Allamby *et al.*	*vs.*	Same.
Alonzo Colby *et als.*	*vs.*	Same.

Hancock. Opinion March 7, 1881.

R. S., c. 91, § 7. Liens on vessels for repairs, how and when enforced. Jurisdiction of federal courts.

To enforce the statutory lien for work and materials furnished in repairing vessels, does not require an attachment to be laid upon the vessel within four days after the plaintiff's work is done or his materials are furnished; it must be within four days after the whole work of repairing is completed; the repairs to be considered as completed when the work upon the vessel has been discontinued and has wholly ceased, although additional repairs might be necessary to fit the vessel for sea.

For repairs put upon a foreign vessel, (a vessel out of the State or country where owned), the remedy in admiralty ever since the creation of the federal courts, has belonged exclusively in such courts; and the later rules and opinions of the Supreme Court of the United States (although formerly otherwise) have established the policy of requiring that admiralty remedies for repairs upon domestic vessels shall belong exclusively to the same tribunals.

ON REPORT.

The opinion states the case.

H. D. Hadlock, for the plaintiffs, upon the questions discussed in the opinion, cited: R. S., c. 91, § 7; *The Kearsarge*,

1 Ware, 552; *Hull of a new ship*, 2 Ware, 207; *The Calistro*, 2 Ware, 45; *Wooly* v. *The Peruvian*, 3 Ware 156; *Barque Clauser*, 2 Story, 445; *Purrington* v. *Hull of a new ship*, 1 Ware, 561; *The Young Mechanic*, 3 Ware, 58; *The Young Mechanic*, 2 Curt. 404; *Platina*, 3 Ware, 180.

L. A. Emery, for the owners of the schooner Lady of the Ocean, upon the questions discussed in the opinion, cited: *Bicknell* v. *Trickey*, 34 Maine, 273; *Scudder* v. *Balkam*, 40 Maine, 291; *Lynch* v. *Cronan*, 6 Gray, 531; *Frost* v. *Ilsley*, 54 Maine, 351; *Fuller* v. *Nickerson*, 69 Maine, 241; *Calkin* v. *U. S.* 3 Ct. of Claims, 297; *Johnson* v. *Pike*, 35 Maine, 291; *U. S. Constitution*, Art. III, § 2; Judiciary Act, 1789, c. 20, § 9; *Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The General Smith*, 4 Wheat. 438; *The Lottawanna*, 20 Wall. 219; *Str. St. Lawrence*, 1 Black, 522; *Str. Petril* v. *Dumont*, 28 Ohio, 602; *Crawford* v. *Caroline*, 42 Cal. 469; *Southern Dry Dock Co.* v. *Perry*, 23 La. Ann. 39; *The Moses Taylor*, 4 Wall. 411; *Weston* v. *Morse*, 40 Wis. 455; 2 Pars. Mar. Law, 508, 640; 1 Whar. Ev. 339, Admiralty, Rule 12, 21 Wall. 560; *The Starlight*, 103 Mass. 227; *The Richard Busteed*, 100 Mass. 409; *The Bee*, 1 Ware Rep. 332.

PETERS, J. These are *in rem* suits for labor and materials expended in repairing the schooner Lady of the Ocean. While the vessel was undergoing repairs, the owner failed, the work was discontinued, the owner soon afterwards died, and the vessel was laid up for more than a year, after the work was ended, before the suits were instituted. In the meantime the vessel was sold by the administrator of the owner to other parties. The statute gives a lien to workmen and material-men in repairing a vessel, to be enforced by attachment within four days after "the work has been completed."

The owners contend that, to preserve the lien, the attachment must be within four days after the plaintiff's work is done, or after the plaintiff's materials are furnished. We think that is not the meaning of the statute. "The work" does not mean the

plaintiff's share of the work, and cannot refer to materials furnished by him; but means all the work, the job of work, to be completed. This interpretation is the one most beneficial to all interests. It affords a definite period within which all lien attachments may be laid upon the vessel, and requiring none to be made at times that may interrupt the work before it is completed.

The lien upon vessels for labor and materials in repairing them was first given in the Revised Statutes of 1841. It was to continue for four days "after the repairs have been completed." The statute now reads, "after the work has been completed." The reason for the change of phraseology is evidently this: In the present statute the four days period for attachment extends to labor and materials in finishing a new vessel after launching, as well as in repairing old vessels. The word "repairs" would be inappropriate to finishing a new vessel that had been launched, but the word "work" may well apply to either finishing or repairing vessels.

Still, we cannot agree with the plaintiffs in the position taken by them, that the work on this vessel was not done because all necessary repairs were not completed. Other repairs might be necessary to fully complete and equip the vessel; but the work towards which the plaintiffs contributed was completed when work upon the vessel was discontinued. It matters not what may have been the cause of its suspension or termination. That work was done, it wholly ceased. There would be too much uncertainty in the other construction. Instead of four days, the duration of the lien might be limited only by the life of the vessel. She might "fly upon the wings of the wind," and "dwell in the uttermost parts of the sea," and the encumbrance clings to her. No subsequent purchaser could ever surely know that his title was clear. *Sheridan* v. *Ireland*, 66 Maine, 65, is a case that, upon this point, strongly resembles, and supports our conclusion in, the case at bar.

It may be profitable to notice another point taken by the defendants, although presenting a question which we are not necessarily called upon to determine, in view of our decision of the

question already disposed of. The defendants (owners of vessel) contend that the question before us is not a matter within State jurisdiction, but is of a maritime nature, cognizable exclusively in the admiralty courts of the United States. These are cases of repairs put upon a vessel at her home port, that is, in a port within the State where the vessel was owned. She was therefore a domestic and in no sense a foreign vessel. For repairs upon a foreign vesssel, that is, a vessel out of the State or country where owned, there is no doubt, and never was any, that the remedy, if sought for in admiralty, belongs exclusively in the courts of the United States. Still, our statute is a general one in its terms, conferring State jurisdiction in all cases of repairs. Whether jurisdiction to enforce *in rem* a statutory lien for repairs upon a domestic vessel belongs to the State and United States courts concurrently, or to the one court in exclusion of the other, are questions that have passed through rather a remarkable alternation of opinion in the decisions of the Supreme Court of the United States.

The reason of the federal courts taking exclusive admiralty jurisdiction in the case of foreign repairs, and at times disclaiming it in the case of domestic repairs, is, that in the former case there is a purely maritime lien, and in the latter case the only lien existing must be local or statutory merely. The general maritime lien does not extend to domestic repairs (or supplies), for the reason that a presumption exists in such cases that the credit is given to the owners and not to the vessel. But where, in the case of domestic repairs, a local lien is given by any custom of the port, or one is created by statute, then the presumption arises that the credit is given to the vessel instead of to the owners. In such case, the lien, although not purely maritime, being of a maritime nature and pertaining to maritime affairs, the admiralty courts take cognizance of it. In the case of a domestic vessel, if the statute imposes a lien for repairs or supplies, the national courts execute it. *The General Smith*, 4 Wheat. 438.

For a long time the State and United States courts exercised jurisdiction concurrently, in suits or proceedings to enforce *in*

rem such liens as were created by the statutes of the different States. The practice allowed the federal courts to appropriate admiralty jurisdiction for the enforcement of liens arising in the building and construction of new vessels, as well as in repairing them or supplying them after built. Workmen and material-men, having a lien under the provisions of a State law, had their election to enforce it, either in a district court or a State court, and having made their election, the defendant had to follow them into the court chosen, and submit to the mode of proceeding and trial in that court. The maxim *Qui prior est tempore potior est jure* prevailed.

It began to be questioned, however, whether contracts pertaining merely to the construction of a vessel were in any sense maritime contracts, and the case of *The People's Ferry Co.* v. *Beers*, 20 How. 393 put an end to the practice of allowing admiralty jurisdiction in the federal courts to enforce statutory liens arising in the original construction of vessels. And now all contracts pertaining to the construction of vessels and finishing or furnishing them, either before or after launching, so as to put them in readiness to go to sea, are considered as land and not sea contracts, with which the federal admiralty courts have nothing to do. *Roach* v. *Chapman* (The Capitol), 22 How. 129.

The efforts of the federal courts to get rid of jurisdiction to enforce State statutory liens did not rest there. They became perplexed with the difficulties which were encountered in enforcing in admiralty many of the provisions and conditions upon which the liens were based. Rule twelve in admiralty, changed in 1858, to take effect May 1, 1859, forbade all proceedings *in rem* for repairs put upon domestic ships, whether the local law gave a lien or not; leaving the *in rem* remedy to be enforced in the courts of the States. Mr. Justice NELSON, in *Maguire* v. *Card*, (The Goliah) 21 Howard, 248, immediately after the publication of the new rule, said, "We have determined to leave all those liens, depending upon State laws, and not arising out of the maritime contract, to be enforced by the State tribunals." The same disinclination to derive judicial competency or jurisdiction in admiralty from

State grant was manifested by some of the federal judges in the lower courts. *Merritt* v. *Sackett*, 12 Law Rep. (Boston 1849) 511; *The Schooner Coernine*, 21 *Idem*, (1858) 343. This condition of things continued until 1872, when rule twelve in admiralty was again amended. See 1 Black, 530.

After diverse experiences and many agitations of the subject, the highest judicial tribunal in the land seemed to resolve upon a different policy, and established in 1872 a new rule in the following words: "In all suits by material men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner *in personam*." In 1872 the doors of the district courts, which had been since 1859 shut against suits like those now before us, were opened to them again. Since this date the opinion and feeling among the judges of the federal courts seem to be that their jurisdiction must be exclusive. The tendency of judicial opinion seems to be that the jurisdiction of the State court shall terminate where the national jurisdiction begins, and that there shall not be concurrent jurisdiction in any questions of admiralty to be settled by process and proceedings *in rem*. It has been most emphatically asserted by the Supreme Court that a State cannot grant admiralty jurisdiction to its own courts in any matter that comes within the jurisdiction of the district courts of the United States. *The Moses Taylor*, 4 Wall. 411; *The Hine* v. *Trevor*, *Id.* 555; *The Belfast*, 7 Wall. 624; *The Lottawana*, 21 Wall. 558. The language of the latter case is direct and most significant. Mr. Justice BRADLEY there says: "State laws cannot confer admiralty jurisdiction upon the State courts so as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the district courts of the United States." It is not in those cases denied that State courts may enforce such liens by common law remedies, or such remedies as are equivalent thereto. But it is not a remedy in the common law courts which is saved, but a common law remedy; not such as a legislature may confer upon a common law court, but such as the common law itself (in 1789) was competent to give. It is clear enough that the processes in the cases before

us are admiralty processes and such as the common law was not competent to give. The suits are not against the defendant's interest in the vessel, but against the vessel itself. It matters not that a jury is allowable to try the cases. All the authorities agree in that.

It will be noticed that the exact question now presented to us has not been determined by any direct adjudication of the Supreme Court of the United States. The necessary facts have not been before them. But they have distinctly announced their rule or policy of decision, and from all the indications we may feel assured that, if opportunity offers, a more decisive declaration upon the subject will come. The doctrine of exclusive jurisdiction in the national courts has been strongly affirmed in the case of *Terrill* v. *Schooner B. F. Woolsey*, decided in U. S. C. C. (S. D. New York) in October, 1880, reported in The Reporter, vol. 10, p. 619. With the same view, several of the State courts have declined jurisdiction in cases like the present, although, before the late declarations of the Supreme Court, they had exercised such jurisdiction. The binding authority of the Supreme Court upon this question would not be denied by the State courts. *Edwards* v. *Elliott*, 21 Wall. 532; *In re Edith*, 11 Blatch. 451; *The Circassian*, *Idem*, 472; *Robert Fulton*, 1 Paine, (C. C.) 620; *Dever* v. *The Hope*, 42 Miss. 715; *Southern Dry Dock Co.* v. *The Perry*, 23 La. An. 30; *Jackson* v. *Propeller Kinnie*, 8 Am. Law. Reg. (N. S.) 470; *Murphy* v. *Mobile Co.* 49 Ala. 436; *Crawford* v. *Bark Caroline Reed*, 42 Cal. 471; *Cavender* v. *Fanny Barker*, 40 Mo. 235; *Wyatt* v. *Stackley*, 29 Ired. 279; *Campbell* v. *Sherman*, 35 Wis. 103; *Weston* v. *Morse*, 40 Wis. 455; *Steamboat General Buell* v. *Long*, 18 Ohio St. 521; *Foster* v. *Busteed*, 100 Mass. 409; *The Josephine*, 39 N. Y. 19; *Sheppard* v. *Steele*, 43 N. Y. 52; *Brookman* v. *Hamrill*, *Id.* 554; *Happy* v. *Mosher*, 48 *Id.* 313; *King* v. *Greenway*, 71 N. Y. 417; *Wilson* v. *Lawrence*, 82 N. Y. 409. Several learned and instructive articles in the Law Reviews cast light upon the question. 5 Amer. Law Rev. 581; 7 Am. Law Rev. 1; 9 Am. Law Rev. 638; 14 Am. Law Reg. N. S. 593. The foregoing authorities

indicate the present condition of judicial sentiment and opinion upon the question. We do not authoritatively determine the question for ourselves, inasmuch as we place the decision of the present cases upon grounds superseding the necessity. The great practical importance of the question leads us to discuss it as we have.

Entry in each case to be: Judgment against the vessel denied; one bill of costs to the owners of vessel, to be apportioned against the plaintiffs in all the cases submitted.

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

WILLIAM ROLLINS *vs.* RICHARD C. MOODY and another.

Kennebec. Opinion March 8, 1881.

R. S., c. 94, § 2. Tenancy at will. Liability of tenant for rent, how terminated.

In this state, a tenancy at will can be determined by either party by thirty days' notice in writing for that purpose given to the other party, and not otherwise except by mutual consent.

Where a tenant without written notice, or the consent of the landlord, abandons the possession of premises verbally leased to him, his liability for rent continues for whatever period may elapse before the tenancy becomes terminated by written notice, or until possession of the premises may be accepted by the landlord.

EXCEPTIONS from superior court, Kennebec.

The facts sufficiently appear in the opinion.

H. S. Webster, for the plaintiff.

Henry Farrington, for the defendants.

R. S., c. 94, § 2, provides that "all tenancies at will may be determined by either party by thirty days' notice in writing for that purpose given to the other party, and not otherwise except by mutual consent." Under this statute, for how long a time,

is a tenant at will, liable to pay rent for premises he has vacated and given up to his landlord, simply because his notice to the landlord was verbal and not in writing?

The defendants contend, if no time was fixed by the parties, at which rent should be payable, that they are liable to pay rent only for thirty days after the plaintiff had notice that they had vacated his store.

That if it is inferable from the facts stated in the exceptions, that they were to pay the rent semi-annually, then that they are liable to pay rent for the succeeding term of six months after they vacated at the end of the third term or eighteen months and no more.

But for the words "and not otherwise except by mutual consent" in the present statute, it would be easy to determine this case by *Withers* v *Larrabee*, 48 Maine, 570, in which it was held in a similar case under R. S., 1841, c. 95, § 19, and the rent was payable quarterly, that the tenant who quit without giving the statute notice in writing, was liable to pay rent for the succeeding quarter and no more.

That statute was precisely like our present statute, excepting the length of notice required and the words "and not otherwise except by mutual consent."

In *Whitney* v. *Gordon*, 1 Cush. 266, — under a statute precisely like the provision in the statutes of 1841 — a case in which rent was payable quarterly and the tenant left at the end of a quarter, without giving the statute notice, it was held that the tenant was liable, *prima facie*, for the second quarter.

The same doctrine was held in *Walker* v. *Furbush*, 11 Cush. 366; 2 Allen, 105, and 108 Mass. 553, and in no case in Maine or Massachusetts has a different rule been adopted under the statutes referred to.

In *Wilson* v. *Prescott et al.* 62 Maine, 115, it was held that "the expiration of the thirty days' notice must be coincident in point of time with a pay day of rent." *Cameron* v. *Little*, 62 Maine, 550; *Robinson* v. *Deering*, 56 Maine, 357; *Goodenow* v. *Allen*, 68 Maine, 308.

In *Esty* v. *Baker*, 50 Maine, 333, and *Young* v. *Young*, 36 Maine, 133, it was held that tenancies at will by the common law,

could be determined at the will of either party without notice, while a tenancy at will by statute, could only be determined by notice. It seems, therefore, a reasonable inference that the legislature intended by the words "and not otherwise except by mutual consent" to include all tenancies at will whether by the common law or by statute and to supersede all the common law methods of terminating tenancies at will. *Cunningham* v. *Horton*, 57 Maine, 420. That this was the intention of the legislature rather than to make a different rule as to the liability of tenants, than that adopted in *Withers* v. *Larrabee*, *supra*.

While it is easy to see that such may be the effect of these words, it is difficult to see how and why the tenant's liability for rent should be any different under the present statute than under the provisions of R. S., 1841, to which reference has been made.

PETERS, J. The parties agreed upon a verbal lease of a store for five years. This created only a tenancy at will. Under our statute, such a tenancy can be determined by either party "by thirty days' notice in writing for that purpose given to the other party, and not otherwise except by mutual consent."

After occupying a year and a half, without giving any written notice at all, the defendants abandoned the store, leaving it unoccupied for two years. The plaintiff knew of the abandonment and refused to accept possession. The rent was payable half yearly. The action is to recover, among other claims, for the use and occupation of the store for those two years.

The defendants contend that their liability for rent is limited to the period at the expiration of which they could have surrendered the store had written notice been given; that thirty days' notice could have been served during the first six months terminating the tenancy at the end of the six months; and that therefore six months' rent only can be recovered. The argument is, that the notice required is of an intention to terminate the tenancy, and not a notice of the fact that the tenancy has been terminated; that the object of notice would be to inform the landlord when the premises would revert to him, so that he may have a reasonable opportunity to relet them; and that no such

notice could be necessary where the landlord has had actual knowledge that his store had been abandoned to him.

If this action were one for damages for an abandonment of the premises without notice, the argument would be good. A tenant at will, evicted by his landlord without notice, may recover damages for being deprived of the use of the premises for such term as he was entitled to occupy before his tenancy could be legally terminated. The same rule applies conversely, when the landlord sues for damages instead of rent. *Ashley* v. *Warner*, 11 Gray, 43; Sedg. on Dam. (7th ed.) 1 vol. 391. But either side can avoid being subjected to such a rule of damages. The tenant can resist an eviction without notice and hold his possession, and the landlord can refuse to accept the possession when without notice it is attempted to be thrown upon him. So here, the landlord refusing to take possession, the tenancy did not become terminated at the end of the six months, and could not be until notice was given. It is not pretended that the tenancy could expire before the end of the first six months. Why at the end of any term of six months? The longer the postponement of notice the longer the lease. The landlord could never drive the tenant from the premises without notice. But the rights of the parties are reciprocal. If the landlord, (as the relation is described by authors) tacitly renews his verbal lease at the end of every pay day by an omission to serve notice to quit before that time, so does the tenant tacitly renew his promise from pay day to pay day as long as he neglects to give the notice required of him. Until notice given, the tenant is conclusively presumed to control the possession whether he actually occupies or not. "It is an occupation which he could have had, had he not voluntarily abstained from it." *Whitehead* v. *Clifford*, 5 Taunt. 518. The tenants in this case could have resumed possession at any time before their abandonment of the store was accepted by the landlord.

We have seen no case where the precise point involved here has been distinctly raised and judicially determined, unless it is so in *Withers* v. *Larrabee*, 48 Maine, 570, cited and relied upon by the defendants. That case seems to decide that only one

quarter's rent was recoverable, where two were sued for under circumstances like those existing in the case at bar. The question was not discussed at all in that case, and the result seems to have been taken as admitted, upon the settlement of the other questions that received the attention of the court.

The Massachusetts cases relied upon do not help the defendants. *Whitney* v. *Gordon*, 1 Cush. 266, decides that one quarter's rent was recoverable; but only one was sued for. In *Walker* v. *Furbush*, 11 Cush. 366, only one quarter's rent was sued for. *Batchelder* v. *Batchelder*, 2 Allen, 105, was a similar case with a similar result, METCALF, J. putting the case upon the principle that "the tenant was liable for the stipulated rent until he had given to the plaintiff the statute notice of an intention to quit." The books contain many declarations of a general character which support the principle which the case before us depends upon. *Redpath* v. *Roberts*, 3 Esp. 225; *Barlow* v. *Wainwright*, 22 Vt. 88; *Hall* v. *Western Transportation Co.* 34 N. Y. 291; Wheaton's Selwyn, N. P. 521; Taylor's Land and Ten. §§ 641, 647; 1 Wash. Real Prop.; Estates at Will.

In *Pergsley* v. *Aikin*, 1 Kernan, 494, it is said, alluding to cases cited in the opinion, "The doctrine of these authorities, when analyzed, amounts to this: that when a tenancy from year to year is created by the parties, it continues until terminated by a legal notice. The estate does not depend upon a continuance of the possession; for the tenant cannot put an end to the tenancy, or his liability for rent, by withdrawing from the occupation of the premises. The notice is a condition of the contract, in the language of the authorities, arising out of it, which must be complied with, in order to absolve him from further responsibility." The defendants by an abandonment of the possession without the statutory notice violated their agreement, but did not terminate the tenancy. *Wood* v. *Wilcox*, 1 Denio, 37. The rulings were more favorable to the defendants than they were entitled to.

Exceptions overruled.

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

DANIEL W. ROBINSON, petitioner,

vs.

SAMUEL H. RING, administrator on the estate of FRANCIS B. RING.

Sagadahoc. Opinion March 9, 1881.

Administration. Gift. Deposit in Savings Bank.

Notwithstanding there has been a final accounting by the administrator and decree of distribution; still, upon ascertaining that there are outstanding debts due the estate and collectible, the probate court may open the administration and order further proceedings.

Where A. deposited money in a savings bank in the name of B. without a declaration of trust at the time, or subsequently, and retained the deposit book in his possession until his death; *Held*,

That, in the absence of proof of any act or declaration under the pressure of immediate or impending death, or of proof of any delivery, or intent to give, the deposit in the bank in B.'s name belonged to A.'s estate, and not to B.

72 140
94 458

ON REPORT.

Appeal from decree of judge of probate.

At the July term, 1877, of the probate court, the defendant was appointed administrator. He filed his final account at the September term, it was allowed at the October term, and the order of distribution issued at the November term, 1877, and the same was returned and ordered recorded at the February term, 1878. This petitioner received and receipted for, upon the order of distribution, his distributive share.

(Petition.)

To the Hon. Judge of Probate for Sagadahoc County:

Whereas, Samuel H. Ring was appointed administrator on the estate of F. B. Ring, deceased, late of Richmond, Maine, and has pretended to settle a final account; and whereas, Stillman H. Ring has received from the savings bank where it was deposited the sum of thirteen hundred dollars ($1300,) deposited in said bank by F. B. Ring, in the name of said Stillman H. Ring, which sum formed and does form a part of the estate of the deceased, F. B. Ring; and whereas, this sum of thirteen hundred dollars has not been accounted for in the administrator's account,

I, Daniel W. Robinson, one of the legal heirs of the said F. B. Ring, humbly petition that the said administrator may be ordered to account for the same and make legal distribution thereof and for such further orders and decree as to your honor shall seem meet.

And thus in duty bound your petitioner will ever pray.

Daniel W. Robinson, petitioner,
Nephew and sole representative of deceased
sister of F. B. Ring.

(Decree.)

State of Maine, Sagadahoc ss. At a probate court holden at Bath, within and for said county on the first Tuesday of November in the year of our Lord one thousand eight hundred and seventy nine:

Upon the foregoing petition and upon full hearing of the parties thereon, it appearing to the court, that at the time of the decease of the said Francis B. Ring, he, the said Francis, had the sum of thirteen hundred dollars in the Richmond savings bank, which said sum, he, the said Francis, had in his lifetime deposited in said bank to the apparent and nominal credit of one Stillman H. Ring, and which sum was, nevertheless, the money of the said Francis at the time of his decease, and parcel of the assets belonging to his estate; and it further appearing that the same was not and is not embraced in the inventory of the said estate to this court by the said administrator returned, and that the same has not in any way been charged to the said administrator, or otherwise by him accounted for;

It is ordered and decreed:

That the said administrator account for the said money and for any interest, income or accumulation thereon accruing, or which may accrue or ought to have accrued to, or upon the same, and that the said administrator present a further account of his administration of the said estate at the next regular session of this court for settlement, and such further proceedings as to the same, may lawfully appertain, and therein charge himself with said

money and increment thereof, which has or ought to have accrued to or upon the same.

W. GILBERT, Judge.

Other facts stated in the opinion.

Daniel W. Robinson, petitioner, *pro se.*

J. W. Spaulding and *F. J. Buker*, for the respondent.

The estate has been fully administered upon. The business was all regularly and publicly transacted, and at a time when all the facts relating to the $1300 were known. All the witnesses appear to have known of the gift from the deceased to his brother, Stillman. The petition does not allege, and the petitioner does not attempt to prove that he had not full knowledge of all the facts in relation to the $1300 gift at the time of the settlement of the administrator's final account. His remedy was by appeal from the decree allowing that account. He ought not to be permitted to stand by and see the final account settled, and take his distributive share, and nearly two years afterwards drag the administrator into court to account for money which never came to his hands. *Harlow* v. *Harlow*, 65 Maine, 448; *Parcher* v. *Bussell*, 11 Cush. 107.

The $1300 deposited by the deceased in the savings bank was not a part of the estate, but was the property of Stillman H. Ring. *Dresser* v. *Dresser*, 46 Maine, 67; *Carleton* v. *Lovejoy*, 54 Maine, 447; *Hill* v. *Stevenson*, 63 Maine, 367; *Tillinghast* v. *Wheaton*, 8 R. I. 536; *Camp's Appeal*, 36 Conn. 88; *Millspaugh* v. *Putnam*, 16 Abbott (N. Y.) 380; *Minor* v. *Rogers*, 40 Conn. 512; *Gardner* v. *Merritt*, 32 Md. 78; *Ray* v. *Simmons*, 11 R. I. 266; *Kerrigan* v. *Rautigan*, 43 Conn. 17; *Blanchard* v. *Sheldon*, 43 Vt. 512; *Davis* v. *Ney*, 125 Mass. 590; *Martin* v. *Funk*, 18 Alb. Law J. (N. Y.) 451; *Blasdell* v. *Locke*, 52 N. H. 238; *Howard* v. *Savings Bank*, 40 Vt. 597.

The facts in the case last cited are reported as follows: A. deposited money in the bank to the credit of B. but retained the deposit book. B. died without knowledge of the intended gift and shortly after A. died without ever having asserted any

right to the money, nor made any effort to recall the gift. It was held to be a completed gift.

The decree made by the judge of probate in this case can only work a great hardship upon this respondent who honestly administered upon the estate that came to his hands. When he was appointed administrator the money had been drawn from the bank by Stillman H. Ring, and, if a part of the estate, it was then in the nature of a claim against Stillman H. Ring, and should be inventoried as such. And that is what should be done now, and that should have been the decree, if it was a part of the estate and anything can be done under this petition.

APPLETON, C. J. This is an appeal from a decree of the judge of probate ordering that the defendant account for and distribute among the heirs of Francis B. Ring the sum of thirteen hundred dollars, belonging to that estate but not included in the inventory of the same.

Notwithstanding there has been a settlement of the final account of an administrator, still upon ascertaining that there are outstanding debts due the estate and collectible, the probate court may open the administration and order further proceedings. "Even after final accounting and distributing, an executor still continues to be a trustee." *Paff* v. *Kinney*, 1 Bradf. 1.

The question presented is whether there are such debts due the estate, which have not been accounted for and which may be collected.

It seems that Francis B. Ring, having deposited in the Richmond savings bank the sum of $2000, the bank refused to receive a further deposit in his name; that he then made a deposit of three hundred dollars in the name of his brother, Stillman H. Ring; that he continued depositing in his name until the sum amounted to thirteen hundred dollars; that during all this time he retained the deposit book in his possession; and that at the time of his death it was found among his papers. There is no evidence of any delivery of the same to the brother. At one time when Stillman H. Ring and his brother were looking over the papers of the deceased, he had this book in his hands and

asked his brother if he should keep it, to which the reply was, "No, not now, I will keep it."

No trust was declared when the deposits were made and there is no satisfactory evidence of any subsequent declaration of trust. Stillman H. Ring no where testifies that the deceased ever gave the deposit book to him.

This is manifestly not a gift *causa mortis*, for there is no evidence of any act or declaration under the pressure of immediate or impending death or of any delivery *Grymes* v. *Hone*, 49 N. Y. 17; *Case* v. *Dennison*, 9 R. I. 88.

To constitute a valid gift *inter vivos* the giver must part with all present and future dominion over the property given. He cannot give it and at the same time retain the ownership of it. There must be a delivery to the donee. *Carleton* v. *Lovejoy*, 54 Maine, 446. Here was no delivery as such. There is no act shown to have been done to pass the title. *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass. 228. In *Hill* v. *Stevenson*, 63 Maine, 367 a delivery of a savings bank book with intent to give the donee the deposits represented thereby, was held a good delivery to constitute a complete gift of such deposits, but here there is the absence of proof of any delivery or intent to give. There must be an intention to give and this must be carried into effect by an actual delivery. *Taylor* v. *Fire Department of New York*, 1 Edw. Ch. 294.

In all the cases cited there was a delivery or a declaration that the deposits were in trust as in *Minor* v. *Rogers*, 40 Conn. 513, when shortly after the time of making the deposits, the depositor stated that the deposits were for the boy in whose name they were made by her, as trustee, and the court found it was a complete gift at the time of the deposit. In *Kerrigan* v. *Rautigan*, 43 Conn. 17, the deposit was made by the depositor as guardian for the niece, whose name the deposit was made and at the same time the declaration was made that it was for her. In *Davis* v. *Ney*, 125 Mass. 590, there was a delivery and assignment which the court held a valid gift. In *Blasdell* v. *Locke*, 52 N. H. 238, the deposit when made was intended as a gift and subsequently the donee was informed of such intention, and the court enforced

the trust upon which the deposit was made. In *Tillinghast* v. *Wheaton*, 8 R. I. 536, the gift was of one *in extremis*, and was accompanied with a delivery of the savings bank pass book.

Without going more fully into an examination of the authorities, the evidence fails to satisfy us that there was any intention to give, any delivery to, or any trust created in favor of, Stillman H. Ring.

Decree affirmed.

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

RICHARD STUART, Executor of the will of DANIEL C. BERRY, and another, in equity, *vs.* ELLIOT WALKER, Administrator on the estate of MARY STRAW, and others.

Penobscot. Opinion March 9, 1881.

Will. Devise. Life-estate—with power of disposal.

Where a testator devises an estate in general terms, without specifying the nature of the estate, and gives the devisee a power of disposition of the property, providing a limitation over; if the power of disposal is unconditional, the devisee takes a fee; if conditioned upon some certain event or purpose, he takes a life estate only.

Where an estate is devised to a person expressly for life, with a power of disposal qualified or unqualified, the devisee takes an estate for life only, with a power to dispose of the reversion; the express limitation for life, controls the operation of the power, and prevents it from enlarging the estate to a fee; to this rule, however, there is an exception sometimes, in the case of a bequest of perishable things, of which the use consists in the consumption.

The testator made a devise and bequest, (discarding redundant words) running thus: "I devise and bequeath to my wife the rest of my estate, real and personal, with the right to use, sell or otherwise dispose of the same, and the income and increase thereof, according to her own will and pleasure, during her lifetime. And so much of said estate, with the increase, income and proceeds thereof as may remain unexpended and undisposed of by her at her decease, I give," etc.

Held: This devise gives, in express terms, an estate to the wife, limited to her lifetime, not to be extended by any implication arising from the power of disposal annexed; the words, 'during her lifetime,' qualifying all the previous clauses of the devise.

Held, also: That the estate devised, with its income, increase and proceeds, real and personal, into whatever form converted or appropriated, so far as the same can be traced and identified, which remained unexpended by the wife at her death, should be surrendered, conveyed and paid over to those persons who were secondarily entitled to the estate under the will.

DEMURRER to bill in equity.

The bill sets out that Daniel C. Berry made a will September 15, 1873, containing the devises stated in the opinion. After his death, his will was duly probated and allowed, and the plaintiffs and the widow, Mary Berry, were appointed executors at the November term, 1873. In 1875, Mary Berry married Love Straw, with whom she lived until July 5, 1878, when she died intestate and childless, and Elliot Walker was duly appointed administrator on her estate. The other defendants are the surviving husband and heirs of Mary Straw.

And the bill further shows that the questions and controversies which have arisen are mainly, if not wholly, embraced in the following propositions:

First. What was the nature of the estate which Mary Berry took under the will of Daniel C. Berry?

Second. Who are entitled under the provisions of said will and acts of said Mary Straw and facts above stated, to have and hold the estate, real and personal, as above named. Whether the heirs and representatives of said Mary Straw, or the heirs of said Frances L. Sargent and devisees, under fourth clause of said will?

Third. To whom is the administrator of the estate of Mary Straw to account for personal property remaining in his hands upon settlement of his account?

Wilson and Woodward, for the plaintiffs, after commenting upon, *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Pickering* v. *Langdon*, 22 Maine, 413; *Constantine* v. *Constantine*, 6 Ves. 101; *Jones* v. *Bacon*, 68 Maine, 34; *Jones* v. *Leeman*, 69

Maine, 489; *Bacon* v. *Woodward*, 12 Gray, 376; *Gifford* v. *Choate*, 100 Mass. 343; *Hale* v. *Marsh*, *Id.* 468, cited: *Shaw* v. *Hussey*, 41 Maine, 495; *Fox* v. *Rumery*, 68 Maine, 121; *Warren* v. *Webb*, *Idem*, 133; *Smith* v. *Snow*, 123 Mass. 323; *Burleigh* v. *Clough*, 52 N. H. 267; *Jackson* v. *Robins*, 16 Johns. 537; *Smith* v. *Bell*, 6 Pet. 68; 4 Kent's Com. Holmes' ed. 202; *Blanchard* v. *Blanchard*, 1 Allen, 223; *LeMarchant* v. *LeMarchant*, 18 L. R. Eq. Cas. 414; R. S., c. 74, § 16.

Chas. P. Stetson and *E. Walker*, for the defendants.

It is well settled that when an estate is devised with an absolute power of disposal, the devise over of what may remain is void. *Jones* v. *Bacon*, 68 Maine, 34.

The exception to this rule is, "where a life-estate only is clearly given to the first taker, with an express power on a certain event or for a certain purpose to dispose of the property, the life-estate is not by such a power enlarged to a fee or absolute right, and the devise over will be good."

We think that a careful examination of the will, will show that Mary Berry took an estate in fee in the real property, and the personal, absolutely; that the devise over is inoperative, and that our case is like the cases of *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Jones* v. *Bacon*, and the cases in the 100 Mass. there cited. *Crossman* v. *Field*, 119 Mass. 170; *Gleason* v. *Fayerweather*, 4 Gray, 348.

He gives to her unlimited power to dispose of same, power without restraint, and freedom of choice and action without qualification, and makes no distinction between the real and personal estate. There could be no more complete ownership of property, than what results from undisturbed and undisputed possession united with an acknowledged and undisputed power and right of its absolute disposal. *Bacon* v. *Woodward*, 12 Gray, 376.

Do the words, "during her life," restrict her estate to a life-estate?

The test usually applied in such cases is whether or not the first taker has the right and absolute power of disposal. If he has, it is construed to be an unqualified gift to him, and the devise over will be void. *Parnell* v. *Parnell*, L. R. 9 Ch. Div.

96; *Breton* v. *Mockett*, *Idem*, 95; 2 Washburn, 670; *Second Reformed Church* v. *Disbrow*, 52 Penn. St. 219; *Stevens* v. *Winship*, 1 Pick. 318; *Hale* v. *Marsh*, 100 Mass.; *Gleason* v. *Fayerweather*, 4 Gray, 348; *Ramsdell* v. *Ramsdell*, 21 Maine. See also, *Fox* v. *Rumery*, 68 Maine, page 128; and *Watkins* v. *Watkins*, 3 Mc. & G. 622; *Perry* v. *Merritt*, L. R. 18 Eq. Cases, 152; *Henderson* v. *Cross*, 29 Beas. 216.

The case of *Burleigh* v. *Clough*, 52 N. H. 267, which the complainants rely upon, differs very materially in the language of the will from our case; there "the use and disposal", only, for life of the wife, is given.

In *Smith* v. *Bell*, 6 Peters, 68, (commented on in *Gifford* v. *Choate*, 100 Mass. page 346,) and in *Brant* v. *Virginia Coal & Iron Co.* 3 Otto, 326, it was held that the right of disposal only extended to the life-estate.

PETERS, J. A testator makes the following devise: "I give, devise, and bequeath unto my wife, Mary Berry, all the rest and residue of my estate, real and personal, of what kind soever and wherever situate, with the right to use, occupy, lease, exchange, sell or otherwise dispose of the same, and the increase and income thereof, according to her own will and pleasure during her life-time. Meaning and intending hereby that the said Mary Berry during her lifetime shall have the absolute right, power, and authority to use and dispose of, by sale or otherwise, all said devised estate, real and personal, for her own support, and for any and all other purposes to which she may choose to appropriate it.

"And so much of said estate so devised to my said wife, together with the increase, income and proceeds thereof, as may remain unexpended and undisposed of by her at her decease, I give, devise, and bequeath unto the said Frances L. Sargent, her heirs and assigns forever, if she shall be then living; and if not living, then to such children or child of said Frances as may be living at that time."

Did Mary Berry take a fee simple, or only a life-estate, in the property devised?

The defendants contend that, where a life-estate is devised, whether impliedly or expressly given, with an unqualified power

of disposal annexed, a gift or limitation over is of no effect. That is true where the life-estate is created by *implication*, but not true where it is *expressly* created in direct and positive terms.

A life-estate by implication usually arises, where a donor devises property generally, without any specification of the quantity of interest, and adds some power of disposition of the property, and provides a remainder. For instance: A gives an estate to B, with a power of disposal annexed, and a gift over to C. Here is an association of purposes and intentions, divisible into three parts. What does A mean by all of them combined? What is implied by them?

A first gives the estate to B in general terms. Stopping there, by our revised statutes, he gives an estate of inheritance. But an estate in fee first described, may be cut down to a lesser estate by subsequent provisions.

A power of disposal is annexed by A to his bequest to B. The effect of this depends upon whether it is a qualified or an unqualified power. If it is an absolute and unqualified power, it really neither takes from, nor adds to, the amount of the estate previously given, though there be a gift over. It would be merely equivalent to adding words of inheritance, making the gift to B and his heirs and assigns. But those words were implied before. The law presumes in such case, that a testator superadds the unlimited power of disposal, to make his intention as emphatic and unequivocal as possible. The gift over in such case, is regarded as repugnant to and controlled by prior provisions. There is nothing to go over. A man cannot give the same thing twice. Having given it once, it is not his to give again. Such a devise comes within the principle of the class of cases where a testator gives an estate of inheritance, and then undertakes to provide that the devisee shall not alien the property; or that it shall not be taken for his debts; or that he shall dispose of it in some particular way indicated; provisions which are powerless to control the prior gift.

But where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, then the words last used

do restrict and limit the words first used, and have the force and efficacy to reduce what was apparently an estate in fee to an estate for life only. Thus: A gives an estate to B, with the right to dispose of as much of it, in his lifetime, as he may need for his support, and if anything remains unexpended at B's death, the balance to go to C. Here there may be something to go over. B is to dispose of the estate only for certain specified purposes. He can defeat the remainder, only by an execution of the power. The clear implication of such a bequest, taking all its parts together, is that B is to possess a life-estate. Here a life-estate is implied, and is not expressly created.

But A makes this devise: "I give to B, my estate to have and hold during his lifetime and no longer, with the right to dispose of all the same during his lifetime, if he pleases to do so, and any unexpended balance I give to C." Here a life-estate is *expressly* created, instead of arising by *implication*. Here, an absolute and unqualified power of disposal annexed, does not enlarge the estate to a fee. Where an estate is expressed, it need not be implied. An absolute control does not amount in such case to an absolute ownership. There is no conflict between the three parts of such a devise. Each clause in the combination may be literally executed. They are in no wise inconsistent with each other.

An examination of the cases invoked to the aid of the defendants, shows that all or nearly all of them pertain to life-estates by implication, and are mostly instances where the purpose was, not to extend a life-estate, but to reduce what was apparently an estate in fee. In some of the cases cited, may be found general expressions appropriate enough in the connection where used, which would be misleading when applied to devises such as the one now presented.

The English cases cited fail to sustain the defendants' view. As favorable a case as any upon their briefs, is *Parnell* v. *Parnell*, L. R. 9 Ch. Div. 96. There the words of the testator were: "I give and devise to my wife, my real and personal property for her sole use and benefit. It is my wish that whatever property my wife might possess at her death, be equally

divided among my children." The question was, whether the property was affected by a trust for the benefit of the children, which would debar the widow, then living, from disposing of it. The court replied that there was no definite gift over and no trust. It will be noticed that the gift was absolute, and not in any express words limited to an estate for life. *Breton* v. *Mockett*, *Id.* 95, is also much relied upon by the defendants. In that case it was declared that a gift for life, to the wife of the giver, of farming stock and materials, she not to be liable for diminution or depreciation, gave an absolute property in those articles which *ipso usu consumuntur*. The question was, whether the widow was entitled to the proceeds on a sale of the articles. But that case is an exception to the general rule. "There is an exception to the rule in case of the bequest for life of specific things, such as corn, hay, and fruits, of which the use consists in the consumption. Such a gift is in most cases, of necessity, a gift of the absolute property," 1 Jarman on Wills, 5th ed. (Bigelow) p. *879, and cases in note. In *Merrill* v. *Emery*, 10 Pick. p. 512, it is said, "that where the use of things is given, which are necessarily consumed by the use, the gift is absolute, and the limitation over is void." It is plain enough that the principle of those cases does not apply to the case at bar.

Nor do our own cases support the position advocated by the defendants. In no case in this State has it been directly or indirectly held that, where there is a devise for life in express terms, a power of disposal annexed, can enlarge it to a fee. In most instances, the question involved has been whether the gift to the primary legatee was absolute or qualified, in view of the ambiguous or contradictory expressions used; the decisions being based upon the supposed intention of the testator as collected from the whole will.

The only point necessarily decided in *Ramsdell* v. *Ramsdell*, 21 Maine, 288, was, that the title to property passed to a purchaser, where the donee had sold the property under a power of disposal and converted the proceeds of the same to his own use. The opinion generalizes considerably upon the doctrine of the books upon this subject-matter, and some of its general state-

ments would be more appropriate to the facts of that case than to this. Still, the case demonstrates that the learned jurist who pronounced the judgment in that case, had in view an estate for life, created by implication, and not one expressly created. The distinction set up here was clearly acknowledged there. The household goods were, in that case, decided to be the property of Sarah Crumpton only to the extent of a life-estate therein, because expressly so declared in the will; and a different rule was applied to the other property devised, for the reason that the donee's interest in such other property was not limited to a life-estate by any express words in the will. It is there said: "It cannot be reasonably supposed that it could be the intention of the testator to give only an estate for life, unless there be words clearly declaring such an intention."

That the general principle enunciated in *Ramsdell* v. *Ramsdell*, was intended to apply only to a life-estate created by implication, is made more manifest in *Pickering* v. *Langdon*, 22 Maine, 413; in which the court expressed its inability to extend into a fee an estate which was by the testator expressly described as being for a lifetime. And it is in the latter case said, "The general intent to dispose of the whole of the property, cannot, therefore, authorize the court to destroy or disregard the other and different purpose to give to Paul and his wife, estates for life." In *McLellan* v. *Turner*, 15 Maine, 436, the same judge who delivered the judgments in the two cases before named, said: "If it were admitted that a power of disposal existed, she would not take a fee, there being an express devise to her for life."

In *Jones* v. *Bacon*, 68 Maine, 34, it was held that an absolute power of disposal in the first taker, renders a subsequent limitation repugnant and void. But that was a case where the contention was, whether the first taker had or not an estate for life by an implication from all parts of the will construed together. The language of the will there was, "As to the residue of my estate, I give and bequeath the same to my beloved wife." These are words of inheritance. It would have been a different thing altogether, had the testator said, "I give and bequeath the same to my wife *for her lifetime*." In that case the bequest was in general terms, unqualified, except by the limitation over; while

in the case at bar, the bequest is for a lifetime only. *Jones* v. *Bacon*, falls within the rule laid down in *Ramsdell* v. *Ramsdell*, *supra;* although both cases are in conflict with the case of *Smith* v. *Bell*, 6 Pet. 68, a case differing somewhat from many of the authorities. See *Gifford* v. *Choate*, 100 Mass. at page 346.

In *Shaw* v. *Hussey*, 41 Maine, 495, the doctrine is truly stated; that a devise of land to another, generally or indefinitely, with a power of disposing of it, amounts to a devise in fee; but that, where a testator gives to the first taker an estate for life, only by certain and express terms, the fee does not vest in the legatee. Other cases clearly illustrate the same rule. *Fox* v. *Rumery*, 68 Maine, 121; *Warren* v. *Webb*, *Id.* 133; *Jones v. Leeman*, 69 Maine, 489; *Starr* v. *McEwan*, *Id.* 334. The question is most elaborately and exhaustively examined in cases in New York and New Hampshire, a reference to which saves the necessity of citing and comparing a long list of authorities. *Burleigh* v. *Clough*, 52 N. H. 267; *Jackson* v. *Robins*, 16 Johns. 537. Some of the later English chancery cases cast light upon the question. *In re Stringer's Estate*, L. R. 6 Chan. Div. 1; *In re Hutchinson*, L. R. 8 Chan. Div. 540; *White* v. *Hight*, L. R. 12 Chan. Div. 751. The Massachusetts cases, when correctly understood, are not in opposition to the doctrine. Their latest case affirms it. *Ayer* v. *Ayer*, 128 Mass. 575.

The text books sustain the doctrine fully. Chancellor Kent says: "If an estate be given to a person generally or indefinitely, with a power of deposition, it carries a fee; unless the testator gives to the first taker an estate for life only, and annexes a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." 4 Kent's Com. *535.

Cruise says, "Although a devise to a person generally, with a power to give and dispose of the estate as he pleases, creates an estate in fee simple; yet where an estate is devised expressly for life, with a power of disposal, the devisee will only take an estate for life, with a power to dispose of the reversion." Cruise Dig. tit. 38 c. 13, § 5.

Bacon says, that "devises by implication are allowed where the intention may be presumed, though it be not expressed in plain words; yet there is no room for such construction where a devisee has an estate given him by express words in the will; for that would be to overrule the plain meaning of the testator against his own words." (Abr. Leg. and Dev. G.)

In 1 Roper's Leg. *643, it is said: "Where a particular estate is limited in the instrument, followed by a declaration that the legatee may dispose of the fund, he will not take a beneficial interest in the capital. He will have a mere power to dispose of it, and no more; because, where a limited interest is expressly given, its enlargement by implication will not be permitted."

Jarman says: "If there is a distinct, positive gift (to the primary legatee), and the intention is express, nothing that afterwards follows can affect the construction of the positive gift." 1 Jar. Wills, 5th ed. (Bigelow) *873, and cases in notes. See *Ward* v. *Emery*, 1 Curtis, 425.

A doubt is raised by the defendants, whether, in the present case, there is a devise for life by express limitation. Nothing could be much plainer; all her rights and powers are limited by her duration of life. The words "during her lifetime" qualify all preceding words in that clause of the will; affecting both the quantum of interest in the estate and the power of disposal. Any other construction would expunge from the will most of the provisions in it. The testator gives a fee in other instances in apt and proper terms, whenever he designs to do so. He appoints executors; makes careful provisions appertaining to the expected remainder; significent evidence of the intention. An estate for life is not for more than life, but for life only. The maxim *expressum facit cessare tacitum* governs.

We have no doubt that the estate devised to the wife, with all the income, increase and proceeds of it, real and personal, into whatever form appropriated or converted, so far as the same can be traced and identified, which remained unexpended at her death, should be surrendered, paid over and applied according to the prayer of the bill. That the same rule applies to the proceeds of the property sold by the widow, and not expended at the time

of her death, as to the original property itself, is determined in *Hall* v. *Otis*, 71 Maine 326.

Demurrer overruled. Bill sustained; with decree as indicated in opinion; without costs.

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

BENJAMIN PIPER and another, in equity, *vs.* LORENZO MOULTON, executor of the last will of ELISHA PIPER, and others.

York. Opinion March 10, 1881.

Will. Attesting witnesses. Charity. Perpetuities. Charitable bequests.

The wife of an executor not beneficially interested under the will is a credible attesting witness thereto.

An inhabitant of a town to which a bequest is made for the support of schools therein is a competent attesting witness.

The probate of a will, where the court has jurisdiction, is conclusive unless vacated by an appeal.

Towns or cities may hold in trust funds given for the purposes of education.

A testator made a bequest of one hundred dollars to a town, in trust, on condition, that the town should expend the income thereof, forever to keep his lot in a certain burying ground in good order and condition, and an iron fence around the same; and made another bequest to the town of the rest and remainder of his estate to establish a school fund, on condition, that said town should accept and perform the conditions as to his lot in the burying ground; *Held*,

1. That the bequest of the hundred dollars was not for a charitable use, and was void as creating a perpetuity.
2. That the bequest to establish a school fund was valid; the condition to keep the testator's lot in repair was a condition subsequent; the estate passes to the town subject to the condition subsequent if valid, if void or against law, discharged of the condition.
3. The bequest being on condition that the town erect a building for the Piper High School, that the town is authorized to raise the amount of money necessary for that purpose.

BILL in equity.

Heard on bill, answer and proof.

The opinion states the case.

J. H. Hobbs, for the plaintiffs, upon the question of perpetuity, cited: 1 Perry on Trusts, 472, 480–483; *Smith* v. *Dunwoody*, 19 Ga. 237.

The one hundred dollars bequest was void. A secondary bequest, depending upon a void bequest, fails. *Corlyes* v. *French*, 4 Ves. 418; 1 Jarman Wills, 248; *Rose* v. *Rose*, 6 Abbott's Dig. 178; 2 Redfield Wills, 565, 574, 531, 523; 22 Wend. 483.

The large bequest was not a public charity. *Attorney General* v. *Soule*, 28 Mich. 153.

A corporation cannot be trustee for purposes foreign to its institution. 15 N. H. 330.

The town of Parsonsfield has no authority to support or aid in supporting a free high school. *Hooper* v. *Emery*, 14 Maine, 375; *Bussey* v. *Gilmore*, 3 Maine, 191; 14 Allen, 585; *Gove* v. *Epping*, 41 N. H. 545; *Perkins* v. *Milford*, 59 Maine, 315.

The attesting witnesses to the will were disqualified. *Hawes* v. *Humphrey*, 9 Pick. 357.

That question is now open to us. *Bent's Appeal*, 35 Conn. 523; *Dickinson* v. *Hayes*, 31 Conn. 424.

Ira T. Drew, for the defendants, cited: 12 Mass. 358; 10 Allen, 153; 47 Maine, 474; *Hawes* v. *Humphrey*, 9 Pick. 350, *Warren* v. *Baxter*, 48 Maine, 193; 22 Pick. 215; 68 Maine, 380; *Drury* v. *Natick*, 10 Allen, 176; *Dexter* v. *Gardner*, 7 Allen, 243; *Att'y General* v. *Greenhill*, 33 Bea. 193.

APPLETON, C. J. Elisha Piper on September 19, 1876, made and executed his last will and testament. He died March 22, 1877. On the first Tuesday of June, 1877, his will was presented for probate and proved and allowed.

After referring to his heirs at law and declaring in the first item, that he shall not give them anything, the will proceeds as follows:

"All my estate is the result of my own earnings and of economy in the care and management of the same, and I feel that my relatives should not question my right to carry out what has been a well considered and settled purpose with me, viz: To dispose of my property in such a manner as will in my judgment do the most good and be of the greatest benefit in promoting popular

education, and whereas the town of Parsonsfield, in the county of York, aforesaid, is my native town, in which I have always felt a great interest, and the inhabitants thereof are interested in the maintenance of good schools, I feel safe in the creation of the trust hereinafter provided.

"Second, I give and bequeath to the inhabitants of Parsonsfield, in the county of York and State of Maine, the sum of one hundred dollars to have and to hold the same forever, in trust, for the following purposes, namely: to expend the interest and income as may be necessary to keep my lot in the Piper burying ground, situate at South Parsonsfield in good order and condition and an iron fence around the same in good repair and painted.

"Third, I give, bequeath and devise all of the rest and residue and remainder of my estate, both real and personal, after the payment of all my just debts and burial expenses to the inhabitants of the aforesaid town of Parsonsfield, to have and to hold the same in trust forever, and to be called the 'Piper school fund' to and for the uses and purposes hereinafter mentioned and declared, namely, that the interest and net income thereof shall be annually expended in aid of the support of a free high school in said Parsonsfield, that is to say, a school which shall be open and free to all residents of said Parsonsfield without charge for tuition, not intended, however, to restrict the right of said inhabitants to charge tuition for scholars admitted to said school, who are not residents of said Parsonsfield; that no part of said money shall ever be expended in the erection or repair of school buildings, but the entire use, income and interest, arising and accruing from the estate hereby bequeathed, shall be forever expended for instruction and payment of incidental expenses, necessary for the support of said school.

"The expenditures of said money shall be under the direction and control of the superintending school committee of said Parsonsfield or such officers as may be by law provided in their stead; this devise is upon the express and certain condition that the inhabitants of said Parsonsfield shall accept and perform the conditions named in the second article of this will."

The heirs at law bring this bill to determine the construction of and the effect to be given to the trusts declared in the will, at

the same time denying the will to have been duly attested by competent witnesses.

1. It is objected that the will was not properly executed, because the attestation of the testator's signature was by interested witnesses.

The wife of the executor was one of the attesting witnesses. But the executor was a competent witness at the time of the attestation of his wife. He might legally have been an attesting witness. *Jones* v. *Larrabee*, 47 Maine, 479. The husband not being then interested his wife was not "beneficially interested" under the will and was a "credible attesting witness."

The other attesting witnesses were inhabitants of Parsonsfield. But that fact would not prevent their being attesting witnesses. In *Eustis* v. *Parker*, 1 N. H. 273, this precise question arose in a case where the attesting witnesses were inhabitants of a town to which a bequest for the support of schools had been made and they were held competent. Their interest, as inhabitants was not direct and certain. If they might be benefitted by the reduction of taxes, which might thereafter be assessed, they might die, or move from the town and cease to be inhabitants of the same, at the time of a subsequent assessment. Their interest was contingent. *State* v. *Stuart*, 23 Maine, 111. The increased privileges of education do not constitute a disqualifying interest. *Warren* v. *Baxter*, 48 Maine, 195; *Hawes* v. *Humphrey*, 9 Pick. 350.

But if it were otherwise and the witnesses were to be deemed interested, the objection is not open to the complainants. The probate court had jurisdiction. If it erred, the error might be corrected on appeal. Whether the questions arising in the probate court were correctly or incorrectly decided as to the competency of evidence can never be made a matter of inquiry in a court of common law to affect that adjudication. *Patten* v. *Tallman*, 27 Maine, 17. The probate of a will is final and conclusive upon all parties. *Dublin* v. *Chadbourn*, 16 Mass. 433. The decisions of the judge of probate in all cases within his jurisdiction are conclusive against all the world unless vacated by an appeal. *Tibbetts* v. *Tilton*, 4 N. H. 121; *McLean* v. *Weeks*, 65 Maine, 411.

A trust for the support of schools or of a particular school as a high school, or for any purpose of general public utility is a valid trust. So towns can hold property in trust for purposes within the general scope of their corporate existence. Thus, towns and cities may hold property in trust for the purpose of educating the poor, and the relief of those who are poor and not paupers. *Sutton* v. *Cole*, 3 Pick. 232; *Webb* v. *Neal*, 5 Allen, 575; *Everett* v. *Carr*, 59 Maine, 325; *Vidal* v. *Gerrard*, 2 How. 188; *Drury* v. *Natick*, 10 Allen, 169; *Second Religious Society in Boxford* v. *Harriman*, 125 Mass. 321; *Attorney General* v. *Butler*, 123 Mass. 305; stat. 1873, c. 92.

But the devise to the inhabitants of Parsonsfield was "upon the express and certain condition that the inhabitants of said Parsonsfield shall accept and perform the conditions named in the second article of this will."

Those conditions are that said inhabitants should have and hold forever the sum of one hundred dollars in trust to expend the interest and income as may be necessary to keep the testator's lot in the Piper burying ground in South Parsonsfield in good order and condition and an iron fence around the same in good repair and painted.

Here is provision for a perpetuity. The amount devised is to be held forever in trust for certain purposes. Whether the amount thus to be held be great or small is immaterial. The true question is whether this is a gift for a charitable use.

A charity is a gift to any general public use, extending to all rich or poor. "Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. So, if a gift for a private purpose tends to create a perpetuity, it will be void; but a gift for a public charity is not void, although in some forms it creates a perpetuity." 2 Perry on Trusts, § 687. "Charity is defined to be a general public use." 1 Jarman on Wills, 192. Courts have been exceedingly liberal in not restricting the objects to be regarded as charitable. "But," observes GRAY, C. J. in *Drury* v. *Natick*, 10 Allen, 169, "the gift must be expressly or by necessary implication for the public

benefit. Therefore a private museum or a library established by private subscription for the use of subscribers, has been held not to be a charity." In *Carne* v. *Long*, 2 De Gex, Fisher & Jones, 75, the devise was to the trustees of the Penzance public library, an institution established and kept on foot by the subscription of certain inhabitants of Penzance for purchasing books for the use of the subscribers; the books to be vested in trustees for the use of the institution, to continue as long as there were ten subscribers. It was held that this was not a charity. "The devise," says Lord CAMPBELL, "is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property is to be taken out of commerce and to become inalienable, not for a life or lives in being, and twenty-one years afterwards, but for so long as ten members of the society shall remain. This seems to be a purpose which the law will not sanction as tending to a perpetuity." The chancellor held this to be no charity, but a devise for the benefit of a society of certain individuals.

The bequest of one hundred dollars to keep the testator's lot in the Piper burying ground forever in repair, was not for any public purpose, beneficial to all, rich or poor. It was not a charitable use, for which a perpetuity might be created. "A condition for keeping a tomb in repair," observes KINDERSLEY, V. C. in *Lloyd* v. *Lloyd*, 10 E. L. & Eq. 139, "is not a charitable use, and is not illegal. It may be illegal to vest property in trust for that purpose, so as to create a perpetuity; but a direction that the wife and Mary A. Lockley, are, during their lives, to enjoy the annuity and are to keep the tomb in repair, is quite lawful." The tomb was to be kept in repair during their lives. There was no perpetuity. In *Richards* v. *Robson*, 31 Beavan, 244, the bequest was to keep up the graves and gravestones of certain persons in good repair. The bequests were to the church wardens in perpetuity. The court say the keeping up the tomb or building, which is of no public benefit, is not a charitable use and the bequests were declared void. In *Hoare* v. *Osborn*, 1 L. R. Eq. 583, a gift to keep in repair forever the vault, in which the testator's mother was interred, was held void, as not

being a charity. To the same effect is the case of *Fisk* v. *Attorney General*, 4 L. R. Eq. 521 and *In re Williams*, 5 L. R. Ch. Div. 735. *In re Burkitt*, 9 L. R. Ch. Div. 576, a certain sum was bequeathed, "the income to be applied when necessary, in keeping in good repair the grave, the railing and tombstones of my late father;" the residue over and the portion of the gift for keeping the grave in repair was held void.

In *Dexter* v. *Gardner*, 7 Allen, 243, a bequest in trust forever, the income of which was to be appropriated for the benefit of the Friends meeting," in a particular place, is a charity, and not void as a perpetuity, it appearing that the Friends under their usages and discipline apply the funds to the maintenance of religious worship, &c. and for the purchase and repair of burying grounds, the latter being regarded as a religious duty. It was contended that the latter purpose was not a charity; but the court held the providing and oversight of a burying ground for this sect of christians, as a religious duty could not be distinguished from that of repairing and maintaining meeting houses for religious worship, and sustained the trust. In *Swasey* v. *American Bible Society*, 57 Maine, 527, it was held that a legacy to keep in repair a family burying ground, might be sustained.

But this is not even to keep in repair the family burying grounds. It is simply to keep in repair his (my) lot, not the Piper bury-ground. It is not for any charitable purpose. It is for a merely secular object. It is not even for all of his family or name, rich or poor. It is not for any general purpose of public interest. 1 Tudor's Law of Charitable Trusts, c. 1, § 14. "The erection of a monument to perpetuate the memory of the donor, is not a charitable purpose; nor is the repairing a vault or tomb containing his remains; *contra*, it seems, if the vault be used for the interment of the donor's family." 1 Jarman on Wills, 238, 4 Am. ed.

Assuming the bequest in perpetuity to keep in repair the testator's lot in the Piper burying ground to be void, the counsel for the complainants in his able argument relies upon the case of *Fowler* v. *Fowler*, 10 Jur. N. S. 648, as showing that the gift, the income of which was to be applied to keeping the tombs of

the testator and family in repair is void as tending to a perpetuity, and if so connected with a gift over as to be inseparable, both will be held void. It appeared in that case that Rev. W. Fowler, by his will directed his executors and executrix to invest and set apart £500 in government securities. . . upon the permanent trust of appropriating the income in and toward the maintenance in good order of the graves and gravestones, with the railing now inclosing the graves in Baldock church yard of my late wife and others, the surplus of such year's income to the rector of Baldock for the time being for his own use.

Both counsel admitted the gift of income for the maintenance of the graves was void. The question was whether this fact invalidated the subsequent bequest to the rector of Baldock, as the sum necessary for carrying into effect the first, was not capable of being ascertained. Sir JOHN ROMILLY, M. R. in his opinion says, "the difficulty is that it is contended the gift is altogether void, and cases cited establish that position; that if a sum of money be given, part of which is to be applied to purposes which cannot be ascertained or which fail, and the remainder is given to other purposes, the whole gift fails, because of the invalidity of the first portion of the gift. . . although I cannot understand the principle in these cases, it is so well established by authority, I must hold the gift of the overplus void. I think I am bound by the cases *Chapman* v. *Brown*, 6 Ves. 404, and the *Attorney General* v. *Hinxman*, 2 J. & W. 270, and as I cannot determine in what way the amount necessary to keep the tombs in repair is to be ascertained, I cannot determine the amount given to the rector of Baldock for the time being, I am of opinion that the whole gift fails." The uncertainty of the amount necessary for repairs is the basis of the decision, but in the case at bar the uncertainty relates only to the fraction of the hundred dollars given for the purpose of repairs, and to nothing else.

But if possible the will of the testator should be sustained. His primary object, "his well considered and settled purpose" was to dispose of his property "to do the most good and be of the greatest benefit in promoting popular education" in the town of Parsonsfield. Is that purpose to be defeated by reason of a

gift, which cannot be sustained? The Piper high school was the paramount purpose, regardless of any claims of his relatives, which he entirely negatived.

In *Hoare* v. *Osborn*, 1 L. R. Eq. Cases, 587, KINDERSLEY, V. C. says: "The one third of the fund attributable to the gift for the repair of the vault, which is void, falls into the residue." In *Fisk* v. *Attorney General*, 4 L. R. Eq. Cases, 521, the bequest was of 10,001 consols to the rector and church-wardens of a parish, and their successors upon trust to apply such of the dividends as should be necessary or required in keeping her family grave in repair, and to pay and divide the residue every year forever amongst the aged poor of the parish. Sir W. PAGE WOOD, V. C. after examining the authorities, concludes thus: "There will be a declaration that the legacy of 10,001 given to the rectors and church-wardens of St. James, Liverpool, is a good gift, and that they take the same discharged from the obligation of keeping in repair the family grave of the testatrix."

The decision, *Fowler* v. *Fowler*, relied upon by the counsel for the complainants, is made by ROMILLY, V. C. to rest upon the cases of *Chapman* v. *Brown*, and the *Attorney General* v. *Hinxman*, though in his opinion he states he could not understand the principle upon which they were determined. In *Mitford* v. *Reynolds*, 1 Phillips Ch. 189, (19 Con. Ch.) those cases were considered and the amount necessary to comply with that portion of the will providing for a monument was referred to a master to ascertain the sum needed for that purpose. *In re Williams*, 5 L. R. Ch. Div. 735, the case of *Chapman* v. *Brown*, was considered as overruled. In that case there was an invalid trust for the repair of tombs, and a disposition of the remainder. "In this case," remarks MALINS, V. C. "if the first gift cannot take effect, there is no reason whatever why the whole fund should not be applied to the second object. If the first gift had taken effect, only a small part of the fund would have been absorbed. It is, therefore, only so much as is required for the illegal purpose which is abstracted. The gift being void, none is required, and consequently the entire fund remains applicable to the valid purpose." *In re Burkett*, 9 L. R. Ch. Div. 576, a bequest was

made to keep in repair the grave, railing and tombstone of A, the residue to the poor of U, it was held that the first purpose of the gift being invalid, the whole was applicable to the charity. "If," says JESSELL, M. R. "a man were to give an income of £10,000 a year, on trust, in the first place to keep his father's tombstone in repair, which under no conceivable estimate could exceed £20 a year, and directed the residue of the £10,000 a year, to go to charity, I should assume that good law, which always means common sense, and common sense would concur in holding that the £20 gift was void, and that £9980 was given in charity. I should have no difficulty whatever in saying that was the law."

"It may well be doubted," observes GRAY, J. in *Giles* v. *Boston, W. & F. Society*, 10 Allen, 355, "whether this condition to maintain a private tomb or burial place, was not void as tending to create a perpetuity." In *Dawson* v. *Small*, L. R. 18 Eq. 114, the testator bequeathed to his executors £600, out of his personal estate upon trust, to invest and apply the income, in keeping in good repair all the tombstones and head stones of his relatives and himself in G churchyard, and directed that any surplus that might remain after defraying yearly the expenses before stated, should be given by his executors every year to poor pious members of the Methodist society above fifty years old. *Held*, that the trust to keep the tombstones in repair being honorary only, the whole £600 was well given for the benefit of the Methodist poor, *discharged from the obligation of keeping the tombstones in repair*. "The obligation to keep up the tombstones," observes Sir JAMES BACON, V. C. "is merely honorary, but the obligation to give all that is not applied for the purposes first mentioned, is by no means honorary; it is a trust that must be executed." So, in the case at bar. In *Hornberger* v. *Hornberger*, 12 Heisk, (Tenn.) 635, the court held a trust for the support and maintenance of the testator's graveyard, was void.

If the bequest for the keeping of testator's grave, railing and tombstone was a valid one, "the average amount for repair," says JESSELL, M. R. *In re Burkett*, his lot and the iron fence "might be ascertained by any competent person." The amount for that purpose being ascertained, the rest must be devoted to

the charitable purposes indicated by the testator. If the bequest was invalid, then it falls into the residue.

In *Nourse* v. *Merriam*, 8 Cush. 11, there was a bequest to the town of Bolton subject to a condition held by the court to be contrary to law and public policy. The question was, whether the void condition could defeat the will otherwise valid or not, and the court held the bequest valid, as if no such illegal condition had been inserted. The same principle is affirmed in *Drury* v. *Natick*, 10 Allen, 183, where the court say that a condition, so far as it undertakes to impose obligation upon a town for the future, which it could not legally assume, would be repugnant to the grant and void. In *Wilkinson* v. *Wilkinson*, 12 L. R. Eq. & Bank. cases, 604, it was held that a condition to do what the law forbids, is invalid, the court holding that a condition, which required the omission of a duty, was void. To the same effect is the case of *Attorney General* v. *Greenhill*, 31 Beavan, 193. When a deed of land is on condition subsequent, the fee is conveyed with all its qualities of transmission. The condition has not the effect to limit the title, until it becomes operative to defeat it. *Shattuck* v. *Hastings*, 99 Mass. 23. Conditions requiring an illegal act are void. In case of conditions subsequent, when the estate or bequest is made dependent upon their full or continued performance, "if such conditions are illegal or void for any cause, or are, or become impossible of performance, the effect is not to defeat the estate dependent upon them, but that continues, having once vested, the same as if no condition had been attached." 2 Redf. on Wills, 2d ed. 285. It must be remarked that here there is no express provision that the estate shall go over on the failure of the condition, in which case regard must be had to the express words of the will.

The condition to take care of the testator's lot in the Piper burying ground, is manifestly a condition subsequent. The estate then vests in the town. It must remain there if the condition be one which is against the rules of law.

It is provided in the will, that the school house for the Piper free high school shall be built and maintained by the inhabitants of Parsonsfield. It is objected that they cannot legally raise

money for the purpose of erecting such school house, or to pay the town treasurer and committee for their care of the bequest made to the town.

By R. S., c. 11, § 5, as amended by stat. 1878, c. 20, "every city, town and plantation shall raise and expend annually, for the support of schools therein, a sum of money, exclusive of the income of any corporate school fund, or of any grant, or from the revenue or funds from the state, or of any voluntary donation, *devise* or *bequest*, or of any forfeiture accruing to the use of the schools, not less than eighty cents for each inhabitant, according to the census of the state, by which, representatives to the legislature were last apportioned," &c. under certain penalties in case of neglect.

The minimum tax only is established. It may be increased for educational purposes to any extent that may be deemed advisable. No limitation is placed upon the sum to be raised but the good judgment of the inhabitants raising it.

That a city or town may receive money by devise or bequest, is fully recognized by this section. The gift becomes the property of the town, to be used for the purposes for which it was given.

By § 30, provision is made for a union school for more advanced scholars. By § 31, "two or more school districts may unite for the purpose of establishing and maintaining a system of graded free schools." But graded free schools are high schools.

The design of the testator was to aid the town in establishing a free high school for teaching higher branches of knowledge than are taught in the common grammar schools of the town. It is the giving the supplementary aid recognized by the statute. The fund is under the control of the superintending school committee of the town. The town itself might have raised the money to build the school-house needed for a school for more advanced scholars, and provided for an instructor. Much more, then, can the town raise the means for erecting and maintaining the school-house in which the munificent bounty of Mr. Piper has furnished the means for providing for instruction. *Nourse* v. *Merriam*, 8 Cush. 12; *Cushing* v. *Newburyport*, 10 Met. 508.

The town have accepted the gift. It is bound to furnish the requisite buildings. It must have a reasonable time for that pur-

pose. When executors or trustees are to pay a legacy to a corporation on conditions precedent, and no time is stated in the will, five years from its probate is allowed for their performance. R. S., c. 74, § 17. If the building of the schoolhouse were to be deemed a condition precedent, there is ample time for its erection.

Bill dismissed.

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

ELLEN H. CASTLE *vs.* BELFAST FOUNDRY COMPANY.

Waldo. Opinion March 11, 1881.

Corporation, authority of officers. Promissory notes — signature to. Money counts.

A vote of the directors of a corporation that the president have full power and control of its business, authorizes him to purchase the materials to be used in its operations, and to borrow money for the corporation, and give its note for the money borrowed.

A note signed "Belfast Foundry Company, W. W. Castle, President," binds the corporation; and if it did not, the corporation, in this case, would be liable on the money counts for money loaned to it, and applied to the purchase of materials for its use or the payment of its debts. And it is immaterial whether the money is passed over to the corporation by the lender, or obtained by the president upon a deposit in a savings bank, transferred to him for that purpose.

ON REPORT.

The opinion states the case.

The law court to render such judgment as the law and evidence (legally admissible) require.

Philo Hersey, for the plaintiff, cited: Field, Corp. § § 271, 273–6; 3 Gratt. 215; 10 Ohio, 372; 1 Sand. Ch. (N. Y.) c. 280; *Beers* v. *Phœnix Glass Co.* 14 Barb. 358; *Graffins* v. *Land Co.* 3 Phila. Pa. 447; 3 U. S. Dig. 697; Green's Brice's *Ultra Vires*, 2d ed. 493; 5 Allen, 338; 59 Maine, 90; 12 N. H. 205; 1 Pick. 215; 12 Cush. 1; 7 Met. 224; 39 Maine, 316; 12 Maine, 354; Story, Agency, 335; 7 Cranch, 299; 35 Maine,

143; *Episcopal Church Prop'rs* v. *Episcopal Church*, 1 Pick. 372; 19 N. Y. 60; 5 Cush. 158; 12 Mass. 237; 8 Pick. 178; Ang. & Ames, Corp. § 297; *Bank of U. S.* v. *Dandridge*, 12 Wheat. 64; 2 Kent, 288, 291; 13 Ill. 366; 41 Maine, 574; R. S., c. 46, § 16.

Wm. H. Fogler, also for plaintiff.

A. P. Gould, for the defendant.

The notes do not purport to be the defendants', not their promise, but W. W. Castle's. To make them the notes of the company, they should have been signed, "Belfast Foundry Co. *by* W. W. Castle," or, W. W. Castle *for* Belfast Foundry Co. There must be some words used, which fairly interpreted, would indicate that the promise is not that of the person who signs, but of another. *Mellen* v. *Moore*, 68 Maine, 390; *Sturdivant* v. *Hull*, 59 Maine, 172; *Tucker M'fg Co.* v. *Fairbanks*, 98 Mass. 101; *Ballou* v. *Talbot*, 16 Mass. 461.

In *Draper* v. *Mass. Steam Heating Co.* 5 Allen, 338, where the note was signed "Mass. Steam Heating Co. L. L. Fuller, Treasurer," the question whether that was a well executed note of the corporation was not at issue, the corporation was defaulted. There are some remarks of the court, entirely unnecessary to the decision, mere *obiter dicta*, which are utterly inconsistent with the decisions of that court. It is a notable fact, that the case is never cited, nor alluded to in subsequent cases in that state touching the necessary form of signature by an agent to bind a principal.

The remarks of our court touching that case in *Atkins* v. *Brown*, 59 Maine, 93, cannot be considered as giving deliberate sanction to the remarks of the court in that case.

For a large number of illustrations for modes of signing, see 1 Daniel, Nego. Instr's, § § 400–408.

Castle had no authority to borrow money or give notes in behalf of the company. Corporations are bound by parol contracts made by an agent, only when authorized by vote or by its by-laws. R. S., c. 46, § 15; 1 Par. Contr. 7; Ang. & Ames on Corp. § 297; *Harward* v. *Humes*, 9 Ala. 659; *McCullough* v.

Moss, 5 Denio, 575; *Cattron* v. *First Universalist Society*, 46 Iowa, 106; *N. Y. Iron Mine* v. *First Nat. Bank*, 18 Alb. Law J. 489 (Mich.); 1 Daniel Nego. Instr. § § 387–397; *Smith* v. *Cheshire*, 13 Gray, 318; *Tabor* v. *Cannon*, 8 Met. 458; *Paige* v. *Stone*, 10 Met. 168; *Bates* v. *Keith Iron Co.* 7 Met. 224; *Brown* v. *Parker*, 7 Allen, 337; *Gould* v. *Norfolk Lead Co.* 9 Cush. 338; *Emerson* v. *Providence Hat Co.* 12 Mass. 237; *Sewanee Mining Co.* v. *McCall*, 3 Head. 619.

The defendants are not liable on the money counts for the money borrowed by Castle, without authority, even if it were made to appear that he appropriated it to their use. *Kelly* v. *Lindsey*, 7 Gray, 287; *Railroad Nat. Bank* v. *Lowell*, 109 Mass. 214; *Agawam Nat. Bank* v. *So. Hadley*, (Mass.) Law Reporter, May 22, 1880; *Siebrecht* v. *New Orleans*, 12 La. Ann. 496; *Jones* v. *Lancaster*, 4 Pick. 149; *French* v. *Auburn*, 62 Maine, 452; *Loker* v. *Brookline*, 13 Pick. 343; *Haskell* v. *Knox*, 3 Maine, 445; *Moor* v. *Cornville*, 13 Maine, 293; *Morrell* v. *Dixfield*, 30 Maine, 157; *Field* v. *Towle*, 34 Maine, 405; *Ingalls* v. *Auburn*, 51 Maine, 352; *Blanchard* v. *First Ass. of Spiritualists*, 59 Maine, 202; *Jones* v. *Wilson*, 3 Johns. 429; *Beach* v. *Vandenburgh*, 10 Johns. 369; *Wallkill* v. *Mamakating*, 14 Johns. 87; 1 Chitty Pl. 350.

Mrs. Castle transferred twenty-four hundred dollars of her deposit in the savings bank to her husband. She has no claim against the association, unless she can trace the fund, the identical money, into the hands of the defendant. The cases proceed upon the ground, that its identity is preserved; as in *Mason* v. *Waite*, 17 Mass. 560, the court say "the identical bills paid by Sargent to the defendant, were proved to be the property of the plaintiff." *Goodell* v. *Buck*, 67 Maine, 514; 2 Story's Eq. 1259; *Benoit* v. *Conway*, 10 Allen, 528.

Joseph Williamson, also for the defendant.

APPLETON, C. J. This is an action of assumpsit on three promissory notes of the following form:

"$330.36. Belfast, June 1, 1873.

One day after date we promise to pay to the order of Ellen H. Castle, three hundred and thirty dollars and thirty-six cents, at

office Belfast Foundry Company, value received, with interest at ten per cent.

No. 13–1 Belfast Foundry Co.
Due June 2, 1873. W. W. Castle, Pres't".

In addition to the counts on the notes, are the usual money counts.

The evidence shows beyond any reasonable doubt that the plaintiff loaned the amounts for which the several notes were given, to the defendant corporation, through the agency of its president, and that the money so loaned, was appropriated in good faith, to pay the laborers in its employ, and for the materials used in its business.

The defendant corporation resists the payment of the notes in suit on various grounds.

1. It is claimed that "Castle had no authority to borrow money or to make or sign a promissory note in behalf of the Belfast Foundry Company."

Though a corporation may not be expressly empowered to make a note, or accept a draft, yet it may do so for any debt which it may lawfully contract. *Came* v. *Brigham*, 39 Maine, 35. A corporation may issue negotiable paper for a debt contracted in the course of its proper business. *Kelley* v. *Brooklyn*, 4 Hill, (N. Y.) 263. If it can contract a debt, it can give a note as evidence of its indebtedness. *Clarke* v. *School District*, 3 R. I. 199; *Moss* v. *Oakley*, 2 Hill, (N. Y.) 265.

W. W. Castle was president, treasurer and director of the defendant corporation, owning three fourths of its stock. He had charge of its books, solicited and filled orders, purchased stock, and was the general manager of its concerns, and transacted all its business. As he could contract for the materials to be used, and for the laborers to be employed, it would seem that he might give a note for any indebtedness arising in the general management of the business intrusted to his charge.

But that is not all. On February 5, 1873, at a meeting of the directors, it was voted "that the president have the full power and control of all the business of the company."

The evidence is, that the president, after this vote, did all the business of the corporation for the following year. As he could

purchase materials and employ men, under this vote he could give notes for debts arising under contracts made by him, to the persons to whom the corporation was indebted. So the authority to give such notes, implies and includes the power to give notes for the money with which to pay such indebtedness, whether in the form of notes, or on the liability of the original contract.

In *Whitney* v. *South Paris Manufacturing Co.* 39 Maine, 317, the agent was authorized "to purchase stock and make sales for the corporation, to hire and discharge help, and manage the concerns of corporation, *being subject at all times to the direction of the board of directors.*" The restriction in that case imposed on the agent does not exist in the one at bar. In delivering the opinion of the court, SHEPLEY, C. J. said: "The usual course of transacting the financial affairs of the company appears to have been by the agent. He procuring loans of money from banks and individuals, on notes of the company made by him, on drafts drawn by him, and on notes and drafts payable to the company and indorsed by him. Notices on such paper, given to him, would bind the company, and he might waive the right to require notice and render the conditional liability absolute. This would come within the scope of his authority to create an absolute liability; it being but one of the forms of doing it. When notes became payable and new loans or an extension of the time for paying those existing became necessary, he must have the power to meet the exigency, or the credit of the company must be destroyed and his financial operations cease." In *Bates* v. *Keith Iron Co.* 7 Met. 224, the agent, as in the case last cited, was subject to the control of the directors. It was held that the notes of the agent without the assent of the directors were valid, and that their assent might be presumed. "Unquestionably," observes WILDE, J. "he was fully authorized to employ workmen to carry on the business of the concern, and to pay them with the funds of the corporation; or, not being in funds, he had authority to give notes of the corporation. *Odiorne* v. *Maxcy*, 13 Mass. 178; and 15 Mass. 39; *White* v. *Westport Cotton Man'f. Co.* 1 Pick. 220." It is clear, therefore, that the president had authority to give notes, which would be binding upon the corporation.

Further, it appears from the records of the corporation, that at a meeting of the directors on December 29, 1879, the directors, W. W. Castle and Charles P. Hazeltine, present, the president and treasurer, W. W. Castle, made his report upon the affairs of the company.

"Voted, that all acts of W. W. Castle as president and treasurer of the company, from January 23, 1873, to the present time be and are hereby ratified and confirmed.

F. S. Wallis, Clerk, *pro tem.*"

There were but three directors. The action of two is binding on the corporation, It would *seem* to be so, though one may have deceased or resigned.

2. It is urged that "the notes declared upon do not on their face, purport to be the promissory notes of the Belfast Foundry Company."

The notes in suit were payable "at office of Belfast Foundry Company." They were intended to bind some person or corporation. They were not intended to bind the president personally, for if they had been so intended, he would not have signed the name of the corporation whose agent he was, and which he had ample authority to bind. In *Draper* v. *Massachusetts Steam Heating Co.* 5 Allen, 338, the signature was as in the case at bar. Thus, "Massachusetts Steam Heating Company, L. S. Fuller, treasurer." In his opinion, HOAR, J. says: "The name of the company is signed to the note. This signature could not be made by the corporation itself, and must have been written by some officer or agent. It was manifestly proper that some indication should be given by whom the signature was made, as evidence of its genuineness; and Fuller added his own, with the designation of his official character. And that the whole taken together shows it to be the signature of the Massachusetts Steam Heating Company, and not of Fuller." The principle decided in this case is to be found in *Abbott* v. *Shawmut Ins. Co.* 3 Allen, 215, and in *Atkins* v. *Brown*, 59 Maine, 90.

In the cases cited by the learned counsel for the defendant, the signer appends to his signature a description of himself as agent, president, trustee or treasurer of some corporation as in *Slawson*

v. *Loring*, 5 Allen, 340, the next case to that of *Draper* v. *Mass. Steam Heating Co.* before cited, as well as in the other cases relied upon.

3. It is insisted that "the defendants are not liable upon the money count, for the money borrowed by Castle without authority, even if it were made to appear that he appropriated it to their use."

It has been clearly shown that Castle was authorized to borrow the sums in controversy and that they were applied to meet the liabilities of the defendant.

The note given for a debt or loan is undoubtedly presumptive evidence of payment of such debt or loan. It is only to be regarded as payment, when the security of the creditor is not impaired. But if negotiable paper is taken under a misapprehension of the rights of the parties, the presumption of payment may be rebutted. *Paine* v. *Dwinel*, 53 Maine, 53.

If the notes in this case are not binding it is obvious that they were taken under a most material misapprehension, for it cannot be doubted that they were given and taken as valid notes upon which the defendant corporation is liable.

Here, then, was a loan, the note given for it not binding. The loan remains. The president, Castle, was authorized to make it. The funds borrowed were applied to the discharge of corporate liabilities. The note given not being valid, the plaintiff may proceed on the original cause of action. The case on this hypothesis stands as if no note had been given. Assuredly, the loan to the defendant, through the agency of an authorized agent, and their use of the same would constitute a good ground of action.

4. It is objected that the two notes dated October, 1873, for two thousand dollars and for four hundred dollars, were not given for borrowed money, but for the plaintiff's credit in the savings bank.

It is immaterial whether the plaintiff loaned bills or loaned a draft on which the money was collected. It is equally unimportant, she furnishing the book of the savings bank, whether her deposit was drawn by her, or by her authorized agent, provided the Belfast Foundry had the funds so drawn out. It is abundantly

proved that it had the benefit of them. The plaintiff should recover for them.

Defendant defaulted.

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

GEORGE H. BILLINGS *vs.* INHABITANTS OF MONMOUTH.

Kennebec. Opinion April 6, 1881.

Exceptions. Money had and received — action for, against a town.

Exceptions taken to the admission of notes declared upon, and other pieces of evidence to show the consideration, and authority for, or ratification of such notes, are deprived of all validity as grounds for a new trial where the jury are peremptorily instructed that these notes were not authorized nor ratified by the defendant, that there was nothing in the case to warrant any such inference, and finally that, "that lays the notes out of the case, and brings us to the other count, that for money had and received."

An action for money had and received to his use, may be maintained by one who, upon representation of town officers that money was needed for municipal use, has furnished them money for such use, if he goes farther and proves that that money was actually applied by such officers to the extinguishment of some of the lawful and proper debts and liabilities of the town.

ON EXCEPTIONS and motion for a new trial.

Assumpsit on three promissory notes signed "William G. Brown, Treasurer;" also for money had and received.

Plea was general issue, and statute of limitations was set up under a brief statement.

The verdict was for $3004.81.

The exceptions relate to the admission in evidence, of the notes declared upon, of certain other notes, and of the records, accounts, and settlements with the treasurer, of the defendant town. Exceptions were also taken to the part of the charge to the jury given below:

"Now a question is raised here in the very beginning whether these notes are the notes of the town, or the notes of the treasurer. I do not deem it necessary to state in regard to that now.

I do not care to state it for the reason that there are several actions pending, in which that very question will be raised and will be finally settled by the law court. And it is sufficient for me to say to you, that those notes were not authorized by any vote of the town . . . That lays the notes out of the case," and to other parts of the charge covering several pages.

G. C. Vose, for the plaintiff, cited: *Jefts* v. *York*, 4 Cush. 371; *Jones* v. *Wolcott*, 2 Allen, 247; *Barlow* v. *Cong. Soc. in Lee*, 8 Allen, 460; *Gould* v. *Sterling*, 23 N. Y. 456; *F. & M. Bank* v. *B. & D. Bank*, 16 N. Y. 125; *Hern* v. *Nichols*, 1 Salk. 289.

J. H. Potter, for the defendants.

If the notes declared on are the individual notes of Brown, then of course they are not admissible. If they are held to be town notes in form, then they should not have been read in evidence, until it was first shown that they were issued by the express permission of the town in its corporate capacity. No such permission was shown, none existed. *Rich* v. *Errol*, 51 N. H. 350.

Again, though in 1865, Brown, the treasurer, was authorized to hire money, yet he was not authorized to issue commercial paper for the same. *Parsons* v. *Monmouth*, 70 Maine, 264, and cases therein cited.

Therefore, the Leuzader notes, dated February 4, 1865, February 6, 1865, and March 10, 1865, were clearly inadmissible on any ground.

The several amounts claimed to have been paid as interest on the Jack, Johnson, Smith and Leuzader notes were, we submit, inadmissible. Counsel for plaintiff claimed that he offered them to show that those notes were not barred by the statute of limitation. But the statute of limitations was only pleaded and could only be pleaded to the notes sued, and the above named notes were not in suit.

The reports of the treasurer from 1864 to 1877, inclusive, made at the annual March meetings, were placed in evidence and read to the jury. These reports are merely statements, in

gross, of the treasurer's account with the town. Nothing is stated in detail, no notes are specifically mentioned, no one could tell whose notes were there, of whom money was borrowed, or to whom the town was indebted. We know of no legal ground on which they were admissible, and can conceive of no purpose for which counsel offered them, (he stated none) unless it was as evidence of ratification by the town of the unauthorized acts of the treasurer in issuing the notes declared on, and others.

In 1866, a case involving this identical question came before the full bench of Massachusetts, *Dickinson* v. *Conway*, 12 Allen, 487, where it was held that the report of the treasurer, accepted by the town, presented no evidence of ratification to be presented to the jury.

In *Dedham Institution for Savings* v. *Slack*, 6 Cush. 409; *Rich* v. *Errol*, 51 N. H. 350; *Benoit* v. *Conway*, 10 Allen, 528, the same rule of law was advanced and maintained.

The presiding judge in his instruction to the jury refused to rule on the question whether the notes declared on were individual notes, or in form, town notes.

Had the learned judge instructed the jury that the notes declared on were the individual notes of Brown, then that would have ended the conflict, and the plaintiff would have been nonsuited.

There is no pretence either in the testimony or the charge that the treasurer was authorized to hire any money for which these notes were given (unless it be the five hundred dollars note.) Therefore, the vital question was what became of the money? And this raised the all important question, viz: the deficiency in the treasury. And the defendants had a right to inquire into every minutiæ pertaining to that deficiency. The learned judge should have given the jury the widest latitude in that direction, and even should have impressed upon them the necessity of thoroughly investigating this branch of the case.

BARROWS, J. The defendants' objections to the reception in evidence of the notes sued, and certain other notes and renewals thereof, which were claimed by plaintiff in one phase of the case to constitute the consideration of the notes in suit, and like objec-

tions to the records of the doings of the town at various town meetings, between 1862, and 1872, and to the reports of the town treasurer at its annual meetings, from 1865 to 1877 inclusive, all accepted by the town, and to the settlements of the treasurer with the selectmen, if said objections could be supposed in any view of them to possess merit, became altogether immaterial, when the presiding judge, with full instructions as to the effect of a want of authority upon the validity of the notes, peremptorily instructed the jury that "these notes were not authorized by any vote of the town, that they were not ratified, that there was nothing in the case which would authorize any such inference," and finally, that "that lays the notes out of the case, and brings us to the other count, that for money had and received."

Nor do we see how the testimony could have been excluded; for the presiding judge could not say in advance, that the plaintiff would be unable to produce evidence of authority to the town officers to make the notes, nor that there would be no proof of a ratification which would bind the town. A rule which would exclude a piece of evidence, because in and of itself it is insufficient to establish the proposition which the party offering it, seeks to maintain, and because without something more which may or may not be forthcoming it is useless and irrelevant, is obviously impracticable, for it would enable an adversary to exclude piecemeal, what taken as a whole would maintain the issue.

Something may be, and often is done in the discretion of the court, by way of requiring a certain order in the introduction of the evidence; but it can hardly be deemed error to trust somewhat in the intelligence, honor and integrity of counsel, to furnish the necessary connecting links, and when they fail to do so, a distinct ruling which lays the defective evidence out of the case will leave the objecting party no substantial cause of complaint. *Penn. R. R. Co.* v. *Roy*, U. S. Sup. Ct. December, 1880. The Reporter, vol x, p. 793.

Here it was a subject of contention, both in law and fact, between the parties, whether these notes had been authorized or ratified by the town. To apply the testimony touching it intel-

ligently, it was proper that the notes should be presented; and we fail to see any plausible ground of objection to the admission of the records of the town and its action. The acts of the town and its officers must be known, in order that their effect upon the subject of controversy might be canvassed; and even had the ruling been less peremptory than it was upon the questions of authority and ratification, it would be difficult to find any good cause of complaint in the admission of this evidence. The defendants' counsel insists in argument upon the refusal of the presiding judge to rule upon the question, whether the notes were in form notes of the town, or notes which could bind the treasurer only. If the instructions to the jury had permitted a recovery upon the notes in any contingency, that inquiry would seem to be pertinent. But they did not. The notes were "laid out of the case," and the plaintiff's right to recover was made to depend upon his establishing what was necessary to entitle him to a verdict upon the count for money had and received. The testimony tending to show authority or ratification, was weighed and found wanting. After this, there was no occasion to pass upon the construction of the notes, any more than there was in *Parsons* v. *Monmouth*, 70 Maine, 264.

That any negotiable paper, made by the officers of a town in the transaction of its ordinary business, not proceeding under special authority conferred by some statute, will be subject, even in the hands of a *bona fide* indorsee, to all equitable defences that might be made against the original promisee, is well settled in this State, as appears in the case last named, and the cases there cited.

And the plain doctrine of *Bessey* v. *Unity*, 65 Maine, 342, and *Parsons* v. *Monmouth*, is that the holder of such paper who has lent money upon the representation of town officers that it was wanted for municipal use, must go farther and show the appropriation of the money lent to discharge legitimate expenses of the town, unless he can show that such officers were specially authorized, by vote of the town at a legal meeting, to effect the loan. The case at bar seems to have been tried in careful conformity with these rules. The fallacy of the greater part of the

defendants' argument upon the exceptions consists in ignoring the fact that "the notes were laid out of the case."

It is strongly implied in the two cases last above cited that money thus advanced and shown to have been actually appropriated to the discharge of legal liabilities of the town, would be held recoverable in an action for money had and received against the town. We see no good reason to excuse the town from refunding it when it has been actually thus appropriated. The plaintiff by such proof brings his case fully within the principles that govern the action for money had and received. He shows his money received and appropriated by the agents of the town to the legitimate use of the town, and in such case the want of an express promise to repay it will not defeat the action. The law will imply a promise, sometimes, even against the denial and protestation of the defendant. *Howe* v. *Clancey*, 53 Maine, 130.

It is the payment of the lawful debts of the town by its own agents with the plaintiff's money which constitutes the cause of action.

To allow a recovery by the plaintiff of whatever sum he can show has thus enured to the benefit of the town, is a more compendious mode of settling the controversy than the English method of subrogating the lender of the money to the rights of the perhaps numerous corporation creditors, who have been paid with the funds procured without authority, a mode of doing justice which manifestly tends to a multiplicity of suits, when, for aught we see, the proper result may be reached, at all events with the assistance of an auditor, in a single action.

Looking at the issue which was in fact presented to the jury, it will be seen that defendants' counsel is in error in supposing that if the presiding judge had ruled that if the notes were *in form* the individual notes of Brown, "that would have ended the conflict and the plaintiff would have been nonsuited."

The plaintiff offered testimony tending to put his case upon another footing than that of *Parsons* v. *Monmouth*, and hence all the evidence which had a tendency to show that plaintiff's money was used for the payment of some legitimate indebtment

of the town was strictly relevant; and the instructions (of some of which the defendants complain) were appropriate to direct the attention of the jury to that which was the chief subject of inquiry. Thus it is obvious that the deficiency in the town treasurer's accounts was of importance only upon the question, what was done with the plaintiff's money, and as it might bear upon that question, the presiding judge called the attention of the jury to it. The defendants surely have no cause of complaint that he did so, nor that he required the jury carefully to ascertain such facts as were necessary to determine whether the old notes which (it was claimed) were paid with this money were barred by the statute of limitations, and whether, if the plaintiff's money was paid to discharge them, they represented not only just but legal claims against the town.

The vital question of fact whether the plaintiff's money had actually been applied by the town officers to the extinguishment of legal claims against the town was settled by the jury against the defendants. The jury found that it was so applied. The testimony produced by the plaintiff, if believed, justified the finding, and there is nothing in its character or in that of the accounts produced which decisively stamps it as untrue. There is an apparent error of a few dollars in the reckoning of interest. When the plaintiff has cured this by a remittitur, the entry will be.

Motion and exceptions overruled.

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

JESSE DYER *vs.* NORRIS G. CURTIS and another.

Cumberland. Opinion April 7, 1881.

Ice pond. Tide waters. Dam. Nuisance. Prescription. Lease, void from public policy.

A dam built across an arm of the sea, into which a fresh water creek empties, to exclude the salt water for the purpose of creating a fresh water pond, upon which to cultivate and harvest ice for the market, without direct authority of the legislature or the delegated action of harbor commissioners, if the case falls within their jurisdiction, is in the same sense a public nuisance as it would be to build a solid wall across a road or street.

Without such authority such a dam never acquires the right to exist by prescription.

Where, by the terms of a lease, the lessor agreed to keep up such a dam during a certain portion of the year, in consideration of the covenants of the lease, it was held to be an illegal contract.

No rule precludes either party from showing the illegality of a lease void from public policy.

A deed of a tide-mill privilege, mill dam, wharf privilege and the right to flow the creek and adjoining lands to high water mark, "and all the rights and highways connected with and belonging to said mill privilege," gives the grantee no right to ice cutting, nor title to the ice formed upon a fresh water pond raised by changing the dam so as to exclude the salt water.

ON REPORT.

The case is stated in the opinion.

The law court was to render such judgment as law and justice require.

Webb and Haskell, for the plaintiff.

These defendants do not claim any right to prevent the plaintiff from utilizing his mill property as an ice field in the winter season, why then should they be upheld in willfully appropriating to their own use the product of the plaintiff's property? The use of the mill is lost to the plaintiff in order that he may harvest ice from his mill pond.

The controversy here is not whether the plaintiff has unlawfully shut out tide water, but whether, having done so and made an ice pond, the defendants who neither do nor can lawfully object,

are justified in trespassing upon his possession and carrying away his ice.

If the defendants were not lessees when the ice sued for was taken they were strangers to the title and had no right to enter upon the premises.

Strout and Holmes, and *E. P. Payson*, for the defendants.

SYMONDS, J. The declaration contains one count for trespass upon real, and another for trespass upon personal estate. The close is described as a mill pond in Cape Elizabeth, the property removed as about six thousand tons of ice.

There is no dispute that the *locus* is a creek, or arm of the sea, within the ordinary ebb and flow of the tide; a small brook running in at the head of it. For a long period, perhaps sixty years or more, there has been a dam below, at the outlet of the creek into the broader parts of the bay or harbor. For the same length of time, except when temporarily destroyed by fire, there has been a tide mill at the dam, operated by letting the tide flow in through gates and fill the pond, holding it there till the tide had ebbed for about three hours so that the process of grinding could begin, and then grinding for about six hours, till the return of the tide stopped the wheel and began to fill the pond again. Upon the ebb of the tide, the mill would again be started by the full pond.

The extent of plaintiff's claim of title, under his deed from Charles Oxnard, July 1, 1874, is to this mill with its dam, ways, rights of wharfage and flowage, and what other rights pertain to it as a mill and mill privilege. He shows no other title by grant or by prescription in himself. If any former owners of the mill had acquired by deed or by possession a higher right than this; either a different easement in the premises or a fee in the flats flowed; the deed to the plaintiff did not undertake to convey it to him. The limit of his title under his deed is to the mill with its rights and privileges. The question of his possession does not at present arise.

Till the winter of 1874–5, no attempt had been made to cut ice for the market upon the mill pond, and the tide had flowed

in and out in the winter, as at other seasons. During that winter the sea was excluded by a solid earth work at the dam, the pond gradually filled by fresh water from the brook, on which ice formed, which was marketed by the firm of Curtis and Dyer, consisting of the plaintiff and one of the defendants. Whether the business of this firm continued during the winter of 1875–6, perhaps does not positively appear.

The right of the firm of Curtis and Dyer to use the mill pond in this way, and to cut and harvest the ice upon it, was evidently questioned by William W. Thomas and others, who claimed to be, or as trustees to represent, the owners of adjacent uplands, and asserted title to the flats, subject to the easement of the mill; and after some negotiation, on November 1, 1876, the defendants took a lease for four years, from those trustees, of certain lots which are said to include the place in dispute, and also of "the right to shut out the sea by a dam, and to flow with fresh water up to high water mark all the flats, marsh and thatch bed in Mill Creek. . . . . to cut ice thereon and remove it therefrom."

After this lease from the trustees had been obtained, on December 16, 1876, the defendants procured, also, a lease from the plaintiff for four years from November 1, 1876, with the right of renewal, and containing the following description of the premises demised: "the privilege to cut and harvest the ice on my mill pond. . . being the same pond and property held by me under deed from Charles Oxnard. . . . . giving said lessees full control of said pond and its flowage during the whole ice forming, cutting and harvesting season, viz. from the first day of November in each year to the twentieth day of March of the year following, if they so long need or desire to so occupy and use it; *and the said Dyer agrees to keep the dam of said pond at same height and in safe condition*, as same has hereby [heretofore?] been kept by him and by Dyer and Curtis, to his and their use and occupation of said pond in the ice business." The lessor might enter and expel the lessees, it was provided, if they failed to pay the rent or to keep their covenants.

In December, 1879, the plaintiff, claiming that the defendants had broken the covenants of his lease to them, entered upon the

pond to take possession, notified the defendants that such entry was for breach of condition, that their right of occupancy under the lease was ended, and any further entry or interference by them forbidden. The defendants, however, in fact retained the possession of a part of the pond that winter against the plaintiff's will, and between the last day of December and the date of the writ, cut and carried away the ice for which recovery is sought in this action.

Was this a trespass upon the lands or goods of the plaintiff? We think not.

It is settled law, that under the Massachusetts Colonial Ordinance of 1647, (*Comm.* v. *Alger*, 7 Cush. 53,) part of the common law of this State, the owner of the upland has the fee in the flats to ordinary low water mark, "where the sea doth not ebb above a hundred rods;" "until severed by some deed or act of the owner, competent to convey or transfer real estate"; but between low and high water mark he holds subject to certain reserved rights of the public. Navigation must not be obstructed, nor the passage of fish into bays, creeks, or up the course of navigable rivers, without legislative authority. These are matters of common right, and such an obstruction of them, even by the holder of the fee in the sea shore, is a public nuisance. They are rights, also, against which no prescription runs. No erection, injurious to them and without legislative sanction, ever acquires the right to be, by lapse of time.

The ordinance of 1647 "vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but it was to be held subject to a general right of the public for navigation until built upon or inclosed, and subject also to the reservation that it should not be built upon or inclosed in such manner as to impede the public right of way over it for boats and vessels. We are not aware that this has been drawn in question by any judicial decision; but on the contrary we think that this construction has been uniformly recognized, adopted and applied, as occasion has required." *Comm* v. *Alger*, *supra*; *Low* v. *Knowlton*, 26 Maine, 128; *Moulton* v. *Libbey*, 37 Maine, 472; *Stoughton* v. *Baker*, 4 Mass. 522.

In the present case, no authority from the legislature is claimed. Suppose the plaintiff to hold all the title to the property purported to be conveyed to him by his deed, which it is possible for a citizen to have in such estate without legislative act; or assume for the present purpose that his deed gave him the fee in the flats of the creek, within the ebb and flow of the tide; the entire *jus privatum*. The creek is still a public highway, and the obstruction of it, so as to exclude the sea, a public nuisance.

It does not necessarily follow that the ancient mill and dam exist without right, and that the plaintiff has taken nothing by his deed. Fishways may be constructed and provision made for the passage of boats, by locks or otherwise, so that the private estate may be enjoyed to the full extent practicable, consistently with the public right. But to close this creek against the incoming tide, so as to make it a pool of fresh water for the formation of ice for the market, without either the direct authority of the legislature, or the delegated action of the harbor commissioners, if the case falls within their jurisdiction, was in the same sense a public nuisance as it would be to build a solid wall across a road or street.

It will be seen that the main consideration for the covenants of the defendants, contained in the lease from the plaintiff, was an agreement on the part of the latter to keep up during the term, from the first of November in each year, till the twentieth of the following March, this permanent obstruction of a public right. If this was not done, there was no ice to be cut. It is common knowledge that salt water creeks upon our shores are not naturally impassable by reason of ice during all that period.

It follows that the lease was an illegal contract and void. It is true that a tenant cannot ordinarily deny the title of his landlord, which he admits in the lease, or under which he receives possession. But no rule precludes either party from showing the illegality of the lease itself. On grounds of public policy, of the disability of the plaintiff, not of protection for the defendant, the court refuses to aid in enforcing a contract to do an illegal act, or one in which the consideration is illegal, however the illegality may be made to appear in evidence, receiving even

oral testimony to determine the status of a written contract in this respect. This contract imposed no obligation upon the plaintiff to maintain the dam in the manner stipulated, a nuisance which exposed him constantly to indictment, and which anybody having lawful occasion to use the creek might abate, committing no breach of the peace. It created no liability against the defendants, as tenants of the ice field thereby formed. In the most favorable light for the plaintiff, it was as if the owner of the soil under a public road should agree in a lease to fence off a part of it, and maintain the fence during the term, if his tenant would agree to pay him rent for the strip inclosed. It is clear that in such case the lease would be void as an illegal contract. If such a lessor, owning the fee of the road, had taken possession for breach of the terms of the lease by the tenant, certain claims on his part to the products of the soil might arise which the plaintiff is not here in position to assert, because he did not take actual possession of the whole pond, not of that part where the defendants cut the ice; and, again, because he shows no property in the water of the creek, but only the right to use it, subject to the public easement, for the purposes of his mill.

It is true, in the present instance, that the *jus publicum* may be of trifling value. But the principle is an important one, protecting the openness of navigable waters, and must be observed. The ice interests of the State are becoming so valuable, that the legislature, which has the power to regulate common rights and privileges, will undoubtedly be disposed to yield them wherever it can be done safely and without public detriment, but the attempt to make this arm of the sea a place for cutting merchantable ice, without the aid of the legislature, is entirely impracticable.

The plaintiff's deed gave him no right to the ice cutting and no title to the ice. He shows no rightful possession except in accordance with the terms of his deed. There was no actual ouster of the defendants, from that part of the pond where they cut it. The right of the plaintiff to exclude them if they did not interfere with his mill privilege does not appear. *Cummings* v. *Barrett*, 10 Cush. 186, 189; *Paine* v. *Woods*, 108 Mass. 160, 173. They remained in possession and took the ice. If

either party has derived an advantage from the lease the law leaves them as they stand.

Judgment for the defendants.

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

GEORGE HEARN *vs.* THOMAS SHAW and others.

Cumberland. Opinion April 7, 1881.

Exceptions. Malicious prosecution. Malice. Abuse of legal process. Practice.

In an action for malicious prosecution where the exceptions state, that appropriate instructions were given as to what constitutes probable cause for commencing an action, and that the jury were told that they might infer malice from the want of probable cause, it was not error to refuse to adopt in terms, as a part of the charge, a request that "if the defendants negligently and ignorantly . . . commenced an action against all the owners of the vessel, and attached the whole vessel when some of the part owners were not liable for the demand sued, and those who were liable, were unjustly and wrongfully harassed and oppressed, the jury have a right to infer actual malice from such acts."

The refusal of a specific instruction, does not in any case affirmatively appear to be an error if it is left uncertain whether those given, were the same in substance and effect; still less when the exceptions show that the whole subject to which the request relates, was covered by appropriate instructions, to which no exception was taken, and which do not appear.

Where it appears from the exceptions, that a requested instruction was refused," "except as given in the charge," and no part of the charge which includes the same subject is reported, they fail to show an error if one exists.

When correct rulings have been given to the full extent of the claim alleged in the declaration, that the action was begun maliciously and without cause; it was for the plaintiff to request a ruling that would enable him to recover on proof, of part of his case, abuse of process properly issued, At least, it should appear that the attention of the court was called to the minor cause of action included in the declaration. Otherwise it was not error to treat the entire cause of action as the one before the court, and to give the rules of law relating to it.

EXCEPTIONS from superior court, Cumberland.

Action on the case to recover damages for malicious suit and prosecution, and for abuse of legal process.

At the trial the plaintiff requested the presiding judge to instruct the jury as follows:

"If the defendants negligently and ignorantly and without due care and investigation commenced an action against all the owners of the vessel, and attached the whole vessel when some of the part owners were not liable for the demand sued, and those who were liable were unjustly and wrongfully harrassed and oppressed, the jury have a right to infer actual malice from such acts," which the court declined to give other than as given in the following extracts from the charge.

"But if you should find a want of probable cause in beginning the suit against Captain Hearn, you will then consider the second proposition which I stated to you it was incumbent on the plaintiff to prove, namely, that the action was commenced maliciously or with malice.

"The plaintiff is not required to prove that the defendants were actuated by express malice in the popular sense of that word, that is, that a feeling of hatred and ill-will existed in the minds of the defendants, but it is sufficient if he prove malice in fact in its legal meaning. And in a legal sense, any act done willfully and purposely to the prejudice and injury of another is as against that person malicious. Any illegal act, the necessary consequence of which is to injure another, is malicious. The question of malice is a question of fact for the jury. The jury may infer malice from want of probable cause, though the want of probable cause is only one item tending to prove malice. Malice as I have said, is a question of fact, and is to be proved by the defendants' acts, conduct and declarations in regard to the original suit, or by other circumstantial evidence as any other fact may be proved."

The plaintiff also requested the following: "If defendants, after the attachment of vessel, were notified that all the defendants were not liable, and they had no reasonable cause to believe all the owners of said vessel in 1877 were liable, then the defendants were not justified in holding the attachment upon the interests of all the owners of the vessel and a further continuance of said attachment upon the interests of all the owners would be evidence of want of probable cause and of actual malice."

Which the court declined to give otherwise than as given in the charge, and remarked to the jury: "I am requested by counsel for the plaintiff to give you a further instruction. It affects the joinder of other parties to the suit, not parties to this proceeding here. If other parties have any cause of action against these defendants they can bring it into court. As I have already said what motives existed in the minds of the defendants as to Lewis, it does not necessarily follow existed in their minds as to Hearn. For that reason I decline the request except as given in the charge."

The court having given the jury appropriate instructions as to what constitutes probable cause for the commencement of an action, further instructed them as follows:

"If you find that the defendants were not actuated by malice in commencing the suit against Captain Hearn, even if you find that it was begun without probable cause, then the plaintiff's case fails and your verdict should be for the defendants."

M. P. Frank and *P. J. Larrabee*, for the plaintiff.

The only questions involved are the instructions in regard to malice, and in regard to abuse of legal process.

Plaintiff claimed that the fact that defendants did not inquire at custom house at time suit was commenced, for names of owners in July, 1876, when goods were sold, was evidence that they were negligent and did not use due care and investigation, which was in the province of the jury to find, and if they should so find, that the requested instruction would be a guide to them in reference to the question of malice. It is not sufficient that defendants should act simply in good faith as instructed by the court, as the greatest negligence, want of care and investigation might exist at the same time with good faith. *Page* v. *Cushing*, 38 Maine, 527.

The account sued was charged, as evidence shows, to the owners of brig Enderus, and not to individual names, and there was not the least evidence of any kind that J. T. Lewis was interested at the time said goods were sold, as owner in said brig; and even good faith on the part of defendants would have elicited an inquiry as to who were the owners at time goods were sold.

The general principle of law is, that plaintiffs are not only responsible for commencement of suits, but for the conduct of same, and that any acts of theirs whereby the opposing party is unnecessarily harassed, oppressed or injured, in his person or property, is an abuse of legal process for which they are liable. 1 Hilliard on Torts, 435; *Savage* v. *Brewer*, 16 Pick. 453; *Page* v. *Cushing*, 38 Maine, 526.

The court further instructed the jury, "If you find that the defendants were not actuated by malice in commencing the suit against Captain Hearn, even if you find that it was begun without probable cause, then the plaintiff's case fails," &c. Now the law is well settled, that in action for abuse of legal process, it is not necessary to aver or prove malice. *Page* v. *Cushing*, 38 Maine, 527; 2 Greenl. Ev. § 452.

Charles F. Libby, for the defendants, cited: *Soule* v. *Winslow*, 66 Maine, 451; *Marshall* v. *Oakes*, 51 Maine, 308; *Prescott* v. *Hobbs*, 30 Maine, 345; *Warren* v. *Walker*, 23 Maine, 453; *Hopkins* v. *McGillicuddy*, 69 Maine, 273.

SYMONDS, J. I. The first exception is to the refusal of the court to give the following instruction requested by the plaintiff: "If the defendants negligently and ignorantly . . . . . commenced an action against all the owners of the vessel, and attached the whole vessel, when some of the part owners were not liable for the demand sued, and those who were liable were unjustly and wrongfully harassed and oppressed, the jury have a right to infer actual malice from such acts."

Whatever may be the fact in regard to the correctness and pertinency of the rule of evidence stated in this request, the exceptions as presented, do not show an error in refusing to adopt it in terms as a part of the charge. Appropriate instructions, the exceptions state, were given as to what constitutes probable cause for commencing an action. On this point, no exception was taken. The jury were also told they might infer malice from the want of probable cause, so correctly defined by the court. If, then, the facts supposed in the request, were such as to leave no reasonable or probable cause for bringing the original action, and attaching property in the manner therein stated—and it is on

this ground, that malice is to be implied from them, if at all— it follows that the ruling requested must have been substantially included in those given. In other words, malice is not to be inferred from the acts stated in the request, unless they are sufficient to show a want of probable cause. Probable cause was correctly defined to the jury, and they were told malice might be inferred from the want of it. Assuming the negligent acts which the request recites to be sufficient to show want of probable cause, then the jury were told in effect they might infer malice from them.

While the whole charge is not given, and we do not know in what terms probable cause was defined, in full, enough appears to show that this element of negligence in proceeding to bring the suit, was not overlooked by the court. In one of the extracts reported, it is upon "an honest and reasonable conviction" on the part of the present defendants, that the plaintiff was then their debtor, appearing from all the evidence, that the finding of the jury on this point was made to depend. This does not extend to questions relating to the ownership of the vessel, nor to the proceedings under the attachment, but so far as these were involved in the subject of probable cause, or the want of it, affecting the inference of malice, there is no exception to the rulings given, and the case states that they were appropriate. The refusal of a specific instruction, does not in any case affirmatively appear to be an error, if it is left uncertain whether those given were the same in substance and effect; still less, when the exceptions show that the whole subject to which the request relates was covered by appropriate instructions, to which no exception was taken, and which do not appear.

II. The second requested ruling was refused except as given in the charge. No part of the charge which includes the same subject is reported. The exceptions, therefore, fail to show an error, if one exists. We suppose the request to mean that the continuance of the attachment under the circumstances stated would be evidence of want of reasonable cause and of malice, in instituting the suit against the defendant. It assumes that there was no reasonable cause to believe all the owners liable,

and, as a matter of course, that the continuance of the attachment on the property of all after notice was unjustifiable. The intention could not have been to ask a ruling that what was assumed as true was merely evidence of the existence of the fact assumed; that there being in fact no reasonable cause for continuing such an attachment was only evidence tending to show the want of such reasonable cause, and therefore the existence of malice. It could not, then, have intended a ruling that the facts stated were evidence of want of good cause and of malice, in continuing the attachment, but must have referred to their effect in evidence, upon the character of the suit at its inception. If the question were before us, it is by no means clear that the holding of the attachment, after the discovery of such new fact, would be evidence that the action was a groundless and malicious one at the start, and when considered only in reference to the plaintiff.

III. The last sentence from the charge would undoubtedly be incomplete and incorrect, if the abuse of legal process had been claimed at the trial as a distinct ground of liability. Even if the writ issued on good grounds and without malice, it might be so mis-used, the plaintiff claims, to detain on a small demand a vessel of great value, having perishable goods on board, and about to start on a voyage, when ample security and other property to be attached were offered, as to create a liability for the damage thereby unnecessarily and wrongfully done. The averments in this declaration are sufficient to set forth such an alleged cause of action, and these are not dependent upon those which aver a malicious and causeless issuing of the writ. "It is generally true, in declarations for torts, that surplusage does not vitiate. A party proves such of the allegations of his writ as he can, and his failure to prove other statements does not prevent his recovery, if he proves any good ground of action." *Fisk* v. *Hicks*, 31 N. H. 540.

But a careful examination of the exceptions leads us to the belief that this abuse of the process was urged at the trial in aggravation of damages, and not as a distinct ground of liability. It is clear that the presiding judge so understood it. Both of the requests, as we have seen, relate to malice and want of reasonable cause in bringing the action. There is no request for a ruling

upon the effect of a subsequent abuse of process, except as evidence of want of cause and of malice in the origin of the suit.

The claim of the plaintiff in argument, "that it was an abuse of legal process and of attachment to join all the owners in said suit and attaching said vessel thereon, and refusing to accept any bond," &c. standing alone, might be opposed to this view; although here the abuse is alleged to consist in joining all the owners in the suit, and the proceedings under the attachment are stated incidentally, by way of aggravation. But from the exceptions as a whole, the inference is reasonably clear that the plaintiff at the trial insisted upon the broad ground of liability set forth in the declaration; that the action against him was instituted maliciously and without cause, and if there was any omission to state the principles of law relating to a narrower ground of action, the abuse of process properly issued, it arose from a failure sufficiently to direct the attention of the court to that branch of the case. With reference to the full extent of the claim alleged in the declaration, the rulings were correct. It was for the plaintiff to request a ruling that would enable him to recover on proof of part of his case. At least it should appear that the attention of the court was called to this minor cause of action, as a distinct ground of liability included in the declaration. Otherwise it was not error to treat the entire cause of action as the one before the court, and to give the rules of law relating to it.

Nor do we assent to the claim of the plaintiff that proof of malice in its legal sense and of want of reasonable cause is not ordinarily essential in an action for abuse of legal process. The cases certainly must be rare, if they exist, in which there can be an abuse of process without malice or with reasonable ground for the acts done. In the passage cited from Greenleaf, in *Page* v. *Cushing*, 38 Maine, 527, to the effect that in such an action it need not be proved that the process "was sued out maliciously or without probable cause," the emphasis should be put upon the words "sued out," and not as the reporter has it upon the words "maliciously or without probable cause." Although not malicious in its origin, a writ may be improperly employed. But a wrong-

ful act done to the injury of another is the gist of the action. "Proof of actual malice is not important except as it may tend to aggravate damages; it is enough that the process was wilfully abused to accomplish some unlawful purpose." Cooley on Torts, 190.

In the present case the quality of malice was attributed by the court to "any act done wilfully and purposely to the prejudice and injury of another."

Upon the whole, the exceptions fail to show that the plaintiff was aggrieved by the rulings given or refused.

Exceptions overruled.

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

CARRIE A. GILMORE *vs.* HUGH ROSS, and another.

Penobscot. Opinion April 14, 1881.

Negligence. Steam-tug.

In an action for damages against the owners of a steam-tug for running down and injuring the plaintiff who was in a row-boat, the gist of the action is the alleged negligence in the management of the tug; and whether or not the captain was a registered master, or licensed as a master or pilot, or that the tug had a right to be navigating the waters where the accident occurred, are immaterial and irrelevant facts.

ON REPORT.

Writ dated September 12, 1877.

Declaration — "In a plea of the case, for that the said plaintiff at Northport, in said county of Waldo, on the 23d day of August, A. D. 1877, was in a small row-boat upon the waters of the Penobscot bay, a public thoroughfare for boats, vessels and steamers, and in the use of ordinary care, and the said Ross and Howell were, then and there, by their servants and agents, in possession of a certain steam tug-boat, called the C. B. Sanford, to the side of which said Ross and Howell by their servants and agents then and there in charge of the said steam tug-boat had

then and there attached a vessel, and was then and there towing the same by force of the steam of said tug-boat.

"And the said plaintiff avers that the said Ross and Howell by their said servants and agents, then and there in charge of said steam tug-boat and vessel thereto attached, so negligently, carelessly, and unskillfully managed said boat and vessel that the said vessel for want of good and sufficient management, then and there fell foul of, ran down, and capsized the said row-boat of plaintiff, in which she then and there was as aforesaid, and then and there threw the plaintiff into the water, and dragged her a great distance, to wit: five hundred feet, at great speed through the water, dislocated her right shoulder, broke one of her ribs, fractured two other of her ribs, jammed, bruised and otherwise injured said plaintiff internally and externally, by reason whereof her life was despaired of, and on account of all which she was greatly frightened and has endured great pain, agony and suffering, been put to great expense in surgical and medical attendance and for nursing, medicine and board, and has been obliged to give up her business, and has become, as she avers, permanently injured, maimed and disfigured for life, and disabled, all to the damage of said plaintiff (as she says) the sum of six thousand dollars."

Plea, general issue.

The material facts as found by the court, are stated in the opinion.

The court were to render such judgment upon the evidence so far as admissible as the legal rights of the parties require.

Barker, Vose and Barker and *A. J. Chapman*, for the plaintiff.

The plaintiff had a right to be in her boat, she was an expert in the management of it. The boat, oars and rowlocks, and the time and place were all suitable and proper, and she was in the use of ordinary and common care. The unexpected act of the master occasioned hurried rowing to avoid impending peril which caused the rowlock to slip out.

A party, having given another reasonable cause for alarm, cannot complain that the person so alarmed has not exercised

cool presence of mind, and thereby find protection from responsibility for damages resulting therefrom. *Wesley City Coal Co.* v. *Healer*, 84 Ill. 126; *Saltonstall* v. *Stockton*, 1 Campbell, 11; 13 Peters, 181; 71 N. Y. 228.

The accident could have been avoided by reasonable care and diligence on the part of the defendants' servants. 24 How. 313.

The defendants were personally negligent in several particulars.

The captain was not a registered master nor licensed as a master or pilot. U. S., R. S., § § 4171, 4183, 4438, 4439, 4442, 4445, 4499, 4500, 5344. The steamer had no right to be navigating the waters of the bay. *Idem*, § § 4399, 4499.

She had not a full complement of men. *Idem*, § 4463; *The Young America*, 1 Brown's Ad. 549; *The Coleman and Foster*, *Id.* 456; *The Victor*, *Id.* 449.

She had no proper lookout. 13 U. S. Stat. at Large, 61, 81; *The Armstrong*, 1 Brown's Ad. 130; *The Douglass*, *Id.* 105; 1 Clif. 343; 5 Blatch. 247; 1 Clif. 410; 13 Blatch. 517; 10 How. 557.

She took an unusual and circuitous route. U. S., R. S., § 4233: *Miller* v. *The W. G. Hewes*, 1 Woods, C. C. 363; 6 Wall. 225; 19 How. 241; *The Governor*, 1 Clif. 97; *The Merrimac*, 14 Wall. 203; *The Wenona*, 19 Wall. 41; *N. Y. &c. Co.* v. *Rumball*, 21 How. 372; 66 Maine, 376; 14 Wall. 189; 9 Wall. 522.

Wilson and Woodward, for the defendants, cited: *Delafield* v. *Union Ferry Co.* 10 Bosw. 216; *Barnes* v. *Cole*, 21 Wend. 188; *Pope* v. *Str. R. B. Forbes*, 1 Clif. 331; *St. John* v. *Paine*, 10 How. 557; *The Alleghany*, 9 Wall. 522; *Phila. & R. R. R. Co.* v. *Adams*, 8 The Reporter, 121; *The Milwaukee*, 7 U. S. Dig. 734.

WALTON, J. This action is based on alleged negligence. The plaintiff says that while she was out in a small row boat, she was negligently run down and injured by the defendants' steam tugboat. The case has been twice submitted to a jury, each time resulting in a disagreement. By agreement of parties the case

is now to be decided by the full court. The question is whether the alleged negligence is proved. We think it is not.

The case shows that the defendants were engaged in carrying passengers to and from Belfast and Rockland, and the camp-meeting grounds at Northport. Having more passengers than they could accommodate on their steam tug, on the afternoon of August 7, 1877, they lashed a schooner to the side of the tug, and, taking on board some five or six hundred passengers, left the wharf at Northport for Rockland. At this time, the plaintiff, a young woman about twenty-three years of age, was out in a small row-boat, unattended by any one except a child about six years old. As the steam tug started from the wharf, the plaintiff commenced to row out into the harbor. The steamer, on leaving, moved partly in a circle; and, unfortunately, the plaintiff rowed directly into the course which the steamer took. While in this position, and not more than one or two hundred feet from the steamer, one of the plaintiff's rowlocks slipped out. This event seems to have so disconcerted or frightened her, that, instead of replacing the rowlock, or, in any way, endeavoring by the use of the remaining oar, to move her boat out of the way, she threw down her oars and threw up her arms, and, as she says, called to them to keep off. The captain of the tug immediately signalled the engineer to stop the tug and back as quickly as possible, and the engineer did so. But the tug was under such headway, and the plaintiff's boat was so near, that the impending collision was not avoided. The plaintiff having ceased all efforts to guide or direct her boat, it swung round, came directly under the bow of the schooner which was lashed to the side of the tug, and was capsized. A deck hand from the tug jumped into the water and supported the plaintiff and the little girl that was with her, till a boat from a vessel which was near by came to their assistance, and they were rescued.

A careful examination of the evidence fails to satisfy us that this accident to the plaintiff was owing in the slightest degree to any fault on the part of those in charge of the tug. If the accident was not the result of the plaintiff's own negligence, then, we think, it must be regarded as one of those unavoidable or inevitable accidents for which no one is to blame.

It is said that those in charge of the tug were negligent in not having a lookout. We think they did have a lookout. The captain himself was acting as a lookout. He occupied the best position on the boat for observation; and, although his eye was not on the plaintiff at the moment her rowlock slipped out, his attention was instantly called to her situation by a passenger who was standing at his side, and he then saw her, and a score of separate lookouts could not have secured more prompt action to avoid the collision than was then had. We think the accident is attributable in no degree to the want of a lookout.

It is further said that the captain of the tug was not the registered master, and that he was not licensed as a master or pilot, and that the tug had no right to be navigating the waters of the bay, and was liable to seizure. These are irrelevant facts. The owners of the tug are not being prosecuted for violations of law in these particulars. The gist of the action is alleged negligence in the management of the tug. All other matters are outside of the issue, and wholly immaterial. Our conclusion is that the alleged negligence is not proved.

Judgment for defendants.

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

ALBERT F. BURNHAM *vs.* CHARLES P. DORR.

Hancock. Opinion April 14, 1881.

Mortgage. Parol agreement. Evidence. Payments.

Where the grantee in a warranty deed, as a part of the consideration for the conveyance, agreed orally with the grantor to pay the balance due upon an outstanding mortgage, oral evidence of such an agreement is admissible in evidence in a real action wherein the plaintiff relies upon such mortgage to support his title.

Payments made by a party upon a mortgage debt, in pursuance of a duty, in the proper performance of which others are interested, must be applied and allowed as payments, and cannot be used by such party as a part consideration for the assignment and transfer of the mortgage and debt to a third person.

ON REPORT.

The opinion states the case.

A. P. Wiswell, for the plaintiff.

In the warranty deed to Walker, the grantor agreed to protect him against the lawful claims and demands of all persons. It is now proposed to show by parol, that the parties to that deed made a parol agreement contradicting or changing the deed. That cannot be done. *Egery* v. *Woodard*, 56 Maine, 45; *Brown* v. *Thurston*, 56 Maine, 126; Jones on Mortgages, § 848: *Loud* v. *Lane*, 8 Met. 517; *Hunt* v. *Hunt*, 14 Pick. 374.

The payments made by Walker, were not an extinguishment of the mortgage *pro tanto*, because Walker didn't intend it as such. The intent controls. *Evans* v. *Kimball*, 1 Allen, 240.

L. A. Emery, for the defendant, cited: *Brown* v. *Lapham*, 3 Cush. 554; Jones on Mort. § § 858, 861, 864, 865; *Fish* v. *French*, 15 Gray, 520; *Goodspeed* v. *Fuller*, 46 Maine, 147; Wharton's Ev. 1042–1046.

WALTON, J. This case is before the law court on report. Upon so much of the evidence reported as is legally admissible, the court is to render such judgment as the legal rights of the parties may require.

It is a real action. In support of his title the plaintiff relies upon a mortgage deed, originally given to Chas. J. Perry, and by him assigned to John B. Redman, and by the latter to the plaintiff. The mortgage was given to secure three notes amounting in the whole to the sum of sixteen hundred dollars. Two of the notes were paid by the mortgagor as they fell due, leaving one for five hundred thirty-three dollars and thirty-three cents unpaid. While things remained in this condition, the mortgagor conveyed the land to Austin B. Walker by deed of warranty, the latter agreeing orally, as part consideration for the conveyance to him, to pay the balance due upon the mortgage. It is in relation to this agreement that the controversy in this case arises. The plaintiff contends that to admit oral evidence of such an agreement would violate the rule which does not allow the written contracts of parties to be varied or contradicted by oral evidence. He says the deed covenanted that there were no incumbrances, and to admit oral evidence that there was an incumbrance, which the grantee agreed to remove, would be in direct conflict with this covenant, and deprive the grantee of the

benefit of the covenant by which the grantor agreed to warrant and defend the premises against the lawful claims and demands of all persons.

The first question, therefore, is whether oral evidence of such an agreement is admissible. We think it is. In the first place, the rule referred to applies only in suits between the parties to the instrument, as they alone are to blame if the writing contains what was not intended, or omits that which it should contain. It does not apply to suits between third persons. They are allowed to prove the truth notwithstanding it may contradict the written statements of others. And this is a suit between third persons. 1 Green. Ev. § 279, and cases there cited.

And evidence of the character of that which is offered in this case is admissible even in suits between the parties to the writing.

In *Bartlett* v. *Parks*, 1 Cush. 82, the declaration alleged that the defendant, in consideration that the plaintiff would convey to him certain real estate, promised to pay the taxes that were or should be assessed upon it for the current year, and the plaintiff was allowed to prove that the defendant, by an oral agreement, made at the time of the conveyance to him, and as part consideration for the conveyance, made the promise set out in the declaration.

And in *Preble* v. *Baldwin*, 6 Cush. 549, similar evidence was admitted. In the latter case precisely the same argument was urged against its admissibility which is urged in this case, namely, that it would be in conflict with the covenants in the deed, but the court held that the evidence was admissible. For numerous cases showing the admissibility of similar evidence, see *Goodspeed* v. *Fuller*, 46 Maine, 141.

The evidence being admissible, the next inquiry is as to its effect. It shows that Walker agreed, as part consideration of the conveyance to him, to pay the note held by Perry when it should become due; that in pursuance of this agreement, he made two payments, one of two hundred and fifty dollars, and one of fifty dollars, amounting in the whole to three hundred dollars, and took Perry's receipts therefor; that afterward he induced Perry to transfer the note and mortgage to Redman, and that Redman

subsequently transferred them to the plaintiff, as already stated. The balance of the note has since been paid; and, if these payments made by Walker are allowed, it has been paid in full. The question is whether these payments can be allowed. We think they must be. They were made by one whose duty it was to pay. He had agreed so to do. The money was left in his hands for that special purpose. It was as if he had paid the full value of the land, and the grantor had then handed him back so much of the money as would pay the note, upon his promise that he would so apply it. It was not his money, In reality it was the grantor's money. The holder of the note knew of this arrangement, and when he accepted the money he accepted it as *pro tanto* payments. Of this, the evidence leaves no doubt. True, these payments were not indorsed upon the note. But receipts were given. Indorsements are not essential to payments. They are only evidence of payments. Payments may exist without them. It may also be true that neither Redman nor the plaintiff knew of these payments when they took the note. But that is of no importance. They took it long after it was overdue, and must, of course, hold it subject to all defenses then existing. They can derive no aid from the rule of law which protects commercial paper negotiated before it is dishonored. This was already dishonored when they took it. The intentions of Walker are of no importance. Having made the payment in part, which it was his duty to make, he could not, at his own will and pleasure, convert it into a consideration for the transfer of the note to a third party. The money paid, was, in reality, the money of another, and when it had been once lawfully applied to the purpose for which its real owner intended it, the appropriation could not be changed without his consent. No such consent is shown in this case. If, says Chief Justice SHAW, the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel a mortgage, and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be a release, and not an assignment, although in form it purports to be an assignment. *Brown* v. *Lapham*, 3 Cush. 551–554.

Being satisfied by what we deem competent evidence that there is nothing due upon the mortgage on which the plaintiff relies in support of his action, that the notes to secure which the mortgage was given have been paid in full, judgment must be entered for the defendant. R. S., c. 90, § 9.

Judgment for defendant.

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

SAMUEL KNOWLTON, Petitioner for writ of *Habeas Corpus*,

vs.

CHARLES BAKER.

Waldo. Opinion April 14, 1881.

Exceptions. Habeas corpus.

Exceptions do not lie to the discharge of a prisoner on *habeas corpus*.

ON EXCEPTIONS.

Habeas corpus. The court held that the petitioner as a matter of legal right was entitled to be discharged from his imprisonment and ordered his discharge. The respondent alleged exceptions which "being seasonably presented and found correct are allowed, if allowable; the full court to determine whether exceptions will be in the case stated."

J. W. Knowlton for the petitioner.

Thompson & Dunton, for the respondent.

WALTON, J. Exceptions do not lie to the discharge of a prisoner on *habeas corpus*. The object of the writ is to secure the right of personal liberty; and this can only be accomplished by prompt action and a speedy trial. To allow exceptions to the order of the court in term time, or to the order of a judge in vacation, discharging a prisoner, would necessarily result in considerable delay, and thus defeat one of the principal purposes of the writ, namely, a speedy release. True, errors may result

from such hasty action, and parties interested in the imprisonment of the person released, may thereby suffer. But the history of the writ shows that greater evils are liable to result from the want of speedy action. We have been cited to no authority justifying the allowance of exceptions in such cases, and we are not aware of the existence of any. On the contrary, it has been decided in Massachusetts that exceptions do not lie in such cases. And their *habeas corpus* act, in force at the time of the decision, so far as this question is concerned, was in no respect different from what ours is now. In fact, ours, as is well known, is substantially a transcript of theirs. *Wyeth* v. *Richardson*, 10 Gray, 240.

Exceptions dismissed.

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

CITY OF BANGOR *vs.* INHABITANTS OF MADAWASKA.

Penobscot. Opinion April 14, 1881.

R. S., c. 24, § § 27, 28. Pauper. Notice. Estoppel.

The failure of the overseers of the poor of the defendant town to return an answer to the notice sent to them by the overseers of the poor of the plaintiff town, estops the defendants to deny that the pauper had a settlement in the defendant town notwithstanding the pauper has not been removed to the latter town; such a removal, or a reasonable excuse for not making it, is not essential to create the estoppel provided by R. S., c. 24, § 27.

AGEEED STATEMENT OF FACTS.

Action for pauper supplies.

Writ dated February 20, 1880. Plea, general issue.

Notice was sent November 12, 1878. The pauper was not removed to the defendant town.

Question submitted to the court:

If the defendants did not deny, are they estopped to deny the settlement of the pauper in their town?

If they are so estopped, case to stand for trial; otherwise a nonsuit to be entered.

T. W. Vose, city solicitor, for the plaintiff, cited: R. S., c. 24, § 27; *Ellsworth* v. *Houlton*, 48 Maine, 416.

Wilson & Woodward, for the defendants.

The defendants would not be estopped to show that the pauper belonged to the plaintiff. *New Bedford* v. *Hingham*, 117 Mass. 445; *Turner* v. *Brunswick*, 5 Maine, 31.

Are they estopped to deny that he belonged to them?

The question is now raised for the first time in this State. The question was not argued or mentioned by either counsel or the court, in *Kennebunkport* v. *Buxton*, 26 Maine, 61.

Estoppels are not to be favored, because the truth may be excluded. *Leicester* v. *Rehoboth*, 4 Mass. 180; *Turner* v. *Brunswick*, *supra*; *Marshpee* v. *Edgartown*, 23 Pick. 156.

We claim that by R. S., c. 24, § 28, the failure to deny and the removal of the pauper, are both conditions precedent to the creation of the estoppel. There are so many contingencies affecting the safe transmission of the notice and denial, it is clearly probable that the legislature did not intend that an estoppel should be created without actually removing the pauper.

The statute says the estoppel shall operate upon an "action brought to recover for the expenses incurred for his previous support, and for his removal."

What meaning have the words, "previous support," and "for his removal," if the construction we contend for, is not correct? See *Ellsworth* v. *Houlton*, 48 Maine, 416.

The decision in *Petersham* v. *Coleraine*, 9 Allen, 91, seems to be adverse to us, but the court in their opinion in that case, did not allude to, or discuss the point.

WALTON, J. This is a pauper suit. The notice provided for by R. S., c. 24, § 27, was sent by the plaintiff town to the defendant town. The latter neither removed the pauper nor returned the answer provided for in § 28. The question is whether a removal of the pauper by the plaintiffs to the defendant town is essential to the creation of the estoppel provided for in the latter section. We think not. If the town receiving the notice neither removes the pauper, nor returns an answer within

two months, it is estopped to deny that the pauper has a settlement therein; and the town sending the notice may cause him to be removed to that town, and may recover the expenses of the removal, and of his previous support; and we think the right to remove, and the right to recover expenses incurred for his previous support, are independent rights; that either may be exercised without exercising the other; and that the estoppel applies whether exercised jointly or severally; that the term "previous support" does not mean support furnished before a removal, but support furnished prior to the commencement of the suit.

It is said that this precise question is now raised for the first time in this State. But the defendants' counsel admit that it has been raised and decided adversely to their position in Massachusetts. And in two cases in this State, we think the decisions must be regarded as impliedly, if not expressly, adverse to their position. The defendants' counsel have supported their position by a very able and ingenious argument, but it fails to satisfy us that our interpretation of the statute is not the correct one. *Petersham* v. *Coleraine*, 9 Allen, 91; *Ellsworth* v. *Houlton*, 48 Maine, 416; *Kennebunkport* v. *Buxton*, 26 Maine, 61.

Case to stand for trial.

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

SAMUEL COPELAND, executor of the will of JOHN W. BARRON, in equity,

vs.

BETSEY P. BARRON and another.

Penobscot. Opinion April 19, 1881.

Will. Life-estate. Bequest for life with power of disposal.

A testator bequeathed to his father and mother, and the survivor of them, a sum of money for their use and support, during the term of their lives; any part thereof remaining unexpended after their death, besides paying their funeral expenses and purchasing grave stones for them, to go to the testator's son.

Held: That the legatees took a life-estate, and not an absolute property, in the money; that they are entitled to the custody and control of the money during their lifetime, or until used and expended for their support; and that the court could not interfere with their possession of it, unless in an extreme case of unfitness of the legatees to exercise the discretion committed to them, or in the case of a threatened wanton ill-use of the fund intrusted to their care.

BILL in equity brought to obtain a construction of the third item in the will of John Wilson Barron.

The item is recited in the opinion.

George W. Barron was deceased at the time of bringing the bill.

Thomas H. B. Pierce, for the executor.

V. A. and M. Sprague, for Betsey P. Barron, cited: *Jones* v. *Bacon*, 68 Maine, 35; *Gifford* v. *Choate*, 100 Mass. 343; *Pickering* v. *Pickering*, 1 Brad. 269; *Hale* v. *Marsh*, 100 Mass. 468; *Breton* v. *Mocket*, 9 Ch. Div. 95; *Parnell* v. *Parnell*, *Id.* 96; *Perry* v. *Merrett*, 18 Eq. Cas. Eng. Dec. 152; *Bayford* v. *Smith*, 14 Ves.; *Harris* v. *Knapp*, 21 Pick. 412; *Jackson* v. *Bull*, 10 Johns. 19; 12 Johns. 389; *Pickering* v. *Langdon*, 22 Maine, 430; *Kuhn* v. *Webster*, 12 Gray, 3; 2 Redf. Wills, 419; *Gibbins* v. *Shepard*, 125 Mass. 541.

D. D. Stewart, for Wilson D. Barron.

In the construction of wills the intention of the testator as expressed in the will shall prevail, if consistent with law, and that intention is gathered from the whole will. *Hall* v. *Preble*, 68 Maine, 101; *Fox* v. *Rumery*, *Id.* 127; *Dawes* v. *Swan*, 4 Mass. 215; *Cotton* v. *Smithwick*, 66 Maine, 367; *Norris* v. *Beyea*, 13 N. Y. 283; *Sweet* v. *Chase*, 2 N. Y. 79; 1 Redf. Wills, 431, 445, 449–454.

The intention of the testator in this case is wholly inconsistent with the claim now set up that this one thousand dollars is to be paid over to Betsey P. Barron at once. *Smith* v. *Bell*, 6 Pet. 68.

"And if any part shall remain unexpended after their death besides paying funeral expenses and putting up grave stones, the said remainder shall go to my son, Wilson D. Barron."

Who was to pay the funeral expenses and put up the grave stones? The legatees clearly could not pay their own funeral expenses and put up their own grave stones. But the executor could, and he is to hold the one thousand dollars as quasi trustee. *Field* v. *Hitchcock*, 17 Pick. 183; *Dole* v. *Johnson*, 3 Allen, 367; *Dimmock* v. *Bixby*, 20 Pick. 374; *Van Vechton* v. *Van Veghten*, 8 Paige, 125; *Gott* v. *Cook*, 7 Paige, 522; *Evans* v. *Massey*, 1 Young & Ves. 197; *Webb* v. *Earl of Shaftsbury*, 7 Ves. 480; *Estate of Mary England*, 1 Russ. & Myl. 499; *Hultoke* v. *Gell*, *Id.* 515; *Bowers* v. *Smith*, 10 Paige, 199; Hill Trustees, 543, 548; *Campart* v. *Campart*, 3 Brown's Ch. 196; *Pedrotte's Will*, 27 Beavan, 583; *Tattersoll* v. *Howell*, 2 Meriv. 26; *Maberly* v. *Turton*, 14 Ves. 499; 1 Smith's Ch. Pr. 653, 660; Bennett's Master in Ch. 4, 5, 17, 48, 110.

These authorities show ample power in the court to appoint a master in chancery to report the amount necessary for the support of Betsey P. Barron.

This case is unlike *Jones* v. *Bacon*, 68 Maine, 34, and falls within the exception stated in *Ramsdell* v. *Ramsdell*, 21 Maine, 288; see *Smith* v. *Snow*, 123 Mass. 323; *Johnson* v. *Battelle*, 125 Mass. 453; *Kuhn* v. *Webster*, 12 Gray, 3; *Ayer* v. *Ayer*, 128 Mass. 575; *Malcolm* v. *Malcolm*, 3 Cush. 472; *Saunderson* v. *Stearns*, 6 Mass. 37; *Slade* v. *Patten*, 68 Maine, 380.

PETERS, J. The legacy in question is this: "3. I give and bequeath to my father and mother, George W. Barron and Betsey P. Barron, or the survivor of the two, the sum of one thousand dollars, to be paid to them from the proceeds of my life insurance, for their use and support during the term of their lives, and if any part of said sum shall remain unexpended after their death, besides paying their funeral expenses and putting up gravestones, the said remainder shall go to my son Wilson D. Barron."

The first question is, whether the primary legatees take the property absolutely, or only for life.

It is a well settled general rule, that, if a gift be absolute and entire in its terms, any limitation over afterwards is repugnant and void. A testator cannot divide an estate into more parts than the estate contains.

It is contended, by the primary legatees, that this bequest falls within this rule, upon the ground that the life-estate first given and the power of disposition over the remainder afterwards added, combined in the same persons, constitute in such persons an estate in fee; that the two parts of the estate coalesce and merge into one, thus creating an absolute and unqualified gift.

But, upon two grounds, the bequest must be regarded as giving an estate for life only, with a power of disposal; and not an absolute property. *First:* Because the gift is not absolute and entire in its terms, the power of disposition annexed being qualified and conditional, and not an absolute power. *Second:* Because, if an estate is given for life in express terms, it is not to be extended by implication arising from an annexed power of disposal, however unqualified. Implication is admitted in the absence of, and not in contradiction to, an express limitation. *Stuart* v. *Walker*, *ante*, p. 146.

It is not probable that a testator would, in the same instrument, devise to a person an estate for life in express terms, and then give him the remainder of the same estate by implication. In *Popham* v. *Banfield*, Salked, 236, one of the earliest cases upon this question, the court said, "there was a mighty difference between a devise to A. and if he die without issue then to B,

and a devise to A, *for life*, and if he die without issue, then to B. Where a particular estate is devised, we cannot, by any subsequent clause, collect a contrary intent, inconsistent with the first, by implication." In the case at bar, any other construction would deprive the words "during their natural life" of all meaning. These are words of limitation. The estate is not only a life-estate, but is expressly limited to life. Had the power of disposal been absolute and unconditional, as it is not, even then it could not have extended the legal estate that vested in the first takers. The privilege of disposition is a collateral gift of power, and not a gift of property. The life-estate and the remainder vested in the different devisees at the same moment. Nor can the remainder be prevented from coming to the possession of the ulterior takers except by a full exercise of the power to dispose of the gift. The case of *Stuart* v. *Walker*, *supra*, embodies a reference to numerous authorities in support of this position; and the late case of *Herring* v. *Barrow*, L. R. 13 Ch. Div. 144, a case exactly in point, should be added to the list. See same case in L. R. 14 Ch. Div. 263.

Ramsdell v. *Ramsdell*, 21 Maine, 288, a leading case among the authorities touching the construction of wills, is appealed to by the primary legatees in defence of their position. There seems to be some misapprehension as to the true purport and scope of the rules imposed by that case. The following propositions are there stated: "It has become a settled rule of law, that if a devisee or legatee have the absolute right to dispose of the property at pleasure, a devise over is inoperative. But where a life-estate only is clearly given to the first taker, with an express power, on a certain event or for a certain purpose, to dispose of the property, the life-estate is not by such power enlarged to a fee or absolute right; and the devise over will be good."

Where a devisee or legatee is spoken of in this language of that judgment, it has reference to cases where devises or legacies are made in general or indefinite terms, without words of limitation; as where I devise you my farm or give you my ship, describing

the object given, but without stating the nature or quantum of the estate, or what its duration is to be; that being a matter of implication to be gathered from all parts of the will. And where a life-estate is spoken of, it refers to a life-estate arising by implication, and not to one expressly created or limited to life. It must be borne in mind that the discussion in that case related to a life-estate created by a rule of the common law in force in this State prior to the statutes of 1841. The revised statutes of 1841 provided, that a devise of land should be construed to convey all the estate of the devisor therein, unless it appears by the will that he intended to convey a lesser estate. Prior to 1841, as to realty, the presumption was the other way. By the common law, a devise in general terms, without words of inheritance added, was not efficacious to convey an estate in fee; unless the intention of the testator to that effect could be collected from that in connection with all other parts of the will. A general devise, the interpretation of which was unaided by any light cast upon it from other portions of the will, carried a life-estate by implication or by construction of law. An absolute power of disposal added thereto, being equivalent to the use of words of inheritance, would enlarge such life-estate to a fee; while a qualified power of disposal would not have that effect. But now the opposite rule of construction or presumption prevails. Words of inheritance are now *prima facie* implied by a general or naked devise. From the nature of things, any power of disposal added to such a devise cannot extend it. It now only serves to emphasize and repeat the gift. But a limited or special power of disposal annexed to a general devise, with limitation over, may restrain and limit the devise to the life-time of the devisee. It is evident enough that the rules laid down in *Ramsdell* v. *Ramsdell*, do not apply to a life-estate expressly created, where, as in the present case, the testator expresses his intention in direct and unambiguous terms.

It is asserted by the learned counsel for the persons who claim as ulterior takers in the present case, that the case of *Ramsdell* v. *Ramsdell*, even as understood by us, cannot stand against the opposing case of *Smith* v. *Bell*, 6 Pet. 68. But the latter case,

in its advanced position upon this question, has not been followed in this State, and is contrary to the authorities generally. Bigelow's Overruled Cases, 456; *Gifford* v. *Choate*, 100 Mass. p. 346; *Homer* v. *Shelton*, 2 Met. p. 201; *Albee* v. *Carpenter*, 12 Cush. p. 387.

Another question is, whether the life-legatees are entitled to the possession of the money bequeathed. We think they are. Had the testator bequeathed chattels instead of money, their right to the custody of the property, upon giving an inventory of it, would be unquestioned. But money may be limited over as well as chattels. It has frequently been held that a bequest of money for life, and then over, gives only the interest. *Field* v. *Hitchcock*, 17 Pick. 182; 1 Jarman on Wills (5th ed.), Bigelow's note, *879. But in this case the legatees are to have not only the interest of the money, but are entitled to expend so much of the capital as may be required for their support. The legacy is payable directly to them by the terms of the will. The meaning of the bequest is, that the money (payable out of the insurance fund) goes to the legatees for their use and support, and not that it is to be paid to them as they may need it for their support. This construction is not prevented by the provision in the bequest that the funeral expenses of the first takers may be paid out of the fund bequeathed. Their own administrators may see to that. The estates of the legatees for life would be chargeable for any unexpended balance, and those expenses, if paid by their administrators, would make the charge upon their estates so much the less. *French* v. *Hatch*, 28 N. H. 331.

If it were a clear case of the unfitness of legatees to exercise the discretion committed to them, or if it were shown that there was danger of a wanton abuse of the confidence reposed in them, a court of equity might, in a proper case for action of the kind, interfere in behalf of the remainder-man. But no such question is presented. We are merely called upon to interpret a bequest in a will. The testator has not indicated a desire that his executor should retain and manage this fund. *Si voluit non dicit.* He provides for neither a trust nor trustee. He evidently relied upon the honesty and judiciousness of the legatees for a proper man-

agement of the money. He must have anticipated that they might freely expend it. The will does not provide that any of the fund shall be left for any purpose; it requires no unexpended balance; it merely provides for a remnant, if one is left. The testator has seen fit to place a personal confidence in his father and mother, which without a change of circumstances, it would be unwarrantable in us to disrespect. If he trusts them, we cannot distrust them without sufficient cause. Our opinion is, that the fund, and any accumulations of it in the executor's hands, must be paid to the surviving legatee, Betsey P. Barron. *Warren* v. *Webb*, 68 Maine, 133; *Starr* v. *McEwan*, 69 Maine, 334; *Sampson* v. *Randall*, *ante*, 109; 1 Rop. Leg. 315; 2 Red. Wills, 654, and note; *Johnson* v. *Goss*, 128 Mass. 433; *Shaw* v. *Hussey*, 41 Maine, 495, 502.

It is claimed that the expense of this litigation should be assessed upon the legacy in dispute. The general rule is, that whenever the testator raises a doubt in regard to the meaning of his will, his general property must pay for settling it. 1 Red. Wills, 495; *Shepheard* v. *Beetham*, L. R. 6 Ch. D. 597. It seems just and equitable, under the present circumstances, that each party should bear his own expenses and costs.

Decree accordingly.

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

INHABITANTS OF NAPLES *vs.* INHABITANTS OF RAYMOND.

Cumberland. Opinion April 20, 1881.

R. S., c. 143, § 20. Stat. 1874, c. 256, § 7. Pauper supplies. Support in insane hospital. Exceptions.

The expenses incurred by a town in committing a pauper to the Insane Hopital and supporting him there cannot be recovered of the town in which he has a settlement, under R. S., c. 143, § 20, when there is no proof that the selectmen in making the commitment, had before them the evidence and certificate of at least two respectable physicians, based upon due inquiry and a personal examination of the person to whom insanity is imputed, as required by stat. 1874, c. 256, § 7.

It is no just ground of exception that the presiding judge did not see fit to adopt the form of an instruction requested when full and correct instructions upon the law of the case are given.

ON EXCEPTIONS from superior court, Cumberland; and motion for new trial.

An action of the case to recover the expenses incurred to relieve Charles Gammon who fell into distress in the plaintiff town, amounting to twenty-one dollars and seventy-five cents, and for further expenses incurred in committing the same person to the insane hospital, and supporting him therein.

At the trial there was no proof that the selectmen of the plaintiff town, in committing Gammon to the hospital, had before them the evidence and certificate of at least two respectable physicians as required by stat. 1874, c. 256, § 7.

The verdict was for $89.31.

The following are the requested instructions referred to in the opinion:

"That the burden is upon the plaintiffs to satisfy the jury that Gammon when he left Raymond and went to Saccarappa, had an intention to return to Raymond as his home, and that this intention was not changed at any time while absent."

"That as bearing upon the question as to his intention to remove from Raymond, and while absent in Saccarappa, the jury may properly consider the disposition of his wife not to live in Raymond; the pecuniary difficulties under which he was

laboring as shown by the evidence, and the uncertainty as to his earning money sufficient to meet the mortgage debt on his farm, as well as his statement, if defendants' witnesses are believed, when moving his furniture and paying his tax to the collector of Raymond, and the fact, if found to be true, that he offered his farm for sale."

Strout and Holmes, for the plaintiffs, cited: *No. Yarmouth* v. *W. Gardiner*, 58 Maine, 207; *Bowdoinham* v. *Phipsburg*, 63 Maine, 497; *Ripley* v. *Hebron*, 60 Maine, 379; *Warren* v. *Thomaston*, 43 Maine, 406; *Brewer* v. *Linnaeus*, 36 Maine, 428; *Jay* v. *Carthage*, 48 Maine, 353.

Charles F. Libby, for the defendants.

The requested instruction as to the burden of proof, should have been given.

In *Ripley* v. *Hebron*, 60 Maine, 395, the court say: "The party setting up the five years' continuous residence, is bound to prove it. This is undoubted. If, whilst attempting to prove it, a break in the actual residence is shown, it is for that party to establish such a state of facts as shows that the legal home remained there, notwithstanding the absence. In other words, the party is bound to make out his case, and if obstacles intervene, he is the one to remove them. The other party is not bound to prove a negative, or to show that an actual removal was no removal at all."

The requested instruction was pertinent to the facts of the case, and the principle of law therein presented was not covered by any instruction of the court. In a case of conflicting testimony the burden of proof is an important consideration, and often turns the scale in favor of the defendant. In this case the burden was upon the plaintiffs to show that the presumption naturally arising on two occasions from the acts of removal from Raymond was not the correct one.

He was leaving his home in fact, and there was no presumption of law that he intended to return. The natural presumption was that he did not intend to retain his home in a place which he was in fact leaving, and to which he did not return on either occasion for more than a year.

And with such a ruling, the defendants might have expected a verdict in their favor, in view of the indecision of the jury, which had existed for seven hours, and which was only overcome by reading to them the charge and opinion in *Com.* v. *Tuey*, 8 Cush. p. 2, a case which, however accurate in its statements of abstract law, is always understood by a jury as laying down the rule that the minority should yield to the views of a majority of the panel, and bring in a verdict accordingly. When such pressure as this is necessary to compel a verdict, we think the defendants may justly complain of any failure to give proper instructions, such as were requested in this case.

The burden of proof never changes; it rested upon the plaintiffs throughout this case. See *State* v. *Flye*, 26 Maine, 318; *Tarbox* v. *Eastern Steamboat Co.* 50 Maine, 345.

As to so much of the case as related to expenses of committal to, and support in insane hospital, counsel cited: stat. 1874, c. 256; R. S., c. 143, § § 12–20; *Bangor* v. *Fairfield*, 46 Maine, 558.

BARROWS, J. The circumstances which attended the outgoings and incomings of Charles Gammon at Raymond for nine successive years, and the fact that he had an interest all that time in a homestead there, sufficiently corroborate the testimony which he gives that when he left there on the occasions upon which the defendants rely, it was to procure the means to redeem that homestead, and always with the intention of returning thither as his home. All the points that are necessary to sustain the verdict for plaintiffs for supplies furnished to Gammon as a pauper, having his legal settlement in the defendant town, are made out by an amount of testimony which forbids us to regard the case as one in which the verdict for such supplies may properly be set aside as against law and evidence or the weight of evidence. The testimony indicates that when the overseers of Naples intervened he was getting his living by working out at day's works, and had neither available means, credit, nor friends who were willing to do what was needful to keep him and his family from suffering, so that recourse to public charity was necessary for his relief.

The right to recover for the sums paid by the plaintiff town for Gammon's support in the insane hospital, was made by the rulings to depend upon the proof offered to show a substantial compliance with the statute requirements touching the commitment of insane persons to the hospital by the municipal officers of the town where they are found, and not upon any finding by the jury that such expenditures were necessary, suitable, and proper as pauper supplies under all the circumstances of the case. To this last inquiry the attention of the jury was not called; and the question whether in any case such supplies furnished to an insane pauper would be recoverable except where there has been such substantial conformity to statute requirements as would give a right of action under R. S., c. 143, § 20, is not raised. To sustain the verdict for any part of the sum paid by the plaintiff town for Gammon's support in the hospital, or the expense of his commitment, the proof must be such as will establish the defendants' liability under the last named section as modified by § 7, c. 256, laws of 1874. Under the provisions of R. S., c. 143, § § 18 and 20, the town from which a person is legally committed to the insane hospital may recover the expense incurred from the town in which he has his legal settlement, provided the requisite notice is given. *Jay* v. *Carthage*, 48 Maine, 353; *Bangor* v. *Fairfield*, 46 Maine, 558.

No record of the proceedings of the selectmen of Naples in making the commitment in the present case, is produced, and none can now be found. Not even the petition of the pauper's father upon which the proceedings were based has been preserved, and the evidence as to its contents is of the vaguest character. Nothing in the shape of documentary evidence touching the commitment is forthcoming, except the certificates deposited at the insane hospital. And there is no proof that the record of their doings in the premises which is called for by R. S., c. 143, § 12, was ever made by the selectmen.

Defendants' counsel claim that the failure to observe the directions in the statute, in this respect, should preclude the plaintiff town from recovering against the defendants. It is not necessary to determine whether where it can be shown that the proceedings

were regular, and the commitment legal, the want of a proper record would have that effect. We think there was a fatal defect in the proceedings in the present case. In § 7, c. 256, laws of 1874, we find the following provision:

"In all cases of preliminary proceedings for the commitment of any person to the hospital, the evidence and certificate of at least two respectable physicians, based upon due inquiry and personal examination of the person to whom insanity is imputed, shall be required to establish the fact of insanity."

It is manifest that this requirement was never fulfilled. The selectmen never had the evidence of the physicians before them, and no physician's certificate was made until after their adjudication and order of commitment.

The second order of commitment, the time of making which does not appear, was not based upon any hearing of evidence from the physicians, which, as well as their certificate is made by the statute indispensable. None of the expenses of the commitment to the hospital, or the sums there paid for support are recoverable by virtue of these proceedings. The verdict cannot be sustained for any sum exceeding twenty-one dollars seventy-five cents, and interest thereon from the date of the writ, that being the amount expended before Gammon was sent to the hospital.

If the plaintiffs remit the excess, the verdict cannot be said to be against law or evidence.

Defendants' counsel claims that there is no count in the writ which covers the items proved, basing this claim upon the proposition that all the expenses were incurred on account of the insanity of Gammon. But a pauper may be both insane and dangerous, and his commitment to the hospital may be necessary for the safety of himself and his family, and it is quite possible that it may be the most economical and suitable method of affording support, so that the town where he has his settlement would have no cause to complain of a verdict against them for such expenditures, simply as suitable and proper pauper supplies; but, as before remarked, the jury were not directed to determine how this was in the present case, the allowance being predicated upon an instruction that the second certificate of commitment was legal

and based upon a legal examination, a ruling which cannot be sustained. We must not be understood as deciding here and now that under a count for pauper supplies only, the expense of committing a pauper to the insane hospital and maintaining him there, is recoverable; for no such question arises in the case as it stands on the record and as it was committed to the jury. But, manifestly, the defect in the declaration, if any, is in the failure to set out the proceedings as to the commitment and support of the pauper at the hospital, so as to show a right of action under R. S., c. 143, § 20, which might lead to a question whether upon any testimony any of the hospital expenses were recoverable. The count is in the ordinary form for pauper supplies and evidence was adduced to show that they were necessary.

The objection raised by the defendants, indicates a misapprehension of the meaning of the provision in R. S., c. 143, § 20, which is relied upon to sustain it.

It does not follow from that provision that no insane person can be a pauper, nor even that pauperism may not result from insanity as it does sometimes from other diseases and misfortunes. The design of the provision is to prevent any one from incurring pauper disabilities or being deemed a pauper from the naked fact that he is thus supported in the hospital upon a commitment by the selectmen. That is a calamity which might befall one who was in no sense destitute or in need of relief from public charity. That an insane person may also be a pauper, or a pauper become so insane that his comfort and safety and that of others interested may be promoted by sending him to the insane hospital, are obvious facts which were recognized by the court in *Jay* v. *Carthage*, 48 Maine, 353; *Same* v. *Same*, 53 Maine, 129, 130.

It remains for us to determine whether the omission to give the requested instructions affords the defendants any just cause of complaint. The obvious aim of the requests was to secure a rehearsal by the court of the various points in the evidence, upon which the defendants relied to prevent the jury from coming to the conclusion that Gammon had gained a settlement in Raymond by having his home in that town for five successive years.

The exceptions do not assert that the presiding judge did not properly instruct the jury that the burden of proof was upon the

plaintiffs to establish the fact that he had his settlement in the defendant town. In the absence of a direct statement that he did not so instruct, the presumption is that he did. But besides the presumption it appears affirmatively that he did instruct the jury that "it is necessary for the town bringing the action, and upon whom the burden of proof rests, to establish four propositions," one of which as stated by the judge is: "4, that the pauper had his settlement in the defendant town." Coupling this with the full and careful instructions which are recited in the exceptions as to what will give a settlement and as to what constitutes a home, and an abandonment of a home, and as to the effect of leaving one's place of residence without an intention to return, and of abandoning a previously existing intention to return while absent, it is plain that the presiding judge gave the jury all the legal propositions necessary for the proper consideration of the case, and told them with sufficient explicitness that the burden of proof was on the plaintiffs. It is no just cause of exception that he did not adopt a form of speech which would probably have sounded like a reiteration of the argument for the defendants. Doubtless the defendants' counsel had laid before the jury with his wonted clearness and precision, the circumstances relating to Gammon's absences from Raymond, and his intentions when he left and while he was away; but he cannot properly complain because the judge was not disposed to supplement his argument by committing to the jury for their special consideration the terse and compact statement of the testimony favorable to defendants' views which was embodied in the request.

If plaintiffs remit so much of the verdict as is in excess of $21.75, and interest from date of writ to rendition of verdict, there will be no substantial reason why the entry should not be,

Motion and exceptions overruled.

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

DEXTER SAVINGS BANK *vs.* SAMUEL COPELAND, executor of the last will of JOHN WILSON BARRON, deceased.

Penobscot. Opinion April 25, 1881.

Pleadings. Demurrer. Declaration in an action against an executor.

A general demurrer to a declaration containing three counts, will be overruled when one of the counts is good.

A count in the usual form against an executor, for money had and received by his testate, in his lifetime, to the plaintiff's' use, containing the allegations that the plaintiffs first presented to the executor their claim in writing and demanded payment thereof, more than thirty days before the commencement of the action and within two years after notice given by the executor of his appointment, is good.

ON EXCEPTIONS to a *pro forma* ruling of the court overruling a general demurrer to a declaration.

(Declaration.)

"In plea of the case, for that the said Barron in his lifetime, on the 22d day of February, A. D. 1878, at said Dexter, being indebted to the plaintiffs, viz: the bank aforesaid, in the sum of four thousand eight hundred and forty-two dollars and twenty-two cents according to the account annexed, in consideration thereof, then and there promised the plaintiffs to pay them that sum on demand.

"Also for that the said Barron in his lifetime, on the 22d day of February, A. D. 1878, at said Dexter, being indebted to the plaintiffs in the sum of $4,547.08, according to the first item in the account annexed, in consideration thereof then and there promised the plaintiffs to pay them that sum on demand.

"Also, for that the said Barron in his lifetime, on the 22d day of February, A. D. 1878, being indebted to the plaintiffs in another sum of eight thousand dollars than in the same account for money before that time had and received by the said Barron to the plaintiffs' use, in consideration thereof then and there promised the plaintiffs to pay them that sum on demand.

"Yet though requested, the said Barron in his lifetime, and since his death the said Copeland never paid the said sums or any

part thereof to the plaintiffs but refused, and the said Copeland still refuses so to do, notwithstanding the plaintiffs have first presented to the said Copeland their claim in writing and demanded payment thereof, more than thirty days before the commencement of this action, and within two years after notice given by said Copeland of his appointment as executor, to the damage of said plaintiffs (as they say) the sum of eight thousand dollars," &c. &c.

Date of writ February 20, 1880.

Josiah Crosby, for the plaintiffs, cited: *Bennett* v. *Davis*, 62 Maine, 544; *Blanchard* v. *Hoxie*, 34 Maine, 376; *Bragg* v. *White*, 66 Maine, 157; *Wood* v. *Decoster*, 66 Maine, 542; *Neal* v. *Hanson*, 60 Maine, 84.

D. D. Stewart, for the defendant.

There are three counts. As to the claims alleged in the first two counts there is nothing in the writ to show that either has been presented to the executor and payment demanded as required by stat. 1872, c. 85, § 12. *Eaton* v. *Buswell*, 69 Maine, 554; *Trustees M. C. Institute* v. *Haskell*, 71 Maine, 487.

There is such an allegation as to the third count, but that is a count for money had and received without any specification of an item due under it.

The claim presented must be such that it could be paid on presentation and receipted as a voucher for the executor. The judge of probate would not allow as a voucher, "a receipted count for money had and received." See R. S., c. 64, § 60.

Upon other questions arising as to the first two counts the counsel cited: *Meservey* v. *Gray*, 55 Maine, 542; *Bennett* v. *Davis*, 62 Maine, 544.

VIRGIN, J. The third count in the declaration is one in the usual form against an executor for money had and received by his testate in his lifetime, to the plaintiffs' use (Oliv. Prec. 173, 182); together with the allegations rendered essential by the statute, that the plaintiffs "first presented to the said Copeland (executor) their claim in writing and demanded payment thereof, more than thirty days before the commencement of this action

and within two years after notice given by said Copeland of his appointment as executor." *Eaton* v. *Buswell*, 69 Maine, 554; stat. 1872, c. 85, § 12. Whether this allegation refers to the first and second counts, is immaterial to our present inquiry, since both parties claim that it does refer, at least, to the third count; and if that count is good, the demurrer must be overruled. *Blanchard* v. *Hoxie*, 34 Maine, 376; *Concord* v. *Delaney*, 56 Maine, 201.

The question is one of pleading and not of evidence or sufficiency of proof. The allegation that the plaintiffs presented their claim in writing does not mean that the written claim as presented was couched in the language of the count, but that it contained a statement of such a cause of action as, if proved, will sustain the count. The particular cause of action may be any one of those which may be proved under and will sustain the count. To enable the plaintiffs to secure an attachment of real estate under such a count, "a specification of the nature and amount of their demand annexed to their writ" was essential. R. S., c. 81, § 56. And a "specification of the matters to be proved in support of such a count" the defendant is entitled to on motion at *nisi prius*. Rule XI. But such specifications are no part of the count, and a judgment could be rendered as well without it as with it. The count itself discloses, as a matter of law, a sufficient statement of a good ground of action, and whether the plaintiffs will be able to establish the facts necessary to entitle them to recover remains to be seen at the trial. *Concord* v. *Delaney*, *supra*. The defendant can plead over under the provisions of R. S., c. 82, § 19.

Exceptions overruled.

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

THE FIRST NATIONAL BANK OF LEWISTON

vs.

CALVIN N. DWELLEY.

Androscoggin. Opinion April 27, 1881.

Trust. Fraudulent conveyance.

Where a debtor receives the title to property for the specific purpose of conveying it to another, he acquires no such interest therein as would make the execution of the trust upon which he received it (whether so constituted as to be legally binding or not) fraudulent as against his creditors, no fraudulent intent being made to appear.

ON REPORT.

This is a writ of entry, dated July 22, 1879. Plea, the general issue.

The plaintiff, on the 30th day of November, 1876, discounted a note of one thousand dollars, signed by Dwelley & Mower, and indorsed by Darwin Dwelley, the father of this defendant. This note was renewed March 3, 1877, July 6, 1877, and January 9, 1878, each renewal having been signed by Dwelley & Mower and indorsed by Darwin Dwelley.

October 17, 1878, the plaintiff brought suit on the note of January 9, against Darwin Dwelley, on which suit real estate attachments were duly returned, judgment obtained at the April term of this court, 1879, and execution issued thereon May 10, 1879, and was duly levied on the demanded premises as the property of Darwin Dwelley.

Darwin Dwelley prior to indorsing any of the notes conveyed certain real estate, situated in Brunswick village, then owned by him in his own right, to Rowena W. Dwelley, his wife. On the 17th day of May, 1877, Rowena conveyed the Brunswick village property to the Lunt heirs by deed recorded July 15, 1877; the Lunt heirs on the same day conveyed the demanded premises to Darwin, and Darwin on the same day conveyed the same to the defendant, Calvin N. Dwelley; the two deeds last named were recorded March 8, 1878.

At the time of the conveyance to this defendant, he was not informed of his father's indebtedness to the plaintiff.

Other facts, as found by the court, are stated in the opinion.

Frye, Cotton and White, for the plaintiffs.

L. H. Hutchinson and *A. R. Savage*, for the defendant.

BARROWS, J. Notwithstanding the sinister construction which the demandant's counsel in their ingenious argument put upon some expressions used by Darwin Dwelley and the defendant in their testimony, we think it plainly appears that the former had no legal or equitable interest in the property in Brunswick village after he conveyed it to his wife, some years before he began to indorse the notes of Dwelley & Mower to the Bank, nor any control over the same, except through the indulgence conceded by conjugal affection to the whim of his old age in making him the conduit through which the title of the Lunt farm for which the village property was exchanged should be passed to the defendant.

There is no controversy here as to the law. Plaintiffs' counsel recognize the doctrine laid down in *French* v. *Holmes*, 67 Maine, 186, but make a strenuous effort to show that there was fraud in fact here, claiming that the antecedent conveyance from Darwin Dwelley to his wife was either *causa mortis*, or, if it were to be regarded as a gift *inter vivos*, that it was revoked by mutual consent, when the property was reconveyed to the husband for the purpose of being conveyed to the Lunts in exchange for the farm deeded on the same day and as part of the same transaction to the defendant, and upon which the plaintiffs levied as being the property of the husband.

Now we think neither of these claims is sustained by the evidence. The first is founded upon Darwin Dwelley's answer that at the time of the conveyance to his wife he " was in a slim state of health," and the next succeeding question and answer, viz: "Whether or not it was your purpose that she should have the whole of it in case of your death at that time" ? "Yes, to do as she pleased with it."

There is nothing singular in the witness assenting to the purpose attributed to him by counsel in the question, for he had

already testified touching the consideration of the deed to his wife—"I considered she had worked as hard through life as I had, and was as much deserving to be looked out for as myself, and I *gave* it to her;" but it does not go far to convert an absolute completed conveyance into one conditioned upon his speedy dissolution. So far as appears, he thought, whether he lived or died, his "wife deserved to be looked out for as much as himself," and hence made the conveyance which gave her the right "to do as she pleased with it" in either case.

Nor, except to creditors desirous of securing a desperate debt, does the testimony indicate a revocation of the gift to the wife by mutual consent. That the aged husband and wife should have the same wishes with regard to the disposition of the property in such a way as would finally transfer it to their son, the defendant upon whom they relied for the support of both, proves nothing. The whole arrangement for the exchange with the Lunts to this end was complete before the transfer of either parcel was made, and all the conveyances of May 17, 1877 were parts of that one transaction, which was in substance the conveyance from the Lunts to the defendant of the farm here in controversy in exchange for property which at that time belonged not to the defendant's father but to his mother. There was nothing there over which Darwin Dwelley at that time had any dominion or control. That he should appear as a nominal party through whom the conveyances were made does not indicate any fraudulent intent as to his creditors, but rather the reverse.

It suffices here to say that years before his indebtment to the plaintiff accrued, he had parted in good faith with all property in the estate, for which this farm was received in exchange; and the only title to either parcel that he has since held was in trust for the specific purpose of making the conveyances in question.

Judgment for defendant.

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

FAIRFIELD SAVINGS BANK *vs.* ISAAC CHASE.

Somerset. Opinion May 13, 1881.

Notice. Savings bank, knowledge of a trustee of. Agency. Knowledge of agent before employment.

A notice to a bank director or trustee, or knowledge obtained by him while not engaged either officially or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank.

Knowledge of an agent obtained prior to his employment as agent, and which he has no personal interest to conceal, will be an implied or imputed notice to the principal, when the knowledge is so fully in mind that it could not at the time have been forgotten, and relates to a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal. In such case the presumption that an agent will do what it is his duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied.

ON EXCEPTIONS.

Writ of entry to recover possession of a certain parcel of land, described in a mortgage from John W. Chase to the plaintiff corporation, dated the tenth day of March, 1876, and duly recorded on that day. The defendant seasonably disclaimed as to one undivided half of the demanded premises, but claimed title to the other undivided half. The plea was the general issue as to the undivided half claimed by the defendant. The defendant based his claim to one undivided half upon a deed from John W. Chase to him, dated the eighth day of March, 1876, but not recorded till the twenty-eighth day of March, 1876.

The attorney who wrote and took the acknowledgment of both the deed and the mortgage, was at that time a trustee of the plaintiff corporation. It was not claimed at the trial that any other officer of the bank had any knowledge of the existence of the deed to the defendant, at the time of the execution or recording of said mortgage.

The court, for the purpose of settling a question of fact, ruled, *pro forma*, that if the attorney, at the time of the execution of the mortgage, had knowledge that the deed had been executed

and delivered by John W. Chase to the defendant, this would be sufficient notice to the plaintiff corporation to overcome the legal effect of the fact that the mortgage was recorded before the deed, and that, if the jury should find that the attorney had such knowledge, they should return a verdict for the defendant. The jury, under this instruction, returned a verdict for the defendant.

To the foregoing instructions the plaintiff excepted.

Brown and Howard, for the plaintiffs, cited: 2 Daniels on Neg. Insts. 49; *Louisiana State Bank* v. *Ellory*, 16 Mart. 87; *Cross* v. *Smith*, 1 M. & Sel. 545; stat. 1877, c. 218 § § 2, 4; *Commercial Bank* v. *Cunningham*, 24 Pick. 270; 22 Pick. 24; 14 Mass. 180; 1 Met. 294; 7 Gray, 465.

Walton and Walton for the defendant, claimed that Brown was acting for the bank in drawing the mortgage from John W. Chase, and that his knowledge of the prior deed was a sufficient notice to the bank, and cited: *Jones* v. *Bramford*, 21 Iowa, 217; *Musgrove* v. *Brouser*, 5 Oreg. 313; 3 Wash. R. P. 3d ed. 283; *The Distilled Spirits*, 11 Wall. 356; *Hovey* v. *Blanchard*, 13 N. H. 145; *May* v. *LeClaire*, 11 Wall. 217; 1 Pars. Contr. 5th ed. 77; *Reed* v. *Ashburnham R. R. Co.* 120 Mass. 47.

PETERS, J. A notice to a bank director or trustee, or knowledge obtained by him, while not engaged either officially or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank. If otherwise, corporations would incur the same liability for the unofficial acts of directors that partnerships do for the acts of partners; and corporate business would be subjected oftentimes to extraordinary confusion and hazards. Carry the proposition, that notice to a director is notice to the bank, to its logical sequence, and a corporation might be made responsible for all the frauds and all the negligences, pertaining to its business, of any and all its directors not officially employed. Any one director would have as much power as all the directors.

A single trustee or director has no power to act for the institution that creates his office, except in conjunction with others. It is the board of directors only that can act. If the board of

directors or trustees makes a director or any person its officer or agent to act for it, then such officer or agent has the same power to act, within the authority delegated to him, that the board itself has. His authority is in such case the authority of the board. Notice to such officer or agent or attorney, who is at the time acting for the corporation in the matter in question, and within the range of his authority or supervision, is notice to the corporation. Abbott's Trial Ev. 45, and cases in note; *Fulton Bank* v. *Canal Co.* 4 Paige, 127; *La Farge Fire Ins. Co.* v. *Bell*, 22 Barb. 54; *National Bank* v. *Norton*, 1 Hill (N. Y.), 578; *Bank of U. S.* v. *Davis*, 2 Hill (N. Y.), 454; *North River Bank* v. *Aymar*, 3 Hill (N. Y.), 263; *Ins. Co.* v. *Ins. Co.* 10 Md. 517; *Bank* v. *Payne*, 25 Conn. 444; *Farrell Foundry* v. *Dart*, 26 Conn. 376; *Smith* v. *South Royalton Bank*, 32 Vt. 341; *Washington Bank* v. *Lewis*, 22 Pick. 24; *Commercial Bank* v. *Cunningham*, 24 Pick. 270; *Housatonic Bank* v. *Martin*, 1 Met. 308; 1 Pars. Con. *77; Story Agen. § 140; South. Law Rev. N. S. vol. 6, p. 45; *Hoover* v. *Wise*, 91 U. S. 308.

Another question arises in the case before us. It appears that Brown's knowledge of a previous conveyance was acquired anterior to his employment by the bank, if employed by the bank at all, and not during or in the course of his employment on their account. The question is, whether a principal is bound by knowledge or notice which his agent had previous to his employment in the service of the principal.

Upon this question the authorities disagree. The negative of the question has been uniformly maintained in Pennsylvania and some other of the states. In the late case of *Houseman* v. *The Building Association*, 81 Penn. St. 256, it was said, that "notice to an agent twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be." But we think, all things considered, the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the

agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. Additional modification might be required in some cases.

These elements appearing, it seems just to say that a previous notice to an agent is present notice to the principal. The presumption, that an agent will do what it is his right and duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied. There may be instances where the rule operates harshly; but, under the rule reversed, many frauds could be easily perpetrated. Of course, the knowledge must be that of a person who is executing some agency, and not acting merely in some ministerial capacity, as servant or clerk. For instance; if in the present case Brown had merely taken the acknowledgment of the deed to the bank, or had transcribed the deed as a clerk or copyist, such acts would not have imposed a duty to impart his knowledge to the bank. But if employed to obtain the title for the bank by a deed to be drawn by him for the purpose, that would place the transaction within the rule. Jones Mort. (2nd ed.) § 587. Notice of the existence of an unrecorded mortgage upon the property to an officer employed to make an attachment, is notice to the plaintiff. *Tucker* v. *Tilton*, 55 N. H. 223. In the case before us, Brown, it is claimed by the defendant was employed by the bank to make an instrument to convey a title from a person to the bank. Brown knew that such person had not the title. It would be his duty to so inform his client. He would be likely to do so. He had no motive not to do it. The law conclusively presumes that he did inform him. We think such a case comes reasonably within the rule, though it is not so marked a case as it would be if Brown had been employed by the bank to ascertain if the grantor had the title, and if he had then to make the deed.

The general rule or principle touching this case, guarded by the cautions and conditions stated, is supported by the later English cases, although the earlier English cases went the other way; is also the law of the United States Supreme Court; and is, we think, sustained by a preponderance of opinion in the state courts where the question has been discussed. *Fuller* v. *Bennett*, 2 Hare, 394; *Dresser* v. *Norwood*, 17 C. B. (N. S.) 466; *Rolland* v. *Hart*, L. R. 6 Ch. App. 687; *The Distilled Spirits*, 11 Wall. 356; *Hovey* v. *Blanchard*, 13 N. H. 148; *Hart* v. *The Bank*, 33 Vt. 252; *Suit* v. *Woodhall*, 113 Mass. 391; *National Bank* v. *Cushman*, 121 Mass. 490; *Anketel* v. *Converse*, 17 Ohio St. 11; *Hoppock* v. *Johnson*, 14 Wis. 303; *Lawrence* v. *Tucker*, 7 Maine, 195; Jones Mort. (2nd ed.) § 584, and following sections and notes. Many other cases, on both sides the questions, will be found cited and reviewed in a learned article in the Amer. Law Reg. (Phila.) New Series, vol. 16, p. 1.

An application of this rule to the facts of this case, requires the verdict to be set aside. S. S. Brown, while a trustee of the Fairfield Savings Bank, had actual knowledge that John W. Chase had deeded certain land to Isaac Chase. Knowing that fact, he as an attorney wrote and took the acknowledgment of a mortgage of the same land from John W. Chase to the bank, and the mortgage was recorded first. The question was whether the bank had knowledge of the prior deed when the mortgage was taken. The *pro forma* ruling that the knowledge of Brown was sufficient notice to the bank to overcome the legal effect of the fact that the mortgage was recorded before the deed, irrespective of the further question whether Brown was, at the time of making the mortgage, acting as an attorney in the business and employment of the bank or not, was erroneous. It is contended that the evidence shows that Brown was acting for the bank. But the fact being at least questionable, it should have been passed upon by the jury.

Exceptions sustained.

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

GEORGE A. CALEB, in equity, *vs.* GEORGE HEARN.

Cumberland. Opinion May 18, 1881.

Bill in equity. Demurrer. R. S., c. 64, § 65. Stat. 1874, c. 168. Embezzlement of effects of deceased person.

A bill in equity by an heir at law is not the proper remedy to pursue against a person charged with embezzling or wrongfully appropriating the goods, chattels and money of a deceased person. The proceedings should be in the name of the executor or administrator of the decedent, who would have an adequate remedy at law and may, if it is desirable, cite the defendant before the judge of probate for examination under the provisions of R. S., c. 64, § 65, *et seq.* and stat. 1874, c. 168.

DEMURRER to bill in equity.

The bill alleges that the plaintiff is the son and only heir of John O. Caleb, who died at the Sailors Snug Harbor in New York, that the decedent at the time of his decease, was possessed of the sum of twenty-nine hundred dollars on deposit in the Seaman's Bank for Savings in New York, and of other personal property amounting to two hundred dollars in money, clothing, valuable papers, etc. of which the plaintiff can give no particular description; that the defendant without any power or authority from the plaintiff, but under color of a false and pretended power of attorney, without the knowledge of the plaintiff, withdrew the money from the Seaman's Bank for Savings, and took all the rest of the personal property and effects of the decedent, and withholds and embezzles all of said money and effects from the plaintiff, and has brought the same into this State; that the plaintiff has made a demand upon the defendant for all such funds, property and effects, but the defendant falsely and fraudulently refuses to pay and deliver the same to him, the defendant falsely pretending and setting up that the decedent and the plaintiff were indebted to him in large sums of money; that the defendant refuses to make any settlement; and so "this complainant charges that the respondent has falsely and fraudulently and without authority, obtained possession of said property, funds, papers, &c. of this complainant, and falsely and willfully refuses to pay over or account for the same to this complainant, but converts and embezzles the same to his own use and benefit."

Clifford and Clifford, for the plaintiff.

The plaintiff can sue in his own name. *Gage* v. *Johnson*, 20 Maine, 438.

If ancillary letters are necessary, then plaintiff moves proper disposition of the cause to that end and preserve the attachment. *Parsons* v. *Lyman*, 20 N. Y. 124.

Formal party can come in before the master, or there may be a supplemental bill or amendment adding representative. Daniel's Ch. Pr. 197; Story's Eq. Pl. § § 77, 238, 541, 543.

P. J. Larrabee and *M. P. Frank*, for the defendant, cited: 1 Daniel's Ch. Pr. 214–216, 331; *Fletcher* v. *Holmes*, 40 Maine, 365; *Crooker* v. *Rogers*, 58 Maine, 339; *P. F. & M. Ins. Co.* v. *Hill*, 60 Maine, 178; *Caswell* v. *Caswell*, 28 Maine, 232; *Law* v. *Thorndike*, 20 Pick. 317.

BARROWS, J. On demurrer. If the complainant has suffered in consequence of the misdoings of the defendant charged in the bill, it is nevertheless indirectly, and complainant has mistaken the remedy. It should be sought by due process of law, and through a legal representative of the deceased, John O. Caleb, whose personal estate the defendant is charged with embezzling and wrongfully appropriating to his own use.

The only relief sought, is compensation in damages for a wrong fully accomplished, and done to the estate of John O. Caleb, whose administrator would have upon the facts alleged, an abundant remedy at law. The bill cannot be maintained for two reasons: 1, because of the want of a proper party plaintiff; 2, because the only party directly injured, has an adequate remedy at law. *Fletcher* v. *Holmes*, 40 Maine, 364; *Crooker* v. *Rogers*, 58 Maine, 339; *Ins. Co.* v. *Hill*, 60 Maine, 178. The way is open for inquiry as to the facts and an appeal to the defendant's conscience under the provisions of R. S., c. 64, § 65, and laws of 1874, c. 168.

Demurrer sustained. Bill dismissed.

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

JOSEPH BRADSTREET and others *vs.* ABRAM RICH, JUNIOR.

Kennebec. Opinion May 23, 1881.

Evidence.

R contracted in writing to sell F ten thousand tons of ice at two dollars and fifty cents per ton. B and others, wrote and signed upon the back of a copy of this contract the words following: "We, the undersigned, hereby agree to furnish to . . . [R] three thousand tons of ice (3000 tons) per the within contract."

Held: In an action of assumpsit by B and others, against R for three thousand tons of ice claimed to have been delivered in pursuance of this agreement, that parol evidence was admissible to prove that R under an understanding or agreement with the plaintiffs, made the contract with F in his own name, they to have an interest in it; also to prove that the plaintiffs agreed after the contract with F was made, and before and at the time of making the contract between the parties to the suit, to take an interest in the F contract to the extent of three thousand tons and to rely for payment upon F as specified in the contract between R and F.

ON EXCEPTIONS and motion to set aside the verdict.

Assumpsit for three thousand tons of ice claimed to have been delivered to the defendant by the plaintiffs in pursuance of a contract the material portion of which is given below:

(Contract.)

"This memorandum of agreement, made this sixth day of May, eighteen hundred and seventy-six (1876), by and between Abraham Rich, Jr. of Gardiner, Maine, of the first part, and Hixon W. Field, Jr. of New York, N. Y. party of the second part, witnesseth as follows:

"First. The party of the first part, for and in consideration of one dollar, to him in hand paid, the receipt whereof is hereby acknowledged, and also of the covenants and agreements hereinafter mentioned to be kept and performed by the party of the second part, doth covenant and agree to sell, and does hereby sell, to the party of the second part, ten thousand tons of river ice, said ice to be of good merchantable quality, not less than twelve inches in thickness, according to the usual custom of such measurement in the ice business on the Kennebec river, at the

price of two dollars and fifty cents ($2.50) per ton of two thousand pounds (2000 lbs.) delivered free on board of the vessel or vessels at the place of loading on the Kennebec river or vicinity, and securely and properly dunnaged as customary for shipments of ice from the Kennebec river to the port of New York. Said ice to be all delivered to the vessels sent by the party of the second part, to receive the same during the months of July and August of the year aforesaid, at an average rate of not less than two hundred tons each day that vessels are in the berth at the loading place ready to receive ice (Sundays and rainy days excepted.)

"Second. The party of the second part for himself does hereby purchase and agree to receive the said ice in the quantity and manner as aforesaid, and to pay for the same upon presentation of a sight draft, with bill of lading and weigher's certificate attached thereto. Said payment to be made upon the quantity expressed in said bill of lading and weigher's certificate.

* * * * * * *

"In witness whereof they have hereunto set their hands and seals the day and year first above written.

S. P. Dean.	Abram Rich, Jr.	[Seal.]
Wm. E. Barnes.	Hixon A. Field, Jr.	[Seal.]

(Indorsement on margin.)

"This is a true copy of the original agreement in our possession.

Chase, Talbot & Co."

New York, May 6, 1876."

(Indorsement on back.)

We, the undersigned, hereby agree to furnish to A. Rich, Jr. three thousand tons of ice (3000 tons), per the within contract.

Joseph Bradstreet.
L. D. Cook.
P. G. Bradstreet.
F. Stevens."

Gardiner, May 15, 1876."

Other material facts appear in the opinion.

Verdict was for plaintiffs for $6043.90.

Joseph Baker and *L. Clay*, for the plaintiffs.

Perhaps the word "per" in the contract between the parties to this suit is not the most accurate word to express the meaning between the parties, but no one can doubt that the true meaning was to furnish to Rich, not to Field, three thousand tons of ice on the terms and conditions contained in his contract with Field. The reference to the Field contract makes that a part of this one, the same as if they had written it out in full, *mutatis mutandis*. So that in legal effect the plaintiffs agreed to furnish to the defendant:

1. Three thousand tons of river ice of merchantable quality not less than twelve inches thick.
2. The price was to be $2.50 per ton of two thousand pounds.
3. It was to be delivered free on board, &c.
4. Payment was to be made by defendant on sight drafts accompanied by the bills of lading.

It is argued that the contract between the plaintiffs and defendant is incomplete and, therefore, could be supplemented by extrinsic evidence. Without denying the law as claimed, we deny the fact and hold that the contract is complete in every point. The defendant's argument on this point ignores the well established rule of law that a reference to another writing makes it a part of the contract. *McLellan* v. *Bank*, 24 Maine, 566.

The parol evidence offered was rightly excluded because it tended to vary or contradict the written contract, not to explain an ambiguity. 1 Greenl. Ev. § § 275, 277, 297, 298; *Bigelow* v. *Collamore*, 5 Cush. 226; *Gould* v. *Norfolk Lead Co.* 9 Cush. 338; *Smith* v. *Morrill*, 54 Maine, 48; 2 Wharton's Ev. § § 956, 957.

W. P. Whitehouse and *Herbert M. Heath*, for the defendant, cited: 1 Chitty, Contr. 149; 2 Whar. Ev. § § 956, 937–941; *Patten* v. *Pearson*, 57 Maine, 428; *Chicago* v. *Sheldon*, 9 Wall. 50; *Knight* v. *Worsted Co.* 2 Cush. 283; *Gray* v. *Harper*, 1 Story, 574; *Thorington* v. *Smith*, 8 Wall. 1; *Hogins* v. *Plympton*, 11 Pick. 97; *Miller* v. *Stevens*, 100 Mass. 522; *Grant* v. *Lathrop*, 23 N. H. 67; *Lowry* v. *Adams*, 22 Vt. 160; *Higgins* v. *Senior*, 8 Mees. & W. 834; *Lerned* v. *Johns*, 9 Allen, 420; Whar. Agency, § 296; *Huntington* v. *Knox*, 7 Cush. 374;

2 Whar. Ev. § § 1015, 1026; Stephens Ev. Art. 90; *Fusting* v. *Sullivan*, 41 Md. 169.

WALTON, J. The principal question is in relation to the admissibility of evidence. The defendant had contracted in writing to sell to Hixon W. Field of New York, ten thousand tons of ice at $2.50 per ton. The plaintiffs wrote upon the back of a copy of this contract the words following:

"We, the undersigned, hereby agree to furnish to A. Rich, Jr. three thousand tons of ice (3000 tons) per the within contract."

This writing is signed by the plaintiffs, and is dated May 15, 1876. This action is to recover for ice claimed to have been delivered in pursuance of this agreement. The form of the action is general *indebitatus assumpsit* upon an account annexed to the writ.

The exceptions state that the defendant's counsel offered to prove by parol evidence that the defendant, under an understanding or agreement with the plaintiffs, took the Field contract in his own name, they to have an interest in it; also to prove by parol evidence that the plaintiffs agreed after the contract was made with Field by the defendant, and before and at the time of making the contract between the parties to the suit, to take an interest in the Field contract to the extent of three thousand tons, and to rely for payment upon Field, as specified in the written contract.

The evidence was objected to and excluded. We think it should have been received. In no way would it have varied or contradicted the writing signed by the plaintiffs. That writing contained one side of the contract only. It contained a promise by the plaintiffs, but none by the defendant. In support of their action the plaintiffs must have relied upon an implied promise. The case shows that they neither proved nor attempted to prove an express one. When, in support of an action of assumpsit, the plaintiff relies upon an implied promise, can there be any doubt that the defendant may repel the implication by parol evidence of an express promise, accepted by the plaintiff, which is inconsistent with the one implied by law? We do not say such would be the law if the plaintiffs had obtained from the defendant an

express written promise on which they relied in support of their action. But such is not the fact. They had no written promise from the defendant. To make out a *prima facie* case they were themselves obliged to rely upon parol evidence. The first step taken in the trial was to call one of the plaintiffs, and have him testify that the defendant was the party with whom they dealt, and to whom they delivered their ice, apparently intending thereby to lay the foundation for an implied promise, which would, *prima facie*, support their action. Under these circumstances we cannot doubt that it was competent for the defendant to prove by parol evidence what his exact promise was, and to show, if he could, that it was contingent; that it was dependent upon whether or not he should collect his pay of Field; that the plaintiffs were to share the risks as well as the benefits of his contract; that they were to rely upon Field's ability to pay for the ice which they should furnish, as the defendant would be obliged to do for the ice which he should furnish. Such an agreement is not improbable. The plaintiffs were to receive for their ice the full price paid by Field. The defendant would receive no profit upon it. Why, then, should he insure their pay? Of course it would be competent for him to do so. But looking at the transaction in the light of what is probable and what is improbable, it seems as if such could hardly have been the fact. But all we mean to say is that a different understanding, such an understanding or agreement as the defendant offered to prove, is by no means improbable, or in conflict with any writing signed by the defendant; or, in conflict, even, with the writing which the plaintiffs signed. We think the evidence should have been received. We do not rest our decision upon the ground that the evidence was admissible to explain any supposed ambiguity in what was written. We hold that it was admissible to supply important facts in relation to which the writing was entirely silent. Admitted for such a purpose, the rule excluding parol evidence to vary or contradict written documents would not be infringed. The evidence would in no way vary or contradict any thing that was written. *Davenport* v. *Mason*, 15 Mass. 85; *Pierce* v. *Woodward*, 6 Pick. 206; *Hogins* v. *Plympton*, 11 Pick. 97; *Tisdale*

v. *Harris*, 20 Pick. 9; *Kinney* v. *Whiton*, 44 Conn. 262; *Lindley* v. *Lacey*, 17 C. B. (N.S.) (112 E. C. L.) 578; 1 Gr. Ev. § 284, *a.*; Stephen on Ev. Art. 90, (2).

Exceptions sustained. New trial granted.

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

STATE *vs.* LIVING L. HILL.

Cumberland. Opinion May 24, 1881.

Indictment. Obtaining credit by false pretences. Evidence. Constructive notice.

At the trial upon an indictment for obtaining a horse, by purchase on credit, for which a note was given, by falsely pretending to be the owner of valuable unencumbered real estate, evidence to show that the note had not been paid is admissible.

When one obtains credit by falsely pretending that he is the owner of property which he does not own, the fraud consists not in misrepresenting his intentions to pay, but in misrepresenting his ability to pay. His intentions are not important.

The doctrine of constructive notice of an existing mortgage because of its record, does not apply to indictments for obtaining credit by falsely pretending to be the owner of valuable real estate upon which there is no existing mortgages. It is no defence in such case that the party deceived relied upon the statements made, without examining the public records.

ON EXCEPTIONS from superior court, Cumberland.

(Indictment.)

"State of Maine. Cumberland, ss. At the superior court, begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and eighty:

"The grand jurors for said State, upon their oath, present, that Living L. Hill of Saco, in the county of York, on the twenty-eighth day of August, in the year of our Lord one thousand eight hundred and seventy-nine, at Portland, in the county of Cumberland, unlawfully, knowingly and designedly did falsely pretend to one John L. Best, that he, the said Living L. Hill,

was then and there the owner of certain real estate situated in said Saco, being the same premises upon which he, the said Living L. Hill, then lived; that the said real estate was then, on said twenty-eighth day of August aforesaid, free and clear of all encumbrances and the same was not mortgaged to any person; and that no person then had the scratch of a pen against the said real estate.

"The said real estate being described as follows: A certain lot of land containing ten acres and being the same premises which were conveyed to the said Living L. Hill by one Charles F. Hill by deed dated August 1, A. D. 1877; also another lot of land being the same which was conveyed to said Living L. Hill by one Stephen A. Haines by deed dated March 23, A. D. 1878, with intent thereby, then and there on said twenty-eighth day of August, A. D. 1879, at Portland aforesaid, to induce the said John L. Best to sell and deliver to him the said Living L. Hill certain goods, chattels and property of him the said John L. Best, to wit: One horse, and to take in part payment therefor his the said Living L. Hill's promissory note for the sum of one hundred seventeen dollars and seventy-five cents, dated on said twenty-eighth day of August, A. D. 1879 and payable to the order of said John L. Best, in three months from the date thereof, at National Traders Bank, Portland, and with intent thereby then and there on the said twenty-eighth day of August, A. D. 1879, at Portland, aforesaid, in the county aforesaid, to cheat and defraud the said John L. Best of his said horse, and by means of said false pretences the said Living L. Hill did then and there induce the said John L. Best to sell and deliver to him the said Living L. Hill, the said horse, and to take in part payment therefor, his the said Living L. Hill's promissory note for the said sum of one hundred seventeen dollars and seventy-five cents, dated on said twenty-eighth day of August, A. D. 1879, and payable to the order of said John L. Best in three months from the date thereof, at National Traders Bank, Portland, and by means of said false pretences the said Living L. Hill did then and there on said twenty-eighth day of August, A. D. 1879, at Portland, aforesaid, in the county aforesaid, designedly obtain

from the said John L. Best the said horse of the value of one hundred and twenty-five dollars, of the goods, chattels and property of the said John L. Best, with intent then and there to cheat and defraud the said John L. Best of the same, and did then and there cheat and defraud the said John L. Best of the said horse. Whereas in truth and in fact the said Living L. Hill was not then and there the owner of the said real estate, and the said real estate was not then free and clear of all encumbrances, and the said real estate was then mortgaged to a large amount to wit: the sum of fifteen hundred dollars. All which the said Living L. Hill then and there well knew. To the great damage and deception of the said John L. Best and against the peace of said State, and contrary to the form of the statute in such case made and provided.

A true bill, JAMES N. READ, Foreman.

ARDON W. COOMBS,
Attorney for the State for said county."

(Motion in arrest.)

"Cumberland, ss. Superior court, May term, 1880. *State* v. *Living L. Hill:*

"And now said Living L. Hill comes into court after verdict of 'Guilty,' and before judgment and sentence, and moves the court in arrest of judgment and sentence because he says that no offence is set out in said indictment which he could be legally tried upon.

"Because said indictment does not state that said Hill did not pay his said note at the maturity thereof, nor set forth any false statement as to said note given for said horse, nor that said note was not fully what it purported to be, and of the value therein set forth.

"Because said verdict was against law and against evidence and the weight of evidence in said case.

LIVING L. HILL,
By his Att'ys, S. W. LUQUES,
A. F. MOULTON."

"Motion overruled. PERCIVAL BONNEY, Justice Superior Court."

H. B. Cleaves, attorney general, and *Ardon W. Coombs*, county attorney, for the State, cited: *Com.* v. *Coe*, 115 Mass. 481; *Com.* v. *Morrill*, 8 Cush. 571; *State* v. *Dorr*, 33 Maine, 498: *Pope* v. *Sully*, 1 Buff. (N. Y.) 17; *State* v. *Munday*, 78 N. C. 460; *McCord* v. *The People*, 46 N. Y. 470; *State* v. *Stanley*, 64 Maine, 157; *Com.* v. *Tenney*, 97 Mass. 50; *Com.* v. *Mason*, 105 Mass. 163; *State* v. *Kingsbury*, 58 Maine, 238; *State* v. *Pike*, 65 Maine, 111; *State* v. *Watson*, 63 Maine, 128; *State* v. *Mills*, 17 Maine, 211; 11 Allen, 266; 19 Pick. 179; 126 Mass. 208; *Com.* v. *Strain*, 10 Met. 521; *State* v. *Smith*, 54 Maine, 33; *State* v. *Gilman*, 70 Maine, 329.

A. F. Moulton and *S. W. Luques*, for the respondent.

The indictment does not set out and we fail to comprehend how the false statement of Hill, as to the condition of the title to his farm, tended to the injury of Best, or how the fact that the farm was incumbered tended to defraud him of his horse.

He sold Hill the horse and took his note and the indictment is silent as to whether the note had been paid.

The indictment does not allege that Best believed the representations and was deceived.

"This statute offense is undoubtedly a very great extension of the criminal court and a party may well insist at least upon all the usual and customary requisites to a valid indictment. It must set out all the material facts and circumstances which the prosecutor is bound to prove. *Com.* v. *Strain*, 10 Met. 522; see *People* v. *Tomkins*, 1 Park, 224; *People* v. *Miller*, 2 Park, 197; 4, Bishop Criminal Law, § 462; *People* v. *Herrick*, 13 Wend. 87; *People* v. *Stetson*, 4 Barb. 151.

The requested instructions should have been given.

A party is bound to exercise ordinary prudence. That in this case required Best to examine the record. *People* v. *Williams*, 4 Hill, 9; *People* v. *Stetson*, 4 Barb. 151; *People* v. *Sully*, 5 Park. 142; *Thomas* v. *People*, 34 N. Y. 351; *Com.* v. *Hulbert*, 12 Met. 446; *Regina* v. *Mills*, 40 Eng. L. & Eq. 562; *Com.* v. *Norton*, 11 Allen, 267.

If Hill intended to pay his note at the time he gave it, and he gave it in payment of the horse, how can it be said that he intended to defraud Best of his horse? We insist that his intention at the time in regard to paying the note should have been submitted to the jury.

WALTON, J. The defendant has been indicted, tried, and convicted of fraudulently obtaining possession of a horse, by a purchase on credit, by falsely pretending that he was the owner of valuable and unencumbered real estate. He claims a new trial:

First, for the alleged illegal admission of evidence. The exceptions state that at the trial one John L. Best testified in relation to the note given for the horse, and was asked by the government whether the note had been paid, and was allowed to answer that it had not, notwithstanding the answer was objected to by the defendant. We think the answer was admissible. It tended to prove that the defendant was insolvent, and made it more probable that his statement, if false, was fraudulently so. If one who is insolvent falsely pretends that he is the owner of property, which in fact he does not own, and thereby obtains credit, the fact that he was insolvent very much strengthens the probability that his statement was not only false but fraudulently so, and made for the very purpose of procuring a credit which he knew he could not otherwise obtain. We think the answer was admissible.

Second, for misdirection. It appears from the charge of the presiding judge, which is made a part of the exceptions, that the defendant's counsel contended that if the defendant intended to pay the note at its maturity, then no such intent as is provided by the statute existed in his mind, and that he was entitled to an acquittal. The presiding judge stated to the jury that he did not so understand the law; that, as a matter of law, it would make no difference whether at the time he gave the note he intended to pay it at maturity or not. We think the ruling was correct. When one obtains credit by falsely pretending that he is the owner of property which he does not own, the fraud consists, not in his misrepresenting his intention to pay, but in misrepresenting his

ability to pay. His intentions are not important. It is his ability on which the creditor relies. The gist of the offense consists in the deception practiced upon his creditor with respect to his means of paying, not with respect to his intentions. We think the ruling was correct.

Third, for refusals to instruct. The exceptions state that the defendant's counsel requested the presiding judge to instruct the jury "that if the mortgages were recorded it was notice to Mr. Best and negatived the charge that he was deceived by any representations, if made, that the real estate was free from incumbrances." The request was properly refused. The doctrine of constructive notice does not apply to such cases. The parties were in Portland. The land was in Saco. The records were in Alfred, many miles from Portland. Under these circumstances Mr. Best had a right to rely upon the defendant's statement; and if the statement was wilfully false, and Mr. Best was in fact deceived by it, the falsehood was not deprived of its criminality because Mr. Best, by going to Alfred, and searching the public records, could have ascertained the truth. The doctrine of constructive notice does not apply to such cases, and the request was properly refused. 126 Mass. 208.

Fourth. The presiding judge was also requested to instruct the jury "that if they should find that Mr. Best was at the time indebted to the defendant for a larger sum than the value of the horse, it was not cheating by false pretenses." It is not necessary to determine whether a creditor may without criminality resort to falsehood to collect his debt, for there is no evidence in this case that the defendant's statements were made for any such purpose. True, Best had been indebted to the defendant, but the defendant had made a note for the amount, Mr. Best had indorsed it, and the defendant had obtained the money upon it, and Best had agreed to pay the note when it should become due; and the defendant does not pretend that the purchase of the horse had any connection whatever with this former indebtedness. On the contrary, the defendant gave his note for the horse, and it was with reference to his ability to pay the note when it should become due that the representations respecting his property were made. The request was properly refused.

Fifth. The defendant moved in arrest of judgment for alleged defects in the indictment. We have carefully examined the points made by the defendant's counsel, and we think it is sufficient to say that in our judgment none of them are sustained. The indictment contains every allegation material to the offense charged, and is in form according to well approved precedents. We think the motion was properly overruled.

Exceptions overruled.

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

EDWIN S. STEVENS *vs.* ORRIN S. HASKELL and others, executors of the last will of GOING HATHORN.

Waldo. Opinion May 23, 1881.

Executors and administrators, actions against. Stat. 1872, c. 85, sec. 12. Pleadings.

In an action against an executor or administrator, the declaration should contain an averment that the claim was first presented in writing, as required by stat. 1872, c. 85, § 12.

ON EXCEPTIONS.

(Declaration.)

"In a plea of the case for that whereas the plaintiff, on the fifteenth day of March, A. D. 1874, was the owner of a certain saw mill situated on Sawadabscook stream, in the town of Hampden, of the value of one thousand dollars, and whereas the said Hathorn, then in full life, was in full possession of said mill for the purpose of manufacturing lumber, at a rent of a certain sum per thousand feet, and then and there said Hathorn, by his servants, without any lawful right or permission from the plaintiff, changed the position of the main water wheel of said mill, and the said Hathorn, not minding or regarding his duty in that behalf, then and there by his servants so unskillfully, carelessly and negligently managed and hoisted said water wheel that said water wheel for want of sufficient care and management, as aforesaid,

then and there fell with great force and violence, and was thereby broken to pieces and destroyed.

"And also for that whereas the plaintiff, on the fifteenth day of March, 1874, was the owner of a certain saw mill, situated on Sawadabscook stream, in the town of Hampden, a portion of the machinery in said mill being driven by another and different water wheel, of great value, to wit:—of the value of two hundred dollars, and whereas the said Hathorn then in full life, was in possession of said mill and wheel for the purpose of manufacturing lumber at a rent of a certain sum per thousand feet, and then and there said Hathorn by his servants having the care and management of said mill and wheel not regarding his duty thereof, so unskillfully, carelessly and negligently managed and behaved himself in this behalf, and by his servants carelessly and negligently managed said mill and wheel, that large clubs, sticks and chips flowed into said wheel, and the said Hathorn by his servants carelessly and negligently continued to use said wheel while so filled with clubs, sticks and chips, thereby causing great damage to said wheel.

"And also for that whereas the plaintiff, on the fifteenth day of March, 1874, was the owner of a certain boarding house situated near his mill in the town of Hampden of the value of five hundred dollars and the said Hathorn, then in full life had the care and possession of said house for the purpose of boarding his men while manufacturing lumber at said mill and the said Hathorn by his servants then and there having the care and management of said house not regarding his duty thereof, so unskillfully, carelessly and negligently behaved himself in this behalf, and by his servants so carelessly and negligently managed said house to the damage of said plaintiff as he says in the sum of three hundred dollars."

The defendants filed a general demurrer to the declaration, which was overruled *pro forma*, and the defendants excepted to such ruling.

George E. Wallace, for the plaintiff.

D. D. Stewart, for the defendants.

WALTON, J. No action against an executor or administrator, on a claim against the estate, can be maintained, unless such claim is first presented in writing, as required by the act of 1872, c. 85, § 12. Like every other fact essential to the maintenance of the suit, the notice, or presentation in writing, must be first averred in the declaration, and then proved at the trial. An averment of this fact is as essential as the averment of any other fact necessary to maintain the action. A declaration against an executor or an administrator upon such a claim, without such an averment, is defective; and defective, not in form merely, but in substance; for the averment is one that must be proved as well as made. It is therefore a defect that may be taken advantage of upon general demurrer. The declaration in this case is, in this particular, defective. *Eaton* v. *Buswell*, 69 Maine, 552.

Exceptions sustained. Declaration adjudged bad.

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

JOHN HODGDON and others, appellants,

vs.

COUNTY COMMISSIONERS OF AROOSTOOK COUNTY.

Aroostook. Opinion May 24, 1881.

Stat. 1879, c. 107. R. S. c. 6 § 51. Ways in unincorporated townships.

The stat. 1879, c. 107, did not change the then existing law so as to require the committee therein provided for, to make the assessment necessary for opening a road in an unincorporated township, instead of the county commissioners. The assessment now as before the passage of that statute is to be under the provisions of R. S., c. 6, § 51.

ON EXCEPTIONS.

This was an appeal from the decision of the county commissioners of Aroostook county, laying out a way in Township Letter B, Range 2, in said county. And also from their decision apportioning the expenses of laying out said way.

The appellants claimed that under the stat. 1879, c. 107, which amends section 35 of chapter 18 of R. S., and repeals section 36, not only the question of the necessity and convenience of the way was for the consideration and determination of the committee, but that the question of the apportionment of the expenses of laying out, making and opening said way and attendant expenses was also to be submitted to their consideration and determination.

This was claimed as a matter of law. The presiding justice ruled that the amendment of the statute, made in 1879, did not change the statute which was then in existence, by which the assessment of making, opening and attendant expenses was to be apportioned by the court, and accordingly proceeded with the hearing, and confirmed the apportionment of expenses made by the county commissioners.

To the above ruling the appellants excepted.

Madigan and Donworth, for the appellants.

This assessment was made by virtue of the provisions R. S., c. 6, § 51. We respectfully submit that stat. 1879, c. 107, substantially repealed, or at least suspended the operation of that section.

By c. 107, upon taking an appeal to the Supreme Judicial Court "all further proceedings before the commissioners are to be stayed until a decision is made in the appellate court."

Does not this mean that the assessment shall be stayed? Any other construction would render the statutes absurd. If the assessment is to be made before the amount of the road to be built be finally ascertained and determined, it would be simply a farce. It would be to erect a superstructure first and a base afterwards. Such a construction is illogical. Laws are to be construed reasonably. *Lex semper intendit quo convenit rationi.*

We submit that c. 107 should be so construed as to avoid circuity of action to prevent useless litigation, to avoid the invocation of two tribunals, where one from the very nature of things must be better informed, and save litigating substantially the same cause twice.

WALTON, J. The question presented by the exceptions is whether the act of 1879, c. 107, changed the then existing law, so as to require the committee therein provided for, to make the assessment necessary for opening a road in an unincorporated township, instead of the county commissioners. We think it did not. The committee provided for by the act of 1879, is to view the route, hear the parties, and report whether the "judgment" of the county commissioners shall be in whole or in part affirmed or reversed. We think the "judgment" here referred to is the judgment of the county commissioners in determining whether or not the way shall be located, altered or discontinued, as prayed for in the petition to them, and not to their judgment in making the assessment necessary to open and build the road in case one is located. The act of 1879 substitutes a committee for a judge of the Supreme Court; and, in case of doubt, it is easy to see what the duties of the committee are by noticing what the duties of the judge previously were. He was to "allow, or disallow, the location, alteration or discontinuance, in whole or in part." By the act of 1879 the judgment of a committee is substituted for that of the judge. We do not think it was the intention of the legislature to change the then existing law declaring how the tax required to build a legally located way should be assessed. We think the assessment now, as before the passage of the act of 1879, is to be made under the provisions of c. 6, § 51, of the revised statutes. The presiding judge so ruled at *nisi prius*, and we think the ruling was correct.

Exceptions overruled.

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

WILLIAM SMYTH AND WIFE *vs.* CITY OF BANGOR.

Penobscot. Opinion May 24, 1881.

Ways — when defective — notice of. Stat. 1877, c. 206. Evidence.

Mere slipperiness of a highway, or sidewalk, caused by either ice or snow, is not a defect for which towns and cities are liable.

The twenty-four hours actual notice to some one of the municipal officers, or highway surveyors, or road commissioners, required by stat. 1877, c. 206, must be a notice of the identical defect which caused the injury. Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient.

Notice of a defect in a way cannot be proved by the admission of a town or city officer; though the declarations of such an officer, which accompanies his official acts, and tend to explain them, are admissible.

ON EXCEPTIONS AND MOTION TO SET ASIDE THE VERDICT.

An action to recover for personal injuries received by Mrs. Smyth, by a fall, in the evening of December 9, 1878, alleged to have been caused by a defective way which the city was by law obliged to keep in repair. 72 249 94 269

Writ dated February 7, 1879. Plea, general issue. Verdict, $3800.

The facts material to the questions considered by the court are stated in the opinion.

J. Varney, for the plaintiffs. Upon the questions discussed in the opinion: The plaintiffs never contended that anything less than actual notice of the defect was sufficient. Their position is that the walk had been visibly, notoriously, and scandalously bad; that it was located where the street commissioner passed several times every day, and must have seen it, and his statements in the conversation with Mr. Smyth, as testified to by Mr. Smyth, had a direct tendency to show actual notice. It was admitted for that purpose and was admissible for that purpose.

It was a defect caused by the negligence of the city. The culvert designed to carry the water across under the surface of the walk had been stopped up, and no effort was made by the city to prevent its flowing over and upon the walk where it froze

and became dangerous. *Stanton* v. *Springfield*, 12 Allen, 569; 104 Mass. 83.

J. F. Rawson, also for plaintiffs.

T. W. Vose, city solicitor, for the defendants, cited: *Tripp* v. *Lyman*, 37 Maine, 252; *Stone* v. *Hubbardston*, 100 Mass. 56; stat. 1877, c. 206; *Porter* v. *Sevey*, 43 Maine, 529; *Curtis* v. *Mundy*, 3 Met. 405; *Perkins* v. *Fayette*, 68 Maine, 152.

WALTON, J. This is an action to recover damages for an injury claimed to have been received through a defect in one of the sidewalks in the city of Bangor. The plaintiff (Mrs. Smyth) says that on the evening of the ninth of December, 1878, as she was walking upon the sidewalk in Court street, she slipped and fell, and was thereby injured. For this injury she has recovered a verdict against the city of thirty-eight hundred dollars. The question is whether, upon the evidence reported, the verdict can be sustained. We think it cannot. The evidence fails to disclose any other defect than slipperiness. Water which had oozed out of the adjoining bank, and the flow of which may have been increased by the drainage from a privy and a sink-spout, had run across the sidewalk and frozen, forming a spot of ice some six or eight feet long and the width of the sidewalk; and the witnesses estimate its thickness from one to three inches. It was in no respect an obstacle to travel except that it made the sidewalk at that place slippery. And we regard it as now well settled that mere slipperiness, caused by either ice or snow, is not a defect for which a town or city is liable.

In this cold climate, where ice and snow cover the whole face of the earth for a considerable portion of the year, such an inconvenience ought not, and rightfully can not, be regarded as a defect. No amount of diligence can keep our streets and sidewalks at all times free from ice and snow; and the latter, when trodden smooth and hard, is nearly, and sometimes quite, as slippery as ice; and travelers will often slip and fall when no one is to blame. To hold towns and cities responsible for such accidents would practically make insurance companies of them. A

block of ice may constitute a defect the same as a block of wood or stone. So a ridge or hummock of ice, or snow, may constitute a defect the same as a pile of lime, or sand, or mortar, upon the sidewalk would. But we regard it as now well settled that mere slipperiness of the surface of a highway or sidewalk, caused by either ice or snow, is not a defect for which towns and cities are liable. *Gilbert and wife* v. *City of Roxbury*, 100 Mass. 185, although a much stronger case for the plaintiffs, was very similar to the one now under consideration; and yet the presiding judge directed a verdict for the defendants, and the law court sustained the direction. In that case, as in this, the sidewalk was constructed of earth, and was some three or four inches lower upon one side than the curbstone upon the other, and the ice had formed a ridge in the middle of the walk from three to five inches higher than at the edge, and sloping off towards the edge; and yet, being satisfied that there was nothing which caused the female plaintiff to fall but the slipperiness of the ice, the court held that the direction to the jury to return a verdict for the defendants was correct. In this case, we are satisfied that the fall of the female plaintiff was caused by nothing but the slippery condition of the sidewalk on which she was traveling. True, the sidewalk was a little higher upon the outside than upon the inside, but not more so than sidewalks are often purposely constructed in order to turn the water, and, in fact, must be, when they are constructed wholly of earth, and there is a gutter between the sidewalk and the street. The spot of ice on which the plaintiff slipped was nearly smooth, and almost as level as the sidewalk itself. There is no pretense that it formed a ridge or hummock upon the sidewalk. Some of the plaintiffs' witnesses say that as the water run across the walk and froze it formed little ridges or waves; that the surface of the ice was a little wavy; but no one pretends that it had assumed a form or shape that would have been dangerous to travelers if it had not been slippery. The evidence leaves no doubt in our minds that it was the slippery condition of the sidewalk alone that caused the plaintiffs' injury; and for an injury thus caused, we hold the defendants are not liable.

And we think the verdict is clearly against the weight of evidence upon another point.

Since the passage of the act of 1877, c. 206, no recovery can be had against a town or city for an injury received through a defect in one of its highways, unless some one of its municipal officers, or highway surveyors, or road commissioners, had twenty four hours actual notice of the defect. And the notice must be of the defect itself, of the identical defect which caused the injury. Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient. The notice must be of the identical defect which caused the injury. "It is not enough," said Mr. Justice GRAY, in *Ryerson* v. *Abington*, 102 Mass. 526–532, "that another defect in the highway, which was the cause of the defect which immediately caused the injury sued for, had existed for more than twenty four hours, or been known to the town." And in *Billings* v. *Worcester*, 102 Mass. 329, the court held that "notice to a town or city, of a cause outside of the way, which may produce a defect in the way, is no notice of the defect itself, if produced." We therefore repeat that the notice required by the statute is notice of the defect which caused the injury; that notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient.

Nor can notice of the defect be proved by the admissions of a town or city officer. It was at one time held in England that the declarations of a taxable inhabitant of a municipal corporation, such inhabitant not being a competent witness on account of interest, were admissible in evidence against such municipality. But such has never been held to be the law in this State. It was expressly repudiated in *Corinna* v. *Exeter*, 13 Maine, 321. It was there held that the interests of towns would be seriously jeopardized if they were liable to be affected by the mere declarations of their inhabitants; that the purposes of justice do not require the admission of such evidence, since the inhabitants of towns are now made competent witnesses by statute, notwithstanding their towns may be interested in the result of the suit. The declarations of town officers which accompany their official acts, and tend to explain them, are admissible; but their narrations of past transactions, or their statements in relation to pre-existing facts, are not admissible. Such, we think, is now the

universally recognized rule in this country. It certainly is in this State.

In the case now under consideration, the report shows, and the plaintiffs' counsel admit that, to prove notice of the alleged defect, evidence was introduced of a conversation between Wingate, the street commissioner, and Smyth, the husband of the woman that was injured. Smyth testified that several days after the accident to his wife, he had a conversation with Wingate, in which the latter stated "that the water run across the sidewalk from the bank, and all the water used in the house run across the sidewalk, and made ice, and it had been a bad place for several years." Wingate denies that he made this statement. It is not necessary, however, to determine which is the more credible witness; for, if Wingate made the statement, precisely as testified to by Smyth, it was not competent evidence to prove notice of the defect. Wingate being a witness in the case, his declarations could be used to contradict him, and thus impair his credibility; but they could not be used to prove the existence of the facts stated by him. And yet, without these declarations, there is no evidence whatever to prove notice to Wingate, unless it be the fact that he had occasion to pass often in the vicinity of the place where the spot of ice was formed, and therefore had an opportunity to see it, if his attention had been called to it. But there is no evidence that he did see it. On the contrary, he swears directly and positively that he did not see it, and had no knowledge of its existence till after the accident to Mrs. Smyth had happened. And, surely, a spot of ice, in this climate, in December, is not so uncommon, that one may not pass it without noticing it. True, it is a circumstance, which, in connection with other facts, may have some tendency to prove notice. But, standing alone, its probative force is too weak to sustain the burden of proof, and justify a finding of actual notice, when met by the direct and positive denial of the person to whom notice is attempted to be proved. Very likely the jury would have so considered it, but for the fact that it was coupled with the alleged declarations of Wingate, which, as we have already seen, could not properly be used to prove notice. We assume that they were so used, because the

plaintiffs' counsel admit, in their argument before the law court, that they were relied upon for that purpose, and endeavor to justify the verdict of the jury upon the ground that they were properly so used.

We think the verdict is clearly wrong upon two points; first, in finding that the way was defective; and, secondly, in finding that the street commissioner, Wingate, had twenty-four hours actual notice of its condition before the accident occurred.

Motion sustained. New trial granted.

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

INHABITANTS OF MADISON, petitioners, *vs.* ROBERT D. GRAY.

Somerset. Opinion May 25, 1881.

Bastardy Process. Petition by the town for execution to issue and bond to be given.

In March, 1874, the respondent in a bastardy process was adjudged to be the father of the child and ordered to pay the mother seventy-five cents a week for its support. In September, 1878, the town where such child had a legal settlement applied to the court, praying that an execution might issue for the amount due under the order. *Held*, that an execution cannot issue in such a case.

A petition by the inhabitants of a town in which an illegitimate child has a legal settlement, that the adjudged father be required to give a bond to the mother and to the town, and averring that no such bonds were given at the time of the rendition of the judgment, is addressed to the discretion of the court, and exceptions do not lie to a denial of the petition.

EXCEPTIONS.

The opinion states the case.

Walton and Walton, for the plaintiffs.

An execution should issue. This petition is presented by the town instead of the mother as it is not a formal proceeding, but in the nature of that in *French* v. *French*, 4 Mass. 587, note; *Slade* v. *Slade*, 106 Mass. 499.

Upon like orders and decrees in divorce matters, executions properly issue. Same cases; and *Orrok* v. *Orrok*, 1 Mass. 341.

Or, an action of debt may be maintained. *Howard* v. *Howard*, 15 Mass. 196; *Prescott* v. *Prescott*, 62 Maine, 429.

The remedy by commitment provided by statute is for not giving bond. *Woodcock* v. *Walker*, 14 Mass. 386; *McLaughlin* v. *Whitten*, 32 Maine, 22; R. S., c. 97 § 7; compare R. S., c. 60, § 6; *Russell* v. *Russell*, 69 Maine, 339.

Does not the decree "till the further order of the court" amount to the same as though the matter had been kept along on the docket, that is, as completely in the hands of the court, so that execution could issue and bonds be required at any time after notice and hearing. *Mariner* v. *Dyer*, 2 Maine, 165; *Dwelly* v. *Dwelly*, 46 Maine, 377.

A. H. Ware, for the defendant, cited: *Calais* v. *Bradford*, 51 Maine, 414: Howe's Practice, 72; *Woodcock* v. *Walker*, 14 Mass. 386; 116 Mass. 360; *McLaughlin* v. *Whitten*, 32 Maine, 21; *Wallsworth* v. *Mead*, 9 Johns. 367; *Sweet* v. *Clinton*, 3 Johns. 26; R. S., c. 97, § 10; *Young* v. *Makepeace*, 103 Mass. 57; *Taylor* v. *Hughes*, 3 Greenl. 433; *Corson* v. *Tuttle*, 19 Maine, 409.

WALTON, J. At a term of the Supreme Judicial Court held at Skowhegan, in March, 1874, the respondent, Robert D. Gray, was adjudged the father of an illegitimate child, and ordered to pay the mother seventy-five cents a week for its future support. In September, 1878 (more than four years after rendition of the judgment), the town of Madison applied to the court praying that an execution might issue for the amount due under the order; and also praying that the respondent be required to give a bond to the complainant, and also to the town of Madison, to secure the performance of the order in the future, averring that no such bonds were given at the time of the rendition of the judgment. At the hearing at *nisi prius* the presiding judge denied the prayer of the petitioners; and, to this denial, the petitioners filed exceptions; and the question now before the law court is whether the exceptions shall be sustained or overruled. We think the exceptions must be overruled. An execution cannot issue in such a case. The court cannot know without proof that there is any

thing due under the order. The remedy provided by the bastardy act is an action of debt. If judgment is recovered in such actions then an execution may issue for the amount found to be due, and not before. The ruling upon this branch of the case was therefore correct. And upon the other branch of the case no error is apparent. The exceptions state no more than that the prayer of the petitioners was denied. Upon what ground the denial was based is not stated. It is clear, therefore, that the exception to this ruling cannot be sustained unless the town of Madison had a legal right, under all circumstances, not inconsistent with those stated in the record, to have the order prayed for made. We think they had no such right. Many good and sufficient reasons, not inconsistent with the record, may have existed and operated upon the mind of the judge to induce him to refuse to make the order prayed for. The petition was at most but an application to the discretionary power of the court, and to the exercise of such a power exceptions do not lie.

Exceptions overruled.

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

INHABITANTS OF DETROIT *vs.* INHABITANTS OF PALMYRA.

Somerset. Opinion May 25, 1881.

Pauper, settlement of.

A person of age having his home in a town five successive years without receiving directly or indirectly supplies as a pauper thereby acquires a settlement; but if within the five years, the person took all which he regarded as important to his home and left the place without any intention to return, such an absence would constitute an interruption of his residence, although he might return a short time afterwards.

ON EXCEPTIONS.

The case is stated in the opinion.

Don A. H. Powers and *S. S. Hackett*, for the plaintiffs.

A "home," under the statute relating to pauper settlement, is acquired in same manner as a "domicile." Robertson Ecc. R. 75; *Roosevelt* v. *Kellogg*, 20 Johns. 208; *Harvard College* v.

Gore, 5 Pick. 370; *Richmond* v. *Vassalborough*, 5 Maine, 396; *Stockton* v. *Staples*, 66 Maine, 197; *Greene* v. *Windham*, 13 Maine, 225; *Wilton* v. *Falmouth*, 15 Maine, 479; *Wayne* v. *Greene*, 21 Maine, 357; *Brewer* v. *Eddington*, 42 Maine, 541.

The domicile of a party in any particular locality is acquired by a union of presence and intention. *Stockton* v. *Staples*, *supra*.

Two of the authorities above cited, and the following are believed to be in direct opposition to the instructions: *Thomaston* v. *St. George*, 17 Maine, 117; *Pittsfield* v. *Detroit*, 53 Maine, 442; see also *Brewer* v. *Linnaeus*, 36 Maine, 428; *Warren* v. *Thomaston*, 43 Maine, 406; *Hampden* v. *Levant*, 59 Maine, 557.

It is not the want of an intention but the existence of a conflicting intention which changes the domicile, and interrupts the five years continuous residence.

Counsel further elaborately argued the case.

D. D. Stewart, for the defendants, cited: *Bowdoinham* v. *Phippsburg*, 63 Maine, 501; *Monson* v. *Fairfield*, 55 Maine, 119; *Eames* v. *Gray*, 61 Maine, 405; *Warren* v. *Thomaston*, 43 Maine, 418; *North Yarmouth* v. *West Gardiner*, 58 Maine, 207; *Ripley* v. *Hebron*, 60 Maine, 394–5.

WALTON, J. This is a pauper suit, and one of the questions raised at the trial was whether the pauper had been absent from the town of Palmyra under such circumstances as would constitute an interruption of his residence there. The presiding judge instructed the jury that if the pauper took all which he regarded as important to his home, and left the place, without any intention to return, although he might return a short time afterwards, such an absence would constitute an interruption of his residence. The plaintiffs complain that this instruction was not correct; that leaving without any intention to return is not the equivalent of an intention not to return; because the former may be true when there is a total absence of intention one way or the other, while the latter cannot be true without the presence of such intention.

That the two expressions do not mean precisely the same thing is undoubtedly true. But supposing this distinction to exist, the question is, which of the two expressions states the rule of law correctly.

A person of age, having his home in a town five successive years, without receiving directly or indirectly supplies as a pauper, thereby acquires a settlement therein. But the home must be continuous. If within the five years the person is absent from the town without an intention of returning to it, the continuity of his home is broken, and the settlement is not acquired. It is not necessary that his departure should be with a fixed purpose not to return. It is enough if he departs without an intention to return. To continue a home while absent from it, there must be at all times an intention to return to it. The intention may be latent. It need not be at all times present in the mind. But it must exist. As often as the intention is the subject of thought, the *animo revertendi* must be found to exist, or the home is lost. This is the precise question which was raised and decided in *North Yarmouth* v. *West Gardiner*, 58 Maine, 207.

In the trial of that case the judge instructed the jury that if the pauper left "without any intention as to whether he would or would not return, his absence would not constitute an interruption of his residence," and this instruction was held to be erroneous. It was decided "that when a person leaves his place of residence with every thing he has, without any intention as to returning, he has, under the pauper laws abandoned that whether he has established another or not." This decision was affirmed in *Ripley* v. *Hebron*, 60 Maine, 397. We think the question must be regarded as *res judicata*, and that a further discussion of it would not be profitable.

Exceptions overruled.
Judgment on the verdict.

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

FRANCIS E. HEATH and another,

vs.

DAVID L. HUNTER and another.

Kennebec. Opinion May 25, 1881.

Bond. Judgment on writ of error.

An action upon a bond, given upon suing out of a writ of error, will be considered prematurely commenced if there has been no adjudication of the court as to whether the costs upon the writ of error, shall be double or single, and whether the former judgment shall or not be affirmed, and, if affirmed, what the damages for the delay shall be.

ON REPORT from superior court, Kennebec. The law court to render such judgment as the law and the facts require.

The opinion states the case.

E. F. Webb, for the plaintiffs.

The legal effect of the entry of "exceptions overruled" which had been taken by the defendants in error, was to render judgment against the defendants in error and affirm the former judgment. *Pierce* v. *Goodrich*, 47 Maine, 173; *Cooly* v. *Patterson*, 52 Maine, 472; *Hoeffner* v. *Stratton*, 57 Maine, 360.

Hunter did not prosecute his suit "with effect." On the contrary his suit was dismissed and his exceptions to that ruling were overruled.

The judgment on writ of error must be either to affirm, recall or reverse the former judgment. If it was not recalled or reversed it was of course affirmed.

The motion to dismiss the writ of error raised all the legal points and went to the merits of the whole case. *Payne* v. *Niles*, 20 How. 219; *Bank* v. *Smith*, 11 Wheat. 171; *Suydam* v. *Williamson*, 20 How. 433; Howe's Practice, 465; *Rochester* v. *Roberts*, 25 N. H. 495; *Peebles* v. *Rand*, 43 N. H. 341; R. S., c. 102, § 8.

Orville D. Baker, for the defendants, cited: *Gardiner* v. *Nutting*, 5 Maine, 140; *Moore* v. *Philbrick*, 32 Maine, 102;

Johnson v. *Shed*, 21 Pick. 225; *Lyon* v. *Williamson*, 27 Maine, 149; *Warren* v. *Coombs*, 44 Maine, 88; *Baker* v. *Johnson*, 41 Maine, 18; Freeman on Judgments, § 7; *Underhill* v. *Devereaux*, 2 Saund. 72; *Warlich* v. *Massey*, Cro. Jac. 67; *Covenheven* v. *Leamen*, 2 Caines Cas. 322; *Owen* v. *Daniels*, 21 Maine, 182; 5 Bac. Abr. *140; 6 Com. Dig. 226; *Coolidge* v. *Inglee*, 15 Mass. 66; Steph. Pl. 83, 85, 134; 1 Chitty Pl. 475, 481; *Cunningham* v. *Houston*, 1 Strange, 127; *Dent* v. *Lingard*, *Id.* 683; *Ginger* v. *Cowper*, 2 L'd Ray. 1403; *Bond* v. *McNider*, 3 Ired. 440; *Bailey* v. *Baxter*, 1 Mass. 156; *Jarvis* v. *Blanchard*, 6 Mass. 5.

WALTON, J. This case is before the law court on facts reported by the presiding judge at *nisi prius*. The court is to render such judgment as the law and the facts authorize.

We think judgment must be rendered for the defendants. The action is upon a bond given upon suing out a writ of error. The condition is as follows: "Now if the said Hunter shall prosecute his said suit with effect, and satisfy the judgment rendered therein, then this obligation to be void, otherwise to remain in full force." It appears from the docket entries and the certificate of the clerk that, although the defendants in error prevailed in the suit, and were entitled to a judgment for costs (double or single, as the court should determine), and, perhaps, to an affirmance of the judgment sought to be reversed, with not less than six nor more than twelve per cent a year, on the amount of their former judgment, as damages for their delay (R. S., c. 102, § 4), still, they have never taxed their cost, have never had the question whether they should recover double or single costs settled, have never obtained from the court an order affirming their former judgment, and have never had any determination or hearing as to the amount of the damages they shall recover for delay. Under these circumstances we think the action must be regarded as prematurely commenced. The case shows that the principal in the bond prosecuted his suit vigorously, persistently, and "with effect." True, the "effect" was not such as he desired; but it was such as the law regards as a performance of that condition in his bond; and we think that neither he nor his surety

can be regarded as in fault for not satisfying a judgment that has not been rendered, and the amount of which has not yet been ascertained, and cannot be ascertained till an adjudication of the court is had as to whether the costs shall be double or single, and whether the former judgment shall or shall not be affirmed, and, if affirmed, what the damages for the delay shall be. *Hobart* v. *Hilliard*, 11 Pick. 143; *Coolidge* v. *Inglee*, 15 Mass. 66; *Owen* v. *Daniels*, 21 Maine, 180.

Judgment for defendants.

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

SAMUEL F. GIBSON *vs.* NATHAN W. ETHRIDGE and others.

Oxford. Opinion May 25, 1881.

Poor debtor's bond.

When it is obvious that there could have been no such judgment, nor any such execution, as is alleged in a poor debtor's bond, and nothing appears in the bond to show at what term of the court the judgment intended to be recited was obtained, the bond is void.

When such a bond by its terms negatives a legal arrest, it must have been given to procure a discharge from an illegal arrest. It is, then, a bond given under duress, and the defendants may well avoid it.

ON AGREED statement of facts.

The material facts appear in the opinion.

S. F. Gibson, for the plaintiff.

David Hammond, for the defendants.

APPLETON, C. J. This is an action on a poor debtor's bond, given by Porter K. Ethridge and others, dated June 15, 1878, and approved by the plaintiff.

The bond is in the usual form, and sets forth in the condition, that said Ethridge "now is arrested . . by virtue of an execution issued against him on a judgment obtained against him by the said Samuel F. Gibson, by the consideration of our justice of

our Supreme Judicial Court, at a term of said court, which was begun and holden at Paris, within and for the county of Oxford, on the third Tuesday of September, A. D. 1878, for the sum of forty-three dollars and forty-three cents damage, and costs of suit taxed at fourteen dollars and two cents," &c. As the bond bears date three months before the term of the court at which the judgment is said to have been rendered, it is obvious there could have been no such judgment, nor any such execution as is alleged to have been issued on such judgment. Nothing in the bond discloses, nor is there anything from which an inference could be drawn as to the term of the court at which the judgment intended to be recited, and on which was issued the execution by virtue of which the judgment debtor was arrested, was obtained. The bond recites, then, an arrest upon an execution issued on an impossible judgment.

As there was no such judgment, there could have been no such execution issued thereon. As there was no such execution, there could have been no legal arrest on such non-existent execution. As the bond negatives a legal arrest by its very terms, it must have been given to procure a discharge from an illegal arrest. It was a bond given under duress, and therefore the defendants may well avoid it. *Whitefield* v. *Longfellow*, 13 Maine, 146; *Sargent* v. *Roberts*, 52 Maine, 590.

Nor is this result to be regretted, as it is apparent from the debtor's disclosure that he was utterly and hopelessly insolvent, and ever would be.

Judgment for defendants.

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

JACOB F. EAMES *vs.* WILLIAM F. BLACK and another.

Waldo. Opinion May 25, 1881.

Costs. R. S., c. 82, § 117.

When successive suits are brought for successive trespasses on real estate, each suit commenced before the next succeeding trespass, the plaintiff is entitled to recover costs in each suit upon default or verdict.

The R. S., c. 82, § 117, has no reference to such a state of facts.

ON REPORT of the judge.

(Report.)

"Upon a hearing claimed by defendants in damages and costs, the presiding judge is of opinion that the certificate referred to in R. S., c. 82, § 117, if necessary in order to enable the plaintiff to tax costs in all the actions, should issue, unless the full court is of a different opinion upon the following state of facts:

"At the October term, 1879, in this county, the plaintiff recovered judgment against defendant in an action of trespass, *q. c.* and a writ of entry tried together in which it was established, that a certain heavy stone wall built by defendant, was on pasture land of the plaintiff for a distance of thirty-nine rods.

"The line between the parties was the subject of a special finding by the jury, and plaintiff requested defendant to remove his wall; defendant did not do this, but after suits were brought, as hereafter mentioned, made verbal offers to pay a fair and adequate price for plaintiff's land, and allow the plaintiff the benefit of the wall as a line fence, which plaintiff declined, unless defendant would pay a price far exceeding the value of the land, to cover expenses of the previous litigation. For the October term, 1880, plaintiff commenced suits for the trespass, *q. c.* in continuing the wall after request to remove, as follows:

"July 12, 1880, served July 20; September 16, served September 25; September 27, served October 1; October 4, served October 5, to which suits, defendant appeared generally at October term, and was defaulted the first day of this term.

"For January term, 1881, plaintiff commenced six similar suits between the sixth and twenty-seventh of November, in which the

defendant offered default, and was defaulted on the first day, January term, claiming a hearing in damages and costs. Damages assessed by court at one dollar in first action, and one cent in each of the others.

"The wall has not been removed, and defendant has commenced a petition for review of the original suits.

"Considering it desirable that the questions as to the necessity of such a certificate, and the propriety of its issuing under the foregoing circumstances, should be determined by the full court, I report them for that purpose.

"Defendant to carry this case forward, and the other cases to stand continued for judgment without costs to either party except for clerk's fees until this is determined, and to abide the result of this."

Harriman and Harriman, for the plaintiff, cited: *C. & O. Canal* v. *Hitchings*, 65 Maine, 142; *Russell* v. *Brown*, 63 Maine, 204; *Williams* v. *Veazie*, 8 Maine, 106; *Simpson* v. *Seavey*, *Id.* 138; *Wendall* v. *Greaton*, 63 Maine, 267.

Philo Hersey, for the defendants, contended that all these actions, at least all those which were returnable at the same term of court, might have been joined in one, and there are no facts showing any good cause for bringing them separately, upon which the court could base a certificate, and therefore there can be costs in but one action each term. R. S., c. 82, § 117.

Otherwise there is no end or limit upon the number of actions which a party may bring in such a case, though not the slightest damage is suffered.

And in this particular case defendants submitted whether or not the single bill of costs should not be for but one-quarter. R. S., c. 82, § 107, and c. 83, § 3; 1 N. H. 14; 6 N. H. 57; 57 N. H. 220.

APPLETON, C. J. The defendants committed a trespass upon the land of the plaintiff, by building a heavy stone wall on the same, for the distance of thirty-nine rods, as was determined by the jury in an action of trespass, on which judgment has been rendered. The wall remaining, the plaintiff brought an action of trespass for the continuance of the nuisance. It still remain-

ing, he brought successive actions until they amounted in all to ten. Upon these actions, defaults were entered, and judgment rendered for nominal damages.

The plaintiff is entitled to costs in each, unless this is a case where a certificate under R. S., c. 82, § 117, should have been given. The section is as follows: "When a plaintiff brings divers actions at the same term of a court, against the same party, *which might have been joined in one*, or brings more than one suit on a joint and several contract, he shall recover costs in only one of them, unless the court certifies that there was good cause for commencing them."

This section has no relation to the case at bar. The successive actions could not have been joined. They are not for the same cause. When the first suit was brought, the cause of action, which is the basis of the second, did not exist, and so in all the successive suits, which are for successive and different acts of wrong doing on the part of the defendants. "It is now perfectly well settled," observes WALTON, J. in *C. & O. Canal* v. *Hitchings*, 65 Maine, 140, "that one who creates a nuisance upon another's land is under a legal obligation to remove it. And successive actions may be maintained until he is compelled to do so."

A default admits there is a good cause for commencing an action.

Judgment for plaintiff for costs in each action.

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

In re JEROME B. FICKETT.

Cumberland. Opinion May 25, 1881.

Promissory note. Security to indorser or surety. Insolvent law. Stat. 1878, c. 74, § 24.

When security is given by the principal on a note to the indorser or surety to indemnify him, such security enures to the benefit of the creditor.

By stat. 1878, c. 74, § 24, a creditor holding security against an insolvent debtor is to be considered a creditor only for the amount of his debt above the value of his security, to be determined in accordance with the provisions of such section.

ON EXCEPTIONS.

The opinion states the case.

Nathan Cleaves, assignee of the insolvent estate, cited: Stat. 1878, c. 74, § 24; *Jaycox* v. *Green*, 8 N. B. R. 241; *Struper* v. *McKee*, 17 N. B. R. 419.

Walker and Cram, for the National Mahaive Bank, appellants.

The bank holds for the payment of the note discounted the name of Briggs, the name of Fickett and the mortgage, Briggs to Fickett. It can proceed against either. If Fickett pays it he is substituted to the rights of the bank in the mortgage. If his estate pays part of it by way of dividend, his assignee has claim against Briggs for same. So the value of the mortgage is not to be deducted from the claim of the bank. It is not Fickett's mortgage. It is the note and mortgage of Briggs, not the insolvent.

In this matter the court has no jurisdiction over Brigg's debt, and his mortgage to secure it. See § 21 of the Insolvent Law; *In re Cram*, 1 N. B. R. 504.

APPLETON, C. J. On October 14, 1879, John R. Briggs and Jerome B. Fickett made their promissory note for ten thousand dollars, payable to their own order at the National Mahaive Bank, on demand, to be negotiated for the benefit of said Briggs. At the same time Briggs made his note for a similar amount on the same

terms as to rate of interest and time of payment payable to said Fickett or order, and secured by a mortgage, "this mortgage and note being intended and given to indemnify said Fickett from all loss by reason of having signed for the accommodation and benefit of said Briggs" the first mentioned note, with "the right to sell and dispose of," the mortgaged premises at any time after one month's continuance of any breach of the conditions of the mortgage.

The note of Briggs and Fickett was indorsed by them; the note of Briggs was indorsed and the mortgage assigned to the bank by Fickett and the money procured by Briggs from the bank as part of one and the same transaction.

The note of Briggs and Fickett is not paid. Fickett is in insolvency. A hearing was had before the judge of insolvency. An appeal was taken from his decree to the Supreme Judicial Court and upon a hearing on the facts stated, the presiding justice ruled "that said note of Briggs and its mortgage is security for the note of Briggs and Fickett, but *only* for the amount of the loss to said Fickett in the premises; viz, a sum equal to the dividend which said insolvent is compelled to pay on said note of Briggs and Fickett.. That said bank is a creditor of said estate only for the balance of said note of Briggs and Fickett above said security."

1. The mortgage by Briggs to Fickett conditioned to pay his note for $10,000 and to indemnify him for having signed a note for the same amount as surety, created a trust and equitable lien for the holder of the note thereby to be secured. Fickett took the mortgaged property subject to such trust. An equitable lien was thereby created for the security and payment of the specified note. The mortgage was given for the indemnity of Fickett, but it enures to the benefit of the creditor, the bank, to which he is security. He is not merely mortgagee for his own protection, but he is trustee for the bank, and the bank can in equity compel him to apply the property mortgaged to the payment of the debt for which it is held. A holder of a note is entitled to the benefit of a collateral security given by the maker to the indorser for his indemnity. *Phillips* v. *Thompson*, 2 Johns. Ch. 418. Nor

does it matter that the mortgage is given for indemnity, "for," observes CHAPMAN, J. in *New Bedford institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175, "it is well settled by the authorities that the creditor has an equitable claim to the security as well when the mortgage is given for mere indemnity as when the condition is added that the principal shall pay the debt." In *Aldrich* v. *Martin*, 4 R. I. 520, the security was given merely to indemnify the indorser, and yet the creditor was held to be entitled to it. It is only by payment there can be complete indemnity. *Eastman* v. *Foster*, 8 Met. 19; *Rice* v. *Drury*, 13 Gray, 47; *In re Holbrook*, 2 Lowell, 259. Here there has been no indemnity. The mortgage is in full force and has not been released.

Had the mortgage remained in the hands of Fickett, he would have been entitled to its protection. The bank, too, would have been entitled to the benefit of it, and in equity might reach this security to satisfy its debt. 1 Story, Eq. 502. Its rights in law or in equity are none the less because the note and mortgage of Briggs were assigned by Fickett when the loan was made and as a part of the transaction.

The conclusion is that the bank holds the note and mortgage of Briggs as security for the indebtedness of Briggs and Fickett arising from their joint note, with full authority to enforce the same. Such was the undoubted expectation and intention of all parties. Such is the equity of the case.

2. The case assumes that the Mahaive Bank has security. Exception is taken to the ruling that it is a creditor *only* for the amount due above the security. If by this he meant the full value of the security, the ruling is correct.

Reference is made by the counsel for the bank to the insolvent law of 1878, c. 74, § 21, which relates to the right of voting for an assignee. But the assignee has been chosen and no question arises as to the validity of his choice. This section has no relation to the mode or manner of proving claims.

The construction of the insolvent law is to be determined by its language, not by the words of any other statute. By § 24, "for the purpose . . . of proving claims against an estate of any insolvent under this act, a creditor, who holds security, shall

be considered a creditor *only* for the amount of his debt above the *value* of his security."

It is enough that a creditor has security. It is to be allowed in reduction of his claim. It matters not from whom or when the security is obtained. The language is general. It applies to all security, by whomsoever furnished. It is not limited to the property of the insolvent. The creditor is not to have a dividend on his whole debt and retain his security. He is to have only the amount due above the value of his security and no more.

It is undoubtedly true that the English rule, which has been followed here "is that the creditor must apply all the property of the *bankrupt* real and personal which he holds as security for his claim, in reduction of his demand and prove only the *balance* against his estate, but the security will not go in reduction of the claim, unless it is the property of the estate against which the proof is offered." *In re Cram*, 1 B. R. 132.

The decision in *In re Cram*, rests upon the peculiar language of the bankrupt law of the United States, which permits a creditor to prove the balance of his debt, only "when a creditor has mortgage or pledge of the real or personal property of the *bankrupt*." When the security is from a source other than the bankrupt the law is otherwise.

The language of the insolvent law of this State differs materially from that of the bankrupt law. The difference is significant. It was for a purpose. It is enough that the creditor has security, that he shall be considered a creditor only "for the amount of his debt above the value of his security." It is not required that the security by which the debt is reduced should be that of the insolvent. It is made specifically to apply to and to require the deduction of the value of any and all security held by the creditor from his debt. This is of the highest equity. The statute means equality among creditors, and in this way alone can it be had. The secured creditor is creditor only for his balance after deducting his security. *Lanckton* v. *Walcott*, 6 Met. 305.

3. The value of the security has not been found. The adjudication that the value of the security specified in the creditors' proof of claim and represented by the note of $10,000, is a sum

equal to the dividend which the insolvent estate is compelled to pay on the joint note of Briggs and Fickett, and that the bank is a creditor only for the amount above said security is an adjudication of no fixed or definite sum.

The claim of the creditor, the bank, is a fixed sum or one determinable on proof. The value of the security is a sum equally to be ascertained. The amount of the creditors' "debt above the value of his security" necessarily depends upon the prior ascertainment of those amounts.

But the value, as stated by the judge of insolvency, is utterly indefinite. It is no fixed sum. What the dividend may be can only be known upon the final settlement of the estate, and then it would be too late to prove it, or, if proved and the settlement reopened, it would necessitate the fixing a new dividend, for every additional claim allowed, must of necessity modify and diminish what would otherwise be the dividend, and so on indefinitely.

What should have been done was to fix the value of the security, *i. e.* the note and mortgage of Briggs to Fickett and by him transferred to the bank. That done, all that remains is to subtract that value in money from the debt of the bank, and the difference will be the amount of the creditors' debt above the value of his security.

Exceptions sustained.

72 270
h94 254

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

HIRAM STROUT *vs.* JOHN HARPER.

Oxford. Opinion May 26, 1881.

Deed. "Standing wood." Evidence.

A reservation of "all the standing wood upon a lot, together with the right to enter and remove the same at any time within three years," in a deed of conveyance of real estate will include trees suitable for timber as well as trees suitable for fuel, when there is nothing in any other part of the deed,

to indicate that the term "standing wood" is used in a more limited sense. And parol evidence is not admissible to show that the words were used in a more limited sense.

ON REPORT.

Trespass for cutting and removing from plaintiff's close thirty large hemlock trees.

The defendant claimed the trees under a reservation in the following deed from him to the plaintiff.

(Deed.)

"Know all men by these presents, that I, John Harper of Oxford, in the county of Oxford and State of Maine, in consideration of one thousand dollars, paid by Hiram Strout of Poland, in the county of Androscoggin and State of Maine, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said Hiram Strout, his heirs and assigns forever, a certain lot or parcel of land situated in Oxford, in the county of Oxford and State of Maine, meaning to convey the same piece of land with the buildings thereon, which I received of Polly Gammon, and all by deed of warranty, dated May 3, 1871, and recorded in Oxford registry of deeds, May 15, 1871, Book 161, p. 186, reserving all the standing wood upon the lot, together with the right to enter and remove the same at any time within three years from the date hereof, excepting the wood standing upon the so called home lot, and meaning all the wood on the west side of a line beginning at the end of the stone wall in the pasture, and running southerly in a straight line, to the west corner of land owned by Abner Thayer.

"To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Hiram Strout, his heirs and assigns to their use and behoof forever. And I do covenant with the said grantee, his heirs and assigns that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said grantee, to hold as aforesaid. And that I and my heirs shall and will warrant and defend the same to the said grantee, his heirs and assigns forever, against the lawful claims and demands of all persons.

"In witness whereof, I, the said grantor, and Mary C. Harper, wife of the said John Harper, in testimony of her relinquishment of her right of dower in the above-described premises, have hereunto set our hands and seals this twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN HARPER. [SEAL.]
MARY C. HARPER. [SEAL.]

Signed, sealed and delivered in presence of
GEORGE HAZEN, to J. H.

"State of Maine, Oxford, ss:—May 23, 1876. Personally appeared the above named John Harper, and acknowledged the above instrument to be his free act and deed. Before me,
GEORGE HAZEN, Justice of the Peace,
for Cumberland county.

"Oxford, ss:—Registry of Deeds. Received August 6, 1877, at 5 H. — M., P. M. and recorded in book 178, p. 251.
Attest, WM. K. GREENE, Register.

J. M. Libby, for the plaintiff, contended that the claim made by the defendant, is the proper subject of an exception and not of a reservation in a deed. But if it could be reserved, then counsel contended, that the word "wood" was the pivotal word and was used in its common and ordinary signification—to designate those sorts of the genus that are commonly used for fuel.

Words are to be taken in their popular and ordinary meaning and most strongly against the party using them. 2 Kent's Com. 756, 758.

Of two possible constructions or uses of the word "wood" that which is least favorable to the party using it, the defendant, should be adopted. The words "wood" and "timber" have well defined meanings in their use in this State and in their common and ordinary signification the one does not include the other. The distinction is every where kept up in the statutes. See chapters on State lands, waste, trespass, &c.

If the defendant's claim is correct he might cut down and destroy the plaintiff's orchard of fruit trees, the shrubbery and

flowers about the house, and even the house itself—all standing wood in the generic sense.

John J. Perry, for the defendant.

WALTON, J. A parcel of land was conveyed "reserving all the standing wood upon the lot, together with the right to enter and remove the same at any time within three years." The question is whether the reservation included trees suitable for timber, or was limited to such as were fit only for fuel. We think it included both kinds. The words used are "all the standing wood upon the lot." Not part of it; not such as is fit only for fuel; but all of it. We think such a reservation must be held to include trees suitable for timber as well as trees suitable only for fuel. True, the word "wood" is often used to designate fuel. But when so used it means fuel wholly, or, at least, partially, prepared for the fire. The term "standing wood" cannot be so used. It can apply only to trees. And when there is nothing in the context, or in any other part of the deed, to indicate that it is used in a more limited sense, we think it must be held to include all the trees—trees suitable for timber as well as those fit only for fire-wood. And parol evidence is not admissible to show that the words were used in a more limited sense.

Plaintiff nonsuit.

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

DANIEL BURNHAM *vs.* ANDREW P. YOUNG.

Franklin. Opinion May 27, 1881.

Liabilities of innholders. Stat. 1874, c. 174, § 2.

By the stat. 1874, c. 174, § 2, innholders are answerable to their guests, in case of loss by fire, only for ordinary and reasonable care in the custody of their baggage or other property.

An action cannot be maintained against an innkeeper for such a loss when there is no proof of want of such ordinary and reasonable care.

ON EXCEPTIONS.

This was an action of trespass on the case against an innkeeper for loss of plaintiff's baggage, and wearing apparel. Plea, gen-

eral issue of not guilty. It was admitted that defendant was an innkeeper at the time of the alleged loss.

Defendant's inn was destroyed by fire, together with plaintiff's baggage and wearing apparel, and the defendant claimed that he exercised ordinary and reasonable care in the custody of plaintiff's baggage and wearing apparel; and further claimed that plaintiff was a "boarder," and that he was not responsible to him, on that account in this action.

The particular ruling complained of is stated in the opinion.

Verdict was for defendant.

S. Clifford Belcher, for plaintiff.

It was admitted that the defendant was an innkeeper. I admit that there is a distinction between a boarding house and an inn. The latter is bound to grant such reasonable accommodations as occasion requires to strangers, travelers and others. R. S., c. 27, § 5.

If one stop at an inn, he is equally protected, whether a traveler or citizen of the town, a guest or a boarder; both sit at the same table, drink at the same fountain, occupy similar apartments, are attended by the same servants, and are equally bound to pay for their entertainment to the keeper of the *inn*.

Generally the distinction made in the decided cases, turns upon the point of whether or not the house is an inn.

The principle upon which the liability of an innkeeper rests, is stated in *Shaw* v. *Berry*, 31 Maine, 484.

B. Emery Pratt, for the defendant, cited: stat. 1874, c. 174; *Healey* v. *Gray*, 68 Maine, 490.

APPLETON, C. J. This is an action of the case against an innkeeper for the loss of baggage and wearing apparel belonging to the plaintiff. The loss was occasioned by fire, and there is nothing indicating that there was any want of "ordinary and reasonable care" on the part of the defendant.

By c. 174, § 2, of the acts of 1874, it is enacted that "in case of loss by fire, innholders shall be answerable to their guests only for ordinary and reasonable care in the custody of their baggage and their property." It is not even alleged, much less

proved, that here there was any want of such care, consequently the defendant is not liable.

This suit is against the defendant as an innholder. The plaintiff claiming to be a traveler seeks to hold him as such. The presiding justice, in his charge, very clearly and accurately stated the distinction between a traveler and a boarder. The sentence in the charge to which special exception is taken, is as follows: "If he was a boarder, under a special contract for board, and not a traveler at the time, then the law applicable to innholders does not apply." It is difficult to perceive any objection to this proposition in and of itself, or as modified by the rest of the charge. But whether erroneous or not, the plaintiff was not thereby harmed. The suit is by the traveler against the innkeeper. It is not by one as a boarder. But whether the plaintiff was a boarder or a traveler, he cannot recover against the defendant as an innholder, inasmuch as no want of ordinary or reasonable care has been shown or even alleged.

Exceptions overruled.

WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

GEORGE JEWETT NORTHROP in equity *vs.* CLARENCE HALE, administrator of the estate of ELIZABETH M. ROBINSON.
MARY ELIZA NORTHROP in equity *vs.* SAME.

Cumberland. Opinion June 1, 1881.

Savings bank deposit. Gift. Evidence aliunde the bank book.

R deposited a sum of money in a savings bank in the name of her nephew, N, with a memorandum that the deposit can be paid to R. She retained the deposit book in her possession and drew out the dividends and part of the principal during her lifetime. At her death, the deposit book was passed to the administrator. *Held*, in a suit in equity by N against the administrator of R, for the amount of the deposit at R's death, that evidence *aliunde* as to the intention of R in making the deposit, is admissible to vary the effect of the entries in the deposit book.

ON AGREED STATEMENT OF FACTS.

Two bills in equity to obtain from the defendant the amount of deposits made by his intestate in her lifetime in a savings bank.

The deposit books which were retained by her during her life, had the following headings:

In the first case: "No. 18999, Maine Savings Bank in account with George Jewett Northrop, *c. b. p.* Eliza M. Robinson."

It was agreed that the letters "*c. b. p.*" meant, "can be paid."

In the second case: "No. 20607, Dr. Portland Savings Bank in account with Mary Eliza Northrop, Cr." and over the name of Mary Eliza Northrop, was written, "Sub. to Mrs. E. M. Robinson."

It was agreed in each case, that if evidence *aliunde* as to the intention of Mrs. Robinson in making the deposit is admissible to vary the effect of the entries, the cases are to stand for trial upon the answers and proofs in the usual manner.

Drummond and Drummond, for the plaintiff, in each case, contended that the transaction showed the establishment of a trust in Mrs. Robinson, in favor of the plaintiffs, and their argument was directed to that point, and cited many authorities bearing upon it.

Clarence Hale, for the defendant, contended that there was no trust, citing many authorities to the point. And there being no explicit statement of a trust, any statement of Mrs. Robinson, or other evidence, *aliunde*, would be immaterial. In view of the fact that the muniments of title were retained by her, no words of hers spoken so many years ago ought to be received to affect the title to the property. No statements of an alleged donor can be allowed to supplement and help out a defective declaration of trust. *Young* v. *Young*, 21 Alb. Law. J. 395.

WALTON, J. Money is often deposited in savings banks in such a form, or under such circumstances, as to give rise to litigation to determine who is the owner of it. The following are samples of this class of cases: *Blasdel* v. *Locke*, 52 N. H. 238, where the donor deposited money in a savings bank in the name of her niece, keeping the bank book herself. *Howard* v. *Windham Bank*, 40 Vt. 597, where A deposited money belonging to himself to the credit of B, keeping the deposit book himself. *Gardner* v. *Merritt*, 32 Md. 78, where a deposit was made by a grandmother in the name of five minor grandchildren,

but subject to her order, or the order of her daughter. *Minor* v. *Rogers*, 40 Conn. 512, where the deposit was made in this form: "Mary Daniels, trustee of William A. Minor." *Ray* v. *Simmons*, 11 R. I. 266, where the deposit was in this form: "Dr. Fall River Savings Bank, in account with Levi Bosworth, trustee for Marianna Ray, Cr." *Hill* v. *Stevenson*, 63 Maine, 364, where the deposit was made in the name of the donor and the bank book was delivered to the husband of one of the intended donees. *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159, where a father made three deposits as trustee, one in trust for his only son, and the others in trust for two grandchildren, taking separate deposit books and keeping them in his own possession. In all of these cases the gifts were sustained; but, to enable the court to do so, resort was had to extraneous evidence, to ascertain the intent of the donors. And in the case last cited, the competency of such evidence was one of the questions submitted to the court, and the court held it was admissible.

The case now before us is one of the same class. Mrs. Robinson deposited money in the Maine Savings Bank to the credit of the plaintiff, keeping the deposit book herself, and having minuted upon it that the money could be paid to her. Mrs. Robinson is now dead, and the question is, who is entitled to this money, the plaintiff, in whose name it was deposited, or the administrator of Mrs. Robinson, by whom the deposit was made. The case is before the law court on an agreed statement of facts. One of the questions submitted is whether "evidence *aliunde* as to the intention of Mrs. Robinson in making the deposit is admissible to vary the effect of the entries." If it is, the case is to stand for trial; otherwise the court is to decide it upon the facts stated. We think the evidence is admissible. Such evidence was admitted in all the cases cited, and we have been referred to no case in which such evidence was rejected. In the case last cited (128 Mass. 159), it was one of the points expressly decided. Consequently, the entry must be,

Case to stand for trial.

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

JAMES WRIGHT *vs.* SETH WHEELER.

Somerset. Opinion June 2, 1881.

Promissory notes. Evidence.

In an action upon a promissory note brought by the indorsee for value, before maturity, where the defence was that the note was given for spiritous liquors to be sold in this State in violation of law; *Held*, that evidence that the payee was called Whiskey Smith, or Whiskey Bill Smith, was not admissible to establish such defence, or to show that the indorsee purchased the note with knowledge of its legal consideration.

ON EXCEPTIONS and motion to set aside the verdict.

Assumpsit on two promissory notes given by the defendant to William Smith, and indorsed to Frank B. Heselton for value, before maturity. The action was brought for the benefit of Heselton.

The plea was general issue, and a brief statement alleging that the notes declared upon were given for intoxicating liquors sold in violation of R. S., c. 27, or purchased out of the State, with the intention to sell them in violation of the statute, and that the plaintiff had knowledge of the illegal consideration.

At the trial the testimony of different witnesses was admitted, against the objections of the plaintiff, that William Smith was known and called as "Whiskey Smith," or "Whiskey Bill Smith."

The verdict was for the defendant.

James Wright, for the plaintiff, cited: R. S., c. 27, § 20; *Field* v. *Tibbetts*, 57 Maine, 358; *Baxter* v. *Ellis*, *Id.* 178; *Hapgood* v. *Needham*, 59 Maine, 443; *Swett* v. *Hooper*, 62 Maine, 54; *Dillingham* v. *Blood*, 66 Maine, 140; *Farrell* v. *Lovett*, 68 Maine, 326; *Kellogg* v. *Curtis*, 69 Maine, 212; *Hobart* v. *Penney*, 70 Maine, 248.

Folsom and Merrill, for the defendant, contended that the evidence objected to was admissible to show the vocation of the payee of the note. "Whiskey" Smith indicated the business of the payee of the note in suit, the same as "Lawyer" Wright and "Lawyer" Folsom indicates the business of the counsel in this

case; and the business of the payee of a note being shown, the consideration for the note is so easily and legitimately drawn from that fact, that the purchaser of the note must be held to have notice of it.

APPLETON, C. J. This is an action on a note of hand payable to William Smith or order, and by Smith indorsed before maturity and for value, to Frank B. Heselton, for whose benefit this suit is brought.

The defence was that the note was given for spirituous liquors to be sold in this State in violation of its laws, and that Heselton purchased it with knowledge of its illegal consideration.

To establish the defence evidence was introduced against the protestations of the plaintiff that William Smith, the payee of the note was called "Whiskey Smith," or "Whiskey Bill Smith."

It appeared that Smith was a merchant in Boston, who had liquors with other articles of merchandise for sale. The nickname given him had no tendency to show the consideration of this note, still less that Heselton, if paying value for it, was aware, at the time of its purchase, that it was given on an illegal consideration. The prefix to Smith's name indicated the drinking rather than the selling of liquor, and was not notice to Heselton of the consideration of the note.

The evidence was hearsay. It was not relevant to the issue. It was offered not to prove material facts but to excite prejudice. It should have been excluded.

Exceptions sustained. New trial granted.

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

HARRIET LINNELL *vs.* THORNTON LYFORD.

Penobscot. Opinion June 2, 1881.

Practice. Equity. Mortgage, equity of redemption. Estoppel.

No one should be made a party to a bill in equity against whom a decree if brought to a hearing could not be had.

The right of redemption is always incident to the mortgage. So long as the instrument is one of security the borrower has the right to redeem, and a subsequent release of that right will be closely scrutinized so guard the debtor from oppression, and it must be for a new and adequate consideration.

Where the equity of redemption is apparently destroyed by the mortgagee, by his conveying an indefeasible title to the premises to a *bona fide* purchaser, a court of equity will treat such mortgagee as a constructive trustee for the balance in his hands after deducting from the price for which the land was sold, the amount for which the defendant held it as security.

A complainant in a bill in equity by a mortgagor against a mortgagee is not estopped from showing the relation between them by a judgment for the plaintiff in a process of forcible entry and detainer between the same parties, the defendant therein being the complainant in the equity suit.

BILL IN EQUITY.

The opinion states the case.

H. L. Mitchell, for the plaintiff, cited: *Howard* v. *Harris*, 3 Leading Cases in Equity, 869; 2 Wash. R. P. 67; *Baxter* v. *Child*, 39 Maine, 110; *Wyman* v. *Babcock*, 2 Curt. 386; *Bailey* v. *Myrick*, 50 Maine, 171; *Russell* v. *Southard*, 12 How. 139; stat. 1874, c. 175: *Sprigg* v. *Bank*, 14 Pet. 201; 4 Kent Com. (12 ed.) 142; *Morris* v. *Nixon*, 1 How. 118; *Woodman* v. *Freeman*, 25 Maine, 531; Story's Eq. Jur. § § 64–74.

Humphreys and Appleton, for the defendant.

The complainant first asks to be permitted to redeem the property under the mortgage of May 17, 1866, and the agreement of April 29, 1874.

The bill discloses that the defendant long before the suit was commenced had conveyed the property to Lydia Dwelley who was the record owner at the time the suit was brought. If the plaintiff wants a decree giving her the right to redeem the premises,

Lydia Dwelley should have been made a party to the bill. She is a party interested in the subject matter of the controversy. *Morse* v. *Machias W. P. & M. Co.* 42 Maine, 119; *Dockray* v. *Thurston*, 43 Maine, 216; *Goodrich* v. *Staples*, 2 Cush. 258.

Counsel further contended that, upon the facts in the case, if there were proper parties to the bill, the plaintiff would not be entitled to redeem. She had conveyed her right of redemption to the defendant for a good and sufficient consideration, to wit, one year's use of the premises under the defendant's agreement of April 29, 1874, and she having failed to meet the terms of that agreement, had no right to a reconveyance and no further interest in the premises.

For the same reason she is not entitled to any of the money which defendant received from the sale of the property, and if she was it cannot be recovered in this proceeding. Her remedy would be by suit at law in assumpsit for money had and received. *Long* v. *Woodman*, 65 Maine, 56; *Wiseman* v. *Lyman*, 7 Mass. 288; 65 Maine, 404; 68 Maine, 373; 2 Edw. Ch. 542; 17 Pick. 217; 2 Jones, 1046.

Finally we submit that whether or not the plaintiff has any of the rights of a mortgagor in these premises is *res adjudicata*. The determination of the action for forcible entry and detainer, brought by this defendant against the plaintiff, being in favor of this defendant, was an adjudication that the relation of mortgagee and mortgagor did not exist between them, for a mortgagee cannot maintain forcible entry and detainer against a mortgagor. *Reed* v *Elwell*, 46 Maine, 270.

APPLETON, C. J. This is a bill in equity. The following facts are either admitted or proved:

On May 17, 1866, the complainant purchased the house, which is the subject matter of this controversy, of the defendant, and on the same day mortgaged it back to secure the payment of fifteen hundred dollars and interest. She then went into and continued in possession till July, 1875, paying neither principal nor interest, and only the taxes of 1866.

The defendant after seven years occupancy brought a suit on the mortgage, on which judgment was rendered, and a writ of

possession issued March 13, 1874. The writ of possession was placed in the hands of an officer with stringent orders for its enforcement. In this state of things the complainant to procure the further occupancy of the house conveyed by deed of release, duly recorded, dated April 29, 1874, all her right, title and interest in the mortgaged premises to the defendant and received from him the following agreement:

"Harriet Linnell, of Bangor, has this day conveyed to me the house and lot in Centre street, Bangor, in which Gilman Cram resides, same having been before mortgaged to me by the said Harriet Linnell to secure payment of five notes of said Cram, the said mortgage bearing date of May 17, 1866, and I agree that in case said Harriet Linnell shall pay or cause to be paid to me, within one month from date, thereof, the sum of two hundred dollars on said mortgage debt, and the balance of said mortgage including all the taxes paid by me on said house and lot, since the date of said mortgage, within one year from this date, and interest on the amount now due on said mortgage debt, and on taxes paid by me from this date at the rate of ten per cent. *per annum*, said interest to be paid quarterly, and shall also pay the costs of the suit, which has been brought by me on said mortgage, and upon which judgment has been obtained, and shall also pay when assessed such taxes as may be assessed on said house and lot for 1874, I will quit claim the said premises, being the house and lot aforesaid, to the said Harriet Linnell or her assigns.

"I have this day been paid on said mortgaged debt the sum of one hundred and forty-five dollars, before the execution of this contract, and upon the payment of the two hundred dollars more, referred to above, there will remain due on the mortgage, including taxes paid by me, the sum of about twenty-four hundred dollars.

THORNTON LYFORD."

Bangor, April 29, 1874."

In December, 1874, after failure by the complainant to comply with the terms of the agreement just recited, the defendant brought the process of forcible entry and detainer against the complainant, and another. The suit went by appeal to the

Supreme Judicial Court, the defendants pleading title in themselves, and at the January term, 1875, this complainant was defaulted and the damages were assessed by Hon. Edward Kent, and judgment on July 17, 1875, was rendered for the defendant "for his title and possession of the premises," and for damages and costs on which a writ of possession issued July 19, 1875.

Subsequently on or about July 29, 1875, the defendant sold the premises to Lydia Dwelley, who is conceded to be a *bona fide* purchaser without notice of any fact impeaching her title.

The prayer of the bill is, that the deed of April 29, 1874, be adjudged null and void, and that the defendant render an account, and after deducting the balance due said Lyford, on said mortgage at the date of said sale, from the proceeds of the same, the balance with interest thereon may be paid the complainant, and for such other relief as the nature of the case may require.

To the maintenance of this bill the defendant interposes various objections.

1. It is claimed that Lydia Dwelley should be made a party. But why? The undisputed evidence shows that she has not the equity of redemption, but the fee discharged, and freed from any right of redemption. For what purpose should she be made a party? No one should be made a party against whom no decree, if brought to a hearing, could be had. The bill does not seek the redemption of the estate from her. It concedes the perfect validity of her title. The only result of making her a party would be to entitle her to a bill of costs. She is upon the conceded facts, neither a necessary nor proper party to the bill.

2. It is urged that the complainant's deed to the defendant, of April 29, 1874, bars her right to redeem.

Not so. The right of redemption is always incident to a mortgage. Even an express stipulation not to redeem, does not, in equity, bind the mortgagor. So long as the instrument is one of security, the borrower has a right to redeem, upon payment of the loan. A subsequent release of the equity may undoubtedly be made to the mortgagee, but the transaction will be closely scrutinized to guard the debtor from oppression. The release, too, must be for a new and adequate consideration.

The deed from the complainant to the defendant and his agreement back, must be regarded as parts of one and the same transaction. It distinctly and fully recognizes throughout the existence of the mortgage. The notes secured by the mortgage are not surrendered. They may be still enforced if the mortgage is not sufficient for their payment. The land stands as security for the complainant's indebtedness. The contract acknowledges the receipt of money on the day of its date as "paid on said mortgage." The defendant has made no advances to the complainant. The only advance is that of interest on her indebtedness from six per cent. to ten per cent. per annum accompanied by a reduction of the time of redemption from three years to one year. The complainant is allowed to remain in possession for one year on the payment at the time and in one month what would be an ample annual rent for the premises.

It matters little whether the original mortgage be regarded as subsisting or the deed of April 29th, 1874, with the contract of that date be regarded as an equitable mortgage; in either event, there is in equity a subsisting equity of redemption. *Baxter* v. *Curtis*, 39 Maine, 110; *Peugh* v. *Davis*, 96 U. S. Rep. S. C. 332; *Hyndman* v. *Hyndman*. 19 Vt. 9; *Wyman* v. *Babcock*, 2 Curtis, 386; *Russell* v. *Southard*, 12 How. (U. S.) 154.

3. This is not so much a bill to redeem a mortgage as to enforce a trust. The complainant, as has been seen, has an equity of redemption, whether the mortgage be regarded as legal or equitable. The defendant having conveyed an indefeasible title to a *bona fide* purchaser, she cannot as against such purchaser redeem the premises. In such case the equity of redemption having been destroyed by the defendant a court of equity will treat him as a constructive trustee for the balance in his hands, after deducting from the price for which the land was sold, the amount for which the defendant held it as security. *Wyman* v. *Babcock*, 2 Curtis, 386.

4. It appears that the complainant neglecting to make the payment required by the defendant's argument of April 29, 1874, the defendant commenced in the municipal court of the city of

Bangor, the process of forcible entry and detainer against the complainant and one Gilman Cram, that on its entry in court, the defendants therein filed a statement of title in themselves, that thereupon the case was carried to the Supreme Judicial Court, the statutory recognizances having been given, that at the April term 1875, of that court, the defendants were defaulted and that judgment was rendered for the complainant in the same, "for his title and possession of and in the premises" and for damages and costs.

The ground is taken that this judgment is a bar to the complainant's bill by way of estoppel.

It has been repeatedly determined that this process cannot be maintained by a mortgagee against a mortgagor. *Clement* v. *Bennett*, 70 Maine, 207; *Reed* v. *Elwell*, 46 Maine, 270; *Boyle* v. *Boyle*, 121 Mass. 85; *Woodside* v. *Ridegway*, 126 Mass. 292. Hence it is argued, that as there was a judgment against the complainant, that the relation of mortgagor and mortgagee did not exist.

But the law is well settled that after a mortgagee has peaceably entered and is in possession, if the mortgagor or any one else should undertake to enter upon him this process may be maintained against him. It is to be assumed that every point essential to the judgment was established, and consequently that it was shown that the defendant had entered under his mortgage and was in possession when the complainant and Cram entered forcibly upon him and withheld the premises. Indeed the defendants in that procedure by their default admitted the complainant's legal right to judgment. To give effect to the point taken by the defendant's counsel, we must assume and without proof, that the judgment was erroneously entered and that too when the result will be to defeat an equity of redemption.

Let a decree be entered that the complainant was the owner of the equity of redemption of the premises in controversy, that the absolute sale and conveyance of the same to a *bona fide* purchaser without notice was a constructive fraud upon the rights of the complainant, that thereupon she became entitled to an account of the sale of said land and of the rents and profits, if

any; and after deducting the amount for principal and interest and taxes and interest thereon and any reasonable expenditures, to the payment of the balance, and let the cause be referred to a master to state the necessary accounts.

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

JOHN R. STUDLEY *vs.* ROBERT GEYER and another.

Knox. Opinion June 2, 1881.

Guide posts. R. S., c. 18, § 78. Liability of municipal officers.

The municipal officers of a town are not liable in an action under R. S., c. 18, § 78, for unreasonably neglecting to cause a guide post to be erected, when it appears that the town has not raised any money for that purpose.

ON EXCEPTIONS.

Case against the selectmen of the town of Friendship for unreasonably neglecting to erect guide posts.

Plea, general issue, with brief statement that the town never raised any money for the purpose and never passed any vote to erect guide boards.

At the trial the court instructed the jury to return a verdict for the defendants and plaintiff alleged exceptions.

The facts appear in the opinion.

The town records disclosed the following vote:

"Voted to raise two hundred and fifty dollars for town charges."

C. E. Littlefield, for the plaintiff.

By sections 77 and 78, c. 18, R. S., it was clearly the intention of the legislature to give two concurrent remedies in case of a neglect to erect guide posts. One against the town and one against the municipal officers. In construing statutes regard must be had to the mischief intended to be remedied. *Winslow* v. *Kimball*, 25 Maine, 493.

True, no money was raised specifically for the purpose of erecting guide posts, but the selectmen were not without funds,

which could be used for that purpose, for two hundred and fifty dollars were raised as a contingent fund.

A. P. Gould, for the defendants, cited: *Harlow* v. *Young*, 37 Maine, 88; *Comins* v. *Eddington*, 64 Maine, 65.

APPLETON, C. J. This is an action of the case against the selectmen of the town of Friendship for neglecting to erect guide posts as provided by law.

By R. S., c. 18, § 77, towns are required to "erect and maintain guide posts at all crossings of highways, and where one highway enters another," . . and "for any neglect herein, towns shall be subject to indictment and fine not exceeding fifty dollars."

The town has never voted to erect guide posts or to raise money for that purpose, nor has it instructed its selectmen to erect them.

By § 78, "if the municipal officers of any town unreasonably neglect to cause a guide post to be erected in their town as provided by law, they shall forfeit and pay five dollars for each month's neglect," &c.

The duty to erect and maintain guide posts devolves primarily on the town. The liability of its officers arises only upon and after their own neglect. But the municipal officers of a town are not required to furnish funds for the performance of any duty imposed on the town.

If they did, it would seem they could not recover these advances of the town. *Comins* v. *Eddington*, 64 Maine, 65. The town must raise the needed funds. It has not been done, and the defendants have been guilty of no neglect whatever.

Exceptions overruled.

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

ISAIAH F. MCCLINCH in equity *vs.* IRA D. STURGIS and others.

Kennebec. Opinion June 4, 1881.

Corporations. Charter. Presumption.

The provision of a state constitution, that, when a bill is presented for an act of incorporation, it shall be continued till another election of members of the assembly shall have taken place, and public notice of the pendency thereof is given, is directory to the assembly, and, in the absence of any clause forbidding the enactment without observing the directions, does not affect the corporators, unless the state itself intervenes.

In the granting of a charter by a state legislature, the presumption is, that all the requirements of law, preliminary in their character, have been complied with, when there is no evidence to the contrary.

The organization of a corporation is not defective because a notice of the first meeting is not served upon each corporator in accordance with the law of the state, when it appears that the powers conferred by the charter have been assumed by the persons by whom it was intended they should be enjoyed.

BILL IN EQUITY, heard on bill, answers and proof.

This was a bill in equity in which the plaintiff alleges, that in 1865, he entered into an association with the defendants for the purpose of working mines in Idaho; that they each agreed to contribute different sums, named, and to divide the profits and losses in proportion to such contributions. That the defendants have, none of them, fully paid the sums which they severally agreed to contribute and pay; that the plaintiff has paid by labor and expenditures in behalf of the association, a sum amounting to twenty-two hundred and ninety-eight dollars and ninety-two cents, in excess of the sum which he agreed to contribute and pay, and he asks for a settlement of the affairs of the association, and that the defendants be required to pay in such sums as such settlement may indicate, the amount of his bill.

The answers generally admit that a voluntary association was thus formed for the purposes stated, but set forth that it was merged into a corporation, and that plaintiff's contract was with that corporation. That the plaintiff recognized the corporation

by participating in its meetings, taking and holding its stock, and suing it in a suit at law for the sums stated in the bill.

The following papers appear in the case.

(Agreement.)

"Memorandum of an agreement this day made between William T. Libby of Vassalborough, Maine, on the first part, and Samuel Cony of Augusta, in said State, and Albert Dailey of Providence, Rhode Island, on the second part, witnesseth:

"That the said Libby, having secured in Centreville Precinct, Boisse county, in the territory of Idaho, upon a silver and gold lode, two contiguous miners' claims, two hundred feet in length each, one by the right of discovery and one by that of location, and having staked them out and had them recorded according to the laws of said territory so as to secure the right thereto, for a valuable consideration to him paid, hereby contracts and binds himself and his legal representatives to convey said claims and the rights and interest secured therein and thereby to the said Cony and Dailey, to be held by them in trust for the use and benefit of the persons and stockholders, and in the proportions hereinafter appearing.

"When an act of incorporation shall be obtained, and an organization of said parties as stockholders under it shall be effected, then said trustees shall convey to said corporation (now proposed to be called the 'Northern Mining Company') all the right, claim and interest they shall have acquired to said mining claims and to any and all other property connected with or purchased for the expedition being fitted out to work said claims, to said corporation when organized as aforesaid. And said corporation shall then divide its capital stock into three hundred shares of the par value of one hundred dollars each, and shall issue its certificates of stock to said parties, stockholders, in the proportions subscribed and paid for by them, respectively, to wit:

"Albert Dailey, $3,000; Wm. B. Pearce, $2,000; Caleb Seagrave, $2,500; Benj. F. Almy, $2,500; Samuel Cony, $2,000; Henry R. Smith, $2,000; Joseph J. Eveleth, $1,000; Ira D. Sturgis, $3,000; [Isaiah] Frank McClinch, $1,000; George B.

McClinch, $1,000; Henry S. Osgood, $1,000; Jos. H. Manley, $1,000; Dan'l A. Cony, $1,000; William T. Libby, $7,000; Total, $30,000.00."

* * * * * * *

Dated March 29, 1865.

(Charter.)

"State of Rhode Island, &c. In General Assembly, May session, A. D. 1865. An act to incorporate the Northern Mining Company. It is enacted by the general assembly, as follows:

"Sec. 1. Albert Dailey, William B. Pearce, Caleb Seagrave, Benjamin F. Almy, Ira D. Sturgis, J. J. Eveleth, William T. Libby, their associates, successors and assigns, are hereby constituted and created a body politic and corporate, with perpetual succession, by the name of the 'Northern Mining Company,' for the purpose of mining, holding and trading in minerals and coal, in any lands which they may at any time own in fee simple, or possess by lease, or which they may acquire the right to use for mining purposes, and for the transaction of all other business connected therewith or incidental thereto; to make, have, and use a common seal, and the same to break, alter, and renew at pleasure; with all the powers and privileges, and subject to all the duties and liabilities set forth in c. 125 and 128, of the R. S., and of any acts in amendment thereof or in addition thereto.

"Sec. 2. The capital stock of said corporation shall consist of three hundred shares, of the par value of one hundred dollars each. Said shares shall be deemed personal estate, and shall be issued, signed and transferred in such manner as the by-laws of said corporation shall provide. The stock or shares of each and every stockholder, shall be pledged and held liable for all debts and demands due and owing from him to said corporation, whether the same be overdue or due at a day future, and whether the same shall arise from installments, assessments, or from any other contract originally made with said corporation or its agents; and said stock or shares may be sold for the payment of such debts and demands in such manner as the by-laws of the corporation may prescribe; and in case the proceeds of such sale shall be insufficient to pay and discharge said debts or demands, with in-

cidental expenses of sale, the corporation may have their action against the debtor for the balance due.

"Sec. 3. There shall be an annual meeting of the stockholders, holden at the city of Providence, at such time as the by-laws shall prescribe, for the choice of officers and for the transaction of such other business as may come before them; but the validity of this act shall not be impaired by the failure to hold such annual meeting, but the business of such meeting may be transacted at any legal meeting of the corporation held thereafter.

"Sec. 4. Said corporation shall have a counting room and place of business in the city of Providence, and in all proceedings in law or equity in which said corporation shall be a party the leaving an attested copy of the writ, summons or other process, with the clerk, agent or treasurer of said corporation, or at such place of business shall be of sufficient service thereof.

"I certify the foregoing to be a true copy of 'an act to incorporate the Northern Mining Company,' passed by the general assembly of the state of Rhode Island, June 8, 1865.

"In testimony whereof I have hereunto set my hand and affixed the seal of the State aforesaid, this thirteenth day of January, A. D. 1879.

[L. S.] JOSHUA M. ADDEMAN,
Secretary of State."

(Record of organization.)

"Office of Albert Dailey & Co. in the city of Providence, July 28, 1865.

"Pursuant to the following notice delivered to *such corporation*, seven days prior to this date, viz:

"Providence, July, 1865. Dear Sir: The first meeting of the corporators named in the act of incorporation of the 'Northern Mining Company,' for the purpose of accepting the charter, electing associates, preparing by-laws, electing officers and any other business that may be proper and necessary to transact, will be held at the counting room of Messrs. Albert Dailey & Company, number 166 Dyer street, in the city of Providence, and State of Rhode Island, on July the 28, at ten o'clock, A. M.

Very truly yours, etc.

(Signed.) ALBERT DAILEY.
One of the corporators named in the charter."

"The following corporators being assembled, Ira D. Sturgis, Samuel Thurbur, Albert Dailey, and William B. Pearce, the meeting was called to order by Albert Dailey, and thereupon Ira D. Sturgis was elected chairman of the meeting and Albert Dailey, secretary, who was duly sworn:

"*Motion.* Upon motion of W. B. Pearce, the act of incorporation of the 'Northern Mining Company' passed at the June session of the general assembly was unanimously accepted.

"*Motion.* Upon motion of Samuel Thurbur the following parties were unanimously elected associates of the corporators, viz: Samuel Cony, D. A. Cony, H. R. Smith, I. F. McClinch, George McClinch, H. S. Osgood, J. H. Manley, Samuel Turbur, J. M. Haynes and Jas. W. Bradbury.

"*Motion.* Albert Dailey presented a draft of by-laws, and moved their adoption as the by-laws of the company. Whereupon they were taken up and read by article, and unanimously adopted, as follows:

* * * * * * *

"*Vote.* It was then voted, upon motion of Albert Dailey, to proceed to the election of officers by *viva voce* vote, whereupon the following persons were elected to constitute a board of directors, viz: Samuel Cony, Ira D. Sturgis, Albert Dailey, Caleb Seagrave. Elected unanimously.

"Samuel Cony was elected president, J. J. Eveleth was elected treasurer and secretary, and W. T. Libby was elected general agent at Idaho.

Attest: ALBERT DAILEY, Secretary."

(Record of action *McClinch* v. *Northern Mining Company.*)

"State of Maine. Kennebec ss. At the Supreme Judicial Court begun and holden at Augusta, within and for the county of Kennebec, on the first Tuesday of August, being the fourth day of said month, anno domini, 1874.

"By the Hon. CHARLES DANFORTH, one of the justices of said Court.

"268. *Isaiah F. McClinch*, of Hallowell, in said county, plaintiff, v. *The Northern Mining Company*, a corporation duly established by law, having their office in said Augusta, defendant:

In a plea of the case as per writ on file, dated June 25, 1872. Date of service, July 1, 1872. To the damage of the said plaintiff (as he says) the sum of four thousand dollars.

"This action was commenced for and entered at the August term of this court, in this county, A. D. 1872, when and where the defendant appeared by his attorney. Thence the action was continued from term to term, to the March term, 1874, when and where the defendant although solemnly called, etc. did not appear, but made default. Thence the action was continued for judgment (as per agreement on file) to this term.

"It is therefore considered by the court here, that said plaintiff recover against the said defendant the sum of two thousand ninety dollars and twenty-one cents damages, and cost of suit taxed at $28.15.

"Execution issued Dec. 9, 1874.

Attest: WM. M. STRATTON, Clerk."

"Supreme Judicial Court, Kennebec county, March term, 1874.

I. F. McClinch v. *Northern Mining Company.*

Plaintiff's account in writ,	Dr.	$3,114.74
	Cr.	$1,425.50
		$1,689.24
Cr. 1st assessment omitted,		250.00
		$1,439.24
Add for interest,		600.00
		$2,039.24

"It is agreed as follows: Defendants to be defaulted, and case continued for judgment. Judgment for $2,039, of which suit the defendants agree to pay the plaintiff $1,200 and interest from this date; and the balance of the judgment is to stand to protect the plaintiff by offset or otherwise against any further assessments besides the two that are credited on his account and is not to be

otherwise enforced against the company or its members. Any other assessments may be credited and allowed thereon.

"A. LIBBEY for plaintiff.

BRADBURY & BRADBURY for defendant.

1st assessment,	$250.00.
2d assessment,	$333.33."

Daniel C. Robinson, for the plaintiff.

1. The defendants failed to incorporate themselves by non-compliance with laws. Const. R. I. § 17, Art. 4; An. & A. on Corporations, 454; Laws of R. I. 1857, c. 2, § 8; c. 125, § 3; c. 128; Public Laws of R. I. 1863, c. 475, § 1; c. 485, § 1; c. 504.

And because the required notice was not delivered to corporators. And because Thurbur, who was not a corporator, was allowed to act at the meeting. They are liable therefore as individuals; and whether incorporated or not, thus liable for what occurred before.

II. The alleged suits against the supposed corporation are not pleaded as an estoppel. They do not estop. It does not appear that the plaintiff intended to levy suit against the persons named as defendants. Some of the parties plead the statute of limitations, but plaintiff did not voluntarily lie by until his claim was stale.

In equity the statute is not to be applied in a way to promote injustice. Story's Com. § § 1521, 1522, 1524; Angell on Limitations, § 30; *Lawrence* v. *Rokes*, 61 Maine, 38; *Robinson* v. *Robinson*, not reported.

These are familiar doctrines supported by all the authorities.

J. W. Bradbury for himself, and *H. W. Bradbury*, administrator, defendants.

J. Baker for Osgood, Manley and Cony, defendants, and *W. P. Whitehouse* for Sturgis, Haynes and Thurbur, defendants, cited: *Lawrence* v. *Rokes*, 61 Maine, 42; *Denny* v. *Gilman*, 26 Maine, 154; *Prop. Bap. M. H.* v. *Webb*, 66 Maine, 398; *Reed* v. *Canal Co.* 65 Maine, 132; *Chaffin* v. *Cummings*, 37

Maine, 83; *Hersey* v. *Veazie*, 24 Maine, 9; *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 54 Maine, 180; Field on Corp. § § 483, 493, 407, 125, 55, 385, 386, 452, 455–457; Ang. & Ames on Corp. § § 774, 777, 312, 599–603; *Burr* v. *Wilcox*, 6 Bosw. 198; *Smith* v. *Poor*, 40 Maine, 422; *Vose* v. *Grant*, 15 Mass. 505; *Lyman* v. *Bonney*, 101 Mass. 562; *Savage* v. *Ball*, 17 N. J. Eq. 142; *Wood* v. *Dummer*, 3 Mason's C. C. 308; *Ireland* v. *Turnpike Co.* 19 Ohio St. 369; R. S., of R. I. c. 125, § § 3, 14; c. 2, § 8; Const. R. I. Art. IV, § 17; *Boom Co.* v. *Lamson*, 16 Maine, 224; *Glass Co.* v. *Dewey*, 16 Mass. 94.

VIRGIN, J. The plaintiff contends that the defendants failed to incorporate themselves in accordance with the constitution and laws of Rhode Island, whence the charter emanated.

There is no doubt but that an act to incorporate the "Northern Mining Company" was passed by the general assembly of Rhode Island, June 8, 1865. This fact is proved by a copy thereof, attested by the secretary of the State. The act itself contains no conditions. Reference is made in the report of the plaintiff's printed evidence to sundry provisions in the constitution and laws of Rhode Island, but none of them are contained in the report.

But assuming that the constitution does provide that when any bill is presented for an act of incorporation like the one in question, it shall be continued till another election of members of the assembly shall have taken place and public notice of the pendency thereof given, it does not necessarily follow that the organization under the charter is not as to all practical purposes valid. The provision is directory to the assembly, and in the absence of any clause forbidding the enactment, does not affect the corporators unless the State itself intervenes. *Whitney* v. *Wyman*, 101 U. S. 392, 397. The State may waive conditions, and so long as the State raises no objection, it is immaterial to other parties whether it is a corporation *de facto* or *de jure*. *Ibid.*

It is further urged that public laws, R. I. 1857, c. 2, § 8 require a certain published notice in a newspaper, printed where the corporation is to be located, and at a time therein specified. The answer is that this provision, being a mere act of the assembly, cannot bind any subsequent session thereof; for the power which

prescribes the formalities to be observed in order to create a corporation, is able to dispense with them. *Black Riv. R. R. Co.* v. *Barnard*, 31 Barb. (N. Y.) 258. Moreover there is no evidence in this case that all these provisions have not literally been complied with. On the contrary, being preliminary in their character the presumption is that they were. *Narragansett Bank* v. *Atlantic Silk Co.* 3 Met. 287; *Penobscot Boom Corp.* v. *Lamson*, 16 Maine, 224, 230. At any rate we cannot presume that the general assembly and governor acted in contravention of the constitution and laws of the State.

It is also urged that the public laws of 1863, R. I., c. 475, prohibits this charter "taking effect until the persons therein incorporated shall have paid to the general treasurer the sum of $100." This, however, is a matter between the State of Rhode Island and the corporators. Whether the sum was paid or not the case does not disclose. The presumption is that it was. Moreover we have the high authority of the Supreme Court of that State, for declaring that the statute last named was repealed by Gen. Stat. R. I. c. 261, § 12; and that the charter, although enacted while the repealed statute was in force, is not for that reason invalid. *Hughesdale Manf Co.* v. *Vanner*, 12 R. I. 491.

It is further contended that the proper notice for the first meeting of the corporators was not served upon "each corporator" as is required by stat. R. I. c. 125, § 3. Whether there is such a statute, does not appear. But assuming there is, the organization is not defective for that reason. *Newcomb* v. *Reed*, 12 Allen, 364; *Walworth* v. *Brackett*, 98 Mass. 98, 100; *Ossipee H. & W. Manf. Co.* v. *Canny*, 54 N. H. 295–312, and cases there cited.

It appears by the record of that meeting that it was held at the "office of Albert Dailey & Co. in the city of Providence, July 28, 1865." The notice is formally recorded. No objection is made to its form. It is addressed "Dear Sir." The record recites (as printed): "Pursuant to the following notice delivered to '*such* corporation,' seven days prior to this date, viz." etc. Now it is evident that the words "such corporation" are a misprint, for "each corporator" or that the person who wrote them

into the record from the minutes of the secretary made the error. But assuming the record as printed is according to the fact, and still the authorities last cited uphold the organization as against this objection. "There is no question," says HOAR, J. in *Newcomb* v. *Reed*, *supra*, "that the corporate powers which it (charter) conferred were assumed by the persons by whom it was intended they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective. . . "It (statute) is directory merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. . . The evidence was ample to show that the persons named in the act of incorporation with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business, contracted debts, and exercised all the functions of corporate existence. It is therefore too late to deny that the corporation never had a legal existence."

Say the court in *Ossipee H. & W. Manf. Co.* v. *Canny*, *supra*, "If neither the grantors of the charter (*i. e.* the State), nor any of the grantees complained of the defect in the preliminary notice, it would seem that the objection could not be subsequently raised by this defendant who has taken stock in the corporation thereby recognizing the corporate existence and manifesting the purpose to participate in the profits thereof." See also *Whitney* v. *Wyman*, 101 U. S. 392, 397 and cases cited.

These cases are applicable to the case at bar. To be sure the plaintiff was not one of the corporators, but he was elected an associate at the first meeting, was present when the articles of association were drawn, must have known their contents and that they were but preliminary to an act of incorporation. And after his return and he had learned all the facts, he sued the "Northern Mining Co." alleging in his writ that it was a "corporation duly established by law, having its office in Augusta," recovered judg-

ment and made a valid contract in relation thereto upon the docket.

We fail to perceive how he can now expect to establish the non-existence of the corporation. If the corporation is established this bill cannot be sustained. Whether he might maintain a creditor's bill and secure his claim against such of the stockholders as have not paid for their stock, if there be any such, we have no occasion to inquire under this bill.

Bill dismissed with costs.

APPLETON, C. J., WALTON, PETERS and SYMONDS, JJ., concurred. LIBBEY, J., did not sit.

CLARISSA B. ABBOTT

vs.

OSCAR HOLWAY, administrator on the estate of JAMES ABBOTT.

Kennebec. Opinion June 4, 1881.

Deed. Feoffment in futuro. Devise. Estate in remainder. Waste.

Where a deed contains a provision that it is not to take effect and operate as a conveyance until the grantor's decease, and not then if the grantee does not survive him, but if the grantee do survive, it is to convey the premises in fee simple, with words appropriate and consistent with this provision in the *habendum* and covenants, it will be upheld as creating a feoffment to commence *in futuro*, and will give the estate in fee simple to the grantee on the happening of the contingency named, the execution and record of the deed operating in the same manner as a livery of seizin at the grantor's decease.

Such a deed is something more than a devise in a will, it conveys to the grantee a contingent right which unlike the interest of a devisee in the lifetime of the testator, cannot be taken from him.

Such a deed negatives the idea of an estate in remainder for the benefit of the grantee and a reservation of a life-estate to the grantor, and the grantee takes no such interest in the premises during the lifetime of the grantor as will enable him to maintain an action on the case in the nature of waste against the administrator of the grantor for acts done by him in his lifetime after making the deed.

ON REPORT.

This is an action on the case for waste. The writ is dated September 28th, 1878.

The plea is the general issue and brief statement denying the plaintiff's title and claim.

At the trial it was admitted that James Abbott was, on the 30th of April, 1872, and long had been, the husband of the plaintiff; that he died May 5th, 1875; that the defendant is the administrator on his estate; that he owned, on the 30th of April, 1872, and long had owned, the premises described in the writ, a valuable farm in Pittston, upon which was a large timber and wood lot; that he continued to live on the farm with his wife managing and taking the crops thereof until his death, she now surviving him; that in the winter and spring of 1875, without the consent and against the remonstrance of the plaintiff, he caused to be cut and hauled to market, a quantity of mill logs, cut for that purpose, and not for fencing or repairs.

Since Abbott's death, his administrator has sold the lumber made from the logs and received the money therefor.

The plaintiff put in evidence the deed from James Abbott to her, dated April 30th, 1872, embracing the premises described in the writ and upon which the alleged waste was committed, and proved its execution and delivery on the day of its date, and its record in the Kennebec registry on the same day by plaintiff's procurement. It is made part of the case.

(Deed.)

"Know all men by these presents, that I, James Abbott of Gardiner in the county of Kennebec, in consideration of one dollar paid by my wife Clarissa B. Abbott, and for the purpose of providing and securing to my said wife a comfortable support in the event of my decease during her life, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Clarissa B. Abbott of said Pittston, her heirs and assigns forever a certain lot of land situate in said Pittston and bounded . . . . .

"This deed is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me, and if she shall

survive me then and in that event only this deed shall be operative to convey to my said wife said premises in fee simple. Neither I, the grantor, nor the said Clarissa B. Abbott, the grantee, shall convey the above premises while we both live without our mutual consent. If I, the grantor, shall abandon or desert my said wife then she shall have the sole use and income and control of said premises during her life.

"To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Clarissa B. if she shall survive me, her heirs and assigns, to their use and behoof forever. And I do covenant with the said Clarissa B. her heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said Clarissa B. if she shall outlive me, to hold as aforesaid at my decease. And that I and my heirs shall and will warrant and defend the same to the said Clarissa B. if she shall survive me, and her heirs and assigns forever, against the lawful claims and demands of all persons.

"In witness whereof, I, the said James Abbott, have hereunto set my hand and seal, this thirtieth day of April in the year of our Lord one thousand eight hundred and seventy-two.

JAMES ABBOTT. [Seal.]"

Signed, sealed and delivered in presence of
N. M. WHITMORE,
L. CLAY."

Duly acknowledged and recorded.

A. P. Gould, for the plaintiff.

The deed from James Abbott to Clarissa B. Abbott, conveyed a freehold to take effect *in futuro* and was a valid conveyance. *Wyman* v. *Brown*, 50 Maine, 139; *Jordan* v. *Stevens*, 51 Maine, 78; *Drown* v. *Smith*, 52 Maine, 141.

The deed seems to have a double intention; first, to make provision for her if she should survive him; and second, that she should also have and possess the estate during his life if he deserted her.

Waste of the estate by the grantor, after the execution of such a deed, is a palpable fraud upon the settlement; and even where the statute would not permit an action of law to recover damages for such waste (as our statute does) they might be recovered in a court of equity. *Powlett* v. *Dutchess of Bolton*, 3 Ves. Jr. 374; Greenl. Cruise, 130; *King* v. *Sharp*, 6 Humph. 55; *Marquis of Landsdowne* v. *Marchioness of Landsdowne*, 1 Mad. 140, [116]. See note (2) to case *Lee* v. *Alston*, 1 Ves. Jr. 82. See also notes to *Pigott* v. *Bullock*, 1 Ves. Jr. 483, 484.

But we do not have to resort to equity. We are entitled to maintain this action by R. S., c. 95, § § 3, 4.

All that *Hunt* v. *Hall*, 37 Maine, 363, decides is that a contingent remainder-man cannot maintain an action of waste, under the statute while the contingency exists. But when the title becomes absolute, may he not then maintain waste against the tenant for life? Judge Jackson seems to intimate that he can. Jackson on Real Actions, 329; see also *Greene* v. *Cole*, 2 Saunders, 252.

Counsel further cited: *Foster* v. *Mansfield*, 3 Met. 412; *Hatch* v. *Hatch*, 9 Mass. 307; 2 Wash. R. P. 612, (2d ed.) *Jackson* v. *Dunsbach*, 1 Johns. Cas. 96; *Richardson* v. *York*, 14 Maine, 216; *Cook* v. *Mason*, 4 Mason, 488.

J W Bradbury, for the defendant.

Nothing passed by the deed from Abbott to his wife. It did not convey a contingent remainder. It might never take effect, there was no certainty that it ever would. Abbott retained the fee in himself. He did not part with the title. The plaintiff derived no estate that she could convey. An estate is vested when there is an immediate fixed right to a present or future enjoyment. Fearne on Rem. 1, c. 8.

The estate remained to Abbott. He had the present enjoyment and it might descend to his heirs.

The learned counsel has been able to refer to no case in this country where a deed has been sustained when by its terms the title might forever remain in the grantor and his heirs. The

case of *Powell* v. *The Duchess of Bolton* does not bear upon this question.

A contingent remainder is a possible remnant of an estate that passes from the grantor at the time he conveys the rest of the estate. 1 Ins. 143; 1 Fearne on Rem. § 747.

The instrument is a mere executory agreement — a promise by Abbott to make a title after he should die. It is an attempt to make an executory devise in a manner not authorized by law, and against sound principles of public policy. If sustained as a conveyance it would amount in effect to a partial repeal of the statute of wills.

BARROWS, J. The plaintiff's right to maintain this action must depend ultimately upon the construction to be given to the deed or instrument under which she claims title, and upon the force and effect of the terms used therein to define the interest which she acquired by virtue thereof.

Our statutes (R. S., c. 73, § 1,) provide that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it, or all his interest in it, by a deed to be acknowledged and recorded as hereinafter provided." Detailed regulations as to the mode of execution and as to the force and effect of conveyances thus made and recorded, follow this general provision in some thirty sections, more or less. Can it be doubted that under such statutes the owner of real estate can convey in the manner prescribed, such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations. Why prevent the owner in fee simple from agreeing with his grantee (and setting forth that agreement in his conveyance) as to the time when, and the conditions upon which, the instrument shall be operative to transfer the estate from one to the other?

In substance our law now says to a party having such an interest in real estate as is mentioned in R. S., c. 73, you may convey that interest or any part thereof in the manner herein

prescribed with such limitations as you see fit, provided you violate no rule of public policy, and place what you do on record so that all may see how the ownership stands.

In the discussion of the effect of the statute of uses and of our own statutes regulating conveyances of real estate in *Wyman* v. *Brown*, 50 Maine, 139, (a leading case upon the validity of conveyances under which the grantee's right of possesssion was to accrue not upon delivery of the deed but at some future day), WALTON, J. remarks: "We are also of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of uses." In this connection he quotes Oliver's Conveyancing, touching the operation and properties of our common warranty deed to the effect that in the transfer authorized by the statute in this mode, "the land itself is conveyed as in a feoffment except that livery of seizin is dispensed with upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it."

And he concludes that deeds executed in accordance with the provisions of our statutes and deriving their validity therefrom may be upheld thereby, as well as under the statute of uses, notwithstanding they purport to convey freeholds to commence at a future day.

In other words the mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seizin, and it is competent to fix such time in the future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate (of some sort) pass immediately to the grantee in opposition to the expressed intention of the parties.

The feoffment is to be regarded as taking place, and the livery of seizin as occurring at the time fixed in the instrument, and the

acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony. The questions, did anything pass by the conveyance, if so, what, and when, are to be determined by a fair construction of the language used, without reference to obsolete technicalities. The instrument will be upheld according to its terms, if those terms are definite and intelligible, and not in contravention of the requirements of sound public policy.

The defendant, while he does not controvert the doctrine of *Wyman* v. *Brown*, insists that nothing passed by the deed of James Abbott to his wife, because according to its terms it was left uncertain whether the instrument would ever take effect as a conveyance, that not even a contingent remainder which the plaintiff claims, passed when the deed was made and delivered, that it amounts at most, to a mere executory agreement, and any recognition of its validity is contrary to public policy, because it is an attempt to evade the statutes regulating the making and execution of wills. But the instrument was duly executed by the defendant's testator, a man capable of contracting, and having an absolute power of disposition over his homestead farm, subject only to the rights of his existing creditors. It was duly recorded so that all the world might know what disposition he had made of a certain interest in it, and what was left in himself. If operative at all, it operated differently from a will. A will is ambulatory, revocable. Whatever passed to the wife by this instrument became irrevocably hers.

We fail to perceive that any principle of public policy, or anything in the statute of wills calls upon us to restrict the power of the owner of property unincumbered by debt, to make gifts of the same, and to qualify those gifts as he pleases, so far as the nature and extent of them are concerned. Public policy in this country has been supposed rather to favor the facilitation of transfers of title, and the alienation of estates, and the exercise of the most ample power over property by its owner that is consistent with good faith and fair dealing. The selfish principle may fairly be supposed to be, in all but exceptional cases, strong enough to prevent too lavish a distribution of a man's property by way of gift.

The learned counsel for defendant speaks of this instrument as "an attempt to make an executory devise," "a mode of devising real estate." It is something more and different, and if the doctrine of *Wyman* v. *Brown* is to be maintained, it gives to the grantee a contingent right in the property which (unlike the interest of a devisee in the lifetime of the testator) cannot be taken from her, and may, upon the performance of the condition make her the owner of the premises in fee simple, according to its terms. It is argued that if the court give effect to this mode of transmitting a title to real estate, it will lead to uncertainty as to the rights of the respective parties, and to litigation between the heirs of the grantor and grantee, that "it would tie up estates, embarrass titles, and impair the simplicity of our modes of conveyance," without producing any compensatory benefit. Why these results should follow (when the validity and effect of such conveyances has once been determined) in any greater measure than they are liable to follow any kind of family settlement is not apparent. What we do is precisely this. We uphold a conveyance in conformity with the agreement of the parties therein expressed, that the title of the grantee shall accrue, not upon the delivery of the deed, but upon the happening of a certain event (the proof of which is commonly easy) at a future time specified in the recorded conveyance. Why should harm come of it any more than from a lease made to run from a future day certain?

In substance the grantor says to the grantee, I give you this conveyance made and executed in the manner prescribed by our statute, so that you may have an irrevocable assurance that if you outlive me the property therein described shall be yours in fee simple, from and after my decease, in like manner as if you took the same by livery of seizin on that day, under a feoffment from me, the statute provisions for a recorded deed dispensing with that ceremony. Doubtless this is all contrary to the ancient doctrine, which is thus stated in Greenleaf's Cruise, vol. IV, p. *48: "A feoffment cannot be made to commence *in futuro*, so that if a person makes a feoffment to commence on a future day, and delivers seizin immediately, the livery is void, and nothing more

than an estate at will passes to the feofee." What was the foundation of this doctrine? It is stated *ibidem* thus: "This doctrine is founded on two grounds; first, because the object and design of livery of seizin would fail if it were allowed to pass an estate which was to commence *in futuro;* as it would, in that case, be no evidence of the change of possession; secondly, the freehold would be in abeyance which is never allowed when it can be avoided." But, given the system of recorded conveyances for which our statutes provide, the ceremony of livery of seizin becomes of no importance as an evidence of the change of possession; and we shall find our natural horror of a freehold in abeyance (if it could be demonstrated that such a result would follow from allowing a freehold to take effect *in futuro*) greatly mitigated by the circumstance that here and now it is no longer necessary "that the superior lord should know on whom to call for the military services due for the feud," and so, in any event, the defence of the commonwealth will not be weakened; and by the further circumstance that "every stranger who claims a right to any particular lands, may know against whom he ought to bring his præcipe for the recovery of them," by a simple inspection of the public records, and proof of actual possession.

The doctrine of *Wyman* v. *Brown* is a good illustration both of the maxim, *cessante ratione, cessat etiam lex*, and of the changes wrought in the common law by statutory provisions.

In Virginia the doctrine that a feoffment cannot be made to commence *in futuro* was long ago done away with by statute. Tate's Dig. p. 175. While it does not form part of the decision in *Wyman* v. *Brown*, this matter underwent a careful scrutiny, and, upon full consideration, the court agreed that our statute system of registered conveyances brought about the same result here.

We are at liberty, then, to give to the language used by the grantor in a deed, its obvious meaning, without invalidating the deed, to say that it shall operate as the parties intended, and carry an estate to commence *in futuro* if they so agree, without the necessity of resorting to any subterfuges under which the estate thus created to commence *in futuro* may be recognized as

existing only by way of remainder or by virtue of some imputed covenant to stand seized.

A single reading of this conveyance of James Abbott to his wife is sufficient to satisfy one that it was no part of the intention or expectation of either, that the wife acquired thereby any interest in the homestead farm during the life of the grantor except as expressly therein declared, to wit, a right to the "use, income and control of said premises during her life," in case the husband deserted her (which he did not do), and besides this, an irrevocable right to the same in fee simple, in case she survived her husband, her estate to commence at his decease.

The language of the deed differs widely from that of any of the conveyances which have been sustained as passing an estate in remainder to the grantee with a life-estate in the grantor reserved. If the object of the draftsman had been to exclude the idea that the conveyance should have any force until the time therein appointed, in other words, to have it take effect as a feoffment made at the time fixed *in futuro*, to convey, as of that date, an estate in fee simple and to have no other operation, it is difficult to see how he could have made that object plainer in words.

"This deed is not to take effect and operate as a conveyance until my decease, and, in case I shall survive my said wife, this deed is not to be operative as a conveyance . . . if she shall survive me, *then*, and in that event only, this deed shall be operative to convey to my said wife said premises *in fee simple*." Note also the language of the *habendum* and covenants. A conveyance thus framed cannot give the rights of a remainder-man presently to the grantee, nor so operate forthwith, as a conveyance as to convert the holding of the grantor from that time forward into a mere tenancy for life.

Such language bears little resemblance to the stipulation in the deed which was under consideration in *Drown* v. *Smith*, 52 Maine, 142, "but the said (grantee) is not to have or take possession till after my decease; and I do reserve full power and control over said farm during my natural life."

It differs quite as much from the provision in the case of *Wyman* v. *Brown*, to the effect that Mrs. Brown was "to have quiet possession, and the entire income of the premises until her decease." *Drown* v. *Smith*, however, is an authority which relieves us on the question whether stipulations which on the face of them are not consistent with terms previously used importing a present conveyance, will avoid the deed. There is an apparent contradiction in saying, I convey this property to you, but this is no conveyance until, &c. nor unless, &c. But the modern cases like *Drown* v. *Smith*, indicate that if the intent, taking the whole together, is clear and intelligible, the court will give effect to it notwithstanding some apparent repugnancy. If a deed can be upheld where, as in *Drown* v. *Smith*, the grantor reserves to himself "full power and control over said farm during my (his) natural life," on the face of it including the power of disposition, we may give its fair and just effect to one framed, as this is, to convey an estate in fee simple to the grantee, *to commence* at the decease of the grantor, provided the grantee outlives him; and the true effect seems to be that of a feoffment under which the execution and record of the deed operate in the same manner as livery of seizin made at the time of the grantor's decease. It gives no right of action for waste committed during the grantor's life. While this grantor lived he could do anything with the homestead farm not inconsistent with the right which he had conveyed to his wife to take it from the time of his decease, if she survived him, as the owner thence forward in fee simple.

If the testimony of Lapham and Palmer represents truly the acts of which the plaintiff complains as waste, her suit, were it otherwise well founded, would fail for want of proof of anything which amounts to waste according to the best considered decisions in this country. See *Drown* v. *Smith*, *ubi supra*, and cases there cited.

Plaintiff nonsuit.

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

WILLIAM FARROW *vs.* ERASMUS H. COCHRAN and another.

Knox. Opinion June 4, 1881.

Life insurance. Action to recover back the premiums paid. Breach of contract.

An action cannot be maintained by the holder of a life insurance policy against the agents of a life insurance company, for premiums paid to them on the same, when it appears that the policy conforms to the application, and is in accordance with the agreement of such agents.

Nor can such an action be maintained against either the principal or agent without proving that he has offered to return the policy, or that it is worthless.

ON REPORT.

Assumpsit for breach of contract. Plea, general issue, with a brief statement of special matters of defence.

The law court to render such judgment as the law and facts authorize.

The facts appear in the opinion.

D. N. Mortland, for the plaintiff.

True P. Pierce, for the defendants.

BARROWS, J. In 1865, plaintiff made application to and through defendants, then and still agents for the New England Mutual Life Insurance Company, for a policy from said company on his own life, in the sum of two thousand dollars, payable at his decease, to his wife and children. His application was accepted and the policy sent; but in one particular it was not conformable to the application or his wishes. It was not made payable to his wife and children, but to his personal representatives. He objected to this, and one of the defendant firm, to obviate his objection, added the clause, "payable to Marcia Olivia Farrow, his wife, and his children." Upon the policy as thus changed, he paid to the defendants as agents of the insurance company, the annual premiums as they fell due, until some time in 1877, to an amount exceeding five hundred dollars, and then for some cause ceased to pay them. In 1878, having failed after some negotiation to induce the insurance company to issue

in exchange for this policy, another payable to his wife for a satisfactory amount, he, without offering to return the policy, brought this action against the defendants to recover the amount of the premiums he had paid with interest, alleging in one count a contract on their part to cause him to be insured in said insurance company, by a policy conformable to his application of the description above stated, and a fraudulent breach of their contract by issuing to him a worthless and void policy, and adding a count for money had and received.

He bases his claim upon the idea that the alteration made by the agent avoided the policy, or at all events that the policy was not what he contracted for.

But he overlooks the provision in R. S., c. 49, § 64, which ordains that "such agents (of foreign insurance companies) and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them."

If it could be maintained, against the sweeping mandate of this statute, that the policy, after the insurance agent had made it conform to the application which the company had accepted, was still not binding on the company so far as its effect was changed, unless ratified by them, the plaintiff would still be as far from showing himself entitled to recover in this action as ever. Whatever there is of legal testimony touching the point, indicates that there was a ratification. The defendant who made the correction in the policy testifies: "I have no doubt that I notified the company of the correction made to make the policy conform to the application," and to the further fact that the company then and subsequently received all the payments of premium, which would be sufficient proof of ratification if ratification were necessary.

Plaintiff's testimony respecting his interviews with the president of the company, and the president's letters to him were objected to as incompetent; and in this suit to recover of the agents in their individual capacity, they are plainly mere hearsay and inadmissible.

Had they been competent, they tend only to show that the president of the insurance company did not consider it bound

by the policy as corrected, to pay to plaintiff's wife and children, but only to his administrator, not that he regarded the alteration made by their own agent as affecting the validity of the policy.

And here still another matter presents itself, which would be fatal to the plaintiff's case, even supposing all that he claims to be proved by legal testimony with the legal effect which he claims for it. Were it proved that the policy was not what he stipulated for, still the plaintiff cannot be permitted to rescind the contract and recover back what he has paid on it, either from principal or agent, without proving either that he has offered to restore what he got, or that it is worthless. *Cutler* v. *Gilbreth*, 53 Maine, 176. He has done neither. He himself testifies that he has never proposed to surrender his policy, and admits that the company offered him in exchange for it, after he had stopped paying his annual premiums, a paid up policy for five hundred and twenty-three dollars, a sum nearly equal to the total amount ot the cash payments he has made exclusive of interest.

There seem to be two insuperable obstacles to the plaintiff's recovery. First: He has got, so far as this report shows, precisely what he bargained for. Second: He keeps what he has got while seeking to recover the consideration paid for it.

Judgment for defendants.

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

ABIGAIL R. HUTCHINS *vs.* HIRAM BURRILL and others.

Somerset. Opinion June 4, 1881.

Dower. Pleadings. Declaration. Demurrer.

A declaration in a writ of dower is not bad because it sets out and claims dower in several separate and distinct parcels of land.

Nor because the modes of setting off dower in the various pieces of real estate in which it is claimed are different.

Unless the declaration in a writ of dower alleges a seizin of the husband of an estate of which his widow is by law dowable, it is defective and will be adjudged bad on demurrer.

ON EXCEPTIONS.

Action of dower.

The defendants filed a demurrer to the declaration which was joined, and overruled, *pro forma*, by the court.

The opinion states the case.

A. H. Ware, for the plaintiff, cited: R. S., c. 103, § § 19, 23; Chitty Pl. 1315; *Atwood* v. *Atwood*, 22 Pick. 287.

D. D. Stewart, for the defendants, cited: Jackson on Real Actions, 23, 103; *Freeman* v. *Freeman*, 39 Maine, 426.

APPLETON, C. J. This is a writ of dower, in which the demandant claims dower in five different parcels in one count, to which the tenants demur specially.

1. The first cause of demurrer is that "the declaration is bad for duplicity, because it contains but one count and yet sets out, alleges and claims on several distinct and separate causes of action, to wit, at least five," &c.

The demandant's claim of dower in a writ may extend to the whole estate of her late husband of which she is dowable, and which the defendants hold. In *Dennis* v. *Dennis*, 2 Saund. 330, the demandant in her writ claimed dower of the third part of three several manors, thirty-two messuages, thirteen cottages, one water mill, forty-five gardens, thirteen hundred and nine acres of land, one hundred and eighty acres of meadow, three hundred and eighty-eight acres of pasture, sixty-eight acres of wood, six hundred acres of furze and heath, forty-two acres of moor, the rent of four bushels of samphire and common of pasture for twelve hundred and eighty-one sheep, and common of pasture for all other cattle, with the appurtenances, and also the advowson of certain churches in Bouchurch and Shanklyn, &c. This would seem to be a claim of distinct and numerous causes of action, but on error, judgment was rendered for the demandant. The form of the count as given in 3 Chitty Pleadings, 1315, and in 2 Scribner on Dower, 88, *n.* embraces a variety of different tracts of land.

2. The second cause of demurrer, is that the lands held by the tenants are held in fee simple and in common, and that dower is claimed in them as well as in a saw mill and machinery, and the modes of setting off dower in each case are distinct and separate and can only be enforced in different suits.

It is a novel objection, on the part of a defendant, that he is not sued as many times as he might have been. But there is no difficulty in setting out dower in many distinct pieces of real estate whether held in severalty or in common. The commissioners too can set out dower at the same time in mills as well as in other property. The statute provides for the setting out dower in the whole estate "as in the levy of an execution on land." R. S., c. 103, § 23. Nobody doubts that real estate of the various descriptions above mentioned, could be appraised and taken on the levy of an execution.

3. It was held in *Freeman* v. *Freeman*, 39 Maine, 426, that the declaration in a writ of dower should allege a seizin of the husband of an estate of which, by law, his widow is dowable, and that if it does not, it is bad on demurrer. The declaration in the present case is precisely like that in the above case and must for the same cause be adjudged defective.

Exceptions sustained.

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

JAMES LOW *vs.* GRAND TRUNK RAILWAY COMPANY.

Cumberland. Opinion June 6, 1881.

Customs officers — liability of wharf owners to. Due care. Contributory negligence.

The owners of a wharf where foreign laden vessels discharge, are liable to customs officers, who are required to visit the premises in the performance of their duties, for personal injuries received while in the exercise of due care, because of the unsafe or unsuitable condition of the wharf.

A customs officer whose duty is to watch for smugglers and prevent smuggling, may be in the exercise of due care, when in the course of his duty he passes over a wharf, where a foreign laden vessel is lying, in the night time and without a lantern.

Where duty requires one to be concealed, as when watching for smugglers and evil doers in the night time, the fact that he does not carry a light is not contributory negligence in an action for damages sustained by the negligence of one whose business imposed the duty upon the plaintiff.

ON EXCEPTIONS AND MOTION TO SET ASIDE THE VERDICT.

An action on the case to recover damages for a personal injury.

The plaintiff was a night inspector of customs in the Portland custom house. On the night of December 16, 1878, he was ordered by the collector, to look after smuggled goods from the English steamer Brooklyn, lying at the defendant's wharf. While passing over that wharf in the performance of that duty, he fell into a slip about eight feet deep and received the injury for which damages were sought to be recovered. The wharf was used at the time as a coal wharf, and the slip was for the purpose of wheeling coal on board steamers. It was admitted that there was no light nor railing around the slip at the time of the accident.

At the trial the court further instructed the jury:

"If you find, upon the evidence, that the presence of an English steamer at that point offered facilities for smuggling, and that this was a danger against which it was proper for customs officers and for plaintiff, in regular discharge of their duty, to be present to watch, and if you find that plaintiff was there in discharge of that duty with reference to that steamer, then I instruct you for the purposes of this trial, that an implied invitation on the part of defendant to the plaintiff might fairly arise from the character of the business conducted there, and from the character of plaintiff's duties."

The defendant requested the court to instruct the jury: That if the plaintiff, at the time of his injury, was not upon the wharf upon any business connected with the unloading of the coal, or with any business for which the premises could be or were legally used, he is not entitled to recover. Which instruction the court declined to give.

The defendant excepted to the instruction and refusal.

The jury returned a verdict for the plaintiff for thirty-five hundred dollars.

D. W. Fessenden and *Webb and Haskell*, for the plaintiff, cited: *Lord* v. *Kennebunkport*, 61 Maine, 462; *Rumrill* v. *Adams*, 57 Maine, 565; *Hill* v. *Packard*, 69 Maine, 158; *Whitney* v. *M. C. R. R. Co. Id.* 208; *Haskell* v. *New Gloucester*, 70 Maine, 305; *Smith* v. *London, &c. Docks Co.* Law Rep. 3 C. P. 326; *Wendell* v. *Baxter*, 12 Gray, 494; *Carleton*

v. *Franconia Co.* 99 Mass. 216; *Sweeny* v. *Old Colony & Newport R. R. Co.* 10 Allen, 372; *Elliott* v. *Pray*, 10 Allen, 378; *Parker* v. *Publishing Co.* 69 Maine, 173; *Campbell* v. *Portland Sugar Co.* 62 Maine, 561; *Stratton* v. *Staples*, 59 Maine, 94; Revised Statutes of United States, title XXXIV, c. 5; Unlading, § § 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875; c. 10, § § 3059, 3070.

J. and E. M. Rand, for the defendants.

In order to maintain this action, plaintiff must show that defendant has neglected to perform some obligation or duty that defendant owed to plaintiff. All of this class of cases turn upon the principle that negligence consists in doing or omitting something by which a legal duty or obligation has been violated. An owner of premises owes nothing to a mere trespasser, or to a mere licensee. Such persons go there at their own risk.

We apprehend that the plaintiff in this case must be regarded as a mere licensee, and cannot recover of the defendant damages for the injury he sustained.

The facts in evidence do not show that the plaintiff was upon the wharf by any invitation from defendant either express or implied. There was no express invitation; and whether there is an implied one in any particular case, depends upon the circumstances of that case.

Had this wharf been used for the ordinary purposes of a wharf, an invitation would be implied to all persons coming there to transact the business to which the wharf was appropriated. But even in such a case we do not perceive how an invitation could be implied to a customs officer to come there to prevent the wharf being used for a purpose to which it was not appropriated.

The instruction given by the court, we submit, was erroneous. How, from the mere existence of "facilities for smuggling" an invitation from defendant to plaintiff to attend there to prevent it can be implied, we are as yet unable to understand. Wharf was not appropriated to smuggling; and if such facilities grew out of the business conducted there (which is not the case) an invitation from defendant to plaintiff to attend there to prevent

it would not be implied. You might as well say that a doctor's sign is an implied invitation to a police officer to attend there to prevent people being killed.

We submit that the instructions given, and the refusal to instruct as requested, were erroneous.

We submit that the construction of this wharf in the manner shown, with this gangway, did not render the same unsafe or out of repair. It was a plain, wide gangway, reasonable in its character, and necessary for the purposes for which the premises were used. It was visible to every one passing upon the premises, was no concealed trap into which a man might ignorantly step or fall. In the daytime no one with eyes could fail to see it; and no one using even the least care could be injured by it. Owners have a right to construct their wharves as they find necessary or convenient for their business, provided they violate no duty which they owe to others.

The plaintiff's own negligence not only contributed to, but caused his injury; and he cannot recover.

We do not perceive the force of an argument urged upon the jury at the trial, that a customs officer is obliged to move about in the dark. If it were so, it would not help plaintiff's case, for it would only show that he was obliged to move about at his own peril. A customs officer may always take a lantern in a dark night, if his object is to prevent smuggling, and not merely to catch a smuggler.

Every person entering the premises of another is bound to exercise ordinary care and diligence, and failing in this, and suffering injury, he cannot recover. The principles governing this point are well settled; and were recognized by this court in the recent case of *Parker* v. *Pub. Co.* 69 Maine, 173, (p. 179).

BARROWS, J. The counsel for defendants, while recognizing as sound law the general principle that "an owner is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation express or implied, by which they have been led to enter therein," stoutly contend that this custom house officer, who on the night of the accident was upon the defendants'

wharf, in the regular course of his duty to watch for smugglers and prevent smuggling from the steamer which was just hauling into the dock there from a foreign port, had no such invitation, but was a mere licensee. We cannot so regard him. His presence there was made necessary by the business to which the defendants had devoted their wharf, the reception of cargoes from foreign going vessels.

Plaintiff contends (and we think rightly both upon fact and law) that "the true statement of their (defendants') use and maintenance of the wharf is, that it was a wharf for the mooring of ships or vessels coming into port with cargoes from foreign lands, and subject to the regulations prescribed by law for such vessels. By putting their wharf to that use they assumed the responsibility of keeping it in a proper and suitable condition for the safe access of all persons whom that use required to come upon it. The business to which they devoted their property, under the laws of the United States called for the presence of the plaintiff (a night inspector at the custom house) there." His business was with a vessel which had arrived from a foreign port within the jurisdiction of the United States, and was not fully unladen, and his duty was to attend to every kind of commodity which might be on board. His right to visit the premises while that vessel was there was not merely the right of visiting in reference to the business for which the premises could lawfully be used. One of the most important portions of his duty was to go there to prevent the use of the premises illegally. He might lawfully conduct his visits as to time and manner in the way best calculated to detect and prevent smuggling.

If it were ever possible, it is too late now to attempt to limit the liability in such cases, as defendants' counsel would have us, strictly "to persons coming there to transact the business to which the wharf was appropriated." Numerous authorities go farther and charge the owner with a duty to those who come on his premises upon legitimate business connected by no means directly with that to which the structure is appropriated.

Thus one who came only to vend his own wares to the officers of a vessel lying in a dock, was regarded as entitled to the pro-

tection of an implied invitation from the Docks company, though it was urged that he was not on board on the ship's business. *Smith* v. *London & St. Catherine's Docks Co.* 3 L. R. C. P. 326.

In *Stratton* v. *Staples*, 59 Maine, 95, the only errand which the plaintiff had at the drug store was to inquire for the defendant's place of business, which she had passed in the darkness before coming to the insufficiently guarded roll-way into which she fell. She had no occasion to go to the drug store to "transact the business to which it was appropriated."

A railroad company owe a duty, in the matter of making the access to their station safe, to the hackman plying his vocation there to meet the trains as well as to the passengers from whom they derive a profit. *Tobin* v. *P. S. & P. R. R. Co.* 59 Maine, 183.

So do the owners of a private wharf to one employed to carry the mail from a steamboat to whose proprietors the owners of the wharf had let a part of it; and this not on the ground of any contract between them and the plaintiff, but because of the duty which the law imposed upon them, to make and keep their wharf safe for all who were on it for a lawful business purpose, so long as they should permit it to be open and used. *Wendell* v. *Baxter*, 12 Gray, 494, citing: *Collett* v. *London & N. W. Railway Co.* 16 Ad. & El. 984, where the defendants were held liable for an injury suffered by an agent of the post office, whom the post master general required them to carry; ERLE, J. remarking, "The defendants have a public duty to perform in conveying the servants of the public safely."

So here. The company owe a duty to all public officers whose attendance there is made necessary by the business carried on at their wharf. It is too subtle a distinction to say, that though an invitation to the customs officer whose duty it was to look after the landing of the coal which the steamer was about to discharge, might perhaps be implied, it can not be to one whose presence was needful to prevent the frauds on the revenue, for which the arrival of any foreign going vessel, whatever her cargo, affords facilities. It avails nothing to say that the owners had not dedicated their wharf to smuggling and did not

invite the plaintiff to come there to prevent it. They had dedicated their wharf to the use of vessels bringing merchandise from foreign ports, and without watchfulness on the part of the customs officers it was sure to be misused. The owners of places used for public entertainments do not dedicate them to pickpockets or mobs, but they none the less owe a duty to the policeman who attends when there is a great crowd, to prevent violence and depredation. The instruction given by the presiding justice with respect to the circumstances which it was necessary for the jury to find in order to constitute an implied invitation to plaintiff, seems to have been carefully considered and affords the defendants no ground for complaint. It follows that the requested instruction was rightly refused. Under the motion to set aside the verdict as against evidence, defendants' counsel present with much force two points which always arise in cases of this description. 1. That defendants were guilty of no negligence in omitting to place a railing at the sides of the gangway into which the plaintiff fell, or a light to show where it was. 2. That plaintiffs's injury was caused by his own negligence. We have given to the positions, taken in defence, the deliberate consideration which their importance merits.

We remark in the first place, that both questions were for the jury and their conclusions are not to be set aside unless it is found that they were manifestly wrong.

1. Was it a defect to leave this gangway, cutting the direct passage along the wharf transversely, and six or eight feet deep where the plaintiff fell, without a railing at its sides, or a light at night, when a newly arrived ship was lying there?

Everything which the defendants' counsel have said in support of their position that there was no negligence in so doing, might be said with equal force, in respect to the rollway cutting transversely the platform in front of the defendant's block of stores in *Stratton* v. *Staples*, 59 Maine, 94. The question is, did a reasonable regard for the safety of those whom the use to which the defendants had devoted their wharf might be expected to bring there, require something in the way of safeguard at this gangway?

In principle the case is the same as all others, (and they are numerous) arising from injuries received in unguarded elevators and other arrangements and contrivances for business purposes in business places. In *Indermaur* v. *Dames*, 2 L. R. C. P. 311, though the unfenced shaft through which the plaintiff fell on defendant's premises, was constructed in the manner usual in the defendant's business, the defendant was not exonerated, as it appeared that the shaft could, when not in use, have been fenced without injury to the business.

The case is an instructive one, as reported from the Exchequer Chamber, *ubi supra*, and also in the discussion upon the rule to set aside the verdict and grant a new trial in the Common Pleas, 1 L. R. C. P. 274. In fitting up a place for business purposes, one is at liberty to consult his own convenience and profit, but not without a reasonable regard for the safety of those whom his operations bring upon his premises, upon lawful business errands. In particular, everything which may operate as a trap or pitfall for those not familiar with the place or moving in a dim light, is to be avoided, if reasonable care will accomplish security to life and limb in that respect. Counsel ask in substance, why call upon the defendants to fence this gangway more than the sides or end of the wharf? It is a sufficient answer that a railing at the sides and end would, even if movable, be likely to be an unreasonably troublesome obstruction to the business for which the wharf was prepared, and it would certainly be from its extent unreasonably expensive to maintain. Not so in either respect at the gangway.

Nor is there so great a liability to accident at the sides or end as there is in such a gangway, midway, where one's eye catches a sense of security from seeing in an uncertain light the bulk of the wharf and of the vessel lying beside it extending before him. Considering how easy it would have been by means of a single piece of railing, fitted upon posts of proper height, movable like those at railroad crossings if desired, to guard against any such mischief as happened here, we think the jury did not err in saying that a reasonable regard for the safety of human beings required the defendants either to put it there or take some other

means to warn a man, engaged as the plaintiff was, of danger at the gangway.

II. The question as to contributory negligence on the part of the plaintiff was a more doubtful one.

Defendants' counsel put the dilemma thus: "If the night is light enough to see the gangway, no railing or light is necessary to enable a person to avoid it, and if the night is too dark to allow of its being seen, then a person groping around in the dark and unconsciously walking into it is guilty of such negligence as to preclude him from recovering." But if this plausible statement is absolutely correct, there never can be an accident of this description for which the injured party can recover. The idea seems to be that there is no necessity for any precaution on the part of the wharf owners, because constant vigilance on the part of those who come there when it is light enough to see the danger will enable them to avoid it; and, duty or no duty, they must not come without a light in the night time, or they will be set down as wanting in ordinary care, and so forfeit their right to protection or compensation. The argument establishes, if anything, too much. The questions are not of a character to be disposed of by a little neat logic. They are rather, as remarked by the court in *Elliott* v. *Pray*, 10 Allen, 384, "questions which can be best determined by practical men on a view of all the facts and circumstances bearing on the issue." No such sweeping syllogism as this presented by defendants' counsel can be adopted as a rule of decision. A man may be deceived by a half light, such as is described in the testimony here, and, using due care himself, may meet with an accident by falling into a chasm where he was not bound to expect to find one unguarded, and in such case, if he is not a mere licensee or trespasser, and the owner of the premises owes him a duty, he is entitled to his remedy.

It is noticeable that in arguing this point on the motion, the learned counsel for defendants fall back in part, upon their original contention that the customs officer "was obliged to move about at his own peril." Not so. His duty carried him there in

consequence of, and in connection with the business which defendants had established there. The jury probably thought that if he went as a section of a torchlight procession he might as well have stayed at home; that he was not in search of an honest man, and had no need of a lantern; that it would take a cordon of custom house officers, exhibiting themselves with lanterns, numerous enough to surround the vessel constantly from the time she hauled into the wharf till she was unloaded, to prevent the mischief, while prudently conducted observation by one or two watching at the right times and seasons without making their presence known, would answer the same purpose. Seeing that the defendants did owe a duty to the public officer, and seeing too how easily they might, to all appearance, by a little precaution, have prevented his being made a cripple, if the "practical men" before whom the case was tried made allowances for the liability of the human senses to deception in a dim light, and acquitted him of a want of ordinary care in the premises, we are not satisfied that the conclusion they reached on this question of contributory negligence, is so plainly unjustifiable as to require us to send the case to a new trial.

No complaint is made as to the amount of damages.

Motion and exceptions overruled.

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

PATRICK SILVER *vs.* PATIENCE WORCESTER, executrix of the will of GEORGE WORCESTER.

Cumberland. Opinion June 6, 1881.

Auditor. Evidence. Books of account.

An auditor can receive only such evidence as would be admissible were the case he is hearing on trial in court.

In a suit for labor and services brought or prosecuted against the estate of a deceased person, and heard before an auditor, the plaintiff, unless the defendant is a witness in relation to facts occurring before the death of such deceased person, cannot testify as to such facts except as allowed under the common

law of the State to present in suitable cases his books of account and verify them by his suppletory oath. Unless the entries in such books are intelligible in themselves as setting forth in substance the facts which constitute a right of action in plaintiff's favor against the deceased, the explanation of such entries must come from witnesses other than the plaintiff. It is not competent for him to testify that charges which apparently represent services rendered for third persons, or which do not indicate that they were rendered to the deceased, were actually so rendered.

It is not competent for a defendant in such case to give in evidence his counter-entries of work done by the plaintiff, or to prove by his books the rate of wages which he is to pay.

ON EXCEPTIONS from superior court, Cumberland.

Assumpsit for labor performed for the testator in his lifetime.

The case was heard by an auditor and the following are the material portions of his report.

"Pursuant to the foregoing commission, being first duly sworn, and after giving due notice to both parties, I have heard, examined and fully considered their evidence and arguments, and I now respectfully report as follows:

"Confessedly the plaintiff was a joiner and carpenter in the service and employ of defendant's testator in each of the months named in the plaintiff's declaration. . . . . .

"Plaintiff offered books 1, 2, 3, 4, and his suppletory oath. I ruled that original entries made by the plaintiff daily in the ordinary course of his business, showing his account for labor in items not exceeding $6.67, accompanied by his suppletory oath would be evidence at common law and received them on condition that the plaintiff would exhibit the books in court though defendant's counsel seasonably objected. Plaintiff had no other evidence to the question of time and if that should have been excluded, he can be allowed no more time than defendant admits." . . . . . .

"Plaintiff offered to testify that all charges in the books not 'crossed out,' were of labor done by him for the defendant's testator, at the latter's request, and that names of other persons in some of the entries were written to designate owners of premises where work was done. The defendant's counsel objected that this would contradict the written entries, some of which, as he claimed, were against other persons."

"I deemed it expedient to admit this testimony, and taking it and the books as evidence, I find that the plaintiff worked for the defendant's testator the time accredited in the account stated at the close of this report."

The report further shows that the defendant offered the testator's books in his handwriting as evidence of time of service and wages, and that they were excluded by the auditor.

At the trial before the court without the intervention of a jury subject to exceptions in matters of law, the only evidence offered by either party was the report of the auditor; and the presiding justice ruled as a matter of law,

First, That the auditor rightfully admitted the plaintiff's books and rightfully allowed the plaintiff to testify as stated in his report.

Second, That the defendant's books were not admissible for the purposes named in the report and that the auditor rightfully excluded them. To these rulings the defendant excepted.

J. H. Fogg, for the plaintiff.

Revised Statutes c. 82, § 87, refers expressly to the five preceding sections and does not abrogate or annul the rule of evidence as it existed at common law relative to the books and suppletory oath of a party. *Kelton* v. *Hill*, 58 Maine, 114; *Mitchell* v. *Belknap*, 23 Maine, 475; *Cogswell* v. *Dolliver*, 2 Mass. 217; *Dunn* v. *Whitney*, 10 Maine, 10; *Mathes* v. *Robinson*, 8 Met. 269.

The plaintiff had a right to explain the entries in his books in the manner set forth in the auditor's report. *Furlong* v. *Hysom*, 35 Maine, 332; *James* v. *Spaulding*, 4 Gray. 451; *Barker* v. *Haskell*, 9 Cush. 218.

The defendant's books were rightfully excluded. *Morse* v. *Potter*, 4 Gray, 292; *Towle* v. *Blake*, 38 Maine, 95.

John J. Perry, for the defendant, cited: 1 Wharton's Ev. 465; *Kelton* v. *Hill*, 58 Maine, 114; 1 Greenl. Ev. 140, note, 141; *Cogswell* v. *Dolliver*, 2 Mass. 217; *Mathes* v. *Robinson*, 8 Met. 269; *Faxon* v. *Hollis*, 13 Mass. 427; *Dunn* v. *Whitney*, 10 Maine, 10; *Amee* v. *Wilson*, 22 Maine, 116; *Mitchell* v. *Belknap*, 23 Maine, 475; *Keith* v. *Kibbe*, 10 Cush. 35;

Gorman v. *Montgomery*, 1 Allen, 416; *Dexter* v. *Booth*, 2 Allen, 559; *Towle* v. *Blake*, 38 Maine, 95; *Faunce* v. *Gray*, 21 Pick. 243; *Morse* v. *Potter*, 4 Gray, 292; *Augusta* v. *Windsor*, 19 Maine, 317; *McLellan* v. *Crofton*, 6 Maine, 307; *Union Bank* v. *Knapp*, 3 Pick. 96; *Faxon* v. *Hollis*, 13 Mass. 426; *Prince* v. *Smith*, 4 Mass. 455; 1 Salk. 285; *Leighton* v. *Manson*, 14 Maine, 208.

BARROWS, J. An auditor can receive only such evidence as would be admissible were the case he is hearing on trial in court, and his report is liable to be impeached and must be amended so far as it is founded upon any evidence not legally competent. *Paine* v. *M. M. Ins. Co.* 69 Maine, 568.

This suit being against the representative of a party deceased, the testimony of the plaintiff is competent only to the same extent as it would have been, by way of suppletory oath to his books, prior to the passage of the general statute relieving parties and interested witnesses from the disability under which they labored at common law. See *Kelton* v. *Hill*, 58 Maine, 114; *Swain* v. *Cheney*, 41 N. H. 234.

The exception to the ancient rule of the common law was one introduced by necessity, to prevent a failure of justice in cases where there was little probability that anybody could be found aside from the parties who could give testimony touching certain transactions which singly were of no great pecuniary importance but liable to become so by aggregation, and thus in the end to be the subject of controversy.

Before the statute making parties witnesses, in suits prosecuted while both were living was enacted, the courts, in some of the New England States especially, had occasion often to consider the extent and limitations of this exception; and in certain directions these limitations are distinct and clearly established, while in others we find a border land of debatable questions which seems to be continually enlarging notwithstanding the often repeated declarations of the court that the exception was one which should not be extended unless in cases of necessity, and is not to be favored.

Thus the rule that the suppletory oath should not be received in support of cash items above forty shillings or $6.67,

has been firmly adhered to, *Dunn* v. *Whitney*, 10 Maine, 9; nor of charges for a single piece of work occupying considerable time and done under circumstances where it might well be supposed that other proof might be had. *Towle* v. *Blake*, 38 Maine, 95; *Earle* v. *Sawyer*, 6 Cush. 142; *Henshaw* v. *Davis*, 5 Cush. 145; nor of the rate of wages or price of goods. *Towle* v. *Blake*, *supra*; *Mitchell* v. *Belknap*, 23 Maine, 475.

On the other hand the decisions, affected in some of the States by statutory provisions, have been by no means so uniform where the questions have been touching the bulk and weight of the goods sold; [Compare *Shillaber* v. *Bingham*, 3 Dane's Abr. 321; *Leach* v. *Shepard*, 5 Vt. 363; *Kingsland* v. *Adams*, 10 Vt. 201; *Clark* v. *Perry*, 17 Maine, 175; and *Mitchell* v. *Belknap*, *supra*, with *Leighton* v. *Manson*, 14 Maine, 208]; or touching the mode in which the books shall be kept; or the character of the memoranda as requiring explanation; [Compare *Faxon* v. *Hollis*, 13 Mass. 427; *Smith* v. *Sanford*, 12 Pick. 139; *Hall* v. *Glidden*, 39 Maine, 445; with *Forsythe* v. *Norcross*, 5 Watts, 432; *Walter* v. *Bollman*, 8 Watts, 544; and *Littlefield* v. *Rice*, 10 Met. 287 with *Luce* v. *Doane*, 38 Maine, 478]. Compare also the requisites for admissibility as stated in note to Greenl. on Ev. vol. 1, § 118, and *Dwinel* v. *Pottle*, 31 Maine, 167, with *Mathes* v. *Robinson*, 8 Met. 269; *Witherell* v. *Swan*, 32 Maine, 247, and *Hooper* v. *Taylor*, 39 Maine, 224, and the cases therein recited.

In some of the cases there cited, it is obvious that the record disclosed very little of the claim and transaction which with the aid of his own suppletory oath, the party was endeavoring to establish. The reliance must have been largely upon the testimony produced by the party to explain and apply the record which was not in itself intelligible. How much of the explanation came from disinterested witnesses does not always appear. Yet the general rule has been recognized even in the cases which at the first glance seem like exceptions. Thus in *Witherell* v. *Swan*, 32 Maine, 250, the court refer expressly to the requirement that the book shall be kept intelligibly, fairly and truthfully, while they admit in a suit for the fees of a surveyor of

lumber, the book on which he recorded his surveys wherein no charge was made against the defendant, except as implied by the record of his name as the buyer of the lumber surveyed. The book seems to have been admitted because the statute imposed upon the buyer the duty to pay for the surveying and fixed the amount of the fee and so no direct charge to the defendant was deemed necessary.

The case of *Furlong* v. *Hysom*, 35 Maine, 332, where the charges on the book were made to the wife, and the suit was against the husband, proceeded in like manner upon the legal liability of the husband to pay for suitable and necessary articles furnished to the wife, and the books were received with the suppletory oath to establish the sale and delivery only.

Careful attention to the precise points which were in controversy between the litigating parties and upon which the testimony was received, will enable us to reconcile some apparent discrepancies in the decisions, and to see that the courts have seldom gone beyond the requirements of *necessity*, preferring to leave those who fail to furnish better evidence of their contracts where it can be had, or to have frequent settlements when the transactions are fresh in the minds of both parties, to the consequences of their own neglect.

Thus it will be seen that in cases where the goods are delivered to third parties or the services are rendered at the call or for the apparent benefit of third parties, and the controversy between the litigant is not merely as to amount or quantity, but whether the defendant is chargeable, the book and suppletory oath are held not to be admissible, unless proof of the defendant's liability is furnished *aliunde*, *Soper* v. *Veazie*, 32 Maine, 122; *Mitchell* v. *Belknap*, 23 Maine, 481; *Keith* v. *Kibbe*, 10 Cush. 35; *Amee* v. *Wilson*, 22 Maine, 116.

In *Kendall* v. *Field*, 14 Maine, 30; the testimony and shingle were admitted only to show the amount of labor that was done under a contract otherwise proved.

In *Tremain* v. *Edwards*, 7 Cush. 414, the testimony under consideration, aside from the mere matter of the items of the

account was drawn out by defendant on cross-examination and for this reason deemed unobjectionable.

Nor is there anything inconsistent with this in *Ball* v. *Gates*, 12 Met. 491, where the liability was established by testimony *aliunde*, but, as might be expected, the person who called for the work was unable to recollect the particular items, as to which the suppletory oath to the books was therefore allowed.

So in *James* v. *Spaulding*, 4 Gray, 451, the parol evidence to show that defendant requested the plaintiff to make his charges in a certain form, was not the testimony of *the plaintiff himself*, nor was the charge in the book relied upon *by him* to show to whom the credit was given. He claimed and was allowed to prove by the testimony of others that it was given to the defendant and not to the person named in the book.

It may be fairly set down as settled law that in all such cases (except as to *details* which the third party could not be expected to remember) the liability of the defendant must be established by proof outside of the plaintiff and his books.

Neither is this species of evidence admissible to prove a special contract, price, rate of wages, value of goods, or other matters about which it would be reasonable to suppose that the testimony of disinterested witnesses might be procured. The decisions are also uniform in support of the doctrine stated by PARKER, C. J. in *Cummings* v. *Nichols*, 13 N. H. 425, thus; "The rule does not extend so far as to authorize the use of his book by a party to curtail or defend the claims of other parties against him." Thus it cannot be shown by the defendant's entries how much time the person performing the service lost, while engaged at work for defendant. *McKewn* v. *Barksdale*, 2 N. & McC. 17. Nor where the plaintiff goes on his original entries, will the defendant be allowed to give in evidence his own counter entries of the same work. *Summers* v. *McKim*, 12 S. & R. 405. To the same effect is *Morse* v. *Potter*, 4 Gray, 292.

It is well said in Swift's Evidence, 81, 82; "The book ought to be kept in a fair and regular manner, and the articles truly entered at the time of the delivery, or the performance of the services, so as to be consistent with, and support the oath of the

party; for the book is to be considered the essential part of the evidence and the oath of the party as supplementary to it."

In *Cummings* v. *Nichols*, *ubi supra*, Chief Justice PARKER epitomizes the doctrine as follows (citing *Eastman* v. *Moulton*, 3 N. H. 157): "there is no particular form in which the book of a party must be kept in order to its admission as evidence in support of his account. But it must be kept in such a mode as to show of itself a charge against the adverse party, and the nature of that charge, so that the book in connection with the party's oath that the book is his original book of entries, that the charges are in his hand writing, that they were made at the time they purport to have been made, and at or near the time of the delivery of the articles or the performance of the services, will show the nature of the claim without further evidence from the party to interpret the meaning of arbitrary characters, the signification of which is known only to himself. In ordinary cases, the suppletory evidence of the party in support of his book goes no further than to the particulars above specified." The case before us is presented upon exceptions to the ruling of the judge, affirming as correct the doings of an auditor in the admission and exclusion of testimony. The auditor's report shows his work carefully, intelligently, and (with a single exception which the report itself furnishes the means of correcting,) we think correctly done. The plaintiff sues to recover a balance which he says is due him from the estate of George Worcester, defendant's testator, for wages earned during the last four years of Worcester's life. That he was more or less, but not constantly, in Worcester's employ during every month in that period was admitted by the defendant; but she disputed the number of days' work claimed in certain months, and the rate of wages demanded.

To sustain his charges, plaintiff offered certain diaries kept by him for the years through which the account extended, and his suppletory oath to the entries therein made. If the entries had purported to be his daily or contemporaneous account of the time employed for Worcester, we see no reason why they should not be admitted with his suppletory oath to their correctness. But very few of them bear any such signification. Very many

of them import something inconsistent, being in form, charges similar to those which he was accustomed to make when he worked for other people, and not in any manner on the face of them connected with Worcester. They are in many cases, distinct charges of the work to individuals other than Worcester, in others, apparently memoranda of the place or kind of work he was engaged in. That in more or less of these days he was working for Worcester, seems probable. The auditor reports that, without allowing entries like these in some of the months, the time admitted by the defendant cannot be made up. Under these circumstances, the auditor, against defendant's objections, allowed plaintiff to testify "that all charges in the books not crossed out, were of labor done by him for defendant's testator at the latter's request, and that names of other persons in some of the entries were written to designate owners of premises where work was done."

This we think went beyond the proper limitations of proof by book and suppletory oath. In effect it was making plaintiff a witness generally, merely refreshing his own memory by the entries, instead of verifying the books by his oath.

Rejecting such entries and testimony, the auditor says will reduce plaintiff's account of the time "to the time admitted by the defendant in all the disputed months except September, 1877, and January, 1878," and will reduce his claim for said September, nine and one-half hours. This should be done, not because the form of the charges is "not susceptible of explanation by parol," but because in a suit against the representative of a deceased party, the explanation must come from other testimony than that of the plaintiff, as in *James* v. *Spaulding*, 4 Gray, 451. The rate of wages seems to have been fixed by the auditor upon testimony of disinterested witnesses. The books and accounts offered by the defendant were properly rejected, according to the decisions above referred to, the correctness of which we see no occasion to question. Neither the rate of wages nor the time of service could be properly shown by the entries of the defendant's testator. His books do not appear to have been called for, or relied upon by the plaintiff; and there is no ground of necessity upon

which such entries made by a party can become evidence which it is competent for him to offer in his own favor.

The auditor's report furnishes a basis for a new and (so far as appears) correct computation. It seems to have been framed so as to present the questions we have considered, and protect the rights of both parties, without making a rehearing before him necessary.

Exceptions sustained.

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

GEORGE F. HITCHINGS *vs.* JOHN W. C. MORRISON.

Cumberland. Opinion June 7, 1881.

Real estate. Title by prescription.

J owning a lot of land on the south side of Green street, in P, with a frontage of one hundred and twenty-six feet, conveyed a piece thereof with a frontage of sixty feet to the defendant, the latter supposing that by the terms of his deed, his lot extended to a certain fence which would give him a frontage of sixty-six feet. Soon after the delivery of his deed, the defendant entered, occupied and cultivated the lot to the fence for more than twenty consecutive years; *Held*, that if the defendant claimed title to the fence during his entire occupation, his title ripened into an absolute title by disseizin, although he was mistaken as to the true bound.

ON MOTION to set aside the verdict.

Writ of entry to recover a lot of land in Portland.

The facts are stated in the opinion.

Webb and Haskell, for the plaintiff.

Manifestly the conveyances give the demandant a title to the land demanded, and the tenant can prevail only upon proof of a disseizin by himself of the demandant for at least twenty years.

The law of this State is said to be that "a man claiming title only to a specified line, capable of being ascertained, cannot, by ignorantly having possession up to another line, acquire a title by disseizin to land lying between the two which he does not intentionally claim." *Worcester* v. *Lord*, 56 Maine, 265; *Dow* v. *McKenney*, 64 Maine, 138.

The line of the tenant's south-easterly limit was fixed in his title deed as sixty feet from and parallel to the Gould land. This line is capable of being ascertained upon the surface of the ground without mistake or chance for question, and its actual location was, in fact, not in dispute at the trial. The Gould line was well known and recognized by both parties.

The tenant testified, that he moved on to the premises in May, 1856; that he did not then take any steps to ascertain the point at which sixty feet from the Gould line would terminate; that the first time he learned that his deed did not reach up to the fence (which was sixty-six feet beyond the Gould line) was a year ago, and that prior to that time he had the impression that the fence was the line, and that whatever he did was done under that belief; that after he moved upon the premises he discovered a sink spout emptying on the land, and told Jose he should charge him a nominal fee for the same, at which Mr. Jose did not seem pleased; that Jose did not promise or agree to cut it off.

H. N. Jose, called by tenant, testified: "At the time I sold tenant his land, I did not know whether the lot, as inclosed, contained more than sixty feet. I sold sixty feet. From that time to the time of this controversy, I never knew where, on the face of the earth, sixty feet from the Gould line would be. I made no point about the fences, as I owned the whole property. I put no stake down at the time I sold to Morrison."

Jose being the owner of one hundred and sixty feet southeast of the Gould land, by selling sixty feet thereof to the tenant, did not thereby surrender or abandon his possession of the remaining one hundred feet, but continued it, both in fact and in law, and the demandant, claiming title thereto under him, should have the same adjudged in his favor in this action.

Ardon W. Coombs, for the defendant.

VIRGIN, J. In 1823, Sarah T. Chase conveyed to Nathan Babcock a rectangular parcel of land, situated on the west side of Green street, in Portland, four rods wide on the street and extending back nine and one-half rods, with a dwelling house upon it. On the south line of the lot was a fence and two or

three feet north of the fence, a row of ash trees now standing.

In 1825, John Mussey conveyed to Babcock another rectangular lot, adjoining the former on the south, and separated therefrom by the fence, with a frontage of sixty feet and extending as far back as the other.

In 1845, Benj. Dodge conveyed to Barnabas Palmer another lot adjoining the second on the south, having a frontage of thirty-three feet.

In April, 1856, H. N. Jose, having previously obtained the title to all these parcels of land, conveyed to the defendant a part of the first, to wit, sixty feet in width, measuring from its northern boundary on the street, southerly, thus leaving the strip of land between the southern boundary of the land thus conveyed, and the fence, six feet in width and one hundred and fifty-seven feet in length, not covered by the deed. Subsequently, the title to the remainder of the three lots, including the six feet strip, came by sundry mesne conveyances to the plaintiff, who now seeks to recover possession of the narrow strip.

The defendant claims title to the land in controversy by disseizin based upon adverse possession of more than twenty-two years prior to the commencement of the plaintiff's action in December, 1878.

The defendant proved that in May, 1856, he moved into the dwelling house, standing upon the land covered by his deed, and took possession of the lot as it was inclosed, occupying, cultivating and improving the land to the fence, having no suspicion that his deed did not include the whole lot that was conveyed to Babcock; that he and his lessees have been in the sole and continuous occupation, and improvement of the disputed strip ever since; and that nobody ever questioned or interfered with his open and notorious possession, until the fall of 1878, when the plaintiff undertook to erect a fence upon the north line of the narrow strip, but was prevented by the defendant's lessee, thus making out a *prima facie* case of disseizin. R. S., c. 105, § 10; *Worcester* v. *Lord*, 56 Maine, 265, 270.

The plaintiff did not deny these facts, but contended that the defendant's possession was not adverse in its character, that it

was neither taken nor held with the intention of asserting title to land not included in his deed, but on the contrary, that it was under a mistaken belief that his title extended clear to the fence. This was the principal question submitted to the jury, who, under instructions to which no exceptions have been taken, found the issue in behalf of the defendant. And now the plaintiff most earnestly contends upon the authority of *Worcester* v. *Lord*, *supra* and *Dow* v. *McKenney*, 64 Maine, 138, that the verdict ought to be set aside.

No question is raised as to the extent, duration or continuity of the defendant's occupation. If it was not accompanied by a claim of title, in fact, but was merely inadvertence or mistake as to the extent of his land, without intention to claim title to the extent of his occupation, but only to the bounds described in his deed, then the verdict is against law. *Lincoln* v. *Edgecomb*, 31 Maine, 345; *Abbott* v. *Abbott*, 51 Maine, 584; *Worcester* v. *Lord*, *supra*, and the earlier cases therein cited; *Dow* v. *McKenney*, 64 Maine, 138. But if, on the contrary, he did claim title clear to the fence which was not on the true line as described in his deed, although he by mistake supposed it was, the verdict is not against law. *Abbott* v. *Abbott*, *supra*. If, however, the evidence is not sufficient to warrant the jury in finding such claim of title, then the verdict is against evidence, and should be set aside for that cause; otherwise there should be judgment on the verdict.

We think the verdict must stand. The undisputed evidence on the part of the defendant is, that he and his grantor, at the latter's solicitation, "went together to look at" "the Babcock house and lot," with a view of the defendant's purchasing it; the grantor "showed him over the premises and house;" that they walked about the lot which was inclosed on the southerly side the same as now; that nothing was said about the width of the lot, and the defendant did not know the width, but supposed he bargained for the whole lot; that the conveyance followed in a few days; that he entered into possession in May following, cultivated a vegetable garden in the back part of the lot and a flower garden in the front, both up to the fence; that in 1857,

discovering a drain or spout discharging water into the disputed land from a house on the adjoining lot belonging to the grantor, the defendant called the former's attention to it and told him he "should have to charge him a nominal fee for entering his premises to prevent his acquiring a right;" that the grantor did not assert any right and did not seem pleased with the suggestion, but that the drain was soon discontinued; that several years afterwards, the defendant saw the grantor's tenant opening a cess-pool on the disputed territory which the defendant "forbade and it was stopped," etc. From these facts, we think the jury were warranted in finding the defendant was claiming a title commensurate with his occupation, notwithstanding his mistaken view as to the boundary in his deed. This view does exact justice to all concerned.

Motion overruled.
Judgment on the verdict.

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

SAMUEL R. JACKSON *vs.* ALBERT P. GOULD.

Knox. Opinion June 7, 1881.

R. S., c. 82, § § 3, 4, 7. Review.

The action of review, when a matter of right, should be brought within one year from the date of the rendition of judgment.

Where a party is entitled to a writ of review as a matter of right, and fails to bring it within the time limited by the statute, he may still be allowed the writ, in the discretion of the court, upon petition.

R. S., c. 82 § § 3, 4, applies to non-resident defendants, as well as to inhabitants temporarily absent.

ON REPORT.

Petition for review.

The parties agreed that the case should be reported for the decision of the law court, that court to have the same powers as the judge at *nisi prius*, all the evidence to be subject to any legal objections, the court to render such judgment as the case required.

The opinion states the case.

Strout and Holmes, for the petitioner, cited: R. S., c. 89, § 1, specifications 1 and 7; *Holmes* v. *Fox*, 19 Maine, 107; *Shurtleff* v. *Thompson*, 63 Maine, 118; *Eastman* v. *Wadleigh*, 65 Maine, 251; *Austin* v. *Dunham*, 65 Maine, 533; *Jones* v. *Eaton*, 51 Maine, 386.

A. P. Gould, for the defendant, contended that the petitioner was not entitled to a review as of right because more than one year had elapsed since the default was entered, and that was the date from which the limitation began to run, and not the time of entering up the judgment where the action was continued for judgment for a year. A reasonable construction is to be given to the statute, and a beneficial effect is to be given to it if possible.

If it requires the withholding of the execution for one year after judgment, in case of a judgment against a non-resident, the action itself would be lost, as a judgment against a non-resident is simply a judgment *in rem* against the property attached; and a withholding of his execution for thirty days after a final record of the judgment would operate as a discontinuance of the action itself.

A history of the legislation upon the subject shows that could not have been the intention of the legislature.

Nor is the petitioner entitled to a review as a matter of discretion. His petition does not set forth what his defence is, so that it can be seen that justice to him requires a review. Nor does it set forth the names of witnesses by whom he expects to prove a defence, nor any facts which he expects to prove by witnesses. See *Warren* v. *Hope*, 6 Maine, 479.

In *Boston* v. *Robbins*, 116 Mass. 313, the court say, "But if upon a petition in due form and competent evidence, the judge is of opinion that the petitioner has a substantial defence to the action upon the merits, which by accident and mistake, and without fault on his part, he has had no opportunity of presenting to the court and jury, it is within the discretion of the judge to grant a review.

If review is granted in this case the court should impose conditions, it should not be granted simply to allow the petitioner to set up the statute of limitations. *Austin* v. *Dunham*, 65 Maine, 533; *Jones* v. *Eaton*, 51 Maine, 386.

SYMONDS, J. On the second day of April, 1879, in Knox county, judgment was rendered in favor of the respondent against the petitioner for the sum of $8168.16, debt and costs, and on the sixteenth day of April, 1879, execution therefor issued against, and on May 2, 1879 was levied upon the real estate attached.

The petitioner was not an inhabitant or resident of Maine at the date of the writ and attachment, nor during the pendency of the action, and no service was made upon him before entry. At the return term, September, 1874, after order of notice by publication in a Rockland newspaper, the case was continued. The docket entry at the December term, 1874, shows that the notice ordered in September was proved to have been given, but the action was continued to the March, and again to the September term, 1875, when a new notice by publication in another Rockland newspaper was ordered, and this order was renewed from term to term till the March term, 1878, when the notice was proved, the action defaulted and continued for judgment. The docket for the September and December terms, 1878, shows only further continuances for judgment, but at the March term, 1879, after the expiration of a year from the date of default, the judgment was rendered and execution issued as at first stated.

The petition for review was entered at the September term, 1879, and by agreement of counsel its statements, so far as they are competent and material, are to be taken as a part of the testimony. They show the non-residence of the petitioner, his absence from the State, that there was no appearance of counsel in his behalf, and that he had no notice of the action till the levy was made. No legal evidence contradicts the statements of the petition on these points. It is not proved that the petitioner received or saw the newspapers containing the notices published by order of the court. *Freeman* v. *Morey*, 45 Maine, 50.

The petition asks the court in the exercise of its discretion to grant the review, but in argument it is claimed as of right under R. S., c. 82, § § 3, 4. If it were a matter of right, it was unnecessary to petition for leave. By doing that, the time

within which it could in any event be of right has passed. The action of review should have been brought, without petition, within the year from judgment rendered, if there was a legal right to be enforced. R. S., c. 89, § 7. The lapse of time has clearly barred the right to review, if one existed. It is now only a question of the use of discretionary power to review the judgment. R. S., c. 82, § 5.

Whether the bond mentioned in R. S., c. 82, § § 4, 5, was given before the execution was procured, or not, does not appear. If this bond was given, there was no irregularity in the issuing of the execution. If the execution issued without it, "through accident, inadvertence or mistake," under the law of 1877, c. 149, the levy may still be valid unless the judgment is reversed upon review. In either case the defendant in that action, if within the provision of R. S., c. 82, § 4, might bring an action of review as of right during the year therein allowed.

If the third and fourth sections of R. S., c. 82, were considered without reference to their history, a doubt might arise whether they included the case of a defendant, like the present petitioner, who was not an inhabitant of the State during the pendency of the action against him, and had no notice of it. But no such question is raised in the argument. The reason for their application to non-residents, as well as to inhabitants temporarily absent, is equally obvious and strong. The earlier statutes, as we shall see, show such intention. The act of 1877 indicates that section four was understood by the legislature to refer to all absent defendants without notice, and in *Davis* v. *Stevens*, 57 Maine, 593, 599, it was distinctly held to apply to a defendant who "during the pendency of the suit . . . was not an inhabitant of this State, had no notice except by publication, and made no appearance." The case here presented, therefore, so far as the parties are concerned, falls within the provisions of these sections.

But upon the construction of section four it is claimed that the year within which review is a matter of right dates from the entry of default, not from the final rendering of judgment; that the continuance for judgment for a year after default serves the

purpose of the statute, gives the absent defendant the year within which to apply for review, and that the date when by the default the charge in the declaration is admitted to be true, not the time of the actual entering and recording of the judgment, should for this purpose be deemed the time of rendering judgment upon default,—the continuance for judgment, it is urged, being in such case only so much delay in making up the judgment and entering it of record. More than a year after default having expired in this case before the petition for review, the petitioner, it is claimed, was not at its date in position to bring an action of review as a matter of right.

There is one argument in favor of this construction strong enough to force it upon the court, if it were possible to reconcile it with the language of the statute, and with other provisions of law. It must be conceded that, if this construction is not adopted, the attachment of property,—against which only judgment is rendered in such case, *Eastman* v. *Wadleigh*, 65 Maine, 251,—will always be lost before execution can be had upon the judgment without filing the bond. The attachment expires in thirty days after final judgment in the original suit. The execution without the bond cannot be obtained till one year after such judgment. The statutes, R. S., c. 82, § 126, contain a special provision that in the cases mentioned in this fourth section the first execution "may be issued not less than one, nor more than two years from the time of judgment," an exception to the usual limitation of one year for the first execution; but they nowhere provide for the continuance of the attachment in such cases beyond the ordinary time of thirty days from final judgment. The process of the court, then, unless the sections are construed as the respondent claims, would hold the property at the date of the judgment, but not at the date of the execution. The final process at best could only be valid against the property which had been attached, so far as no superior rights had intervened between the dissolving of the attachment and the issuing of the execution. This is a serious difficulty in the constructiou of section four; but there are reasons which induce us to regard the want of a provision continuing the attachment

in force during the year and till a levy could be made upon the execution as a *casus omissus*,(*) rather than as compelling or justifying the construction claimed by the respondent.

It is to be observed that the first act in this State, relating to the subject, 1821, c. 59, § 7; stat. Mass. 1798, February 17, § 5, clearly includes the case of non-residents, who have no notice of the suit, but makes no provision for issuing the execution at any time without the bond. It was to be stayed till the bond was filed. The limitation of one year related only to the suit brought by the absent defendant to reverse, annul or alter the judgment. That must be commenced within the year to hold the surety on the bond. There was a separate provision for giving the defendant actual notice of the pendency of the suit, by serving upon him out of the State an attested copy of the writ and officer's return thirty days before the term of rendering the judgment, and thereupon the execution might issue as usual without a bond, but real estate levied on was not to be conveyed by the plaintiff within one year.

Here were two distinct classes of cases: first, an absent defendant without notice, in which case there could be no execution without a bond; secondly, an absent defendant, served during the pendency of the action with a copy of the writ and return, in which case the execution issued in the usual course, but land levied on could not be conveyed for a year.

The revision of 1841 brings the subject somewhat into obscurity, but we think these two classes of cases were still intended to be distinguished. The absent defendants without notice were referred to in R. S., 1841, c. 115, § 3; that section applying, as we have seen in regard to the present statute, to non-residents, as well as to inhabitants absent at the time; while section four of the same chapter referred to defendants not inhabitants of the State, or within it, but who had actual notice of the suit; the words, actual notice, undoubtedly intending a legal notice, such as had been

(*)This omission of the law was supplied by stat. 1881, c. 59, enacted after Judge SYMONDS had prepared this opinion. That statute provides that any attachment made on the original writ, defaulted, the defendant being absent from the State, shall continue one year and thirty days after the judgment is rendered upon such default. REPORTER.

provided for in the law of 1821. In 1841, as in 1821, no bond was required before taking out execution in the latter case. The provision limiting the conveyance of the land levied on, however, disappears. But in the former case it was provided, c. 115, § 5, that "when judgment in any personal action shall be rendered, . . . upon the default of an absent defendant, the plaintiff shall not take out execution thereon, within one year thereafter," unless he gives the bond. This applied only to absentees without notice, and it was only to them that the seventh section gave a review as of right, "to be commenced and prosecuted . . . within one year next after the judgment was rendered." No such right was given to those who had had the actual notice of the suit, nor as to them was there to be any delay in issuing the execution.

The implication is, that against defendants absent at the date of the writ and during the pendency of the action, or, rather against their property attached, execution may issue after the year without a bond and without proof that they have had notice of the action, but this is an implication or a provision which the original act did not contain, which came into the statute only upon revision, and which was probably introduced for the reason that the surety in the bond was only liable on review brought within one year. At the expiration of the year, without review brought, the liability of the surety would be at an end if a bond had been given. So the time for issuing the first execution was extended, R. S., 1841, c. 115, § 104, and it was allowed to issue after a year without a bond.

No substantial change in these respects was made by the revisions of 1857 and 1871, although some difficulty is introduced by condensing § § 3 and 4 of the law of 1841 into one section in the later revisions. But § 4 of R. S., c. 82, still refers only to the first class of cases mentioned in the preceding section, including, therein, absent defendants who are not, as well as those who are, inhabitants of the State. The distinction is between those who have, and those who do not have, actual (legal) notice of the suit. It was not intended to give the review of right to the defendants mentioned in the last sentence of R. S., 1871, c. 82, § 3.

This examination of the statutes is only valuable in order to account for their incompleteness and want of harmony in providing for an execution to issue after the expiration of a year from the rendering of the judgment, without continuing the attachment till a levy could be made upon such an execution. It was not originally contemplated that the execution should be given without the bond. That provision came in when the statutes were revised in 1841, without the additional provision which was necessary to give it its full value or to make it wholly effective.

In all these statutes, the limitation dates from the judgment, not from the default. By the act of 1821, the suit to recover back the amount of the first judgment was to be brought in one year next after it was entered up. The language of the laws of 1841 seems to leave no doubt upon this point. The execution without the bond was not to be taken out within one year after judgment rendered upon the default. The condition of the bond was to repay the amount of damages and costs to the defendant, "if the judgment shall be reversed, upon a review to be brought by the original defendant, within one year after the rendition of the original judgment." "The defendant shall be entitled to a review of the action, as of right, to be commenced and prosecuted in the same court, within one year next after the judgment was rendered."

The later act of 1877, relating to the same subject, in two instances fixes the limitation as one year from or after "the rendition of such judgment."

While the case stands upon the docket, continued for judgment, as a matter of course no judgment has been rendered. There is none to be reviewed. An action of review, where it is of right, could not be brought. A petition for review, where it is of discretion, could not be entertained. The original action is still within the control of the court. The default may be stricken off, the case re-heard, and further proceedings may so change the result that a very different judgment may be rendered from that which it stands upon the docket awaiting.

When this petition was entered in court, the petitioner had a right, without application for leave, to bring an action of review.

The time has passed for the exercise of that right; but it is the opinion of the court that the review should still be granted if the petitioner waives the right to plead the statute of limitations in defence of the original action. Upon the petition no costs will be recovered.

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

EZRA MARSHALL *vs.* CYRUS PERKINS,
executor of the last will and testament of SEBRA DUNHAM.

Oxford. Opinion June 7, 1881.

Stat. 1872, c. 85, § 12. Executor or administrator — presentment of a claim to.

An action cannot be maintained against an executor or administrator upon a promissory note of the deceased, unless the plaintiff has seasonably presented the defendant, as required by stat. 1872, c. 85, § 12, with a written statement of his claim comprising a full description of the note, [copy] unless the defendant waived the same by making no objection to a like presentment of the note itself.

The claim must be presented in writing by the plaintiff, or his agent or attorney, its presentment by a prior holder is not sufficient.

ON REPORT.

Assumpsit upon the promissory note of Sebra Dunham, for three hundred and sixty dollars, dated September 1, 1851. The writ was dated November 19, 1878. Plea, general issue, with brief statement that the claim had not been presented in writing to the defendant as required by the statute.

The opinion states the facts that are material to the question.

Geo. A. Wilson, for the plaintiff.

Statutes are to receive such a construction as must evidently have been intended by the legislature. *Winslow* v. *Kimball*, 25 Maine, 493.

The intention of the legislature in providing that the claim must be presented in writing thirty days before suit is brought against an executor or administrator, was evidently to give the

representative notice of the existence of such a claim, and give him time and opportunity to investigate it. See *Blackington* v. *Rockland*, 66 Maine, 333; *Holbrook* v. *Holbrook*, 15 Maine, 9, for analogous cases.

The presentment of the note itself not only answered the statute requirements but performed in the fullest manner the offices desired and intended by the legislature; it was more than sufficient. *Ingalls* v. *Cole*, 47 Maine, 540; *Stimpson* v. *Monmouth Fire Ins. Co. Id.* 379; *Nichols* v. *Perry*, 58 Maine, 29.

It makes no difference that the note changed hands after it was presented for payment. The change of the claimant does not affect the defendant.

Enoch Foster, for the defendant, cited: Stat. 1872, c. 85, § 12; *Eaton* v. *Buswell*, 69 Maine, 552; *Lancey* v. *White*, 68 Maine, 30.

VIRGIN, J. Assumpsit on a promissory note given by the defendant's testator, payable to his wife, Marion Dunham or bearer, at the testator's decease, which occurred November 30, 1876. The question is, has the requirement of R. S., c. 87, § 12, as amended by stat. 1872, c. 85, § 12, been complied with. That requirement, so far as it applies to this case, is that, no action shall be maintained against an executor on a claim against his testator's estate, "unless such claim is first presented in writing, and payment demanded at least thirty days before the action is commenced."

In this case, the note itself was presented seasonably to the defendant, and payment thereof demanded; and the plaintiff contends that thereby his claim was "presented in writing," within the substantial requirement of the statute.

A substantial compliance with its provision, is a condition precedent to the maintenance of the action. *Eaton* v. *Buswell*, 69 Maine, 552. What constitutes a presenting in writing of a claim, must be determined (in the language of BARROWS, J. in *Nichols* v. *Perry*, 58 Maine, 29, 32, in construing a somewhat similar statute notice,) "by a fair and liberal construction of the statute in furtherance of its object." And considering the numerous claims meritorious and otherwise, which are frequently set up

against dead men's estates, and, in the absence of only such personal knowledge of the deceased as can be gleaned from the papers which he may have left, the great embarrassment of the administrator in determining which should be paid, and which rejected, and the desirability of seasonably paying such as shall appear just; the evident design was to prevent actions involving needless cost and expense to the estate in collecting honest claims against it, by compelling a claimant to hand to the administrator the nature and extent of his claim, and allow the reasonable prescribed period for investigating the justice of it. The solicitude of the legislature concerning the just settlement of estates is disclosed by the statutes.

Thus: As early as the revision of 1841, it was provided that claims against insolvent estates "must be presented in writing, supported by affidavit of the claimant or of some person cognizant thereof, stating what security the claimant has, and the amount of credit to be given." R. S., 1841, c. 109, § 6. And § 7, allowed the commissioners of insolvency to examine the claimant under oath on all matters relating to the claim. The design of these provisions was to afford persons administering on estates, additional means for the protection of the estate against spurious claims, SHEPLEY, J. *Morse* v. *Page*, 25 Maine, 496, 499. But realizing that spurious claims were not confined to insolvent estates, the legislature authorized executors or administrators to require of claimants against solvent estates, precisely the same mode of prosecuting their claims as the statute imperatively demanded of claimants against insolvent estates. Stat. 1869, c. 7, § 6, now incorporated in R. S., c. 64, § 60. And on the same day the legislature enacted the statute under consideration. Stat. 1869, c. 9, incorporated in R. S., c. 87, § 11, and amended by stat. 1872, c. 85, § 12. The phrase "presented in writing" is in each of the three statutes mentioned. We fail to see how the provisions of the first two statutes can be complied with, unless the claim, whether the original evidence of it is in writing or not, be reduced to writing; for both of those statutes seem to contemplate that the claim presented shall be deposited with the executor, else he could not prosecute him should he commit per-

jury. And if this view be correct in relation to those statutes, no good reason occurs to us for construing otherwise the same phrase in § 12.

The word "claim," is a general one, and broad enough in its signification to include all demands of every name and nature, whether resting in contract oral or written, or sounding in tort. The statute makes no distinction between verbal or written contracts, simple contracts or specialties. Whichever or whatever the claim may be, it is to be presented in writing. The law being general, its construction must be general, and apply to all cases. We cannot divide it into as many special rules as there are cases which may arise under it.

Of course the claimant is not bound, under the statute requiring thirty days notice, to furnish the executor a detailed statement of all the information he may have concerning his claim. That construction would add to the nature and extent of the notice required by the statute. *Ingalls* v. *Cole*, 47 Maine, 540. If the executor desires more than a simple written statement of the claim handed to him, R. S., c. 64, § 60, affords him ample means to obtain it.

But stat. 1872, c. 85, § 12, like the others cited, was enacted for the benefit of estates, and of those who take upon themselves the important trust of administering on them; and any party may waive the provisions of a statute made for his benefit. *Smith* v. *Chadwick*, 51 Maine, 515; *Mattocks* v. *Young*, 66 Maine, 459. When a claimant hands to an executor a written statement comprising a full description of a promissory note to which his testator was a party, its date, sum payable, time of payment and parties, and demands of him payment thereof he has done all this statute requires of him. And if instead thereof, he hands to him the original note and permits him to examine and take memoranda of it, the executor thereby acquires the best possible evidence of the claim, together with a knowledge of the genuineness of the signatures of the responsible parties, and of the witness' signature and the probability of the latter being made at the date of the note. And if the executor avail himself of such a presentation, and make no objection thereto, he must

be considered to have waived the more formal statute requirement, for neither he nor the estate which he represents, can suffer by the waiver.

But is is said that, when the note was presented to the defendant and payment thereof demanded, Eliza M. Marshall was the owner of the note and claimant, and that thereafterward and before the commencement of this action, she gave the note to her husband, the present plaintiff, who has never presented the claim anew to the defendant, but relies upon the presentment made by his wife; and the defendant contends that this plaintiff cannot maintain an action thereon as claimant until thirty days after he has presented it. We think this proposition is sound.

Of course the presentation may be made by the claimant in person, or by his agent or attorney. And while the statute does not require this in terms, or that no one who has not presented it as claimant shall bring an action thereon, we think such a construction is fair, and the only one consistent with its object. Otherwise the executor might not be able to find the claimant in order to pay the note, and thus save costs and expense of a needless action. Moreover there might be legal reasons for not paying the note to a payee who may have presented it as claimant which might not exist as against some subsequent holder, without notice. *Field* v. *Tibbetts*, 57 Maine, 358. And the law of set-off might have been the reason why the executor did not pay the note when presented by the heir of the maker, while the estate might not have any account against the present plaintiff.

The defendant does not question the title of the plaintiff to the note through a completed gift, as the plaintiff anticipated he would. And if he had raised that question and succeeded in defeating his title, thus leaving it in the wife, the authorities cited by the plaintiff's brief would hardly be applicable; for the "facts reported and evidence offered" fail to show that the action was brought for the benefit of Eliza, and by her order; and the cases cited only authorize an action on a promissory note, which passes by delivery, to be brought in the name of any person who consents thereto, except when brought "for the benefit of the owner

and by his order." See *Ticonic Bank* v. *Bagley*, 68 Maine, 250, where BARROWS, J. sums up the decisions.

According to the terms of the report,

Plaintiff nonsuit.

WALTON, BARROWS, DANFORTH, LIBBEY and SYMONDS, JJ., concurred.

APPLETON, C. J., did not concur.

INHABITANTS OF MT. DESERT *vs.* INHABITANTS OF TREMONT.

Hancock. Opinion June 7, 1881.

Towns, division of. Liability of the new town when it is to pay a portion of existing liabilities. Special laws, 1848, c. 98.

Where an act of the legislature dividing a town and incorporating a new town provided that the new town should be holden to pay to the parent town a certain proportion of the debts and liabilities of such town existing at the time of the separation, the parent town, while primarly liable for the whole, and acting in its own behalf, became the agent of the new town, so far as it was interested, in defending an action brought to establish any such liability; and if in defending any such suit the parent town acted in good faith, and with due diligence and skill, the new town would be bound by the result of the action and the judgment would be conclusive upon it.

In such a case it is not necessary that the new town should be notified of the pendency of the action against the old town.

ON REPORT.

An action to recover such portion of the sum of $1200, paid by the town Mt. Desert, in a settlement of judgment upon a liability of that town existing June 3, 1848, when the town of Mt. Desert was divided and the town of Tremont was incorporated, as is provided by the act of separation, special laws, 1848, c. 98.

The opinion states the case.

L. A. Emery, for the plaintiffs, cited: *North Yarmouth* v. *Skillings*, 45 Maine, 133; *State* v. *Madison*, 59 Maine, 538; *Cyr* v. *Dufour*, 62 Maine, 20; *Topsham* v. *Lisbon*, 65 Maine, 449; *Brewster* v. *Harwich*, 4 Mass. 278; *Godfrey* v. *Rice*, 59 Maine, 308.

A. P. Wiswell, for the defendants.

No notice was given to the town of Tremont to appear and defend, or take part in the defence of, the action of Kimball against the town of Mt. Desert. There can be no question then, that any defence which Mt. Desert could or should have made to the original action can now be made by these defendants, it being the first opportunity they have had to be heard upon that question. And the judgment rendered in that case cannot be conclusive against Tremont, not having been a party or privy to the action. Counsel then ably argued the questions which arose in the case of *Kimball* v. *Mt. Desert*, contending that Kimball had no legal claim against Mt. Desert and that therefore, at the time of the separation, as there was no liability upon the part of Mt. Desert to pay Kimball anything, and as the suit of Kimball against Mt. Desert was not then pending, the act of separation imposed no liability on the defendants to pay any part of the Kimball judgment.

LIBBEY, J. This action is brought to recover of the defendants their proportion of the sum paid by the plaintiffs to Daniel Kimball in discharge of a judgment recovered by him against them on a claim for property taken by warrant of distress against Mt. Desert, prior to June 3, 1848.

At their October term, 1837, the county commissioners of Hancock county located a county way in Mt. Desert, and ordered it opened in two years. At their April term, 1846, a petition was presented for the appointment of an agent to open the way, and an agent was duly appointed therefor, who made a contract for constructing and opening the way; and afterwards presented his account of his disbursements, which was allowed and judgment duly entered up by said commissioners, in his favor for $927.71, at their November term, 1847.

No objection is made to the regularity of the proceedings after the appointment of the agent to the allowance of his account.

On this judgment a warrant of distress was issued against the town, February 8, 1848; and by it the sheriff of the county, on the 22d of April, 1848, took and sold the property of said Kimball, who was an inhabitant of the town.

By c. 98 of special laws of 1848, approved June 3, 1848, the town of Mt. Desert was divided, and a portion of it was incorporated a new town by the name of Mansel. By c. 160 of the special laws of the same year, the name of the new town was changed to Tremont.

Section two of the act of separation is as follows: "Said town of Mansel shall be holden to pay the said town of Mt. Desert such proportion of the debts and liabilities of the said town of Mt. Desert, beyond their resources now existing, and which may hereafter arise in consequence of any and all suits at law now pending against or in favor of said town of Mt. Desert; and also assume the support of such proportion of all persons, supported as permanent or occasional paupers by said town of Mt. Desert, as the last valuation of that portion set off hereby, bears to the whole valuation of the town of Mt. Desert."

Section three provides for the payment by the inhabitants of the town of Mansel of all taxes which had been assessed upon them by Mt. Desert and remain unpaid. Section four provides for an equitable division of the school money which had been raised by Mt. Desert.

It is agreed that the proportion of the valuation of the new town to the whole valuation of the old at the time of division was as fifty-six to one hundred.

On July 28th, 1848, said Kimball commenced an action in the district court for said county, returnable at the October term, against the town of Mt. Desert for the value of his property taken and sold on the warrant of distress against the town. The action was duly entered when the defendants appeared by counsel and it was continued to the April term 1849, when it was taken by appeal to the Supreme Judicial Court, and was duly entered in said court and continued to the May term, 1850, when it was tried to the jury, and a verdict rendered for the plaintiff for $426.80 damages; and judgment was duly rendered for that sum and $58.23 costs.

On that judgment said Kimball brought an action in said court at the April term, 1865, and recovered judgment for $930.00 debt and $21.26 costs.

On the second judgment said Kimball brought an action in said court, at the April term, 1869, and recovered judgment for $1157.85 debt, and $11.24 costs.

On the last named judgment said Kimball brought an action in said court at the October term, 1872, and recovered judgment for $1401.25 debt and $12.07 costs.

On the first of June, 1876, the plaintiffs settled with Kimball and procured a discharge of the last named judgment for the sum of $1200.

The great contention between the parties is as to the effect to be given to said judgments in this case. The plaintiffs claim that they are conclusive upon the defendants as to the validity and amount of the claim of Kimball against the town of Mt. Desert, at the time of the separation; and on the other hand the defendants claim that they are not conclusive upon them, but that they may now show that Kimball had no legal claim against the town. And to show this they rely, principally upon two grounds. 1. That more than six years had elapsed from the time the way was to be opened when the petition was presented to the commissioners for the appointment of an agent to open it, and that therefore, the way had become discontinued, and the commissioners had no jurisdiction to appoint an agent. 2. That the warrant of distress was void because it was issued without notice to the town of the allowance of the agent's accounts, and was not in the form required by law.

The question presented is not free from doubt. We are aware of no decided case precisely in point, and must, therefore, apply to the determination of the question, the intention of the legisture, as expressed in the act of separation, and established principles of law applicable to it.

It appears to have been the intention of the legislature in making the division and incorporating the new town, that, while in law the town of Mt. Desert should remain liable for all debts and liabilities then existing and all actions then pending, the inhabitants of the new town should remain liable for their just share of such debts and liabilities, and the results of such actions, in excess of the resources of the old town, as if no division had

been made, and we think it may well be held that under the provisions of the act, the town of Mt. Desert, while primarily liable for the whole, and acting in its own behalf, became the agent of the new town, so far as it was interested, in defending any action then pending or afterwards brought, to fix and establish the liability of the town of Mt. Desert for any claim made against it; and in doing so, acting in good faith, and with due diligence and skill, the new town is bound by the result of the action.

This clearly seems to be so in regard to "actions pending against or in favor of said town of Mt. Desert," for their share of the results of which the inhabitants of the new town were to be liable, and we think the same rule should be applied to the debts and liabilities not in suit at that time.

There is no suggestion of bad faith or want of diligence or skill in the defence of Kimball's action.

Well established legal principles seem to lead to the same result. In an action by a creditor against the fraudulent vendee or grantee of his debtor, for the property held by him in fraud of creditors, it is incumbent on the plaintiff to prove that he held a valid debt at the time of the conveyance; and in *Sidensparker* v. *Sidensparker*, 52 Maine, 481, this court held that a judgment in favor of the plaintiff against the debtor, rendered in an action commenced after the conveyance, was conclusive upon the vendee or grantee, as to the validity of the debt and its amount, unless the court rendering the judgment had no jurisdiction, or it was obtained by fraud or collusion, or erroneously and unlawfully entered up.

In an action by a creditor of a corporation against a stockholder, based on the liability of the stockholder for the corporate debts, it is incumbent on the plaintiff to prove his debt; and it is well settled that a valid judgment against the corporation is conclusive upon the stockholder as to the validity of the debt and its amount. *Milliken* v. *Whitehouse*, 49 Maine, 527.

In *Tracy* v. *Goodwin*, 5 Allen, 409, it was held that a judgment recovered without fraud or collusion, against a constable for a wrongful attachment of the goods of a third person on a

writ, is conclusive evidence both as to damages and costs, in an action against him and his sureties upon his bond, executed by them jointly and not severally.

The principles decided in these cases apply with more or less force to the case at bar. In each of them it was incumbent on the plaintiff to prove his claim, and the parties held to be bound by the judgments had no opportunity to be heard in the actions in which they were rendered; but they were bound by the proceedings in the action establishing the relation of debtor and creditor and the amount of the debt.

It is claimed that to render the judgment conclusive upon the defendants, they should have been notified of the pendency of the action that they might have had an opportunity to defend. The answer is that the plaintiffs were primarily liable for the whole claim, and ultimately for nearly one half, and therefore, could not be required to give up to the defendants the defence of the action; and further, when Kimball's claim accrued the defendants were inhabitants of the plaintiff town, and in privity with it, and as to that claim, the privity did not cease by the terms of the act incorporating them.

Upon the whole we are satisfied that the obligation imposed upon the defendants by the act of separation, is that they shall pay their proportion, as fixed by the act, of all debts and liabilities then existing against the town of Mt. Desert, legally established by judgment of the court; and that the judgments in favor of Kimball are conclusive.

It is suggested that the case does not show the amount of the resources of the plaintiffs at the time of the separation; but, as by the terms of the report, if the action is maintainable it is to stand for trial, that matter will be open to the parties.

Action to stand for trial.

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

PETER LANE *vs.* INHABITANTS OF THE TOWN OF EMBDEN.

Somerset. Opinion June 7, 1881.

Town bonds. Recitals — binding upon the town. Town records—construction of. Special laws, 1868, c. 622, § 1. "Bond."

When by legislative enactment a town is empowered to raise money by a loan for a specified purpose, and the act is silent as to the officers who shall make the loan and issue the bonds, the municipal officers would be authorized to perform those duties; and before issuing the bonds, such officers must determine whether the town had executed the power conferred upon it in accordance with the provisions of the act, and their recital upon the face of the bond of the facts in regard to that matter as they had determined them to be, would be conclusive upon the town in an action by a bondholder for value to recover the amount of an interest coupon.

In its ordinary, popular signification, the word "bond" includes instruments not under seal by which the maker binds himself to pay money, or do some specified act, as well as instruments for like purposes under seal.

In construing town records, evidentiary of the action of the town, the words used are to receive their ordinary and popular signification, rather than their technical meaning.

ON REPORT.

Assumpsit on the following instrument:

"No. 30. Town of Embden loan. $30.00.

"The town of Embden will pay to bearer thirty dollars, at the treasurer's office in Embden, on the first day of July, 1878.

O. H. MCFADDEN, Treasurer."

This coupon was cut from a bond issued by the defendant town, July 1, 1869, and of the following tenor:

"$500.00. State of Maine. No. 30.

Loan of town of Embden, Somerset railroad.

"Be it known, that the town of Embden will pay, at the treasurer's office in Embden, to the holder of this bond the sum of five hundred dollars in forty years from the date hereof, and will also pay, at the same place, the annual coupons hereto attached, as the same shall severally become due, value received. In testimony whereof, we, the selectmen of said town, by virtue of authority conferred by the vote passed at a legal town meeting,

held therein, March 28, A. D. 1868, and by an act of the legislature, approved March 6, A. D. 1868, and in conformity thereto, do issue this bond with coupons attached, and have set our hands hereunto, and the treasurer has signed said coupons, at said Embden, this first day of July, A. D. 1869.

T. F. Boothby,
I. W. Adams,
Amos Hilton, } Selectmen."

Writ was dated March, 3, 1879.

Plea, general issue, with a brief statement, that the instrument declared upon in the plaintiff's writ was issued without legal authority and without consideration and is void.

Other material facts appear in the opinion.

By the terms of the report the law court was to render such judgment as the legal rights of the parties may require.

Frye, *Cotton and White*, for the plaintiff, cited: R. S., c. 51, § 80; Laws 1868, c. 622; Jones on R. R. Securities, § § 284, 320-326, 288, 291, 292; *Murray* v. *Lardner*, 2 Wall. 110; *Commissioners*, *&c.* v. *Clark*, 94 U. S. 278; *Cromwell* v. *County of Sac.* 96 U. S. 51; 1 Dillon, Mun. Corp. § § 405, 418, 419; *Aurora City* v. *West*, 7 Wall. 105; *San Antonio* v. *Mehaffy*, 96 U. S. 312; 2 Pars. Notes and Bills, 9; *Coloma* v. *Eaves*, 92 U. S. 484; *Warren* v. *Marcy*, 97 U. S. 96; *Grand Chute* v. *Winegar*, 15 Wall. 355; *East Lincoln* v. *Davenport*, 94 U. S. 801; *Miller* v. *Berlin*, 13 Blatch. 245; *Knox Co.* v. *Aspinwall*, 21 How. 539; *Venice* v. *Murdock*, 92 U. S. 494; *Commissioners*, *&c.* v. *Bolles*, 94 U. S. 104; *Rock Creek* v. *Strong*, 96 U. S. 271; *Hackett* v. *Ottawa*, 99 U. S. 86; *Orleans* v. *Platt*, 99 U. S. 676; *Block* v. *Commissioners*, 99 U. S. 686; *Mercer Co.* v. *Hacket*, 1 Wall. 83; *Moultrie* v. *Savings Bank*, 92 U. S. 631; *Moran* v. *Miami Co.* 2 Black, 722; *Gelpeke* v. *Dubuque*, 1 Wall. 175; *Lexington* v. *Butler*, 14 Wall. 282; *Supervisors* v. *Schenck*, 5 Wall. 782; *Deming* v. *Houlton*, 64 Maine, 254.

D. D. Stewart, for the defendants.

The form of this action is assumpsit, and this court has decided after argument and reargument of the same question, that

assumpsit cannot be maintained upon a coupon cut from a railroad bond; that it is a specialty, partaking of the nature of the bond, and that only debt or covenant can be maintained upon such a coupon. *Jackson* v. *York & Cumb. R. R. Co.* 48 Maine, 147, 152.

Upon examination, the alleged bond turns out to be no bond, but a mere certificate of indebtedness, or scrip or promissory note. It has neither penal sum, condition nor seal. It is not sealed, and does not purport or profess to be under seal. Authorities are not needed in support of a principle so familiar to every common-law lawyer, that an instrument is never a bond unless actually sealed. A recital on its face that it is under seal, will not make it so, unless it actually bears a seal. *Boothbay* v. *Giles*, 68 Maine, 160; *Warren* v. *Lynch*, 5 Johns. 238.

"The term 'bond,' *ex vi termini*, imports a sealed instrument. All the definitions in the books describe a bond as a deed, or instrument under seal, and sealing has always been held to be a necessary requisite to its validity." 1 Burrill's Law Dict. 155, Bond.

The decisive effect of a seal, or the want of one, cannot be better illustrated than in the decisions of this court, in *Wheeler* v. *Nevins*, 34 Maine, 54; *Wing* v. *Chase*, 35 Maine, 260; *Baker* v. *Freeman*, 35 Maine, 485.

The allegation, therefore, in each of the special counts in the plaintiff's writ that the defendants issued bonds to the amount of forty thousand dollars, of one of which the plaintiff is the holder, is not supported by the proof offered.

Indeed, the proof offered is wholly inadmissible, because fatally variant from the declaration. *Stanwood* v. *Scovel*, 4 Pick. 423; *Buddington* v. *Shearer*, 20 Pick. 478; 1 Greenl. Evidence, § § 56, 57, 58, 60, 63; *Parsons* v. *Monmouth*, 70 Maine, 262.

It will be noticed that this act confers a special and specific power which must be strictly executed, or it will fail. Towns have no power to raise money for any such purpose unless authorized by specific legislative enactment. The town of Embden, under this act, could not legally raise money and appropriate it to aid any other railroad, or for any other possible object or pur-

pose. By the terms of this act the town is imperatively required to apply the money, if they vote to raise it, to aid in the construction of the Somerset railroad, and to determine the manner in which it shall be applied for that purpose; and all this must be done by a vote of two thirds of the legal voters present and voting. If the money is not raised; or if raised to aid in the construction of the Somerset railroad; or if the manner in which it is to be appropriated for that purpose is not determined, and all by a two thirds vote, then there is an organic defect in the execution of the power conferred by the act, which will make void all securities or obligations attempted by the officers of the town, to be issued under it; and all persons purchasing such securities, are chargeable with notice of such defective execution. "Dealers in municipal bonds," said the Supreme Court of the United States in a recent decision, "are charged with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. . . Every person who deals with or through an agent, assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected from this inquiry than any other." *Anthony* v. *County of Jasper*, decided at October term, 1879, and reported in vol. 21, No. 20, Albany Law Journal, May 15, 1880, pages 397–8.

In *Marsh* v. *Fulton County*, 10 Wallace, 683, the same court say: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such was the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments declared upon possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. . . It is a case where the holder was bound to look to the action of the officers of the county, and ascertain whether the laws had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. . . In each case the person dealing with the agent, knowing

that he acts only by a delegated power, must, at his peril, see that the paper on which he relies, comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued."

These votes were to issue town bonds, "the selectmen being authorized to sign said bonds when issued." No authority is conferred upon the selectmen to sign promissory notes, or scrip, or obligations of any kind, except bonds.

The instrument described in the plaintiff's writ, and offered in evidence by him, is not a bond. It is at most but a simple contract, a sort of certificate of indebtedness, a promissory note creating liabilities, if valid, widely different from those arising under bonds. It was solely for the town, and not for the selectmen, to determine the kind and character of the liabilities they were willing to assume. They had the right to rely upon the decision of this court in the case already cited, *Jackson* v. *York & Cumb. R. R. Co.* 48 Maine, 147, as the law of the State, defining the character and extent of the liabilities which would be created under an issue of bonds, holding that neither bonds nor coupons were negotiable paper within the law merchant, and therefore not liable to be scattered all over the State. *Almy* v. *Winslow*, 126 Mass. 343; *Lexington* v. *Butler*, 14 Wallace, 283.

None of these votes were passed by the requisite two thirds majority. The record is entirely silent upon that subject. This is fatal to the plaintiff's case. It is not a mere irregularity in the execution of a power, but a total failure to execute it in the manner required by the statute. Upon this question, the decision of this court in a very recent case, *Portland and Ogdensburg R. R. Co.* v. *Inhabitants of Standish*, 65 Maine, 63, is conclusive.

This opinion is decisive of the case at bar. The plaintiff was bound to know, and take notice of the condition and character of this record and of these votes, and must be held to know that they created no liability whatever on the part of the town, and

gave no authority to the selectmen to sign and issue any such instruments as are here declared upon. He is specifically referred to these insufficient votes by the very paper he purchased, and therefore purchased them at his peril, with full notice and knowledge of their invalidity. He is not, therefore, in any commercial sense, a *bona fide* purchaser. *Cushing* v. *Field*, 70 Maine, 50.

A coupon for interest is never valid, unless the bond is valid. *Concord* v. *National Bank*, 51 Vermont, 146.

LIBBEY, J. By special act of 1868, c. 622, § 1, the defendant town, with several other towns in Somerset county, was empowered, at any legal meeting duly notified and held for the purpose, to raise by tax or loan, such sum of money as it deemed expedient, not exceeding forty thousand dollars, and to appropriate the same to aid in the construction of the Somerset railroad, or extending the Somerset and Kennebec railroad, in such manner as it should deem proper, provided, that two thirds of the legal voters present and voting at such meeting, shall vote therefor.

At a legal meeting duly notified and held for that purpose on March 28, 1868, the inhabitants of the defendant town, by a vote of one hundred and thirty-two for to seven against, "Voted to raise the sum of forty thousand dollars to aid in the construction of the Somerset railroad, and the selectmen to issue town bonds therefor." The record discloses that several other votes were afterwards passed by them, without disclosing the number voting for or against, as follows:

1. To authorize the town agent for and in behalf of the town to subscribe for and take stock in the Somerset railroad to the amount voted. 2. To issue bonds for a term not exceeding forty years. 3. That the selectmen be authorized to sign said bonds when issued, and the treasurer to sign the coupons.

By authority of these votes certain instruments by their terms called bonds, but not under seal, were issued, duly signed as required by the vote of the town, and sold to raise the sum of money voted. The plaintiff for full value, without notice of any defence, bought one of these bonds for five hundred dollars, of the person holding it; and this action is brought on one of the interest coupons attached to the bond.

The bond contains the following recital: "In testimony whereof, we, the selectmen of said town, by virtue of the authority, conferred by the vote passed at a legal town meeting held therein, March 28, A. D. 1868, and by act of the legislature, approved March 6, A. D. 1868, and in conformity thereto, do issue this bond with coupons attached, and have set our hands hereto, and the treasurer has signed said coupons at said Embden this first day of July, A. D. 1869."

Payment is resisted by the defendants on two grounds.

1. That the power conferred upon the town by the statute was not executed in accordance with its provisions, because the record does not show that the vote prescribing the manner in which the aid should be furnished to the corporation was passed by the requisite majority. 2. That the vote of the town authorized the selectmen to issue the bonds of the town for the money loaned; but the instruments issued were not bonds, not being under seal, and therefore issued without authority.

Questions very similar to the first point of the defence were determined by this court, in *Augusta Bank* v. *Augusta*, 49 Maine, 507, and *Deming* v. *Houlton*, 64 Maine, 254.

In *Augusta Bank* v. *Augusta*, the act under which the scrip was issued authorized the treasurer of the city, on the acceptance of the act by it, to issue the scrip of the city as therein provided. The city denied that the act was ever legally accepted by it. Upon this point the court, by TENNEY, C. J. says: "The act provides in no express terms for any tribunal which shall adjudge whether these various steps have been taken. It could not have been intended by the legislature, that this scrip should be issued, delivered to the directors of the railroad, who should receive the amount of the same, and expend it in the construction and completion of the railroad, and the question be open to be presented on the trial of any action brought upon any piece of the scrip, whether the act was duly accepted, and the scrip had been issued, and sent into the world for a full consideration, after a compliance with every requirement of that act. The duty of deciding these questions was imposed upon the treasurer of each city and town. He could

not issue the scrip till the act was accepted; he could not deliver the scrip to the directors till every necessary step had been taken to render the delivery proper. It was his province to see that every legal requirement was fulfilled as a condition of carrying out the great object of the act. It was, under the act, a matter of absolute necessity that he should be the judge of these matters, or he could not act at all in the premises." And the determination of the treasurer was held conclusive.

In *Deming* v. *Houlton*, *supra*, the doctrine of *Augusta Bank* v. *Augusta* was affirmed. The court, by APPLETON, C. J. says: "The bonds were issued by the proper authorities of the town. It was their duty to determine whether the preliminaries necessary to give validity to the bonds had been complied with before issuing them; and their determination is conclusive."

It may be said that these cases are not precisely in point in the case at bar, because in them the statute made it the duty of the officers named, on compliance with the requisite conditions, to issue the scrip; while in this case, the act is silent as to the officers who shall make the loan and issue the bonds. But we think the principle is the same in each case. It must have been in the contemplation of the legislature, that, if the town raised the money by loan, it would be made, and the bonds issued by its municipal officers; and that, before putting upon the market the commercial paper of the town to raise the money, they must determine whether the town had executed the power conferred upon it in accordance with the provisions of the act. It is worthy of remark, on this point, that the town, by vote of one hundred and thirty-two to seven, as well as by the subsequent vote, directed the selectmen to issue the bonds of the town for the money to be loaned, thereby, in substance, declaring that the requirements of the act had been complied with.

The bonds or scrip issued are negotiable and pass by delivery as commercial paper. They contain a certificate that the requirements of the statute have been complied with by the town, and that they are issued in conformity therewith. We think the law well settled, that, "if upon a true construction of the legislative enactment conferring the authority, the corporation, or certain

officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of the matter *in pais*, which they are authorized to decide, will, in favor of the bond-holder for value, bind the corporation." *Town of Venice* v. *Murdock*, 92 U. S. 494; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *St. Joseph Township* v. *Rogers*, 16 Wall. 644; *Orleans* v. *Platt*, 99 U. S. 676; *Buchanan* v. *Litchfield*, 102 U. S. 278.

In *Orleans* v. *Platt*, the court, (SWAYNE, J.) declares the rule thus: "This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such security, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital." (See authorities cited.)

This rule inflicts no unjust hardship upon the defendant town and its tax payers. They knew the vote of the town directing the selectmen to loan the money and issue the bonds; and that they were proceeding to issue them. If they had no legal authority for so doing, the tax payers might have applied to this court for an injunction to restrain them from proceeding. It was their duty to have done so. In *Orleans* v. *Platt*, *supra*, SWAYNE, J. in discussing a similar point, says: "In this case a preliminary injunction might and should have been procured forbidding the commissioners to issue the bonds, and the railroad company, if it received them, from parting with them until the case made by the *certiorari*, was finally brought to a close. This would have involved only an ordinary exercise of equity jurisdiction" (citing authorities.) "The omission was gross laches. This negligence is the source of all the difficulties of the plaintiff in error touching the bonds. The loss, if any should ensue, will be due, not to the law or its administration, but to the supineness of the town and the contestants." *County of Ray* v. *Vansyckle*, 96 U. S. 675.

But instead of instituting proper proceedings to prevent the evil, the town and its tax payers stood by and saw the selectmen issue the bonds, put them on the market, and raise the money with them for the benefit of the town; and now, after the bonds have passed from hand to hand as commercial paper for years, payment is resisted because of an irregularity on the part of the town in exercising the power conferred upon it. The well established rules of law will not sanction such a defence.

Portland and Ogdensburg R. R. Co. v. *Standish*, 65 Maine, 63, is relied upon by the learned counsel for the defendants, as decisive of the case in their favor. But the question involved in that case, was entirely different from the one in issue in this. That was an action to enforce a subscription for stock voted by the town. It was between the parties to the alleged contract. No subscription had been, in fact, made. The action was based upon the validity of the vote alone. The town might well say it had passed no legal vote to subscribe for the stock.

The second ground of defence is alike untenable. The same question was before this court in *Augusta Bank* v. *Augusta*, *supra*. In that case it was contended that the coupons in suit, being cut from scrip issued by the city without seal, were not within the provisions of the statute relied on, as the statute embraced coupons cut from *bonds* only. But the court held otherwise, TENNEY, C. J. in the opinion of the court, remarking that: "The term bond has a great variety of significations, and in law it does not necessarily import a seal as the word is ordinarily used." To like effect is *Stone* v. *Bradbury*, 14 Maine, 185.

In *Deming* v. *Houlton*, *supra*, the act of the legislature authorized the town treasurer to issue scrip, and he issued the bonds of the town and this court held them valid. In *Town of Venice* v. *Murdock*, 92 U. S. 494, the statute authorized the issue of bonds of the town. The instruments issued were similar to those issued by town of Embden, having no seal, and not purporting to be sealed; but the court in speaking of them in the opinion uniformly calls them *bonds*.

In *Humboldt Township* v. *Long*, 92 U. S. 642, the statute authorized the issue of bonds; but the instruments issued were certificates not under seal; and the court in speaking of them, characterizes them as certificates of indebtedness, bonds, and contracts, interchangeably. In both cases the instruments were held valid.

In *Scipio* v. *Wright*, 101 U. S., 665, the statute authorized the raising of money by the issue of bonds, but the instruments issued were mere promises not under seal. STRONG, J. in the opinion of the court, says: "The plaintiff below brought suit upon twenty-five bonds, or rather, notes," but when the instruments are afterwards referred to in the opinion he uniformly calls them bonds. All that were issued for money loaned were held valid.

The foregoing authorities sustain the position, that, in its ordinary, popular signification the word bond includes instruments not under seal, by which the maker binds himself to pay money, or do some act specified, as well as instruments for like purposes under seal.

In construing town records, evidentiary of the action of the town, the words used are to receive their ordinary and popular signification, rather than their technical meaning. The vote of the town, directing the officers to issue the bonds of the town, for the money loaned, authorized them to issue the instrument in suit.

Judgment for the plaintiff for the amount of the coupon declared on with interest from date of the writ.

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

INHABITANTS OF BROOKS

vs.

BELFAST AND MOOSEHEAD LAKE RAILROAD COMPANY.

Waldo. Opinion June 8, 1881.

Review. Error in an admission.

Reviews when not a matter of right, are granted to prevent injustice.

A review of a judgment against a defendant will not be granted because of an error in an admission by the defendant, in an action to collect a subscription to stock, deliberately made, when it appears that all the facts were matters of record to which the defendant had access at the time of the admission, though it might be different if the defendant had been entrapped or misled into making the fatal admission without laches on his part, or had been prevented from ascertaining and procuring evidence of the real facts.

ON PETITION for review.

The opinion states the facts. The case is reported to the full court for decision upon so much of the evidence and admissions of fact as are legally admissible.

N. H. Hubbard, for the petitioners.

The case of *B. & M. L. R. R. Co.* v. *Cottrell*, 66 Maine, 185, judicially established the fact that there was not stock enough subscribed to build the road from Belfast to Newport at the time the assessments were made and that the directors violated the fourth condition upon which the petitioners' subscription was made. In the former action *B. & M. L. R. R. Co.* v. *Brooks*, 60 Maine, 568, the defendants [these petitioners] admitted the contrary to be true. This erroneous admission was without laches on their part. They had able counsel to make up the case for them. The subscription book did show a subscription of $935,700 and the engineer's estimate then was $906,500. The mistake must have been a mutual one, or the R. R. Co. perpetrated a fraud upon these petitioners, and in either case a review should be granted. *Stockbridge* v. *West Stockbridge*, 13 Mass. 303; 6 Met. 414.

The information acquired since the decision of the court in the original case, I think, shows conclusively that Brooks had a valid

defence, and that they were prevented from presenting it by mistake both of law and fact, and the court in the exercise of a sound discretion will grant a review.

S. C. Strout, *H. W. Gage* and *F. S. Strout*, for the defendant, cited: *Lexington* v. *Mulliken*, 7 Gray, 280; *Walpole* v. *Gray*, 11 Allen, 149; *Butler* v. *Charlestown*, 7 Gray, 16; Kerr on Fraud and Mistake, 303, 403–407; *Beckford* v. *Wade*, 17 Ves. 87; *Pickering* v. *Ld. Stamford*, 2 Ves. 583; *Jones* v. *Turberville*, 2 Ves. 11, note; *Spaulding* v. *Farwell*, 70 Maine, 17; *Railroad* v. *Sleeper*, 121 Mass. 29; *Railroad* v. *Brooks*, 60 Maine, 576; *Foxcroft* v. *Devonshire*, 2 Burr, 936; *Mayfield* v. *Wadsley*, 3 Barn. and Cress. 357; *Van Slyck* v. *Hogeboom*, 6 Johns. 270; *Cogswell* v. *Brown*, 1 Mass. 237; *Wilkinson* v. *Payne*, 4 T. R. 468; *Booden* v. *Ellis*, 7 Mass. 507; *Lexington R. R. Co.* v. *Chandler*, 13 Met. 311; *B. & B. R. R. Co.* v. *Buck*, 65 Maine, 539; *K. & P. R. R. Co.* v. *Jarvis*, 34 Maine, 360; *Jordan* v. *Stevens*, 51 Maine, 78; *McCobb* v. *Richardson*, 24 Maine, 82; *Daniel* v. *Mitchell*, 1 Story, 172; *Warner* v. *Daniels*, 1 Wood. and Min. 90; 2 Graham and Waterman, New Trials, 48; *Brackett* v. *Morse*, 23 Vt. 554; *Kelsey* v. *Hanmer*, 18 Conn. 311; *Lester* v. *State*, 11 Conn. 415; *McLanahan* v. *Universal Ins. Co.* 1 Pet. 170; Story's Equity, § § 147, 151; *Fellows* v. *School Dist.* 39 Maine, 559.

VIRGIN, J. On February 25, 1868, the selectmen of the town of Brooks, pursuant to previous corporate authority of the town (60 Maine, 568), subscribed for two hundred shares of the non-preferred stock of the respondent railroad company, upon the condition that no assessment should be made thereon, until the full amount of subscription was secured for the completion of the road to Newport or to any junction of the Maine Central Railroad.

On June 23, 1868, the books were closed and returned to the treasurer, the whole amount of stock subscribed, as appeared therein, being $935,700. The engineer estimated the cost of constructing the road to Newport at $906,500; but the route was changed, making Burnham instead of Newport the place of junction, and the road constructed at an expense of $950,000,

which was less by $150,000 or $200,000 than the other route would have cost.

On July 20, 1868, the directors laid an assessment of fifteen per cent. upon all the subscriptions, and on February 3, 1869, the town paid fifteen hundred dollars on its assessment. Subsequently other assessements were laid, altogether covering the whole subscription, which, the town refusing to pay, the company, on March 12, 1870, brought an action to recover. At the April term, 1871, the action, by agreement of the parties, was reported to the law court upon certain evidence and admissions; and at the April term, 1873, judgment was rendered against the town for the unpaid balance of the subscription, and execution issued June 25, 1873.

At a legal meeting held September 16, 1873, the town, under a proper article in the warrant, instructed the selectmen "to settle the execution on the best terms they could obtain by the first of January following, by paying five thousand dollars in money, and the balance in town orders at par, payable in three equal installments of two, four and six years, at six per cent. annual interest." Accordingly on February 19, 1874, the parties compromised, the company discounted two thousand dollars, and received five thousand dollars cash, and the balance in town orders dated January 1, 1874, payable in two, four and six years. Thereupon the execution was discharged, and a certificate of two hundred shares of the company's stock was issued to and accepted by the town which has remained in the possession of its officers ever since, though placed on file with an offer of surrender when this petition was entered.

When the original action was made up for the law court, the report contained an admission on the part of the defendants in that action, that, at the time the assessments were made, there was stock enough subscribed for in the books of the company to complete the road. They now say that the admission was not true as matter of fact; that the admission was made by mistake and under misapprehension, they not knowing all the circumstances under which other subscriptions were made; that the subscriptions of Unity, Newport, Troy and Detroit, as well as

those of sundry individuals, were invalid, thus reducing the whole amount of valid subscriptions far below that estimated by the engineer as sufficient to complete the road even to Newport; that they had no knowledge of these facts until after the rendition and satisfaction of the judgment against them; and that the judgment could not have been rendered but for such admission. They therefore ask us to grant a review of the action and enable them to recover back the amount paid by them.

But granting that the subscriptions of the above named towns have been adjudicated to be invalid; that without them the aggregate amount of subscriptions was less than the sum estimated by the engineer to be sufficient for the completion of the road; and that if these facts had appeared in the report of the original action, instead of the admission to the contrary, the company would not, in the absence of any other controlling facts, have recovered the judgment; still it would not necessarily follow that a review would be warranted. Reviews, when not a matter of right, are granted to prevent injustice. The inhabitants of Brooks desired the construction of a railroad through their town. They deliberately agreed in their corporate capacity, by a vote of more than three to one, to pay $20,000 towards its construction, provided the location, terms of agreement, etc., should be satisfactory to their selectmen, and the advisory committee duly appointed therefor. Relying upon this agreement, the company built the road through the town and established a station therein, all to the satisfaction of the selectmen and committee. The town, when called upon to fulfill their agreement, paid a portion of the first assessment, refused to pay the balance and appealed to the court. They agreed upon the facts and were defeated. If they had been "entrapped or misled into making the fatal admission, and without laches on their part" (*Stockbridge* v. *W. Stockbridge*, 13 Mass. 303 approved in *Bowditch Ins. Co.* v. *Winslow*, 3 Gray, 424); or had been prevented from ascertaining, and procuring evidence of the real facts (*Ward* v. *Clapp*, 6 Metc. 414); justice might require us to grant a review. But the facts were all a matter of record, to which they had access. Moreover, after judgment, the town with full means of knowledge of

the facts, in its corporate capacity, deliberately caused their debt to be compromised and paid, and received their certificate of stock which they have ever since kept, offering to surrender it only when their case on the petition was completed for this court. There would be no more justice in granting a review for the cause assigned than for allowing the petitioners a review in order to plead the statute of limitations.

Moreover, we by no means feel clear that a review would result favorably for the petitioners. The decision of *B. & M. L. Ry. Co.* v. *Cottrell, supra*, was made upon the facts then before the court, one controlling fact being that the aggregate amount of valid subscriptions was less than the sum estimated by the engineer as sufficient to complete the road. It did not appear in that case as in this, that prior to laying any assessment, the company *bona fide* contracted with parties supposed to be responsible, for the completion of the road, at a sum considerably less than the aggregate sum of valid subscriptions. Had Cottrell's case disclosed that fact, the decision might have been different. But we have no occasion to decide this point.

Prayer of petition denied.

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

LIBBEY, J., having once been of counsel did not sit.

IVORY LITTLEFIELD and another *vs.* VASSAL D. PINKHAM.

Piscataquis. Opinion June 4, 1881.

Stat. 1874, c. 235. Pleadings. Declaration. Demurrer. Waiver. U. S. Rev. Sts. § 3963.

Where the assignment, or copy, is not filed with the writ when an action is brought by the assignee in his own name as provided by stat. 1874, c. 235, the objection to such omission must be seasonably taken by motion or plea in abatement; and where a motion to dismiss for such cause was not filed until the second term; *Held*, that the defendant had waived the objections.

Where a declaration alleges that the consideration for the contract upon which suit was brought, was an assignment of a contract with the government for

transporting the United States mail, it will be held bad on demurrer, as such an assignment is declared null and void by express provision. U. S. Rev. Sts. § 3963.

ON REPORT.

The opinion states the case.

(Declaration.)

"For that William A. Frye, of Newport, in the county of Penobscot, in the State of Maine, on the first day of May, A. D. 1873, was contractor and was interested as sole contractor in a certain contract or contracts, between himself and the United States of America, to wit, a contract or contracts to carry the United States mails, on mail route, number nineteen, from South Windham to Warren in the State of Maine, and on mail route, number one hundred and twenty-one, to carry the United States mail from Gardiner to New Castle, in the State of Maine, and then had the right to carry said mails according to said contract or contracts before then made between him, said Frye, and the United States, and in accordance with all orders, directions and regulations then existing, or thereafter to be made on the part of the United States, said contract or contracts, being then in full force, and to terminate in any event on July 1, A. D. 1877, and the said Frye was then and there entitled to all the pay and compensation which should arise out of said contract or contracts, and the proper performance of the same. Vassal D. Pinkham, then of said Augusta, being desirous of purchasing and receiving of said Frye all his, said Frye's, rights in said contract or contracts with the United States to receive from the United States the full compensation allowed, or to be allowed, by the United States for the transportation of said mails on and over said mail routes, numbers nineteen and one hundred and twenty-one, according to said contract or contracts, and orders, directions and regulations as aforesaid, for his, said Pinkham's, own use and benefit, on said first day of May, A. D. 1873, at said Augusta, in consideration that the said Frye then and there at the special instance and request of said Pinkham, had so sold, assigned and transferred all his, said Frye's, interest in said mail contract or contracts of himself with the United States, that the said Pink-

ham then and there instantly, thereby and by proper power of attorney, then and there made, executed and delivered by said Frye to said Pinkham, became entitled to receive all such pay and compensation, as aforesaid, from the United States, and for divers other valuable consideration by said Frye, then and there made and delivered by said Frye to said Pinkham by his, said Pinkham's, certain instrument, to wit, promise in writing of that date, signed by said Pinkham and delivered by said Pinkham to said Frye, then and there promised to said Frye, that he the said Pinkham would carry said United States mail on said mail routes, according to said contract or contracts, between said Frye and the United States, and in accordance with all orders, directions and regulations then existing or thereafter to be made on the part of the United States, and in all things to do and perform whatever would he required of said Frye by the United States concerning the conveyance of said mails, over said routes, numbers nineteen and one hundred and twenty-one, as aforesaid, and hold and save Frye harmless and free of expense in every way concerning the fulfillment of said contract or contracts, orders, directions and regulations, it being understood by said written promise that said mail contract or contracts, in any event would terminate on the first day of July, A. D. 1877, and to pay said Frye the sum of eight hundred dollars, in four years, in equal quarterly payments of fifty dollars each, on the first days of January, April, July and October in each of the years then next following, during the continuance of said contract or contracts, commencing on the first day of October, A. D. 1873, when the first payment was due, whereupon the said Pinkham then and there at the same time and place of making said contract by the said assignment of said contracts to carry the United States mails as aforesaid, entered thereupon and by virtue of said assignment and power of attorney as a part of said assignment from said Frye to said Pinkham, made and delivered, as aforesaid, as a part of said assignment, said Pinkham became entitled to all said compensation, pay and emoluments arising and to arise from said mail contracts, but said Pinkham not minding his said promise and contract, has utterly failed to pay and refuses to pay the last

of said quarterly payments, being the sum of fifty dollars which became due on the first day of July, A. D. 1877, although the same was duly demanded of the said Pinkham, at said Augusta, on the twenty-third day of July, A. D. 1877. Now, therefore, by reason of said contracts and the breach thereof, as aforesaid, the said defendant became liable to pay said sum of fifty dollars, being said last quarterly payment, then and there promised said William A. Frye to pay him the same with lawful interest from said 23d day of July, A. D. 1877, and the said William A. Frye on the 28th day of December, A. D. 1875, by his written assignment of that date, in consideration of three hundred and fifty dollars, to him paid by the plaintiffs, sold, transferred and assigned to the plaintiffs the said bond or obligation of which the defendant has had due notice, whereby the said defendant became liable, and in consideration thereof, promised the plaintiffs to pay them the same on demand. And the plaintiffs aver that since the date of said assignment, said defendant has paid only a part of the sum due on said bond or obligation, to wit, the sum of three hundred dollars, and that there now remains due the plaintiffs, the said sum of fifty dollars, being the last quarterly payment with lawful interest from said 23d of July, A. D. 1877."

J. F. Sprague with *Lebroke and Parsons*, for the plaintiffs.

D. D. Stewart, for the defendant.

VIRGIN, J. Prior to May 1, 1873, one Frye contracted with the United States to carry the mail over mail routes, nineteen and one hundred and twenty-one, for the term of four years, ending July 1, 1877. On the day first mentioned, the defendant contracted in writing with Frye to carry the mail over the same routes, for the same period; save the latter harmless from his mail contract; pay him eight hundred dollars in four years in equal quarterly payments of fifty dollars each; and was to receive therefor the full compensation allowed by the United States to said Frye.

On December 28, 1875, Frye, in consideration of three hundred and fifty dollars, by his written assignment, transferred and assigned the written contract of the defendant, to the plaintiffs,

who received all the instalments, except that of the last quarter; which the defendant refused to pay, And on August 11, 1879, the plaintiffs brought this action upon the defendant's contract, in their own name, to recover the sum due. The action was duly entered at the following September term, but neither the assignment nor a copy thereof was filed with the writ.

At the second term, when the action came on for trial and after the plaintiff had read his writ, the defendant submitted a written motion to dismiss the action upon the ground that the assignment or a copy thereof was not filed with the writ; which motion was overruled. The plaintiffs' counsel then offered to file a copy of the assignment, which is to be considered as done if competent. The defendant thereupon filed a general demurrer to the declaration which was joined, and the case was thereupon reported to this court, "who are to consider the motion and the effect of it the same as if no ruling had been made," and are to order the proper judgment on the whole case.

It is contended that the motion should be sustained by reason of the provisions of stat. 1874, c. 235, and of Rule II, of the general rules of this court.

Statute 1874, c. 235, provides that an assignee of a chose in action not negotiable, assigned in writing, may bring and maintain an action thereon in his own name; and that he "shall file with his writ the assignment or a copy thereof." Rule II, provides: "No civil action shall be entered after the first day of the term, unless by consent of the adverse party and by leave of court; or unless the court shall allow the same upon proof that the entry was prevented by inevitable accident, or other sufficient causes. . . Writs are to be filed before entry of the action and are to remain on file."

Admitting the contract of the defendant declared on to be valid, the declaration shows every fact that is essential to the plaintiffs' right to maintain the action in their own name. *Wood* v. *Decoster*, 66 Maine, 542. And the motion finds no fault with the writ or declaration, but seeks to prevent the recovery of a judgment against the defendant, on a good cause of action properly counted on, on the ground of the plaintiffs' omission to

seasonably file a paper declared on, and which had been duly and seasonably executed, and was then in court and placed on file when the motion was submitted. The motion, therefore, does not go to the merits of the action but to matter in abatement.

The learned counsel of the defendant urges that the provision of the statute requiring the filing of the assignment was enacted for the benefit of the defendant, that "he may be apprised at the earliest moment of the nature of the claim," etc. But he gains that information from the declaration the same as if he were sued on his promissory note by an indorsee, or on his mortgage by an assignee thereof. Moreover, admitting the object of the provision to be as claimed, a complete answer is found in the useful and highly reasonable principle on which the doctrine of waiver is founded, and which is so extensively applied. "For whilst," says SHAW, C. J. "the law protects the right of parties, even in minute and unimportant matters, it requires diligence and good faith in taking advantage of its rules to accomplish those ends and not to work injustice." *Simonds* v. *Parker*, 1 Metc. 508, 511. And "if a party," continues the same authority, "takes no notice of any matter of exception to the form or service of the process, in an early stage of the proceedings, it affords a a reasonable ground to conclude that he considers them of no importance, and is willing to proceed to the trial of his rights upon the substantial merits of the controversy." And the rule relating to matters in abatement is based upon this principle and holds parties to its reasonable requirements.

This finds illustration in numerous classes of cases. Thus R. S., c. 81, § 6, provides that "every original writ, etc., "shall, before entry in court, be indorsed by some sufficient inhabitant of the State, when the plaintiff is not an inhabitant thereof." And notwithstanding this imperative language, the court in Massachusetts, long before the separation said: "The provision was made for the benefit of the defendant, which, if he pleased, he might waive; and if at the return term he does not except to the want of an indorser either by plea or motion, he must be considered as having waived the security provided for his benefit." *Whiting* v. *Hollister*, 2 Mass. 102. Such has been the ruling

in this State ever since. *Archer* v. *Noble*, 3 Maine, 418; *Stevens* v. *Getchell*, 11 Maine, 443; *Smith* v. *Davis*, 38 Maine, 459.

Again, R. S., c. 96, § 10, provides that "the officer, before serving a writ of replevin, shall take from the plaintiff, or some one in his behalf, a bond to the defendant, with sufficient sureties, in double the value of the goods to be replevied," etc. And yet this court has frequently decided that this provision was made for the benefit of the defendant and that he may waive it. So that if the bond is defective in having only one surety when the statute requires two, the defendant will waive the defect unless he takes advantage of it by motion or plea in abatement. *Johnson* v. *Richards*, 11 Maine, 49; *Greely* v. *Currier*, 39 Maine, 516. And if the bond be not "in double the value of the goods to be replevied" the defect must be pleaded in abatement, although the defendant did not know the fact until the trial. *Douglass* v. *Gardner*, 63 Maine, 462.

The rule requires writs to be filed when entered, and allows entries to be made after the first day "for sufficient causes," that is, at the discretion of the court. Then comes the statutes requiring the filing of the assignment "with the writ." If in this case, the plaintiff had omitted to enter his action and file his writ the first day, the court would have allowed him to enter it afterward; and then by the letter of the statute he could have filed his assignment. The question of filing the assignment not having been raised by motion or plea in abatement, we think the court could allow the subsequent filing the same as it allows writs to be indorsed under similar circumstances.

But the defendant contends that *Prescott* v. *Hobbs*, 30 Maine, 345, is decisive of this case in his favor. We think otherwise. As at common law, a breach of the covenant of seizin of one not seized is broken when made, the right of action thereon does not pass to the assignee of the covenantor's grantee; and hence the assignee cannot maintain an action thereon in his own name at common law. But to "avoid circuity of action," (*Trask* v. *Wilder*, 50 Maine, 453,) the legislature changed the common law conditionally, by providing in substance that the assignee of

the covenantor's grantee, might, upon eviction, maintain such action in his own name, "upon filing at the first term in court for the use of his grantor, a release of the covenants of his deed and of all causes of action thereon." R. S., c. 82, § 15. The release in such case is not for the benefit of the defendant but for the "use of the defendant's grantee." Hence the principle of waiver, as in cases of want of an indorser of a writ, or of defective replevin bond cannot apply; and the case of *Prescott* v. *Hobbs*, is not applicable in principle to the case at bar. Our opinion therefore is that the defendant waived the objection to the plaintiffs' omission to file the assignment or a copy thereof with this writ; and that the presiding justice, in the absence of any seasonable motion or plea in abatement, had discretionary power to allow the subsequent filing.

But the defendant demurred to the declaration, thereby admitting all the facts therein properly alleged. Among those are the allegations that Frye, on May 1, 1873, was sole contractor with the United States for carrying the mail on routes nineteen and one hundred and twenty-one for four years ending July 1, 1877; and that in consideration Frye had sold, transferred and assigned all his interest in the contract with the United States, the defendant had made to Frye, the contract declared on.

The contract declared on, therefore, if the declaration be true, was given in consideration of Frye's assignment of his contract as contractor for transporting the United States mail; and such assignment is declared null and void by the express provision of United States, Rev. Sts., § 3963.

Demurrer sustained. Declaration bad. Plaintiffs may amend on such terms as shall be fixed at nisi prius.

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

CHARLES H. CARPENTER *vs.* WILLIAM H. DRESSER.

Cumberland. Opinion June 8, 1881.

Trespass against attaching officer. Tender of return of property attached. Damages.

An officer who wrongfully attaches and takes actual possession of goods, cannot show, in an action against him by the owner, that on the day after the attachment he tendered to the owner a return of the property in the same condition as when attached. He cannot return the property in mitigation of damages for the taking, against the owner's consent.

ON EXCEPTIONS from superior court, Cumberland.

TRESPASS against the sheriff for the act of his deputy in attaching certain oil paintings, frames, silver plated ware, and other articles, on a writ against Morgan and Davenport, who were at the time auctioneers employed by the plaintiff to sell the goods at auction.

The attachment was made while this plaintiff was at tea, on his return he found the goods in charge of the keeper, who refused to allow him any control over the property. Whereupon he left the premises and did not return.

Other material facts stated in the opinion.

M. P. Frank and *N. and H. B. Cleaves*, for the plaintiff, cited: *Neff* v. *Thompson*, 8 Barb. 215; 1 Waterman Trespass, § 619; *Gibbs* v. *Chase*, 10 Mass. 126.

Strout and Holmes, for the defendant.

At the trial the plaintiff relied upon *Gibbs* v. *Chase*, 10 Mass. 125, and some remarks in that case would seem at first sight to justify the ruling requested by the plaintiff. SEWALL, J. says: "He who interferes with my goods, and without any delivery [authority?] by me, and, without my consent, undertakes to dispose of them as having the property, general or special, does it at his peril, to answer me the value in trespass or trover, and even a subsequent tender of the goods will not excuse him, if I demand the value."

Now in the first place that case did not call for any such adjudication. No defence was made in that case of return, and no question, not even one of damages, was raised, which could depend upon a return or tender of return. These remarks of Judge SEWALL, were therefore purely *obiter dicta*.

Stickney v. *Allen*, 10 Gray, 352, was an action in which return of the property was set up, and the court ruled that it would not affect the damages "if rightly rejected."

It is also said, "Where one has committed a trespass, the party injured is not obliged to take back the property. It would afford an inadequate remedy. The property may have deteriorated. It would not therefore be safe to say that a redelivery of the goods should be taken in discharge of the trespass." It is plain that the court was here considering the question of a return as a defence to the action, which it is not. It is only material upon the question of damages. *Robinson* v. *Mansfield*, 13 Pick. 139.

So in Waterman on Trespass, § 438, it is said: "No tender will at common law either bar an action for a tort, or take away the right to full compensation." But "full compensation" is payment for the loss incurred by the plaintiff, and this is attained, when the trespasser goes off and leaves the property in the place and condition in which it was found by him upon the plaintiff's premises, if the damages caused by the interruption of free use and possession are paid for.

In *Otis* v. *Jones*, 21 Wend. 394, cited in the note to this section, the New York court held that an offer to return after suit could not relieve the defendant from paying the value. This is contrary to the well-established doctrine in our State, and shows that the rule of law in relation to mitigation of damages stands on a different ground from that in Maine and Massachusetts. *Prescott* v. *Wright*, 6 Mass. 20; *Squire* v. *Hollenbeck*, 9 Pick. 551; *Pierce* v. *Benjamin*, 14 Pick. 356; *Higgins* v. *Whiting*, 24 Wend. 379.

Two other cases, in which the doctrine contended for by the plaintiff seems to be held, are based upon *Gibbs* v. *Chase*, as authority. *Connah* v. *Hale*, 23 Wend. 462; *Wooley* v. *Carter*, 7 N. J. L. (2 Halst.) 85.

On the other hand, the Supreme Court of Massachusetts, in a lengthy opinion have said: "Upon the question concerning the amount of damages to be recovered, the court should have adopted the prayer of the defendant, and have instructed the jury that his having given the plaintiff notice . . . that the association had relinquished all claim to the machinery, . . . and the fact that the machinery had never been appropriated to their use, nor moved from the place where it had always been, should be considered in mitigation of damages." *Delano* v. *Curtis*, 7 Allen, 470; So as in trover, *Woodbury* v. *Long*, 8 Pick. 543; *Wheelock* v. *Wheelwright*, 5 Mass. 104.

The doctrine of the charge in this case is also laid down in Sedgwick on Dam. 689, 690, 691; *Brandon* v. *Allen*, 28 La. Ann. 60. An intermeddling with another's property, any tortuous act by one person toward another, cannot exonerate the other from the duty to use ordinary care so as not to further damage himself thereby. *Plummer* v. *Penobscot Lumber Ass'n*, 67 Maine, 363.

PETERS, J. A deputy sheriff wrongfully attached the plaintiff's goods, dispossessing the plaintiff and putting a keeper in charge of his store. On the next day, the deputy tendered to the plaintiff a return of the goods uninjured, and in the same condition as when attached the day before. The plaintiff refused to receive them.

It was ruled, at the trial, that the damages for the attachment and taking, should be limited to any injury necessarily sustained by the plaintiff, by the disturbance of his possession from the date of the attachment to the date of the offered return. This was error. The general rule of damages applies in such case. The plaintiff was entitled to recover what the entire property was worth when it was attached. A return of property in mitigation of damages could not be forced upon the owner against his consent.

When repossession and redelivery are spoken of, in the cases relied upon by the defendant, as going in mitigation of damages, it has reference to a return of the property with the consent of the owner. A person cannot be said to possess, who does not

consent to the possession. Nor can there be a redelivery where there is no acceptance. A mere offer to deliver is not a delivery.

It has been held that an officer, liable as a trespasser for irregularly distraining goods for taxes, may be entitled to have the amount of the taxes deducted from the damages recoverable against him, the taxes being regarded as thus cancelled and paid. It is for the owner's benefit in such case that the tax be regarded as paid. And other cases founded upon the same or a similar principle may be found. But in all of them the doctrine is founded upon the idea, that the deduction or mitigation is allowed with the implied assent of the owner. The case at bar is not such a case.

The case most relied upon, to support the proposition advocated by the defendant, is *Delano* v. *Curtis*, 7 Allen, 470. But in that case a vital element was wanting which is not absent here. In that case, the defendant did not take the property into his own possession, or necessarily exclude the owner from its control. He merely forbade, but did not attempt to prevent, a removal of property which was upon his own premises. The facts are not very fully reported, but *Greenfield Bank* v. *Leavitt*, 17 Pick. 1, is cited in the opinion as its authority, and the latter case decides only, that "if the property for which the action is brought, should be returned to and *received by* the plaintiff, it shall go in mitigation of damages." In *Stickney* v. *Allen*, 10 Gray, 352, the same court refused to apply the doctrine, which the present defendant contends for, to a state of facts calling for its application, if in any case it should be applied, the property taken being certain stereotype plates of peculiar value to the plaintiff, and of very little value to anybody else. But, as PUTNAM, J. said, in *Greenfield Bank* v. *Leavitt*, *supra;* "the certainty of a rule is quite an equivalent for its occasional want of perfect exactness."

The rule asked for by the defendant, would give to the trespasser more power and discretion than courts are accustomed to exercise which order an acceptance of property offered to be returned in mitigation of damages, after a hearing as to its justice and expediency. In such case, by the power of the courts, an owner may have to accept a return of his property; but by

the power of the party he must accept it, if the defendant's theory prevails.

It is true, that such a rule would work well in a few peculiar and exceptional cases. The trouble is, that it would operate unjustly in very many and most cases. A dividing line could not be easily established. The rule would have to apply to all cases where the trespass is not wilful, wanton or malicious. This would give the election to a trespasser to decide how an owner shall be compensated for his trespasses. It would have a tendency to stimulate carelessness and unwarranted experiments in attaching property. It would impose unusual and unreasonable risks and responsibilities upon the owner. He may lose his credit, or be broken up in his business, by an improvident trespasser, and still be obliged to accept his goods again. He may, in the meantime, have got other goods, or gone into other business, and not be favorably situated to take the property back. He must at his peril decide correctly whether the trespass was a wanton or malicious act or not. How is he to ascertain that fact? How may he know whether the property will be returned or not? How long shall he be held in suspense by the wrongdoer? How can he always know whether the property is returned in the same condition as when taken or not? In most cases, his embarrassments would be greater than he could bear. The law does not impose them upon him.

Exceptions sustained.

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

ORRIN STEVENS *vs.* THOMAS L. ROBINSON.

Oxford. Opinion June 24, 1881.

Deed. Fraudulent conveyance. Fraud in fact.

As the law now stands in this State there is no such thing as fraud in law as distinguished from fraud in fact.

A voluntary conveyance to a relative by an insolvent person, though *prima facie* evidence of fraud, is not void unless it is in fact tainted by fraudulent intent.

The cases of *Wescott* v. *McDonald*, 22 Maine, 407, and *McLean* v. *Weeks*, 65 Maine, 425, considered in the opinion.

ON REPORT.

A writ of entry to recover a parcel of real estate situated in Oxford.

Plea, general issue, and brief statement claiming title in the defendant.

The opinion states the facts.

The law court was to render such judgment as the rights of the parties required.

Enoch Foster, Jr. and *George Hazen* for the plaintiff, cited: *Wyman* v. *Brown*, 50 Maine, 143; R. S., c. 104, § 4; *Morse* v. *Sleeper*, 58 Maine, 335; *Marwick* v. *Andrews*, 25 Maine, 530; *Hovey* v. *Hobson*, 51 Maine, 66; R. S., c. 73, § 1, *Austin* v. *Stevens*, 24 Maine, 526; *Kingsbury* v. *Wild*, 3 N. H. 32; *Gore* v. *Brazier*, 3 Mass. 541; *Bigelow* v. *Jones*, 4 Mass. 513; *Wildridge* v. *Patterson*, 15 Mass. 151; *Drinkwater* v. *Drinkwater*, 4 Mass. 359; *Scott* v. *Hancock*, 13 Mass. 163; R. S., c. 71, § 22; *Howe* v. *Ward*, 4 Maine, 195; *Bates* v. *Avery*, 59 Maine, 354; *Arnold* v. *Sabin*, 1 Cush. 525; *Wells* v. *Child*, 12 Allen, 332; *Yeomans* v. *Brown*, 8 Met. 51; *Tenney* v. *Poor*, 14 Gray, 500.

Polly Davis, the deceased insolvent, at the time of her death was owing various creditors, in all amounting to $118.09,—$41.09 of which appears to have been presented and proved before the commissioners of insolvency, and the balance was due to C. F. Durrell, thirty dollars, and Orrin Stevens, forty-seven dollars.

The forty-seven dollars of Dr. Stevens was a preferred claim, and, as he testifies, was due him at the time of the conveyance from Polly Davis to Sarah J. Davis, and it does not appear in the list of claims proved before the commissioners.

The only property or assets that ever came to the hands of the administrator was the real estate named in the inventory, being the premises conveyed by the deceased without consideration to Sarah J. Davis, the same sold by the administrator, and the same sued for in this action.

The sale of the premises was by virtue of that section of the statute hereinbefore named, as "lands fraudulently conveyed."

We respectfully submit to the court that the word "fraudulently," as used in this connection, does not mean or necessarily import any moral turpitude, or premeditated fraud, but that legal fraud which results from the transactions of a party, as in this case, where the conveyance is fraudulent as to creditors. That this is the true construction of the statute is conclusively settled in the following cases: *Wescott* v. *McDonald*, 22 Maine, 407; *McLean* v. *Weeks*, 65 Maine, 425; *Norton* v. *Norton*, 5 Cush. 528.

Black and Holt, for the defendant, cited: *French* v. *Holmes*, 67 Maine, 186, and cases cited; *Seward* v. *Jackson*, 8 Cow. 406; R. S., c. 103, § 6; *Usher* v. *Richardson*, 29 Maine, 415; *French* v. *Peters*, 33 Maine, 396; *Adams* v. *Palmer*, 51 Maine, 487; *Fowler* v. *Shearer*, 7 Mass. 19; *Stearns* v. *Swift*, 8 Pick. 533.

BARROWS, J. The demandant claims in this action to recover a small lot of land in Oxford with a building thereon occupied as a dwelling house, upon testimony which may be regarded as establishing the following facts.

Demandant is a creditor of one Polly Davis, who died insolvent January 5, 1877. His claim is a preferred one amounting to about fifty dollars; and other claims against her estate amounting to between forty and fifty dollars were duly proved before the commissioners of insolvency appointed by the judge of probate.

The only property inventoried was the above named piece of real estate appraised at $150. Upon due proceedings in probate court the administrator was licensed in August, 1877, to sell the whole of the real estate for the payment of debts and charges of administration; and in regular course of proceeding upon proper notice sold the same at auction to the demandant for fifty dollars in November, 1877, and gave him a deed in proper form dated January 14, 1878, which constitutes the demandant's title. Polly Davis' title to the demanded premises accrued November 22, 1872, by deed from her daughter Elizabeth Morse. The consid-

eration was $42.50, paid in four notes for $10.63 each; two of which were outstanding in the hands of an indorsee when Polly Davis died. The house was built some twelve or more years ago; by whom does not distinctly appear, but it was prior to the conveyances about to be mentioned, and although their legal effect was to convey the building if it was owned by the grantor, it seems to have been all along regarded in the bargains as the personal property of some third party and distinct from the land. It was occupied by James B. Davis, a son of Polly Davis, and his family, by Polly herself and her daughter Mrs. Morse and her husband. The lot, originally twice as large as it is now, was conveyed by one Jones to Mrs. Morse, and she conveyed the half upon which the house stood to Polly Davis in consideration of $42.50 as before stated. We think the fair inference from all the testimony is that the building was erected by James B. Davis with the consent of the owner of the land, and that Polly Davis took the conveyance from Mrs. Morse at James' request for the purpose of keeping it out of the reach of possible creditors of James.

About a month before Polly Davis' death she conveyed the lot at James' request to James' wife, so far as appears without any pecuniary consideration. In March, 1877, before administration granted on Polly Davis' estate, the defendant, bargaining with James B. Davis, received, for a fair and adequate consideration, a deed of the premises from Davis' wife which constitutes his title.

The defendant seems to have stipulated that a bill which he had against James' wife, and one of six or seven dollars against James himself, and one of four dollars contracted by Polly Davis, but left by her for a younger son to pay, should be allowed to him in part payment of the consideration, and to this James agreed. The defendant also seems to have required James to pay the outstanding notes given by Polly Davis to Mrs. Morse for the land, and this was done.

The defendant forthwith made expensive improvements, laying out much more than the original cost in improving the building. We are satisfied that he bought in good faith, with no design of

defrauding Polly Davis' creditors, or any knowledge that they had any just claim upon the premises, for the extinguishment of which he did not provide.

Hereupon the defendant contends that there was no fraud as against Polly Davis' creditors in the conveyance from her to her son's wife; and that in any event, he, himself, having purchased in good faith and for value from Polly Davis' grantee, is protected from any imputation of fraud in the conveyance to his grantor, and so has the better title.

The demandant insists that the conveyance made by Polly Davis a month before her death (when she was doubtless insolvent unless this piece of real estate could be appropriated for the payment of her debts,) was legally fraudulent as to her existing creditors, and that it is not necessary to show any actual fraudulent intention on her part or that of her grantee; and that although the defendant, if he had made the purchase in good faith from her grantee before her death would have got a good title, inasmuch as he did not purchase until after her death, he took his title subject to the lien of her creditors, and the liability to a sale by her administrator under the statute authorizing a sale for the payment of debts of all lands fraudulently conveyed by the deceased.

Whether the statute subjects property, which at the time of the death of the insolvent grantor is still in the possession of his fraudulent grantee, to a sale for the payment of the insolvent's debts as effectually as if it went into the possession of his heir or devisee, is a question which we need not now decide. The demandant's counsel makes a strong argument on this point, apparently well supported by the authorities he cites, in favor of the proposition which he seeks to maintain. But the difficulty in the way of his recovery in the present action lies deeper. If he would prevail he must first establish the fraudulent character of Polly Davis' conveyance to the defendant's grantor.

Counsel does not claim that there was any "premeditated fraud," but founds on what he calls a "legal fraud," which he says appears in the conveyance of this property by Polly Davis at her son's request to his wife without consideration when she had not property sufficient to pay her own debts.

He quotes to support this position, the law as laid down by SHEPLEY, J., in *Wescott* v. *McDonald*, 22 Maine, 407, thus: "The object of the statute was to enable creditors through the action of the administrator to obtain their debts out of the estate in all cases where they were by law entitled to consider the conveyances fraudulent as against them. And conveyances may be fraudulent as against them without proof of actual fraud when made without any valuable consideration received therefor. There is no reason to believe that those terms were used by the legislature with the intention to include actual only and not constructive fraudulent conveyances." Demandant relies also upon *Norton* v. *Norton*, 5 Cush. 528, where the court say that "the conveyance of property by way of gift by one deeply in debt if thereby he becomes incapacitated to pay his debts, is legally fraudulent as to his creditors," and "may be deemed in law fraudulent though no such fraudulent intention existed in the mind of the grantor, he not properly considering the amount of his indebtedness, or the extent of his assets;" and upon *McLean* v. *Weeks*, 65 Maine, 415, 425 where a similar doctrine seems to have been recognized. But these notions are obsolete.

The law as it now stands in this State is found in *French* v. *Holmes*, 67 Maine, 189, 193, where it is held that "where a creditor contests a gift, sale, or conveyance by his debtor as fraudulent, the question of fraud is a matter of fact to be determined by a jury;" 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;" that, although a gift of his property by an insolvent debtor is *prima facie* fraudulent as against existing creditors, still, "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;" that, "there is no such thing as fraud in law as distinguished from fraud in fact; that, the want of consideration is simply a circumstance bearing upon the question of fraud which is a fact for the jury;" that, "mere indebtedness is not sufficient to render a voluntary conveyance void. Whether it is fraudulent or not is to be determined by the jury upon a full knowledge of all the facts and circumstances of the case."

As before observed, it is not claimed on the part of the demandant that there was actual or premeditated fraud on the part of Polly Davis in making the conveyance under which the defendant derives title.

If it were claimed, and if, (without any express stipulation in the report that the court shall have power to draw inferences as a jury might,) we should consider the question of fraud in fact upon such "knowledge of all the facts and circumstances" as we have, we should find it impossible to say that this conveyance of Polly Davis, whose equitable interest in the premises seems never to have exceeded the small amount of the notes which she gave for the land, was made with the intent of defrauding her creditors.

It seems rather to have been in the execution of a trust which she assumed at the request of her son who paid the notes which she gave, in fact had paid part of them (as appears by the testimony of his wife) when the conveyance was made, and at that time seems to have assumed the remainder. "We were agoing to pay for the land," says the witness. It is plain that it would require all the strictness of the old doctrines and something more to make this conveyance a fraud upon Polly Davis' creditors.

Much of the testimony which would ordinarily be inadmissible in a real action is competent so far as it discloses "facts and circumstances" bearing upon the question whether there was or was not actual fraud in this conveyance.

With this view of the law and facts, the foundation of the plaintiff's claim disappears.

Judgment for defendant.

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

FRANCIS CARPENTER *vs.* GRAND TRUNK RAILWAY COMPANY.

Oxford. Opinion June 27, 1881.

Stat. 1871, c. 223. Railroad ticket. Limitations.

The stat. 1871, c. 223, which declares that the holder of a railroad ticket shall have the right to stop over at any of the stations along the line of the road, and that his ticket shall be good for a passage for six years from the time it is first used, applies only to transportation within the territorial limits of this State; the statute has no force beyond the limits of the State, and consequently does not apply to a ticket from Portland to Montreal, while the ticket is being used beyond the limits of the State.

While such a ticket is being used in New Hampshire, Vermont, or Canada, the rights of the passenger will be governed and controlled by the laws of those places and not by the laws of Maine, but in the absence of proof to the contrary, the law of those places will be presumed to be the same as the common law of Maine, and not the same as the statute above cited.

ON EXCEPTIONS and motion for new trial.

Case for forcibly ejecting the plaintiff from the cars of the defendant at Compton in Canada on the 30th day of March, 1875, while he was riding upon a ticket purchased of the defendant at Portland, on the day of its date, which read as follows:

"GRAND TRUNK RAILWAY.

Mch. 3, '75.

☞ Good only for continuous trip within two days from date.

Portland to Montreal.

7101

Second-class."

The opinion states the case presented to the law court.

Geo. A. Wilson, for the plaintiff.

The only question in this case not settled by *Dryden* v. *Grand Trunk Ry. Co.* 60 Maine, 512, arises from the fact that the expulsion from the cars in this case occurred in Canada instead of in this State.

The contract was made in Portland, it was valid and must be governed by the laws of this State regulating such contracts. 2 Kent Com. 454, 462. The contract was made here in accordance with the laws of this State. There was a breach of this contract on the part of the defendant; for this breach action is brought to the bar of this court, and there is no principle of law or justice that can be invoked to exonerate the company from its liability voluntarily incurred.

J. and E. M. Rand, for the defendant, cited: *Paul* v. *Virginia*, 8 Wall. 168; *Henderson* v. *Mayor*, *N. Y.* 92 U. S. 259; *LeForest* v. *Tolman*, 117 Mass. 109; *Milwaukee R. Co.* v. *Armes*, 91 U. S. 489.

WALTON, J. The plaintiff claims to recover damages for having been, as he says, wrongfully ejected from the defendants' cars. The facts, briefly stated, are these:

The plaintiff purchased a ticket of the Grand Trunk Railway Company, of Canada, entitling him to a passage from Portland to Montreal. The ticket had these words printed upon it: "*Good only for continuous trip within two days from date.*" The ticket was dated March 3, 1875. It was purchased at the company's office in Portland. The plaintiff started on his journey, and having stopped over at various places along the route, reached Coatacook in Canada several days before March 30, 1875. On that day he took the train for Montreal, but the conductor refused to allow him to ride on the ticket of March 3, 1875, and forcibly ejected him from the cars. For this act he commenced an action against the company in this State, and has obtained a verdict for two hundred dollars damages. The defendants claim a new trial upon the ground that the rulings of the presiding judge were erroneous.

A statute of this State (Act 1871, c. 223) declares that the holder of a railroad ticket shall have the right to stop over at any of the stations along the line of the road, and that his ticket shall be good for a passage for six years from the time it is first used. The presiding judge ruled that if the plaintiff was put off the train for no other reason than because he was traveling

on the 30th of March on a ticket dated on the 3d of the same month (there being no evidence in the case of any local law or statute of Canada in conflict with the law of Maine) the defendants would be liable. The question is whether this ruling can be sustained. We think it cannot. The act of 1871 applies only to transportation within the territorial limits of this State, and cannot be applied to an entire passage from Portland to Montreal. To hold otherwise would render the act unconstitutional. *Hall* v. *DeCuir*, 95 U. S. 485. In that case the courts of Louisiana had construed a statute of that State, intended to secure equality of rights to colored passengers, as applicable to the entire voyage of a steamboat carrying passengers from New Orleans, in the State of Louisiana, to Vicksburg, in the State of Mississippi; and, because of this construction, which gave an extra territorial force to the statute, the federal Supreme Court held the act unconstitutional, as an attempt to regulate inter-State commerce, in violation of that article of the federal constitution which confers that power upon congress. There is nothing in the decision to indicate that the constitutionality of the act would not have been sustained, if the State courts had held that it applied only to transportation within the State of Louisiana. It is clear, therefore, that we cannot give our statute extra territorial force without rendering it unconstitutional, unless there is a distinction between a voyage by water upon the Mississippi river, and a passage by land over the Grand Trunk Railroad; and it is the opinion of the court that no such distinction can be maintained.

This brings us to the inquiry whether the ruling at the trial can be sustained upon the ground that there was no evidence of what the law of Canada was. We think not. Undoubtedly the case was to be tried in accordance with the law of this State, in the absence of proof of any other law. "It is a well settled rule," say the court of appeals of New York, "founded on reason and authority, that the *lex fori*, or, in other words, the laws of the country to whose courts a party appeals for redress, furnish in all cases, *prima facie*, the rule of decision; and if either party wants the benefit of a different rule or law (as, for instance, the

lex domicilii, *lex loci contractus*, or *lex loci rei sitæ*), he must aver and prove it; the courts of a country are presumed to be acquainted with their own laws, but those of other countries are to be averred and proved, like other facts of which courts do not take judicial notice." *Monroe* v. *Douglass*, 5 N. Y. 447. And the rule is similarly stated in a recent English case: "A party who relies upon a right, or an exemption, by foreign law, is bound to bring such law properly before the court, and to establish it in proof; otherwise the court (not being entitled to notice such law without judicial proof), must proceed according to the law of England." *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115–129. It is often said that in the absence of proof to the contrary the court will presume the foreign law to be the same as the domestic law. But we think the above is the better way of stating the rule. The result is the same.

The judge who presided at the trial was therefore right in the assumption that the law of Maine was to furnish the rule of decision, the law of Canada not having been proved; but we think he was wrong in the assumption that it must be the statute of 1871 instead of the common law of the State. Holding, as we do, that the statute of 1871 is applicable only to transportation within the State—that it abrogates the common law only to that extent—we think a contract for the sale of a ticket may lawfully be made here, and may lawfully place a limitation upon the time within which it shall be used, other than that stated in the statute, if it is to be used in some other State or country; and that such limitation will be, *prima facie*, binding upon the purchaser; and that he can only avoid the *prima facie* effect of such limitation by showing that the law of the place where it was to be used did not permit it. In other words, we hold that the common law is still in force here with respect to such contracts; that is, with respect to contracts or tickets for transportation in other states or countries. For instance, the plaintiff's ticket entitled him to a passage from Portland to Montreal. It had this limitation printed upon it: "Good only for continuous trip within two days from date." While using it within this State the limitation would be inoperative by force of the statute of 1871.

Within this State he could stop over and resume his journey at any time within six years. But while using it in New Hampshire, Vermont, or Canada, the limitation would be, *prima facie*, valid; and he could only avoid this *prima facie* presumption, by showing that by the law of these places the limitation was not valid. The burden of proof, to show the existence of such a law would be upon him, not upon the railroad company to show its non-existence. The fact, however, should not be overlooked that by availing himself of his right to stop over in this State, the holder of such a ticket would break the continuity of his journey, and thus, perhaps, forfeit his right to ride further upon it, when he should reach the line of the State. But that is a matter to be thought of when purchasing or accepting such a ticket.

By what law a carrier's contract is to be governed, when it stipulates for transportation of freight or passengers through more than one State or country, and the laws of these States or countries are not the same, is a problem not easily solved. The authorities are confused and conflicting. The more recent decisions will be found cited and commented upon in the second edition of Wharton's Conflict of Laws, § § 471–481, inclusive. We do not find it necessary to discuss the question, because, at the trial of this cause, no such conflict was shown to exist, and the question is not properly before us.

Exceptions sustained.
New trial granted.

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

JOHN S. GETCHELL and another *vs.* SAMUEL H. WHITTEMORE.

Washington. Opinion June 28, 1881.

Deed. Mistake. Description. Exceptions.

A deed described the premises by metes and bounds, and excepted therefrom a lot previously conveyed to the grantee by *Roswell* Hitchcock. The records disclosed that this lot was conveyed to the grantee by *Urban L.* Hitchcock, and not by *Roswell. Held,* that this mistake in the name does not vitiate the exception when by the aid of the records referred to, there is enough of the description which is true to make certain the lot intended by the exception.

Where a deed describes the land as the premises conveyed to the grantor by another deed, to which reference is made for a particular description, it will not give the grantee title to a lot which was excepted from the deed to which reference was made, although the title to the excepted lot was in the grantor of the last deed at the time of executing the same.

ON REPORT.

Writ of entry, wherein the plaintiff demands a certain lot of land in East Machias, embracing what is marked on the plan as the Getchell lot, and the S. H. Whittemore homestead.

Plea, *nul disseizen*, and brief statement.

The plaintiffs' title was by a mortgage from the defendant to them, September 11, 1875, which contained the following description: "A certain lot or parcel of land with the buildings thereon, situated in East Machias, and being the same premises which were conveyed to me by Urban L. Hitchcock and his wife, Mary G. Hitchcock, by deed dated July 16, 1855, recorded in Washington county records, book 84, page 332, to which deed or the record thereof, reference may be had for a more particular description of the premises hereby intended to be conveyed."

The deed from Urban L. Hitchcock to the defendant, described all the lots shown by the plan, "reserving therefrom so much of the above described premises as was sold to John Pierson, Charles McGuire, John B. Blackburn, and said Samuel H. Whittemore by Roswell Hitchcock, to whose several deeds reference is made for particulars."

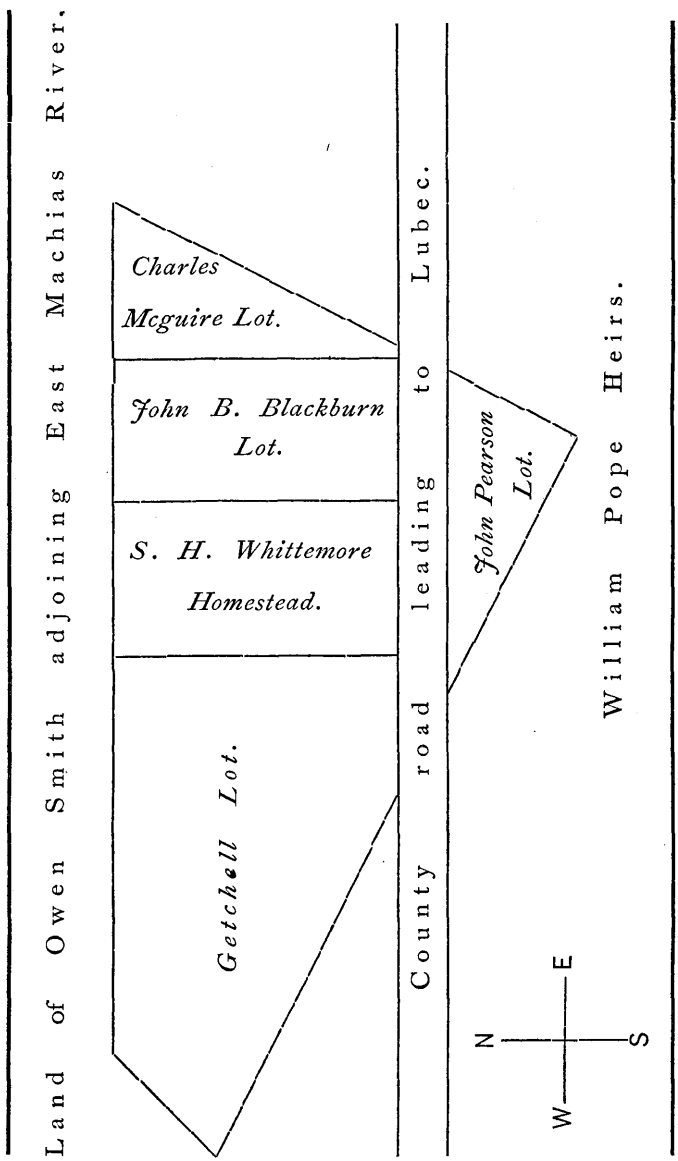


Diagram showing the lots of land referred to in the opinion and report.

Other material facts appear in the opinion.

J. A. Milliken and *Charles Sargent*, for the plaintiffs.

A. McNichol, for the defendant.

DANFORTH, J. This is a real action involving the title to a portion only of the land described in the writ. That portion is the lot marked upon the accompanying plan, "S. H. Whittemore homestead." The remainder of the land described, it is conceded, belongs to the plaintiffs. The defendant is in possession, and defends as to the lot in dispute on the ground of a prior mortgage to other parties, and an entire want of title in the plaintiffs. Whether this mortgage is prior to any title in the plaintiffs, is not material in this case, as the defendant shows no claim under it, unless possibly the right of redemption, and that would not avail him, if the plaintiffs' deed covers it. So that the only question presented is, whether the plaintiffs have shown a better title to this lot in question, than the possession of the defendant.

To sustain their title, the plaintiffs put in evidence a mortgage deed from the defendant to themselves, duly executed and delivered with a notice of foreclosure. The answer to this is, that it does not cover the lot in dispute, and this is the only question at issue.

The description in the deed gives no metes or bounds, but so far as is material to this case describes the premises, as "being the same . . which were conveyed to me by Urban L. Hitchcock and his wife, Mary G: Hitchcock, by deed dated July 16, 1855, . . to which deed . . . . reference may be had for a more particular description of the premises hereby intended to be conveyed." Upon reference to this latter deed, we find a description which includes the lot in question with other land, but also a reservation, having the force of an exception, of four different lots previously sold to different persons by "Roswell Hitchcock." Three of these lots are not material now, as neither of them are included in the writ in this case. The other alleged to have been sold to this defendant is material, for that is the one if any were so sold, which is now in question. The case not only fails to show any conveyance from Roswell Hitchcock to this defendant, but shows affirmatively that none such ever was made, and for that reason it is claimed that the reservation, so far as it relates to this lot, can have no effect, but leaves it a part of the conveyance in the deed.

But the case further shows that the lot had been previously conveyed, and to S. H. Whittemore, as stated, though the conveyance seems to have been made by Urban L. Hitchcock, and not by Roswell.

Now is this difference in the name of the grantor sufficient to vitiate the description of the lot to be excepted? We think not. It is a familiar principle in the construction of deeds that however false the description may be in its particulars, if there is sufficient of the true remaining, to ascertain fairly what was intended to be conveyed, the false shall be rejected and the true retained. In this case, if the name of the grantor had been omitted, enough would have remained to show the lot intended to be excepted. It would then have plainly appeared that it was the lot formerly sold to Whittemore, and that this very lot was the only one included in the description, which had been so sold. Nor is it probable that the grantees could be led astray by such a mistake. They must have understood that some lot was intended to be excepted from the grant, and the records to which they must go in any event to ascertain what they were getting, would show them with entire certainty the false and the true in the description. It could hardly be possible that they would take a deed with such an exception, without the proper inquiry, and such inquiry made at legitimate sources alone, would lead to certainty. Thus by the deed, aided by the records alone, it is easy to ascertain what was intended to be excepted. The deed itself shows the exception; its extent, even if the mistake had not been made, could be ascertained only from the records, and from them the extent of it is shown without danger of error, even with the wrong name.

Another view of this renders the mistake immaterial, even if otherwise important. The description in the deed to the plaintiff does not refer to the reservation. It conveys the same premises which were conveyed to Whittemore by the deed of Hitchcock and wife, dated "July 16, 1855." On reference to that deed and the records, it is found that at that date, U. L. Hitchcock had no title to the lot in question. He had previously sold it to the same grantee to be sure, but nevertheless so conveyed that his

deed of July 16, 1855, could not convey it, unless a grantor can convey that to which he has no title. It is true the defendant owned that lot at the time he gave his deed to the plaintiffs, but he had acquired the title to it, not by the deed of July 16, 1855, but by one of an earlier date. His deed to the plaintiffs therefore does not cover the lot in question, nor by any construction which can be given to its terms does it purport to do so.

As the title of the plaintiffs to the remainder of the lot described in their writ is conceded, the entry must be,

Judgment for the plaintiffs for the land claimed, except the lot marked on the plan "S. H. Whittemore homestead."

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

DANIEL W. GARLAND and another in equity,

vs.

WILLARD R. PLUMMER and others.

Penobscot. Opinion June 22, 1881.

Chattel mortgage. Fund representing mortgaged property. Title of mortgagee, and assignee of the mortgagor.

A title by purchase from a mortgagor of a chose in action or fund, that represents mortgaged personal property, takes precedence under our statute of the title under the mortgage to the property which is represented by such fund, where the mortgage had never been recorded.

BILL IN EQUITY, heard on bill, answer and proof.

The bill sets out that Willard R. Plummer, having a permit to cut and carry away hemlock logs from land in Edinburg during the logging season of 1872-3, cut about seven hundred thousand feet of such logs, and February 18, 1873, assigned the permit to the plaintiffs to secure them for the lumbering supplies, etc. furnished him; that the logs while on the way to market were

greatly damaged and destroyed by the wrongful acts of the Penobscot Lumbering Association; that Plummer instituted a suit against that association for the damage thus sustained by him. While the action was pending, Plummer assigned it to John A. Eames, and Eames assigned to Alfred E. Nickerson. Judgment was in favor of the plaintiff there, and these plaintiffs seek to share in the same to a sum little rising $350, being the amount due them from Plummer, and secured by the assignment of the permit. Plummer, Eames, Nickerson and the Penobscot Lumbering Association were made parties defendant in the bill.

Wilson and Woodward, for the plaintiffs.

The assignment of the permit to the plaintiffs gave them title in the logs as against Plummer and all persons claiming under him. *Fiske* v. *Small*, 25 Maine, 453; *Sawyer* v. *Wilson*, 61 Maine, 529.

They can follow not only the logs but the proceeds. *Prentiss* v. *Garland*, 67 Maine, 345; *Rice* v. *Cobb*, 9 Cush. 302; *Farnsworth* v. *Boston*, 121 Mass. 173.

In a court of equity the plaintiffs will be regarded as mortgagees. 2 Story's Eq. Jur. § 1018.

There can be no doubt that the plaintiffs are entitled to so much of the damage to the property mortgaged as will pay the mortgage debt. And equity is the proper remedy. *Wilson* v. *E. & N. A. Ry Co.* 67 Maine, 358.

It is well settled on authority and principle that a purchaser of a chose in action is not within the rule which protects purchasers for valuable consideration, and that the vendee will not only take no better title than that of his vendor but will not be entitled to set up the purchase as a bar to equitable relief in favor of prior equities created by the vendor. *Downer* v. *So. Royalton Bank*, 39 Vt. 25; *Covell* v. *The Tradesman Bank*, 1 Paige, 131; *Cockrell* v. *Taylor*, 15 Eng. L. & Eq. 101; *Mangles* v. *Dixon*, 18 Eng. L. & Eq. 82; *Sargent* v. *Southgate*, 5 Pick. 312; *Bartlett* v. *Pearson*, 29 Maine, 9.

E. C. Brett, for the defendants Eames and Nickerson, cited: *Googins* v. *Gilmore*, 47 Maine, 9; *Bussey* v. *Page*, 14 Maine,

132; *Treat* v. *Gilmore*, 49 Maine, 34; *Wilson* v. *E. & N. A. Ry Co.* 67 Maine, 358; *Amee* v. *Wilson*, 22 Maine, 116; *Chadbourne* v. *Hanscom*, 56 Maine, 554; *Jenness* v. *Mt. Hope Iron Co.* 53 Maine, 20.

Plummer and the Penobscot Lumbering Association filed no answers and present no briefs.

SYMONDS, J. In this bill in equity, a decree is sought, adjudging the complainants owners, in part, of a judgment recovered in the name of Willard R. Plummer against the Penobscot Lumbering Association, declaring the nominal judgment-creditor the trustee of the complainants in respect to the judgment to the extent of their claim against him for supplies, and commanding the judgment-debtors to pay the balance due upon the supply bill out of the amount of the judgment against them.

If we assume that there is a balance of about $300, still due from Plummer to the complainants, for supplies, as they allege; that this balance was secured by the assignment to them, February 18, 1873, of Plummer's permit from Eames and Godfrey, being in effect a mortgage to the complainants of the logs then cut under the permit (and there is no proof that any of the logs destroyed were subsequently cut;) that no prior lien upon the logs or their proceeds for stumpage, exists; that the judgment against the lumbering association represents in part the proceeds of the logs so mortgaged, and that the complainants, as mortgagees, may follow in equity the proceeds of the mortgaged property and hold their lien upon the fund as if it were the logs themselves, the question still remains whether the bill can be maintained against the assignees of the judgment who purchased for value; the mortgage not having been recorded.

The purchaser of a chose in action on which an action is pending takes subject to all the equities relating to it, between the litigating parties; and ordinarily acquires only the right of his assignor, who can convey simply his own interest, not that of another, in the claim.

But the facts of this case are peculiar. The action against the Lumbering Association, while pending, was first assigned January, 21, 1875, by the plaintiff, Plummer, to Eames, and

afterwards, March 27, 1877, by Eames to Nickerson, in each instance for a valuable consideration. The complainants seek to hold a part of that judgment against the assignees, on the ground that it was recovered for logs mortgaged to the complainants by the plaintiff in that action and destroyed or lost by the negligence of the defendants, and so should take the place of, or be regarded in equity as if it were the logs so destroyed. The claim is, substantially, that the fund in the hands of the judgment-debtors, to be paid on the execution, *is* the mortgaged property in another form, reduced to money.

The mortgage to the complainants, not having been recorded would not be valid against Eames or Nickerson, if the logs had been in existence and they had bought the logs, instead of buying the suit pending to recover damages for the loss or destruction of them. Nor would notice of the complainants' mortgage in such case, without record, have defeated the title by purchase. *Rich* v. *Roberts*, 48 Maine, 548; *Sheldon* v. *Conner*, 48 Maine, 584.

The question then is simply this: Can the complainants in equity assert a superior right, and enforce it, against purchasers of a suit pending to recover damages for the destruction of property, when a purchase under the same circumstances of the property itself, had it been in existence, would have given title superior to the complainants' mortgage?

We think it must be answered in the negative. When mortgaged property is reduced to money, if the fund is to be regarded as the property itself for the benefit of the mortgagee, to uphold his lien, it must be regarded in the same way in determining priority of right between the mortgagee and a purchaser for value.

The right of the complainants to the fund is no greater than their right to the property, and can only prevail against those in reference to whom the complainants' title to the logs under the same circumstances would be superior. The purchaser of a chose in action is advised that he takes it subject to all legal defences, but he as naturally expects to get good title to the claim, whatever it may be, from the person to whom it is nominally due and

who is prosecuting a suit to recover it, as to obtain title to a chattel by buying it of one who assumes to be the owner. It is no more equitable in the general sense of the term for the unrecorded mortgage to prevail in the one case than in the other. The statute is imperative. "No mortgage of personal property shall be valid against any other person than the parties thereto," unless the mortgagee has possession or the mortgage is recorded. The mortgage to the complainants was not recorded; they were not in possession. Yet they seek indirectly to make their mortgage effective against one who has purchased a judgment recovered for the destruction of the mortgaged property, who was not a party to the mortgage, who paid a valuable consideration, and against whom there is no allegation of fraud or collusion. To sustain the claim would be to make the unrecorded mortgage valid against others than the parties to it, in contravention of the statute.

In *Murray* v. *Sylbum*, 2 Johns. ch. R. 442, it was said by KENT, the chancellor, "It is a general and well settled principle, that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor. But this rule is generally understood to mean, the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. He takes it *subject to all the equity of the assignor*, say the judges in the very elaborately argued case of *Norton* v. *Rose*, 2 Wash. R. 233, 254, on this very point, touching the rights of the assignee of a bond. The assignee can always go to the debtor, and ascertain what claims he may have against the bond, or other chose in action which he is about purchasing from the obligee; but he may not be able with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and for this reason, the claim of the assignee without notice, of a chose in action was preferred in the late case of *Redfearn* v. *Ferrier*, 1 Dow. R. 50, to that of a third party setting up a secret equity against the assignor. Lord ELDON observed in that case, that if it were not to be so, no

assignments could ever be taken with safety. I am not aware that this decision was the introduction of any new principle in the case of actual *bona fide* purchases or assignments by contract; though Lord THURLOW said in one case, that the purchaser of a chose in action must abide by the case of the person from whom he buys; but he spoke this on a question between the assignee and the debtor. In assignments by operation of law, as to assignees of bankrupts, the case may be different; for such assignments are said to pass the rights of the bankrupt, subject to all equities, and precisely in the same plight and condition as he possessed them."

There are cases that seem opposed to this language of the learned chancellor, and the later case of *Covell* v. *Tradesman's Bank*, 1 Paige R. 131, cited by the complainants, may perhaps limit or question it. The cases, however, which assert the contrary as the general rule, admit that there are exceptions to the rule which they adopt, arising in special and peculiar relations of fact.

But without attempting to define the precise limits of the doctrine, as applicable to all varieties of cases, presenting widely different circumstances, we are satisfied the distinction we have drawn is one that the law raises upon the facts of the present case.

If the complainants seek to share in a fund, on the ground that it represents mortgaged property, the question between the complainants and the respondents is, in what relation to mortgaged property do the respondents stand. Their relation to the fund being that of purchasers for value, they are as much purchasers for value of the mortgaged property, as the complainants are mortgagees of the fund; and in such case, under our statute, the title by purchase from the mortgagor takes precedence of that by mortgage unrecorded.

Bill dismissed with costs,

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

MARY T. RICHARDSON *vs.* JOHN RICHARDSON.

Hancock. Opinion June 29, 1881.

Tenants in common — assumpsit between, disseizin of. R. S., c. 95, § 16.

A tenant for life of an undivided portion of real estate has a right to his share of the profits accruing from the products of a quarry opened upon the premises.

A tenant in common may disseize a co-tenant of the common estate.

A tenant in common may maintain assumpsit, independently of R. S., c. 95, § 16, against a co-tenant who has received from sub-tenants more than his share of the rents and profits of the common estate; unless the plaintiff had been disseized by such co-tenant when the rents and profits were received. By R. S., c. 95, § 16, this right of recovery in assumpsit is extended to cases of personal occupancy, by the co-tenant, of the whole, or more than his proportion, of the common estate.

A disseizee of lands cannot maintain assumpsit for rents against the disseizor.

ON REPORT.

Upon so much of the evidence as was pertinent and legally admissible, the law court was to render such judgment as the law and facts required.

The material facts appear in the opinion.

A. P. Wiswell, for the plaintiff.

Tenants in common may hold different interests. One may have an estate in fee and the other a life-estate. 1 Wash. R. P. 416.

A tenant for life of a quarry is entitled to work it and take the profits. 1 Wash. R. P. 111; *Billings* v. *Taylor*, 10 Pick. 460.

A tenant in common may maintain assumpsit against his co-tenant. R. S., c. 95, § 16; *Cutler* v. *Currier*, 54 Maine, 90.

True, there is a principle of law running through the reports, that the title to real estate cannot be tried in an action of assumpsit, but isn't the reason for it a thing of the past?

The statute cited authorizes assumpsit by one tenant in common against another, but the first step to be taken in such a case is to prove title, to show that plaintiff is a co-tenant. If his title is disputed the main issue may be upon that question, and if he prevails upon that, if he proves that he is a tenant in common, then the statute gives him a remedy by assumpsit. If that is not the construction of the statute, then it is a nullity, for there

can be no case so clear but that the defendant may raise the question of title.

Hale and Emery, for the defendant, cited: *McLellan* v. *Cox*, 36 Maine, 95; *Page* v. *Swanton*, 39 Maine, 400; *Brigham* v. *Winchester*, 6 Met. 460; *Wyman* v. *Hook*, 2 Maine, 337; *Rogers* v. *Libbey*, 35 Maine, 200; *Howe* v. *Russell*, 41 Maine, 446; *Porter* v. *Hooper*, 11 Maine, 170; *Bigelow* v. *Jones*, 10 Pick. 161; *Miller* v. *Miller*, 7 Pick. 133; *Buck* v. *Spofford*, 31 Maine, 34; *Shepard* v. *Richards*, 2 Gray, 424; *Peck* v. *Carpenter*, 7 Gray, 283; *Moses* v. *Ross*, 41 Maine, 360; 106 Mass. 318.

SYMONDS, J. This is an action of *indebitatus assumpsit*, for money had and received. By the specification under a declaration in the ordinary form, the plaintiff claims to recover "one quarter of certain sums of money paid by Cyrus J. Hall to defendant for stumpage of granite," cut on the real estate therein described.

It appears that the defendant, and one Stephen Richardson, let the premises to Cyrus J. Hall and A. Sherman, by lease dated June 2, 1871, "for the purpose of carrying on the business of granite quarrying," and that certain moneys have been received by the defendant for the stone quarried there.

As the case is upon report, we think it right to infer from the admission and other evidence, from the terms of the lease and the absence of denial on the part of the defendant, that the rent of the quarry has been received since the date of the lease by the lessors; to the exclusion of the plaintiff, who claims to have a life-estate in one-fourth of the land on which the quarry is situated, and, as such life-tenant, to be entitled to one-fourth of its rents and income. The admission on this point is not explicit; but, taken in connection with all the testimony, we think it was intended to remove from the case the question of the reception by the defendant of sums of money exceeding his share, if the plaintiff establishes her claim to one-fourth of the income of the quarry; and to leave the precise amount for which the defendant in such event is to be liable to be fixed at the hearing in damages at *nisi prius*.

Taking it, then, as proved that the defendant has in his possession a certain amount of money that would belong to the plaintiff, if she owned a share as tenant in common in the quarry, has she shown such an interest, and does the testimony disclose a state of facts which entitles her to recover in an action of assumpsit?

It may be regarded as settled by the case of *Richardson* v. *Richardson*, 64 Maine, 62, in which the question of plaintiff's title to these premises was involved, that the two deeds under which she claims from the heirs of Richard Richardson, gave her a tenancy for life in one undivided fourth of the premises where the quarry was opened; provided Richard Richardson at his death, and his heirs afterwards, had such an interest to convey. In the case cited, this was correctly assumed to be the construction and effect of the deeds under which the plaintiff claims title.

It is not denied that Richard Richardson on November 8, 1836, by deed from Benjamin Richardson, acquired title to such undivided fourth, nor is it claimed that he or his heirs have ever since conveyed it by deed, except to the plaintiff. But it is urged by the defendant that some time after the deed to Richard, in 1836, the four owners of the undivided tract, of whom Richard was one, and the defendant another, went upon the premises and by common consent made a division of them, running the lines and establishing the boundaries according to which each was to hold in severalty; and that, while no deeds were given, the occupation since that date has been in severalty according to the division then made, and of such a character as, after the lapse of twenty years, to give title to each owner in the part assigned to him. According to this division, as the defendant states it, the granite quarry is on the fourth which fell to him, and under this claim it would be, therefore, his exclusive property.

In this division the tract was first divided into ten lots, of which four were assigned to the defendant, and two to each of the other three owners. The claim of the plaintiff now is — through her counsel, although she states it more broadly in her testimony — that one reason for allowing the defendant a double share in that division was that the granite along the front of his lot, on the shore, where the quarry now is, was reserved, and

was to remain as before the common property of the four owners. This the defendant denies, and here arises the most difficult question of fact in the case. The burden is upon the defendant to establish such a division and such possession under it as to give him exclusive title. The record leaves him as the owner of an undivided fourth. We do not find in the testimony any other adequate explanation of the assignment of a double lot to the defendant, than that there was some such reservation of the granite as the plaintiff claims. Considering what the case shows as to the tract itself, and the growth upon it, we doubt very much if the difference in wood and timber was the reason for giving the defendant so much more than the others. The testimony, also, fails to show an exclusive occupation by the defendant of the locus of the granite quarry. The proceeds of the occasional cuttings of granite at that point, since the division, and down to a comparatively recent period, have been claimed and to some extent have been received, as the property of the four. Upon careful review of the testimony, we think the reservation of the granite, along the front of the lot assigned to the defendant, from the division, affords a better explanation of the difficulties which the case presents than any other theory.

The plaintiff, then, is a life-tenant of one undivided fourth of a granite quarry, which was opened and which the lessees of the defendant were working at the date of the deeds to her, from the heirs of Richard Richardson. One of these deeds gave her in terms all the right of said heirs, "to any and all profits which have or may arise from the sale of granite," and the other included "the due proportion of the rent of the stone quarry worked, or that may be worked on the said estate." Without such express grant, it is not doubted that as tenant for life in the estate, she had a right to her share of the profits accruing from the working of such opened quarry. 1 Washburn on Real Property, *111, and cases cited.

Independently of the provisions of R. S., c. 95, § 16—and it may well be doubted whether this declaration contains the proper averments to bring it within that section—one tenant in common could maintain an action of assumpsit against a co-tenant

who had received in money more than his share of the income of the estate; provided the plaintiff had not been disseized. That section does not enlarge the remedy in this respect. A tenant in common who has been disseized cannot now maintain such an action. The main purpose of the statute was to extend the right of recovery in such action to cases in which the defendant had had the use and occupation of the joint estate, or more than his share of it, or where he had himself received or taken more than his share of the rents or income thereof, in the products of the soil or otherwise than in money.

Under the statute 4 and 5 Anne, c. 16, which is a part of the common law of this State and of Massachusetts, it had been held in a series of decisions in both States that *indebitatus assumpsit*, in place of the old action of account, would lie by one tenant in common against another, as bailiff, for receiving more than his proportion of the rents and profits. "The statute constitutes the receiver bailiff to his co-tenant, without special appointment, and all that is requisite to bring the plaintiff within it, is to allege and prove that he is tenant in common, and that his co-tenant has received more than his just share of the rents." *Munroe* v. *Luke*, 1 Met. 464.

"The application of this doctrine, however, has been restricted to cases where the money has been actually received, and the liability to account has resulted in a duty to pay money, or where the defendant holds the share as bailiff of the plaintiff, or the occupation has been by consent." *Cutler* v. *Currier*, 54 Maine, 91; *Peck* v. *Carpenter*, 7 Gray, 283; *Brigham* v. *Eveleth*, 9 Mass. *538; *Jones* v. *Harraden*, 9 Mass, *540, note; *Gowen* v. *Shaw*, 40 Maine, 56; *Dyer* v. *Wilbur*, 48 Maine, 287; *Brown* v. *Wellington*, 106 Mass. 318; *Buck* v. *Spofford*, 31 Maine, 34.

In *Miller* v. *Miller*, 7 Pick. 136, the court seem to regard this right of action as limited to cases in which the title of the plaintiff is an admitted fact, but we think a mere dispute about the title, if the plaintiff proves the estate he claims and seizin thereof at the date when the defendant took the income, more than his share of which he retains in money, cannot have the effect to defeat

the action. If the plaintiff was, in fact, seized of the estate in common, when the defendant received in money the whole income thereof, we think the later cases in Massachusetts and in this State, clearly indicate that upon proof of those facts she must have her remedy under the statute of Anne. If the defendant were in possession of the estate under a denial of plaintiff's title, it would be evidence tending to show the disseizin of the plaintiff, and if it resulted in proof of that fact—as it might well do, if unexplained—then, and not till then, would the relative position of the parties be changed.

The result then may be briefly stated, that neither at common law, nor under the statute of Anne, can one tenant in common maintain assumpsit against another for use and occupation of the common estate, and that this rule is modified by R. S., c. 95, § 16. But that under the statute of Anne, the general rule is that assumpsit will lie to recover the due proportion of moneys in the hands of defendant, received from the income of the common estate.

This rule, however, cannot have universal application. The action is assumpsit, not trespass, nor a writ of entry. The disseizee of lands cannot maintain assumpsit for rents, against the disseizor. *Bigelow* v. *Jones*, 10 Pick. 161. Possession under an adverse claim of title negatives the idea of a promise to pay rent. The disseizor is a wrongdoer against whom a writ of entry or trespass for mesne profits in proper cases will lie, but the disseizee does not have the freehold or possession, on which he must rely in order to prove a promise to pay rent to him. The disseizor is a trespasser and cannot be treated as a tenant. The tort cannot be waived for the purpose of trying the title to lands in an action of assumpsit. *Munroe* v. *Luke*, *supra*.

One tenant in common may be disseized by another. When this has been done, as to the rents received during the period of disseizin, assumpsit is no longer the proper remedy at common law, nor under any statute. *Bracket* v. *Norcross*, 1 Greenl. 89; *Thomas* v. *Pickering*, 13 Maine, 353; *McLang* v. *Ross*, 5 Wheat. 124; *William* v. *Watkins*, 3 Peters, 51, 52; Stearns on Real Actions, 41; *Barnard* v. *Pope*, 14 Mass. *438.

The plaintiff, then, may maintain assumpsit, independently of R. S., c. 95, § 16, for her share of the moneys in the defendant's hands, the income of the common estate, unless she had been disseized by the defendant, when the rents were received by him.

One tenant in common may disseize another of the whole or of a part of the common estate. *Bennett* v. *Clemence*, 6 Allen, 10, 18. In this case we are forced to the conclusion that, as to the site of the granite quarry, during the period for which the plaintiff claims to recover her proportion of the rents, she was actually disseized by the defendant and his co-lessor. It is true that *prima facie* the possession of the defendant would be held to be in accordance with his title. He would be rightfully in possession as a tenant in common, and that would be held to be the character and extent of his occupancy, in the absence of evidence to indicate the contrary. *Small* v. *Clifford*, 38 Maine, 213; *Prescott* v. *Nevers*, 4 Mason, 330; *Dexter* v. *Arnold* 3 Sumner, 157. But here, according to the plaintiff's own account, when her title accrued, and from that time to the date of the writ, the defendant by his lessees was in actual possession of the quarry, under claim of title adverse to the plaintiff, denying her title and holding her out. The evidence shows a state of facts which amounts to a disseizin, even as between tenants in common. The rents, therefore, were received during a period when the plaintiff was actually disseized. Her proportion cannot be recovered in an action of assumpsit. The phrase, "without the consent of their co-tenants," in R. S., c. 95, § 16, does not refer to the case of a disseizor, receiving rents under an adverse claim, known to his co-tenant.

Plaintiff nonsuit.

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

WILLIAM H. MCLELLAN *vs.* AXEL HAYFORD.

Waldo. Opinion July 1, 1881.

Attorney at law. Retainer fee. Usage.

The proper scope and application of the right to charge retainers, is to remunerate counsel for being deprived, by being retained by one party, of the opportunity of rendering services for and receiving pay from the other.

There is no such general usage or custom among lawyers in this State, to charge retainers in all contested cases in which they are employed, as to justify an instruction to the jury as a matter of law, that in contested cases and for reasonable amounts such fees were a legal charge in each case in which he was engaged. And such an instruction, in an action by an attorney at law, for services and disbursements in behalf of a client, is erroneous, when the account sued embraces besides the charges of retainers in each contested case other charges covering all the services actually performed, and disbursements made in behalf of his client.

ON EXCEPTIONS.

ASSUMPSIT on account annexed and for labor and services done and performed, and money paid and expended.

Writ was dated October 6, 1877.

Among the items in the plaintiff's bill of particulars were the following:

January, 1873. "To retainer to prevent Godfrey engaging me in matter of Willson, Tennant and Company. I make a charge of this, although it was paid to me by Mr. Hayford, because he has filed the amount in his account in set-off, $50.00"

September, 1873. "To retainer in action of Willson, Tennant and Company in U. S. court, commenced by Bradbury, 50.00"

October, 1874. "To retainer in action of James Higgins for notes; action of trover, 25.00"

October, 1875. "To retainer in action of James Higgins against you on the account hereto annexed, or substantially this account, entered October, 1875, $100.00"

Numerous other items in same cases, amounting to,	1028.38
Other charges relating to other matters,	112.99
	$1366.27
Numerous credits amounting to,	393.14
Balance claimed by the plaintiff,	$973.13

Verdict was for $909.78.

The instruction to which exceptions were taken is stated in the opinion.

Fogler and McLellan, for the plaintiff.

"After the defendants were retained, it was proper for them to charge a reasonable fee for the retainer without any special contract." 103 Mass. page 527. In *Perry* v. *Lord*, the court allowed $200 retainer. 111 Mass. 504. See also, *Pierce* v. *Parker*, and others, 121 Mass. 403.

"Retainers are uniformly and universally charged, and the same may be recovered under the common counts." *Eggleston et al.* v. *Boardman*, vol. 5, of the Reporter, page 724. This case was determined in the Supreme Court of Michigan, June term, 1877. We presume it is in the thirty-seventh vol. of Michigan reports. In neither of these cases was proof of usage or custom required.

If the instructions of the court to the jury were wrong, then why not let the plaintiff have the verdict less the retainers allowed by reason of the wrong instructions.

J. W. Knowlton, for the defendant, cited: Story on Contracts, § § 11, 12, 13, 14; *Bodfish* v. *Fox*, 23 Maine, 94; *Codman* v. *Armstrong*, 28 Maine, 91; 1 Kent's Com. § § 20, 22; 2 Bouvier's Law Dict. 13; 16 Pet. 18; *Robinson* v. *Fiske*, 25 Maine, 401; *Leach* v. *Perkins*, 17 Maine, 462; *Emmons* v. *Lord*, 18 Maine, 35.

BARROWS, J. The question briefly stated, is whether in an action by a counselor at law against a client on an account annexed for services and disbursements in a number of suits embracing specific charges for all the services rendered and expenses incurred in minute detail, it is proper for the presiding justice, without proof of any agreement to pay any retainer fees (except

in a single case where one of fifty dollars was paid in advance,) and without proof of any custom or usage among lawyers to charge a retainer fee to their clients, to instruct the jury that "in contested cases and for reasonable amounts, such fees were a legal charge, and that the plaintiff should recover a reasonable sum for retainer fees in each account," leaving it to the jury to say whether the charges were reasonable or not.

The jury must have understood from this, that proof of the employment of the plaintiff as counsel, would of itself as matter of law, raise an implied promise on the part of the defendant, to pay any reasonable sum which the plaintiff might charge as a retaining fee in all the contested cases, besides making compensation for all the services actually rendered; that *something* was due and recoverable as and for a retaining fee, in addition to the pay for services and disbursements in each contested case, and that the only question for them was, whether the sum charged was a reasonable sum to charge for a retainer. In support of the instructions, the plaintiff relies upon the cases of *Aldrich* v. *Brown*, 103 Mass. 527; *Perry* v. *Lord*, 111 Mass. 504; *Pierce* v. *Parker*, 121 Mass. 403; and *Eggleston* v. *Boardman*, decided by the Supreme Court of Michigan in 1877, and given in the Reporter, vol. 5, p. 724.

But neither of these cases nor all of them combined can be regarded as authority for the instruction here complained of. So far as they have any bearing on the question, the propositions which they respectively sustain are these:

In *Aldrich* v. *Brown*, it is held that no special contract is necessary to entitle an attorney actually retained in a suit, to charge a reasonable retainer. Doubtless, in proper cases, such a contract may be implied.

Perry v. *Lord*, is a good brief illustration of the special operation of a retainer, and of the circumstances under which a contract to pay one may properly be implied. The counselor, though consulted and engaged to assist throughout the case, was not again called upon, and had no further claim for services in the matter.

Pierce v. *Parker*, only holds that where an attorney performs other services besides those which are made the subject of specific

charges, he is entitled to compensation therefor, by a charge for commissions on the money collected, "or in some other general form," though the money may not have actually gone through his hands.

Eggleston v. *Boardman*, simply affirms the doctrine declared in *Aldrich* v. *Brown*, with the additional remark that "retainers are uniformly and universally charged, and may be recovered under the common counts. The remark is doubtless true as touching the usage in Michigan. But we know of no such universal practice in this State, and the exceptions before us, at all events, show that no evidence of any such usage was presented at this trial. Nor do we find that the instruction can be better maintained upon principle than by authority.

The circumstances under which a contract to pay a counselor at law for services rendered and expenses incurred may be inferred, and the character and effect of that contract, do not essentially differ from those which pertain to, and regulate contracts for other professional services, skilled labor of any kind, and, in fact, any kind of service in which the amount of the compensation necessarily depends largely upon the circumstances under which the service is rendered, its nature, and the charges that are usual and customary for like services.

Hence in the absence of a special contract to pay these retainers, the plaintiff must prove enough to show that there was an implied promise on the part of the defendant to pay them. The proper scope and application of the right to charge retainers, is to remunerate counsel for being deprived by being retained for one party, of the opportunity of rendering services for, and receiving pay from the other—not to swell the amount of the bill which accrues for services rendered throughout the progress of the cause, and contains specific charges for them all. The necessity, force and effect of proof of a particular usage, have been so fully discussed in *Bodfish* v. *Fox*, 23 Maine, 90; *Codman* v. *Armstrong*, 28 Maine, 91; and *Leach* v. *Perkins*, 17 Maine, 462, that they need no further elucidation here.

Referring to these cases for the rules and principles involved, we say that there is no general custom in this State amounting to a rule of law, to be declared by the court, which would author-

ize the presiding judge to pronounce the plaintiff entitled to recover these retainers from the mere fact that he was employed by the defendant to render services in the cases.

In the absence of any evidence tending to establish the existence of a particular usage, with reference to which these parties may be presumed, under the circumstances, to have made their contract, the instruction that such fees were a legal charge, and the plaintiff was entitled to recover a reasonable amount for retainer fees in each account was not correct.

Moreover had there been proof of a usage to charge retainer fees, in addition to liberal specific charges for all services rendered and all expenses incurred in cases where the counselor was not merely retained, but was actually employed in the case throughout, we think it would have been the duty of the presiding judge to declare such a usage to be against natural reason and justice, and not binding upon the defendant.

An examination of the account presented by the plaintiff, shows that besides specific charges for services, (some of which might well be regarded as included in the liberal and punctual charges of term fees in the cases he was engaged in) the plaintiff charged his client with even the minutest items of his personal expenses in attending to the business, such as sixpences for fares in the horse cars and the like. Such exactness leaves neither occasion nor room for the charges "in some other general form" (like that of retainer fees) spoken of in *Pierce* v. *Parker*, 121 Mass. 403, as designed to cover other services performed by the counsel, besides those which are made the subject of specific charge. It is suggested at the bar, that plaintiff is willing to cure the error by a *remittitur*. If he remits an amount equal to all the sums which stand charged in his account for unpaid retainers, there will be no occasion to send the case to a new trial. The only error alleged will then have become harmless, and the exceptions may be overruled.

Unless he so remits within a reasonable time,

Exceptions sustained.

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

SYMONDS, J. dissented.

COLUMBUS BROWN *vs.* JAMES P. BLUNT and another.

Somerset. Opinion July 19, 1881.

Fraud. Fraudulent representations. Damages.

To enable one to recover damage for false representation by a party when making a conveyance to him, it is essential that there should be some evidence that he has been thereby injured.

When the only consideration for such a conveyance is that the plaintiff was induced thereby to pay his own debt, he cannot be said to be injured, because he suffered no damage. It was not defrauding him to induce him, by means of a false representation, (had that been proved) to pay his own debt.

Nor are expenses, subsequently incurred in the prosecution of fruitless suits, based upon such conveyance, evidence of damages resulting from the false representation, when it appears that by the exercise of common prudence and caution, such suits would not have been commenced.

ON EXCEPTIONS.

An action on the case for deceit in selling to the plaintiff six wagons, in which the plaintiff alleges that the defendants had no interest in fact. The writ was dated February 23, 1880.

Plea, general issue.

The facts are stated in the opinion.

D. D. Stewart, for the plaintiff.

From Lord COKE, to the present time, it has been the glory of the common law that it abhors fraud in whatever shape it may present itself.

"The common law," said all the judges of England in *Fermor's* case, 3 Coke, 78, a, "doth so abhor fraud and covin, that all acts, as well judicial as others, being mixed with fraud and deceit, are in judgment of law, wrongful and unlawful."

"Fraud," said PARKER, C. J. in *Somes* v. *Brewer*, 2 Pick. 192, "vitiates all transactions, even those of a court of record."

"A learned writer terms fraud *hydra multorum capitum*." BIGELOW, C. J. in *Reynolds* v. *Reynolds*, 3 Allen, 606.

The present case presents one of those heads. It involves both fraudulent acts, in selling him the Huntress contract without telling him it was worthless, and fraudulent words in telling him

that his title to six wagons was good. *Pasley* v. *Freeman*, 3 T. R. 51; *Lee* v. *Jones*, 17 C. B. (N. S.) 495; *Com.* v. *Stone*, 4 Met. 47; *Lobdell* v. *Baker*, 1 Met. 201; *McCance* v. *R. R. Co.* 7 Hurls & N. 490; *Donovan* v. *Donovan*, 9 Allen, 140; Bigelow on Fraud, 4, 70, 71; *Marston* v. *Knight*, 29 Maine, 341; *Nowlan* v. *Cain*, 3 Allen, 261; *George* v. *Johnson*, 6 Humph. (Tenn.) 36; *Bean* v. *Arnold*, 16 Maine, 251; *Hussey* v. *Sibley*, 66 Maine, 192.

Folsom and Merrill, for the defendants, cited: *Coe* v. *Persons unknown*, 43 Maine, 436; *Walker* v. *Lincoln*, 45 Maine, 71; *Sweet* v. *Brown*, 12 Met. 177; *Allen* v. *Holton*, 20 Pick. 458; *Munro* v. *Gardiner*, 5 Am. Dec. 531; *Leonard* v. *Vredenburg*, *Idem*, 316; Benj. Sales, § § 428, 429; Add. Torts, § § 1218, 1226; Broom's Com. on Com. Law, 339; Chitty Contr. 682, 683; 10 Mass. 199; 25 Maine, 247; *Atwood* v. *Chapman*, 68 Maine, 40; 1 Addison Con. 242.

BARROWS, J. It appears in the exceptions, that the defendants, on May 5, 1877, had control of an execution which had been recovered in the name of a Skowhegan bank, against one Huntress and the plaintiff, upon a note in which the defendants were payees, and said Huntress and the plaintiff (as his surety) were original promisors. One of the defendants went with the attorney and sheriff to the plaintiff's house, with the avowed purpose of levying the execution upon the plaintiff's homestead; but such negotiations were then had between them that no levy was made, the plaintiff agreeing to go with them to the village, and give his note for the debt, secured by a conveyance of real estate, which he did on the same day, and then and there received from the defendants a written assignment of all defendant's interest in a certain agreement or contract in writing, which had been made some two years previously, between said Huntress and the defendants, whereby Huntress had agreed to build a certain number of wagons for the defendants, they furnishing certain stock and materials, the wagons and all materials to be and remain the property of defendants during the process of building, and until disposed of by them, when the proceeds were to be appropriated,

first, to the payment of the defendants for such stock and material as they might furnish, and the residue to go to Huntress in payment for the labor and materials furnished by him. The assignment given by defendants to plaintiff, closes with the following significant language: "Meaning and intending to release and assign simply the interest which we now hold and retain in the said agreement, and the property specified therein. No claim to be made upon us in any event in regard to said matter or said property, and we are not to be liable for costs in looking up said property, or in any suit to enforce said agreement."

If the assumptions made by plaintiff's counsel in argument as to matters of fact were verified by the testimony reported, and there was evidence upon which the jury would have been justified in finding that the plaintiff, in the exercise of common prudence and caution, was nevertheless deceived by a false and fraudulent assertion on the part of the defendants, that they had a good title to six of the wagons referred to in the agreement, and was induced thereby to pay his money to the defendants for the assignment of a title, which not only was of no value, but which entailed upon him a heavy loss in endeavoring to enforce it, then certainly the nonsuit which was ordered at *nisi prius*, ought to be set aside. The objection to the testimony of the plaintiff, interposed by defendant's counsel, was rightly overruled, and plaintiff was permitted to put in his "evidence relating to the false representation." What was it? Aside from the contract with Huntress, and the assignment by the defendants before spoken of, there is only the testimony of the plaintiff himself, which upon his examination in chief, in reply to his own counsel, consists of a somewhat bold, though repetitious statement, defective as to exact time and circumstances, that when Blunt gave him this writing, "he said the title to those wagons was good;" "that there were six wagons not released that I was to have a claim on; I don't recollect that he told me at that time into whose hands those six wagons had gone, or any portion of them; don't recollect that he said what they were worth; said that would be my only way to get my pay. I asked him if the bill of sale was good, and he

said it was perfectly good. He says 'yes, just as good as it ever was.' His lawyer spoke up and said, it is good for twenty years. Acting upon the strength of his representations, I paid him the money. I gave him a claim on my farm on a year's time. When the year was out, he deeded the farm away, and got the money on it himself. After paying him in this way, I found out where the wagons were. Bartlett had two; Atwood, one; Steward or Ripley, one; Trafton, one, and Davis, one. Mr. Blunt owned up that the claim against Davis wasn't good for anything before he transferred the bill of sale to me. I brought actions against Trafton, Bartlett, Steward and Atwood, not against Davis; calculate I was obliged to abandon them. They recovered costs against me. Don't know of anything else of importance that was said at that time that Mr. Blunt made this transfer to me, only that he told me the bill of sale was good, and that would be my only way to get my pay out of him."

If the case stopped here, it might fairly be said that the testimony, if not modified or controlled, would justify a jury in finding the concurrent intentional deceit, and damage accruing therefrom to a party acting with reasonable caution, which will suffice to maintain the action. See discussion of principles applicable in such cases, in *Hammatt* v. *Emerson*, 27 Maine, 308.

These points established the case would fall within the familiar and incontrovertible principle of law, referred to by the court in *Lobdell* v. *Baker*, 1 Met. 201, "that where a party affirms either that which he knows to be false, or does not know to be true to another's loss and his own gain, he is responsible in damages for the injury occasioned by such falsehood." If the evidence suffices to establish those points, manifestly the defendant is not relieved from liability, because the conveyance which his fraud may have induced the plaintiff to accept, contains no warranty respecting the matter to which the alleged false representation relates, or may be a mere naked release of his interest with stipulations against further liability in the premises. See *Nowlan* v. *Cain*, 3 Allen, 261.

The fact that the conveyance which the defendant in such an action has given contains no warranty, but on the contrary,

stipulations against liability on the part of the vendor, is not conclusive that he has made no false representations to induce his vendee to accept such a conveyance. The contents of the conveyance may furnish matter for the consideration, first, of the court, and then, if a *prima facie* case is made out, of the jury, bearing upon the question whether the alleged false representations were, in fact, made, and whether the plaintiff in the exercise of reasonable caution could have been deceived thereby, seeing what was suggested by the character of the writing; but the writing works no estoppel upon a party actually defrauded, while its existence may sharply suggest the necessity of clear and decisive proof of the frand which is relied on to vitiate it and give the defrauded party a right of action outside of it. Hence the justice presiding at *nisi prius* admitted and heard all the evidence touching the alleged fraud which the plaintiff had to offer. The reasoning of the court in *Parlin* v. *Small*, 68 Maine, 290, 291, is applicable in all such cases. The written transaction between the parties "is a wall of evidence against oral assaults to begin with. It should not be battered down for alleged deceits or misunderstandings, unless the proof of them is clearly and abundantly established." And again, quoting from a Pennsylvania case, "It has more than once been decided that it is error to submit a question of fraud upon slight parol evidence to overturn a written instrument. The evidence of fraud must be precise, clear and indubitable, otherwise it should be withdrawn from the jury." Conceding that at the end of his examination in chief, the plaintiff had made out a case that would entitle him to go to the jury, it seems equally clear that when his cross examination was finished and he announced that he had no more testimony to offer, the case was so modified that a verdict in his favor could not have been sustained, and hence the nonsuit of which he complains was properly ordered.

At the close of the plaintiff's examination in chief, we are left with the impression that the three hundred dollars named in the assignment, as a consideration, was actually paid in money or money's worth, under circumstances of some hardship, by plaintiff to defendant for the transfer of their claim on the wagons. But it presently appears upon cross examination that he paid nothing but the debt and costs in the execution which they held

against him, as surety for Huntress. The chief element of damage to the plaintiff and the chief motive for fraud on the part of the defendants vanish upon this avowal.

Plaintiff's counsel strive to find a motive for the defendants to commit a fraud in the supposed wish to procure from the plaintiff a conveyance of his land, instead of making a levy upon it. But the hypothesis is not supported by plaintiff's testimony, which tends to show that nothing was said about making the assignment to the plaintiff until after the agreement for a conveyance had been made. "The arrangement was made at my house when they come there for me to go to the village, and give a claim on my farm and the note. I can't say as to whether or not the wagons were first mentioned after I went to Harmony village, and went to see Mr. Huntress," says the plaintiff. "I don't remember whether I knew the wagons were sold or not." The aspect that the case now wears is that of a simple making over to the surety of whatever possibilities of reimbursement from the defaulting principal the creditor had in his power. There remains no conceivable motive for the perpetration of any fraud, unless it be pure malice.

The remark of BULLER, J. in *Pasley* v. *Freeman*, 3 T. R. 51, respecting *Crosse* v. *Garden*, Carth, 90, is apposite: "A man may be mistaken in his property and right to a thing without any fraud or ill intent."

But plaintiff's counsel still urge that he suffered damage from defendant's affirmation by reason of the expense he incurred in attempting to enforce the contract assigned, and they insist that the doctrine of *Pasley* v. *Freeman*, 3 D. and E. 51, that it is not necessary that the defendant should have been benefitted by the deceit in order to maintain the action where there has been a false affirmation with intent to defraud and consequent damage, should be applied. The doctrine is correct, if applicable.

In the complicated transactions of trade, fraud appears in such manifold and protean guise, that we are not disposed to lay it down as a rule of law that no action can be maintained for an intentionally false affirmation, causing damage to a reasonably cautious plaintiff, unless it appears that the defendant had an interest in causing it. Doubtless there may be cases where satis-

factory proof may be presented that the defendant has thus intentionally deceived the plaintiff to his injury and loss when it might be impossible to show that he himself was benefitted thereby, or that he colluded with those who were. We do not feel inclined to question the correctness of the doctrine of *Pasley* v. *Freeman*. But in the practical consideration of cases of this sort the remark of ASHURST, J. in that case that "it is not likely that such a species of fraud should be practised unless the party is in some way interested" should not be overlooked. The question here is narrower. Was there enough in the testimony offered in this case to warrant a verdict for the plaintiff? Weak in more than one point, upon one which it was essential for the plaintiff to establish it is entirely wanting.

"To enable one to recover damage for a false representation it is essential that there should be some proof that he has been thereby injured." *Fuller* v. *Hodgdon*, 25 Maine, 248.

There is no proof here of any damage to the plaintiff which could have happened to any one using ordinary caution. The payment of his own debt was no damage. It was not defrauding him to induce him to pay it by means of a false representation, had that been proved. Hence it is held in *Commonwealth* v. *McDuffy*, 126 Mass. 467, that the offence of obtaining property by false pretences cannot be committed when the party charged obtains no more than is rightfully due him; that the question in such cases is whether the defendant had an intent to defraud and effected that purpose; whether in order to accomplish it he made use of fraudulent representations and succeeded by means thereof.

The only other damage suggested was purely the fruit of plaintiff's venturesome spirit in litigation of which this suit furnishes fresh proof. The assignment was a written warning to him that there was nothing there that the defendants would risk any cost to secure. His testimony shows that he saw Huntress the day he received it, and for aught that appears could have ascertained before any cost was made whether Huntress had authority to dispose of the wagons.

As remarked by Lord KENYON in *Pasley* v. *Freeman*, "undoubtedly when the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence." It was probably the failure to prove any damage

for which an action could be maintained which induced the presiding judge to hold that "the evidence was not sufficient to prove a false representation that would entitle the plaintiff to recover;" "that the evidence failed to prove what must be a material averment in any count which could properly be filed by way of amendment" and to order a nonsuit.

On the case here presented we do not think the plaintiff was justly aggrieved by these rulings.

Exceptions overruled. Nonsuit confirmed.

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

COLLINS GRANITE COMPANY

vs.

AUGUSTUS R. DEVEREUX, Sheriff.

Hancock. Opinion July 20, 1881.

Stat. 1876, c. 90. Lien on granite. Words.

Stat. 1876, c. 90, gives to him who labors in quarrying or cutting and dressing granite in any quarry, a lien for the wages of his labor on all the granite quarried or cut and dressed in the quarry by him or his co-laborers for thirty days after such granite is cut and dressed, and as much longer as the stone remains unsold and not shipped on board a vessel.

This lien, if enforced by attachment within said thirty days, will have precedence of all other claims, including sales made within said thirty days. A laborer's attachment made after the lapse of said thirty days, will prevail against prior claims, only when made before the stone is sold or shipped on board a vessel.

The words "and" and "or" are convertible terms when the true import and design of a statute require it.

REPLEVIN for certain granite, cut stone, attached by the defendant, as sheriff, on various lien writs against George W. Collins, the owner of the quarry, where the stone were quarried, and in favor of laborers employed by Collins in quarrying and cutting the stone.

The various plaintiffs in the lien writs, labored on the stone in quarrying and cutting the same within thirty days before the attachment, and the attachment was to enforce liens claimed by them on the stone for such labor. Collins, however, had sold

the stone to the plaintiff before the attachment, but the stone had not been shipped on board a vessel.

The only question was, whether the liens of the laborers were lost by the sale before the attachment and within thirty days after the performance of the labor.

The law court to render judgment according to the law and facts, and damages in either event to be nominal.

H. A. Tripp, for the plaintiff.

The sale of the granite before any attachment, defeated the lien of the laborers under stat. 1876, c. 90.

That statute gives the laborer a lien, "for thirty days after such granite is cut and dressed, or until such granite is sold, or shipped on board a vessel."

Words or phrases are to be construed according to the common meaning. R. S., c. 1, § 4, par. 1.

The common meaning of "or" is that the expression, idea or phrase, is in the alternative, either this or that. Either a lien for thirty days, or a lien until such granite is sold.

The laborer should be protected so far as a just regard for the rights of others will admit, further than that, he is not entitled to protection.

L. A. Emery, for the defendant, cited: 3 Pars. Contr. 235, 241; *Winterfield* v. *Strauss*, 24 Wis. 394; *Com.* v. *Griffin*, 105 Mass. 185; *People* v. *Sweetsir*, 1 Dakota, 308; *Sheridan* v. *Ireland*, 66 Maine, 65; *Smith* v. *Colcord*, 115 Mass. 70.

BARROWS, J. Laborers employed, as those were whom the defendant here represents, by the owner of a granite quarry, to quarry and cut stone therein, would seldom if ever derive any benefit from the provisions of c. 90, laws of 1876, if the construction of said statute contended for by plaintiff's counsel should prevail. Without the statute, they can secure a lien by attachment of the stone which they and their co-laborers have worked upon, so long as it remains the property of their employer, and within reach of process; and upon plaintiff's construction, the provision which gives them a lien "for thirty days after such granite is cut and dressed," becomes as to them utterly meaningless.

A construction which will deprive this clause of the statute of all force, efficacy and significance in the greater part of the cases to which it is applicable, and will tend to neutralize its effect in all, is to be avoided if it is possible to do so. If the lien can be cut off by a sale or shipment before the lapse of the thirty days, it would be too much to expect that it would be suffered to exist that length of time in any case, where the laborers were really in danger of losing their wages. The object of the statute, is to make the pay of those whose labor has gone to enhance the value of the product, prompt and secure in all cases against both the misfortunes and the possible dishonesty of their employers.

The construction to be adopted, is that which, without violating the true signification of the language employed, shall best promote the object and efficiency of the statute in all its parts.

As remarked by SHAW, C. J. in *Cleaveland* v. *Norton*, 6 Cush. 384, "After all, the best ground of exposition is to take the entire provisions of the act and ascertain if possible, what the legislature intended."

To this, wherever it is possible to apply it, all other rules must give way.

Why should the legislature have mentioned a brief fixed time, within which the lien might be enforced by attachment, if its duration for that short space was to depend after all upon a contingency?

It is more consonant with the apparent legislative intent, and more certain to promote the object to be effected, to suppose that the day certain is given in any event, and the further opportunity after the expiration of the specified time, unless the stone should be sold or shipped.

We ought not to adopt a construction which would render any clause of the statute superfluous or insignificant, unless such construction is forced upon us in unmistakable terms.

We think the legislature intended to confer a substantial benefit and security upon the laborer, by giving him a lien upon the stone for his wages, for at least thirty days after it is cut and dressed, and as much longer as it remains unsold, and not shipped on board a vessel.

Instances are not wanting in which courts have construed words ordinarily disjunctive and alternative in a conjunctive and cumu-

lative sense, and the reverse, to conform to the obvious design of a statute.

The words "and" and "or" are convertible as the sense of a statute may require. *People* v. *Sweetsir*, 1 Dak. Ter. 308; *Winterfield* v. *Strauss*, 24 Wisc. 394; *Commonwealth* v. *Griffin*, 105 Mass. 185; *Barker* v. *Esty*, 19 Vermont, 131.

Judgment for defendant; and for a return with $1 damages.

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

STATE *vs.* EDWARD E. WIGGIN and another.

Kennebec. Opinion July 21, 1881.

Intoxicating liquors. Common Seller. Evidence.

At a trial upon an indictment as a common seller of intoxicting liquors, a certified copy of the record of a special internal revenue tax showing that the respondent paid a special tax as a retail liquor dealer during the time covered by the indictment is admissible in evidence.

Upon the trial of an indictment as a common seller, a request that the jury be instructed that, if there was no evidence of any sale the verdict must be for the respondent, cannot properly be given.

ON EXCEPTIONS.

Indictment of Edward E. Wiggin and Edwin A. Getchell, as common sellers of intoxicating liquors from December 15, 1880, to the time of finding the indictment at the April term of court, 1881.

The verdict was guilty, and the defendants alleged exceptions to the ruling of the presiding judge in admitting in evidence a certified copy of the record of a deputy collector of United States internal revenue, showing that the respondents paid a special tax of $25 as retail liquor dealers, and also to the refusal of the presiding justice to instruct the jury that the evidence was not sufficient in law to find the respondents guilty, also that although the jury find intoxicating liquors upon the premises, if there is no evidence of sale the verdict must be for the respondents.

H. M. Heath, county attorney, for the State.

E. W. Whitehouse, for the defendants.

APPLETON, C. J. The defendants were convicted as common sellers of intoxicating liquors.

Exceptions are alleged to the rulings of the justice presiding at their trial.

1. It is objected that a certified copy of the record of a special internal tax for the district including Kennebec county, showing the respondents paid a special tax as liquor dealers during the time covered by the indictment was received.

In *State* v. *Gorham*, 65 Maine, 270, the question of the admissibility of evidence of this character was fully considered. It was there held that a book containing a record of the names of persons paying special taxes kept at the office of the collector of internal revenue, as required by the statutes of the United States, or a duly certified copy of the same, was receivable in evidence.

The copy offered contained the letters, R. L. D. as describing the business or occupation of the defendants, for and on account of which the tax was paid by them.

These letters the deputy collector of the United States internal revenue testified to mean, retail liquor dealer. The evidence was properly admitted.

2. The counsel requested the court to instruct that the evidence upon the law was not sufficient to find the defendants guilty.

It was for the jury to determine the facts. The instructions given being correct, the error of the jury if they erred, is not to be corrected by exceptions. It may not be amiss, however, to remark, that it is difficult to see how they could have rendered a different verdict.

3. The third request was that "if there was no evidence of sale the verdict must be for the respondents." But this could not properly have been given. The defendants might have been shown to be common sellers by their own admissions. The fact might have been established by circumstantial evidence. The instructions given in relation to this request are not made the subject of exception.

Exceptions overruled.

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

E. M. BLANDING and others *vs.* T. H. MANSFIELD.

Penobscot. Opinion July 20, 1881.

Pleadings. Declaration. Demurrer. Exceptions. Practice.

Where there is nothing in the context to show that the defendant was likely to be thereby misled or prejudiced, it is no ground for sustaining a general demurrer that the word "plaintiff" is used in some parts of the declaration when there are three plaintiffs named.

Nor that in the account annexed the defendant is charged as indebted to a certain newspaper when the names of the plaintiffs as proprietors of the newspaper are given upon the bill.

Nor that one item of the account is for "bill rendered," without specifications, when there are other items upon which judgment may be rendered.

The adjudication of the presiding judge at *nisi prius* that a demurrer, filed at the second term and presented and passed upon the day it was filed, is frivolous and intended for delay, has no effect upon the rights or liabilities of the defendant and he is not legally aggrieved thereby.

ON EXCEPTIONS.

Action of assumpsit upon an account annexed, which was as follows:

(Account annexed.)

Maine Mining Journal. $2.00 per year in advance. Editors: E.M.Blanding, W.F.Blanding. E. H. Dakin, Business Manager.

Advertising Rates. Outside pages: Per square first insertion, $1.00 Per square, for continuance .40 Inside page: Per Square, first insertion, .75 Per square, for continuance .25

"Orders Solicited for General Job Printing of every Description.

Bangor, August 2nd, 1880.

M T. H. Mansfield & Co., Portland,

To MAINE MINING JOURNAL, Dr.

28 West Market Square.

June 21.	To card, 4 sqs. 2 mo.	12.00	
" "	Bill rend. Subscriptions & Papers,	10.50	
April 16.	2 Ea. No's. 26, 27, 28, 29 & 33,	.50	
July 23,	24 No. 30 & stamps,	1.44	
Aug. 6.	26 " 32 & stamps,	1.56	
June 25.	To new card, 2 sqr's 3 mos. to No. 37,	9.00	
" "	" " " " " " " 50,	9.00	
" "	To ———	.90	44.90

The action was entered at the January term, 1881, and at the next [April] term, the twentieth day, the defendant filed a general demurrer to the plaintiffs' declaration. A hearing was had on the same day and the demurrer was overruled and adjudged frivolous and intended for delay. To this ruling and adjudication the defendant excepted.

Bertram L. Smith, for the plaintiffs, cited: 62 Maine, 544; *Lord* v. *Kennebunkport*, 61 Maine, 462; *Rumrill* v. *Adams*, 57 Maine, 565.

George W. Verrill, for the defendant.

The demurrer should be sustained. (1.) The declaration alleges that the defendant being indebted to the "plaintiff" promised the "plaintiffs" to pay them, &c. (2). The account annexed is an essential part of the declaration. This one does not show that the defendant was indebted to the plaintiffs, but to the "Maine Mining Journal." This is a variance. (3.) The second item in the account is clearly insufficient. *Bennett* v. *Davis*, 62 Maine, 544.

The adjudication of the court that the demurrer was frivolous and intended for delay was unauthorized. R. S., c. 82, § 19.

BARROWS, J. Bad grammar does not vitiate a declaration when the person and case can be rightly understood. If it did, in these heedless days legal process as a remedy in the collection of small debts would be of little worth. In a declaration, as in a statute, we think "words of the singular may include the plural number," unless the connection is such as to make them likely to mislead the defendant as to some matter that is important to his defence. The word "plaintiff" which is here criticised by defendant's counsel, plainly signifies the plaintiff party and may well include all who are specified by name as plaintiffs. No one could be misled or harmed by the use of the singular for the plural. Nor do we think that the form of the debit in the account annexed can have produced any misleading effect, or be regarded as a variance, when the names of all the plaintiffs appear upon the bill as the conductors and apparent proprietors of the newspaper. It is a form much used in news-

paper bills and is perfectly intelligible when the names of the proprietors accompany it.

Nor does the fact that one item of the account is for "bill rendered, subscriptions and papers," draw the whole declaration within the condemnation of *Bennett* v. *Davis*, 62 Maine, 544. It was open to the defendant to demur for want of proper form in this item, but the demurrer should have been special, calling attention to the defect. And, as Clfitty says, in remarking upon the statute of Elizabeth requiring a special demurrer in certain cases, "where there are merits to be tried it is in practice more liberal not to demur for a mere mistake in form." A motion for a bill of particulars of the item would have been sustained, and would have preserved all the defendant's rights. *Harrington* v. *Tuttle*, 64 Maine, 474.

As the declaration stands there is sufficient matter substantially alleged to entitle the plaintiffs to their action, and hence the declaration is good on general demurrer. *Dole* v. *Weeks*, 4 Mass. 451. There are other items in the account which are not subject to the objection. It may be that the plaintiffs do not consider this item of sufficient importance to ask for judgment on it and take the trouble of amending.

But the demurrer admits only what is well set forth in the declaration. See *Lowell* v. *Morse*, 1 Met. 475, and the last clause of the opinion of the court, in *Millard* v. *Baldwin*, 3 Gray, 486.

The concluding remark of the court in *Dole* v. *Weeks*, above cited, is also apposite.

Under the circumstances stated, the adjudication by the presiding justice that the demurrer was frivolous and intended for delay, produced no effect whatever upon the rights or liabilities of the defendant, and he was not legally aggrieved thereby. The judge did not certify that the exceptions, which he allowed, were frivolous and intended for delay, nor did the plaintiffs ask him to do so.

In view of the efforts of the respective counsel and the course the case has taken, we do not feel disposed to say that what may have been only a well meant effort to show the necessity for that care and exactness which it is as much for the interest of plaintiffs

as of defendants to secure, shall be visited with the penalty of treble costs under R. S., c. 82, § 19.

Exceptions overruled.

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

WILLIAM HARVEY and others, petitioners for a road,

vs.

THE TOWNS OF WAYNE, READFIELD AND WINTHROP, appellants.

Kennebec. Opinion July 21, 1881.

Ways. County commissioners. Record. Judicial notice.

It is not essential that the number of rods, belonging to each town to build, of a way, laid out by the county commissioners through two or more towns, should be stated, if the record shows with certainty and precision the entire location upon the face of the earth.

The court takes judicial notice, not only of the division of the state into counties, towns, &c. as declared in R. S., c. 1, § 1, with bounds continuing as they are established, but of their geographical position also.

ON EXCEPTIONS.

Appeal from the doings of the county commissioners in laying out a county way through the towns of Wayne, Readfield and Winthrop.

A committee was appointed by the court on the appeal, and they made their report to the court at the October term, 1880, affirming the decision of the county commissioners.

Objections were filed by the appellants to the acceptance of the report, and overruled by the court. To this ruling the appellants excepted.

The facts sufficiently appear in the opinion.

J. H. Potter, for the petitioners.

Bean and Bean, for the appellants.

If the record of the county commissioners is defective and would be quashed on certiorari, it may be on this appeal.

Goodwin v. *Co. Com. Sagadahoc Co.* 60 Maine, 328; *Hodgdon* v. *Co. Com. Lincoln Co.* 68 Maine, 226.

There is no legal and sufficient description of the road located. The adjudication, return and record do not show in what towns portions of the road are located; nor that it is in any town; nor that it is in the county of Kennebec.

If it is said, that is certain which is capable of being made certain, it is replied, that any point and fact absolutely necessary in establishing such certainty must appear upon the record, and the grand preliminary fact necessary as a starting point, in our search for this road, is entirely wanting. In all located lands or ways, the place, the town, the county is the descriptive starting point. It does not appear that two pieces of the road are in any town in the county. See *Lewiston* v. *Lincoln Co. Com.* 30 Maine, 19; *P. S. & P. R. R. Co.* v. *Co. Com. of York*, 65 Maine, 292.

BARROWS, J. Objections were made to the acceptance of the report of the committee, affirming the judgment of the county commissioners in locating the road in question, for the following alleged reasons briefly stated: 1, Want of a legal and sufficient description of the road. 2, It is claimed that neither of the portions constituting the two ends of the located road are described as in any town in the county of Kennebec. 3, Because the record does not show what portion of said located way is to be built by each of the towns through which it passes.

The record exhibits a petition addressed to the county commissioners for the county of Kennebec, and signed by "citizens of said county," asking for the location of a county road beginning at one or the other of two proposed termini, both minutely described, and severally alleged to be "in the town of Wayne," thence to run by the most feasible route to and by several points in Wayne, one of which is "the road leading to one Robert Waugh's dwelling house, in the town of Wayne," and to certain points in Readfield, and to "some point on the Maine Central Railroad, not more than two miles southerly of the westerly end of the railroad bridge, across the Winthrop and Readfield pond." It exhibits also an adjudication by said commissioners after due

notice and hearing that common convenience and necessity require that the request of the petitioners should be granted, and a consequent location by them of a way beginning at one of the proposed termini described in the petition as "in the town of Wayne," and further designated by a birch stake, and thence running certain courses and distances, in all one hundred and ninety-two rods, over lands owned or occupied by individuals named, to "the road leading southerly from said Waugh's"— so far unmistakably in the town of Wayne. This is the piece which the appellants describe as constituting one end of the located way. It is apparently separate from the larger portion thereof, but connected therewith by public ways in which this portion ends and the remaining portion begins. The northwesterly terminus of the part remaining, is defined with sufficient clearness. It is at the road leading from Readfield woolen mill to the Sturtevant Hill, at the line between the towns of Readfield and Winthrop. This means the centre of the Sturtevant Hill road where it crosses the line between the towns. From thence the line is traced easterly following the town line on the southerly side thereof, a certain number of rods over lands of individuals named, to the road leading from Readfield corner to Winthrop village, and from thence, crossing said road to the northerly side of the town line, and following said town line on the northerly side thereof, on land of Salmon Smith, two hundred and twenty-one rods to stake in the woods, thence in a general southeasterly direction various courses and distances over land of another party, sixty one rods farther to the Maine Central Railroad. The width of the road and its position on one side or the other of the line traced as above, are carefully provided for.

We do not see any difficulty in ascertaining the location of the road from the record within the true meaning and intent of the cases cited from 30 Maine, 19, and 65 Maine, 292. We take judicial notice not only of the division of the State into counties, towns, &c. as declared in R. S., c. 1, § 1, with bounds continuing as they are established, but of their geographical position also. Hence we know that the three towns here appealing, whose jurors we recognize as rightfully summoned at every

nisi prius term held within and for this county are included in Kennebec county, and within the jurisdiction of these commissioners, that Wayne is in the western tier of towns, and that Readfield and Winthrop both adjoin it on the east. A road no longer than this, commencing in Wayne and running south easterly, and then for the principal part of its length easterly, on the boundary line between Readfield and Winthrop must needs lie wholly within the county of Kennebec and in these three towns. We think a careful examination of the record would show the precise number of rods in each. But that is not essential if the exact location can be ascertained from the record. Each town is required by law to build so much as lies within its borders, and is bound to know where its own lines are. If either neglects its duty, it is not perceived that any practical difficulty can arise in assigning to each its proper portion of the expense of building by an agent.

Neither of the objections raised by the appellants is tenable; part of them not being sustained by the facts, and the remainder not valid in law.

Exceptions overruled.

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

STATE *vs.* JOHN MURPHY.

Sagadahoc. Opinion July 21, 1881.

Indictment. Practice. Motion in arrest of judgment.

A motion in arrest of judgment reaches errors appearing on the face of the record and no others.

ON EXCEPTIONS.

Search and seizure. After verdict the defendant filed a motion in arrest of judgment; the motion was overruled and exceptions were taken to that ruling.

(Motion.)

"And now the defendant, notwithstanding a verdict rendered against him at the present term of said court, moves that judgment be arrested for the reasons following, viz:

"First, Because the search made by the officer on the 13th of September, A. D. 1880, without warrant, of defendant's dwelling, in no part of which a shop was kept, was unlawful and in violation of defendant's constitutional rights, to be secure in his own house from all unreasonable searches and seizures.

"Second, Because the warrant recites that Hugh Tibbetts made oath that on the 13th day of September, A. D. 1880, being then an officer, to wit, a constable of the city of Bath, duly qualified and authorized to seize intoxicating liquors kept and deposited for unlawful sale, &c. by virtue of a warrant, therefor issued in conformity with the provision of the law, did find one jug containing about one quart of intoxicating liquor as aforesaid, . . there did seize said liquor as a constable, and show that the officer made said search without a warrant authorizing him to search defendant's dwelling house, and that said search was illegal, unreasonable, and without the sanction of law.

"Third, Because the officer's return upon said warrant in the words and figures following, viz:

"'Sagadahoc, ss. Bath, September 14, 1880. By virtue of the within warrant I have seized the following described liquors with the vessels in which they are contained, viz: One jug containing a small quantity of intoxicating liquor, and have deposited them in a place of safety until final action and decision thereon, and I have apprehended the said John Murphy, and have him before the municipal court of the city of Bath, for the purposes therein mentioned;

ENOCH M. REED, Constable of Bath,'

does not identify the liquor as being the same mentioned and described in the complaint and warrant."

Henry B. Cleaves, attorney general, and *E. J. Millay*, county attorney, for the State, cited: *State* v. *Plunkett*, 64 Maine, 534; *State* v. *McCann*, 61 Maine, 116.

C. W. Larrabee, for the defendant.

The search of defendant's dwelling house without legal process was unauthorized, it was an outrage under the common law, and is none the less so because it is prohibited by the constitution of Maine.

Art. 1, § 5, "Declaration of Rights" of the constitution of Maine, says, that the people shall be secure in their persons, houses, &c. . . from all unreasonable searches and seizures, &c. . . .

Revised Statute, c. 27, § 33, forbids the depositing or having in possession intoxicating liquors, with intent to sell, &c. This enactment was never intended to invade the privacy of a man's dwelling house.

Section 38 of c. 27 modifies § 33 and makes manifest that a decent regard for the constitution, teaches us that a man's dwelling house, occupied by him as such, and for that purpose only is not exposed to the wanton trespass of a police officer.

Section 34, of the same chapter is not authority for an officer to seize in violation of law without a warrant, and if he has done so, as in the case at bar, the return of the officer that served the warrant should identify the liquors thus taken, and in default of this the complaint should have been *nol prossed.*

APPLETON, C. J. This was a search and seizure process. No exceptions are alleged to the rulings of the presiding justice at the trial. They are, therefore, presumed to have been sufficiently favorable to the defendant.

After verdict a motion was filed in arrest of judgment, which was overruled. To this overruling the defendant alleges exceptions.

Judgments are arrested only for "error appearing on the face of the record." The motion in arrest reaches those, but no others. This rule is universal in its application. *State* v. *Carver*, 49 Maine, 588; *Bedell* v. *Stevens*, 28 N. H. 118.

The ground of arrest relied on in argument, is that the search and seizure was made in the dwelling house of the defendant without legal warrant and in violation of the provisions of the constitution. This may be conceded, but as such fact is not apparent of record, it cannot avail the defendant.

Any matter appearing in evidence at the trial, any facts then proved, any defect in the process for bringing the defendant into court or in its service, are not reached by this motion. 1 Bishop on Criminal Procedure, § 1285; *Com.* v. *Gregory*, 7 Gray, 498. The court must judge in motions of this kind from the record, and that only, and not from what took place at the trial. *Bedell* v. *Stevens*.

Exceptions overruled.

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

FANNIE F. RUSSELL *vs.* CHARLES B. FOLSOM and another.

Somerset. Opinion July 21, 1881.

Promissory Note. Indorsement. Transfer.

An action may be maintained by the indorsee of a promissory note payable to the order of a corporation and indorsed thus: "Charles B. Folsom, Treas," by one who held that office in the corporation and was authorized to perform the financial business thereof.

Such an indorsement is sufficient to transfer the note.

ASSUMPSIT upon the following note:

"Skowhegan, Nov. 4, 1874.

"Six months after date I promise to pay to the order of the Madison Pond Slate Company, seven hundred and fifty dollars at First National Bank, Skowhegan, value received, with interest at 7 1-2 per cent.

H. E. HALL,
A. S. C. HALL."

Indorsed: "Holden without demand or notice," in the handwriting of W. M. E. Brown, one of the defendants, and signed.

"CHARLES B. FOLSOM, Treas.
W. M. E. BROWN,
CHARLES B. FOLSOM."

The plaintiff offered evidence tending to show that Charles B. Folsom, one of the defendants, applied to Dr. Leonard Russell for a loan of $750, for the benefit of the Madison Pond Slate

Company, of which he was then treasurer and one of the directors, and the other defendant, W. M. E. Brown, clerk and director; that he offered to procure the signature of Mr. Brown and add his own personally; that soon after he brought this note to Dr. Russell with the indorsement and signatures as they now appear, and thereupon received the $750 in cash which was entered upon the treasurer's books.

Dr. Russell is dead and the plaintiff is his widow and administratrix. The court granted leave to amend by adding a count alleging the plaintiff to be his administratrix, and declaring on the note in that capacity, if the amendment is legally allowable.

Other material facts are stated in the opinion.

The presiding justice directed a nonsuit, upon the ground that there was no legal indorsement and negotiation of the note by the company; and the plaintiff alleged exceptions.

D. D. Stewart and *S. Coburn*, for the plaintiff, cited: Special stat. 1874, c. 561; R. S., c. 46, § 1; *Farrar* v. *Gilman*, 19 Maine, 440; *Leary* v. *Blanchard*, 48 Maine, 272; *Chase* v. *Hathorn*, 61 Maine, 505; *Nichols* v. *Frothingham*, 45 Maine, 220; *Trustees, &c.* v. *Parks*, 10 Maine, 441; *Bank* v. *Pepoon*, 11 Mass. 288; *Folger* v. *Chase*, 18 Pick. 63; *Fleckner* v. *Bank of U. S.* 8 Wheat. 338; *Bank* v. *Baldwin*, 1 Clif. 519; *Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326; *Bank* v. *White*, 1 Denio, 608; *Babcock* v. *Beman*, 1 Kernan, 200; *Dunn* v. *Weston*, 71 Maine, 275.

Folsom and Merrill, for the defendants, citing 44 Maine, 442; 11 Cush. 324; Story on Prom. Notes, § 121; *Sturdivant* v. *Hull*, 59 Maine, 172; *Morrell* v. *Codding*, 4 Allen, 403, claimed that the transfer of a note by indorsement can only be made in the first instance by the payee. The mode of making an indorsement when it is done by persons acting officially, is precisely the same as a signature should be in drawing a note. And this indorsement by C. B. Folsom, Treas. is not the indorsement of the company. *Bass* v. *O'Brien*, 12 Gray, 481; *Fuller* v. *Hooper*, 3 Gray, 341; *Bank* v. *Hooper*, 5 Gray, 567; *Brown* v. *Parker*, 7 Allen, 339; *Slawson* v. *Loring*, 5 Allen, 341.

The authorities cited by the counsel for the plaintiff and which are claimed to be decisive of the case at bar, all contain an important element wanting in the case under consideration, that is, it is not shown here that the treasurer had authority to sign or indorse notes for the company.

APPLETON, C. J. The defendants are sued as indorsers on a note payable to the order of the Madison Pond Slate Company, and on which they waived demand and notice.

The note is indorsed, Charles B. Folsom, Treas. and the question presented is whether such indorsement is sufficient to transfer the title to the note so as to enable the indorsee to sue in his or her name.

The case shows that the payee was a corporation legally organized under the laws of this State and that Folsom was its treasurer.

By the by laws of the corporation, it is provided that the treasurer "shall receive and disburse all money belonging to the company and perform the financial business thereof." The indorsement of notes payable to the company is manifestly a part of its "financial business." The authority to indorse is clearly given. The only inquiry here is whether it has been properly exercised.

The indorsement by the treasurer is thus: "Charles B. Folsom, Treas." It will hardly be contended that the abbreviation for treasurer is not sufficient. In *Farrar* v. *Gilman*, 19 Maine, 441, the indorsement was by the cashier; in *Chase* v. *Hathorn*, 61 Maine, 505, by A. Hobart, treasurer of Newport Savings Bank; in *Dunn* v. *Weston*, 71 Maine, 275, by the treasurer. In *Castle* v. *Belfast Foundry Co. ante*, p. 167, the signature was Wm. H. Castle, President. In *Nicolas* v. *Oliver*, 36 N. H. 219, the indorsement was by W. Earl, Sec'y, and held a good indorsement of a note payable to an insurance company. In *Folger* v. *Chase*, 18 Pick. 63, the note of the bank was indorsed P. H. Folger, Cashier, and it was held to pass the title to the note, WILDE, J. remarking that "the indorsement by the cashier in his official capacity sufficiently shows, that the indorsement was made in behalf of the bank and if that is not sufficiently certain, the plaint-

iffs have the right now to affix the name of the corporation." In *McIntyre* v. *Preston*, 5 Gilman, 48, a note payable to a corporation was transferred by its authorized officer indorsing the same by his own name with his official designation and the indorsement was held to pass the title to the note.

The treasurer of the Madison Pond Slate Company, having authority to indorse the note in suit, his indorsement as made transferred the legal title to the same. The plaintiff is the holder of the note and no reason is shown why the suit may not be sustained in her name. No amendment was necessary and none is made.

Exceptions sustained.

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

EDMUND FLOOD *vs.* ALONZO RANDALL, and logs.

Washington. Opinion July 22, 1881.

Lien. Attachment. Amendment. Name.

An attachment to enforce a lien for wages, is lost by an amendment changing the christian name of the plaintiff from "Edward" to "Edmund."

ON EXCEPTIONS.

Assumpsit to enforce by attachment a lien on a certain mark, (called a double witness) of logs in St. Croix river, for seventy-two days' work hauling the logs. Writ dated October 28, 1878.

Charles F. Todd, the owner of the logs, appeared and pleaded general issue which was joined.

Subsequently the plaintiff on motion, was allowed to amend his writ by inserting Edmund instead of Edward in the plaintiff's name; thereupon the presiding judge ruled that the amendment dissolved the attachment. To this ruling the plaintiff excepted.

George A. Curran, for the plaintiff.

E. B. Harvey, for Charles F. Todd, the owner of the logs.

APPLETON, C. J. This was an action in the name of Edward Flood to enforce a lien claim for hauling logs described in the plaintiff's writ. After issue joined, the writ was amended by

inserting Edmund instead of Edward in the plaintiff's name. The presiding judge ruled that this dissolved the attachment, to which ruling, exceptions were taken.

We think the ruling correct. A lien given by statute for labor done on logs by A. B. is not the lien given for labor done on logs by C. B. though in each, the employer should be the same person. The lien attempted to be enforced by attachment, was for labor done by Edward Flood, not by Edmund Flood. The names are different, and are universally so recognized. The doctrine of *idem sonans*, is inapplicable.

In *Moulton* v. *Chapin*, 28 Maine, 505, it was held that an attachment was dissolved by amending the writ by inserting a co-plaintiff. In this case one plaintiff went out, and another came in, so far as regards the lien.

In *Dutton* v. *Simmons*, 65 Maine, 583, it was held, where the name in the writ was Henry *F.* Hawkins, and the certificate by the officer to the register of deeds was of an attachment of the real estate of Henry *M.* Hawkins, that the misdescription of the person, rendered the attachment void. Much more, then, would an attachment of Edward Flood's real estate, fail to hold that of Edmund Flood. It matters not whether the attachment relates to real or personal estate, or is to enforce a lien, or secure a debt, the same rule applies in each case.

Exceptions overruled.

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

HIRAM HIGGINS *vs.* JESSE RINES.

Penobscot. Opinion July 22, 1881.

Costs. Reference. R. S., c. 82, § § 107, 21.

A pending action, in which there was an account filed in set-off and an offer to be defaulted was referred by rule of court, and the referee found the plaintiff's claim was reduced by set-off below twenty dollars; and the amount found due being less than the offer to be defaulted the referee referred the

question of costs to the court to be determined on legal principles; *Held*, that the plaintiff was entitled to full costs to the day of the offer to be defaulted, and the defendant to full costs since the date of such offer.

ON EXCEPTIONS.

Assumpsit on account annexed. Writ dated March 11, 1880, entered at the October term, 1880.

On the first day of the return term the defendant filed an account in set-off, and an offer to be defaulted for fifty dollars.

The action was referred by a rule of court, which stated among other things:

"The parties appear and agree to refer this action to the determination of Charles B. Brown, of Bangor."

The material portion of the report of the referee with the ruling of the court thereon, to which the exception was taken, is stated in the opinion.

A. L. Simpson and *H. W. Mayo*, for the plaintiff.

The parties agreed to refer "this action," and the rule was issued upon that agreement; that placed the whole matter of costs as well as damages in the hands of the referee. It annulled all the rights of the defendant arising from the offer of default.

The referee awarded the plaintiff five dollars and fifteen cents damages "and *costs of court* and costs before referee as per certificates to be taxed by the court." This report entitled him to full costs. R. S., c. 82, § 107; *Brown* v. *Keith*, 14 Maine, 396; *Moore* v. *Heald*, 7 Mass. 467; *Nelson* v. *Andrews*, 2 Mass. 164. There was nothing in the report indicating any costs for defendant.

Barker, Vose and Barker, for the defendant.

APPLETON, C. J. The referee, to whom this action was referred by rule of court, awarded the plaintiff "five dollars and fifteen cents as damages and costs of court, and costs before the referee. . . . to be taxed by the court," concluding his award with the following words: "I further find the plaintiff's claim is reduced below twenty dollars by the amount in set-off; and there having been an offer to be defaulted for fifty dollars, I leave the question of costs to the court to be taxed in accordance with the legal rights of the parties."

The justice presiding ruled that the plaintiff was entitled to full costs up to the day of the offer by the defendant to be defaulted, and no more; and that the defendant was entitled to full costs since the date of his offer. To this ruling the plaintiff alleged exceptions.

By R. S., c. 82, § 107, "On reports of referees, full costs *may* be allowed, unless the report otherwise provides." Here the report "otherwise provides." The referee instead of leaving the question of costs as left by the statute, or making a special decision in "relation" thereto, states certain facts, abstains from deciding as to the costs, and submits the question to the court.

By § 108, in case of set-off, the plaintiff is entitled to full costs, where the damages are reduced below twenty dollars by reason of the amount allowed in set-off.

But in this case, besides the amount in set-off, there was an offer to be defaulted, the amount in set-off still remaining. A time was fixed for the acceptance of the offer, but it was not accepted within the time limited.

By R. S., c. 82, § 21, "If the plaintiff fails to recover a sum as due at the time of the offer, greater than the sum offered, he recovers such costs only as accrued before the offer, and the defendant recovers costs accrued after that time."

The ruling was in accordance with the provisions of this section. The plaintiff refused an offer which exceeded the sum recovered. The equity is with the defendant. No reason is perceived why this provision is not equally applicable, when the case is referred after the offer, as when the amount due is found by a verdict. It is the penalty imposed for non-acceptance, when all that is due, is offered.

Exceptions overruled.

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

ALBION P. VEAZIE and another *vs.* HENRY PARKER and another.

Penobscot. Opinion July 22, 1881.

Broker — duties of; compensation of.

A broker is entitled to compensation when he has found for his employer one who makes a written contract for the purchase or sale of the property to be bought or sold.

It is no part of the broker's duty to direct or advise as to the terms of the contract between the parties, or explain the meaning of the words used by them.

Conversations between buyer and seller before and after the making of the contract, are not admissible to affect the broker's right to compensation.

ON EXCEPTIONS.

Assumpsit to recover compensation as a broker, for selling or obtaining a purchaser, who entered into the following written contract with the defendants, for the purchase of a quantity of ice.

(Contract.)

"Bangor, April 19th, 1880. The Brewer Sweet's Pond Ice Company, and the Sweet's Fresh Pond Ice Company, have this day sold to F. H. Clergue, the ice in their houses at Sweet's Pond, in South Orrington, on the following conditions:

"Said Clergue shall pay for said ice at the rate one dollar and twenty-five cents per ton, cash, measured forty-five cubic feet to the ton; said Clergue shall have the right to occupy said houses and the land thereunder, until January 1, 1881; the title to said ice shall not vest in said Clergue until fully paid for. Said companies represent said ice to be good, merchantable ice, none less than eighteen inches thick, and they agree to put it in good condition for preservation, by double boarding all around, and filling with sawdust or other suitable material. Said Clergue shall use so much of the hay, etc. for packing on board as may be necessary."

Duly signed.

The writ was dated June 23, 1880; plea, general issue.

Barker, Vose and Barker, for the plaintiffs, cited: 8 Moak. 452; *Cooke* v. *Fiske*, 12 Gray, 493; *Love* v. *Miller*, 21 Am. R. 192; S. C. 53 Ind. 294.

Laughton and Clergue, for the defendants.

Parker was ignorant of what was necessary to constitute "merchantable" ice. Veazie assured him that the contract was all right and he could safely sign it. The ice was not merchantable, and the contract failed.

A broker is required to employ in his principal's service, the diligence and skill which good business men are accustomed to apply under similar circumstances. If the principal derives no benefit from the broker's services by reason of the latter's unskillfulness, negligence or unfaithfulness, the latter is not entitled to compensation. 1 Pars. Contr. 99; 2 Chitty, Contr. 803, 804; Story, Agency, 331; Whar. Agency & Agents, 325, 726; 12 Pick. 328.

This negligence and unskillfulness the defendants should have been permitted to prove. *McClane* v. *Maynard*, 35 How. 313.

Plaintiffs did not find a purchaser for the ice which the defendants had to sell, and there was no valid contract, because the ice sold was not of the quality required by the contract, and therefore plaintiffs cannot recover. Benjamin Sales, § 50; Edwards, Factors and Brokers, 113.

A broker who brings parties together where one wants to buy a particular article and the other wants to sell that particular article, and a contract of sale is then made, may be entitled to his commission. But that was not done here. Clergue did not want to buy the ice which Parker had to sell, and the contract was void, and the broker did not earn his commission.

APPLETON, C. J. The plaintiffs are brokers and bring this action to recover compensation for their services as such.

The defendants having ice to sell, employed them to find a purchaser. They found one wishing to purchase and introduced the parties to each other. A bargain was made. Its terms were in writing. It was binding on the parties. So far as relates to compensation, a binding agreement to sell is a sale within the contemplation of the parties. *Rice* v. *Mayo*, 107 Mass. 550.

Whether the contract is verbal or written, the bringing the parties together entitles the broker to his compensation. *Barnard* v. *Monnot*, 40 N. Y. 203; *Higgins* v. *Moore*, 34 N. Y. 417. It is no answer to the broker's claim, after he has found his employer a vendor, who makes a written contract for the sale of the property, that he could not make a perfect title, and therefore was unable to carry out his contract. *Knapp* v. *Wallace*, 41 N. Y. 477. Nor does a refusal to perform, constitute a defence. *Love* v. *Miller*, 53 Ind. 294; *Cooke* v. *Fiske*, 12 Gray, 491. So, though a principal who has been brought by the broker into communication with the party with whom he is dealing, revokes his authority, and takes the negotiation in his own hands. *Stillman* v. *Mitchell*, 2 Robertson, 523; *Green* v. *Ballard*, 108 E. C. L. 681. The contract is that of the parties. The brokers are not parties to it. Their right to compensation attaches on its completion. It matters not whether it was absolute or conditional; whether modified, changed or rescinded by the parties.

2. "The defendants proposed to show by a witness, that the contract was not completed according to the conditions, by reason of the unskilled and negligent performance by the plaintiffs of their duties in directing and advising the drawing of the contract." The contract was drawn by the purchaser. The plaintiffs had no duties to perform in directing or advising the contract. It was not for them to advise, still less to direct.

The burden of the complaint is that the word "merchantable," was used in reference to the ice. But it will hardly be contended that "unmerchantable" was the word to be used; or if there was any peculiar, unusual and recondite meaning to be attached to it, that the brokers were bound to have better knowledge of such meaning when applied to ice, than when referring to any other subject matter of traffic or than the parties themselves.

3. The conversation between the buyer and purchaser, prior to their making the contract or subsequently thereto, are matters with which the plaintiffs have nothing to do, and in no way affect their right to compensation.

4. The testimony of Bracket to show the meaning of "merchantable" in the ice trade, is immaterial so far as relates to the

contract. The terms of the contract were those of the parties, and cannot but have expressed their intentions. If the ice was not of the quality required, the purchaser's remedy was on the contract.

5. The question as to whether the ice was or was not merchantable was a matter between the parties. The question before the jury was not as to the rule or amount of compensation, but whether any thing was due. The amount of ice as measured in April, was twenty-seven hundred and one tons. The ice was shipped in August after being hauled a mile and a quarter or two miles to the place of shipment. The defendant Parker says it then weighed out seventeen hundred tons. The verdict was rendered for commissions on this sum at the price agreed upon. When it is borne in mind how long the ice remained, after its first admeasurement and how great the necessary and inevitable loss by removal under an August sun would be, it would seem that if any complaint were to be made as to the verdict, it should come from the plaintiffs rather than the defendants. Indeed, the defendant Parker testifies he never denied his liability, nor, indeed, does there seem to be any reason why he should.

Motion and exceptions overruled.

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

DAVID WEYMOUTH *vs.* SAMUEL M. GILE.

Piscataquis. Opinion July 22, 1881.

Trespass. Cattle.

The agister, or general owner of cattle, is liable in trespass for damage done by the cattle under his charge.

ON AGREED statement of facts which are sufficiently stated in the opinion.

Henry Hudson, for the plaintiff, cited: Cooley, Torts, 340; 1 Thompson, Negligence, 196, 209, 213; *Noyes* v. *Colby*, 30 N. H. 143; *Barnum* v. *Van Dusen*, 16 Conn. 200; *Sheridan* v. *Bean*, 8 Met. 284.

A. G. Lebroke and *W. E. Parsons*, for the defendant.

The defendant had no such possession of the cows as would be necessary to make him liable in this action. There was no contract by which he was to have the care and custody of the animals. Their several owners took them home each night and returned them to the pasture in the morning. He had neither a general nor special property in them.

It is only when the agister has the possession, care and custody of the animals that he is liable in trespass for damage done by them. Cooley Torts, 340; *Sheridan* v. *Bean*, 8 Met. 284.

APPLETON, C. J. This is an action of trespass *quare clausum fregit*. The trespass is admitted. Is the defendant liable?

The defendant depastured five cows on land leased by him. While under his charge they escaped from his premises and committed the trespass, which is the subject matter of this litigation. As occupier he was bound to keep the fences in repair. *Tewksbury* v. *Bucklin*, 7 N. H. 518. It was through his negligence the cattle escaped. The defendant was a bailee, an agister. Having care and control of the cattle, he might maintain trespass for an injury to them. *Bass* v. *Pierce*, 16 Barb. 595. So he would be liable for any injury done by them. *Smith* v. *Jaques*, 6 Conn. 530; *Barnum* v. *Van Dusen*, 16 Conn. 200. The agister, as well as the general owner of cattle trespassing, are liable in damage. *Sheridan* v. *Bean*, 8 Met. 284. So trespass lies against A, if cattle in his custody do a trespass, or against the owner, at his election. Com. Dig. Trespass, C. 1.

Defendant defaulted. Damages, $4.

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

EDWIN R. HAYNES

vs.

BENJAMIN S. HUSSEY, and ADONIRAM J. CUSHMAN, Trustee.

Piscataquis. Opinion July 22, 1881.

Trustee process. Wages for personal labor. R. S., c. 86, § 55.

The exemption from attachment by trustee process of wages due the principal defendant for personal labor applies only to labor done the month immediately preceding the service of process.

ON AGREED STATEMENT.

Assumpsit. Writ dated September 6, 1879 and served upon the trustee September 9, 1879. At that time the trustee was owing the principal defendant $16.04 as wages for personal labor performed from June 26, 1879, to August 5, 1879.

J. F. Sprague, for the plaintiff, cited: R. S. c. 86, § 55, part 6; *Winslow* v. *Kimball*, 25 Maine, 493; *Parks* v. *Knox*, 22 Maine, 494; *Pingree* v. *Snell*, 42 Maine, 53; *Coffin* v. *Rich*, 45 Maine, 507; *Varner* v. *Nobleboro'*, 2 Maine, 121; *Strang* v. *Hirst*, 61 Maine, 9; *Paine* v. *Dwinell*, 53 Maine, 53.

A. G. Lebroke and *W. E. Parsons*, for the trustee.

The amount due the alleged trustee to the principal defendant is for his wages for personal labor not exceeding one month and less than twenty dollars. R. S. c. 86, § 55.

The true construction of the statute is clear. It was the intention of the legislature to exempt to the destitute laborer $20 out of one month's labor. *Winslow* v. *Kimball*, 25 Maine, 493; *Rogers* v. *Goodwin*, 2 Mass. 477; *Langdon* v. *Porter*, 3 Mass. 221; *Ayers* v. *Knox*, 7 Mass. 310; *Green* v. *Kemp*, 13 Mass. 519; *Davlin* v. *Stone*, 4 Cush. 359; *Kennedy* v. *Bradbury*, 55 Maine, 107; *Bonzey* v. *Newbegin*, 48 Maine, 410; *Dow* v. *Smith*, 7 Vt. 465; *Freeman* v. *Carpenter*, 10 Vt. 433.

APPLETON, C. J. The question in issue relates to the liability of the trustee upon the following facts.

The writ is dated September 6, 1879. The defendant labored for the supposed trustee thirty days at one dollar and twenty-five cents a day, commencing June 26, 1879 and ending August 5,

1879, on which a balance of $16.04 was due. This was the last service performed by the defendant for any one prior to the service of the writ on the trustee on September 9, 1879.

It is apparent that all the labor done by the defendant for the alleged trustee was more than thirty days before the service of the writ on him.

By R. S., 1841, c. 119, § 63 "no person shall be adjudged trustee . . by reason of any amount due from him to the principal defendant as wages for his personal labor for a time not exceeding one month."

In *Parks* v. *Knox and trustee*, 22 Maine, 494, this court held that the above provision was not restricted to the month immediately preceding the service of the process on the supposed trustee, at the same time remarking that "the legislature may have overlooked the effect of their language in this instance; but if they have, it is for that body to cure the defect."

It was in that case argued that if the exemption was not confined to the debtor's labor for the month next preceding the service of the process, the debtor might have any amount put out of the reach of creditors by working at different places a month at a time. This result, which followed from the unambiguous language of the statute, was the defect to which the court alluded.

Accordingly, in the revision of 1857, c. 86, § 55, it was enacted "that no person shall be adjudged trustee . . . by reason of any amount due from him to the principal defendant as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month *next* preceding the service of the process." This provision is found in the same words in R. S., 1871, c. 86, § 55.

The meaning of the statute is obvious. The language can admit of but one construction. It was to restrict the exemption to work done the month next preceding the service of the process. The defendant's labor was not done within that time and the trustee must be charged.

Trustee charged for $16.04.

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

COLUMBIA HUNTRESS, in submission, *vs.* IRA HURD.

NATHANIEL DUSTIN, and another,

vs.

COLUMBIA HUNTRESS and IRA HURD, Trustee.

Somerset. Opinion July 23, 1881.

Practice. Judgment. Trustee process. Stat. 1877, c. 181. R. S., c. 77, § 16; c. 86, § § 58-60.

When an order from the law court is received by a clerk of court, overruling exceptions taken to an order directing judgment to be entered upon a report of referees, he should enter up judgment as of the next preceding term, in accordance with stat. 1877, c. 181, even though the defendant had been summoned as trustee of the plaintiff in a suit then pending against the plaintiff, if there is no subsisting order to the contrary.

The action of the clerk in bringing such a case forward on the docket of the next succeeding term, is without authority of law, unless there was an order at a prior term, made upon the motion of the plaintiff in the trustee suit, under R. S., c. 86, § 58, to continue it for judgment; and whether such an order would be precluded by the agreement of arbitration is not considered.

The court will not allow an error of their officer to affect the legal rights of parties when it can be avoided, and in such a case as stated will render judgment upon the report of the referees, and discharge the trustee in the other suit.

Huntress v. *Hurd*, was on exceptions.

Dustin v. *Huntress & Tr.* was on report.

The first case was a submission under the statutes, made in September, 1879.

The report of the referees was accepted at the March term, 1880, and judgment ordered for the amount found by the referees. To this order exceptions were filed and allowed. May 31, 1880, the clerk received an order from the law court, of "Exceptions overruled." Judgment was not then entered up as of the preceding (March) term, but the case was continued on the docket, and at the next (September) term, the plaintiff moved to have action dismissed from the docket of that term, and to have execution issue upon the judgment ordered at the last (March) term.

The motion was denied *pro forma*, and the case ordered to be continued to await the trustee process.

The question presented by the second suit was upon the trustee's disclosure.

The writ was served upon the trustee, who was the defendant in the first action, January 3, 1880, and entered at the March term, 1880. The disclosure was filed at the September term, 1880, and alleged that the trustee had no goods, effects or credits of the principal defendant, (the plaintiff in the first suit) in his hands, except the indebtedness as shown by the report of the referees in the first suit.

"If the trustee is in no event liable to be legally charged in this suit, he is to be discharged by the law court."

Joseph Baker, (*J. F. Holman* with him) for Columbia Huntress, cited: R. S., c. 77, § 16, as amended by stat. 1877, c. 181; High on Ex. Leg. Rem. § § 82, 238; *Holt* v. *Kirby*, 39 Maine, 164; *Codman* v. *Strout*, 22 Maine, 292; *M'Caffrey* v. *Moore*, 18 Pick. 492; R. S., c. 108, § § 1, 5.

D. D. Stewart, for Ira Hurd.

The action of *Huntress* v. *Hurd*, was properly and necessarily continued by the express provision of R. S., c. 86, § 56. And the action of the court in continuing it to await the result of the trustee suit, was in accordance with § 60, of same chapter.

The exercise of the discretion of the court in such case is conclusive. *Hunnewell* v. *Young*, 18 Maine, 263.

V. A. and M. Sprague, for Nathaniel Dustin, *et al.*

BARROWS, J. The mingling of statutory provisions intended to apply to different cases and conditions in one chapter, in a revision of the statutes, may answer for an excuse, but not for a defence of the irregularities which have occurred in the first named of the above cases.

When the order from the full court overruling the exceptions filed at the March term, 1880, was received by the clerk of the court in Somerset county, May 31, 1880, he should have entered up judgment as of the March term previous, in pursuance of

the order made at that term, to which exceptions were taken, and of R. S., c. 77, § 16, as amended by c. 181, laws of 1877.

The effect of the order overruling the exceptions to entitle Huntress to judgment upon his award, could only have been controlled by an order made at the March term, 1880, upon the motion of the plaintiffs in the trustee suit, under R. S., c. 86, § 58, to continue it for judgment.

In the absence of such an order, the action of the clerk in bringing the case forward upon the docket of the September term, was without authority of law. The *pro forma* ruling of the justice at the September term, 1880, upon the motion of the plaintiff in submission, was erroneous also. Finding that the case had not been continued for judgment at the March term under the provisions of § 58, he should have given its legitimate effect to the certificate from the law court, and ordered judgment to be made up, either forthwith, or as of the previous March term.

A little examination shows conclusively that there has been no change in the statutory provisions upon this topic, except by collocation in the revision, which is not allowed to change their effect except when manifestly so intended, since the decisions rendered by this court in cases presenting certain features like those before us.

The provision in R. S., c. 86, § 56, upon which Hurd's counsel relies as requiring a continuance of the process of *Huntress in sub.* v. *Hurd*, to await proceedings in the trustee suit, assumed substantially its present form in § 3, c. 368, laws of 1839, and reappears in R. S., of 1841, c. 119, § 13, and in the successive revisions since that time. But it relates obviously to cases where the defendant in a pending suit has been summoned as trustee of the plaintiff, long enough before the first suit has proceeded to trial and verdict to make his disclosure, and give the proceedings in evidence at the trial. It is not imperative; but the granting of a continuance, rests in the discretion of the court, and hence the court, in *Hunnewell* v. *Young*, 18 Maine, 262, decided at May term, 1841, not finding any statute provision for the protection of the trustee when summoned and charged after

verdict against him, held that the refusal of the judge to continue the principal action, was right, and that the trustee on disclosing the facts, would be entitled to his discharge.

But, then came the provision of R. S., of 1841, c. 119, § § 64–66, in substance identical with R. S., of 1871, c. 86, § § 58–60. Under these also, there is the same discretionary power in the presiding judge to continue the first suit, or to render judgment in it, and discharge the trustee. Were it otherwise, and the continuance imperative, it would be in the power of any defendant against whom a verdict had been rendered, or an award presented, to prevent the rendition of any judgment thereon, so long as he could induce parties to commence trustee suits against his adversary, and summon him as trustee. It would be only a question of tenacity of purpose and ability to pay costs and counsel fees.

The statute does not require any such absurdity, and the court cannot permit its judgments to be thus trifled with.

Hence, under substantially the same provisions as we now have, in 1843, in *Strout* v. *Clement*, and *Codman* v. *Strout and Clement, trustee*, the court overruled exceptions to the refusal of the judge to continue the first suit, and charge the trustee; and in *Holt* v. *Kirby*, 39 Maine, 164, they went a step farther, and sustained exceptions to a refusal of the judge, to order judgment on the accepted award, and to his order charging the trustee.

Apparently the real ground of these decisions, is the feeling of the court, that a debtor ought not to be allowed to secure a delay of judgment in this manner, when he has agreed with his adversary to submit the question of his indebtment to a tribunal, mutually selected, by whose decision he has bound himself to abide; and therefore they held that the discretionary power of the judge to continue the case to await the disposition of the trustee process, should not be exercised in such cases. In both the cases cited, the fact that the party has agreed that when the report of the referees has been made and accepted, the judgment thereon shall be final, is referred to as a ground of the opinion, and there is an obvious force and propriety in the suggestion. It is true that the statute then existing, and now embraced in R. S.,

c. 86, § § 58–60, may have been overlooked. Some remarks referring to the want of power in the court to protect the trustee, indicate the possibility of this.

If so, it will not be the first time that a wrong reason has been given for a right decision. But the authority of those cases is not necessary for the rightful disposition of these. The policy of the law, is to relieve the party summoned as trustee, unless the plaintiff in the trustee suit, actively intervening, presents his motion to continue the first case for judgment under § 58; and such is its express provision, § 59.

The docket shows no motion made by the plaintiff in the trustee suit for such continuance at the March term, 1880. If the judge presiding at that term had, in the exercise of his discretion, made an order that the case of *Huntress* v. *Hurd*, should stand continued for judgment, in case the exceptions were overruled, the question would have been presented whether we would follow *Holt* v. *Kirby*, and hold that the agreement for arbitration precluded such action.

The discretion of the court does not seem ever to have been invoked by the plaintiff in the trustee suit to procure a continuance for judgment. The ruling at the September term was expressly made *pro forma*. For most purposes, the order of the law court to the clerk of the Supreme Judicial Court to enter up judgment, or directing such a disposition of all pending questions as leaves nothing to be done but to make up the judgment, must be deemed a judgment. For all purposes where it is necessary in order to sustain legal and equitable rights, the court so regards it. *Cooley* v. *Patterson*, 52 Maine, 472.

When such order is made conditionally, and the conditions have been complied with, no exceptions lie to the order of the judge at *nisi prius* to enter judgment. *Mitchell* v. *Smith*, 69 Maine, 66. That it should have been so regarded here and followed by the making up of the judgment, and the issuing of execution in the suit of *Huntress* v. *Hurd*, is obvious; and this would have drawn after it a discharge of Hurd as trustee in the other suit, under the fifth specification in R. S., c. 86, § 55. The same results should be reached now. That they did not follow imme-

diately, is owing to the misfeasance of an officer of the court, doubtless at Hurd's instance, coupled with the erroneous suggestion, that the pendency of the trustee process required a further continuance of the first suit. Notwithstanding his dissatisfaction at the doings of the tribunal of his own selection, Hurd is still bound by his agreement, that judgment rendered on their report shall be final; and where no legal objection is found to the report, judgment should not have been delayed at his intervention. The court will not allow the error of their officer to affect the legal rights of parties when it can be avoided.

To the end that the defendant Hurd, in addition to the delay of judgment already secured, may not, in the language of the court, 22 Maine, 294, "be enabled to give any part of the award a destination contrary to what he had agreed upon," the disposition of these cases should be as follows;

In Huntress in sub. v. *Hurd, Exceptions sustained. Judgment for plaintiff as of the March term, 1881.*

In Dustin et al. v. *Huntress and trustee, Trustee discharged.*

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

STATE OF MAINE *vs.* CHARLES EMERSON AND WESLEY TRASK.

Penobscot. Opinion July 30, 1881.

Indictment. Special stat. 1868, c. 448.

A person who operated a shingle machine to manufacture shingles by the thousand for the owners or lessees of a mill is a contractor, and not an employee or servant for whose acts the owners or lessees are liable under special stat. 1868, c. 448.

INDICTMENT for violation of special stat. 1868, c. 448, entitled "an act to prevent throwing slabs and other refuse into Penobscot river."

The respondents hired a shingle machine and contracted with another party to run it for them, the other party conducting the running, and controlling the mill himself. The lumber belonged to the respondents.

B. H. Mace, county attorney, for the State.

Charles A. Bailey (*D. F. Davis* with him,) for the respondents.

LIBBEY, J. This is an indictment under special act of 1868, c. 448, and the attorney for the State claims that the defendants are liable on the ground that they were the lessees of a shingle mill, and that the acts complained of were done by a person in their employ in the mill.

By the facts stated in the report the party who contracted with the defendants to manufacture their shingles, run and controlled the mill himself, as he pleased. In operating the mill he was not subject to the direction and control of the defendants. The relation of master and servant did not exist between them. In conducting the business he was his own master, and the men employed were subject to his direction and control. He was a contractor and not an employee. *McCarthy* v. *Second Parish in Portland*, 71 Maine, 318.

We think it clear that the contractor in this case cannot be held to have been "in the employ" of the defendants within the meaning of the act; and that they are not responsible for the offence committed by him in operating the mill.

Indictment dismissed.

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

STATE *vs.* EBENEZER S. COE.

STATE *vs.* LEWIS SIMPSON.

Penobscot. Opinion July 30, 1881.

Indictment. Special stat. 1868, c. 448.

The lessees of mills in possession and control, and operating them, cannot be held to be "in the employ" of the owner and lessor within the meaning of special stat. 1868, c. 448. Nor can the agent of the owner and lessor be held as the "owner" or "occupant" of the mills within the meaning of that statute.

ON REPORT.

Indictment under special stat. 1868, c. 448, entitled "an act to prevent throwing slabs and other refuse into Penobscot river."

The facts are stated in the opinion.

By the terms of the report, by consent of parties, if both or either of the respondents are liable, they were to plead *nolo contendere;* if not liable, the indictments to be dismissed.

B. H. Mace, county attorney, for the State.

It is admitted that the object of the statute — the keeping of refuse from the river — is a proper subject of legislation. The statute will not be declared unconstitutional. *Dartmouth College* v. *Woodward*, 1 N. H. 114.

It is a settled principle of law that the owner of tenements after leasing them, still has control under certain circumstances. *Bonnett* v. *Sadler*, 14 Vesey, 526; *Atkins* v. *Chilson, et al.* 7 Met. 404.

Houses which are taken by another who is not the owner, and converted by him into a public nuisance, may be abated. *Lord Mayor of London* v. *Bolt*, 5 Vesey, 129.

Here the milder course is pursued. The mills are left to the owner and he is merely subjected to a fine.

The leases which this respondent gave, show that his attention was called to these acts of the legislature, and he attempted to have them partially complied with. By the leases, however, he knowingly permitted his tenants to throw into the river a "sort" of refuse known as "sawdust." By giving such leases and appointing Simpson to have the general oversight and to see among other things that the covenants in the leases were performed, and to collect the rents, he connected himself with the subject matter of these indictments.

Even the receipt of rent was upholding his tenants in the wrong. *Roswell* v. *Prior*, 2 Salkeld, 460; *People* v. *Flagg*, 46 N. Y. 401; *Lunt's Case*, 6 Greenleaf, 412; *Rich* v. *Flanders*, 39 N. H. 311; United States Digest, 5 volume, 199, sec. 5; *Lord* v. *Chadbourne*, 42 Maine, 441; *Wells* v. *Somerset and Ken. R. R. Co.* 47 Maine, 345; *People* v. *Potter*, 47 N. Y. 378, 379.

The appointment of Simpson put these mills as much in the possession, and under the control of Simpson as of Coe, and he might, with equal propriety, perhaps, have been indicted as

owner, or occupant. This appointment did not create an office. It was not by commission. It was merely an employment and he was correctly set forth in the indictment as employee; Heard's Criminal Law, 353; *Com.* v. *Thompson*, 108 Mass. 461, 463; *Rex.* v. *Ellsworth*, 2 East. P. C. 986; *Rex.* v. *Fuller*, 1 B. & P. 180; *Regina* v. *Harvey*, L. R. 1 C. C. 284.

A. W. Paine, for the respondents, cited: *Dwinel* v. *Veazie*, 44 Maine, 176; *Earle* v. *Hall*, 2 Met. 353; *Wyman* v. *Farrar*, 35 Maine, 64; 44 Maine, 176; 50 Maine, 479; *Parks* v. *Morse*, 52 Maine, 260; *Lancy* v. *Clifford*, 54 Maine, 487; *Eaton* v. *E. & N. A. R. Co.* 59 Maine, 520; *Tibbetts* v. *K. & L. R. R. Co.* 62 Maine, 437; *Buttrick* v. *Lowell*, 1 Allen, 172; *Walcott* v. *Swampscott*, 1 Allen, 101; *Hafford* v. *New Bedford*, 16 Gray, 297; *Bigelow* v. *Randolph*, 14 Gray, 541; *Perley* v. *Georgetown*, 7 Gray, 464.

LIBBEY, J. These cases are indictments under special act of 1868, c. 448, and they were argued together and depend substantially upon the same legal principles.

The defendant, Coe, is the owner of certain sawmills, at Milford, on the Penobscot river, which he annually rents, separately or in parts, to different tenants. The leases, at the time embraced in the indictments, contained a covenant by the lessees, "that no slabs, edgings or other waste, except saw dust, shall be thrown, or suffered to be thrown into the river; or placed in such a manner as may be washed or fall into the river; and not to do any other act such as is prohibited by the statutes of this State in reference to the subject."

The defendant, Simpson, was general agent for said Coe, among other things, to oversee and have the general care of the mills in question, so far as repairs were concerned; aided in renting them, and looked after the collection of rents; and he had a general oversight of the tenants to see that they performed the covenants in their leases.

It is admitted that all kinds of waste inhibited by the statute, were thrown into the Penobscot river, as alleged in the indictments, by the persons actually operating the mills; and the questions to be decided are, whether either or both of the defendants are liable therefor, under the act aforesaid.

Section 3, of the act is as follows: "If the offence, or offences forbidden in the first section of this act shall be committed by any person or persons who may be in the employ of any mill owner or owners, mill occupant or occupants, such owner or owners, occupant or occupants, shall also be liable in the same penalties, recoverable in the same manner as hereinbefore provided."

The court is of opinion that the lessees of the mills and their employees who were actually operating them, cannot be held to have been "in the employ" of the defendant Coe, within the meaning of the act. The lessees were in possession of the mills, had the full control of them, and were operating them on their own account, and not as the servants or employees of Coe. True, he might have entered and terminated the leases for breach of the covenants by the lessees, but that right rendered him in no way responsible for their acts.

Nor can the defendant, Simpson, be held to be the owner or occupant of the mills within the meaning of the act. He was merely the agent of the owner, the lessor of the mills.

In accordance with the stipulation in the report the indictments must be dismissed.

Indictments dismissed.

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

STATE OF MAINE *vs.* GEORGE HOWARD.

Penobscot. Opinion July 30, 1881.

Indictment. Special stat. 1868, c. 448. Shingle sawdust.

Special stat. 1868, c. 448, prohibits the throwing of shingle sawdust, or long sawdust, and shingle shavings, or jointer shavings, into Penobscot river; such sawdust and shavings being embraced in the general description of "refuse wood or timber of any sort" prohibited by such statute.

ON REPORT.

Indictment under special stat. 1868, c. 448.

The opinion states the case.

B. H. Mace, county attorney, for the State, cited: *Winslow* v. *Kimball*, 25 Maine, 495; *Hart* v. *Cleis*, 8 John. 41; *United States* v. *Coombs*, 12 Peters, 80; *McCluskey* v. *Cromwell*, 1 Kernan, 602; *The Watervliet Turnpike Co.* v. *McKean*, 6 Hill, 620; *Pillow* v. *Bushnell*, 5 Barb. 156, 159; *Gibson* v. *Jenney*, 15 Mass. 206; *Gore* v. *Brazier*, 3 Mass. 539; *Putnam* v. *Longley*, 11 Pick. 490; *Pitman* v. *Flint*, 10 Pick. 506; Opinion of the Justices, 22 Pick. 573; *Jackson* v. *Lewis*, 17 John. 477; *People* v. *N. Y. Central R. R. Co.* 3 Kernan, 78; 5 Abbott Digest, 79, § 31; *King* v. *The Company of Prop. of M. & S. W. W.* 630; 8 E. C. L. 168; *Casher* v. *Holmes*, Clerk, 2 Barn. & Adol. 592; 22 E. C. L. 146; 79 E. C. L. 511; *Jones* v. *Jones*, 18 Maine, 313; *Ogden* v. *Strong*, 2 Paine, 587; *Holbrook* v. *Holbrook*, 1 Pick. 250; *Mendon* v. *County of Worcester*, 10 Pick. 243; 5 Abbott's Digest, 80; Heard's Criminal Law, 66, 67, 68, 69; *United States* v. *Reed*, 1 Lowell, 233; *United States* v. *Pond*, 2 Curtis, C. C. 268.

C. A. Bailey, (*D. F. Davis* with him,) for the defendant.

Prior to the year 1868, the throwing into the river of all kinds of waste substances, from mills employed in the manufacture of lnmber on Penobscot river, had been the custom from the earliest establishment of such mills; and, indeed, such was the original custom everywhere from the first settlement of the country. In some of the States this custom, not unreasonably exercised, had been declared to be a legal right. *Palmer* v. *Mulligan*, 3 Caines, 307; *Snow* v. *Parsons*, 28 Vt. 459; *Jacobs* v. *Allard*, 42 Vt. 303.

But the court in this State, while not denying the right, had, however, limited it so far as to make parties exercising it, assume the risk of obstructing a common highway or of injuring lower riparian proprietors. *Veazie* v. *Dwinel*, 50 Maine, 490; *Washburn* v. *Gilman*, 64 Maine, 163.

In 1859 this right received legislative recognition in "An act to define the liability of mill owners," public laws c. 98, a proviso to which declares: "But nothing herein contained shall be construed to create any restriction upon the present rights of

operators of mills, to float their waste matter from their mills upon any river or stream."

In 1868 "An act to prevent the throwing of slabs and other refuse into the Penobscot river" was passed, under which these actions are prosecuted.

By this statute, that which had hitherto been lawful, was made an offence punishable by indictment.

Of such offences Bouvier says, their "criminality consists not in the simple perpetration of the act . . . but in its being a violation of a positive law." Law Dict. Crime.

With this explicit declaration of what the offence consists we come to inquire wherein the respondents have violated any "positive law."

In the manufacture of shingles there is of necessity much waste. That waste most obstructive to navigation is the bark, slabs and refuse timber taken from the bolts. The statute clearly prohibits the thowing of these into the river. The two other necessary waste products from the process of making shingles are the sawdust and jointer shavings.

In the enumeration of the various classes of waste, prohibited by the statute, "sawdust" and "shavings" are not to be found. The words "wood" and "timber," have a well established and popular significance, as representing specific subjects. They designate commodities of commercial value and importance, the sale and admeasurement of which are regulated by law. Nobody, however wild his imagination, could conceive that "wood" and "timber" designate "sawdust" and "shavings." Nor can their representative character be changed by the qualitative word "refuse."

"Words and phrases are to be construed according to the common meaning of the language." R. S., c. 1, § 4.

The difficulty with the case, as presented by the government, lies in the failure to discriminate between "refuse wood" and wooden refuse. If the statute had prohibited the latter, there might have been less room to question the position taken. As it is, however, it would be a gross violation of all principles for the

construction of penal statutes to hold the respondents. Bishop on Statutory Crimes, § §, 190, 193, 194, 220; *Cleaveland* v. *Norton*, 6 Cush. 383; *United States* v. *Wiltberger*, 5 Wheat. 76.

It will be observed by the petition (in the case) which was the inducing cause of the legislation upon the subject, that if the prayer of the petitioners had been fully granted, "sawdust and other materials which shall fill up, or obstruct, or have a tendency to fill up said river, or obstruct the navigation thereof," would have been within the statute, and the act, with which the respondents are charged, would have been expressly prohibited. In the face of this conspicuous denial of that part of the petition, it is too much to believe, that the omission was not intentional.

The history of legislation in this State, upon the subject of throwing waste into streams, shows that no lack of proper words to express what was proposed, has ever been manifested.

It is believed that the initiatory step in this direction is c. 30, special laws, 1840, for Machias river; the enumeration there being "slabs, lathings, edgings or any other refuse timber of any nature whatsoever or other materials, whereby the navigation of said river may be impeded or injuriously affected."

This was followed by special laws, c. 230, 1854, Narraguagus river, the enumeration there being, "slabs, lath or board edgings, or refuse timber of any sort, or other materials whereby the navigation," &c.

And the Penobscot act of 1868 was next; in which the words, "or other materials," as we have seen, are noticeably omitted.

But to show more particularly that the legislature has never failed to use apt words when intending that shingle sawdust and jointer shavings should be brought expressly within the inhibition of a statute, attention is called to the Piscataquis act, special laws 1878, c. 94, wherein the very substances proscribed by the Penobscot act, are not only enumerated, *ipsissimis verbis*, but added thereto are the following: "or any shavings or fibrous material created by the manufacture of shingles."

Also the Kenebec act, c. 80, special laws of 1878, which interdicts throwing into the river "slabs, edgings, or any shavings or fibrous material created by the manufacturing of shingles, . . . whereby the navigation of said river may become impeded," &c.

A. W. Paine, for the defendant, also furnished an able brief.

LIBBEY, J. This is an indictment under special act of 1868, c. 448, and comes before this court on report. The first section of the act is as follows: "No person or persons shall cast or throw into the Penobscot river, below the mouth of the Mattawamkeag river, or into any of its tributaries entering below the mouth of said Mattawamkeag river, any slabs, board or lath edgings, bark, grindings of edgings, wood, bark or lumber, or refuse wood or timber of any sort, or shall place, pile or deposit on the banks of said Penobscot river, or banks of said tributaries, any slabs, board or lath edgings, bark, grindings of edgings, bark, wood or lumber, or refuse wood or timber of any sort, in such negligent or careless manner that the same shall fall or be washed into said river or said tributaries, or with the intent that the same shall fall or be washed into said river or said tributaries, whereby the navigation of said river may become impeded or injuriously affected, or which shall tend to impede or injuriously affect the navigation of, or fill up said river, under a penalty," &c.

It is admitted that "during the time alleged in the indictment, the respondent was the lessee in possession of a shingle machine, and in operating and running the same, threw into the Penobscot river large quantities of waste produced in the sawing and manufacture of shingles; the waste being of two kinds or descriptions. First, that made by the saw in sawing the shingle bolt into shingles. Second, that made by the machinery in edging and trimming the shingles after the shingle saw has gone through the bolt. The latter is done by the edger or jointer."

The first substance named is commonly called among mill men "shingle saw dust" or "long saw dust" and consists of long fibres of the wood cut out by the saw, of the length, or nearly of the length of the shingle bolt. The second is called "shingle shavings" or "jointer shavings," and consists of the portions of the shingle taken off by the machine in edging and trimming it and is of the length, or nearly of the length of the shingle. Specimens of each were exhibited at the argument that the court might get a better idea of the materials involved than by a description merely.

"It is admitted that either of the sorts of debris named, thrown into the river, has a tendency to fill the river so as to impede or injuriously affect the navigation thereof."

The question to be determined is whether the materials named or either of them, are within the inhibitions of the act.

Neither is described in the act by the name by which it is known among mill men; but it is claimed by the attorney for the State that both are embraced under the general description in the act of "refuse wood or timber of any sort."

On the other hand the counsel for the defendant maintain that, if the legislature intended to include these materials among those prohibited, they would have been named in the act by their well recognized names. That the words "wood" and "timber" have a well established and popular meaning, as representing specific subjects, designating commodities of commercial value and importance, the sale and admeasurment of which are regulated by law; "and that *refuse wood* and *refuse timber* are the opposites in quality of merchantable wood and merchantable timber."

In construing a statute the great purpose to be sought is to ascertain the intention of the legislature. That intention must be ascertained from the language used; for, if the legislature had in view a certain purpose to be accomplished, but failed to use language which, giving to it any recognized meaning, fails to express such purpose, the court cannot supply it.

When, however, words used in a statute have more than one well defined and recognized meaning, in ascertaining the sense in which they are used by the legislature, recourse should be had to the subject matter to which they relate, and the object sought to be accomplished; and if the title of the act tends to explain the sense in which the words are used that may be resorted to.

The word "wood" has several well defined and recognized meanings. Among them, as given by Worcester, are "1, A large and thick collection of trees; a forest." "2, *The substance of trees;* trees sawed or cut for architectural or other purposes; timber." "3, Trees cut or sawed for fuel." In what sense is the word used in the act under consideration.

The subject matter to which the act relates is the business of manufacturing logs, as cut in the forest and floated to the mills,

into various kinds of lumber; and the manner in which, at the time of the passage of the act, at the mills, on the Penobscot river, the manufacturer was accustomed to get rid of the refuse or waste, or such portions of the log as were not utilized for any purpose and were valueless, by casting them into the river to be floated away from the mill. It was found that this practice was fast filling up the channel of the river and greatly impeding its navigation; and the object sought to be accomplished by the act was to prevent it.

Having in view the subject matter to which the act relates and the object to be accomplished by it, it cannot be supposed that the word *wood* was used in its commercial sense, as designating "trees cut or sawed for fuel," as the materials which it was intended to designate were not subjects of commerce, but such as were cast off as waste or refuse, of no value. We think it was used in its generic sense as designating "the substance of trees," or of the logs to be manufactured.

But it is contended in argument, that the use of the adjective, "refuse," to qualify and limit the word "wood," is inconsistent with this interpretation; that *refuse*, used to qualify and limit *wood* or *timber*, means unmerchantable, of inferior quality, and is not an apt or appropriate word to describe such portions of the substance of the log as are cast off in its manufacture; but that, for that purpose the apt and appropriate word is *waste*.

The answer to this argument is that standard lexicographers use "refuse" as synonymous with "waste." Thus, Worcester: "Refuse, *a*—left as worthless when the rest is taken; worthless; *waste*;" and one of the meanings given by him of *waste* is *refuse*. Moreover, the title of the act is: "an act to prevent the throwing of slabs and *other refuse* into the Penobscot river." Here it is obvious that "slabs, board or lath edgings, bark, grindings of edgings, wood, bark or lumber" named in the act, which it is claimed are properly called *waste*, are all designated by the word *refuse*.

Then the word "sort" has some significance in pointing the meaning of the other words. It does not appear to be used in

reference to the different *kinds* of wood, but rather in reference to the *form* or *shape* of the refuse wood or timber.

The great purpose sought to be accomplished by the act was to prevent obstructions to the navigation of the river by throwing into it the waste or refuse made in the manufacture of logs into the various kinds of lumber; and that this purpose might not be defeated, the legislature, after naming several articles of refuse or waste, added the general description of "refuse wood or timber of any sort."

Both of the materials involved in this indictment are a part of the substance of the log; they are refuse or waste; and when thrown into the river tend to obstruct and impede its navigation; and we are of opinion that they are embraced in the general description in the act, and that throwing them into the river is inhibited by it.

In accordance with the stipulation in the report,

A plea of nolo contendere must be entered.

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

STATE *vs.* JOHN MULLEN.

Somerset. Opinion July 30, 1881.

Larceny. Jurisdiction of the Supreme Judicial Court. R. S., c. 131, § 1.

By R. S., c. 131, § 1, the Supreme Judicial Court has jurisdiction on an indictment for larceny, where the property stolen was alleged to be worth but ten dollars.

ON REPORT OF FACTS AGREED.

From the agreed statement it appears, that a complaint was made before a trial justice against the respondent, for the larceny of two sheep, January 17, 1880, alleged to be of the value of five dollars each. A warrant was issued, upon which respondent was tried before the justice, who ordered the respondent to recognize for his appearance before the Supreme Judicial Court, Somerset county, to await the action of the grand jury. At the

March term, an indictment was found by the grand jury against Mullen, for larceny, the property being alleged to be of the value of ten dollars. If the Supreme Judicial Court has jurisdiction, the case is to stand for trial.

Levi Greenleaf, county attorney, for the State, cited: R. S., c. 131, § 1; *State* v. *Billington*, 33 Maine, 146; R. S., 1841, c. 162, § 13; R. S., c. 77.

Walton and Walton, for the defendant.

The respondent has been once tried by a court of competent jurisdiction, and the Supreme Judicial Court has not now, nor never had jurisdiction. R. S., c. 131, § § 1, 4; c. 132, § 3; *State* v. *Bonney*, 34 Maine, 223.

BARROWS, J. The question here presented is not a new one. It is substantially the same as that in *State* v. *Billington*, 33 Maine, 146. The question there, was whether the late district court had jurisdiction in case of an indictment for malicious mischief, in which it was not alleged that the injury to the property exceeded ten dollars. By c. 162, § 15, R. S., of 1841, justices of the peace had jurisdiction of the offence (which was described in § 13, of the same chapter,) "when the property so destroyed, or the injury occasioned by the trespass shall not be alleged to exceed the sum of ten dollars," in which case also the penalty was mitigated so as not to exceed that which might lawfully be imposed by justices of the peace in other cases. The provision under which it was claimed that the district court had concurrent jurisdiction, was found in c. 166, § 2, of the same revision, and gave to the district court jurisdiction of all offences, "with the exception of those" over which the Supreme Judicial Court had exclusive jurisdiction, and, "of those of which justices of the peace, police and municipal courts have by law, original jurisdiction exclusive or concurrent with the district court."

The construction given by the court was that where it did not expressly appear that the jurisdiction of the offence conferred upon the justices of the peace, or police or municipal courts, was exclusive, the district court had concurrent jurisdiction with them over the same cases. By c. 246, laws of 1852, § 1, the entire

jurisdiction, civil, criminal, and appellate of the district court, was transferred to the Supreme Judicial Court; and in the next revision of the statutes, the section which had been thus construed by the court, together with § 1, of the same chapter, which defined the criminal jurisdiction of the last named court, was condensed into the provision of c. 131, § 1, R. S., of 1857, which runs as follows: "The Supreme Judicial Court shall have original jurisdiction, exclusive or concurrent, of all criminal offences, except those of which the jurisdiction is conferred by law on municipal and police courts, and justices of the peace, and appellate jurisdiction of these." Substituting trial justices for justices of the peace, c. 131, § 1, R. S., of 1871, is of the same tenor. It must have the construction formerly given it; not only because the legislature is understood to have adopted that construction in re-enacting it, (*French* v. *Co. Com'rs*, 64 Maine, 586, and cases there cited) but because it is necessary if we would give the words, "or concurrent" in the statute as it stands, any meaning.

The case is stronger than *State* v. *Billington*, because in that case, the only penalty which the district court could impose in the absence of an allegation of value exceeding ten dollars, was that which might have been imposed by the justice of the peace; while larceny is punishable under R. S., c. 120, § 1, where the property stolen does not exceed the value of one hundred dollars, by imprisonment not more than two years, or by fine not exceeding one hundred dollars. So the lower courts have no power to impose the highest penalty prescribed by the law defining the crime and its punishment, and it is only by the special provision in R. S., c. 132, § 3, that they have jurisdiction to try and punish any such offence. The jurisdiction there given, is not exclusive, and the Supreme Judicial Court accordingly has concurrent jurisdiction in the same class of cases. It may sometimes occur, that owing to the circumstances under which the crime is committed, or on account of the necessity of protection for property unavoidably exposed, the magistrate may be satisfied that a larceny of property not exceeding ten dollars in value, would not be adequately punished by a "fine not exceeding ten

dollars, and imprisonment not more than two months"; and where such is the case, instead of assuming jurisdiction to try and dispose of the complaint, he may examine and bind over the offender to a court having power to impose the proper punishment within the limits of R. S., c. 120, § 1. It may well be that the practice of sheep stealing against which no watchfulness of the owner of the property can well guard, requires to be repressed by heavier penalties than the magistrate can lawfully impose, though the value of the property taken in each case, may be less than ten dollars.

In a pure case of petty larceny affected by no such considerations as those just suggested, but placed within his jurisdiction by c. 132, § 3, it is of course desirable that the magistrate should if possible, make a final disposition of the matter, and avoid a needless accumulation of costs.

Case to stand for trial.

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

WALTON, J., did not concur.

OCEAN INSURANCE COMPANY, applicants for commission to take depositions *in perpetuam*, *vs.* JAMES BIGLER, and another.

Cumberland. Opinion July 30, 1881.

Depositions in perpetuam. R. S., c. 107.

The provisions of the statutes authorizing the issuing of commissions by the Supreme Judicial Court for the taking of depositions in other States or foreign countries, to perpetuate the testimony of witnesses living out of the State, do not limit the power of the court to issue these commissions to cases where some one, or more, of the persons supposed to be adversely interested resides within this State. The court may issue such commissions though all the adverse parties reside without the State.

ON EXCEPTIONS.

Application to issue a commission to take the depositions *in perpetuam* of certain witnesses residing out of the State in relation to a claim made by James Bigler of Newburg, N. Y. and

Willard W. Brown of Buffalo, N. Y. under a policy issued by the Ocean Insurance Company upon the ship "Elizabeth Hamilton," for the alleged loss of the ship. The petition states that Bigler had threatened to bring a suit against the company upon the claim; that Bigler and Brown were the only persons interested in the claim under the policy; that there was a good defence to such claim, and that the company desired to perpetuate the testimony of the following witnesses, (naming them) to substantiate such defence.

Upon this application, filed at the April term, 1881, an order of notice issued and was duly served, and on the return day, July 18, 1881, the respondents "appearing solely for the purpose of objecting," objected to issuing the commission because,

1. Neither of them is a resident of this State.
2. Neither was served with these proceedings in this State.
3. This court has therefore no jurisdiction.

The objections were overruled and exceptions were taken to that ruling.

Webb and Haskell, for the petitioners.

William L. Putnam, for the respondents.

BARROWS, J. Sections 26, 27 and 28 of c. 107, R. S., should receive such construction consistent with their terms, as will make them most effective to remedy the mischiefs against which they were designed to operate. Their scope and effect should not be unnecessarily restricted by a doubtful construction or labored inference. They contain provisions authorizing the issuing of commissions by the Supreme Judicial Court for the taking of depositions in other States or foreign countries, to perpetuate the testimony of witnesses living out of this State.

The course of proceeding prescribed, requires the applicant to file "a statement in writing, under oath, setting forth in substance his title, interest or claim in the subject to which the desired testimony relates, and the names of all persons supposed to be interested therein, and the name of each witness proposed to be examined," like that which under section 22, (regulating the taking of depositions *in perpetuam* within the State) must be

delivered to the magistrate who is requested to take the deposition. By § 22 which contemplates the taking of the deposition upon interrogatories propounded by the parties or their attorneys *viva voce*, the magistrate is directed to give notice of "the time and place for taking such deposition to all persons so named in the statement, which may be given and proved as in the case of other depositions." Referring now to § § 6 and 8 of the same chapter, we find among other things that the service of the notice "may be made by a sworn officer or by any other person and proved by his affidavit; that notice to one or more of the adverse party is sufficient, and that he shall be allowed, at least, at the rate of one day, Sundays excepted, for every twenty miles travel from his usual place of abode to the place of caption between the service of the notice and the time appointed for taking the deposition. While this provision is without limitation as to the place of residence (whether within or without the State) of the party to be thus notified, it might require in extreme cases within this State, the lapse of more than twenty days, exclusive of Sundays, between the time of service and that of caption of the deposition. It is manifest that no such length of time is necessary to enable a party resident in this State to prepare himself for a hearing upon the question whether a commission to take such deposition ought to issue, and accordingly by § 27 it is provided that upon application to the court for the issuing of a commission, "the court shall order notice to be served upon each of the parties named in the statement, living in the State, fourteen days before the time appointed for hearing the parties; or, under § 28, the applicant "may file his statement in the clerk's office in vacation, and cause notice to be given to the persons named therein as interested fourteen days at least before the next term of court, at which time the parties may be heard."

The respondents in the present case having been personally served beyond the limits of the State with copies, attested by the clerk of the courts, of the statement, application and order of notice, appeared at the time appointed and objected to the issuing of the commission on the following grounds, viz: that neither of them is a resident of the State of Maine, nor was

served with notice of these proceedings within it and therefore that the court had no jurisdiction to entertain and grant the application.

We think the objections were rightly overruled. In view of the general language contemplating the giving of notice to all persons named in the statement as supposed to be interested therein, without regard to their place of residence, we do not think that we ought to infer from the single provision that a specific period of fourteen days' notice to those living within this State is to be regarded as sufficient, that it is not competent to take the testimony in this mode when all the parties supposed to be adversely interested reside out of the State. The respondents do not seem to have objected on the ground that they had not had a notice of the required length of time to enable them to appear, nor that the application and statement were not under oath.

They must be confined to the objections which they interposed at *nisi prius*. Whether fourteen days' notice to parties resident out of the State and more than two hundred and eighty miles distant from the place of return is sufficient is not now the question.

Want of proper opportunity to cross-examine witnesses called by the adverse party is an objection entitled to the favorable consideration of the court, but it does not exist and cannot be urged here. The respondents can present their cross-interrogatories to go with the commission as well as though a suit were now pending between the parties.

Taking all the provisions of the statute together we think the legislature did not intend to limit the power of the court to issue these commissions to cases where some one (or more) of the persons supposed to be adversely interested resides within the State. Sufficient notice to the adverse party wherever his residence is, to enable him, if he sees fit, to exercise his right of cross-examination, is essential.

Exceptions overruled.

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

WILLIAM H. CLAPHAM *vs.* LEMUEL CRABTREE.

Hancock. Opinion August 1, 1881.

Partnership. Replevin bond. Damages.

Whether one copartner who, ignoring the partnership and the remedies in equity between partners, has taken from another member of the firm by virtue of a replevin writ, some of the partnership property, is thereby estopped from setting up the existence of the partnership and his own interest as a partner in the property, at a hearing upon equitable principles for the mitigation of damages on his replevin bond, *Quære.*

But upon such hearing for the equitable reduction of damages on the replevin bond given in such a case, the rule is full indemnity for the obligee in the bond, and it is incumbent upon the obligor to establish, not merely the apparent interest of the obligee in the property replevied upon a numerical division of it among the members of the firm, but to go farther and show that as between the obligee and himself, the obligee will have had more of the property and funds of the firm, than himself, if full damages are given, or that the obligee is indebted to the firm, and his equitable interest in the property thereof does not equal the value of the property replevied and not returned.

When the obligor in a replevin bond thus given comes forward to have the damages arising from the breach of his contract mitigated on equitable principles, he should, at all events, go far enough to show that he has not deprived his partner by a resort to the forms of law of that which was necessary to his partner's equitable security for his dues in the adjustment of the copartnership affairs.

In equity, each partner has an interest in the property of the firm in proportion to his contributions to its funds. It is this equitable interest that is to be regarded in such a hearing in mitigation of damages; and where there is no proof that if he had remained in possession of the property replevied from him, the obligee would have more than his just proportion of the firm's property, full damages will be awarded.

ON REPORT.

The facts appear in the opinion.

A. P. Wiswell, for the plaintiff, cited: *Bath* v. *Miller*, 53 Maine, 308; 40 Maine, 284; *Tuck* v. *Moses*, 58 Maine, 461; *Bartlett* v. *Kidder*, 14 Gray, 449; *Davis* v. *Harding*, 3 Allen, 302; 22 Wallace, 208.

Hale and Emery, for the defendant.

It would seem on principle, that the measure of damages would be only the value of the plaintiff's interest. Damages are intended for compensation only, and when the plaintiff is paid the value of his interest he is fully compensated.

Suppose they were co-tenants, and instead of replevying and selling, the defendant had taken and sold the property. In such case, the plaintiff would have had no bond to put in suit, but would have brought his action of trover, or money had and received. What would have been the measure of damages in such actions? In such case it could not be said that defendant received the whole five hundred dollars, to the use of the plaintiff, when he, the defendant, owned half of it.

In trover, it is clear that plaintiff could only recover the value of his interest. That was all that plaintiff recovered in *Wheeler* v. *Wheeler*, 33 Maine, 347; *Weld* v. *Oliver*, 21 Pick. 559.

Now if instead of taking and selling, the defendant replevied and sold, and so gave the plaintiff security for his interest, it is hard to understand why the plaintiff should receive more, or the defendant pay more. In *Bartlett* v. *Kidder*, 14 Gray, 449, this question is settled as between co-tenants, and it is there decided that the plaintiff in the replevin bond suit, can only recover the value of his interest.

Now in the opinion in this replevin suit, *Crabtree* v. *Clapham*, 67 Maine, 326, the principles of cases between co-tenants are expressly applied to cases between partners. It is there stated, that nothing appearing to the contrary, the parties are presumed to be equal owners. In assessing damages, the court say interest on one-half the sum would not be adequate compensation for the detention of a half interest, and their assessment of damages is based on the idea of one half interest only. The facts now presented are precisely the same, so that on principle and authority, the plaintiff can only have judgment for two hundred and fifty dollars, and interest, from January 7, 1878.

Barrows, J. The defendant brought an action of replevin, for a yoke of oxen and a horse valued at five hundred dollars, against the plaintiff who was his copartner, and the property replevied belonged to the firm. When he brought this action,

defendant had another horse and yoke of oxen of the same value, belonging to the firm, in his own possession; but, giving the requisite replevin bond, he took these also out of the possession of his copartner, by a replevin writ. He failed in his action, and it was held that as a general rule, replevin does not lie in favor of one copartner against another for partnership property; and a return of the whole of the property taken on the replevin writ, with costs and damages for the detention from the time of taking, to the date of final judgment, was ordered, *Crabtree* v. *Clapham*, 67 Maine, 326. The defendant paid the damages and costs, but he had sold the property and could not return it; and in this action on the replevin bond, he resists the payment of anything beyond one half the value of the property, claiming that that is the extent of the plaintiff's interest.

To get possession of this property, he contracted with sureties among other things, to return it in case such should be the judgment of the court—to return, not half, but the whole of it. *Prima facie*, the damages for the breach of that contract should be the value of the property, with interest from the time when the return was demanded.

The burden is upon the defendant to satisfy us that less will indemnify the plaintiff.

The case develops nothing that would justify us in concluding otherwise than that the defendant has had the whole of the copartnership property, possession of one half of it having been "gained by the abuse of legal process," (*Crabtree* v. *Clapham*, 67 Maine, 327,) and that a bill in equity is pending, to determine how the partnership matters stand, the same never having been settled, in which suit nothing has yet appeared to show that the plaintiff is indebted to the copartnership, or is not equally entitled with the defendant to the possession of and a beneficial interest in, one half of *all* the partnership property. To say that upon such a showing the plaintiff was limited by law to the recovery of only one half the value of the property replevied as damages upon the replevin bond, would be to put it into the power of any insolvent partner who might at the same time be heavily indebted to the partnership, to possess himself of all the

copartnership property, and dispose of the same for his own benefit, and relieve his sureties on the replevin bond, by the payment of one half its value to his defrauded co-partner, leaving him nothing but a worthless judgment against himself at the end of a process in equity.

Certainly this is not the full indemnity to which the successful defendant in replevin is entitled by virtue of his bond.

The strongest cases which favor the defendant's position, that the plaintiff is entitled to recover only the value of his apparent legal interest in the property, nevertheless recognize the rule of full indemnity for the wrongful act of depriving him of his possession by means of the replevin writ. Thus in *Bartlett* v. *Kidder*, 14 Gray, 449, where the plaintiff, an officer, had attached on mesne process, personal property owned by the principals in the replevin bond in common with the debtor, and the defendants were allowed to show their interest in the property in mitigation of damages in the suit on the bond, the court remark in substance that the officer could have sold the interest of the debtor only; that if he sold more he would be a trespasser against the cotenants; that he would be fully indemnified by allowing him the value of the debtor's interest in the property with statute damages, as that was all that he could be liable for either to the attaching creditor or the debtor, and finally that "the principle upon which such facts may be shown in mitigation of damages, is, that full indemnity will be thus given to the obligee of the bond; and this is all he is entitled to on the hearing in equity."

So, in *Hacker* v. *Johnson*, 66 Maine, 21, which was replevin brought by one partner against an officer who had attached the partnership stock for the debt of the other partner, a nonsuit and return were ordered, notwithstanding the plaintiff offered to show that the partnership was insolvent; that the copartner whose share in the stock was thus attached was indebted to the firm in a large amount, and that the plaintiff in replevin was solvent and had sold the replevied goods and applied the proceeds to pay the indebtment of the firm as far as they would go. The court then remarked that these matters would be competent in mitigation of damages in a suit on the replevin bond, as the attaching creditor

would then "have had an opportunity of first seeking an account of the partnership affairs in a court of equity," thus showing that it was the *equitable* and not the *legal* interest of the partner that was to be ascertained in order to fix the damages. That evidence of this sort cannot be received as a full defence to the action on the bond, or to the extent of impeaching the judgment for a return where such judgment has been entered after a hearing on the merits, see *Davis* v. *Harding*, 3 Allen, 302; *Buck* v. *Collins*, 69 Maine, 445. Indeed, the counsel for defendant do not claim this in argument, but admit that the plaintiff is entitled to judgment for the value of his apparent interest in the property as an equal partner, without regard to the disposition which has been made of the other partnership property; *i. e.* for one half its value and interest since the date of the demand.

The defendant is here to urge equitable considerations for the mitigation of the damages ensuing from the breach of his bond. He that asks equity must do equity; and the defendant in order to satisfy us that it is equitable that he should have three fourths of what so far as appears, constitutes all the partnership property should have been prepared to show that the equitable interest of his partner, the plaintiff, was no more than one fourth. It is the equitable interest, as distinguished from the mere apparent legal interest which is to be regarded in this hearing in equity to mitigate damages. It was the equitable interest of the debtor which the attaching officer in *Hacker* v. *Johnson*, was to hold, not his share according to a mere equal numerical division.

The defendant fails to show any equitable reason why he should not have complied with the order of court, which was that he should return the whole of the property which he had taken on his replevin writ.

But aside from the equitable aspects of the case we think there are strong reasons for holding that a copartner who brings a suit of this description against his associate, thereby estops himself from setting up the copartnership which he has in the outset ignored, and should be held to the performance of the order of the court, or to the payment of the natural damages for the breach of his contract, without letting in the equities the existence of which

he has denied in order to possess himself of the property. Abundant remedies for copartners as between themselves are provided in equity in a court always open. If they wish to guard against the misapplication of partnership funds or property, an application for an injunction and a receiver will do it thoroughly.

If, notwithstanding all this, a copartner, neglecting his appropriate remedy, will resort to an action at law, we think he must live up to his contract to abide by the result, and not seek, as here, to convert defeat into half a victory by a late and partial application of equitable rules, which if applied at all should govern at the beginning as well as the end.

But it is not necessary in the decision of the present case to determine that a partner replevying copartnership property from his associate shall be estopped thereby from asserting partnership equities to mitigate the damages recoverable on his replevin bond.

The defendant fails to show that such equities will justify the reduction which he claims. Apparently they require that the value of the property taken by him on the replevin writ, be restored to the plaintiff in order to make an equal division of the partnership property. In equity all the property of the partnership is chargeable as between the partners with the sums due from the individual members to the firm, and for aught that appears, the beneficial interest of the plaintiff in the property replevied may be equal to its entire value. To mitigate the damages for the breach of his contract it was incumbent on the defendant to make it appear that it was not so. Instead of doing this he places his main reliance upon the fact that the amount of damages awarded to the present plaintiff, (then defendant) for the detention of this property before judgment in the replevin suit was based upon the apparent legal interest of the parties. *Crabtree* v. *Clapham*, 67 Maine, 326.

He forgets that the burden of proof has now changed. It rested then upon this plaintiff (if he would have damage computed upon more than half the value), to prove that his damage was more than his apparent legal interest would indicate, and he

neglected to do it, leaving us, as now, uncertain how the accounts between the partners and the firm stand. *Now* it is incumbent upon this defendant who asks to have the damages for the breach of his bond equitably reduced, to show that the interest of the plaintiff in the partnership property is by reason of his indebtment to the firm, less than the value of this portion of it. He fails to show that the plaintiff is indebted to the firm, or that the plaintiff's equitable interest in the partnership property is less than the full value of this fraction of it, as completely as this plaintiff, in the former case, failed to show that it was more than half when the burden rested on him. Each of the parties has in his turn failed to appreciate the burden of proof devolving on him.

The case shows that a bill in equity is pending for the adjustment of the partnership affairs; but we are left without any information as to its probable result. If the plaintiff recovers more than his actual equitable interest in the property by way of damages here, it may affect the balance and costs in the equity suit.

To insure exact justice, it might have been proper to allow this case to await at *nisi prius* the result of the equity suit. But no such request was made. We pass upon the case as the parties saw fit to present it.

Judgment for plaintiff for $500, and interest from January 7, 1878.

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

PETERS, J., did not concur.

STATE *vs.* JAMES BURROUGHS.

Kennebec. Opinion August 3, 1881.

Complaint for search and seizure. Practice. Evidence.

It is not error to instruct the jury that the criminality of an offence, and the severity of its punishment may be considered by them with the facts and circumstances of the case as evidence bearing on the greater or less probability of its commission.

Bottles, glasses, &c. found in defendant's shop, are admissible as evidence in a trial upon a complaint for search and seizure, though procured by an illegal and unauthorized search.

ON EXCEPTIONS from superior court, Kennebec county.

The case is stated in the opinion.

H. M. Heath, county attorney, for the State, cited: *State* v. *Flynn*, 36 N. H. 64; *Decker* v. *Somerset Ins. Co.* 66 Maine, 408.

E. W. Whitehouse, for the defendant.

The instruction complained of was erroneous. I do not understand that the law makes any distinction whatever in the weight of testimony required under a search and seizure and any other crime. In all criminal prosecutions the same weight, degree and amount of testimony are required for a conviction. 3 Greenl. Ev. 29.

APPLETON, C. J. This is a complaint for search and seizure, appealed from the municipal court of Augusta, and is brought here on exceptions to the rulings of the justice presiding at *nisi prius*.

1. The judge in his charge, said to the jury, "You have a right to consider, however, in this case, the question whether it requires the same amount of proof, the same weight to fasten upon a man the crime of selling intoxicating liquors, or keeping them with intent to sell, in view of the penalty attached, as it would to fasten upon him a higher crime for which the penalty was much severer."

Here is no rule of law given. The jury were told they were at liberty to consider the criminality of an offence, and the severity of its punishment as circumstances bearing upon the greater or lesser probability of its commission. It was left to them to determine the effect of those as of all other facts and circumstances in proof bearing on the guilt or innocence of the respondent.

2. Bottles, glasses, and measures identified as found in the defendant's shop, were received in evidence, to the introduction of which, the objection was made that their seizure was unauthorized by the warrant. They were or might be imple-

ments used in unlawful traffic. They were admissible in evidence however obtained. Their evidentiary force was for the jury. They are nevertheless articles of evidence, even if procured by an unauthorized and illegal search. *State* v. *Plunkett*, 64 Maine, 536; *State* v. *McGlynn*, 34 N. H. 422; *State* v. *Flynn*, 36 N. H. 64; *Com.* v. *Dana*, 2 Met. 329.

Exceptions overruled.

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

LIBBEY, J., did not concur.

MARY E. MILLER *vs.* HENRY HATCH and another.

Kennebec. Opinion August 3, 1881.

Principal and surety. Contract with principal.

M, the holder of two notes upon which F & Co. were holden as principals, and H (as he claimed) as surety, executed, with other creditors of F. & Co. and delivered to the principals the following contract: "We, the undersigned, creditors of Warren A. Farr & Co., of Boston, in the commonwealth of Massachusetts, in consideration of one dollar, and other good and sufficient considerations to us severally paid by said Warren A. Farr & Co., the receipt whereof is hereby acknowledged, do severally promise and agree with the said Warren A. Farr & Co., that we will receive in full satisfaction and discharge of our respective claims against them, the amount of sixty per cent. thereof in the following manner, namely: Twenty-five per cent. of said claims respectively, in thirty days from the date thereof, and the remainder in sixty days from the same date of this instrument. Witness our hands and seals, hereby severally adopting the seal set opposite the first signature hereto as the seal of each of us respectively, this thirty-first day of December, A. D. 1872."

Held, That this was an executory contract; that it gave the principals no delay; that it was no bar to an instantaneous suit by M upon the notes, and that until performed by F. & Co. M's debt remained unaffected thereby, and H, if a surety, was not thereby discharged.

ON A MOTION to set aside the verdict in superior court.

The verdict was for plaintiff for $3554.23.

At the trial Warren A. Farr, nominally one of the defendants, a brother of the plaintiff and a witness in her behalf, testified:

"That agreement with my creditors was put in writing. [Compromise marked 'G.' shown witness.] Should say that was it. I was active myself in bringing this about. The several parties whose signatures appear there, signed and delivered it to me. Should say that was the plaintiff's signature on the paper. She signed it and delivered it to me." Witness further stated that he took receipts from the parties to that agreement, so far as he settled with them, but took none from the plaintiff, never paid her anything "by virtue of that agreement."

Other material facts are stated in the opinion.

G. T. Stevens, for the plaintiff, upon the question considered in the opinion, cited: *Clifton* v. *Litchfield*, 106 Mass. 34; *Walker* v. *McCulloch*, 4 Maine, 421; *McAllester* v. *Sprague*, 34 Maine, 296; *Drinkwater* v. *Jordan*, 46 Maine, 432.

J. W. Spaulding, *W. T. Haines* and *F. J. Buker*, for Henry Hatch, one of the defendants, upon the question considered in the opinion, contended that the compromise agreement in the case had the effect to discharge the defendant Hatch as a surety upon the notes in suit, citing: *Perkins* v. *Lockwood*, 100 Mass. p. 250, and cases there cited.

APPLETON, C. J. This is an action of assumpsit on two promissory notes, dated September 15, 1871, signed by Farr, Hatch and Co. The defendant, Henry Hatch, was a member of that firm at the time the notes were given.

April 18, 1872, Hatch sold out his interest in the firm to Jerome L. Farr, for five thousand dollars. On August 3, 1872, notice was given in the papers of the dissolution of the firm of Farr, Hatch and Co. and that it was succeeded by the firm of Warren A. Farr and Co. which assumed the liabilities of the firm of Farr, Hatch and Co.

In December, 1872, the firm of Warren A. Farr and Co. became insolvent. The defence rests on the ground that after the dissolution of the firm of Farr, Hatch and Co. they stood in the relation of sureties on the note, and they were discharged by reason of the plaintiff's signing with others an agreement under seal in these words:

"We, the undersigned, creditors of Warren A. Farr & Co. of Boston in the commonwealth of Massachusetts, in consideration of one dollar, and other good and sufficient considerations to us severally paid by said Warren A. Farr, & Co., the receipt of which is hereby acknowledged, do severally promise and agree with the said Warren A. Farr & Co., that we receive in full satisfaction and discharge of our respective claims against them, the amount of sixty per cent. thereof in the following manner, namely: Twenty-five per cent. of said claims, respectively, in thirty days from the date hereof, and the remainder in sixty days from the same date of this instrument.

"Witness our hands and seals severally adopting the seal set opposite the first signature as the seal of each of us respectively, this thirty-first day of December, A. D. 1872.

M. E. Miller. [Seal]."

This was signed by over forty creditors of the firm. Nothing was paid the plaintiff under this contract.

The jury found specially that the plaintiff had no knowledge of the assumption of the liabilities of the firm of Farr, Hatch and Company by that of Warren A. Farr and Company. Much of the argument of the learned counsel for the defendant, is devoted to proving that this finding was erroneous. In the view we take of the case, it is immaterial whether she knew of such assumption or not, inasmuch as she has done nothing to injuriously affect the rights of Farr, Hatch and Company.

Conceding, for the purpose of argument, that after the dissolution of the firm of Farr, Hatch and Company, the firm were to be regarded as sureties, the plaintiff, by her signature to the contract of December 31, 1872, has done nothing to discharge their liability. This was only an offer on condition. It was not accepted or performed by the firm to which it was made. The plaintiff gave no delay. She might have sued at any time. The contract was no present discharge of the plaintiff's rights. It was no bar to an instantaneous suit had she brought one. The agreement was purely executory. It was never executed. Nothing was ever paid. The only provision for a future discharge was upon the payment of the sum stipulated. Until that condition

should be performed, the plaintiff's debt remains unaffected by the executory agreement for a discharge.

The authorities are in entire accord with this view of the case. In *Clifton* v. *Litchfield*, 106 Mass. 34, it was held that an executory contract, by way of compromise to discharge a disputed, unliquidated claim, by the giving of the debtor's promissory note, for a sum less than the amount actually due, was not a bar to a suit upon the original demand, although the note has been tendered the creditor, if it has not been accepted. In *Blake* v. *Blake*, 110 Mass. 202, the agreement was under seal. "The agreement," observes WELLS, J. "to accept a part in satisfaction of the whole, so long as it remains executory, will not operate either as payment, satisfaction or discharge." In *Cushing* v. *Wyman*, 44 Maine, 121, the question here presented was fully examined and considered, and it was then held that an executory agreement constituted no bar to a suit.

Upon some of the facts contested in the motion for a new trial, there is conflicting evidence, but there is no such preponderance as would justify or require our interference.

Motion overruled. Judgment on the verdict.

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

INHABITANTS of NORRIDGEWOCK,

vs.

EDWARD SAWTELLE, Administrator.

Somerset. Opinion August 3, 1881.

Poor debtor. Disinterested justice. R. S., c. 113, § 28. Recognizance.

Upon a poor debtor's disclosure on an execution in favor of the inhabitants of a town, a justice who is an inhabitant of the town is not disinterested as required by R. S., c. 113, § 28.

The disclosure of a judgment debtor, as a poor debtor, is not a performance of the conditions of a recognizance given upon an appeal and will not discharge the surety from the liability incurred by entering into such recognizance.

ON REPORT.

The law court to enter such judgment as the law and the facts require.

This was an action of debt on a recognizance to prosecute an appeal from the decision of a trial justice in a civil action, entered into by the defendant's intestate, as surety for the debtor, Gould, in accordance with R. S., c. 83, § 18.

The judgment of the appellate court was for the plaintiffs. Upon this judgment execution issued, and the debtor, Gould, was arrested on it and gave a six month's bond, provided by R. S., c. 113, § 24.

The six months had expired before this action was commenced, within the six months the debtor cited the plaintiff to attend to his disclosure according to c. 113, and the creditor not appearing to select a justice, the officer who arrested the debtor, selected as a justice an inhabitant of the plaintiff town. The justices heard the disclosure and administered the oath prescribed in § 30.

Walton and Walton, for the plaintiffs, upon the question considered in the opinion, cited: R. S., c. 83, § 18; *Bates* v. *Tallman*, 35 Maine, 275.

John H. Webster, for the defendant.

By the common law the arrest of a debtor on execution, when connected with a release or discharge of the debtor by the creditor, amounted to plenary evidence of satisfaction of the debt; *Miller* v. *Miller*, 25 Maine, 110, and cases there cited.

It is the same now with the exception of cases provided for by statutes, which being in contravention of the common law are to be construed strictly. The debtor Gould was arrested and gave a perfectly good statute bond. He undertook, it is true, to disclose, but one of the justices was one of the creditors, therefore incompetent to sit; R. S., c. 113, § 28. Had the creditor called on the bondsman or sued the bond before it was barred by statute, the whole execution would have been collected and this defendant relieved, § 53.

The defendant's intestate was surety for Gould on his appeal, and as such, liable for the costs arising after the appeal, and after judgment the creditor had his election to collect the cost immediately of the surety, or pursue Gould with the execution until Gould's body should be freed from arrest, or the execution discharged. He has pursued Gould till the execution is discharged. That discharges this defendant as effectually as if the creditor had taken a promissory note for the amount, and discharged the execution with his own hand; *Springer* v. *Toothaker*, 43 Maine, 381; *Cummings* v. *Little*, 45 Maine, 183; *Baker* v. *Briggs*, 8 Pick. 122.

APPLETON, C. J. In a suit pending before a trial justice between the plaintiffs and one M. M. Gould, the latter appealed from the judgment rendered against him. The appellant with the defendant's intestate recognized to the plaintiff, "with condition to prosecute the appeal with effect and pay all costs arising after the appeal" in accordance with R. S., c. 83, § 18.

Judgment having been rendered against Gould in the appellate court, execution issued thereon, Gould was arrested and gave a poor debtor's bond upon which he made or attempted to make a valid disclosure and on which he was discharged by the justices before whom the disclosure was had.

If the disclosure was valid and before a competent tribunal, that would not constitute payment. It would not be a performance of the condition of the recognizance.

The justice chosen by the officer before whom the disclosure was had was an inhabitant of the plaintiff town. He was not disinterested, as by the statute R. S., c. 113, § 28 is required. He could not have acted as juryman between the parties, if objection had been taken to his action. *Hawes* v. *Gustin*, 2 Allen, 403.

The bond was given to procure a release from arrest. "Such bonds," observes SHEPLEY, C. J. in *Bates* v. *Tallman*, 35 Maine, 275, "are only collateral security for the debt; and the creditor may refuse to prosecute them or may discharge them without relinquishing his debt." The liability the defendant incurred by entering into the recognizance upon which this suit has been

brought, has not been discharged. The "costs arising after the appeal" have not been paid.

Judgment for plaintiffs.

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

DANFORTH, J., did not sit.

WESTON LEWIS and another

vs.

FREDERICK LATNER and trustees.

Cumberland. Opinion July 30, 1881.

Insolvent law. Stat. 1878, c. 74. R. S., c. 70. Trustee process.

The insolvent law repealed chapter 70, of the Revised Statutes. And a person summoned as trustee, who holds goods, effects and credits of the principal defendant, by virtue of an assignment for the benefit of creditors, under R. S., c. 70, will be charged as trustee.

ON REPORT.

Assumpsit on account annexed for two hundred and eighty-one dollars and ninety-one cents. *Ad damnum*, six hundred dollars. Service was made on two of the trustees July 25, 1879, and on the third, August 21, 1879.

June 30, 1879, the defendant made an assignment to one of the trustees under R. S., c. 70, for the benefit of creditors, and all the goods, effects and credits in the hands of either of the trustees, were held by virtue of that assignment. A portion of the creditors, about forty in number, became parties to the assignment. The plaintiffs were not parties.

Strout and Holmes, for the plaintiffs.

Walker and Cram, for the trustees.

If c. 70, R. S., 1871, is repealed by c. 74, laws 1878, this assignment would still be good at common law, as previous to service of the writ upon F. O. Bailey and C. W. Allen, trustees, July 25, 1879, creditors whose debts amounted in the aggregate to eleven hundred and seventy dollars and sixty-nine cents, had become parties to the assignment, and subsequent, but prior to

the service upon E. B. Cram, the other trustee, August 21, 1879, the entire amount of the debts due to creditors who had become parties thereto, was nineteen hundred and sixty-nine dollars and fifteen cents, a sum much larger than the entire amount then in the trustees' hands. *Jewett* v. *Barnard*, 6 Maine, 381; *Copeland* v. *Weld*, 8 Maine, 411; *Fox* v. *Adams*, 5 Maine, 245; *Canal Bank* v. *Cox*, 6 Maine, 395.

Assignment at common law is avoidable only at the suit of the assignee of the debtor in insolvency or bankruptcy, except there be proof of that which would constitute fraud at common law. *National Mechanics' and Traders' Bank* v. *Eagle Sugar Refinery and Trustees*, 109 Mass. 38; *May* v. *Wannemacher*, 111 Mass. 202.

It is for the plaintiff to prove his allegation, not for the trustee to disprove. *Cardany* v. *New England Furniture Co. and Trustee*, 107 Mass. 116.

The assignment if voidable is not void, and the possession of the goods and estate of the principal defendant by E. B. Cram, the assignee, would therefore be a rightful possession. Bailey and Allen, the other trustees, received possession of the goods in question from Cram, the assignee holding under the assignment to him, and selling and accounting for the proceeds to him as assignee, and therefore would not be liable as trustees in a suit against the principal defendant, Latner. *Sprague* v. *Steam Navigation Co.* 52 Maine, 592; *Pettingill* v. *Androscoggin Railroad Co.* 51 Maine, 370.

WALTON, J. The only question submitted to the law court in this case is whether the trustees are chargeable; and the answer to this question depends upon whether the insolvent law of 1878, repealed chapter 70 of the Revised Statutes of 1871; and this last question was answered in the affirmative in *Smith* v. *Sullivan*, 71 Maine, 150. Consequently, the trustees must be charged. The amount will be determined and apportioned among the several attaching creditors at *nisi prius*.

Trustees charged.

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

CHARLES H. GROVES, appellant, *vs.* FRANK KILGORE.

Androscoggin. Opinion July 30, 1881.

Insolvent law. Trader. Livery-stable keeper. Stat. 1878, c. 74, § 42.

A livery-stable keeper who buys hay and grain and sells, by keeping horses to bait and board, is a trader within the meaning of the insolvent law, Stat. 1878, c. 74, § 42.

ON EXCEPTIONS.

An appeal from the court of insolvency.

The appellee, Frank Kilgore, was duly adjudged an insolvent, and petitioned the court of insolvency for a discharge. The appellant objected to his discharge for the following reason, among others:

"That said debtor being, since the law was passed under which said proceedings are pending, a trader, . . . did not keep a cash book, and did not keep other proper books of account."

The judge of the court of insolvency decreed the discharge, and this appeal was taken.

At the trial, the jury found specially that "the appellee from May 14, 1878, to July 3, 1879, at Lewiston, in this county, bought hay and grain and sold it, by keeping horses to bait and to board at his stable, or at the stable hired by him." Thereupon the presiding justice ruled *pro forma*, that as a matter of law, the appellee was not entitled to a discharge, and exceptions were alleged to that ruling.

Ludden and Drew, for the appellant, cited: *In re O'Bannan*, 2 N. B. R.; *In re Odell & Odell*, 17 N. B. R. 73; U. S. Rev. Sts. § 5110; *In re Littlefield*, 3 N. B. R. 57.

L. H. Hutchinson and *A. R. Savage*, for the appellee.

The appellee was not a trader. He was a truckman who occasionally let out horses for hire and sometimes baited horses at his stable.

A trader is one who engages in commercial transactions, buying and selling for the sake of gain.

A livery-stable keeper may be a trader or he may not. It would depend upon the extent of his business and the manner of conducting it. If in addition to keeping horses to let for hire, or baiting or boarding horses, he should traffic in horses or keep a sale stable, he would be a "trader;" if he simply kept horses to let for hire, we contend he would not be a "trader." This case discloses that Kilgore kept one horse to let, and occasionally let two others.

The legal significance of the word "trader," is that of one who exchanges for the purpose of gain. Trade is commerce; traffic; barter. The idea we have suggested is inseparable from the legitimate use of the term. If one so conducts business of any name as to be engaged in exchanges for profit, he is a trader; otherwise not. See Webster's Dictionary, Trade; Trader; Bouvier's Law Dictionary, Trader.

WALTON, J. The insolvent law of this State declares that the debtor shall not be discharged, if, being a merchant or trader, he has not, since the passage of the act, kept a cash book, and other proper books of account. Act 1878, § 42.

In this case, the debtor's discharge is objected to upon the ground that he has been a livery-stable keeper since the passage of the act, and that a livery-stable keeper is a trader within the meaning of the law, and that, being such trader, he did not keep a cash book.

The debtor admits he did not keep a cash book, but he denies as matter of fact that he has been a livery-stable keeper, and he denies as matter of law that a livery-stable keeper is a trader.

The parties have been permitted to have the question of fact determined by a jury, and the jury found that the debtor had been a livery-stable keeper, and bought hay and grain and sold it by keeping horses to bait and board at his stable.

There is no motion to have the verdict set aside, and the only question for the law court is whether the presiding judge ruled correctly in holding that, a livery-stable keeper, who buys hay and grain and sells it by keeping horses to bait and board, is a trader within the meaning of the law.

We think the ruling was correct. It is settled law in England that a livery-stable keeper is a trader. He is so classed in the English bankrupt act of 1869. And it is so held in this country. *Re Odell*, 17 Bankr. Reg. 73. It was there held that a livery-stable keeper, who takes horses to board, cannot have a discharge, if he has not kept proper books of account. U. S. Dig. for 1878, p. 85, § 194.

In a general sense any one who buys and sells is a trader. But occasionally buying and selling will not necessarily make one a trader under bankrupt and insolvent laws. To make one such he must buy and sell as a business. Not necessarily as his only business. The same person may engage in many kinds of business. Nor is a large amount of buying and selling necessary to create a trader. There are small traders as well as large traders. To draw the line, however, between an occasional buyer and seller, and one who makes it a business to buy and sell, is not easy. It is mainly a question of intent; and, like all questions of intention, each individual case must be determined by the circumstances attending it.

To constitute a trader it is not necessary that he should sell the articles in the same condition as when he bought them. A butcher, who buys cattle and sells beef, a shoemaker who buys leather and sells shoes, a baker who buys his materials and sells bread, a brickmaker who buys his earth and sells bricks, a carriage maker who buys his materials and sells carriages, are held to be traders within the meaning of bankrupt and insolvent laws. The important fact is whether the seller is also a buyer, for it is usually the buying, and the buying on credit, and not the selling, that runs him into debt, and ultimately makes a bankrupt of him. A livery-stable keeper is one who takes horses to bait and board; and he usually keeps horses to let; but the reason why he is held to be a trader is not because he lets horses, not because he occasionally sells a horse when he is no longer fit for his business, but because it is a part of his business to buy hay and grain and to sell it again in the form of feed for the horses of others. Baiting and boarding the horses of others, and receiving pay for so doing, is regarded as a selling of the

feed purchased, and in a form less changed than the articles sold by the baker, or the butcher, or the shoemaker, or the brick-maker; and the same reason exists why he should keep proper books of account. In this case, the jury not only found that the insolvent was the keeper of a livery stable, but they found separately and distinctly that he bought hay and grain and sold it by keeping horses to bait and board at his stable. We think there was no error on the part of the presiding judge in holding that he was a trader; that the written objections to his discharge were sufficient in substance and in form; and that his discharge was rightly refused. Abbott's Law Dict. Trade; Trader; Tradesman, and cases cited. Bouvier's Law Dict. Trader, and cases cited. Hamlin's Insolvent Law of Maine, 58, and cases cited.

Exceptions overruled.

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

INHABITANTS OF CAPE ELIZABETH

vs.

GEORGE H. LOMBARD.

Cumberland. Opinion July 30, 1881.

Insane person — support of, action for. Evidence.

Any town which has been made chargeable, and has paid, for the commitment and support of an insane person at the insane hospital, may recover the amount paid of the insane person if able. In such an action, upon a hearing in damages, evidence of the ability of the defendant is inadmissible to reduce the amount to be recovered below the amount actually paid. If he is not able to pay the whole amount, he is not liable to pay any portion of it.

ON EXCEPTIONS.

Assumpsit to recover the amount paid by the town for the support, &c. of the defendant in the insane hospital.

At a hearing upon the question of damages, the defendant offered evidence of the financial ability of the defendant to pay

the amount sued for. The presiding justice ruled as a matter of law that such question was not open to the defendant, and the defendant alleged exceptions.

N. and H. B. Cleaves, for the plaintiffs.

John J. Perry, for the defendant.

WALTON, J. Any town, which has been made chargeable, and has paid, for the commitment and support of an insane person at the insane hospital, may recover the amount paid of the insane person, "if able." Such is the language of the statute. R. S., c. 143, § 20. The question is whether, if he is not able to pay the whole, he can be required to pay a part of the expenses thus incurred, so that, upon a hearing in damages, evidence of his ability is admissible to reduce the amount to be recovered below the amount actually paid. We think not. A similar question was before the court in an action to recover the expenses incurred in taking care of a person sick with the small pox, and the court held that if the person taken care of was not able to pay the whole amount, he was not liable to pay any portion of it. *Orono* v. *Peavey*, 66 Maine, 60. The two statutes, in this particular, are precisely alike, and must, we think, receive the same interpretation. The evidence offered was properly excluded.

Exceptions overruled.

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

STATE *vs.* TIMOTHY W. FURBUSH.

Franklin. Opinion July 30, 1881.

Constitutional law. R. S., c. 44, unconstitutional.

R. S., c. 44, violates the federal constitution by discriminating in favor of goods manufactured in this State, and against goods manfactured in other States, and is therefore unconstitutional and void.

ON REPORT.

This is an indictment for violation of R. S., c. 44, § 1, by traveling from place to place, and peddling in the town of Free-

man, goods, wares, and merchandise, not lawfully raised or manufactured in this State. The respondent pleaded not guilty, but admitted the selling of the goods in the manner alleged in the indictment.

If the respondent can be legally convicted on the indictment and facts agreed, judgment is to be for the State. Otherwise, he is to be discharged from said indictment.

R. S., c. 44, § 1, reads as follows: "No person, except as hereinafter provided, shall travel from town to town, or place to place in any town, on foot, or by any kind of land or water conveyance, carrying for sale, or offering for sale, any goods, wares or merchandise, whole or by sample, under a penalty of not less than fifty nor more than two hundred dollars, and the forfeiture of all property thus unlawfully carried; but this provision shall not apply to commission merchants and commercial brokers traveling from place to place in the city or town where they reside, and selling or offering to sell goods by sample or otherwise; nor to any citizen of this State selling any fish, fruit, provisions, farming utensils or other articles lawfully raised or manufactured in this State."

Henry B. Cleaves, attorney general, for the State.

No question can arise under this indictment as to that clause of the constitution of the United States, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The respondent being a citizen of this State, and whatever discrimination there may be, if any, so far as exercising the calling of a peddler, is in his favor.

The decisions of the Supreme Court of the United States indicate, that taxes imposed by a State, discriminating against commodities of other States, would be inconsistent with the provisions of the constitution of the United States and therefore unconstitutional. That the power vested in Congress by the constitution, to regulate commerce with foreign nations, and among the several States &c., prevents all interference on the part of the State relating to the regulation of inter-State commerce,

notwithstanding Congress has neglected to provide any regulation as to the same.

The constitution of the United States declares that no State shall without the consent of Congress lay any duties on imports or exports, or any duty on tonnage, &c. U. S. Constitution, article 1, § 10.

Here is an express prohibition by the constitution; but where the power is simply granted to Congress, with no prohibition, the authority is concurrent and may be exercised by the States until Congress legislates upon the subject. The grant to congress (U. S. Con. article 1, § 81,) to regulate commerce among the several States is not exclusive.

"If the terms of the grant are not exclusive and there is no express prohibition upon the States and no repugnancy or inconsistency in its exercise by the States, the authority is concurrent." *People ex. rel. Barlow* v. *Curtis*, 50 N. Y. 326.

The State has the power to regulate the manner of doing business.

It has no authority to pass laws where there is an express prohibition by the constitution of the United States. "There are many powers conferred upon Congress, which until exercised by it are regarded as dormant, and may be exercised by the States within their limits, among which is the power to regulate commerce." *Phelps* v. *Racey*, App. 60 N. Y. 11.

This view is sustained in the celebrated license cases. *Thurlow et als.* v. *State of New Hampshire et als*, 5 Howard (U. S.), 513; see also *Gibbons* v. *Ogden*, 9 Wheat. 1; *Wilson* v. *Blackbird, C. M. Co.* 2 Pet. 251; *Houston* v. *Moore*, 5 Wheat. 1; *Sturgis* v. *Crowinshield*, 4 Wheat. 196; *Chirae* v. *Chirae*, 2 Wheat. 269; *Wilton* v. *Missouri*, 91 U. S. 275; *Burbank* v. *McDuffee*, 65 Maine, 135.

H. L. Whitcomb, for the defendant, cited: Constitution U. S. article 1, § 8, par. 3, and article 4, § 2; *Ward* v. *Maryland*, 12 Wall. 418; *Wilton* v. *Missouri*, 91 U. S. 275.

WALTON, J. It is the opinion of the court that c. 44 of the revised statutes of this State, is unconstitutional. It allows

goods manufactured in this State to be peddled free, and exacts a license fee from those who peddle similar goods which are manufactured out of the State. Such a discrimination in favor of goods manufactured in this State, and against goods manufactured in other States, violates the federal constitution. This precise question has been several times before the Supreme Court of the United States, and that court holds that such legislation is unconstitutional. *Wilton* v. *Missouri*, 91 U. S. (1 Otto), 275; *Tiernan* v. *Rinker*, 102, U. S. (12 Otto), 123; *Webber* v. *Virginia*, Reporter for June 15, 1881.

We shall not repeat the reasoning by which this conclusion is sustained by the Supreme Court of the United States. It is sufficient to say that it is full, and we think, satisfactory. But whether satisfactory or not, it must be acquiesced in by the State courts, for the question arises under the federal constitution, and it is the duty of the Supreme Court of the United States to answer it, and their answer is conclusive upon the State courts. It is held by that court that such legislation is an interference with the power vested in congress to regulate commerce.

Chapter 44 of the revised statutes being unconstitutional and void, the defendant, who is indicted for no other offense than a violation of it, must be discharged.

Defendant discharged.

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

MARIA SIMPSON, and others, appellants from a decree of JUDGE OF PROBATE,

vs.

I. C. WELCOME, and another, executors.

Lincoln. Opinion July 30, 1881.

Will. Trust. Charity. "Religious."

A testator inserted an item in his will in these words: "I hereby give, devise and bequeath in trust to I. C. Welcome, of Yarmouth, and Franklin L. Carney, of Newcastle, all that may remain both of my real and personal

estate, . . . and further direct the said Welcome and Carney to expend all that remain, . . . in the purchase and distribution of such religious books or reading as they shall deem best, and as fast as the funds shall come into their hands;"

Held, That this legacy must be considered legally as intended for a public charity; that the trust is clear and the objects sufficiently certain and definite to be carried into effect, according to established principles of law and equity, governing donations to charitable uses.

The word "religious," when used in a will made in this country, as descriptive of books and reading, means those books or reading, which tend to promote the religion taught by the Christian dispensation, unless the meaning is so limited by associate words or circumstances as to show that the testator had reference to some other mode of worship.

ON REPORT.

Appeal from a decree of judge of probate made to obtain a construction of the fourth item of the will of Ralph Harley, deceased, which is stated sufficiently in the opinion.

It was "agreed that the court shall have the power of determining the construction of the will, and whether the funds in the hands of the respondents shall be disposed of as is provided in article four of the will, or whether the heirs at law are entitled to it."

The following was the decree of the probate court:

(Decree.)

"Lincoln, ss. Probate court, February term, A. D. 1880. Ordered and decreed: That the sum of eleven hundred and twenty-five and $\frac{47}{100}$ dollars, balance due from the said I. C. Welcome and F. L. Carney, as executors of the last will of Ralph Harley, the said deceased, as appears by above statement of account by them made and allowed, be distributed to them as trustees under the provisions of said will. They giving bond in the sum of twenty-three hundred dollars, for the faithful discharge of the trusts named therein, and that they close their account as executors of the estate of said deceased, and charge themselves with said amount in a new account as said trustees.

ALMORE KENNEDY, Judge."

A. P. Gould, for the appellants.

The gift of the remainder in this will is too vague, indefinite and uncertain to be sustained.

It is not declared to whom nor where the distribution of the books is to be made, in what country or part of the world, to what race, nation or people. They are to be "religious books." But it is not declared to what religion they shall relate. In the discretion or will of the trustees may mean pagan, mahomedan buddhistic or christian; and if christian, roman or protestant.

The gift is not for charitable uses. It is not declared to be a charity. The will does not indicate that the books are to be distributed among the poor.

The stat. of charitable uses (43 Eliz. c. 4), does not embrace the objects of this gift. The devise is therefore not aided by it, and it must stand or fall as at common law, without the aid of that statute.

Either there must be some words in a gift declaring it to be for a charitable purpose, or the purpose declared must in its very nature be a charity.

The reported cases on this subject are innumerable, and many of them hard to reconcile, but I am able to find none which declare a gift in such words as those in this will to be for a charitable use. See *Dole* v. *Lincoln*, 31 Maine, 422; *Brown* v. *Yeall*, 7 Ves. Jr. 51; *James* v. *Allen*, 3 Merivale, 17; *Ellis* v. *Selby*, 7 Simons, 352; *Williams* v. *Kershaw*, 1 Keene, 232; *Morice* v. *Bishop of Durham*, 9 Ves. Jr. 399; 10 Ves. Jr. 521; Redfield on Wills, Part II, 778, 779, 780, 782; *Attorney General* v. *Haberdasher's Co.* 1 Mylne and Keene, 428; *Ommauney* v. *Butcher*, Turner and Russell, 260; *Heiss* v. *Murphy*, 40 Wis. 276; *Nash* v. *Morley*, 5 Beav. 182; Redfield Wills, Part I, 697, *et seq.*

"Religion" is defined by Worcester "as any system of faith and worship." It would be impossible for a court to decide to what religion or religious books this fund should be devoted without further indication in the will itself.

Byron D. Verrill, for the executors, cited: *Going* v. *Emery*, 16 Pick. 107; *Drew* v. *Wakefield*, 54 Maine, 291; *Jackson* v. *Phillips*, 14 Allen, 539; *Everett* v. *Carr*, 59 Maine, 325; *Saltonstall* v. *Sanders*, 11 Allen, 446; *Attorney General* v. *Stepney*, 10 Ves. 22.

DANFORTH, J. The question involved in this case is the construction of the fourth item in the will of the late Ralph Harley, or the validity of the gift contained therein. The item so far as material is as follows: "I hereby give, devise and bequeath in trust to I. C. Welcome, of Yarmouth, and Franklin L. Carney, of Newcastle, all that may remain both of my real and personal estate, . . . and further direct the said Welcome and Carney to expend all that may remain . . in the purchase and distribution of such religious books or reading as they shall deem best, and as fast as the funds shall come into their hands."

The objection made is that the direction as to the appropriation of the fund is too vague and indefinite to be sustained.

The meaning of the testator is not obscure or open to doubt. That the fund is given in trust, that the whole of it is to be expended in religious books or reading, that all the books or reading so purchased are to be distributed, and that the class of persons to whom distribution is to be made is limited only by the discretion of the trustees, are all so clearly within the meaning of the testator as expressed in his will, as not to admit of doubt. But it is claimed that vagueness and uncertainty attaches both to the character of the books to be distributed and the persons or class who are the beneficiaries under the gift.

The word "religious" is the only expression descriptive of the character of the books to be bought and distributed, and describes such as teach or inculcate religion. It is true that religion in its broadest sense may include all the different systems of faith and worship, which can be found in the world. In this sense it may be conceded that the trust is one which neither law nor equity would sustain. In the great variety of religions prevailing, and so great the conflict between them, if all were to be included, the intention of the testator could not be executed, if one, or more, his intention could not be ascertained. But happily we are not reduced to this dilemma. Words used in a will, as in other instruments, are construed in connection with the words in whose company they are found, as well as in the light of the circumstances in, and under which, they are used.

In this case the testator had his domicile, and made his will in a country where, though there is no religion established by law,

there is one general system which is universally recognized as embodying the true faith, and whatever difference there may be in the detail, as to belief or form of worship, all the different denominations are equally entitled to the protection of, and are equally recognized by the law. Under these circumstances when religious books or reading are spoken of, those which tend to promote the religion taught by the christian dispensation, must be considered as referred to, unless the meaning is so limited by associate words or circumstances as to show that the speaker or writer had reference to some other mode of worship. There is no such limitation in this case. Whether this testator, or his trustees were or are believers in any form of religion which may, *ex cathedra*, be pronounced superstitious, or erroneous, does not appear. Nor can we assume such to be the fact from the absence of any evidence upon that point. The inference is the other way and we must conclude that the meaning to be attached to the word "religious" as used in the will, is the same as that which is usually given to it in the community under like circumstances. If susceptible of two or more meanings, the better, that which is more consonant with the policy of the law and productive of the welfare of society, is to be taken rather than the other.

It is true that no beneficiaries are specifically named. If this is a public charity it is not necessary that any should be. The persons to be reached are left to the discretion of the trustees, and are otherwise unlimited in numbers or class. The object to be accomplished may be considered the general welfare of the community, or, if circumstances permit even that of mankind. In either view it may be sustained, as in the case of the gift for the Smithsonian Institution, at Washington "for the increase of knowledge among men," approved by the courts of England, and in *Whicker* v. *Hume*, 14 Beavan, 509; S. C. 7 H. L. C. 124, in which the trustees were to apply the fund given in "their absolute and uncontrolled discretion, for the benefit and advancement, and propogation of education and learning in every part of the world, so far as circumstances will permit." This case is in the principles involved, similar to and decisive of the one at bar. It is not material that the names or number of persons to be benefitted should be given if the purpose to be accomplished is made certain.

The very idea of a public charity is that the benefit is to be generally bestowed. *Going* v. *Emery*, 16 Pick. 107.

That this legacy must be considered legally as intended for a public charity would seem to be well settled by the authorities in England and in this country. True it is not so named in the will, nor does it come within the terms of the stat. 43 Eliz. c. 4, which is descriptive of public charities, and has been adopted as part of the common law here. *Going* v. *Emery*, *supra*. It is sufficient if the terms used bring it within the description of a charity, and within the spirit of the statute referred to. 2 Story Eq. Jur. § § 1155–1164. Lord CAMDEN in *Jones* v. *Williams*, Amb. 651, defines a charity as "a gift to a general public use, which extends to the poor as well as the rich." After a full review of the authorities, GRAY, J. in *Jackson* v. *Phillips*, 14 Allen, 556, defines a charity, in the legal sense, "as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion," &c. These definitions so far as we have been able to ascertain, are fully sustained by the cases, and fully cover the legacy in this case. See also, 2 Redfield on Wills, § 71, and cases cited; *Drew* v. *Wakefield*, 54 Maine, 291; *Everett* v. *Carr*, 59 Maine, 325; *Bartlet* v. *King*, 12 Mass. 537.

In view of these authorities we may well adopt the language of SHAW, C. J. in *Going* v. *Emery*, 16 Pick. on page 119, as particularly applicable to this case. "The donees are particularly designated, the trust is clear, the general objects sufficiently indicated to bind the consciences of the trustees, and to render them liable in equity to account for the execution of this trust, by a suit to be instituted in the name of the attorney general, representing the public; and that these objects are sufficiently certain and definite, to be carried into effect, according to the established principles of law and equity, governing donations to charitable uses."

Decree of probate court affirmed.

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

MELVIN A. ALLEN *vs.* WILLIAM G. MORSE and another.

Oxford. Opinion July 30, 1881.

Stat. 1874, c. 234. Tax deed.

A tax deed which shows on its face that the sale was illegal, is not sufficient for the purposes mentioned in stat. 1874, c. 234.

A tax deed which purports to convey the whole of the real estate while the recitals show that it was necessary to sell a part only, would convey no title to the purchaser.

To sell a separate and distinct portion of a farm to pay the taxes assessed upon the whole of it, would be illegal. The only legal course is to sell the whole, or, when possible, an undivided fraction of the whole.

ON EXCEPTIONS.

Writ of entry to recover possession of a lot of land in Buckfield, to which the plaintiff claimed title by virtue of the following deed from the collector of taxes:

(Deed.)

"State of Maine. To all people to whom these presents shall come. I, Nathaniel T. Shaw, collector of taxes for the town of Buckfield, in the county of Oxford and State of Maine, for the year one thousand eight hundred and seventy-three, legally chosen and sworn, send greeting:

"Whereas, the assessors of the town of Buckfield for the year aforesaid, legally chosen and sworn, have, agreeably to law, assessed the real estate hereinafter described in the sum of thirty-nine dollars and thirty-eight cents, taxed to Levi Turner, as resident proprietor of land in said Buckfield, which in their list of assessment they have committed to me, collector of said town, to collect, and whereas no person has appeared to discharge said tax, although I have advertised the same by posting notices of the non-payment of said tax for the term of nine months from the date of said assessment and of my intention to sell so much of said real estate as would be necessary to discharge said tax and all intervening charges, at three public places in said town

where warrants for town meetings are required to be posted, six weeks before the day of sale; and at least ten days before the sale, I delivered to the owner a written notice signed by me, stating the time and place of sale and the amount of tax due.

"Therefore, know ye, that I, Nathaniel T. Shaw, collector of taxes as aforesaid, in consideration of the sum of forty-two dollars and eighty-eight cents, to me paid by Melville A. Allen, of Buckfield, in the county of Oxford, and State of Maine, have granted, bargained, and sold, and do hereby grant, bargain, sell, and convey to the said Melville A. Allen, his heirs and assigns forever, the following described real estate situated in said town of Buckfield, viz: A pasture lot, a part of Thayer lot so called, being a part of said Turner's homestead farm, and bounded as follows: North, by county road leading from North Buckfield to Paris Hill, and by Joseph Damon's land; east, by Sylvester Damon's land; south, by M. J. Damon and C. Woodbury's land; and west, by C. Thayer's land, containing twenty acres, more or less.

"The same having been struck off to the said Melville A. Allen, he being the highest bidder therefor, and it being necessary to sell a part of the real estate so assessed and advertised, at a public auction, legally notified and holden at the post office in Buckfield village in said Buckfield, on the thirty-first day of May, 1875.

"To have and to hold the same to the said Melville A. Allen, his heirs and assigns, to his and their only proper use and behoof forever; subject however, to the right of redemption of the owner thereof, or his heirs and assigns, at any time within the time specified by law.

"And I do covenant with the said Melville A. Allen, his heirs and assigns, that I gave notice of the intended sale of the said real estate according to law, and that in all respects in the premises, I have observed the directions of the law, whereby I have good right and full power to sell and convey the premises to the said Melville A. Allen, to hold as aforesaid.

"In witness whereof, I have hereunto set my hand and seal, in my capacity as collector aforesaid, this second day of June, Anno Domini eighteen hundred and seventy-five.

Nathaniel T. Shaw, Collector." [Seal.]

Duly executed, acknowledged and recorded.

At the trial, the presiding justice ruled *pro forma* that the deed was not sufficient to make out a case for the plaintiff, and as the plaintiff proceeded no further, a nonsuit was ordered.

O. H. Hersey and *George D. Bisbee*, for the plaintiff.

The plaintiff "produced in evidence the collector's deed duly executed and recorded," and was "entitled to judgment in his favor," no other evidence being introduced on either side. Stat. 1874, c. 234; Stat. 1878, c. 35.

Black and Holt, for the defendants, cited: *Keene* v. *Houghton*, 19 Maine, 368; *Lovejoy* v. *Lunt*, 48 Maine, 377; *French* v. *Patterson*, 61 Maine, 203; *Greene* v. *Lunt*, 58 Maine, 532; *Nason* v. *Ricker*, 63 Maine, 381; *Phillips* v. *Sherman*, 61 Maine, 551.

WALTON, J. The statute of 1874, c. 234, declared that in the trial of any action involving the validity of a sale of real estate for the non-payment of taxes, it should be sufficient for the party claiming under it, in the first instance, to produce in evidence the collector's deed, duly executed and recorded, and then he should be entitled to judgment in his favor, unless the party contesting such sale should prove to the court that he, or the person under whom he claims, had paid or tendered the amount of all such taxes and the legal charges and interest thereon, and then he might be permitted to prosecute or defend, etc. The question is whether a deed which shows upon its face that the sale was illegal is sufficient for the purposes mentioned in the statute.

We think it is not. It could never have been the intention of the legislature to make a deed, which, upon its very face, shows the sale to have been illegal, evidence of title for any purpose. Such a deed does not prove, it disproves, the demandant's title, and shows that he is not entitled to prevail. It cannot be nec-

essary for the adverse party to produce evidence to defeat the demandant's title, when, by his own showing, he has no title. Such was the decision in *Orono* v. *Veazie*, 57 Maine, 517, and the statute then in force differed from the statute of 1874 only in the amount of documentary evidence required to make out a *prima facie* case of title and cast the burden of paying the taxes upon the party contesting it.

The objection made to the deed on which the plaintiff in this case relies is that, it purports to convey the whole of the real estate taxed, while its recitals show that it was necessary to sell a part only. We think the objection is well taken. The deed does purport to convey the whole of the real estate on which the tax was assessed, while the collector has very carefully stated that it was necessary to sell a part only. Such a sale would be illegal, and would convey no title to the purchaser. And the error cannot be regarded as a mere inadvertence, for the words "in part" are interlined in ink in a printed blank, and the words "the whole," which were printed in the blank, are erased; and the words "no person offering to pay the taxes and legal charges for a fractional part of said real estate," which were printed in the blank, and were intended to show a necessity and justification for selling the whole, are also erased. It is clear, therefore, that it was not necessary to sell the whole, while the deed does in fact convey the whole.

It may be, as suggested by the defendants' counsel, that the tax was assessed upon the whole farm, and that the collector undertook to sell only that portion of the farm which composed the pasture, thinking he had a right so to do. Such is not the meaning of the language used in the deed. But suppose this explanation to be true, and that the language used in the deed would bear this interpretation, it does not relieve the sale of its illegality. To sell a separate and distinct portion of a farm to pay the taxes assessed upon the whole of it, would be as illegal as to sell the whole when it is only necessary to sell a part. The only legal course is to sell an undivided fraction of the whole; as, for instance, one fourth, one third, one half, or three-tenths, four-tenths, seven-tenths, etc. That is what is meant by the

statute which authorizes the collector to sell "so much of such real estate, or interest, as is necessary to pay the tax," etc.

The collector's deed on which the plaintiff relied, not showing a sale *prima facie* legal, but a sale *prima facie* illegal, we think a nonsuit was properly ordered.

Exceptions overruled.

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

JOHN LINSCOTT *vs.* NOAH WEEKS and others.

York. Opinion July 30, 1881.

Mortgagor and mortgagee.

Knowledge of the mortgagee of a sale by the mortgagor of a building, situated on the mortgaged premises, without the consent of the mortgagee, will not impair his title to the property thus sold.

The mortgagee in possession or his assignee has sufficient title to maintain trespass against the mortgagor, there having been no redemption of the mortgage.

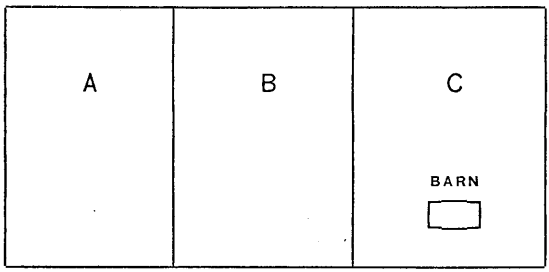
ON REPORT.

Trespass. The writ was dated October 23, 1877. The action was referred by rule of court. In addition to the facts stated in the report it was admitted that the plaintiff at the time he took his deed to lot C, referred to in the report, had knowledge of the sale of the barn, the title to which is in controversy.

(Referee's report of facts.)

"York, ss. Pursuant to the foregoing rule, I, the referee therein named, have notified, met and fully heard the parties, and maturely considered their several allegations, and the evidence produced to support the same, am of opinion, and do report accordingly, that on the twenty-second day of October, 1877, the defendants, without the permission of the plaintiff went upon the premises described in the writ with their team, and took up

and carried away a portion of the floor of a barn standing thereon.



"November 27, 1869, Samuel Pendexter conveyed by warranty deed to Timothy A. Pendexter, certain land represented in above plan by the three lots A, B and C, and Timothy A. Pendexter at the same time mortgaged back the same to Samuel Pendexter to secure notes given for the purchase money.

"December 20, 1869, Timothy A. Pendexter sold the barn in controversy, standing on lot C, verbally to Noah Weeks (one of the defendants) and Nathaniel Pendexter, who subsequently sold his interest in the barn to Andrew J. Pendexter, another of the defendants. The defendant, David Weeks, acted as servant of the two other defendants. Timothy A. Pendexter received one hundred dollars for the barn. The barn still stands on lot C, as it then stood, upon a wall, and having a cellar. December 27, 1869, Timothy A. Pendexter conveyed to Levi Pendexter by warranty deed, lot A, for one thousand dollars, and on same day Samuel Pendexter, the mortgagee, conveyed by quitclaim deed his interest in the same to said Levi Pendexter.

"March 2, 1870, Timothy A. Pendexter, conveyed by warranty deed, consideration being five hundred dollars, to John Linscott, the plaintiff, the lot marked C, without mentioning the mortgage but reserving the new barn on said premises. Lot C, being the premises described in the writ. At the time Linscott took this deed he had actual notice of the sale of the barn.

"January 11, 1871, Timothy A. Pendexter conveyed by warranty deed to Joseph W. Pendexter and another, lot marked

B, without mentioning the mortgage, but Pendexter and the other had knowledge at that time that the barn had been previously sold.

"November 9th, 1876, Samuel Pendexter assigned in writing to John Linscott, the plaintiff, the mortgage from Timothy A. Pendexter for $267.50 the amount then due on the mortgage note.

"It is agreed by the parties that lot B is worth the amount now due on the mortgage.

"The plaintiff, John Linscott, has been in possession of lot C, since the date of his deed from Timothy A. Pendexter, March 2, 1870. Linscott and Samuel Pendexter had actual knowledge of all conveyances herein named at time of assignment of mortgages.

"If, upon the foregoing statement, the plaintiff is entitled to recover, then he is entitled to judgment for twenty dollars damage which is the amount of damage done said barn; cost of reference taxed at ninety-nine cents and costs of court, to be taxed by the court.

"If the plaintiff is not entitled to recover as above, then judgment is to be entered for the defendants for cost of reference taxed at seven dollars and sixty-one cents, and cost of court to be taxed by the court.

H. FAIRFIELD."

Ayer and Clifford, for the plaintiff.

L. S. Moore, for the defendants.

WALTON, J. We think it is clear that upon the facts reported by the referee, and agreed upon by the parties, the plaintiff is entitled to judgment. As assignee of the mortgage from Timothy A. Pendexter to Samuel Pendexter, his title to the barn in controversy is superior to that of the defendants, who claim title to it by a subsequent purchase from the mortgagor. The mortgagor could give no title which would impair that of his mortgagee. So far as appears, the mortgagee had done nothing to impair his title. The case finds that he knew of the sale of the barn by the mortgagor, but it does not appear that he assented to the sale. Knowledge, without consent, would not impair his title. Having,

so far as appears, a good title himself, no reason is perceived why he could not convey a good title to whomsoever he pleased —to the plaintiff as well as to any one else. There are no facts reported which would operate as an estoppel upon the plaintiff thus to obtain and assert a title to the barn. True, he accepted a deed from the mortgagor in which the barn was reserved. But that would not prevent him from afterward obtaining a title to it from another and an independent source. Allowing the mortgagor to reserve it would not expressly or impliedly amount to a covenant on the part of the plaintiff that he would never become the owner of it. Nor do we think it would estop him from becoming the owner of it by purchase of the mortgagee's title. Nor are there any facts reported to justify the conclusion that the plaintiff was under an obligation to pay the mortgage debt, so that his purchase of the mortgage would operate as a discharge of it. The plaintiff's title is, of course, a conditional one. It is a mortgagee's title, which he has obtained by a purchase of the mortgage, and by taking an assignment of it to himself. But that is a title superior to that of the defendants, and is sufficient to maintain the action, there having been no redemption of the mortgage.

Judgment for plaintiff for twenty dollars damages, and costs, as awarded by the referee.

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

INHABITANTS OF WEST GARDINER,

vs.

INHABITANTS OF MANCHESTER.

Kennebec. Opinion August 3, 1881.

Pauper. Minor, when emancipated.

A child at eight years of age, having no mother, commenced living with H and wife; for four years her father paid something towards her board and furnished a portion of her clothing, when with her consent and her father's consent H and wife proposed to adopt her; from that time until she was

twenty-one she lived in H's family, assumed his name, was fed, clothed and sent to school (one term at an academy) by him, and treated by H and his wife as their own child; her father never resumed his parental duties and obligations nor asserted his parental rights and authority. *Held,* that the child was emancipated from the father notwithstanding that H and wife had failed to adopt her by proper proceedings in probate court as they had promised to do.

Complete emancipation may take place although a statutory adoption is never begun or thought of.

ON REPORT.

Assumpsit for pauper supplies furnished one Eliza A. Gray, an alleged pauper of the defendant town from June 8, 1877, to January 11, 1878. Writ dated January 12, 1878. Plea, general issue.

It was agreed that if the plaintiffs were entitled to recover, judgment might be entered for seventy-one dollars and interest from the date of the writ.

The facts are stated in the opinion.

W. S. Choate, for the plaintiffs, cited: *Lowell* v. *Newport,* 66 Maine, 78; *Wells* v. *Kennebunk,* 8 Maine, 200; *Portland* v. *New Gloucester,* 16 Maine, 427.

Loring Farr and *G. C. Vose,* for the defendants.

So long as the father had the right in law, whether enjoying the right or not, to the custody, control and service of his daughter she was not emancipated. "A minor bound to service by the overseers until he becomes of age is not emancipated. Poverty even culminating in absolute pauperism of the parents and resulting in binding out to service of the child by the selectmen until he is twenty-one years of age does not affect it." *Lowell* v. *Newport,* 66 Maine, 89; *Monroe* v. *Jackson,* 55 Maine. 59. Emancipation is ordinarily matter of contract or agreement. When the parents are living there must be consent proved on their part, or acts from which such consent may be inferred to constitute emancipation. *Oldtown* v. *Falmouth,* 40 Maine, 108.

The only consent in this case was the following: "I, the undersigned, father of Eliza A. Gray, consent to her being adopted as the child of Cyrus Howard and Elmira, his wife. John Gray."

This was not a contract. It was his consent to the adoption which was never perfected. He said they could have the child, but they must take her with the burden and responsibility of parentage. He would relinquish the rights of a father, when he was absolved from the duties of a father; and they could have one which was valuable, when they assumed the other which was burdensome.

The party who makes the offer has a right to say, *non haec in fœdera veni* and decline any other terms than those offered. Until so accepted the offer may be rescinded. Smith's Contracts, 5 ed. 152; *White* v. *Henry*, 24 Maine, 531; Pars. Contr. 477; Benj. Sales, § 39.

Nor has there been any waiver of parental rights from which emancipation can follow as in *Wells* v. *Kennebunk*, 8 Maine, 200, and *Portland* v. *New Gloucester*, 16 Maine, 427. Every act or declaration of Gray from which such a waiver might otherwise be inferred, is explained and neutralized by the paper in which he gave his consent to the adoption. In that paper there were certain conditions to be complied with before his parental rights would be divested. Were those conditions ever waived?

"A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show, not merely his own understanding but that the other party had the same understanding." Addison on Contracts, § 359.

WALTON, J. The question is whether Eliza A. Gray, an insane pauper, was emancipated during her minority, so that she took and retained the settlement which her father then had in the defendant town (Manchester), or whether, not being emancipated, she followed and took a new settlement which he afterward acquired in Hartland. The evidence satisfies us that she was emancipated. Her mother died when she was about two years old. When she was eight years old she commenced living with Mr. and Mrs. Cyrus Howard. She remained with them

four years, her father during that time paying something towards her board and furnishing her with a portion of her clothing. He then proposed to take her away, when Mr. Howard (he and his wife having no children of their own) proposed to adopt her. Her father consented. She consented. Mrs. Howard, though at first a little reluctant, consented. From that time forward, and until she was twenty-one years of age, she remained a member of Mr. Howard's family. She assumed the family name, and was afterward known as Eliza A. Howard. Mr. Howard fed her, clothed her, sent her to school—one term at an academy —and paid her bills. Mr. and Mrs. Howard both testify that she was treated in all respects precisely as if she had been their own child. Her father was relieved from all his parental duties and obligations, and voluntarily relinquished all his parental rights and authority; and he never afterward resumed the former or asserted the latter. That here was a clear case of emancipation would not, probably, be denied by the defendants, but for the fact that at the time this arrangement was entered into, it was understood that the adoption of Eliza by Mr. and Mrs. Howard should be followed by such proceedings in the probate court as would make it legally binding upon the parties, and that such proceedings, although commenced, were never completed. But we think this fact does not defeat the emancipation. Emancipation is one thing, adoption is another. A father may emancipate a child, although another does not adopt it. Complete emancipation may take place, although a statutory adoption is never begun or thought of. If the non-completion of the proceedings in the probate court gave the father, morally as well as legally, the right to reclaim his child, it does not appear that he ever exercised, or claimed to exercise, the right; or that he ever resumed any of his parental duties or obligations. We think the alleged emancipation is clearly established. *Lowell* v. *Newport*, 66 Maine, 78.

Judgment for plaintiffs.

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

LIBBEY, J., having once been of counsel for the plaintiffs did not sit.

CARLOS HAMMOND *vs.* WILLIAM M. REYNOLDS AND WIFE.

Kennebec. Opinion August 3, 1881.

R. S., c. 81, § § 57, 58. Mortgage. Attachment.

One who has paid to the person entitled thereto the amount due upon a mortgage of real estate, (claiming to have attached the right to redeem,) and received the release of the mortgagee's interest therein, as provided by R. S., c. 81, § § 57, 58, may maintain a writ of entry for possession against the owner of the equity of redemption.

Such an action may be maintained under the circumstances stated, even though the attachment was not valid.

ON EXCEPTIONS.

This was a writ of entry for possession of certain real estate in Sidney. The writ was dated June 28, 1878.

At the trial, the plaintiff introduced a mortgage of demanded premises from T. Everett Reynolds to Eunice C. Bean, dated September 20, 1869, and duly recorded; an assignment of same from Bean to Guild dated April 15, 1875, and duly recorded; a release of same from Guild to plaintiff, dated September 28, 1875, duly recorded. Also notice of foreclosure of same by Bean, October 3, 1872, duly recorded; the writ, *Hammond* v. *William M. and Thomas Reynolds*, dated June 4, 1874, and officer's attachment of real estate of same date; the note declared on, judgment in same suit, and execution issued thereon, and officer's return on said execution, dated July 15, 1876; and deed of equity of William M. Reynolds from officer of same date to plaintiff, duly recorded.

It was admitted that the equity of T. Everett Reynolds in the demanded premises was attached at the suit of plaintiff in a former action; that the equity was sold upon the execution recovered by plaintiff to one Andrew Trask, and by him conveyed to the female defendant, April 14, 1874, by deeds duly recorded.

It was also admitted that the conveyance from Trask to the female defendant was subsequent to the date of the note upon

which judgment was rendered against William M. Reynolds, and that (for the purpose of this trial only) it was either directly or indirectly paid for from the property of William M. Reynolds, the husband of the female defendant.

The defendants introduced deed from Thomas Reynolds to Thomas E. Reynolds, [T. Everett Reynolds] dated April 23, 1867, of the demanded premises, duly acknowledged, and recorded August 29, 1863.

The case was referred to the presiding justice with right to except.

The court ruled that plaintiff should recover judgment "for possession of the demanded premises, subject to the rights of Thomas Reynolds and the defendants, while his servants, to occupy the buildings thereon."

And the defendants alleged exceptions.

Potter and Andrews, for the plaintiff, cited: 4 Kent, Com. 109; 2 Bouvier's Law Dict. 175; 2 Wash. R. P. 180; *Savage* v. *Hall*, 12 Gray, 363; *Mallory* v. *Hitchcock*, 29 Conn. 135; *Simonton* v. *Gray*, 34 Maine, 50; 1 Hilliard, R. P. 425.

G. C. Vose, for the defendants.

The legal title was never in the debtor, William M. Reynolds. The only ground upon which the plaintiffs claimed to recover was that the conveyance from Trask was paid for from the funds of said William M. Reynolds. If so the wife would hold the title in trust for her husband, but the legal title never having been in him, a writ of entry cannot be maintained.

It is a well established principle that an equitable estate will not sustain a writ of entry. *Crane* v. *Crane*, 4 Gray, 323; *Chapin* v. *U. Society*, 8 Gray, 580.

If the plaintiff seeks to hold it in the hands of the wife, as having been paid for out of the husband's property, he must pursue his remedy in equity. *Low* v. *Marco*, 53 Maine, 45; *Webster* v. *Folsom*, 58 Maine, 232; *Sampson* v. *Alexander*, 66 Maine, 182.

It is only when the legal title has once been in the husband and has been conveyed by him in fraud of creditors, that a levy

will avail to give a creditor such a seizin as will enable him to maintain a writ of entry against the wife. *Webster* v. *Folsom*, 58 Maine, 232.

The release so required to be given by statute is for the purpose of preventing the plaintiff's attachment from being lost, it was never intended to operate as a mode of obtaining title to real estate.

The release was, we submit, improperly obtained; and if so, certainly cannot be used by plaintiff as the basis of an action.

It was obtained upon the representation (as recited in the release) that the equity of William M. Reynolds, was attached, when as we have seen, the equity was in his wife.

The very statute under which this proceeding was had clearly indicates that it is to be used only when the legal estate is in the debtor, for it provides that upon tender of the amount due on the mortgage, the title and interest of the mortgage shall vest in the plaintiff, subject to the defendant's right to redeem. In this case, the defendant had no right to redeem, and Mrs. Reynolds, in whom was the legal title, had under this statute no right to do so.

And again, § 58 provides that the plaintiff shall thereupon hold such title in trust for the defendant, and subject to his right of redemption, without power of alienation, &c.

WALTON, J. It is provided in the Revised Statutes, c. 81, § § 57-58, that when a right to redeem real estate under mortgage is attached, the plaintiff in the suit may pay or tender to the person entitled thereto, the amount required to discharge the mortgage, and that thereby the title and interest of such person shall vest in the plaintiff, and that such person shall release his interest in the premises; and if he refuses, may be compelled to do so by bill in equity. The plaintiff, claiming that he had made such an attachment of the equity, paid to an assignee of the mortgage the amount due upon it, four hundred and thirteen dollars and fifty cents, and obtained the release provided for in the statute. The plaintiff now brings this action (a writ of entry) to recover possession of the premises; and the question is whether his title, thus obtained from the assignee of the mortgage, is sufficient to

maintain the suit against the defendants (husband and wife), the latter claiming to be the owner of the equity of redemption. We think it is. The presiding judge, to whom the case was submitted upon an agreed statement of facts, so ruled. We think the ruling was correct. It may be true, as the defendants contend, that the equity was not legally attached, and that the assignee of the mortgage could not have been compelled to release his interest to the plaintiff; but he did do so, and accepted the plaintiff's money, and still retains it; and, so far as appears is content to allow the release to remain unrescinded; and we think it is not competent for the defendants to interfere and claim to rescind it for him. It is no concern of theirs. If they choose to redeem, and still have a right to do so, they can redeem from the plaintiff as readily as they could have done from his releasor. The statute gives them this right. As their titles now stand, the plaintiff's is superior to theirs, and he is entitled to possession of the premises, as ruled by the judge at *nisi prius*.

Exceptions overruled.

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

ABIJAH TUFTS, JUNIOR, *vs.* INHABITANTS OF LEXINGTON.

Somerset. Opinion August 12, 1881.

Ways, repairs of. Surveyors. Selectmen. Taxes. R. S., c. 18, § 44, et seq. R. S., c. 3, § 12. Stat. 1875 c,. 6.

When a town has surveyors of highways duly appointed by the municipal officers as provided by R. S., c. 3, § 12, as amended by stat. 1875, c. 6, the selectmen cannot bind the town by a contract to pay for labor on the highways either in money or by allowance upon the highway tax.

When labor is performed upon the highways in pursuance of a contract with the selectmen and not under the direction of the surveyor of highways, such surveyor cannot legally allow for the same on the highway tax of the person performing such labor.

When a highway tax is returned by the surveyor as unpaid, the instruction of the selectmen to a subsequent surveyor to consider such tax as one then to be worked is without authority of law, and if it is paid to such subsequent surveyor it would not be by compulsion of law, nor to any officer of the town who had any right to receive it.

ON EXCEPTIONS and motion to set aside the verdict.

Action of assumpsit for labor and services performed in the repair of highways in the town of Lexington, amounting to $46.97, in pursuance of a contract with the selectmen in behalf of the town.

The material facts appear in the opinion.

Ben. S. Collins, for the plaintiff.

Walton and Walton, for the defendants.

DANFORTH, J. The plaintiff sets out in his writ a contract made with the selectmen of the defendant town, by virtue of which he was to perform labor in repairing the highway in the town and was to receive a compensation therefor in money.

The contract proved by his own testimony was one by which he was to receive his pay for the labor performed, by an allowance upon his highway tax. Such a variance between the allegation and proof would prevent his recovery.

2. Under the circumstances shown in this case, it would not be competent for the selectmen to bind the town either by such a contract as the one alleged, or the one proved.

The duties and liabilities of towns in relation to the repairs of ways within their limits are fixed by statute alone. For this purpose they may, as was done in this case, raise a tax to be expended in labor upon and materials for the highway, R. S., c, 18, § § 44, 45. By R. S., c. 3, § 12, as amended by the act of 1875, c. 6, when towns neglect to choose "surveyors of highways or appoint the municipal officers surveyors of highways, said officers shall appoint surveyors of highways." When surveyors are elected by the town or appointed by the municipal officers it is the duty of the selectmen to "make a written assignment of his division and limits to each surveyor of highways to be observed by him." R. S., c. 18, § 43. The case shows that the selectmen were not appointed surveyors nor were any chosen by the town; but by a vote of the town the selectmen were authorized to appoint. They did so appoint and assigned the limits to each. With this act the duties of the selectmen in relation to the highway tax ceased except in some specified instances in case of a deficiency, which are not material in this case, for no deficiency appears.

By § 44, "the assessors shall deliver to each surveyor, . . . a list of the persons and the assessments on them to be expended within his limits." The plaintiff's name and his assessment was in the list delivered to the surveyor of the district in which he resided. Thus it appears that this assessment was out of the control of the selectmen and was legally placed within that of the surveyor. It was the surveyor's duty to collect and expend it as prescribed in § 45 and the following sections. It does not change the result that he was not under oath. He was still a surveyor *de facto*, or if not it does not add to the authority of the selectmen, for if one appointed declines or fails to qualify, their duty would be simply to appoint another. As they were not surveyors no duty or authority rested upon them in regard to the expenditure of the assessment, therefore it was not competent for them to make any appropriation of it in payment for labor upon the highways, or elsewhere.

There is equally a want of authority on the part of the selectmen under these circumstances to contract for the ordinary repairs of the highways so as to make a debt against the town therefor. The assessment was the appropriation made by the town for that purpose. There was no deficiency in that respect, and therefore no other fund could be drawn upon. There was no other to be drawn from for that purpose. *Getchell* v. *Wells*, 55 Maine, 433.

3. Nor would the plaintiff be in any better condition if the contract, as he states it, were binding upon the town. His evidence shows that he was to receive pay for his labor by an allowance of the amount upon his highway tax for that year. It is true this tax was returned by the surveyor as unpaid as it was his duty to do. He was not a party to the contract, the work was not done under his direction, therefore the tax was not paid to him nor could he legally cancel it. This under the alleged contract could only be done by the selectmen. The adjustment under the contract could only be made by the parties to it. Still, if the contract was performed by the plaintiff on his part, it was in effect a payment of his tax to the extent of the value of his labor. When the tax was returned by the surveyor,

if it had not been paid it was the duty of the assessors to place the amount due in their next assessment of town taxes on such delinquent. R. S., c. 18, § 48. No other legal disposition could have been made of it. But if paid this of course could not legally be done. The case shows that it was not done. The instruction of the selectmen to a subsequent surveyor to consider the tax as one to be then worked, if true, was without authority of law. The assessors could not re-assess, or keep alive a tax in this way. The tax then has not been paid by compulsion of law, nor to any officer of the town who had any right to receive it, or legally to enforce it. *Ingalls* v. *Auburn*, 51 Maine, 352–4. Nor does it appear that the surveyor undertook to enforce it. It was not paid in money, and if paid in labor a second time it was a voluntary payment on the part of the plaintiff and would give him no cause of action under any count in his writ.

As by his own showing the plaintiff cannot maintain his action under any count in his writ, the entry must be,

Motion sustained.

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

ALMON LYON

vs.

JAMES B. RUSSELL, AND MAINE CENTRAL RAILROAD COMPANY, trustee.

Kennebec. Opinion August 19, 1881.

Trustee process. Corporations. R. S., c. 86 § 55.

Where a corporation is summoned as trustee, and the service of the writ is made on an officer of the corporation away from its office and place of business, and the debt due the principal defendant from the trustee is paid by another officer of the corporation, acting in his ordinary course of business and line of duty, without actual notice of the service of the trustee writ, or reasonable cause to believe that such service had been made at the time of payment, and it appears that the corporation, or its officer upon whom service was made, was guilty of no neglect in giving notice to the officer making the payment, the trustee will be discharged.

The provisions of R. S., c. 86, § 55, apply to such a case.

ON EXCEPTIONS from superior court, Kennebec county.

The opinion states the case.

S. and L. Titcomb, for the plaintiff.

This writ was served and notice given to the corporation as required by statute. R. S., c. 81, § 18. And it binds the company, although notice of the service is not communicated to any other officer. Wade on Law of Notice, § 1309; 1 Redf. Railways, 557; *Newburg Car Spring Co.* v. *Union Rubber Co.* 4 Black. 1; *Boyd* v. *C. and O. Canal Co.* 17 Md. 195; *Scorpion S. M. Co.* v. *Marsano*, 10 Nev. 370; *Alletson* v. *Chichester*, 12 Moak, 386; *Curtis* v. *A. G. and M. R. R. Co.* 49 Barb. 148.

The Massachusetts statutes, upon which judgments in cases of trustee process rest, differ from our statutes.

Compare Gen. Stat. of Mass. c. 142, § 28, with our R. S., c. 86, § 55. Our statute applies only to cases where the service of the writ is by leaving a copy at the last and usual place of abode of the trustee, and the trustee makes the payment to the principal defendant before actual notice of the service.

There was ample time here for the director or attorney to notify the paymaster by telegraph of the service of the trustee writ, and though they may have acted in good faith, they may still be liable for negligence. *Lincoln* v. *Buckmaster*, 32 Vt. 652; *Woodworth* v. *Ranzehousen*, 7 Cush. 430.

The facts in the cases, *Williams* v. *Kenney*, 98 Mass. 142; *Spooner* v. *Rowland*, 4 Allen, 485, differ materially from the facts of this case.

G. C. Vose, for the alleged trustee, cited: *Spooner* v. *Rowland*, 4 Allen, 485; *Williams* v. *Kenney*, 98 Mass. 142.

LIBBEY, J. By R. S., c. 86, § 55, clause seven, a trustee is not chargeable "when service was made on him by leaving a copy, and before actual notice of such service, or reasonable ground to believe that it was made, he paid the debt due to the principal defendant, or gave his negotiable security therefor."

This provision of the statute applies to a corporation summoned as trustee, when the service of the writ is made on an officer of the corporation, away from its office and place of business, and the debt due the principal defendant is paid by another officer of the corporation, whose duty it is to pay it, acting in his ordinary

course of business, if he had no actual notice of the service, or reasonable ground of belief that it was made before payment, and the corporation, or its officer on whom the service was made, was guilty of no negligence in not giving such notice. *Spooner* v. *Rowland*, 4 Allen, 485; *Williams* v. *Kenney*, 98 Mass. 142.

The corporation, or officer on whom the service is made, must use diligence in giving notice of the service of the writ to the officer or agent whose duty it is to make the payment; and the question in this case is whether the trustee used due diligence in that respect. Service was made on one of the directors, at Augusta, by leaving a copy with him at five o'clock in the afternoon, January 11. The office of the corporation and the paymaster's office were in Portland. It was known that the paymaster was to leave Portland to pay off the laborers at Augusta, the next morning before business hours, so that a letter would not reach him; and the director on whom service was made, notified their local attorney, at Augusta, of the service, at once, and as the paymaster was to arrive at Augusta the next morning he determined to see him and notify him of the service on his arrival, and for that purpose was at the depot on the arrival of the train. But the paymaster left the train before its arrival at the depot, went to the shop where the principal defendant worked, and, before the attorney had time to go to the shop, had paid the debt.

The director or attorney might well think that the surest and most practicable mode of giving notice to the paymaster was to see him on the arrival of the train the next morning, having no reason to apprehend that he would leave the train before it arrived at the depot. They were not obliged to use the telegraph in the night, if at all.

We think under the circumstances of the case, the trustee used due diligence to notify the paymaster, and that payment was made without the fault of the trustee, or the director on whom service was made. *Spooner* v. *Rowland*, and *Williams* v. *Kenney*, *supra*.

Exceptions overruled.

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

BELFAST NATIONAL BANK *vs.* INHABITANTS OF STOCKTON.

Waldo. Opinion August 19, 1881.

Towns. Municipal debts. Unauthorized loans.

One who lends money upon the representations of town officers that it is required for municipal purposes, in order to recover against the town therefor, must prove the appropriation of the money lent, to the discharge of legal municipal debts, unless such officers were authorized by a legal vote of the town to effect the loan.

Such appropriation of the money to the purposes stated, must have been by some person who stood in such relation to the town as to render his act of itself effective as between the town and its creditor, to discharge the debt to which it was applied, or there must have been a ratification or acceptance of such payment on the part of the town.

Neither by corporate action, nor by corporate inaction, can a town knowingly retain the benefit of payments made by its agents in discharge of legal municipal debts, with moneys hired in its name without authority, and at the same time withdraw itself from liability for moneys so hired and used.

ON REPORT, the law court to render such judgment as the law and evidence warrant.

Assumpsit upon the following town order:

"$2000. "Stockton, July 16, 1878.

"To Joseph Seger, town treasurer, or his successor: Pay to Belfast National Bank, two thousand dollars, it being for money hired for the year 1878.

C. C. ROBERTS, }
E. H. CROCKER, } Selectmen of
F. J. MARDEN, } Stockton."

No. 68.

[Across face] "Accepted, Joseph Seger, treasurer."

The writ also contained the money counts, and was dated September 19, 1879.

Plea, general issue.

The material facts are stated in the opinion.

William H. Fogler, for the plaintiff, cited: *Augusta* v. *Leadbetter*, 16 Maine, 45; *Dennett* v. *Nevers*, 7 Maine, 399; *Orneville* v. *Pearson*, 61 Maine, 557; *Industry* v. *Starks*, 65 Maine, 167; *Bessey* v. *Unity*, *Id.* 347; *Sanborn* v. *Deerfield*,

2 N. H. 251; *Andover* v. *Grafton*, 7 N. H. 298; *Pike* v. *Middleton*, 12 N. H. 278; *West* v. *Erroll*, 58 N. H. (Reporter, June 11, 1879,; Dill. Mun. Corp. § § 384, *et seq.* 750; Green's Brice's Ultra Vires, (2 Am. ed.) 717, 729; Sedgwick Stat. and Const. Constr. 73; *Dill* v. *Wareham*, 7 Met. 438; *Ganse* v. *Clarksville*, (U. S. C. C. E. D. Mo.) 7 Reporter, 579; *The Mayor* v. *Ray*, 19 Wall. 468; *Moore* v. *Mayor*, 73 N. Y. 238; *Nat. Bank* v. *Mathews*, 98 S. C. 6260; *March* v. *Fulton Co.* 10 Wall. 684.

A. P. Gould, for the defendants.

There are two counts in the writ.

The action cannot be sustained on the first count which declares on the order, because the selectmen had no authority to issue it. *Parsons* v. *Monmouth*, 70 Maine, 262.

Nor can the count for money had and received be maintained. It was not shown that the money was needed, but it is said that it was needed, and convenient to pay the State tax and outstanding orders.

The selectmen, *virtute officii*, had no power to borrow money in behalf of the town, whatever the purpose for which it was obtained. The office is created, and certain specific duties not touching the question now at issue imposed. All the rest is left to inference or implication; see *Smith* v. *Cheshire*, 13 Gray, 318.

In New Hampshire, selectmen have always been empowered by statute, "to manage all the prudential affairs of the town," still it was there held that "selectmen have not authority, *ex officio*, without a vote of the town, to borrow money upon the credit of the town. *Rich* v. *Errol*, 51 N. H. 350; see also, *Sanborn* v. *Deerfield*, 2 N. H. 251; *Parsons* v. *Monmouth*, *supra; Hooper* v. *Emery*, 14 Maine, 375; *Ganse* v. *Clarksville*, 19 Alb. L. J. 253; Dill. Mun. Corp. § § 5, 81; 1 Daniel Nego. Instr. § 420; 2 Do. § 1530; *Mayor* v. *Ray*, 19 Wall. 468; *Baileyville* v. *Lowell*, 20 Maine, 182.

To hold the town as for money received and appropriated to its legitimate expenses, the receipt and appropriation must appear

by legal corporate action. The receipt and expenditure of it by the selectmen, is not sufficient, even though they may have used it in payment of debts of the town.

Wherever towns have been held for money borrowed by their officers, the appropriation has been by authority of the town previous or subsequent, evidenced by some corporate action, not by the mere act of its officers. In *Ganse* v. *Clarksville*, *supra*, and cases there cited, and Dill. Mun. Corp. § § 384, 750, and notes, corporate appropriation was shown, and *Ganse* v. *Clarksville*, clearly and expressly recognized the necessity of showing the appropriation of the money borrowed to lawful municipal purposes, by corporate action. S. p. *Herzo* v. *San Francisco*, 33 Cal. 134; *Dill* v. *Wareham*, 7 Met. 438; *Mayor* v. *Ray*, 19 Wall. 484; *Argenti* v. *San Francisco*, 16 Cal. 255; *McCracken* v. *Same*, 16 Cal. 591; *Pimental* v. *Same*, 21 Cal. 351.

"No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other." *Salsbury* v. *Philadelphia*, 44 Pa. St. 303; *Siebrecht* v. *New Orleans*, 12 La. Ann. 496.

An unauthorized contract or act on the part of the officers of a town or city, however advantageous, does not bind the corporation, or subject it to legal liability. *Loker* v. *Brookline*, 13 Pick. 343; *Jones* v. *Lancaster*, 4 Pick. 149; *Haskell* v. *Knox*, 3 Maine, 445; *Morrell* v. *Dixfield*, 30 Maine, 157; *Moor* v. *Cornville*, 13 Maine, 293; *Ingalls* v. *Auburn*, 51 Maine, 352; *Field* v. *Towle*, 34 Maine, 405; *French* v. *Auburn*, 62 Maine, 452; *Kelley* v. *Lindsey*, 7 Gray, 287; *Railroad Nat. Bank* v. *Lowell*, 109 Mass. 214.

The payment of the State tax was unauthorized, and contrary to the statute provisions. R. S., c. 6, § § 38, 39, 60, 44, 123, 126, 127. It did not constitute a debt of the town, or a corporate liability of any kind.

SYMONDS, J. It may be regarded as settled in this State that one who lends money upon the representation of town officers that it is required for municipal purposes, in order to recover against the town therefor, must prove the appropriation of the money lent to the discharge of legal municipal debts, unless such

officers were authorized by vote of the town at a legal meeting to effect the loan. "There can be no such thing as a general and unlimited authority in municipal officers, to borrow money on the credit of the town by which they are elected, without regard to the purposes to which it is devoted. To show money had and received to the use of the plaintiff by a town, it will not suffice merely to show money lent by the plaintiff, upon the representations of its officers, that it was required for legitimate expenditures." "But where the lender proceeds against the town upon this ground, we think he is bound, in order to recover, to show the appropriation of the money to legitimate expenses of the town." *Bessey* v. *Unity*, 65 Maine, 342; *Parsons* v. *Monmouth*, 70 Maine, 264.

"It is strongly implied in the two cases last cited, that the money thus advanced, and shown to have been actually appropriated to the discharge of legal liabilities of the town, would be held to be legally recoverable in an action for money had and received against the town. We see no good reason for excusing the town from refunding it, when it has been actually thus appropriated. . . . . It is the payment of the lawful debts of the town by its own agents with the plaintiff's money, which constitutes the cause of action." *Billings* v. *Monmouth*, *ante*, p. 174.

The opinion of the court from which the last extract is taken, seems to determine the law of the present case, and to render unnecessary any further discussion of the legal principles involved, which had been elaborately argued in this case before that decision was announced. It is only upon the ground therein stated that the plaintiffs claim to recover. They do not argue that the town gave prior authority for procuring the loan from the bank.

We do not understand the opinion in *Billings* v. *Monmouth*, to be intended to contravene the maxim that no one can make himself the creditor of another by the unsolicited payment of his debts; or to hold the fact that the defendants, without their own act or will, have had the benefit of the plaintiffs' money to be the sole and sufficient ground of liability. *Agawam National Bank* v. *South Hadley*, 128 Mass. 503.

In order so to charge the town with liability, the use of the moneys loaned, their appropriation to the purpose stated, must

have been by some person who stood in such relation to the town as to render his act of itself effective, as between the town and its creditor, to discharge the debt to which they were applied, or there must have been a ratification or acceptance of such payment on the part of the town.

Without corporate act or assent, or the agency of a person exercising some authority, there can be no such thing in a legal sense as the payment of the debt of a town. If a person having no authority assumes to pay a municipal debt, the payment is a nullity at the will of the town. Its relations to its creditor cannot be affected by a stranger against its will; and the act of the creditor alone, while it may destroy the evidence of debt, and deprive him of remedy, cannot (at least theoretically, if it may practically,) extinguish the legal obligation of the contract against the will of the other party. Nor can any arrangement between the creditor and a stranger, to this effect, be forced upon the acceptance of the debtor.

The language of the court, in the opinion cited, refers to a case where there was in fact and in law a payment of the debt of a town by the use of moneys hired without authority; where the debt was discharged not only in form but in effect. "The vital question of fact," it is stated, "is whether the plaintiff's money has actually been applied by the town officers to the extinguishment of legal claims against the town." If one without authority assumes to pay a municipal debt the town may object or may assent. It may, upon discovery of the fact, defeat the attempted discharge of its debts in that way. But neither by corporate action, nor by corporate inaction, can it knowingly retain the benefit of payments so made by its agents, with moneys hired in its name without authority, and thereby give effect, so far as to release itself from the old debt, to the acts of its officers assuming more than their legal powers, and at the same time withdraw itself from liability for moneys so hired and used. This would be for the town tacitly to hold all that was favorable to itself in a single transaction, and openly to reject all that was not beneficial, although it was only a precise equivalent for the advantage gained. The act of the agent in procuring the loan

and paying the debt is a thing to be accepted or rejected as a whole. The corporation owes either the old debt or the new, and failure to act, to attempt even the expression of dissent, at legal meetings held after official reports have advised them that such a loan has been made, that their treasurer, or one of the selectmen, has employed it in paying a municipal debt, outstanding and overdue, and that the creditor has accepted the payment and given a formal release of his claim, may be clear evidence of the silence which gives consent. Formal corporate action is not always necessary to show the assent of the body corporate. By non-action, after knowledge of the facts, there may be recognition by the principal of the agent's acts as his own.

We are aware that it is the object of the law, on urgent grounds of public policy, "to protect cities and towns from the creation of municipal debts, without sufficient necessity and consideration, and without proper provision for payment, and to prevent improvident and reckless expenditures of public money, as a natural consequence of debts so contracted;" and we do not now consider cases in which an agent without authority, in the name, and for the alleged benefit, of the town, incurs debts where none existed before, but confine our attention to the case presented, of an exchange of liabilities, the creation of a new debt on similar terms to pay another which is valid and due. In such case, if the first debt is paid, it is precisely as if the town itself had the amount of it in its treasury, derived from the plaintiff's loan.

In this case, with the exception of the $1162.90 paid on account of the State tax, which is an item to be considered by itself, we are not prepared to find as matter of fact upon the evidence reported, that the town received the benefit of the loan from the bank. The claim is, that the balance was turned over by Mr. Roberts, the selectman who effected the loan, to the treasurer in money and town orders which Mr. Roberts had paid. That the treasurer received any part of it in money, the testimony certainly fails to prove. His own statements in support of the plaintiffs' claim on this point are full of contradictions, at one time saying that he received in cash the amount of the loan,

except the interest on it and the State tax, then that either cash or its equivalent, that is to say, town orders, to that amount, were received by him, and finally admitting at the close of the cross-examination, that the whole amount of the loan from the bank was paid away by Mr. Roberts. The statements of Mr. Roberts, in regard to cash payments to the treasurer out of this loan are quite as unsatisfactory. When asked if he paid the treasurer as much as five dollars of the sums received from the bank, he replied that he was not able to state anything about it, and this reply seems to contain the substance of his testimony on this point.

It is not proved that the money loaned, or any part of it, passed into the hands of the town treasurer.

Is this balance shown to have been applied by Mr. Roberts to the payment of town debts?

The treasurer knows nothing of the use of this specific fund. It was hired in July, 1878. The books of the treasurer show no credit of it till March, 1879. He simply knows that Mr. Roberts was accustomed, during the year, to pay orders and turn them over to him on account of the town as cash. He may infer that Mr. Roberts used a part of this loan for that purpose, but he does not know it. He was accustomed to intrust Mr. Roberts with funds of the town to be used in meeting its liabilities, and the case strongly indicates that money from other sources was wrongfully procured by Mr. Roberts in the name of the town. The accounts of the treasurer throw little light on the matter. They present no correct account of the financial affairs of the town, as conducted by the municipal officers. Mr. Roberts' testimony scarcely denies that town orders, to the amount of twenty-six hundred dollars, were issued for money hired prior to the date of this loan, which did not appear in the settlement between the selectmen and the treasurer at the close of the year. Why were they knowingly excluded from the treasurer's accounts and from the settlements with him, if not to serve fraudulent purposes on the part of the principal agent for the town in these transactions? Nor is this the only sign, which the case gives, of fraudulent mismanagement of the affairs of the town.

In such a state of facts, it is not enough, to charge the town with liability, as to the balance of the loan above the $1162.90, for Mr. Roberts to testify that it was applied to the payment of quite an accumulation of town orders, while distinctly declaring his inability to designate what order, or what debt, of the town was paid by it. It was part of the plaintiff's case, if they would recover under the rule of law on which they rely, to show that their loan was used by the town agents to discharge existing legal municipal obligations. The first step in proving that is to show what debts were paid by it. The case leaves more than a suspicion that municipal funds were misapplied by the agent who effected this loan; and for all that we see in the evidence, quite as likely this amount as any other. We do not find it proved that the town has ever received the benefit of this unauthorized loan, except to the extent that it went to pay the State tax.

It is an admission in the case that on August 1, 1878, Mr. Roberts paid to the State Treasurer the sum of $1162.90 on account of "the State tax levied by the State upon the said inhabitants of the town of Stockton for the year 1877, then due and unpaid." Mr. Roberts says, "That sum was paid from the identical money which I received from the bank." The act of 1877, c. 390, under which the State tax was levied, provided that each town should be assessed, *and should pay*, the amount set against it in the lists; and the warrant from the Treasurer of State was directed to require the selectmen or assessors to assess the tax, and "*to pay*, or to issue their several warrants requiring the collectors to pay, the said treasurer on or before January 1, 1878," the sum against such town in that act contained.

Here seems to be a provision authorizing a direct payment of the State tax by the municipal officers to the State Treasurer. It is true the State holds in reserve the power to proceed directly against delinquent assessors or collectors, to compel the performance of official duty on their part, but no default by them can defeat the claim of the State upon the town. If the assessors fail in their duty, they may be personally liable, and the tax

may be levied without their aid. If the collector is deficient, the express provision is that after certain proceedings against him the town shall pay the amount for which he is in default; to be levied finally, like other debts, on the real and personal estate of any inhabitant. But we think it is not the true view of the law to hold that there is no duty resting upon the town to pay the State tax, or to cause it to be paid, until after the State has itself exhausted every process by which it has sought to guard the integrity and efficiency of those who have its assessment and collection in charge. At least under the act of 1877, notwithstanding the precautions taken for the fidelity of officers, the tax remains a liability of the town in such sense that payment of it by the municipal officers is not necessarily in all cases an act beyond their official authority.

The case does not show that the town in any way suffered detriment by the direct payment of the tax which had been assessed upon the polls and estates of its inhabitants and was then overdue and unpaid. There is no proof of default on the part of the collector, for which he was liable and from which liability he or his property was released to the prejudice of the town. The evidence tends to show the contrary — that the town received into its treasury the amount of the collected tax. The defendants never disavowed the act of their agent in paying the tax with borrowed money. We think the course of proceeding has been in effect an adoption of that act, and the tax is paid. To this extent, the town silently holds the plaintiffs' moneys so applied, and reaps the full benefit of them.

The payment was not the act of a stranger who sought to thrust himself into the position of creditor of the town without their consent, but of the principal municipal officer, who assumed to act for them in that respect and whose power to make a valid payment of the tax, the town has never seen fit to question.

Judgment for plaintiffs, for $1162.90, and interest from August 1, 1878.

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

STATE *vs.* CHARLES H. WITHAM.

Cumberland. Opinion August 22, 1881.

Indictment. Adultery. Evidence. Stat. 1879, c. 92, § 2.

A defendant, in a criminal prosecution, testifying in his own behalf, may be cross-examined in full, in the same manner and to the same extent that any other witness could be.

He is not to be protected against cross-examination because his answers may implicate him in other criminalities besides the offence with which he is charged, if the connection is such that the proof is relevant to the issue.

The statute of 1879, which provides that he shall not be compelled to testify on cross-examination to facts which would convict him of any other crime than that for which he is on trial, only excludes compulsory admission of independent and extraneous offences, evidence of which is offered merely to affect character or credibility.

The cross-examination of a defendant, legally obtained in one criminal prosecution, is admissible as evidence in another criminal prosecution against him, if pertinent to the issue.

It is not error, under an indictment for a single act of adultery, to omit to specify some particular act as the offence to be proved, where several acts are testified to between the same parties, neither side asking for such specification.

In a prosecution for adultery, acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence for the purpose of showing the relation and mutual disposition of the parties, the reception of such evidence to be largely controlled by the judge who tries the cause, explaining to the jury its purpose and effect.

It is a general rule of practice in this State that, when one side without objection introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other side, the other party is entitled to introduce evidence that goes directly and strictly to contradict and disprove it.

On the trial of the defendant for adultery with Miss Small, a government witness testified that frequently in the summer and fall, between eight and nine in the evening, she saw the defendant go to Miss Small's house, call her out, talk with her at the gate, and once walk to the ship-yard with her. The defendant denied this, and offered to show by another witness that, during the same summer and fall, in the evening, such other witness had several times seen a man, not the defendant, call Miss Small out and stand with her at the gate, and walk to the ship-yard with her; *Held*, that the testimony offered was admissible upon the question of the identity of the defendant with the person described by the first witness.

ON EXCEPTIONS from superior court.

Indictment for adultery with Annie Susan Small, July 18, 1878, at Cape Elizabeth.

The questions presented by the exceptions and the facts material to their consideration are fully stated in the opinion.

T. H. Haskell, county attorney, for the State, cited: *State* v. *Gilman*, 51 Maine, 206; *Com.* v. *Reynolds*, 122 Mass. 454; *Com.* v. *Nichols*, 114 Mass. 285; *State* v. *Wentworth*, 65 Maine, 234; *Andrews* v. *Frye*, 104 Mass. 234; *State* v. *Cleaves*, 59 Maine, 298; 2 Greenl. Ev. § 40; *Com.* v. *Cobb*, 14 Gray, 57; *Thayer* v. *Thayer*, 101 Mass. 111; *Com.* v. *Merriam*, 14 Pick. 518; *Com.* v. *Tuckerman*, 10 Gray, 200; *Com.* v. *Lahey*, 14 Gray, 91.

The questions asked the respondent's witnesses and excluded, were inadmissible because they were either leading, immaterial or related to the conduct of Miss Small in a collateral matter concerning which she was not interrogated in chief, and which she denied on cross examination and thereby precluded the defendant from contradicting her. *State* v. *Benner*, 64 Maine, 267.

In this case the paternity of the child was not in question, and even in a trial under the bastardy act where that is the issue, proof that the complainant had sexual intercourse with other men at a time other than when the child could have been begotten, for the purpose of contradicting her testimony in chief that she had not had sexual intercourse with other men, is inadmissible. *Parker* v. *Dudley*, 118 Mass. 602.

Nor can she be discredited as a witness by proof of such facts, or that her character is bad for chastity. *Sabines* v. *Jones*, 119 Mass. 167; *Sidelinger* v. *Bucklin*, 64 Maine, 371; *Eddy* v. *Gray*, 4 Allen, 435; *Com.* v. *Moore*, 3 Pick. 194; *Paull* v. *Padelford*, 16 Gray, 263.

Alden J. Blethen and *Sewall C. Strout*, for the defendant, cited: 1 Greenl. Ev. § § 451, 379, 380; *People* v. *McMahon*, 1 Smith, (N. Y.) 384; *State* v. *Gilman*, 51 Maine, 222; Const. U. S. Amendments, Art 5; Const. Maine, Art 1, § 6; *Gilham's Case*, 1 Moo. C. C. 203; Roscoe Crim. Ev. 48, 49; Stat. 1879, c. 92, § 2; *State* v. *Wentworth*, 65 Maine, 239; Bishop Stat. Crimes, § 684; *Blackman* v. *The State*, 36 Ala. 295; *Com.* v.

Pierce, 11 Gray, 448; *Com.* v. *Merriam*, 14 Pick. 518; 14 Gray, 91; 2 Gray, 335; 2 Greenl. Ev. § 47; 100 Mass. 145.

PETERS, J. Upon an indictment for the murder of an illegitimate infant, the respondent was tried and acquitted. In the present case, he was on trial for adultery alleged to have been committed with the mother of the infant. In the former case, he was a witness in his own behalf, and was cross-examined by the government with a view of eliciting admissions tending to show that the paternity of the child was his. Most of the questions put by the government in the former case he refused to answer, claiming it to be his privilege to avoid interrogation as to his participation in any crime or offence for which he was not then on trial.

Was the cross-examination in that case admissible in this case, subject to respondent's objection? That depends upon whether it is to be regarded as voluntary instead of compulsory testimony, and whether it was lawfully or unlawfully obtained. In our opinion, the entire examination of the respondent in the former trial must, in a judicial sense at least, be considered as voluntary testimony and legally obtained. When the accused volunteers to testify in his own behalf at all, upon the issue whether the alleged crime has been committed or not, he volunteers to testify in full. His oath in such case requires it. If he waives the constitutional privilege at all, he waives it all. He cannot retire under shelter when danger comes. The door opened by him is shut against retreat. The object of all examinations is to elicit the whole truth and not a part of it. Under our rule, the cross-examination of a witness is not confined to the matters inquired of in chief. A party, testifying as his own witness, can be examined just as any other witness could be in any respect material and relevant to the issue. To some extent, more may be elicited from him than from a common witness, because his statements are admissions as well as testimony. Any other construction would render the statute a shield to crime and criminals. *State* v. *Wentworth*, 65 Maine, 234; *State* v. *Ober*, 52 N. H. 459; *Com.* v. *Nichols*, 114 Mass. 285; *Com.* v. *Reynolds*, 122 Mass. 454; *Connors* v. *People*, 50 N. Y. 240; *Stover* v. *People*,

56 N. Y. 315; 1 Greenl. Ev. § 451, (13th ed.) and cases in note. Whar. Crim. Ev. (8th ed.) § § 470, 669, and notes.

So far as the respondent refused to answer proper and competent questions, the refusal was evidence from which the jury could draw unfavorable inferences against him. *Andrews* v. *Frye*, 104 Mass. 234; Whar. Ev. § § 533, 546, 1266.

It is no objection that, in attempting to prove one offence by the respondent's answers, another offence is proved or confessed by him, if the connection is such that the proof is relevant to the issue. That is unavoidable. If a person accused of crime takes the benefit of his own swearing, he takes its risks. It was relevant to the issue in the trial for the homicide to show the respondent to be the father of the illegitimate child, as indicating motive for the commission of the crime charged against him. *Com.* v. *Call*, 21 Pick. 515; Whar. Crim. Ev. (8th ed.) § 29, *et seq.* and numerous cases cited in notes.

The statute of 1879, relied on by respondent, does not change the case. It is in these words: "The defendant in a criminal prosecution who testifies in his own behalf, shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict, him of any other crime than that for which he is on trial." This does not alter the law as it stood in this State before the enactment. It does not provide that evidence legally obtained at one trial may not be used in another trial. It merely declares the rule already adopted in this State, in the case of *State* v. *Carson*, 66 Maine, 116, where it was held that a prisoner, who testifies in his own behalf, should not be compelled upon cross-examination to disclose his guilt in any other crime or offence, the evidence of which was not necessarily involved in the proof of the offence for which he was on trial; that a defendant in a criminal prosecution could not be compelled, while a witness, to confess independent and extraneous offences, merely to affect character or credibility. The statute is in accord with the decision. Neither excludes evidence which charges or confesses extraneous criminalities, the evidence of which from circumstances becomes relevant and material to the main question in issue.

The respondent stood indicted for a single act of adultery; while his paramour was allowed to testify to several acts as having taken place at several times and under different circumstances. Complaint is made that the prosecution was not required to specify some particular act as the offence to be proved under the indictment. It was not a legal error to omit to do so, so long as no specification was by any party asked for.

It is objected that this mode of trial involved the admission of evidence of acts of adultery happening both before and after the principal act complained of. Formerly, the criticism might have been regarded favorably in many courts. Latterly, however, courts and text-writers are rapidly falling in with the view, that acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties; the reception of such evidence to be largely controlled by the judge who tries the cause, and the evidence to be submitted to the jury with proper explanation of its purpose and effect. We think this doctrine is most in accordance with the logic of the law and with the authorities. The same rule applies where intent, or system, or scienter, may be involved, as illustrated in successive cheats or forgeries, or passing counterfeit money to different persons, and the like; the doctrine concerning which classes of crime may be found elaborately illustrated and supported in the text, and cases cited, in Whar. Crim. Ev. (8th ed.) in section thirty-one, and sections following, and in 1 Greenl. Ev. (13th ed.) § § 53, 451, 454, and notes thereto. *State* v. *Bridgman*, 49 Vt. 202; *Thayer* v. *Thayer*, 101 Mass. 111; *Com.* v. *Nichols*, 114 Mass. 285; Whar. Crim. Law, 8th ed. § 1733; Bishop Stat. Crimes, § 682; 2 Bishop Mar. & Div. 6th ed. § 625, and cases in note.

Annie Small, the female implicated, testified to sexual intercourse with the respondent in July, 1878, and to the birth of a child by her nine months afterwards. The latter fact was inadmissible. *Com.* v. *Foster*, 107 Mass. 221. But it was not objected to. To rebut an unfavorable inference from this evidence, the respondent offered testimony tending to show that some one other than

himself was the father. This was excluded. The introduction of immaterial testimony to meet immaterial testimony on the other side, is generally within the discretion of the presiding judge. But if one side introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other party, then, although it come in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it. Thus, in this case the respondent would have been authorized to prove, if he could, that a child was not born at all, or was not born at the time testified to by the paramour. The government waives the strict rule of law to this extent, by its misstep of introducing illegal evidence, and the respondent is entitled to no more relaxation of the common rule, because he could by his objection have excluded the illegal or irregular evidence. The ruling, therefore, was not erroneous. *State* v. *Sargent*, 32 Maine, 431: *Williams* v. *Gilman*, 71 Maine, 21; *Mowry* v. *Smith*, 9 Allen, 67; *Parker* v. *Dudley*, 118 Mass. at p. 605, and cases.

But other evidence was offered and excluded which should have been admitted. A Mrs. Tucker, a government witness, testified that frequently, in the summer and fall of 1878, between eight and nine o'clock in the evening, she saw the respondent go to the house where Miss Small (the alleged paramour) lived, and call her out, and stand and talk with her at the gate, and that once they walked towards the ship yard together — her own house being about ninety feet from Miss Small's house. This was pertinent testimony.

The respondent denied it to be true, and, in order to corroborate his own statement and discredit the statement of the government witness, by showing that she was mistaken in the identity of the person whom she saw, called another witness, who lived nearer Miss Small than the government witness did, and offered to show by such witness, that, during the same summer and fall, in the evening, she had several times seen a man, not the respondent, call Miss Small out and stand with her at the gate, and walk to the ship yard with her. This was excluded. It should have been admitted.

The question is whether it was relevant or not. It was relevant if it had any tendency, however slight, to show that the government witness was mistaken, or testified falsely, as to the identity of the person of the accused. Of course, both statements might be true. Still, it cannot reasonably be said that the truth of the one would not lessen the probability of the truth of the other. It would, certainly, be an uncommon occurrence for two persons to be upon the same ground, at the same hours of the day, covering the same period of time, to see the same person, acting in the same peculiar manner, making the same movement to the ship yard, and making such a call in such a manner as a frequent and habitual thing. There is not complete definiteness in the contradictory statement, nor is there in the story to be contradicted. Bearing in mind that, as the case comes to us, the respondent denies the identity; that the principal government witness, who knows whether it be true or false, has not affirmed it; that Mrs. Tucker does not say that she ever saw any man other than the respondent at the place and in the situation described by her, and it would seem that the rejected testimony, if true, must bear with considerable force against one of the positions of attack relied on by the government.

"Relevancy is that which conduces to the proof of a pertinent hypothesis. Hence it is relevant to put in evidence any circumstances which tend to make the proposition at issue more or less improbable." Whar. Ev. § § 20, 21. In *Trull* v. *True*, 33 Maine, 367, it was held, that "testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability or improbability of the fact in issue." *Huntsman* v. *Nichols*, 116 Mass. 521, presents a similar decision upon similar facts.

It is held in the cases generally, that more liberality may properly be accorded to the admission of evidence affecting the probabilities of a hypothesis, where, if explainable, opportunity is left within the power of the opposing party to submit an explanation of it. *Stevens* v. *Bruce*, 21 Pick. 193, and *Sabine* v. *Strong*, are cases of the kind. In the case at bar, if the

offered evidence should not be denied by the paramour, or explained by her or any other witness, its weight and probative force would be all the more.

Evidence of the kind excluded, is especially relevant in matters of identity. "In questions of identity," says Wharton (Crim. Ev. 8th ed. § 27), "no matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the indication is to be made." In *Com.* v. *Cooper*, 5 Allen, 495, in which dying declarations were shown to prove the identity of a defendant as the person who committed a crime, evidence was held to be admissible in reply, showing that the deceased had mistaken persons with whom he was well acquainted, and that he was in the habit of doing so.

Both in criminal and civil causes, and especially in criminal causes, evidence of collateral facts may be received for the purpose of confirming witnesses. *Llewellyn* v. *Winckworth*, 13 M. and W. 598; 1 Greenl. Ev. 13th ed. § 53, and cases in note; *Eaton* v. *Telegraph Co.* 68 Maine, at p. 68. In the case before us, the evidence was offered to corroborate the positive testimony of the respondent who was his own witness. While from the nature of things, the circumstances and details of different cases are seldom alike, multitudes of cases exist, and those before cited are specimens of them, in which evidence more remote and uncertain than that tendered and rejected in this case, has been held competent to be submitted to and be considered by the jury.

It was suggested at the argument, that the exceptions did not make it sufficiently apparent that the testimony was offered to disprove identity. It would be difficult to make the purpose of the respondent's counsel much plainer. First, Mrs. Tucker swears against the respondent. Then the respondent denies her statement; that is, he swears he was not the person described by her testimony. That is all that he could deny. Thereupon, in the same connection, he calls upon his witness to corroborate his denial, by stating facts that would corroborate it. The purpose is apparent from the association. *Noscitur a sociis.* The

allowance of the exceptions as made up is an admission by the Judge that the purpose of the offer was not misunderstood by him. Where testimony is apparently relevant and competent, the grounds for its admission are not usually stated, unless called for. It is unreasonable to imperil the liberty of a man in a criminal prosecution by so critical an objection.

Exceptions sustained.

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

GEORGE D. B. WITHAM *vs.* CITY OF PORTLAND.

Cumberland. Opinion March 10, 1881.*

Ways. Sidewalks — defects in.

In an action for personal injuries received from an alleged defect in a way, the question of whether there was such a defect as unlawfully impaired the reasonable safety of travelers is generally one of pure fact for the jury depending upon the special circumstances of the particular case; but when the facts bearing upon the subject are unquestioned or are sustained by uncontroverted testimony, their legal effect is a matter of law.

A sidewalk on a cross street in a city where there was comparatively little passing, was laid out by the city authorities, seven feet wide, the outside line being within four and one-half inches of a block, and the whole space was bricked as though the sidewalk extended to the block, excepting in front of a basement window about nine feet wide, there was a depression in the brick walk eight and one-half inches in width from the window, and six and one-half inches in depth.

Held, in an action for damages for personal injuries received from stepping into the depression described, while walking along the sidewalk in the daytime, in the absence of any testimony that such was an improper or unusual construction for the necessary lighting and ventilating of the basement of buildings, that the depression was not a defect in the legal sense.

ON MOTION to set aside the verdict rendered in the superior court, Cumberland.

An action on the case for damages sustained by the plaintiff for personal injuries caused by an alleged defect in the sidewalk on Milk street, in Portland.

*Received by the Reporter, November 11, 1881.

The opinion states the material facts.

Bion Bradbury, for the plaintiff.

Clarence Hale, for the defendant.

VIRGIN, J. The plaintiff recovered a verdict of six thousand five hundred dollars against the city of Portland, for a personal injury which he testified was caused solely by an alleged defect in the sidewalk which extends along the east end of Stanton block, on the west side of Milk street. The sidewalk, as laid out by the city authorities, is seven feet in width, the outside line thereof being within four and one-half inches of the east end of the block, the whole space being bricked as if the sidewalk extended clear to the block, except as follows.

In the east end of the block is a basement window, about nine feet wide, consisting of one row of panes of glass extending one foot above, and six inches below the surface of the sidewalk. And for the purpose of letting in the light, a depression in the sidewalk along in front of the window is constructed, eight and one-half inches in width from the window, and six and one-half inches below the surface, so that three and three-quarters inches of the width of the depression are within the sidewalk, and the remainder, four and three-quarters inches, are outside of it. And this is the defect complained of, and into which, the plaintiff testified, he stepped with his right foot while walking along that sidewalk in the daytime. The question, therefore, is, whether such a depression on the extreme outside line of the sidewalk, so near to the wall of the building, on a cross-street over which there is comparatively but little passing, is a defect which unlawfully impairs the reasonable safety of travelers there.

Generally, such an issue is a pure question of fact depending upon the special circumstances of the particular case; but when the facts bearing upon the subject are unquestioned or are sustained by uncontroverted testimony, their legal effect is a matter of law. *Todd* v. *Whitney*, 27 Maine, 480.

In the case in hand, considering the undisputed affirmative facts, together with the absence of any testimony that this is an improper or unusual construction for the necessary lighting and

ventilating of the basements of buildings, we are of the opinion that it is not a defect in the legal sense. *King* v. *Thompson*, 87 Penn. St. 369; *Cushing* v. *Boston*, 124 Mass. 437. The plaintiff's foot was not accidentally caught in this narrow place, and wrenched by being held there against his will; but he contends that his injury was occasioned by his stepping his foot into the place so much lower than his other, as to cause a shock of his system. If he had been walking in the opposite direction and as near the curb stone as he was to Stanton block, he would have stepped down quite as deep a depression into the street proper, and perhaps with a like result. And to call the latter a defect, would condemn every foot of street on each side of every street in the city, and the curb around every tree therein.

And if we had any doubt as to the soundness of this view, we should have no hesitation in declaring that the case fails to show the exercise of ordinary care on the part of the plaintiff. With such ample width of sidewalk for the safety and convenience of the traveller, it is almost past comprehension how the plaintiff could step into the place involuntarily.

Motion sustained.

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

APPENDIX.

QUESTION SUBMITTED BY THE COUNCIL OF MAINE,

March 31, 1881,

WITH THE ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THERETO.

STATE OF MAINE.

In Council, March 31, 1881.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be respectfully asked by the Governor and Council upon the following statement:

April 24, 1880, J. W. Spaulding was appointed by the Governor, with advice and consent of council, as reporter of decisions of the law court of Maine, and commissioned to hold his office "four years, unless sooner removed by the governor and council for the time being," and has been discharging the duties of that office ever since. On the twenty-ninth instant the governor, without advice or consent of the council, claimed to remove said Spaulding from said office, by causing the secretary of State to serve upon him a notice, a copy of which with a copy of the commission is hereunto annexed.

Question. Has the governor the power of removal without the concurrence of the council, in manner as claimed by him?

In Council, March 31, 1881.

Read and passed by the council, but the governor withheld his approval.

JOSEPH O. SMITH,
Secretary of State.

STATE OF MAINE.

In Council, March 31, 1881.

Inasmuch as the governor has withheld his approval of an order this day passed by the council, inviting a concurrent application by the governor and council, to the Justices of the Supreme Judicial Court, for their opinion upon the question of the power of the governor, without the advice and consent of the council, to remove the Honorable J. W. Spaulding, as reporter of decisions of the law court of Maine, and inasmuch as the council deem it an important question of law, coming within the provisions of Art. VI, § III, of the constitution of this State, whether, by the action of the governor, a vacancy exists in said office, therefore,

Ordered, That this council most respectfully ask the opinion of said justices upon the question and facts submitted in said order, and that the secretary of State be directed to forthwith forward to the Honorable Chief Justice of said court, certified copies of both orders, and the paper thereunto annexed.

In Council, March 31, 1881.

Read and passed by the council.

JOSEPH O. SMITH,
Secretary of State.

Bangor, September 1, 1881.

To the Honorable The Council of Maine.

In accordance with the provision of the constitution imposing upon the Supreme Judicial Court, the duty of giving its opinion upon important questions of law, and upon solemn occasions, when required by your body, we have the honor to answer as follows:

From the papers forwarded it appears that Joseph W. Spaulding was nominated, and with the advice and consent of the council, appointed reporter of the decisions of the Supreme Judicial Court, and his commission accordingly issued on the twenty-fourth of April, 1880, in the form adopted on the organization of the government of this State, and followed ever since, reciting therein that he was "to have and hold the same together with all

the powers, privileges and emoluments thereto of right appertaining unto him, the said Joseph W. Spaulding, for the term of four years, if he shall so long behave himself in said office, "*unless sooner removed by the Governor and Council for the time being.*"

The original appointment of the reporter, was for an unlimited term of years. The language of the commission was subsequently changed in respect of time in consequence of chapter 257, of the acts of 1824, by which the term of office was limited to four years. But in all cases, the reporter held his office subject to be "removed by the governor and council for the time being."

Under and by virtue of this commission, Mr. Spaulding being duly qualified, entered upon the discharge of the duties of the office to which he had been appointed. On March 29, 1881, the governor by a paper signed by him, headed Executive Department, to which the seal of the State was attached, notified Mr. Spaulding that the term of his office as reporter of decisions, which he held during the pleasure of the executive, was terminated and that he was removed from said office. This act, if done "in the executive part" of his duty, was without the advice or the consent of the council.

The question upon which our opinion is required relates to the power of the governor in the removal of an officer nominated and commissioned by him with the advice of the council as in the present case.

The order of the council requiring the opinion of the court, received neither the assent nor the approval of the governor. But that was unnecessary. By the Constitution, Art. 6, § 3, this court is obliged to give their opinion on important questions of law and upon solemn occasions, when required by the governor, council, senate or house of representatives.

The council have the same right to require the opinion of the court as the governor or either of the other designated bodies. In case of disagreement between the governor and his council, the right to require an opinion is given to each — to one as much as the other. The assent of the governor is not needed to nor can his dissent or veto prevent the action of the council.

That the question at issue is important and that this is a solemn occasion, within the constitutional provision, should not be questioned, since it involves the constitutional rights and powers and duties both of the governor and of the council.

Whether there is a vacancy in the office of reporter or not is a question of public concern. The action of the council in the exercise of their advisory functions is dependent on the determination of this question. When the inquiry was made the question was pending. If there was no vacancy, the option was with the council to create one or not, as the public interest might require. If there was a vacancy, there was no option. It would be their duty to fill it, when in their judgment, a suitable nomination should have been made. To know what their action should be, it is first to be determined, whether there be a vacancy, without which knowledge they can not understandingly act.

So, too, if the reporter is not removed, he is entitled to his salary for his official services, and that, too, without the delay incident to protracted litigation.

Whether there is a salary due or not is a question depending upon the power of removal existing in the governor alone.

The opinion of this court has been required in some forty instances in relation to a variety of subjects and under different circumstances. In no instance has the obligation to answer been questioned or an answer denied. The inquiries made have embraced a great number of subjects—the right to and the tenure of office, the duty of the executive department in relation to the counting of votes, the right to a membership of the house or senate, the fees of the members of those bodies, the organization of the legislature and the constitutionality of statutes, &c. matters affecting individuals and the public, but in respect to which it was deemed advisable to obtain the opinion of the court before final action should be had in reference to the subject matter embraced in the inquiries proposed. In pursuance, therefore, of the obligations imposed upon us by the constitution, we proceed to consider the questions submitted.

Article 5, part first, of the constitution, relates to "executive powers" and defines and limits the same.

By § 1, "The *supreme executive* power of the State shall be vested in a governor," thus recognizing him as the head of the executive department of government. But he is not the executive department. "He shall take care that the laws be faithfully executed." He may issue commissions, sign warrants, remit penalties, grant reprieves, commutations and pardons, but he does all this by and with the advice of his council. He carries into effect the doings of the executive department of which he is the head but he does not control it.

If he was clothed with supreme and uncontrolled executive power, the council would have no duties. His powers are only what are specially given him by the constitution or necessarily inferable from powers clearly granted. He is to execute the powers conferred, in the manner and under the methods and limitations prescribed by the constitution and the statutes enacted in accordance therewith.

It was early held that the president of the United States had the power of removal without the concurrence of the senate, though not that of appointment, without such concurrence.

The question was so close, that this construction was carried by the casting vote of the vice president. This construction has ever been doubted by many of the ablest statesmen and jurists.

Indeed, in the argument advanced for the adoption of the constition by the great statesman, whose influence was alike paramount, in its foundation and adoption, it is said that "the consent of the body would be necessary to displace as well as appoint," thus holding that the power of removal was an inference from that of appointment.

But whether this construction was right or wrong, no argument can be drawn from the power claimed and exercised by the president of the United States. The constitution of this State differs so widely from that of the United States, that the argument from the exercise of such power by the president is entirely inapplicable. The reasons assigned for the exercise of that power without senatorial concurrence, were, first, that there might be great misfeasance in a public office and the necessity of prompt action, which might not be had if the senate was not in session.

But this does not apply, because the council may be readily convened at any time by the call of the governor.

The second reason was, that as the senate is the court for the trial of impeachment, it would not be an impartial tribunal for the trial of those who had been appointed through its instrumentality. But the council of Maine has nothing to do in the matter of impeachment.

Thirdly. It was argued that as the power to participate in removals was not given in terms to the senate, the power could not be implied. The answer then made to this was that it was no more expressly given to the president than to the senate, and that the implication no more arises in his case than in that of the senate; that the power of appointment was given conjointly to the president and senate and the power of removal if granted, was granted by implication to both. But the argument for the power of the president, whether unanswerable or not, has no application to the question under discussion. And, besides, this power of the president has been limited and restricted by subsequent legislation, by Revised Statutes U. S. § 1767, *et seq.* which diminish and regulate his power of removal in essential particulars.

In this State the council is a part of the executive, and specially created to advise the governor in the executive part of government. Indeed, it will be seen, in the different parts of the constitution, that when the appointment is by the governor with the advice and consent of council, not only no power of removal is given to the governor, but that he is even denied that power when an officer is to be removed by address, without the advice of his council first had and obtained.

By § 8, of the same article "He shall nominate, and, with the advice and consent of the council, appoint all judicial officers, coroners, notaries public; and he shall also nominate, and with the advice and consent of the council, appoint *all* other civil and military officers, whose appointment is not by this constitution, or shall not by law be otherwise provided for," &c. The cases, "otherwise provided for," are those in which the advice and consent of the council is not necessary. The reporter is not an

officer "otherwise provided for," because his appointment is by their advice and consent. Except in the special instance in which the power of appointment is conferred on the governor, he cannot appoint without the concurrence of the council. Where he has such power by statute, he has the right of removal as incident to the power of appointment.

As an illustration, by chapter 290, of the acts of 1837, continued through all subsequent revisions, and found in R. S., 1871, c. 110, § 1, the governor of the State, was authorized to appoint commissioners to take the acknowledgment of deeds and to commission them to hold office during *his* pleasure. So the act of 1876, c. 110, authorizing certain persons to solemnize marriage, gives the right to appoint to the governor alone.

These are instances of the office "otherwise provided for" where the council have nothing to do in advising or consenting to the appointment or removal. The power of the governor is derived from the statutes conferring it, and from them alone.

By section one of part second, of the same article, the council are "to advise the governor in the executive part of government," and he with the councillors or a majority of them, may from time to time hold and keep a council for ordering and directing the affairs of the State according to law. The council are "to advise the governor in the executive part of government." Appointments belong to the executive part of government. The removal of unfit or incompetent men belongs equally to "the executive part of government." If removals belong to "the executive part" of his duty, then the council by the constitution are to advise with him in reference thereto, unless otherwise specially provided. If they are not done "in the executive part of government," from whence is the power derived? The right to remove is claimed as belonging to the executive part of government, but if it be so, then it is a part in which the council are to advise. The very claim by the governor to remove as belonging to the executive part of government, necessarily requires and involves the advice of council, unless there are portions of the executive part of government in which he may act without advice. But the constitution designates none such, and the power of removal by the

governor exists only in the few cases specially "provided for," where the appointing and the removing power is intrusted to him by statutory provisions.

The council is to be held and kept "for ordering and directing the affairs of the State according to law." A removal is no less one of the affairs of the State than is an appointment. There is nothing more important than that the offices of the State be filled by able and competent men, and if they are held by weak, incompetent men, that such men should be removed. Now, the removal and the appointment equally appertain to "the affairs of the State," in the ordering and directing of which the council are to participate, unless it is to be held that the one is an affair of the State and the other is not.

By article 9, § 6, "the tenure of all offices which are not or shall not be *otherwise provided* for, shall be during the pleasure of the governor and council."

The general rule is that appointments are by the governor with the advice and consent of the council, and the tenure is during their pleasure. The tenure may be at the pleasure of the governor alone, when he has the appointing power without advice or consent of his council. The cases "otherwise provided for" are those where the appointing power is vested in the governor alone — and the power of removal being an incident to that of appointment is in his hands, or there is a constitutional limitation upon the conditions and duration of official tenure.

By article 9, § 5, "every person holding an office, may be removed by the governor with the advice of the council, on the address of both branches of the legislature." In the only case where removal is specifically referred to, the advice of the council is required. In the case of an address by both branches of the legislature the power of removal is not intrusted to the governor as the supreme executive, but is made subject to the limitation of the advice of the council.

If on the address made by both branches of the legislature for the removal of the reporter, the governor could not remove except by the advice of council, much more, then, can he not remove on his own motion — except in the special cases otherwise

"provided for," where he may remove those he has appointed without advice of council. It is thus clear, that the general power of appointment or removal is no part of the executive functions of the governor alone. In reference to each his action is restricted by the advice and consent of his council. Even in the special case of an address of both branches of the legislature, he is subject to their advice, without which there can be no removal. His power of removal is restricted to the instances where the appointment is vested in him alone, and the power of removal is specially given in the statute conferring the appointing power or is an inference from the power of appointment.

Where the appointments have been with the advice and consent of the council, the removals have been by the appointment and qualification of a successor. The appointment and removal are by one and the same act. The appointment removes. This should obviously be so, else the governor might create vacancies he could never fill, because the council not consenting to his nominations, the offices would remain vacant. Hence removals have ever been by confirmed nominations. The removal is a consequence of the appointment of a new officer. It never precedes it.

The document purporting to be a removal, is equally unauthorized and unprecedented in the administration of the State.

The power of removal where the appointment is by the governor with the advice and consent of the council, is not conferred by the constitution on the governor. Neither is it by the statute creating the office, which was approved June 20, 1820, by which the governor by and with the advice of the council "was empowered to appoint a reporter," who was "removable at the pleasure of the executive."

A constitution had just been adopted. A new government had been inaugurated. Those who framed the constitution were called upon to administer the government. The act first creating the office of reporter, was passed shortly after the adoption of the constitution. The president of the constitutional convention was the governor of the State. The office was created "removable at the pleasure of the executive." The commission issued,

was to have and to hold, &c. "unless sooner removed by the governor and council for the time being." Thus those administering the government at its very inception, construed executive to mean governor and council. The form then adopted has been in use to the present time, in reference to the tenure of the reporter's office, as well as to the other offices, when in the statute creating them, this language is used.

The statutes have been repeatedly revised, and the same language used, and commissions in the same form issued.

The contemporaneous meaning given to the word "executive," has received the sanction of every succeeding administration.

The reporter, be it observed, is "removable at the pleasure of the executive," that is by the governor with the advice and consent of the council, not by the *supreme* executive power or authority, as in the case when the governor as the "the supreme executive authority" of the State, issues as such, his warrant "under the great seal of the State," to the sheriff or his deputies, commanding him, in the case of one sentenced to death, to carry said sentence into execution. In such case his action is without the advice or consent of his council. R. S., c. 135, § 9. Nor is the reporter made removable "by the governor" simply.

The executive power is clearly referred to, that is, the executive branch of the government.

"Great deference has been paid in all cases to the action of the executive department, when its officers have been called upon under the responsibilities of their official oaths, to inaugurate a new system, and when it is to be presumed, they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the constitution." Cooley on Constitutional Limitations, 69.

It is implied in the claim to remove, that every preceding State administration has erred in the meaning to be attached to the word "executive," and that every commission issued, when the language of the act creating the tenure is like the one establishing the office of reporter, has been issued not merely without, but against law. But it will be found on examination that the construction given to the statute is recognized by the constitu-

tion, by acts of the legislature and in the messages of the different governors of the State. Undoubtedly the word may sometimes be used in a different sense, but as Mr. Story has well observed: "It does not follow, either logically or grammatically, that because a word is found in one connection in the constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs." The same remark is equally applicable in the construction of a statute as of the constitution.

The act of Massachusetts of June 19, 1819, "relating to the separation of the District of Maine from Massachusetts proper and forming the same into a separate and independent State," in part, is embodied in the constitution of this State.

By § 6, of this act "the executive authority" of each State was to appoint two commissioners in relation to the division of the public lands, &c. in Maine, and the four so appointed shall appoint two men, and in case of their disagreement, the executive of each State shall appoint one in addition, &c. "Executive" and "executive authority" are used as equivalent terms, and were understood as referring to appointments by the governor of the respective States by the advice and consent of their respective councils, and the appointments were so made—so that in each State, the terms "executive" or "executive authority," were by the respective governments of each State construed as meaning governor and council. The right to remove as well as to appoint was conferred by these words.

Governor King, in his message of January 11, 1821, says: "The situation of the Judges of the Circuit Court of Common Pleas is not such at this time as is contemplated by the constitution. The courts not having been organized anew, the judges continue to act under their old commissions, and thus hold their offices during the pleasure of the governor and council and not during good behavior, as the principles of the constitution require." Governor Parris in his message of January 5, 1822, referring to this subject, says: "On examination, I find that the law of Massachusetts, establishing a Circuit Court of Common Pleas, has not been revised and re-enacted here, and on turning to the council

records, that the justices of that court do not hold their commissions from the executive of this State, except such only as have been appointed to fill vacancies. Of course, this court exists by a law of the parent Sate in force under the provisions of the act of separation, and the whole of its members in the first and third circuits and one on the second, hold their offices during the pleasure of the executive, instead of good behavior, as contemplated by the constitution." It will be perceived that in these communications the governor and council were considered "the executive."

By c. 226, of the acts of 1823, "the governor with the advice of council," was authorized to appoint a suitable person to superintend the erection of the state prison. Governor Parris, in his message of January 10, 1824, on this subject, says: "The *executive* proceeded to the appointment of a suitable person to superintend the erection of said prison," &c.

By c. 78, of the resolves of 1824, the amount of fifteen hundred dollars was placed at the disposal of the governor with the advice of council for the education of the deaf and dumb. Governor Parris, in his message of January 7, 1825, uses this language: "The executive have adopted such measures as seemed most likely to comport with the views of the legislature and to secure the accomplishment of the object,"—that is, the education of the deaf and dumb.

By the resolve of February 2, 1828, the governor with advice of council was authorized and requested to appoint during pleasure "a commissioner of public buildings," with power to obtain plans and estimates of the probable expense of preparing grounds and finishing the public buildings for the accommodation of the executive and legislative departments to be laid before the governor and council for their approval, subject to changes, modifications and alterations to be suggested and approved by them.

Honorable William King was appointed the commissioner of public buildings under this resolve, and in answer to a request by Governor Lincoln, he writes, January 29, 1829, "Having been requested to present to the executive the plans for the erection

of a building for the accommodation of the legislative and executive departments," &c. he proceeds to give his estimates and plans as far as completed—directing his communication to the governor and council—as the executive to whom his plans and estimates were to be presented.

It is to be observed that the commission was to act under the advice and direction of the governor and council. The house of representatives having requested a copy of the directions, Governor Smith, in his message of February 1, 1831, in compliance with such request, says: "I herewith transmit copies of all the directions, which have been given by the executive in relation to the state house," &c.

Governor Smith, in his message to the senate and house of representatives of February 7, 1832, after saying that the secretary of State will lay before them a communication from the commissioner of public buildings, stating the amount of expenditures, proceeds as follows: "In furnishing the house in a suitable manner, it was found necessary to exceed the appropriations made for that purpose, and several additions and alterations not contemplated in the original plan have been made by the commissioner under the direction of the executive department."

On February 17, 1831, (c. 490) an act was approved, the object of which was as alleged in the preamble, to make valid the alleged unconstitutional acts of the legislature and the doings of the executive department of 1830.

By § 4, the doings of any officer deriving his authority from the *executive department* of that year shall not be set aside or held void by reason of the unconstitutionality of the doings and proceedings mentioned in the preamble of the act.

By § 5, it was enacted that no marriage solemnized by any person deriving his authority to solemnize from said *executive* shall be set aside or made void by reason of any defects in the proceedings aforesaid, that is the legislative and executive proceedings of the preceding year.

By the then existent law, persons appointed to solemnize marriages were appointed and commissioned by the governor

with advice of council (since changed by c. 110, of the acts of 1876 as before stated).

The words executive and executive department were used to mean governor and council, in a carefully worded and important act rendering valid all the acts of the legislative and executive departments.

By a resolve of March 23, 1835, the governor with the advice of council was authorized to appoint three commissioners of the state prison to report the best system of prison discipline. The appointments were made and in his message of January, 1836, Governor Dunlap says: "By recurring to the proceedings of the last legislature you will find that a resolve was passed authorizing the governor with the advice of council to appoint commissioners to report a system of prison discipline for the State, &c. In conformity to the authority vested in the executive, the trust was confided to William D. Williamson, Nathaniel Clark and Joseph R. Abbott," &c.

By a resolve of March 1, 1836, the governor by advice of council was authorized to appoint an agent to superintend the erection of an insane hospital under the general direction of the governor with the advice of council. In his message of 1837, Governor Dunlap says: "In conformity to the authority vested in the executive, the trust was confided to Reuel Williams, Esq." &c.

In all these cases the power was entrusted to the governor and council, and not to the governor. The "executive" was the governor with the advice and consent of his council.

So Governor Kent, in his message of March 12, 1835, uses the word executive as equivalent to and meaning governor and council.

But it is unnecessary to give additional illustrations of the use of the word executive by all the different governors who have been called to administer the affairs of the State.

The same word may have different meanings, and different words or forms of expression may be used to convey the same idea. The various statutes in relation to officers appointed by the governor by the advice and consent of his council, enacted

in the early days of the government, as well as since, adopt different language to express one and the same meaning. Thus, by c. 148, of the acts of 1821, "the governor with the advice and consent of council," was empowered to appoint an inspector general of beef and pork, "to be by them removable at pleasure." By c. 175, they were authorized to appoint an Indian agent, "during pleasure." By c. 177, they were authorized to "appoint and commission" pilots, whom they might suspend or remove "at their discretion."

By c. 54, of the acts of 1820, they were authorized to appoint a reporter "removable" at the pleasure of the executive. "The bank examiner is appointed by the governor with advice of council" and holds his office by R. S., c. 47, § 54, "subject to removal at any time by the appointing power."

Coroners by R. S., c. 80, § 40, "hold their offices according to the provisions of the constitution." By R. S., c. 142, § 1, the trustees of the state reform school are to be appointed by the governor with the advice of council, "to hold their offices during the pleasure of the governor and council" but not more than four years under one appointment.

In some instances the statute says nothing in relation to removal, but that would not affect the right to remove.

Most of these offices were created at the commencement of the State government. But notwithstanding this varying use of language, it was unquestionably the intention of the legislature to place the power of removal in the governor by the advice and consent of his council. It was so understood by those administering the government, when the offices named and others with varying language as to removal were created, for in all instances the commissions were issued and signed, — the respective officers being removable at the pleasure of the governor and council.

In some instances, in the different revisions of the statutes, the language as to removals has been changed from one form of expression to another, the different forms being regarded as equivalent and identical in their meaning — the revisers not being authorized to change the law.

By c. 90, of the acts of 1821, the governor and council were authorized to appoint and commission fish inspectors to hold office "during *his* pleasure," and the first commission was issued "during the pleasure of our governor." This, it is believed, is the only case where an appointment by the govenor and council was made removable by the governor.

By c. 257 of the acts of 1824, it was enacted, "that *all* civil officers, appointed and commissioned by the governor and council, or who shall be hereafter commissioned by the governor and council, whose tenure of office is not otherwise provided for or limited by the constitution, shall hold and exercise their respective offices for the term of four years and no longer, unless re-appointed: provided, however, that this act shall not be so construed as to prevent the governor, with the advice of council, from removing any such officers within the term of four years; and this act shall not extend to such ministers of the gospel as are or may be appointed and commissioned to solemnize marriages; or to such as are or may be commissioned by the *governor* before whom certain judicial, executive and civil officers are required by law to take and subscribe the oaths or affirmations required by the constitution."

The reporter is a civil officer appointed and commissioned by the governor and council. His "tenure of office is not otherwise provided for or limited by the constitution." He is therefore by the express terms of the statute to hold for four years, "unless re-appointed." He may by the *proviso* be removed, by "the governor with the advice of the council," and not otherwise. The statute is general and applies to *all* civil officers. The exceptions from this statute are specially named "the cases provided for, and limited by the constitution"—are judges whose tenure was during good behavior,—to the age of seventy—justices of the peace, and notaries public for seven years if they so long behave themselves well. The act embraced within its terms, the office of reporter, who originally was "removable at the pleasure of the executive." It affirms by necessary and inevitable implication the correctness of the construction first

given as to the removability of the reporter, for he is within the obvious words of the act.

This act was passed in the administration of Governor Parris, a learned and able judge and an influential member of the constitutional convention. In the case of fish inspector, an officer appointed by the governor with the advice of the council, to hold at the governor's pleasure, the commission was changed, and the appointee held his office for four years, removable at the pleasure of the governor by the advice and consent of the council.

This act with slight alterations by way of condensation and not intended to effect any change, is found in R. S., c. 2, § 84. The original enactment was passed for the purpose of establishing uniformity in the duration of official life. It applies to all, "whose tenure of office is not otherwise provided for by law or limited by the constitution." It applies to the office of reporter equally as to other offices. There is no statute taking this office from its operation. There is no reason why there should be such a statute.

In all cases where the governor appoints with the advice and consent of the council, they remove. When the appointing power is in the governor alone, he may remove.

The contemporaneous construction given to the statute adopted and uniformly followed by the series of able and upright men, who have administered the affairs of the State, has been in accordance with law and with the undoubted intention of the legislature. Neither negligence, ignorance nor imbecility is to be imputed to them. Indeed, as is forcibly remarked by PARKER, C. J., in *Packard* v. *Richardson*, 17 Mass. 144, "a contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by a legislature.

"If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature is the strongest evidence that it has been rightly explained in practice."

To the question proposed, we answer:

1. That the reporter does not hold his office at the will and pleasure of the governor alone, and is not removable by him.

2. That he is removable only by the governor by and with the advice and consent of the council.

JOHN APPLETON.
JOHN A. PETERS.
W. G. BARROWS.

We concur in the opinion that in the section of the statute defining the tenure of office of the reporter of the decisions of the law court, R. S., c. 77, § 28, the words "the executive" are employed to embrace, in one general term, both the governor and council, who had been mentioned together in the earlier lines of the section, and to indicate the executive authority by which the appointment is made; that the phrase "who shall hold his office during the pleasure of the executive," contemplates the same mode of executive action and procedure in effecting a removal, as in making an appointment, and that neither from the letter, reason nor history of the statute, nor from a comparison of it, with those in *pari materia*, can a just inference be drawn of an intention to divide the removing from the appointing power.

We think the section substantially re-enacts, in this particular instance, the general constitutional provision that "the tenure of all offices which are not or shall not be otherwise provided for, shall be during the pleasure of the governor and council," and that it was never intended that the former, who has only the power to nominate for appointment, shall be able alone to create a vacancy which he has not the power to fill without the action of the latter.

WM. WIRT VIRGIN.
J. W. SYMONDS.
CHAS. DANFORTH.

The undersigned, justice of the Supreme Judicial Court, having taken into consideration the question propounded to the justices of said court by the executive council of this State, and the statement of facts accompanying it; and having given them careful and mature examination, respectfully submits the following answer.

By the constitution of this State, article 6, section 3, the justices of said court "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate or house of representatives." The question propounded must be an important question of law, and the occasion upon which it is put must be a solemn occasion, to justify the justices of the court in giving an opinion. The question may be an important question of law, but if the occasion is not a solemn one within the meaning of the constitution, it should not be answered.

I respectfully submit, with great deference to the opinion of the other justices of the court, that the occasion upon which the question is propounded, as shown by the statement of facts, is not a solemn occasion within the true meaning of the constitution.

The object of the clause of the constitution under consideration, appears to me to be to enable the governor, council, senate or house of representatives, to obtain the opinion of the justices upon any important question of law, of public concern, which the body making the inquiry has occasion to consider and act upon in the exercise of the legislative or executive powers intrusted to them respectively, for their guidance in their action.

It does not contemplate that one branch of the executive or legislative department may properly put to the justices, questions in regard to the power of another to do an act performed by it, or as to the legal effect of such act, in the performance of which the body putting the question was not requested to act, and upon which it cannot be required to act. It cannot be that it contemplates that the senate or house of representatives may propound questions in regard to the power of the governor to remove officers from office, or as to the legal effect of an attempted removal, upon which it can in no event act. Nor does it appear to me that it contemplates that the council may require the opinion of the justices, as to the legal effect of the action of the governor in assuming to remove an officer from office without their consent. In doing so they would require the justices to determine the rule by which the governor should be controlled in his action in matters upon which he does not require their

advice or action, without his consent, and against his protest. The fact that the governor acted alone, precludes the idea that the council can be required to join in the same act. It may be said that they may be required to act with the governor in making a new appointment to the office. If they should be they must exercise the duties of their office according to their judgment. The attempted removal by the governor in no way affects their constitutional powers or duties. It is their duty to act in some way on all nominations made by the governor. If one should be made in place of Mr. Spaulding, and they desire his removal, they can easily accomplish it by confirming the nomination, and then the question of the power of the governor to remove alone will be of no consequence. If they do not desire his removal, and doubt the power of the governor to remove without their consent, they can decline to confirm, until Mr. Spaulding's right to the office can be judicially determined by the court. In the mean time the public interest will not suffer.

By the papers sent up, it appears that Mr. Spaulding denies the power of the governor to remove him without consent of the council, and claims the right to discharge the duties of the office. While thus exercising them under color of his commission, and with a claim of right to do so, he is an officer *de facto*, if not *de jure*, and by the well established rule of law, so far as the public are concerned, his acts will be as valid and binding in the one case as in the other. *Belfast* v. *Morrill*, 65 Maine, 580; *Sheehan's Case*, 122 Mass. 445.

There is another reason why the question is one upon which the justices are not required to give their opinions. It is a pure question of law whether, by the act of the governor, Mr. Spaulding was legally removed from the office of reporter of decisions. It involves his title to the office. It is a questiou upon which both the State and the officer have a right to be heard before a final judgment is pronounced. The proper process in which the question can be judicially tried and determined, is the writ of *quo warranto*, which may be sued out at any time by the attorney general; and in it each party would be properly before the court,

could be represented and heard, and a final judgment could be rendered.

If the justices should answer that the governor had the power to remove as claimed by him, and that Mr. Spaulding was legally removed, it would not be binding upon him as he has had, and can have, no opportunity to be heard in the matter; and it would violate every principle of law and justice to judicially determine the right of an officer to his office without giving him an opportunity to be heard; and if the answer is against the power of the governor, it would not be binding upon the State, for the attorney general might at once bring the writ of *quo warranto*, and the court would be obliged to hear the parties, and determine the question judicially. The court should not prejudge the case without a hearing in the proper process, unless the occasion is so solemn as to require it to avert some public injury.

If the justices are obliged to answer the question sent up, it is not perceived why they may not be obliged to answer any question put upon a statement of facts, by the council, involving the title of a sheriff or other elective officer to his office, on the ground that if there is a vacancy it would be the duty of the council to act with the governor in filling it, and thus introduce a new mode of trying the right of the officer to his office.

The case is very similar to that in which the court in Massachusetts declined to answer the questions propounded by the house of representatives in 1877. Opinion of the Justices, 122 Mass. 600.

I am, therefore, of opinion that the question ought not to be answered. But although my judgment leads me to this conclusion, my confidence in its correctness is somewhat shaken by the fact that so many of the other justices of the court are of a different opinion. In cases of doubt it may be the duty of the court to yield in favor of the prerogative of the body propounding the question. The justices of the court in Massachusetts have twice recognized this duty, and answered under protest. 5 Met. 597; 9 Cush. 604. Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the court by the proper process, and lest, in declining to

answer, I may omit the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted.

I concur in the result of the opinion of Chief Justice APPLETON and Justices BARROWS and PETERS; but not in all the propositions and arguments upon which the result is reached.

By the constitution of this State, article 9, § 6, "The tenure of all offices which are or shall not be otherwise provided for, shall be during the pleasure of the governor and council."

The office of reporter of decisions was created by act of 1820, chapter 54, section 9, which provided that the officer "shall be removable at the pleasure of the executive."

This provision is substantially the same in the Revised Statutes. R. S., c. 77, § 28. The word "executive" has two well-defined and recognized meanings; and as applied to our form of State government, one designates the governor as the chief executive, or head of the executive department; the other embraces both the governor and council when they are required to act together in the execution of any executive power; and while the constitution (article 5, part first, § 1,) declares that the supreme executive power of the State shall be vested in a governor, it uses (article 6, § 8) the words "executive power" as embracing both the governor and council.

Considering the question upon the act of 1820 alone, the question arises, In which sense did the legislature use the word, "executive?"

There is much in the early legislation of the State, and in the interpretation of the word "executive" and "executive authority" as they occur in the constitution of the United States, and the statutes of this State, by the several departments of our government, upon which an argument may be based in support of either construction; and after a careful consideration of the question in all the lights drawn from these sources, it appears to me to be very doubtful whether the legislature in said act used the word "executive" as designating the governor alone, or the governor and council. It was undoubtedly competent for the legislature to give the governor alone the power of removal; but if such intention is not clearly expressed in the statute, the tenure

of the office must be determined by the constitutional rule before quoted. But there is another statute which it appears to me conclusively settles the question. R. S., c. 2, § 84. This statute is derived from the act of 1824, chapter 257, which reads as follows: "That all civil officers appointed and commissioned by the governor and council, or who shall hereafter be commissioned by the governor and council, whose tenure of office is not otherwise provided for or limited by the constitution, shall hold and exercise their respective offices for the term of four years and no longer, unless re-appointed; *provided, however*, that this act shall not be so construed as to prevent the governor with the advice of council from removing such officer within said term of four years; and this act shall not extend to such ministers of the gospel as are or may be appointed and commissioned to solemnize marriages; or to such magistrates as are or may be commissioned by the governor, before whom certain judicial, executive and civil officers are required by law to take and subscribe the oaths or affirmations required by the constitution."

The provisions of that act have been brought down through the revisions of 1840 and 1857, to the Revised Statutes before cited, with no change of language indicating an intention of the legislature to change the meaning, except a change in the phraseology, designed to except from the operation of the statute, certain offices created by statute with a tenure for a fixed term other than four years.

Under the provisions of the act of 1824, if the tenure of the office of reporter of decisions was determined by the constitution, then the governor had no power to remove without the consent of the council. If not, and the reporter was removable at the pleasure of the governor under the act of 1820, then the tenure of the office was not "otherwise provided for or limited by the constitution," and became subject to the provisions of said act of 1824, and by it was fixed at four years, unless sooner removed by the governor with advice of the council.

The acts of 1820 and 1824 remained without change till the revision of 1840; and up to that time the act of 1820, so far as the tenure of the office was concerned, was modified and con-

trolled by the act of 1824. The provisions of both acts, having been incorporated into the revisions of 1840, 1857 and 1871, by a well settled rule of construction, they must receive the same construction as before the revisions. *Hughes* v. *Farrar*, 45 Maine, 72; *French* v. *Co. Com'rs*, 64 Maine, 583.

This has been the uniform construction put upon these statutory provisions by the executive power of the State from 1824 down to this year.

Mr. Greenleaf was appointed reporter in 1820, under the act of that year creating the office, and by the terms of his commission was to hold the office during the pleasure of the governor and council. After the passage of the act of 1824, and at the end of four years from his first appointment he was re-appointed, and by the terms of his commission, was to hold the office for four years, unless sooner removed by the governor and council as provided in that act. The same form of commission, so far as the tenure of the office is concerned, has been continued ever since, and every reporter, who has held the office for more then four years in succession has been re-appointed at the end of said term.

I think this construction of the statutes, so long sanctioned, is the correct one, and that the reporter of decisions must be appointed and commissioned for the term of four years, unless sooner removed by the governor with advice of council, and that the governor has no power to remove him without advice of the council.

I therefore answer the question propounded in the negative.

ARTEMAS LIBBEY.

I concur in the foregoing opinion prepared by Judge LIBBEY.

C. W. WALTON.

To the Honorable, The Council of Maine.

RULES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

AT PENOBSCOT, JUNE TERM, 1881.

Ordered, that the following RULES and ORDERS are ordained and established as the rules for conducting business in this Court.

I.

Admission of attorneys of the courts of another state.

Any person who shall have been admitted an attorney of the highest judicial court of any other state, in which he shall dwell, and who shall have been a member of the bar in such state, in good standing and in active practice, for at least three years, and afterwards shall become an inhabitant of this state, may be

admitted an attorney or counsellor of this court, at the discretion of the justices thereof, after due inquiry and information concerning his moral character and professional qualifications; such person having first conformed to the requisitions of the statute regulating the admission of attorneys.

II.

Time of the entry of actions.

No civil action shall be entered after the first day of the term, unless by consent of the adverse party, and by leave of the court; or unless the court shall allow the same upon proof that the entry was prevented by inevitable accident, or other sufficient causes; and in all cases the christian and surname of the parties, and of each trustee, shall be entered upon the docket. Writs are to be filed before entry of the action, and are to remain on file. And any action may be made a misentry at any time during the first term, upon proof that the action was settled before the sitting of the court.

III.

Entry of the attorney's name on the clerk's docket.

Change of attorney.

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the clerk's docket, and in default thereof a nonsuit may be entered; and after entry of the action or appeal, before the call of the new docket, the attorney of the defendant or respondent shall cause his name to be entered on the same docket as such attorney, and if it be not so entered, the defendant or respondent may be defaulted. And if either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party in writing. And until such notice of the change of an attorney, all notices given to or by the attorney first appointed, shall be considered in all respects as notice to or from his client, excepting only such cases in which

by law the notice is required to be given to the party personally. *Provided, however*, that nothing in this rule contained shall be construed to prevent either party in a suit from appearing for himself, in the manner provided by law; and in such case the party so appearing shall be subject to all and the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

IV.

Amendments in matters of form.

Amendments in matters of form will be allowed, as of course, on motion; but if the defect or want of form be shown as cause of demurrer, the court will impose terms on the party amending.

V.

Amendments in matters of substance.

Amendments in matters of substance may be made, in the discretion of the court, on payment of costs, or on such other terms as the court shall impose; but if applied for after joinder of an issue of fact or law, the court will in their discretion refuse the application or grant it upon special terms: and when either party amends, the other party shall be entitled also to amend, if his case requires it. But no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action.

VI.

Pleas and motions in abatement.

Pleas or motions in abatement, or to the jurisdiction in actions originally brought in this court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if consisting of matter of fact not apparent on the face of the record, shall be verified by affidavit.

VII.

Obtaining a rule to plead.

Either party may obtain a rule on the other to plead, reply, rejoin, &c. within a given time, to be prescribed by the court;

and if the party so required neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court, for good cause shown, shall enlarge the rule.

VIII.

Time of filing amendments or pleadings.

When an action shall be continued with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, &c., if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office by the middle of the vacation after the term when the order is made; and, in such case, the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, &c., as the case may be, by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require; unless the court, for good cause shown, shall allow further time for filing such amendment, or other pleadings.

IX.

Specifications of defence.

Parties pleading the general issue, may be required to file, in addition thereto, a brief specification of the nature and grounds of their defence; and shall, in all cases, be confined on the trial of the action to the grounds of defence therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial.

X.

Denial of signatures, and partnerships.

No party, or his attorney, shall be permitted to deny the signature to any paper, or call for proof of its execution, which is declared on, or filed in set-off, or mentioned in any specification

filed by the plaintiff, or in defence, unless the party, or his attorney, shall first make affidavit that he has reason to believe, and does believe, that such signature or execution is not genuine, or that the paper purporting to be so signed or executed has been mutilated or altered since it was executed; or that the production of any subscribing witness thereto is material and necessary for the purposes of justice, and shall have given reasonable notice to the other party of his denial, or intended denial, of such signature or execution. And in all cases where a partnership is alleged in the writ or declaration, or in the specification of defence, and the names of the members thereof are set forth therein, such partnership shall not be denied, unless upon affidavit of the party, or his attorney, that he has reason to believe, and does believe, that such partnership does not exist as alleged.

XI.

Specifications by plaintiff.

In actions of assumpsit on the common counts, a specification of the matters to be proved in support thereof shall be filed, on motion of the defendant, within such time as the court shall order. And in actions upon an account annexed, one copy of the specifications shall be furnished by the party presenting the same, for the court, and one other copy for the jury.

XII.

Trustee disclosures.

In cases of foreign attachment, when any trustee shall present himself for examination, he or his attorney shall give written notice thereof to the attorney for the plaintiff, or in his absence cause the same to be noted on the docket; and, upon motion, the court may fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the names of the counsel for the plaintiff, and such trustee, with the date of the service of the writ upon him, and the number of the action upon the docket.

XIII.

Continuances.

No costs will be allowed, unless for cause shown, to either party for that term when an action is continued by consent of parties.

XIV.

Time for making motions for continuances.

All motions for the continuance of any civil action shall be made at the opening of the court on the morning of the second day of the term unless the cause shall come in course to be disposed of in the order of the docket on the first day. *Provided, however*, where the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterwards as it can be made, according to the course of the court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

XV.

Affidavits to support a motion for a continuance.

No motion for a continuance, grounded on the want of material testimony, will be sustained, unless supported by an affidavit, which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation; and the endeavors and means which have been used to procure his attendance or deposition, to the end that the court may judge whether due diligence has been used for that purpose.

And no counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. And no action shall

be continued on such motion if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit, and will agree that the same shall be received and considered as evidence on the trial, in like manner as if the witness were present and had testified thereto; and such agreement shall be made in writing at the foot of the affidavit, and signed by the party, or his counsel or attorney, if required. And the same rule shall apply, *mutatis mutandis*, when the motion is grounded on the want of any material document, paper or other evidence that might be used on the trial.

XVI.

Evidence to support a motion grounded on facts.

The court will not hear any motion grounded on facts, unless the facts are verified by affidavit or are apparent from the record, or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys, and the same rule will be applied as to all facts relied on, in opposing any motion.

XVII.

Motions for new trials.

Motions for new trials must be made in writing, and assign the reasons thereof, and must be filed within two days after the verdict, unless the court shall for good cause by special order enlarge the time.

When a motion is made to have a verdict set aside as being against law or evidence, the party making the motion shall prepare, or cause to be prepared, a report of the whole evidence in the case, and present the same to the presiding judge for his signature within such time as he shall by special order direct; and if no such special order is made, it must be done within ten days after the adjournment of the court; and if not so done, the judge shall not be required to sign it; and the motion may be regarded as withdrawn, and the clerk be directed to enter judgment on the verdict.

And when a motion for a new trial is made for any other cause, the evidence in support thereof shall be taken within such time as the court shall order, or the motion will be regarded as withdrawn.

XVIII.

Exceptions.

Exceptions to the admission or exclusion of evidence must be taken, and a note thereof made by the presiding judge, at the time the ruling admitting or excluding the evidence is made, or all objections to it will be regarded as waived.

Exceptions to any opinion, direction or omission, of the presiding judge, in his charge to the jury, must be stated before the jury retire, or all objections thereto will be regarded as waived.

XIX.

Motions in arrest of judgment in criminal cases.

Motions in arrest of judgment, in criminal cases, shall be filed and presented to the court for adjudication during the term in which the accused has been found guilty, whether exceptions be or be not filed and allowed; and if not so presented, all right to file the same shall be considered as waived.

XX.

Time of filing motions, presenting petitions, &c.

All motions, petitions, reports of referees, applications for commissions to take depositions, surveys, or for views by the jury in cases touching the realty, and all like applications shall be made and presented at the opening of the court on the morning of the second day of the term: — *provided*, that where the cause or ground of such motion or other application shall first exist or become known to the party after the time in this rule appointed for making the same, it may be made at any subsequent time. But motions or applications, such as from their nature require no notice previous to granting the same, may be made at the opening of the court on the morning of each day.

XXI.

Objections to reports.

Objections to any report offered to the court for acceptance, shall be made in writing and filed with the clerk and shall set forth specifically the grounds of the objections, and these only shall be considered by the court.

XXII.

Notice previous to motions.

When any motion is made in relation to any civil action at the times specifically assigned for such motions by the rules of this court, no previous notice need be given to the adverse party. But the court, if notice have not been given, will allow time to oppose the motion if the case shall require it. Where, however, for any special cause, such motion may, by the proviso of any rule, be made at a subsequent time, it will not be heard unless seasonable notice thereof shall have been given to the adverse party.

XXIII.

Depositions taken in term time.

Depositions may be taken for the causes and in the manner by law prescribed, in term time, as well as in vacation; *provided*, they be taken in the town in which the court is holden, and at an hour when the court is not actually in session. But neither party shall be required during term time to attend the taking of a deposition, at any other time than is above provided, unless the court, upon good cause shown, shall specially order the deposition to be taken.

XXIV.

Commissions to take depositions.

The court will grant commissions to take the depositions of witnesses and will appoint the commissioners; and in vacation a commission may be issued upon application to either of the judges of the court, in the same manner as may be granted in term

time; or either party, upon application to the clerk, may obtain a like commission; but, in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be directed to any judge of any court of record. And in each case the evidence, by the testimony of witnesses, shall be taken upon interrogatories to be filed in the clerk's office by the party applying for the commission, and upon such cross interrogatories as shall be filed by the adverse party, a copy of the whole of which interrogatories shall be annexed to the deposition. And no such commission shall issue but upon interrogatories to be filed as aforesaid by the party applying and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within fourteen days from the service of such notice. And no deposition taken out of the State without such commission shall be admitted in evidence unless the same were taken by some justice of the peace, notary public, or other officer legally empowered to take depositions or affidavits in the State or county in which the deposition is taken, or unless the adverse party was present, or was duly and seasonably notified, but unreasonably neglected to attend.

XXV.

Filing depositions.

All depositions shall be opened and filed with the clerk at the term for which they are taken; and if the action in which they are to be used shall be continued, such depositions shall remain on file and be open to all objections when offered on the trial as at the term at which they were opened; and if not so left on the files they shall not be used by the party who originally produced them; but the party producing a deposition may, if he see fit, withdraw it during the same term in which it is originally filed, it which case it shall not be used by either party.

XXVI.

Use of copies of deeds.

In all actions touching the realty, office copies of deeds pertinent to the issue, from the registry of deeds, may be read in

evidence without proof of their execution, where the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee, or his heirs.

XXVII.

Notice to produce written evidence.

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless *previous notice* to produce it on trial shall have been given to such adverse party or his attorney, nor will counsel be allowed to comment upon a refusal to produce such evidence, without first proving such notice.

XXVIII.

Trial list and order of trials.

Immediately after the call of the continued docket, a trial list of all actions to be tried by the jury shall be made, and a time assigned for the trial of each action upon the list, and all other actions shall be tried or otherwise disposed of in the order in which they stand upon the docket. Any action shall be considered in order for trial at the return term, when the party desiring it shall have given written notice thereof to the adverse party ten days before the sitting of the court.

XXIX.

Copies for the law court.

No cause standing for argument on the law docket will be heard until the parties shall have furnished each of the judges with a copy or abstract of the case fairly and legibly written or printed, containing the substance of all the material pleadings, facts and documents on which the parties rely; and each of the parties, or their respective counsel, before or at the commencement of the argument of each case, shall furnish to each justice of the court present, and also to the reporter, a written or printed statement of all the points of law to be made in the argument, noting under each point the authorities to be cited to sustain it.

Should both parties neglect to comply with this rule, the case, when it comes in the order of the docket to a hearing, will be continued or judgment will be immediately entered, at the discretion of the court. Should one party comply and the other neglect to do so, the party complying may be heard in argument and the case be decided without hearing the other party.

Statements of points may be omitted by counsel who present an argument in writing and confine themselves to it, except in strict reply. One copy only of the case will be required in cases submitted upon written arguments or briefs not read to the court.

In all cases of writs of error or *certiorari*, issues of law on pleadings, facts agreed and stated by the parties, and trustee processes, it shall be the duty of the plaintiff or complainant to furnish the papers or abstracts for the court; and in all other cases the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued; but this shall not prevent the adverse party from furnishing the papers if neglected by him whose duty it is to furnish them; and where the party whose duty it is shall neglect to furnish the papers, as by the rules of this court is required, he shall not have any costs that term and shall further be liable to be non-suited, defaulted, or have judgment entered against him as upon a *nol pros.* or discontinuance, or such other judgment as the case may require.

XXX.

Payment of clerk's fees.

No cause shall be opened for trial by the jury until the fees due to the clerk shall be paid when they are by law payable; and if the clerk shall fail to demand any such fees when payable aforesaid, he shall be chargeable with all those for which he is by law required to account to others in like manner as if he had actually received the same.

XXXI.

Costs in actions under reference.

When an action is continued by the court for advisement, or under reference by a rule of court, costs shall be allowed to the

party prevailing for only one day's attendance and his travel at every intermediate term.

XXXII.

Taxation of costs.

Bills of costs shall be taxed by the clerk upon a bill to be made out by the party entitled to them, if he shall present such bill, and otherwise upon a view of the proceedings and files appearing in the clerk's office; and no costs shall be taxed without notice to the adverse party to be present, provided he shall have given notice to the clerk in writing, or by causing it to be entered on the clerk's docket, of his desire to be present at the taxation thereof.

XXXIII.

Day of rendition of judgment.

The clerk shall make a memorandum on his docket of the day on which any judgment is awarded; and if no special award of judgment is made it shall be entered as of the last day of the term.

XXXIV.

Custody of papers by the clerk.

The clerk shall be answerable for all records and papers filed in court, or in his office; and they shall not be lent by him, or taken from his custody, unless by special order of court; but the parties may at all times have copies; provided only that depositions may be withdrawn by the party producing them at the same term at which they are opened; and whilst remaining on the files they shall be open to the inspection of either party at all reasonable hours.

XXXV.

Filing papers and recording judgments.

In order to enable the clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party in every suit forthwith to file with the clerk

all papers and documents necessary to enable him to make up and enter the judgment and to complete the record of the case; and if the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded unless upon a petition to the court at a subsequent term, and after notice to the adverse party, the court shall order it to be recorded. And no execution shall issue until the papers are filed as aforesaid. And when a judgment shall be recorded upon such petition the clerk shall enter the same, together with the order of court for recording it, among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found, and the judgment when so recorded shall be, and be considered, in all respects as a judgment of the term in which it was originally awarded. And the party delinquent in such case shall pay to the clerk the costs of recording the judgment anew, and also the costs on the petition and also the costs of the adverse party, if he shall attend to answer thereto.

XXXVI.

Writs of venire facias.

Every *venire facias* shall be made returnable into the clerk's office by ten of the clock in the forenoon of the *first day of the term*, and the jurors shall be required to attend at that time; excepting only when, in case of a deficiency of jurors, the court shall order an additional *venire facias* in term time, in which case the same shall be made returnable forthwith, or at such time as the court shall order.

XXXVII.

Capias upon indictments and scire facias upon recognizances.

On indictments found by the grand jury, the clerk shall, *ex officio*, issue a capias without delay; and when default is made by any party bound by recognizance in any criminal proceeding,

the clerk shall in like manner issue a *scire facias* thereon, returnable to the next term, unless the court shall make a special order to the contrary, and when not otherwise provided by statute.

XXXVIII.

Decision of causes where there is disagreement.

In case of a disagreement of the members of the court in a cause argued orally or otherwise, the papers in the case shall be submitted to the members of the court not present at the term and the decision shall be made by all the members of the court, unless the counsel, or either of them, at the term when the case is entered, shall present their dissent thereto upon the docket.

XXXIX.

Examination of witnesses.

But one counsel on each side will be permitted to examine a witness, except by leave of court.

XL.

Re-examination of witnesses.

A witness cannot be re-examined by the party calling him, after his cross-examination, unless by leave of court, except so far as may be necessary to explain his answers on his cross-examination, and except as to new matter elicited by the cross-examination, touching which he had not been examined in chief.

XLI.

Limitation of time for argument.

In all trials of causes, whether by jury or by the court, the closing arguments of the counsel of the respective parties shall be limited to one hour on each side, unless before the commencement of the arguments, for good cause, the court shall allow further time, which shall in all cases be fixed and definite.

XLII.

Attorneys not to be bail or witnesses.

No attorney shall give bail or recognize as principal or surety in any criminal matter in which he is employed as counsel or attorney, nor shall he become bail in any civil suit.

No attorney or counsellor shall be permitted to take any part in the conduct of a cause before a jury in which he is a witness for his client, except by special leave of the court.

XLIII.

Assessment of damages by clerk.

When the defendant is defaulted by agreement to be heard in damages by the clerk or an assessor instead of the presiding judge or a jury, the clerk or assessor may, on due notice, hear the parties in vacation and assess the damages; and judgment may be entered on such assessment as of the term of the default without the right of a party aggrieved to have the assessment returned to the next term for acceptance or rejection, unless such right is reserved.

Schedule of Fees.

Writ of attachment (including power of attorney, declaration, attorney's fee and blank),	3.54
Libel, petition or complaint,	3.50
Writ of replevin and bond,	4.58

Service as taxed by the officer, subject to correction.

Entry, 60 cents in the county courts. $1 in the law courts.

Travel, 33 cents for every 10 miles to the court and the same returning (observing the rule prescribed in R. S., c. 116, § 14.)

Attendance, 33 cents for each day as noted upon the docket, not exceeding 10 days (but actions under reference, under advisement in the law court, where a party has deceased and his administrator has not come in, and where the defendant is out of the State and the case is waiting service or notice, only one day's attendance shall be taxed.)

Continuance at each term for the plaintiff or appellant, except in counties where clerks are salaried officers, 5 cents.

Subpœnas, 10 cents each.

Witness fees as per certificate and depositions as taxed by the magistrate (subject to correction on hearing.)

Surveyors' and auditors' fees as charged by them (subject to correction.)

Costs of reference as reported by the referee.

Advertising notices, the amount charged by the publisher, (subject to objection and correction.)

Commission to an auditor or surveyor, 50 cents.

Writ of seizin of dower, $1, and the fees of the officer and commissioners as taxed thereon (subject to correction on objection.)

Warrant to make partition, $1, and the fees of the commissioners as taxed thereon (subject to correction if objected to.)

Copy of judgment in actions of debt on judgment, and in *scire facias* against a trustee, 50 cents.

Copy of writ, libel or other process, with order of notice thereon, and copy of libel with summons annexed, $1 each.

Order of notice annexed to an original libel or other process, returnable in another county, 50 cents.

Copy of order of notice, with abstract of the writ or other process, 50 cents.

When the register of probate, or register of deeds, by request brings his books or papers into court, to be used on the trial of a cause instead of copies, the usual witness fee may be taxed for him.

Official copies, 12 cents per page of 224 words.

Rule of reference, 20 cents.

Acceptance, 30 cents.

Clerk for making up judgment (casting damages and taxing costs) 25 cents, and for a hearing in damages or costs such reasonable compensation as a justice of the court may allow.

Filing depositions, or other papers, 5 cents each.

When a trustee is entitled to costs, they may be taxed as for any other party.

In actions transferred to the law court, the plaintiff, if he prevail, may tax one attorney's fee in addition to that embraced in his writ. If the defendant prevail, he may tax one attorney's fee for the issue in fact, and one for the issue in law.

The defendant, when he recovers cost, may tax the same fees and charges as mentioned in the plaintiff's schedule above, so far as they are appropriate.

In cases brought up by appeal, the prevailing party will be allowed the legal costs below, as certified by the magistrates, subject to revision if objected to.

Process to enforce a lien on personal property,	1.00
Writ of execution,	15 cents.
Execution for possession,	25 cents.
Writ of restitution,	40 cents.

Printed copies of reports, exceptions, &c., furnished by the clerks to the law judges, may be taxed in the bill of cost at the rates paid to the printer, with reasonable compensation to the clerks for preparing the manuscripts, correcting proof, &c.

RULES

FOR THE

REGULATION OF PRACTICE

IN

CHANCERY.

I.

The supreme judicial court, held by one of the judges, shall be deemed always open in each county for equity proceedings.

II.

There shall be rule-days on the first Tuesday of each month, in all the counties, for the return of process and the entry of all proceedings and orders that may be taken at the rules.

III.

The clerk's office shall be open, and the clerk shall be in attendance, on every rule-day, to receive, enter and dispose of all motions, rules, orders and other proceedings in equity which do not require the allowance or order of a judge of the court, when the same shall be applied for in pursuance of these rules.

IV.

Any judge, in vacation or in term, at chambers, or on rule-days at the clerk's office, in any county, may make and direct any interlocutory orders, rules and other proceedings preparatory to hearing the causes on their merits, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

V.

All motions, rules, orders and other proceedings made and directed at chambers, or on rule-days at the clerk's office, shall be entered by the clerk upon the docket as of the day when they are made and directed.

Any order or decree made at a hearing out of the county where the cause is pending, shall be transmitted at once and entered upon the docket of said county.

VI.

The bill shall contain a clear and explicit statement of the plaintiff's case, avoiding prolixity and repetition.

The introductory part shall contain the names, places of residence and proper description of all parties—plaintiffs and defendants—by and against whom the bill is brought; and the form shall be in substance as follows:

"———, *ss:* *To the Supreme Judicial Court:*

A. B. of ———, etc., complains against C. D. of ———, etc., and E. F. of ———, etc., and says," etc.

VII.

The common confederacy clause—averring a confederacy between the defendants to injure or defraud the plaintiff; the charging part—setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; the jurisdiction clause—that the acts complained of are contrary to equity and that the plaintiff is without remedy at

law; and the prayer for an answer and for answers to interrogatories, except where the plaintiff relies on the discovery of the defendant, may all be omitted. The prayer shall ask the special relief to which the plaintiff supposes himself entitled and for general relief; and if an injunction, or other special order pending the suit, is required, it shall be specially asked for.

A general interrogatory only need be introduced and it shall be sufficient to require a full answer to all matters alleged; but the plaintiff, when his case requires it, may propose specific interrogatories, and may allege by way of charge any particular fact for the purpose of putting it in issue.

VIII.

The prayer for process of subpœna shall contain the names of all the defendants named in the introductory part of the bill; and if any of them are known to be infants, or under other legal disability, shall state the fact, so that the proper order may be taken thereon. If an injunction, or other special order, pending the suit, is asked for in the prayer for relief, it need not be repeated in the prayer for process.

IX.

Bills of discovery and those praying for an injunction must be verified by oath, in the form herein prescribed for the oath to answers.

X.

Every bill shall have the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

XI.

The plaintiff shall file his bill before or at the time of taking out the subpœna; and no injunction or other proceeding shall be allowed until the bill is filed, except for good cause shown.

XII.

When the bill is not inserted in an original writ, the original process to require the appearance of defendants shall be a subpœna under the seal of the court, bearing the test of some justice thereof not a party nor interested and signed by the clerk; and it shall also contain an order on the defendants to file in writing with the clerk, within the number of days therein designated, his demurrer, plea or answer. The subpœna shall be in the form following:

STATE OF MAINE.

——, *ss.* To C. D. of (addition)

GREETING:

[L. S.] We command you that you appear before our Supreme Judicial Court, next to be holden at within and for the County of on the day of next, then and there to answer to a bill of complaint exhibited against you by E. F. of (addition), and to do and receive what our said court shall then and there consider in that behalf.

And we further command yon, and each of you, to file with the clerk of said court, within days after the service hereof, your demurrer, plea, or answer to said bill.

Hereof fail not, under the pains and penalties of the law in that behalf provided.

Witness, J. A., Justice of our said Court, the day of in the year of our Lord

Clerk.

The return day and the service shall be in accordance with the statute and with the order of court if such order has been given thereon. Service may be made by any officer qualified to serve other writs of summons. If a party shall not be found, a copy thereof may be left at his usual place of abode, and the truth of the case being returned by the officer, if it shall be made to appear to the court that the party has actual notice of the suit, no other service shall be required; otherwise such notice shall be given as the court shall order.

XIII.

Whenever it shall appear that a defendant resides out of the State, the clerk, on application of the plaintiff, at any time after the filing of the bill, shall enter an order requiring such defend-

ant to appear and answer the bill, if in any part of the United States east of the Mississippi River, or in the States of Louisiana, Missouri, Iowa or Minnesota, within one month; if within any other of the United States or New Brunswick, Nova Scotia or Canada, within two months; if elsewhere in the territory of the United States, or in Great Britan, Ireland or France, within three months; and if in other foreign parts, within six months, from the rule-day next succeeding the date of such order. The order shall state the title of the suit, and shall set forth briefly the substance of the plaintiff's bill. A copy of the order shall be served on such defendant personally, or published three times, in different weeks, within thirty days after the date of the order, in some newspaper published in the county where the suit is pending; and proof of such service shall be made by affidavit, or such other manner as the court may order.

XIV.

The reasonable expense of printing bills, answers, pleas and demurrers, when incurred, may, at the discretion of the court, be taxed in the bill of costs.

XV.

The defendant shall be required to answer fully, directly and particularly, to every material allegation or statement of the bill, as if he had been thereto particularly interrogated.

Answers shall be entitled, with the county in the margin, the style of the court, and the title of the cause, and shall be in substance as follows:

"——, ss. IN THE SUPREME JUDICIAL COURT.

A. B. v. C. D. ET AL.

The answer of C. D., who says," etc.

The clause in answers reserving exceptions, and protestations in pleas, answers and demurrers, and the common concluding clause in answers denying combination, and the general traverse, may be omitted.

XVI.

An answer shall be upon oath or not, acording to the requirement of the statute. The oath shall be in substance that the

defendant has read the answer or heard it read and knows the contents of it, and that the same is true of his own knowledge, except the matters stated to be on his information and belief; and that as to these matters he belives them to be true. The certificate of the magistrate must state the oath adminstered. An affirmation may take the place of the oath in cases authorized by the statute.

XVII.

When a discovery is required, or an answer is necessary to the entering of a proper decree, a writ of attachment may issue by special order of the court, on which the defendant will be bailable on a bond with sufficient sureties given to the plaintiff in such sum as the court may order, which is to be returned with the writ. In case of neglect to enter his appearance according to the statute, the bond shall be forfeited, and may be enforced by petition and notice thereon, and on a summary hearing damages may be assessed and an execution issue therefor; and a new writ of attachment may issue on a special order therefor, on which he will not be bailable.

XVIII.

Each defendant shall make his appearance on the docket within the time limited in the statute, or upon motion, as therein prescribed, the bill shall be taken for confessed, and thereupon the cause shall be proceeded in *ex parte* and the matter of the bill may be decreed by the court, if the same can be decreed without an answer and is proper to be decreed, unless the time for making the defence shall be enlarged as provided in the statute; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to a process of attachment against such defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer or otherwise complying with such order as the court may direct, as to pleading to or fully answering the bill within a period to be fixed by the court, or undertaking to speed the cause.

XIX.

Defence shall be made by answer, plea or demurrer, within the thirty days limited in the statute, except as the court may enlarge the time.

XX.

A demurrer or plea shall be entitled like an answer. A demurrer shall be in substance—"The defendant says the plaintiff is not entitled upon said bill to the relief [or discovery] prayed for, because," etc.

XXI.

The defendant may demur to part of the bill, plead to part, and answer to the residue. But in any case in which the bill specifically charges fraud or combination, a plea to such part must be accompanied with an answer supporting the plea and explicitly denying the fraud or combination and the facts on which the charge is founded.

XXII.

No demurrer or plea shall be filed to any bill unless upon certificate of counsel, that in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay, and, if a plea, that it is true in point of fact.

XXIII.

On motion of either party, the cause may be set down to be heard on bill and demurrer at any time after the demurrer is filed.

XXIV.

The plaintiff may set down a plea to be argued, or take issue on the plea, within fifteen days from the time when the same is filed; and if he shall fail to do so, a decree dismissing the bill with costs may be entered on motion, unless good cause appear to the contrary.

XXV.

If a plea or demurrer be overruled, no other plea or demurrer shall be received, but the defendant, whether exceptions are filed to the overruling of the plea or demurrer or not, shall proceed to answer the plaintiff's bill; and if, without exceptions taken, he shall fail to do so within the time ordered, the plaintiff may enter an order that the same, or so much thereof as is covered by the plea or demurrer, be taken for confessed, and the matter thereof may be decreed accordingly, unless good cause appear to the contrary.

If exceptions to the overruling of the plea or demurrer are taken, and the defendant fails to answer within the time ordered, the same proceedings may be had upon the overruling of the exceptions by the law court.

XXVI.

Upon a plea or demurrer being overruled or adjudged good, the party prevailing upon the question shall recover full costs from the time of filing such plea or demurrer, and execution may issue therefor, unless the court shall otherwise specially order.

XXVII.

The defendant, instead of filing a formal plea or demurrer, may insist on any special matter in his answer, and have the same benefit therefrom as if he had pleaded the same or demurred to the bill.

XXVIII.

The defendant to a cross bill shall in no case be compelled to answer thereto, before the defendant to the original bill shall have answered such original bill.

XXIX.

The general replication shall be entitled like an answer, and shall be in substance—"The plaintiff says his bill is true and the defendant's answer, as set forth, is not true; and this he is ready to prove." The replication shall be filed within the fifteen

days mentioned in the statute, except as the court may enlarge the time. No special replication shall be filed, but by leave of the court.

XXX.

The bill shall contain so much as is material, and no more, of deeds, documents, contracts or other written instruments, but no unnecessary recitals of them, in terms, nor any impertinent or scandalous matter. Exceptions to the bill for impertinence or scandal may be referred to a master. If so found by him, the matter shall be expunged at the expense of the plaintiff, and the plaintiff shall pay to the defendant all costs in the suit up to that time, unless otherwise ordered. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to the cost caused by the reference. But either party dissatisfied with the master's decision, may within seven days from the filing of the report set down the matter to be argued.

XXXI.

No order shall be made for referring any bill for scandal or impertinence unless exceptions are taken within twenty days after service, in writing, signed by counsel, describing the particular passages so considered. And such order when obtained shall be considered abandoned, unless the party obtaining it shall, without any unnecessary delay, procure the master to examine and report thereon, on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

XXXII.

If the plaintiff shall except to an answer as insufficient, he shall file his exceptions, and forthwith give notice thereof to the defendant or his solicitor; and if within fifteen days the defendant shall put in a sufficient answer, the same shall be received without costs; but if the defendant insist on the sufficiency of his answer, he shall within fifteen days, file a statement to that effect, and give notice thereof to the plaintiff, and thereupon the

exceptions shall be referred to a master; and either party, dissatisfied with the master's decision, may, within seven days after the filing of his report, set down the exceptions to be argued. If the exceptions shall be overruled, or the answer adjudged insufficient, the prevailing party shall recover costs of the reference to the master, and also of the hearing before the court. If the answer shall be adjudged insufficient, a new answer shall be filed within fifteen days.

XXXIII.

Upon a second answer being adjudged insufficient, costs shall be doubled by the court; and the defendant may be examined upon interrogatories, and committed until he shall answer them.

XXXIV.

The bill may be amended or re-formed at the discretion of the court, with or without terms, at any time before final decree is entered in the cause. But if the defendant's appearance has been entered, the plaintiff shall, at his own expense, furnish the defendant with a certified copy of the amendment filed; and the defendant may be required to answer the amended bill.

XXXV.

An answer may be amended as of course, in any matter of mere form, such as the correction of a date or reference to a document, at any time before replication is filed, or the cause is set down for hearing on bill and answer; the defendant furnishing the plaintiff at once with a certified copy of the amendment made.

After replication, or such setting down for hearing, it shall not be amended in any material matter, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of court, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit.

XXXVI.

The court may in its discretion allow the parties to amend their pleadings, and order or permit pleadings to be filed, or any proceeding to be had, at other times than are prescribed in these rules; and may in all cases impose just and reasonable terms upon the parties.

XXXVII.

Notices required by these rules will be served in writing, and signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases to be properly directed to him and placed in the post office and postage paid. Copies are to be preserved and produced, and the original will in all cases be regarded as received when the counsel giving the notice produces a memorandum, made at the time on the copy retained, of its having been delivered or sent by mail on a day certain; unless the reception is positively, and not for a want of recollection, denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case no one will be good unless given to him. And in case of a change of such counsel, notice will be given thereof, and the change noted on the clerk's docket.

XXXVIII.

When the death of any party shall be suggested in writing and entered upon the docket, the clerk, upon application, may issue process to bring into court the representative of such deceased party.

XXXIX.

When the circumstances of the case are such as to require a bill of revivor, or supplemental bill, or bill in the nature of either or both, or the joinder of additional or different parties, the requisite allegations may be made by way of amendment to the original bill; and, after service on any new parties as in the case of an original bill, and service of copies of the amendments

on all the defendants affected thereby, shall entitle the plaintiff to proceed as on an original bill.

XL.

Under the statute, in sixty days from issue joined, unless the time is enlarged for cause shown, the case shall be considered as ready for hearing.

XLI.

All facts well alleged in a bill, other than for a discovery only, which are not denied or put in issue by the answer, shall be deemed to be admitted; but nothing in this rule shall prevent the plaintiff from excepting to the answer for insufficiency, when the defendant's oath is not waived.

XLII.

Testimony by depositions shall be taken in the manner required by statute and by the rules of court in actions at law.

XLIII.

When any matter shall be referred to a master, he shall, upon the application of either party, assign a time and place for a hearing, which shall be not less than ten days thereafter; and the party obtaining the reference shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte;* and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the reference shall lose the benefit of the same, at the election of the adverse party.

XLIV.

The compensation to be allowed to masters for their services shall be fixed by the court in its discretion in each case, having

regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when it is allowed, he shall be entitled to an attachment for the amount against the party ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

XLV.

When exceptions shall be taken to the report of a master, they shall be filed with the clerk at once, and notice thereof shall forthwith be given to the adverse party; and the exceptions shall then be set down for argument. In every case, the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

XLVI.

Whenever it shall be necessary or proper to have any fact tried and determined by a jury, the court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the court shall order; and the issue thus framed and joined shall be submitted to a jury, and be tried upon the like evidence as in a suit at law, together with such part of the answers, depositions, and other proceedings in the cause, as the court shall direct.

XLVII.

All documentary evidence not requiring proof by the testimony of witnesses shall be filed with the clerk before the publication of testimony and notice thereof given. Deeds executed in due form and recorded, or copies of them, and other instruments in writing, may be so filed and used without proof of execution, unless the due execution be denied, or fraud in relation thereto be alleged, of which notice shall be given within ten days after notice that they are filed.

Copies of any votes, entries or papers found on the books of any corporation and attested by its clerk, may be received as

testimony, instead of the books, unless it shall appear that the opposite counsel has been refused access to such books at reasonable hours.

XLVIII.

When books, papers, or instruments in writing, are in the possession of the opposite party, counsel may file a rule with the clerk, stating the fact, the ground on which the claim is made for their production or inspection, and the necessity therefor, and naming also the time and place, and give notice thereof. Within ten days after notice the opposing counsel will in writing express his assent, or his dissent, with the reasons therefor; and may propose any modification of the time and place, and give notice thereof. The moving counsel within ten days shall in writing express his assent or dissent to the modifications or objections proposed, and may assign his reasons therefor, and give notice. And may, when necessary, submit a copy of the rule and these papers to a member of the court, whose decision and directions will be binding on the parties.

Extracts from any books and papers thus produced, verified by signature of counsel, may be filed as documentary evidence by each party and used as testimony instead of the books and papers. In like manner and with like proceedings a rule may be filed for the production or inspection of the books of any corporation, when copies are refused, but in such case a copy of the rule shall be delivered to the clerk or president of the corporation and a reply thereto may be returned within ten days and become a part of the proceedings.

XLIX.

When an opinion is delivered, or a decision made, by which a party becomes entitled to a decree in his favor, it will be the duty of his counsel to draw the same in the proper form to secure his rights in strict conformity to such opinion and decision, and file the same with the clerk, to be by him recorded, and give notice thereof. If the opposing counsel considers the proposed decree unauthorized, he may file "corrections of the decree," and give notice thereof. The counsel drawing it will then submit to

such corrections, or cause a copy of the proposed decree and corrections to be submitted to a member of the court for decision.

L.

In drawing up decrees and orders, neither the bill nor answer nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, need be recited or stated in the decree or order; but the decree or order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be,) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz:" (Here insert the decree or order.)

LI.

When a party is entitled to costs, his counsel will tax each item of the bill in a fair handwriting, referring to the documents on file or inclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days after notice, make his objections to the same in writing and give notice. A reply may be made in writing and the bill filed with these inclosed papers for the decision of the clerk, who will make his decision in writing, from which either party may appeal and submit the papers to a member of the court for decision. The clerk may regard costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill that he does not find cause to object, or when no objections are made within two days after notice of taxation.

LII.

Copies required by these rules may be verified by signature of counsel, for the accuracy of which they will be held responsible. When found to be inaccurate or badly written, they must be withdrawn, and others correctly made furnished without additional charge.

LIII.

The attorney making the application will be personally responsible, for the payment of fees to commissioners, examiners,

stenographers, or magistrates taking testimony; to the clerk for his fees; and for costs imposed as terms of amendment or relief. And when it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has, after request, neglected to pay, he will, unless good cause is shown for such neglect, be suspended from practice in chancery cases, until payment is made. And when any attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner, until the further order of court.

LIV.

When an application for an injunction, or for a decision by virtue of these rules, is made to one member of the court, and the same has been acted upon by him, it shall not be presented to any other member.

LV.

When a bill is filed out of term time, it will be entered on the docket of the last term. The day of issuing the subpœna and of its return will also be entered. The day of filing each paper will be noted on the back of it, and also on the docket. The day of the respondent's appearance will be noted on the docket, and also all orders or decisions by a member of the court, and the day of their reception. Papers filed can be taken off only by special order, or when the rules permit; and in all cases the clerk will take a receipt for them; but this will not prohibit the use of them in open court, or in the presence of the clerk, who will be held responsible for them.

LVI.

Writs of injunction, preliminary, pending the suit, or perpetual, may be granted according to the principles of equity procedure and as authorized by the statute; to be in the form annexed with such changes as the case may demand.

LVII.

Applications to the discretion of the court for a re-hearing may be made on petition, verified as required by rule XVI, and set-

ting forth particularly the facts, and the name of each witness, and the testimony expected from him. The petitioner can examine only witnesses named, except to rebut the opposing testimony. The petition, having been presented to a member of the court, and by him allowed, may be filed, and the same proceedings may be had thereon as on an original bill. If the decree has not been executed, such member of the court may suspend its execution until the further order of court, by a writ of *supersedeas* or order, on the petitioner's filing a bond, with sufficient sureties, in such sum and to be approved in such manner as he may direct, conditioned to perform the original decree, in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

LVIII.

All former rules in equity are hereby repealed.

FEE BILL.

The following fees may be taxed and allowed to the party entitled to costs, when no fees are provided by statute for the like service:

ATTORNEYS.

Drawing and filing bill,	$5 00
" " answer,	5 00
" interrogatories, each set,	1 00
But all in one case not to exceed $10.00	
" and filing decree when not requiring material alteration,	$1 00
" and filing each rule,	25
Each notice given, not to be taxed also as copy,	25

Copies at the rate of ten cents for each page of 100 words.

The postage paid on notices and papers transmitted.

All papers transmitted to a member of the court to be free from charge to him.

For an amendment of the bill or answer, when such amendment is occasioned by an amendment made by the opposing party, half the fee for drawing a bill or answer.

CLERK.

For filing each paper required to be filed on the back, and noting the same on the docket, and carrying it forward each term, $ 05

COMMISSIONER, EXAMINER OR MAGISTRATE.

For each jurat to bill, answer or other paper requiring a like certificate, 20

For each deposition not exceeding one page of 224 words, 1 00

and for each additional page, 25

Upon exceptions to a bill or answer, travel and attendance shall be taxed as follows: For every ten miles travel of a party to attend a hearing before one of the justices, or before a master, thirty-three cents; but no more than forty miles travel shall be taxed in any case, unless the party shall make an affidavit that he actually travelled a greater distance for the purpose of attending such hearing; for each day's attendance at a hearing before a justice or before a master, two dollars shall be taxed.

FORMS ANNEXED.

Writ of attachment.

[SEAL.] *State of Maine.*

To the sheriffs of our counties and their deputies:

We command you to attach the body of A. B. of———, in our county of———, so that you have him before our Supreme Judicial Court, next to be holden at———, within and for our county of———, on the——— Tuesday of———, next, to answer for an alleged contempt in not [*here insert the cause*] and you may take a bond with sufficient sureties to C. D. the party injured, in the sum of———, conditioned that he then and there appear and abide the order of court. Hereof fail not and make due return thereof and of your proceedings, at the time and place aforesaid. Witness J. A. justice of our said court, the——— day of———, in the year of our Lord 18—.

———, *Clerk.*

When the party is not bailable, that part of the writ is to be omitted.

Writ of injunction.

[SEAL.] *State of Maine.*

To the sheriffs of our counties and their deputies:

We command you to make known to A. B. of ———, in our county of ———, that C. D. of ———, in the county of ———, has filed his bill in equity before our Supreme Judicial Court, therein alleging [*here insert the allegations in the bill, showing the cause for issuing the writ*] and that in consideration thereof, he, the said A. B. and his attorneys and agents, are strictly enjoined and commanded by our said court, under the penalty of ———, absolutely to desist and refrain from [*here insert the acts enjoined*] and from all attempts, directly or indirectly, to accomplish such object until the further order of our said court. Hereof fail not and make due return thereof and of your proceedings to our next court, where the bill is pending. Witness J. A. justice of our said court, the ——— day of ———, in the year of our Lord 18—.

——— ———, *Clerk.*

When the injunction is to be perpetual, the writ is to be varied accordingly.

INDEX.

COLLATERAL SECURITY.

CONSTITUTIONAL LAW.

CONSTRUCTIVE NOTICE.

CONTRACT.

CONTRIBUTORY NEGLIGENCE.

CORPORATIONS.

DAMAGES.

See ATTACHMENT, 1. BOND, 6, 7, 8. CATTELL, . FRAUD, 3, 4, 5. NEGLIGENCE, 3. WAYS, 1.

DEBTOR AND CREDITOR.

See COLLATERAL SECURITY, 1.

DECLARATION.

See EXECUTOR AND ADMINISTRATOR, 4. PLEADINGS, 1, 4, 14.

DEED.

1. The well settled doctrine in this State is, that a grant of land bounded on a highway, carries the fee in the highway to the centre of it, if the grantor owns to the centre, unless the terms of the conveyance clearly and distinctly exclude it. *Low* v. *Tibbetts*, 92.

2. The mere mention of a monument on the side of the road, or on the bank of a stream, as the place of beginning or end of a line in the description, is not of itself sufficient to control the ordinary presumption, that the grantee will hold to the centre of the road, or the thread of the stream where the road or stream is made the boundary. *Ib.*

3. An instrument purporting to be a deed, not under seal, will not operate as a declaration of a dry, naked, or passive trust, such as will prevent a recovery for possession in an action at law by the trustee against the *cestui que trust*. *Jewell* v. *Harding*, 124.

4. Such an instrument is an equitable but not a legal deed. In equity the seller can be made to reform the deed unless sufficient cause is shown to excuse it. *Ib.*

5. A deed of a tide-mill privilege, mill dam, wharf privilege and the right to flow the creek and adjoining lands to high water mark, "and all the rights and highways connected with and belonging to said mill privilege," gives the grantee no right to ice cutting, nor title to the ice formed upon a fresh water pond raised by changing the dam so as to exclude the salt water. *Dyer* v. *Curtis*, 181.

6. A reservation of "all the standing wood upon a lot, together with the right to enter and remove the same at any time within three years," in a deed of conveyance of real estate will include trees suitable for timber as well as trees suitable for fuel, when there is nothing in any other part of the deed, to indicate that the term "standing wood" is used in a more limited sense. And parol evidence is not admissible to show that the words were used in a more limited sense. *Strout* v. *Harper*, 270.

7. Where a deed contains a provision that it is not to take effect and operate as a conveyance until the grantor's decease, and not then if the grantee does not

EDUCATION.

See TOWNS, 1.

EMANCIPATION.

EQUITY.

See BOND, 8. DEED, 4. PRACTICE, (Equity.)

ESTOPPEL.

See PRACTICE (Equity), 3. PAUPER, 1.

EVIDENCE.

EXCEPTIONS.

Held 2, that repairs and improvements made upon such rolling-stock by the Consolidated European and North American Railway Company, which had acquired the right to control the road subsequently to the plaintiffs' mortgage, were in the nature of accessions to a mortgaged chattel, and subject first to the mortgage that had priority of date;

Held 3, that there can be no loss of identity of the original companies in the consolidation to the prejudice of the rights of prior creditors, or to the destrucion of prior liens, and that such increased values do not belong to the consolidated company as a distinct entity;

Held, further, that the plaintiffs, being in possession of other rolling stock, to which their own mortgage does not apply, purchased by the New Brunswick company, which consolidated with the E. and N. A. Railway Company, or the consolidated company, and mortgaged by them to other trustees; the plaintiffs, having the right to use and consume it in the performance of the duties the corporation owed to the public, and being liable to the mortgagees for their interest, under the facts stated, may recover its full value of the attaching creditors of the mortgagor, or the attaching officer; holding any part to which their own mortgage does not apply, in trust, or subject to their liability to those from whom they received possession, as they held the property before the attachments were made.

Hamlin et al. v. *Jerrard*, 62.

2. A mortgage of a railroad company to trustees for the security of its bondholders of "all its right, title and interest in and to all and singular its property, real and personal, of whatsoever nature and description, now possessed or to be hereafter acquired, including its railway, equipments and appurtenances, all its rights, privileges, franchises and easements," &c. operates upon the inchoate right of the company to a conveyance of lands under contracts subsequently made as soon as the contracts are made and the company is in possession under them for the purposes of the charter. Such a mortgage will take effect upon lands subsequently contracted for or purchased to secure adequate facilities and space for engine and car houses and other railroad accommodations, to which the company at the time of the purchase had a right and expected to build their road; and such incumbrance will continue though the road is not built to such land, and the right to use them in direct connection with the road, without further legislative authority, has expired. The case of a railroad holding more property for its own purposes than its present needs demand is entirely different from one in which the company buys other property distinct from the road or its appurtenances, not intended or necessary for the present or prospective exercise of its franchise and therefore not within the purview of the mortgage.

Hamlin v. *E. & N. A. Ry. Co.* 83.

3. The mortgage attached to the right to a deed of such lands under contract and continued to attach to it as the right grew in value, whether the increased value arose from payments and improvements made by the company or by a new consolidated company which took the entire property and assumed the debts of the first company. *Ib.*

MONEY HAD AND RECEIVED.

See TOWNS, 2.

MOTIONS IN ARREST OF JUDGMENT.

See PRACTICE (LAW), 7.

MUNICIPAL OFFICERS.

See TOWNS, 3, 7, 9, 10, 11.

MUTUAL DEALINGS.

See LIMITATIONS, STATUTE OF, 1.

NEGLIGENCE.

1. The owners of a wharf where foreign laden vessels discharge, are liable to customs officers, who are required to visit the premises in the performance of their duties, for personal injuries received while in the exercise of due care, because of the unsafe or unsuitable condition of the wharf.
Low v. *Grand Trunk Railway*, 313.

2. A customs officer whose duty is to watch for smugglers and prevent smuggling, may be in the exercise of due care, when in the course of his duty he passes over a wharf, where a foreign laden vessel is lying, in the night time and without a lantern. *Ib.*

3. Where duty requires one to be concealed, as when watching for smugglers and evil doers in the night time, the fact that he does not carry a light is not contributory negligence in an action for damages sustained by the negligence of one whose business imposed the duty upon the plaintiff. *Ib.*

See BURDEN OF PROOF, 1. EVIDENCE. 3.

NEW TRIAL.

See EXCEPTIONS, 2.

NON-SUIT.

See PRACTICE (LAW), 2.

NOTICE.

See CORPORATION, 3. FALSE PRETENCES, 3. LANDLORD AND TENANT, 1, 2. PAUPER, 1. PLEADINGS, 6. PRINCIPAL AND AGENT, 8. TOWNS, 5. WAYS, 4, 5.

NUISANCE.

1. A dam built across an arm of the sea, into which a fresh water creek empties, to exclude the salt water for the purpose of creating a fresh water pond, upon which to cultivate and harvest ice for the market, without direct authority of the legislature or the delegated action of harbor commissioners, if the case falls within their jurisdiction, is in the same sense a public nuisance as it would be to build a solid wall across a road or street. *Dyer* v. *Curtis*, 181.
2. Without such authority such a dam never acquires the right to exist by prescription. *Ib.*
3. Where, by the terms of a lease, the lessor agreed to keep up such a dam during a certain portion of the year, in consideration of the covenants of the lease, it was held to be an illegal contract. *Ib.*

OFFICER.

See ATTACHMENT, 1.

OPINIONS OF THE JUSTICES.

See pp. 542–565.

ORDINARY CARE.

See INNKEEPER, 1, 2. BURDEN OF PROOF, 1.

PARENT AND CHILD.

See EMANCIPATION.

PARTNERSHIP.

See BOND, 5–8. PRINCIPAL AND AGENT, 2.

PAUPER.

PAYMENT.

PEDDLER'S LICENSE.

PENOBSCOT RIVER.

PERPETUITY.

PILOT.

PLEADINGS.

PRESUMPTION.

See PRINCIPAL AND AGENT, 9.

PRINCIPAL AND AGENT.

See LIFE INSURANCE. TOWNS, 14.

PRINCIPAL AND SURETY.

See CONTRACT, 2. COLLATERAL SECURITY, 2, 3.

PROMISSORY NOTES.

1. An action may be maintained by the indorsee of a promissory note payable to the order of a corporation and indorsed thus: "Charles B. Folsom, Treas," by one who held that office in the corporation and was authorized to perform the financial business thereof. *Russell* v. *Folsom*, 436.

2. Such an indorsement is sufficient to transfer the note. *Ib.*

See COLLATERAL SECURITY, 2. CONTRACT, 2. EVIDENCE, 7. EXCEPTIONS, 2, EXECUTOR AND ADMINISTRATOR, 5. PRINCIPAL AND AGENT, 5, 6, 7.

PROBABLE CAUSE.

See EXCEPTIONS, 3.

PUBLIC POLICY.

See EVIDENCE, 2.

QUARRY.

See TENANT FOR LIFE, 1. LIENS, 3, 4.

RAILROADS.

1. Without a deed a railroad location can never become legal except on payment or waiver of the land damages, or by prescription. In no other way can the company acquire legal, permanent possession.
Perkins v. *Maine Central R. R. Co.* 95.

2. While the lapse of six years from the time an action accrued for land damage might, unexplained, constitute a waiver of damage, yet where the circumstances show that there has been no waiver, and no title acquired by prescription, simple lapse of time would not bar the land owner's right to bring suit against the road for an obstruction which was a continuing trespass, though there would be a limitation of damages to the period of six years, immediately preceding the date of the writ. *Ib.*

See MORTGAGES, 1, 2, 3.

RETAINER FEE.

See ATTORNEY AT LAW, 1, 2.

REVIEW.

1. The action of review, when a matter of right, should be brought within one year from the date of the rendition of judgment.
Jackson v. *Gould*, 335.
2. Where a party is entitled to a writ of review as a matter of right, and fails to bring it within the time limited by the statute, he may still be allowed the writ, in the discretion of the court, upon petition. *Ib.*
3. R. S., c. 82 § § 3, 4, applies to non-resident defendants, as well as to inhabitants temporarily absent. *Ib.*
4. Reviews when not a matter of right, are granted to prevent injustice.
Brooks v. *B. & M. L. R. R. Co.* 365.
5. A review of a judgment against a defendant will not be granted because of an error in an admission by the defendant, in an action to collect a subscription to stock, deliberately made, when it appears that all the facts were matters of record to which the defendant had access at the time of the admission, though it might be different if the defendant had been entrapped or misled into making the fatal admission without laches on his part, or had been prevented from ascertaining and procuring evidence of the real facts. *Ib.*

RIGHT OF REDEMPION.

See MORTGAGES, 5, 6. REAL ACTION, 5.

RULES SUPREME JUDICIAL COURT.

LAW, pp. 566–583. CHANCERY, pp. 584.

RULES U. S. TREASURY.

1. The rules adopted by the treasury department of the United States government for the payment of arrears of pay due to deceased officers, seamen and mariners in the United States navy, have the force of law, and courts will take judicial knowledge of them. *Low* v. *Hanson*, 104.
2. Money paid in accordance with such rules, to the guardian of the minor children of a deceased officer, seaman or mariner, belongs to such minors, and not to the administrator on the estate of the deceased. *Ib.*

STATUTES CITED, EXPOUNDED, &c.

PRIVATE AND SPECIAL LAWS OF MAINE.

REVISED STATUTES.

STEAM TUG.

See EVIDENCE, 3.

SUBSCRIPTIONS.

See CONTRACT, 1.

SURVEYORS OF HIGHWAYS.

See TOWNS, 9, 10.

TAX.

See TOWNS, 9–11.

TAX DEED,

1. A tax deed which shows on its face that the sale was illegal, is not sufficient for the purposes mentioned in stat. 1874, c. 234. *Allen* v. *Morse*, 502.
2. A tax deed which purports to convey the whole of the real estate while the recitals show that it was necessary to sell a part only, would convey no title to the purchaser. *Ib.*
3. To sell a separate and distinct portion of a farm to pay the taxes assessed upon the whole of it, would be illegal. The only legal course is to sell the whole, or, when possible, an undivided fraction of the whole. *Ib.*

TENANT FOR LIFE.

1. A tenant for life of an undivided portion of real estate has a right to his share of the profits accruing from the products of a quarry opened upon the premises. *Richardson* v. *Richardson*, 403.

WASTE.

See DEED, 9.

WAYS.

WITNESS.

See WILLS, 8.

WOOD AND BARK.

WORDS.

WRIT OF ERROR.

See BOND, 1.