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,

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PORTLAND, MAINE :
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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN APPLETON, LL.D., CHIEF JUSTICE.
HON. CHARLES W. WALTON.
HON. 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.

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* Term expired April 23, 1882. Re-appointed January 11, 1883.

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OF CASES REPORTED.

TABLE OF CASES

CITED BY THE COURT.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

HENRY K. BAKER, judge of probate,

vs.

ALBERT F. BEAN, executor of the will of MARINDA F. LAMBERT.

Kennebec. Opinion June 10, 1882.

Executors and administrators. Statute of limitations. Stat. 1872, c. 85, §§ 14, 16.

Where the amount due on a covenant or contract is fixed and ascertained, and a demand might have been made and an action have accrued against an executor or administrator within two years, it cannot be maintained against an heir or devisee under the provisions of stat. 1872, c. 85, §§ 14, 16.

It is enough that upon a formal demand a right of action would have accrued.

To sustain an action against an heir or devisee under stat. 1872, c. 85, §§ 14, 16, the plaintiff must show that administration has been taken out on the estate of the ancestor, that the demand was not due and could not have been enforced within two years from the granting of administration and within one year after it became due.

ON REPORT.

The opinion states the case and the material facts.

Joseph Baker and L. C. Cornish, for the plaintiff.

The action on this bond must have been brought on R. S., c. 72, § 15, and that plainly shows how the guardian is to be "required" to pay over the money. He must have been cited by the judge of probate to account, upon oath, for such personal property of the deceased (or ward) as he has received, and must have failed to do so, and then there must be "express authority" of the court to put the bond in suit, and this "express authority" must be alleged in the writ, and until this is done there is no breach of the bond and no "action accrues" or could be maintained on the bond. This is well settled law in this state by the decisions of this court as well as the statutes. *Nelson* v. *Jaques*, 1 Maine, 139; 2 Redfield on Wills, 82, 83; *Potter* v. *Titcomb*, 7 Maine, 302, and cases cited; *Groton, J.* v. *Tallman*, 27 Maine, 68, 76-7; *Potter* v. *Cummings*, 18 Maine, 55; *Gilbert, J.* v. *Duncan*, 65 Maine, 469; *Wood* v. *Leland*, 1 Met. 387.

Of course if there was no breach of the bond, and if "an action does not accrue," in the language of the stat. 1872, c. 85, § 14, on the guardian's bond till the principal has been cited into the probate court to account and pay over, and has neglected or refused, and the court has expressly authorized the bond to be sued, then it is equally clear that no action has accrued against any surety on such bond until these essential prerequisites have taken place.

On the twenty-second day of May, 1876, for the first time, "an action accrued," to use the language of the statute, on this bond, and from that time, and that only, would the statute of limitations begin to run. See authorities before cited.

The true rule and test is stated by MELLEN, C. J., in *Potter* v. *Titcomb*, 7 Maine, 315, as follows: "Indeed, this presumption does not seem applicable, except in cases of bonds or other contracts for payment of money or other articles, or performance of some act at certain specified times. In such cases, and such only, it would seem there could be a *terminus a quo* the computation is to be commenced." *White* v. *Swain*, 3 Pick. 365.

S. Lancaster, and *Bean and Beane*, for the defendant.

APPLETON, C. J. This action was originally brought against Marinda F. Lambert, as sole devisee of her late husband, and

upon her decease, the defence is assumed by her executor. The plaintiff claims to maintain it by the provisions of R. S., c. 87, § 16, as amended by c. 85, § 16, of the laws of 1872.

The facts on which the plaintiff's claim is founded are not in dispute.

On March 12, 1839, Dudley Haines was appointed guardian of Augustus T. Bowles, Emily A. Bowles and John F. Bowles. He assumed the trust and gave a bond dated February 26, 1839, signed by himself as principal and John Haines and John Lambert as sureties in the ordinary form and returned an inventory of the estates of his three wards.

Emily A. Bowles died in 1844, unmarried, and her estate descended to the other two heirs.

The guardian settled in the probate office from time to time the accounts first of the three children and then of the two remaining, finally dividing and settling separate accounts for John F. Bowles and Augustus T. Bowles.

The account with John F. Bowles was settled on the second Monday of October, 1857. At that time the guardian charges himself with $3,477.76 as due Augustus T. Bowles and claims credit for $516.73, thus having a balance in his hands of $2,961.03. This balance remained unaccounted for up to the death of Dudley Haines, the guardian, which occurred on the twenty-seventh day of March, 1875.

Augustus T. Bowles, who became of age in 1854, died, according to the representation of John F. Bowles to the judge of probate, in consequence of which administration was granted.

On the eighth of May, 1875, Orville D. Baker was appointed administrator on the estate of Augustus T. Bowles, and on the same day Joseph W. Patterson was appointed administrator on the estate of Dudley Haines, and each was duly qualified to act as such.

On the same day, Baker as administrator, filed in the probate court his petition to have said Patterson cited into court to show cause why he should not pay to said Baker, administrator on the estate of Augustus T. Bowles, the balance due from the estate

of Dudley Haines, his guardian, and in default of such payment for authority to put his guardian's bond in suit.

The citation was duly issued and served, but Patterson neglected to appear and thereupon the court ordered the guardianship bond to be put in suit to recover the balance due the deceased ward of Haines.

John Haines, one of the sureties on the bond, died in 1844. John Lambert, the other surety, died May 6, 1872, bequeathing his property to Marinda F. Lambert, the original defendant in this action and appointing her sole executrix. This will was probated on the second Monday of July, 1872, and the executrix gave the required bond on August 12, 1872, when the court issued an order requiring her to post notices of her appointment at certain specified places, and on November 23, 1872, she made return under oath that she had posted the notices as required within three months of August 12, 1872, so that the statutory limitation of two years would expire on the twelfth of November, 1874.

The plaintiff claims that no cause of action accrued against the guardian Haines, or against Mrs. Lambert as devisee, until May 22, 1876, when Patterson, the administrator, being duly cited, neglected to appear and the court ordered the bond to be put in suit; and that, notwithstanding the limitation of two years he is entitled to maintain an action against Mrs. Lambert as devisee of John Lambert, a surety on the guardianship bond of Dudley Haines, by virtue of the provisions of the statute of 1872, c. 85, § 16.

It is urged that the guardianship bond is a "covenant or contract," within § 14, of c. 85, and that it did not become due within the two years within which to present the claim, and consequently that the suit is maintainable by § 16 of the same statute, which is in these words: "When such claim has not been filed in the probate office within said two years, the claimant may have remedy against the heirs and devisees of the estate within one year after it becomes due and not against the executor or administrator."

The bond of the guardian was to protect the interests of the

ward during his minority. Augustus T. Bowles was born August 17, 1832 and became of age August 17, 1853. After the termination of his guardianship, the guardian rendered his fourth, called his final account, October, 1857, in which he was allowed for services during his ward's minority and a balance was declared in his hands. That balance was due the ward, or if deceased, to his heirs. All that was required to fix the liability of the guardian or his sureties was to demand payment and if this was refused to bring a suit on the bond.

But this is not a suit against a guardian, nor against a surety of the guardian, but against the devisee of such surety, under c. 85, § § 14, and 16, of the acts of 1872.

The plaintiff's right of action is barred. The amount due to Augustus T. Bowles was ascertained and fixed in 1857. All that was then required to fix the liability of the guardian or the surety was to make a demand. This is not the case of a covenant or contract referred to in c. 85, § 16, of the acts of 1872. The contracts or covenants therein mentioned are those which by their terms and conditions were not enforceable. When an action would have accrued upon demand within the two years, it might have been brought against the administrator and in such case it is not maintainable against the heir or devisee.

Here, the party interested in the claim knew of its existence for eighteen years and never moved for its enforcement until after the death of the guardian in 1875, and after all claims against the estate of Lambert, the surety, had become barred. In *Hall* v. *Bumstead*, 20 Pick. 2, which resembles in some respects the case at bar, SHAW, C. J., says "it would make no difference if it should appear that the ward was under the disability of infancy during the whole or part of the time that the estate was under administration. No such disability has ever been allowed as an avoidance of this statute; on the contrary the lapse of time under the statute has been regarded as an absolute bar to all claims, and we think it is right it should be so."

It is no answer that no administration had been taken out on the estate of Augustus T. Bowles. That was no fault of the surety on the guardian's bond. John F. Bowles knew of the

death of his brother. If the claimant was a minor, the disability of infancy while the estate is under administration, would not prevent his claim being barred by the lapse of two years in this state. *Hall* v. *Bumstead*, 20 Pick. 2. Much more, then, shall the plaintiff in interest be barred, he being of full age and conusant of his legal rights. To entitle the plaintiff to recover "it must also appear" observes SHAW, C. J., in the case last cited, "that the claim could not have been made until the administration has closed. It is not enough that a mere formal right of action accrues by an act done after the four years. If the demand might have been made, and thereupon an action would have accrued, before the expiration of the four years, then it might have been brought against the administrator and will not lie against the heir."

The claim in controversy might have been presented to the executrix on the estate of Lambert within the two years allowed by the statute. It was the neglect of those interested that it was not done. The estate is not in fault that administration was not taken out and the claim presented before it was barred by the lapse of time. Augustus T. Bowles, was of age in 1854; he died in 1857 and no effort was made to collect this until 1876. The plaintiff fails to sustain his suit.

Plaintiff nonsuit.

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

MONCENA DUNN *vs.* NORMAN SNELL.

Androscoggin. Opinion June 12, 1882.

Tax title. Mortgagor. Tenant. Stat. 1878, c. 35. Stat. 1880, c. 214. Constitutional law.

When a mortgagor, by his mortgage, is bound to pay all taxes, accruing on the estate, he cannot permit the estate to be sold for taxes, and by purchasing it on such sale acquire a title against the mortgagee.

Neither can a tenant for life or for years, thus acquire a title against the reversioner, nor a tenant of the mortgagor against the mortgagee.

When the tax deed is void on its face, or the person signing is not shown to be a treasurer, (or collector as the case may be,) or the deed is not duly recorded, or the payment for the tax deed was by one whose duty it was to pay the tax and he seeks to uphold it for fraudulent purposes, no tender or payment of taxes, etc. is required by stat. 1878, c. 35, from one contesting such deed.

Whether stat. 1880, c. 214, requiring a deposit of taxes, interest and costs, before the owner of land can commence or defend a suit, is constitutional, *Quere?*

ON REPORT.

Writ of entry, dated July 7, 1880, to recover the Elisha Dunn homestead in Poland. Plea, *nul disseizin*, with brief statement claiming title in the defendant under a tax deed from the town treasurer, and that the plaintiff had not deposited with the clerk the amount of taxes, interest and costs as required by stat. 1880, c. 214. By order of the court the plaintiff deposited with the clerk of court forty dollars for that purpose.

Material facts are stated in the opinion.

J. M. Libby, for the plaintiff, cited: Blackwell, Tax Titles, 431; 3 Wash. Real Prop. 207; *Orono* v. *Veazie*, 61 Maine, 431; *Larrabee v. Hodgkins*, 58 Maine, 412; *Nason* v. *Ricker*, 63 Maine, 381; *Patterson* v. *Stoddard*, 47 Maine, 355; *Haskell* v. *Putnam*, 42 Maine, 244; *Moshier* v. *Reding*, 12 Maine, 478; *Saco* v. *Wentworth*, 37 Maine, 165; *Saco* v. *Woodsum*, 39 Maine, 258; *Rowell* v. *Mitchell*, 68 Maine, 21.

John P. Swasey, for the defendant, contended that the action could not be maintained because the deposit with the clerk was not made prior to the commencement of the action, and because the deposit was not sufficient in amount to cover a tax of $27.90 with twenty per cent. interest from March 2, 1878 to May 7, 1881. Stat. 1880, c. 214; stat. 1879, c. 117; R. S., c. 6, § 161.

APPLETON, C. J. The plaintiff brings this action as mortgagee of the demanded premises.

It appears that in January or February, 1876, the defendant, being then in occupation of the premises in controversy, bargained with the plaintiff for their purchase on certain terms and

conditions. This bargain was carried into effect in all respects, on April 19, 1876, save that the deed was made to Mrs. Ewer, and the mortgage and notes were at the same date given by her to the plaintiff. This change from the original contract was made at the instance of the defendant and assented to by the plaintiff. Mrs. Ewer, to whom the conveyance was made, is the mother-in-law of the defendant, who has up to the present time continued in possession of the premises conveyed.

It would seem probable that the conveyance was made to Mrs. Ewer in trust for the defendant with whom the contract was originally made. Mrs. Ewer has made no payments on the notes. Those made have been made by the defendant, who when unable to pay has apologized for his inability to pay. The possession of the defendant was either as *cestui que trust*, or as tenant under the mortgagor.

Whether the defendant has an equitable interest in the estate or is a tenant under the mortgagor, the purchase in either event must be regarded as made for the benefit of the estate rather than in fraud of the rights of the mortgagee.

One whose duty it is to pay the taxes upon land to prevent a sale of the same, cannot acquire a title by such sale and conveyance as against the real owner, but the vendee's deed will be treated as void from the beginning. *Blake* v. *Howe*, 1 Aiken, 306. In *Williams* v. *Gray*, 3 Greenl. 207, it was held that when one co-tenant bought in a tax title, his purchase enured to the benefit of his co-tenant, who would be liable for his share of the money advanced. When a piece of land is sold for taxes, and the same is purchased by and deeded to one of the tenants in common thereof, he acquires no right, title or interest in or to the moiety belonging to his co-tenant. *Downer* v. *Smith*, 38 Vermont, 464. If a tenant for life, whose duty it is to cause all taxes assessed upon the estate during his tenancy to be paid, neglects it and suffers the land to be sold for such taxes, and subsequently receives a release of the title acquired under the sale, such release extinguishes the title and gives him no rights whatever against the reversioner. *Varney* v. *Stevens*, 22 Maine, 331. To sustain such title in his hand, would be a fraud on the reversioner.

A purchaser at a tax sale of land in which he has an interest as heir acquires no greater title by permitting it to be sold for taxes and purchasing it in himself. *Choteau* v. *Jones et al.* 11 Ill. 301.

I. The mortgagor would not be allowed to purchase the mortgaged premises, if sold for taxes, for the purpose of defeating the mortgage. In such case he is regarded as paying the taxes for his own benefit. *Frye* v. *Bank of Illinois*, 11 Ill. 383. The tenant of the mortgagor is in no better condition than such mortgagor.

The mortgagor, then, whether having an equitable interest in the estate and so benefited by the payment of the tax, or the tenant of the mortgagor, and paying the taxes which by the express language of the mortgage, the mortgagor covenanted to pay, would not be permitted to set up this title in fraud of the rights of others. The mortgagor could not do it, and those holding under and in submission to the mortgagor would be equally estopped.

The tax title must be deemed as fraudulently obtained, and in such case the requirements of the statute are inapplicable. *McMahon* v. *McGraw*, 26 Wisconsin, 614.

II. The tax, under which the alleged sale was made, was assessed in 1876. The sale was made in 1878, and at that time, the statute of that year, (c. 35,) was in force, in which it was provided that "in any trial in law or in equity involving the validity of any sale of real estate for non-payment of taxes, it shall be sufficient for the party claiming under it, in the first instance, to produce in evidence the collector's or treasurer's deed, duly executed and *recorded*, and then he shall be entitled to judgment in his favor, unless the party contesting such sale shall prove to the court that he or the person under whom he claims, has paid or tendered the amount of all such taxes and the legal charges and interest thereon and all *costs of suit*, and then he may he permitted to prosecute and defend," &c. By this statute, there was no necessity of making any tender unless the opposite party brought himself within the statute, — that is, produced "the collector's or treasurer's deed, duly executed and *recorded*. That produced, made a *prima facie* case. The opposing party wishing to contest the sale by showing the

weakness of this *prima facie* case, must make a tender,— among other items of the "costs of suit." This shows that not desiring to offer further proof, but relying on the apparent defects of the record title, there is no occasion for any tender.

The statute requires a collector's or treasurer's deed duly executed and recorded. A party relying on the statute must bring himself within its provisions. One having a deed not "duly executed," cannot claim its favorable presumptions. One having a deed *not duly "recorded,"* is not one entitled to the same statutory rights as one having a deed duly recorded. The record of a deed and its execution are equally and alike required, and if not existent, the party thus deficient is without the statute, and no tender is necessary by its provisions.

This statute, so far as relates to what shall constitute a sufficient title in the first instance so as to require a tender, is in full force. A tax deed void on its face is not "sufficient" to require a tender under stat. 1874, c. 224. When the party relying on his tax deed shows by his evidence that he has no title whatever, there is nothing to be tendered. *Orono* v. *Veazie*, 57 Maine, 517; *Allen* v. *Morse*, 72 Maine, 503. So, too, when the statute makes the recordation an indispensable requirement of what it constitutes a *prima facie* title and it is not recorded.

III. But it may be urged that the statute of 1880, c. 214, is applicable. Whatever statute may apply, the plaintiff may bring his suit and run the risk of a defence under a tax title and deed. If no such defence is interposed, he stands as other plaintiffs. If a tax deed is relied upon, it must be one "duly executed and recorded." The statute of 1878, c. 35, is in full force, and determines what shall be "sufficient" to constitute a *prima facie* title. Here, there was no evidence of the choice of a town treasurer, without which there could be no treasurer's deed. The paper purporting to be a treasurer's deed is not recorded. It is not enough for a party to say he has a tax title to enable him to raise the objection that no tender was seasonably made. He must produce a deed duly executed *and recorded*, before he can invoke the adverse application of this stringent statute against his opponent. This he has not done.

When the deed has no seal, or the person signing it is not shown to be or is not treasurer, or the deed is not recorded, or the payment was one which the party making was bound to make, and the deed is sought to be upheld for fraudulent purposes, it would seem that a tender is not required.

But it may well be questioned whether the statute of 1880, c. 214, does not infringe upon the constitutional right of every citizen to a remedy for any injury to his person, reputation or property, and that right and justice shall be administered freely and without sale. Every citizen, if the law is upheld, but the plaintiff and those similarily situated, has free and unrestricted access to the courts of justice. So, all other defendants are untrammeled in their defence and are not compelled to advance what is in dispute to be disposed of after the litigation is ended, as the court may order. The payment required may be of what is not due on the face of the paper and what the party paying is not legally bound to pay, yet if not advanced a party without right, may hold under a deed absolutely void that to which he has no title whatever. Legally, if the tax sale is void, the owner's right continues and subsists after as before the sale and the pretended purchaser is a mere trespasser in possession. To deny any remedy is to adjudge a forfeiture because taxes illegally assessed were not paid and to vest the title in one who has none. In *Weller* v. *St. Paul*, 5 Minn. 95, there was a statute requiring prepayment as in the case at bar, but none was made or tendered. The court held the provision inconsistent with the constitution, which provided that "every person ought to obtain justice freely and without purchase," and that the effect of the provision was to compel a party aggrieved to purchase the right to a status in court. Referring to a similar provision, Mr. Chief Justice BREESE, in *Wilson* v. *McKenna*, 52 Ill. 43, says: "That provision of the general revenue law has remained a dead letter upon the statute book, and is not considered of any validity; the effect of it being to compel a man to buy justice. This no one can be compelled to do under our organic law. By that it is declared, that every person in this state ought to obtain rights and justice freely, and without being obliged to purchase it, completely and without

denial, promptly and without delay, conformably to the laws." The same question had been previously examined and determined in *Conway* v. *Cable*, 37 Ill. 82. It was, however, in Tennessee, held otherwise by a divided court in *Burrow* v. *Smith*, 2 Sneed, 566. Undoubtedly the legislature may establish rules of evidence. The requirement of prepayment of the amount of a tax which has never been legally assessed, and which constitutes no lien whatever on the estate sold is a very different matter. If the tax deed is void on its face before the party whose land is sold can contest it, he must leave in the hands of the purchaser the amount for which the land was sold, to remain there without interest till the end of the litigation, and then to be returned to him, unless it should be appropriated without his consent to the discharge of an alleged tax, for which neither the land nor its owner was liable. If the tax is valid, before its validity can be contested, the amount of the taxes and cost must be tendered, to be returned to the party contesting their validity, after the futility of the attack has been judicially established. In either event there has been temporary confiscation of the money thus required to be advanced, before a party can be permitted to seek redress.

But without deciding this question, we think upon other grounds the action is maintainable.

Judgment as of mortgage.

WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred. BARROWS, J., concurred in the result.

MARSHALL H. HOLMES *vs.* DAVID J. HALDE.

Kennebec. Opinion June 12, 1882.

Physician. Master and servant. Damages. Negligence.

The plaintiff testified that he attended an institution three terms, three months each term, that there were lectures on medicine and medical studies, and all branches of surgery taught, that there were over two hundred students, that he paid tuition, completed the course and paid thirty dollars for a

diploma; and he described the building, its location, etc. *Held;* That the evidence was sufficient to lay the foundation for the introduction of the diploma which he received from the institution, and which, when its execution was proved, was legal evidence tending to prove that the plaintiff received a medical degree at that institution.

In an action for damages occasioned by the negligence of the servant of the defendant in driving a horse on a public way, the presiding justice instructed the jury that, "he is to be deemed the master who has the choice, the selection, the direction and control, and the right to discharge the alleged servant; whose will is represented by that alleged servant, not only as to the result of the work performed or to be performed by the servant, but in all its details, in the means by which the work is performed," and illustrated the rule by the familiar case of those known as contractors in the erection of buildings. *Held;* That the rule of law given the jury by which the relation of master and servant should be determined was correct.

In such an action where the plaintiff claimed damages for loss of business as a physician, it is not error to instruct the jury that the plaintiff is not prohibited from recovering damages for loss of business as a physician, although he has no such degree from a public medical institution as would entitle him to maintain an action for professional services.

In such an action it is not error to refuse a requested instruction, "that if they (the jury) find that by reason of the horse being frightened, or otherwise became uncontrollable and Beaulieu [the driver] could not guide him and the collision resulted from that, the defendant would not be liable."

On exceptions from the superior court.

An action to recover damages for injuries to person and property on account of alleged negligence and unskillfulness on the part of the defendant's servant in driving a horse in a public street of Waterville, March 10, 1880. The writ was dated March 31, 1880, and contained an averment, that the plaintiff by reason of the injury "was disabled for a long time from doing his ordinary business as a physician and surgeon in regular standing and practice."

At the trial the plaintiff testified as follows:

Question. What is your business? *Answer.* Physician. *Mr. Webb*,—I object to that. . . . [Witness produces two documents purporting to be diplomas.] *Witness*,—This is my diploma which I received at Philadelphia, granted at the time it purports to have been. *Mr. Webb*,—I object to the question. . . . *Witness*,—I attended a course of medical lectures at the institution named in the diploma. I was there three terms. The last was in 1866. I was there three months

at a time. There were lectures on medicine and medical studies in that institution. [Objected to.]

Question. How large were the classes? [Objected to and admitted.] *Answer.* There were eighty-five in the last class that I was in, when I graduated, or about that.

Question. Was that a public institution at which any one could attend by paying the fees required? [Objected to, and the witness was allowed to describe the building and the institution.] *Answer.* The building was on Sixth street, College Hall, so called, a large double building, three stories, I think. The second story was occupied for the institution. And the first term I was there I think there were about two hundred and some odd of students, and about as many the second; and the third term, there were more. I have forgotten how many professors there were, but those names on the diploma were all professors. Should guess the building was one hundred feet one way and forty the other. All branches of surgery were taught there. I completed the full course. I had studied medicine, years before, with an old physician in Searsport, Maine, old Doctor Beals; I was with him two years, I think; perhaps not all the time, but off and on. Cannot tell whether all that were in the faculty signed my diploma when I graduated; I think the most of them did, though.

Counsel for plaintiff then offered in evidence, certificate of Eclectic Medical College of Pennsylvania, to Marshall H. Holmes, dated January 25, 1866, which was objected to and admitted. Also offered certificate of Eclectic Medical Society of the state of Maine, dated June 23, 1869, which was objected to and admitted. Also placed in evidence c. 597, of the private and special laws of 1868.

On cross-examination the witness testified:

Question. I now produce for your inspection the paper which you have put in, entitled Eclectic Medical College of Pennsylvania, dated January 25, 1866, and signed Z. C. Howell, president, (I cannot read the secretary's name.) Joseph Sites, one of the professors, Henry Hollellenbech, another professor, Joseph P. P. Fitler, another professor, John Buchanan, another professor,

A. W. Clark, another professor, E. Downs, another professor. Will you state whether there is any seal upon that diploma, made by impression upon the paper? *Answer.* It is a seal as they put on to all diplomas, printed on a ribbon of silk or satin. Think I was first at this college in 1862 or 1863, I cannot say which. I then resided in West Waterville where I was in practice. Think I went to the college in October. Was gone about three months. This was the first medical school I had ever attended. Think I went again the next spring, the summer time, June term I think, but not certain. That would be in 1863 or 1864. I staid three months. I next went in October, 1866, and staid about three months. Had not before attended a medical college regularly. I have been in a number of medical schools before that in Philadelphia. Don't mean that I attended them. This diploma certifies that I was there three terms. I was there when I received this diploma. I took it from Philadelphia to West Waterville with me. Think it was delivered to me by Mr. Sites. I paid my regular college fee. For the diploma I paid thirty dollars to the dean of the college, Mr. Sites, I think; I don't recollect. Think Howell was president when I was there. I cannot describe him. He was a stout man about forty-five or fifty years old. Cannot recollect the name of the professor of chemistry when I was there. Sites was professor of obstetrics, and Clark of materia medica, I think, but am not certain. I haven't looked at that diploma or thought anything about it. Downs was professor of surgery. I recollect him very well.

Question. John Buchanan is put down here as professor of surgery? *Answer.* O yes, I am mistaken. He was a stout thick-set man, I should think about forty when I saw him. He might not have been over thirty-five or thirty-eight. Don't know where he is now. The last time I heard of him he was in what they called his place at five hundred and fourteen Pine street. Think I had a journal from that college within a year and a half or two years. That is all I know of him. That diploma is in just the same condition now that it was when I received it. The lettering is precisely the same for anything I

know. It has been in my possession all the time, hung up in my office.

The presiding justice instructed the jury as follows:

. . . "For the purpose of this trial, gentlemen, I instruct you that if you should find, under the rules that I shall proceed to give you with respect to master and servant, that in performing that particular service of driving John Canning from the railroad station to the defendant's house, George Beaulieu was acting as the servant of the bishop as representative of the catholic church, although for certain other purposes he was the servant of the defendant, the defendant in this case would not be liable, whoever else might be liable; and it is unnecessary for you, as I have intimated, to pursue that inquiry.

"Now, he is to be deemed the master who has the choice, the selection, the direction and control and the right to discharge the alleged servant; whose will is represented by that alleged servant, not only as to the result of the work performed or to be performed by the servant, but in all its details, in the means by which the work is to be performed. To illustrate this relation between master and servant and distinguish it from other kinds of employment, take the familiar case of those known as contractors. The owner of a lot about to erect a building upon it, contracts with B to build the brick walls of that structure for a certain specified sum, to be paid upon the completion of the work; or work to be done, if you please, in accordance with certain plans delivered to the contractor. That contractor represents the will of the owner of that lot with respect to the result of that work. He is answerable to him for the result of it as called for by the plans, not in its details, not in the means by which the work is to be performed. The owner of the lot under that arrangement would have no authority to direct or control the laborers, the hod-carriers or the brick-layers; to select them, or to discharge them if they proved unfaithful; no right to discharge one and employ another in his stead for the same kind of service. All the details and all the means would be under the direction and control of the contractor. And if an accident, an injury should result from the negligence of a hod-

carrier or brick-layer, the contractor would be answerable to that particular party injured by the negligence and not the owner of the lot, although the owner of the lot in the end would receive the benefit of that work. You perceive that the rule, carefully examined, is a just and reasonable one. The law says it is just and reasonable that he who has the selection of the agent, the servant, the right to dismiss him at any time for unfaithfulness on the slightest intimation or indication of carelessness, should be responsible for any injury resulting from a want of care or skill on the part of such servant. But as the reason of the rule does not apply, so should the rule itself not apply where the person sought to be charged for the negligence, does not have such control over the servant, such right to employ him or discharge him. For the purpose of insuring greater precision of statement and more carefully guarding the rights of the parties here, I have, during the progress of the arguments this afternoon, reduced to writing, a few sentences covering the propositions which I will give you, as applicable to this particular case.

"It is conceded that the defendant was the owner of the team driven by Beaulieu at the time of the collision; but if you find that the catholic bishop of the Portland diocese, having the power of appointing and removing the defendant as superintending priest of the Waterville mission, had also not only the right to require a report of the result of the mission, and a business settlement, and a payment of the surplus receipts of the mission at the end of each year, but the right to direct as to the details of the work of the mission, and the means by which that work was accomplished, and further find that under the relations existing between the bishop and the defendant at that time, the bishop had the direction and control of Beaulieu in the performance of such duties as he was then performing, and the right to discharge him at any time from such service for carelessness or unfaithfulness, or any other cause, and select and employ another in his stead, and the service then performed by Beaulieu was for the benefit of the bishop, as representative of the catholic church,

you would be authorized to find that Beaulieu was the servant of the bishop and not the servant of this defendant, and this defendant would not be responsible. But if, on the other hand, you find the defendant, as conceded, the owner of the team so driven by Beaulieu, and find that under the relations between the bishop and the defendant, the defendant did not represent the will of the bishop as to the details of the work of the mission and the means by which it should be accomplished, and that the defendant himself had the selection and employment of Beaulieu for such service as he was then performing, and the right to discharge him at any time and choose another in his place, and had the entire control and direction of Beaulieu with respect to such duties as he was then performing, then, although the bishop, as representative of the church, directly or indirectly received the benefit of such service, you would be authorized to find the defendant answerable for the results of Beaulieu's negligence, the other conditions, to which your attention will be called, being fulfilled. . . .

"I instruct you as matter of law that the plaintiff is not prohibited from recovering damages for loss of business as a physician, although he had no such degree from a public medical institution or no such license from the Maine Medical Association, if he satisfies the jury that he actually received cash for his services. It would be a question of fact for the jury whether his business was a profitable one or not without such degree or such license; whether he would receive by voluntary payments from his patients, compensation for his services. You have heard the arguments of the counsel upon the one side and the other in reference to his loss of business as a physician. This is proper matter for your consideration. It is proper for you to consider what amount of cash he received out of the charges which he made; but, as is argued by counsel, finding the ratio of charges might be a proper manner of determining the relative loss of services prior and since the injury." . . .

Mr. Webb: Will your honor instruct the jury that if they find that by reason of the horse being frightened or otherwise, or became uncontrollable and Beaulieu could not guide him, and

the collision resulted from that, the defendant would not be liable?

The Court: I cannot give you that rule.

The verdict was for $1610.04

Joseph Baker, (*F. A. Waldron* with him,) for the plaintiff, cited: Abbott's Trial Ev. 382; *Finch* v. *Gridley's Ex'r*, 25 Wend. 469; Sedgwick on Damages (6th ed.) 103, *92; *Nebraska City* v. *Campbell*, 2 Black. 590; *Wade* v. *Leroy*, 20 How. 34; *Ballou* v. *Farnum*, 11 Allen, 73; *N. J. Express Co.* v. *Nichols*, 33 N. J. L. 434; Shear. and Red. Negligence, § § 71, 73, 74, 77, 79; 2 Hillard on Torts, 436; *McCarthy* v. *Second Parish Church of Portland*, 71 Maine, 318; *Eaton* v. *E and N. A. R. R. Co.* 59 Maine, 520; *Murray* v. *Currie*, L. R. 6 C. P. 24.

E. F. Webb, for the defendant. R. S., c. 13, § 3, provides that no one "shall recover any compensation for medical or surgical services unless . . . he has received a medical degree at a public medical institution." . . . The plaintiff in his writ claims special damage for loss of profits of business as a physician and surgeon, in regular standing. It therefore became necessary for plaintiff to prove he was such, and offered those papers for that purpose. I submit that the papers offered do not establish a "medical degree" or a "public medical institution." The corporate existence of the corporation and the issuing of the diploma are matters of record and are to be proved by the records, if there are any. The same John Buchanan who sold this diploma is the same one now in prison in Philadelphia for making such sales, and his confession made since the trial is a matter of history.

The defendant was prejudiced by the example given by the court of a "contractor" to illustrate the relation between master and servant. A "contractor" of the class described by the court is one who renders service in the course of independent occupation and represents the will of his employer only as to *results*, and not as to the *means* by which it is accomplished. Sherman and Redfield on Negligence, § 76. As an abstract rule of law it is correct, but not being applicable to this class of cases it misled the jury as it is a forcible example given in the books relating to that class of contractors who agree to render results and not

observe in the least, the will of its employer as to the means. A "contractor" hires for himself, and does not submit to the will of his employer, the employer has no control over the "contractor," when he submits he ceases to be a "contractor" and becomes a servant, and a "contractor" is neither agent or servant of his employer. Sherman and Redfield, § § 77, 81. The defendant was in no way responsible for results and neither party so claim, and the example given by the court was not germain to the issue and prejudiced the defendant.

The defendant excepts to that part of the charge which allows the jury to give plaintiff damages for loss of business as physician, although he had not qualified as prescribed in R. S., c. 13, § 3. It is true, the statute does not affirmatively declare contracts between an unlicensed physician and his patients to be void, but they are so in effect. Rights which the law will not enforce, because against public policy, are illegal rights; the law does not refuse to enforce legal contracts. The legislature has the right to take away the remedy for the recovery of debts. As in the case of a public school teacher without certificate, *Jose* v. *Moulton*, 37 Maine, 367, or of a physician without being qualified, *Thompson* v. *Hazen*, 25 Maine, 104, or an attorney without having taken the oath, &c. as in *Perkins* v. *McDuffee*, 63 Maine, 182, or contracts executed upon the Lord's day, or to recover the price of spirituous liquors sold, or for the sale of goods bought to be carried about and peddled, where the statute required a peddler's license, as in *Robinson* v. *Howard*, 7 Cush. 611, or for services rendered in peddling goods for another without license, as in *Stewartson* v. *Lothrop*, 12 Gray, 52, or to recover commissions as a broker without a license, as in *Harding* v. *Hagar*, 63 Maine, 515, or for services as a "medical clairvoyant," as in *Bibber* v. *Simpson*, 59 Maine, 181, or the price of hay pressed and put up in bundles unless branded in a certain manner, as in *Pickard* v. *Bayley*, 46 Maine, 200. There can be no damage for loss of profits to a business which is not entitled to the security and protection of the law. The plaintiff is not aided because he received or might receive gratuities, for no action lies for gratuities. *Wells* v. *Wills*, 4 E. C. L. 98,

(8 Taun. 264;) *Boyter* v. *Dodsworth*, 6 T. R. 681. There are some authorities in point. In *Sherman* v. *Fall River Iron Works Co.* 5 Allen, 213, it is held, "that an unlicensed keeper of a livery stable cannot recover damages for an injury to his business caused by the escape of gas through the ground into the water of a well upon his premises."

In Sherman and Redfield on Negligence, § 599, *a*, the rule is stated as follows: "Nothing can be allowed for the loss of profits in an illegal business, such, for example, as a traffic carried on without the license required by statute." It was so held as to an unlicensed liquor store. *Kane* v. *Johnston*, 9 Bosw. 154.

In *Pickard* v. *Bayley et al.* 46 Maine, 200, it is held, "That no action can be maintained against the owner of a vessel for the non-performance of a contract to transport hay, if the bundles are not marked as the statute requires. Nor for neglect in taking care of the hay after its delivery to them for shipment, whereby the hay was greatly damaged."

In *Buxton* v. *Hamblen*, 32 Maine, 448, it is held, "That no damage can be recovered for non-fulfillment of a contract for sale of pressed hay not branded as the statute requires." Trover will not lie for a note given for an illegal consideration. *Morrill* v. *Goodenow*, 65 Maine, 178. The defense of illegality is founded upon consideration of public policy and will prevail, whatever the form of action may be. *Id.* 179.

In *Lord* v. *Chadbourne*, 42 Maine, 441, APPLETON, J., in discussing a similar principle, says: "The right to take away the remedy for the recovery of debts and for the recovery of compensation in damages for torts, rests upon similar grounds. For a long time usury was a valid defence to a loan of money made against the provisions of the statute on this subject. So the right to recover has been denied, because regulations as to the survey, or the inspection of articles sold have been disregarded, though in all such cases the articles sold were none the less valuable, and the seller was none the less in equity entitled to compensation for the thing sold. Much more, then, may the aid of the law be denied, when the plaintiff seeks compensation for what was held in defiance of its mandates, and with intent to disregard its clearest prohibitions."

In 1 Hillard on Torts, c. 4, § 25, it is stated as follows: "And the same principle has been extended to a claim for damages for an act somewhat more remotely connected with the wrongful conduct of the plaintiff. Thus where the plaintiff was proprietor of a public building kept for the purpose of exhibiting the art of boxing . . . by persons skilled in that art, for an admission fee, and brought an action for a libel contained in a newspaper, imputing misconduct to him as such proprietor, and proved that he had sustained damages thereby; held it was an illegal occupation as it tended to prize fighting, and the case was given to the defendant." It seems a rational rule, that if a business be illegal and outlawed, and the law refuse to shield and protect it, it will deny its relief to profits annexed to such illegal business.

LIBBEY, J. The first exception relied on by the defendant, is to the admission of the plaintiff's diploma from the Eclectic Medical College of Pennsylvania. By R. S., c. 13, § 3, one of the requirements to authorize a physician to recover compensation for his services, is that he "has received a medical degree at a public medical institution in the United States." The statute does not require that the institution shall be a corporation. It is sufficient if it be a medical institution or school to which the public have a right of admission and instruction, on compliance with the rules and regulations established therefor, and which has the right by law to confer degrees. We are of opinion that the evidence upon this point was sufficient to lay the foundation for the introduction of the diploma, which, when its execution was proved, was legal evidence tending to prove that the plaintiff received a medical degree at that institution.

The second exception is to the rule of law given to the jury by the court, by which the relation of master and servant should be determined. We think the charge on this point presented to the jury the rule of law carefully, fully and correctly. It is in harmony with the law as declared by this court in *Eaton* v. *European and North American Railway Company*, 59 Maine, 520; and *McCarthy* v. *Second Parish of Portland*, 71 Maine, 318.

The third exception is to the charge of the judge upon the question of damages. The clause of the charge excepted to is as follows: "But I instruct you as matter of law that the plaintiff is not prohibited from recovering damages for his loss of business as a physician, although he had no such degree from a public medical institution, or no such license from the Maine Medical Association, if he satisfies the jury that he actually received cash for his services."

We think this instruction correct. The action is for damages resulting from a personal injury. If, by the injuries received, the plaintiff was deprived of his capacity to perform his ordinary labor, or attend to his ordinary business, the loss he sustained thereby is an element of damages. The true test is what his services might be worth to him in his ordinary employment or business. It is not what sum he might legally recover for such services, but what he might fairly be expected to receive therefor. What he had previously been receiving for his services in his business, is proper evidence on this point. A clergyman who has no fixed salary, but is dependent entirely upon voluntary contributions for his compensation for his services, as in some of our churches, may have an income, and if by an injury he is deprived of his capacity to perform his duties, might lose that income, and suffer as much loss as if he was receiving a salary fixed by contract; and still he could not enforce the payment of anything from his church or society.

The plaintiff was practicing his profession as a physician. If he had received no medical degree or license, still he was not pursuing a business in violation of law. The law would afford him no remedy for the collection of his charges for his services, but if his patients voluntarily paid him therefor, so that he was receiving an income of a certain amount for his services, that was the measure of the value of his capacity to render them, and might be fairly considered as evidence tending to show that he would receive similar compensation in the future.

This question was fully considered in England in the recent case, *Phillips* v. *London and South Western Railway Company*, 42 L. T. Rep. N. S. 6. The plaintiff was a physician, and

brought his action for a personal injury by which he was incapacitated from attending to his business. At the trial, he proved that before the injury he had been receiving large special fees in the nature of gratuities from wealthy patients, which, with his regular charges, gave him an income of about five thousand pounds per year. The jury rendered a verdict for the plaintiff for sixteen thousand pounds. The case was taken to the court of appeal, and one of the questions was whether the jury was properly permitted to consider the special fees in estimating the value of the plaintiff's business; and the court held that it was a proper matter for their consideration.

The authorities cited and relied upon by the counsel for the defendant, are cases where the business lost or damaged was prosecuted in violation of law, and hence are clearly distinguishable from this case.

The defendant requested the court to give the jury the following instruction: "That if they find that by reason of the horse being frightened, *or otherwise became uncontrollable*, and Beaulieu [the driver] could not guide him, and the collision resulted from that, the defendant would not be liable." It is claimed that this requested instruction should have been given. It was properly refused, because it does not embrace the element that the horse was reasonably safe for the use to which he was put on that occasion, nor the element that the horse became uncontrollable without the fault of the driver. Upon this point the instruction given was sufficiently favorable to the defendant.

It is unnecessary to consider the other requests for instructions, as they all relate to the rule of law by which the jury should determine whether the driver of the horse was the servant of the defendant, in regard to which the jury was fully and correctly instructed.

Exceptions overruled.

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

JOHN K. CORTHELL *vs.* THOMAS N. EGERY and others.

Piscataquis. Opinion June 17, 1882.

Amendment. Execution. Judgment debt. Officer's sale.

When the only error in an execution is the statement of an insufficient balance as still due on the judgment debt, it is amendable; and when a defect in final process is amendable, it will be regarded as amended in proceedings involving the validity of acts done by virtue of it, unless the rights of third parties have intervened or injustice will thereby be done.

A sale of lands upon execution will not be held void on account of an error of the clerk, which may be amended without prejudice, leaving all parties in the same position they would have occupied, had the execution issued correctly at first.

Formal errors in prior executions do not invalidate a later execution correctly issued.

ON REPORT.

Writ of entry, to recover possession of certain lands in the town of Kingsbury, dated August 20, 1879. Plea, general issue.

The case was reported to the law court to be decided by nonsuit or default according to the legal rights of the parties.

The material facts are stated in the opinion.

C. A. Everett, for the plaintiff, after indicating errors in the statement of the balance of the judgment debt in some of the executions prior to that upon which sale was made, upon which the defendant's title depended, contended that such errors rendered those executions absolutely void.

An execution issued upon a judgment calling for more than the judgment authorizes is not void because the officer collects such sum and thus makes the levy void. It is the mandate which makes it void. It is not issued in conformity to the judgment.

An execution returnable in sixty days when it should be one hundred and twenty days is void. *Bond* v. *Wilder*, 16 Vt. 393; *Fifield* v. *Richardson*, 34 Vt. 410; *Wilson* v. *Fleming*, 16 Vt. 649. A warrant returnable in ninety days instead of three months is fatally defective. *Waterville* v. *Barton*, 64 Maine, 321.

Some of the prior executions had nothing written upon them

to show they were unsatisfied. And others had a certificate to that effect by a person whose authority to make it does not appear. A new execution could not issue in such a case. And none but the last execution was issued against the land in Kingsbury "whether owned by said inhabitants or not." For some or all of these reasons prior executions were void and it is respectfully contended that a new and valid execution cannot issue upon the return of a void execution. Counsel further elaborately argued the questions presented by the report, citing *Prescott* v. *Prescott*, 62 Maine, 428; Howe's Pr. 275, 276.

Wilson and Woodard, for the defendants, cited: *Pierce* v. *Strickland*, 26 Maine, 277; *Tibbetts* v. *Estes*, 52 Maine, 566; *Chaplin* v. *Barker*, 53 Maine, 275. Counsel added, "another point which we make in this case, is, that the statute under which title is claimed, by both parties in this case originally is a statute title. It is a title derived by sale upon execution, of property of an owner of property in a town, against the town itself."

"Such legislation is unconstitutional, and all acts under the legislation are void. 14 Amendment to Constitution, § 1, "Due process," &c. This doctrine is announced and maintained in *Meriwether* v. *Garrett*, 102 U. S. Reports, 11 Otto, 472. Opinion of Chief Justice WAITE, page 501; opinion of Mr. Justice FIELD, page 519; opinion of Mr. Justice STRONG, page 526.

"If now this court is prepared to meet the question and take the ground taken by the Supreme Court, which certainly seems tenable, both parties are claiming under defective title, and the condition of the one in possession is the better, and the judgment must be for the tenant."

SYMONDS, J. In this real action, the demandant, to prove title, introduces a warranty deed of the demanded premises from John S. Abbot to William E. Hewes, dated September 11, 1863; and we understand the report to intend that the title is regularly traced, by mesne conveyances, from the grantee in that deed to the demandant, though the deeds are not all in the case.

It is not denied that the title of John S. Abbot, which the demandant so holds, is derived from Andrew Wiggin, purchaser at a sheriff's sale of the lands on an execution dated July 30,

1861; which was the sixth execution issued upon a judgment recovered by William Tarbox, administrator, against the inhabitants of the town of Kingsbury, at the August term, 1855, of the Supreme Court in Kennebec.

The tenant's title is derived through mesne conveyances from Isaac R. Clark, purchaser at a sheriff's sale upon the tenth execution issued upon the same judgment, dated January 14, 1868.

It is a peculiarity of such a proceeding against a town that, other things being equal, the later sale gives the better title; the remedy of the prior purchaser upon the execution, like that of the original land owner, being against the town. R. S., c. 84, § § 29, 31.

The first objection urged against the validity of the sale on the tenth execution, under which the tenant claims, is that this, as well as some of the prior executions, did not follow the judgment; that the clerk in several instances, while describing the judgment correctly, was at fault in his computation and statement of the amount remaining due; and in some cases in inserting what was substantially a requirement for the payment of interest upon interest.

Such errors undoubtedly appear. But in all the executions the original judgment is described with substantial accuracy, so as to be clearly identified, the debt and costs correctly stated, the mistakes occurring in the statement of the amounts unsatisfied; and when the tenth execution is reached, it is a mere matter of computation to show that the clerk's statement of the amount "whereof execution remains to be done" is less than was in fact legally due upon the judgment as originally entered.

It is not necessary now to determine how far advantage can be taken, indirectly and collaterally, of errors of this sort, to impair the validity of the acts of the officer proceeding under process in due form, but we think it clear and according to the authorities, that when as in this case the only error is the statement of an insufficient balance as still due upon the judgment debt, it is amendable; and when a defect in final process is amendable, in proceedings involving the validity of acts done by virtue of it it will be regarded as amended, unless the rights of

third parties have intervened or injustice will thereby be done. *Hayford* v. *Everett*, 68 Maine, 505; *Caldwell* v. *Blake*, 69 Maine, 458. A sale of lands upon execution will not be held void on account of an error of the clerk which may be amended, without prejudice, leaving all parties in the same position they would have occupied, had the execution issued correctly at first.

The only result of a correction of the error here would be to show a small amount still remaining due upon the tenth execution, instead of its being fully satisfied, as the officer returned it. It makes the last levy one in partial satisfaction, instead of one in full satisfaction, of the execution; but we do not see why it should render it invalid as against the demandant's title. The levy under which he claims was one in partial satisfaction of the judgment debt.

While there is some conflict in the cases relating to this subject, we think the weight of authority sustains the tenant's title, against the objection which has been considered. *Wright* v. *Wright*, 6 Green. 415; *Chase* v. *Gilman*, 15 Maine, 64; *Colby* v. *Moody*, 19 Maine, 111; *Smith* v. *Keen*, 26 Maine, 420; *Rollins* v. *Rich*, 27 Maine, 557; *Morrell* v. *Cook*, 31 Maine, 120; *Campbell* v. *Stiles*, 9 Mass. 217; *Blake* v. *Blanchard*, 48 Maine, 297; *Burrell* v. *Burrell*, 10 Mass. 221; *M'Gee* v. *Barber*, 14 Pick. 212; *Currier* v. *Bartlett*, 122 Mass. 133; *Avery* v. *Bowman*, 40 N. H. 453; *Perry* v. *Whipple*, 38 Vt. 278; *Willard* v. *Whipple*, 40 Vt. 219; *Phelps* v. *Ball*, 1 John. Cas. 31; *Bissell* v. *Kip*, 5 Johns. 100; *Jackson* v. *Walker*, 4 Wend. 462; *Jackson* v. *Anderson*, 4 Wend. 474.

In *Prescott* v. *Prescott*, 62 Maine, 428, which holds that the levy of an execution exceeding the amount of the judgment is void, the court, by implication at least, excludes from the rule there established cases in which the error is "that of the court in making an erroneous computation of the amount due, which, perhaps, might be rectified;" citing *Avery* v. *Bowman*, *supra*, in which the fault was on the part of the clerk. But that point need not now be considered. Here, there is no such excess.

"These decisions establish the rule that in the case of an

obvious clerical error, where the whole record taken by itself, without resort to other evidence, furnishes certainty as to the fact, the requisite correction may be made." *Currier* v. *Bartlett, supra.*

The other objections taken to the validity of the levy of the tenth execution, such as the omission from the first nine executions of the words, "whether owned by said inhabitants or not," in the description of the real estate to be levied on, and of the names of the assessors in the officer's return of the notice served upon them before making the last levy, are not such, we think, as to defeat it. Formal errors in prior executions do not invalidate a later execution correctly issued. Nor can any irregularity, such as is alleged, in the manner of returning some of the earlier executions, have that effect. There is no evidence that either execution was issued till the previous execution had been returned by the officer or by an attorney purporting to act for the judgment-creditor to that extent; nor that anything was done by virtue of either of the executions which was not properly returned by an officer. Of the two executions dated January 5, 1859, one appears upon its face to be a rough draft, and the other the execution in the amended and completed form. The latter is returned by an attorney in no part satisfied. The history of the former does not appear.

Our conclusion is, after examining all the grounds taken in the elaborate argument for the demandant, that under the stipulations of the report, a nonsuit should be entered. No constitutional questions in regard to the levying of executions against towns upon private property are here involved; as in this respect the title of the demandant and that of the tenant are on equal footing, and the tenant has the possession.

Demandant nonsuit.

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

INHABITANTS OF STRONG *vs.* INHABITANTS OF FARMINGTON.

Franklin. Opinion June 19, 1882.

Insane paupers. Settlement.

A *non compos* or insane person is incapable of acquiring a pauper settlement in his own right.

Such a person who lived continuously in his father's family until the age of forty-eight years, was then sent to the insane hospital; *Held*, That he followed the residence of his father acquired while the pauper was an inmate of the hospital.

ON REPORT, the law court to render such judgment as the testimony, legally admissible, and the law require.

Assumpsit for pauper supplies. The writ was dated February 1, 1878. Plea, general issue. The opinion states the material facts. The case showed that the pauper was placed under guardianship in 1849, and his estate was then appraised at five hundred ninety-seven dollars and thirty-four cents.

Philip H. Stubbs, for the plaintiffs, cited: R. S., 1857, c. 24, § 1; *Upton* v. *Northbridge*, 15 Mass. 237; *Springfield* v. *Wilbraham*, 4 Mass. 496; *Wiscasset* v. *Waldoborough*, 3 Maine, 388; *Monroe* v. *Jackson*, 55 Maine, 55; *Sumner* v. *Sebec*, 3 Maine, 223; *Hovey* v. *Harmon*, 49 Maine, 269; *Oldtown* v. *Falmouth*, 40 Maine, 106; *Fayette* v. *Leeds*, 10 Maine, 409; 2 Dane's Abr. c. 53, art. 1, § § 9–11.

S. Clifford Belcher, for the defendants.

I. The pauper became of age in 1839. He takes the settlement his father then had unless he has since gained one for himself.

II. He was not *non compos e nativitate*. The case shows that in 1849, when he was put under guardianship, he had accumulated six or seven hundred dollars. From that time till 1862, when he was sent to the insane hospital, his guardian had the custody of his person though he remained at his father's.

III. He certainly did not continue to be a member of his father's family after he was received into the insane hospital.

He was not dependent on his father pecuniarily; he was not subject to his control; he neither needed nor received his counsel or advice.

Years subsequent to this date, his father moved to Farmington, and it is the theory of the plaintiff that this insane man continued to reside in his father's family, and hence by derivation gained a settlement in Farmington. The doctrine of derivative settlement cannot be carried to this length.

APPLETON, C. J. This is an action to recover the amount paid for the support of Peter Haines, Junior, in the insane hospital.

It is conceded that the father of the pauper had his settlement in the defendant town. The question presented for determination is whether the settlement of the son accompanies that of the father.

The pauper was born in Phillips, in 1818, and lived continuously in his father's family until 1862, when he was sent as an insane pauper by the municipal officers of Strong (of which town his father was then a resident) to the insane hospital, where he has remained to the present time. Subsequently to the pauper's removal to the hospital, the father acquired a settlement in Farmington.

The pauper was a person of weak mind, of filthy and disgusting habits, careless of his personal appearance, able to labor, but requiring for successful labor, supervision. He lived continuously with his father and in his family till he was sent to the insane hospital.

The plaintiffs claim to recover on the ground that the pauper was *non compos* or insane, and incapable of acquiring a settlement in his own right, and that his settlement followed that of his father, with whom he resided until he was sent to the hospital. *Wiscasset* v. *Waldoborough*, 3 Maine, 388; *Monroe* v. *Jackson*, 55 Maine, 55.

It is not pretended that the settlement of the pauper is in the plaintiff town. The father's settlement is in Farmington. The pauper is shown to have been and to be idiotic and incapable of

gaining a settlement in his own right. His settlement, therefore, follows that of the father, and is in the defendant town.

Defendants defaulted.

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

DELMONT THOMPSON *vs.* CHARLES BAKER.

WALDO. Opinion June 30, 1882.

Attachment of personal property.

The lien acquired by the attachment of personal property which is easily removable, is lost by neglect to retain possession of the property.

Where the attachment is only of the interest of one co-tenant in an article of personal property, the sale of the whole is unlawful.

ON REPORT. Agreed statement.

Trespass against the sheriff for the act of the deputy in taking and selling plaintiff's double wagon and hay-rack.

The statement shows that on the twenty-third day of August, 1879, Selden Morton and Charles A. Luce owned the wagon and rack, each owning one undivided half. On that day the defendant's deputy attached the same as the property of Morton, but did not remove them or exercise any control of them, other than to notify Morton in the presence of Luce of the attachment, and to file a certificate of the attachment in the office of the town clerk, as provided in R. S., c. 81, § 24.

The wagon and rack were then in the limits of the highway in good running order, and remained in the possession and use of Morton and Luce until September 30, 1879, when the same were purchased of them by this plaintiff in good faith.

Judgment was rendered and execution issued against Morton in the suit upon which the property was attached, and the same deputy, having the execution in his hands, took the wagon and rack from the possession of the plaintiff, though forbidden by him, and after due notice sold the whole of the same, and applied the proceeds in part satisfaction of that execution.

The law court to render judgment, and if it is for plaintiff, damages are to be assessed by the clerk.

Wm. H. Fogler, for the plaintiff, cited: *Nichols* v. *Patten*, 18 Maine, 238; *Gower* v. *Stevens*, 19 Maine, 92; *Waterhouse* v. *Smith*, 22 Maine, 338; *Weston* v. *Dorr*, 25 Maine, 182; *Sanderson* v. *Edwards*, 16 Pick. 144; *Melville* v. *Brown*, 15 Mass. 82; *Bryant* v. *Clifford*, 13 Metcalf, 138; *Boobier* v. *Boobier*, 39 Maine, 409.

N. H. Hubbard, for the defendant, submitted the case without argument.

APPLETON, C. J. The lien acquired by the attachment was lost by the neglect to retain possession of the property attached.

The property attached was easily removeable. The case is not within R. S., c. 81, § 24.

If the attachment was valid, it was but the attachment of the interest of only one co-tenant. The sale of the whole property was wrongful.

Judgment for plaintiff.

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

RUTH A. CROWELL *vs.* JOHN UTLEY and another.

Penobscot. Opinion June 30, 1882.

*Practice. Tax-title. Stat. 1880, c. 214.**

If a demandant claims to recover land by virtue of a tax-title, he must make out a *prima facie* case before the defendant is required by stat. 1880, c. 214, to deposit the amount of the taxes and charges, in order to be allowed to contest the validity of such tax-title.

A party who claims under or declares upon a tax-title, must produce some evidence of such title before the other party can be required to deposit

*See *Straw* v. *Poor*, the case next following.

with the court the amount of the taxes and charges, and there cannot be any grade or degree of proof short of a *prima facie* case.

ON REPORT.

Writ of entry to recover certain premises in Bangor which the plaintiff claims under a tax sale, under the provisions of R. S., c. 6, § 159, *et seq.*

The case is stated in the opinion.

H. L. Mitchell, for the plaintiff.

R. S., 1857, c. 6, § 145, which was before the court for construction in *Orono* v. *Veazie*, 57 Maine, 517, differs materially from stat. 1880, c. 214.

In the former, he who would contest a tax-title, must first pay or tender all such taxes, legal charges and interest thereon and all costs of suit to the other party; and there was propriety in requiring a *prima facie* case to be made out, as stated in *French* v. *Patterson*, 61 Maine, 203, before one party should be obliged to pay or tender all such sums to the other party. Under the latter he has only to deposit the taxes, etc. with the clerk of the court to be finally disposed of as the court directs; and he has no standing in court until such deposit is made.

No hardship is thus imposed. It is a means of securing the just proportion of the public expense of the owner of real estate who claims protection of person and property, a hearing in court and trial by jury, in trying to avoid such payment. If the assessment is found valid, the party ought to pay the taxes, if invalid or if the tax-title is upheld, the court can direct the money to be returned, if equity requires that to be done. Stat. 1880, c. 214, repeals the former acts. *Knight* v. *Aroostook R. R.* 67 Maine, 291; *Commonwealth* v. *Kelliher*, 12 Allen, 480; *Smith* v. *Sullivan*, 71 Maine, 150; *York* v. *Goodwin*, 67 Maine, 260; *Grosvenor* v. *Chesley*, 48 Maine, 369, so that no payment or tender can now be required by virtue of those acts.

Counsel further ably argued the question of the constitutionality of the 1880 statute.

Wilson and Woodard, for the defendants.

PETERS, J. This is a real action, in which the demandant claims the *locus* under a tax-title. The case is sent to us upon a brief report, to obtain the decision of these two questions of law. *First:* Must the demandant establish a *prima facie* case of tax-title, as was held in *Orono* v. *Veazie*, 57 Maine, 517, before the defendant can be required to deposit the amount of taxes and expenses, to authorize a defense against the validity of the tax-title? *Second:* If not so, are the acts, which dispense with the necessity of such proof, constitutional?

There is no occasion to consider the second question. The first question may be regarded as settled by the case of *Wiggin* v. *Temple*, 73 Maine, 380, in which case, upon a review of the various statutory provisions upon the subject by DANFORTH, J., the doctrine of *Orono* v. *Veazie*, *supra*, is adhered to, and is regarded as undisturbed by any of the statutes passed since that decision was made. The conclusion reached is, that the later acts are declarative and cumulative only, and were not intended to repeal the act of 1874, (c. 234, laws of 1874,) which requires a *prima facie* case to be made, by the person claiming under a tax-title, before the deposit shall be required to enable the defendant to undertake to defend. See *Allen* v. *Morse*, 72 Maine, 502.

We do not see how it can be otherwise, upon any reasonable view of even the statute of 1880, the most intensified of all the acts touching the matter, which reads thus: "No person contesting the validity of any sale of land for non-payment of taxes, shall be permitted to commence, maintain or defend any action at law or in equity, involving the validity of such sale, until he shall have deposited with the clerk of the court in which such action is to be commenced or defended, the amount of all taxes, interest and costs accruing under such sale, and of all taxes paid after such sales and interest thereon, to be paid out by order of court to the party legally and equitably entitled thereto."

How can it appear that the validity of a sale is involved in a case, when no evidence of a sale is introduced? How can "the amount of all taxes, interest and costs arising under *such* sale," be ascertained, unless there is evidence that a sale has been made?

Is it enough for a demandant to say in court that he has a tax-title, or that he claims under one? Will his word be taken? Or is it enough for a demandant to allege the fact in the declaration or writ? Will his assertion of the fact be taken without proof? No one would deny that there must be some proof that the assertion is true. Then, how much evidence must be produced? Shall it be what the demandant calls evidence of sale, or shall it be legal evidence of a sale? Is it enough to raise a suspicion or prove a possibility that a sale has been made? Is an attempt at sale to be of the same efficacy as a sale indeed? We think not. It cannot be said that a sale of land is involved in a case, when there is not *prima facie* evidence that a sale has been made. From the nature of things, if any evidence is required, there must be a *prima facie* case. Between no evidence at all and evidence to make a *prima facie* case, there cannot be grades or degrees of probability. A claim supported with evidence less than enough to make a *prima facie* case, is not supported at all. In a very literal sense, a case might be said to involve the validity of a tax sale, though the deed presented be a forgery, or be made by a stranger instead of a collector or treasurer, or though it might not contain evidence of a single step properly taken to produce a forfeiture, such as may be required by law. We think the law of 1880 cannot be amenable to such an interpretation.

But the defendant cannot "defend any action at law," until he makes the deposit. Defend against what? Defend against an assertion, or suggestion, or an allegation which is not supported by any proof? That cannot be. Nor can an owner of land "*commence* an action at law" to recover his land, if a tax-title is involved, without a deposit of the taxes. But his writ makes no mention of tax-title, nor can it be known in advance that any defense of any kind will be set up. It is very easy to see that there would be very great incongruity in an exact and literal interpretation of the statute, if not an impossibility that such an interpretation could be practically upheld.

Further, depositing the money would be a purposeless thing, if the demandant cannot make out even a *prima facie* case,

because in such event the money cannot ever be his. In *Belfast Savings Bank* v. *Kennebec Land and Lumber Co.* 73 Maine, 404, it is held that the money in such case must be restored to the depositor. "To hold otherwise," says WALTON, J., in the case cited, "would make a tax illegally assessed as collectible by a sale of the land as one in the assessment of which all the requirements of the law had been scrupulously complied with."

The present case, as reported, does not require us to decide whether the treasurer's deed makes out a *prima facie* case or not; that question is not discussed.

Action to stand for trial.

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

DAVID R. STRAW *vs.* JOHN O. POOR and another.

Penobscot. Opinion June 30, 1882.

Tax-title.

If a demandant has the title to the premises demanded, unless his title is defeated by a tax-sale under which the defendant claims possession of the premises, the defendant must exhibit *prima facie* evidence of his tax-title, before the demandant is required to deposit the taxes and charges in order to be allowed to contest the validity of such tax-title.

By R. S., 1857, c. 6, § 42, a county treasurer can sell such fractional part of land assessed for taxes as will bring the amount of the taxes and charges thereon; but a sale will be void, if the whole tract is sold, and the treasurer does not certify that it was necessary to sell the whole to pay such amount.

ON REPORT.

A writ of entry to recover possession of two lots of land in Woodville plantation. The writ is dated September 16, 1878. The question presented to the court is stated in the opinion.

D. F. Davis and C. A. Bailey, and C. A. Everett, for the plaintiff, cited: *Whitmore* v. *Learned*, 70 Maine, 276; *Orono* v. *Veazie*, 61 Maine, 431; *Orono* v. *Veazie*, 57 Maine, 517;

Phillips v. *Sherman*, 61 Maine, 548; Const. U. S. Art. 14, § 1; Const. Maine, Art. 1, § 19; *Stuart* v. *Palmer*, 74 N. Y. 183; *Zeigler* v. *S. and N. A. R. R. Co.* 55 Ala. 594; *Clark* v. *Mitchell*, 64 Mo. 564; *Lennon* v. *Mayor, etc.* 55 N. Y. 361; *Davidson* v. *New Orleans*, 96 U. S. 97.

A. W. Paine, for the defendants.

This action is not maintainable without tender or payment of the sum for which the tax sale was made. The sale was under R. S., 1857, c. 6, § 42, as amended by statute 1862, c. 116. The assessment was in 1861 by the county commissioners for building or repairing highways, the sale was in December 1862. The assessment was legal and conclusive so far as this action is concerned until overruled on *certiorari*. 29 Maine, 196; 33 Maine, 457. The assessment being valid and the sale for taxes being made, the defence is made out, for the plaintiff has not paid nor tendered the sum for which the sale was made as required by the statute, 1862, c. 116, § 2.

If it be said that the statute of 1862 was repealed by R. S., 1871, the answer is that the defendants' right had already become vested and was protected by the constitution; and the repealing act expressly provided that "the acts declared to be repealed remain in force . . . for the preservation of rights and their remedies existing by virtue of them."

The counsel further ably argued the question of the constitutionality of the law of 1862.

PETERS, J. This is a real action. It is not denied that the demandant is entitled to the demanded premises, unless a tax-title, under which the defendants claim the land, takes the demandant's title from him.

It is contended by the defendants that the action cannot be maintained, because the demandant has not deposited with the clerk the amount of the taxes and charges for the non-payment of which the tax sale was made. In *Crowell* v. *Utley*, *ante* p. 49, it is held, following other recent decisions, that, where a demandant claims under a tax sale, the defendant cannot be required to

make such deposit, until the demandant shall establish his right by at least a *prima facie* case, the court adhering to the doctrine of the case of *Orono* v. *Veazie*, 57 Maine, 517. And the same rule must apply where the parties to the litigation are reversed. If the demandant has the true title, subject to its loss by a sale of the land for non-payment of taxes, then the defendant, who sets up a claim of title by virtue of a tax sale, must first make out a *prima facie* tax-title in defense of his claim, before the demandant can be required to make such deposit.

Here the defendants fail to make out a *prima facie* case. The proceedings of sale are void. A tax was assessed by county commissioners upon certain lots in an unincorporated township, assessing some of them at one rate and others at another rate, and portions of each set of lots were sold *in solido* by the county treasurer at a given sum paid for the whole by the purchaser, the treasurer certifying that the lands were "struck off (at that sum) to the said Gilman, the highest bidder therefor." It does not appear, as it should, that any effort was made to obtain the amount of the tax and charges by a sale of some fractional part of the land less than the whole. The statutes, under which the sale was made, (R. S., 1857, c. 6, § 42, amended by c. 116, acts of 1862,) required that "*so much* of it (the land) should be sold" as would raise the sum that would cover taxes and charges and interest. "So much" means such fractional portion. *Allen* v. *Morse*, 72 Maine, 502. The error is fatal, and renders the deed void. *Lovejoy* v. *Lunt*, 48 Maine, 377; *French* v. *Patterson*, 61 Maine, 203; *Whitmore* v. *Learned*, 70 Maine, 276; *Wiggin* v. *Temple*, 73 Maine, 380.

Judgment for demandant.

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

INHABITANTS OF GREENFIELD *vs.* INHABITANTS OF CAMDEN.

Penobscot. Opinion June 30, 1882.

Paupers. Settlement. Evidence. Presumption.

In settlement cases, evidence of the declarations of a deceased person is admissible to show when, but not where, such person was born.

The recital in an ancient deed that the grantor was of a certain place, is competent evidence of his residence in such place at the date of the deed. It is an act done *ante litem motam*, a part of the *res gestæ*, the actors in which are dead.

In a pauper suit, the ancient books of records belonging to a town which is a party to the litigation, reciting facts bearing upon the residence of the pauper's ancestor in such town, although the books are not kept with technical accuracy, are competent evidence of the facts recited; they are a part of the *res gestæ*, and partake of the character of declarations made by the town.

Where it is shown that a person was residing at a certain place at a certain time, the ordinary presumption is that such residence was a continuing residence. For what period of time such presumption would last must depend upon all the associated circumstances.

The fact that a pauper's ancestor lived and had his home upon the territory of a town upon the day of its incorporation, thereby acquiring his settlement in such town, may be shown by circumstantial and presumptive evidence.

The town of Camden was incorporated on February 17, 1791. John Gordon, Junior, in a deed of October 12, 1786, describes himself as residing in the place afterwards incorporated. On April 15, 1791, the selectmen of Camden laid out a road "to John Gordon, Junior's house," and the town accepted it. It appears from the town records and registry of deeds, that, for many years continuously after 1791, he was residing in Camden, dealing to some extent in real estate, and taxed for a considerable real and personal estate between 1801 and 1813, no lists of assessments or valuation being found of a date prior to 1801, and that at times during this period he held a minor office in town, and in other respects performed acts that were to some extent indicative of citizenship. Aged witnesses remember him as living in Camden as long ago as their memories serve them, which would be somewhere at the beginning of the present century; and such persons do not remember, and there is nothing in the case to indicate, that he resided in any other place prior to 1813. *Held*, That these facts are *prima facie* proof that John Gordon, Junior, resided in Camden on the day of its incorporation, February 17, 1791. *Held*, also, That the presumption from such facts is that he was a citizen and not an alien. *Held*, further, that inasmuch as

the town was incorporated from a plantation, all citizens residing within its limits on the day of its incorporation were made inhabitants with privileges alike and had a legal settlement therein.

ON REPORT.

Assumpsit to recover expenses incurred by plaintiffs for the support of paupers, David Gordon, his wife and minor children, from November 10, 1874, to the date of the writ, December 10, 1875. Plea, general issue.

For the purposes of the trial it was admitted that the articles furnished to the amount of one hundred forty-three dollars and fifty-four cents, were needed, and were furnished and received, as pauper supplies; and that there was seasonable notice and denial.

The material facts shown in the report are stated in the opinion. If upon so much of the evidence as the law court deemed competent and admissible, John Gordon, David's father, acquired a settlement in Camden, and the action was otherwise maintainable, the case was to stand for trial; if not it was to be entered nonsuit.

Sewall and Blanchard, for the plaintiffs, cited: 29 Maine, 333; 36 Maine, 448; *Kenady* v. *Doyle*, 10 Allen, 164; 2 Greenl. Ev. § § 461, 462; 9 Mass. 414; 4 Campbell, 401; *Hingham* v. *Scituate*, 7 Gray, 231; *Adams* v. *Ipswich*, 116 Mass. 570; *Bath* v. *Bowdoin*, 4 Mass. 453; *Buckfield* v. *Gorham*, 6 Mass. 445; *Sutton* v. *Orange*, 6 Met. 484; *Fayette* v. *Hebron*, 21 Maine, 266; 1 Greenl. Ev. § § 104, 106, 485, 555, 503, 144, 570, 142, 571; *Hammatt* v. *Emerson*, 27 Maine, 335; Rev. Stat. U. S. c. 17, § 882; 1 Whar. Ev. § § 114 (note 2), 640, 642, 643; *Oldtown* v. *Shapleigh*, 33 Maine, 280; 1 Cush. 436; 4 Mason, 268; 13 Pick. 523; 8 Pick. 476; 105 Mass. 519; 10 Pick. 98; 36 Maine, 428; 6 Allen, 508; *Calais* v. *Marshfield*, 30 Maine, 519; 6 Pickering, 158; *Boston* v. *Weymouth*, 4 Cush. 538; *Pelham* v. *Middleboro'*, 4 Gray, 57; *Freeport* v. *Sidney*, 21 Maine, 305; 4 Mass. 545; 7 Mass. 381; 2 Maine, 28; 25 Maine, 468; 53 Maine, 228; *Charlestown* v. *Acworth*, 1 N. H. 62; 3 Wash. Real Prop. § § 50, 306, 307; *Russell* v.

Coffin, 8 Pick. 143; *Randolph* v. *Norton*, 16 Gray, 395; 107 Mass. 598; *Conway* v. *Ashfield*, 110 Mass. 113; *Westbrook* v. *Gorham*, 15 Mass. 160; *Attleboro'* v. *Middleboro'*, 10 Pickering, 377.

A. P. Gould, for the defendants.

There is no evidence that John Gordon, Junior, was an inhabitant of the plantation of Camden, at the date of the act of incorporation, February 17, 1791.

By the act of 1767, no person could become an inhabitant of any town without the consent of its inhabitants expressed by a vote at a regular town meeting. Ancient Charters, 663, 664. This was repealed by the act of June 23, 1789, which provided that a person could become an inhabitant by two years' residence therein without being warned to depart. 2 Laws of Mass. c. 14, § 1. This was extended to three years, by the act of 1790, chapter 30.

Now there is no evidence that Gordon obtained permission to become an inhabitant of the plantation under the first act, and there had not been sufficient time (two years, or three years,) for him to become an inhabitant under the other acts. And the act of incorporation embraced only the "inhabitants" of the plantation.

In suits of this kind between towns there are no equities, and the statutes are construed with great strictness. *Springfield* v. *Enfield*, 30 N. H. 71; *Monson* v. *Chester*, 22 Pick. 385.

If Gordon acquired a legal settlement in Camden, it must have been under the act of 1794, the twelfth mode, which provided "a person being a citizen" twenty-one years of age, residing in a town ten years, and paying all taxes for five years, should gain a settlement.

It is therefore incumbent on the plaintiff to show that Gordon was a citizen. *Cummington* v. *Springfield*, 2 Pick. 394; *Monson* v. *Chester*, 22 Pick. 385.

As to the evidence of citizenship, see: 3 Laws, Massachusetts, Appendix, c. 71; 2 Kent's Com. 39, 40, 41; the Pension Act, 3 U. S Stat. at Large, c. 19, p. 410. Notice the difference in

the acts of 1828. 4 U. S. Stat at Large, c. 53, p. 269; and 1832, *Idem*, c. 126, p. 529. See also, *Jackson* v. *White*, 20 Johnson, 313, 323; *Ingliss* v. *The Sailors' Snug Harbor*, 3 Peters, 99, 166.

The statement in the deed at the most shows only that Gordon was living in Lincoln county, but does not prove his status there as to citizenship. A man may have two places of residence but only one domicile, and on that question the declaration of a person in so solemn an instrument as a will, proves but little. *Gilman* v. *Gilman*, 52 Maine, 175; *Whicker* v. *Hume*, 5 Eng. L. and E. 52. The cases where the written declarations of a person have been admitted to show his residence under the pauper laws, have no application to this question.

It must be shown that John Gordon, Junior, resided in Camden "for the space of ten years together," commencing after he was twenty-one years of age. And the plaintiffs must show when the ten years commenced. This cannot be done by hearsay evidence. *Wilmington* v. *Burlington*, 4 Pick. 174; *Braintree* v. *Hingham*, 1 Pick. 245; *King* v. *Erith*, 8 East. 538; *King* v. *Chadderton*, 2 East. 27; *King* v. *Ferry Frystone*, 2 East. 54; *Southampton* v. *Fowler*, 54 N. H. 197; *Union* v. *Plainfield*, 39 Conn. 563; *Mima Queen* v. *Hepburn*, 7 Cranch, 290. The statutes mean ten consecutive years. *Billerica* v. *Chelmsford*, 10 Mass. 394. Declarations in deeds only show that on the day of the date the grantor lived in the place named; they do not show such a residence as is required by the pauper laws, — an inhabitancy *animo manendi*. *Turner* v. *Buckfield*, 3 Maine, 229; *Jefferson* v. *Washington*, 19 Maine, 293; *Warren* v. *Thomaston*, 43 Maine, 406. At the most "this evidence is merely presumptive." *Ward* v. *Oxford*, 8 Pick. 477. And that is to base a presumption upon a presumption, which is too far fetched for logical deduction. Proof that a pauper had a residence in a certain town upon a particular day, does not create the presumption of continuance. *Kirkland* v. *Bradford*, 30 Maine, 452. It has sometimes been said that when a home has been once fixed, it continues until it is actually changed. *Brewer* v. *Linnæus*, 36 Maine, 428; *Chicopee* v. *Whately*, 6 Allen, 508.

This cannot be correct. If it were so, to make out a legal settlement by five years' residence, it would only be necessary to show that a residence was once acquired and that five years have since elapsed.

It must appear that Gordon was legally assessed and actually paid taxes for five years. *Reading* v. *Tewksbury*, 2 Pick. 534; *East Sudbury* v. *Sudbury*, 12 Pick. 1; *Berlin* v. *Bolton*, 10 Met. 115; *Shrewsbury* v. *Salem*, 19 Pick. 389; *Robbins* v. *Townsend*, 20 Pick. 345. The paper books offered by the plaintiffs, purporting to be signed by certain persons as assessors of Camden, are not legal evidence. They are not the evidence of the assessment required by the statute. 1 Laws of Mass. 275; *Wakefield* v. *Alton*, 3 N. H. 378. No legal assessors were elected, or tax voted. The constable's return on the warrant for the town meetings for the years from 1809 to 1813, says, "pursuant to the within warrant, I have notified the within inhabitants of said town, qualified as therein expressed to meet at the time and place and for the purposes therein mentioned." *Tuttle* v. *Cary*, 7 Maine, 426; *Fossett* v. *Bearce*, 29 Maine, 523; *Bearce* v. *Fossett*, 34 Maine, 575; *Chapman* v. *Limerick*, 56 Maine, 390; *Allen* v. *Archer*, 49 Maine, 346; *Brunswick* v. *McKeen*, 4 Maine, 508. It must be proved affirmatively that Gordon paid the taxes, payment is not to be presumed even if a legal tax was assessed. *Dana* v. *Petersham*, 107 Mass. 598; *Attleboro'* v. *Middleboro'*, 10 Pick. 378; *Shrewsbury* v. *Salem*, 19 Pick. 389; *Robbins* v. *Townsend*, 20 Pick. 345; *Berlin* v. *Bolton*, 10 Met. 118.

Gordon was once elected a hogreeve. The law required that "two or more persons for hogreeves shall be chosen." 2 Laws of Mass. c. 56, § 1. Thus any person, any man or woman, citizen or not, resident or non-resident could be chosen to that office. Dillon Mun. Corp. § 134; *State* v. *Blanchard*, 6 La. Ann. 554.

PETERS, J. This action is to recover for supplies furnished to David Gordon, wife and minor children, paupers in the town of Greenfield. The facts disclose that David is the son of John Gordon, Junior, whose father was John Gordon, Senior, and that David had a brother first known as John Gordon, Third, and

that all of them lived in the early part of the present century in the town of Camden. John Gordon died and was buried in Camden "a few years before the war of 1812." John Gordon, Junior, died in Greenfield in about the year 1850. John Gordon, Third, died during service in the war of 1812. David lives in Greenfield.

The case does not disclose that David has any settlement in the state, unless he takes derivatively the settlement of his father, which the plaintiffs contend the father obtained by being an inhabitant of Camden when that town was incorporated on February 17, 1791. Upon this hinge, in our view of the facts, the case turns.

Bearing upon this question the following facts, objected to by the defendants, are relied upon by the plaintiffs: First, papers upon which John Gordon, Junior, obtained a revolutionary pension, being his own sworn declaration, and the accompanying affidavits of two other persons many years deceased, to the effect that he was born in New Hampshire in 1764, and lived in Camden from his early youth until he removed therefrom in about the year 1813. However much weight these papers may have morally, they are not legally admissible. As to strangers, they are hearsay merely, and do not, in the main facts sworn to, come under any of the exceptions which make hearsay admissible. The only admissible fact contained therein is the declaration of the pensioner that he was born in 1764. The law receives his statement of the date of birth, but many authorities refuse to receive such evidence of the place of birth, in settlement cases. 1 Green. Ev. § § 125, 555; 1 Whar. Ev. § § 208, 821; *Wilmington* v. *Burlington*, 4 Pick. 174; *Hall* v. *Mayo*, 97 Mass. 416; *Adams* v. *Swansea*, 116 Mass. 591.

The next item of evidence presented is the copy of a deed from the registry of Lincoln county, dated October 12, 1786, in which John Gordon, Junior, deeded to Peter Ott land in Camden, in which deed the grantor is described as "of a place called Camden in Lincoln county." There can be no mistake that John Gordon, Junior, was the father and not the grandfather of David, inasmuch as the distinction is well kept up between the two names,

as evidenced by subsequent conveyances and by various allusions to the two persons in subsequent records of the town. The testimony of several aged persons who are called as witnesses confirms the fact. The recital of John Gordon, Junior's, residence in this deed is competent evidence tending to show that fact. It is an act done *ante litem motam*, a part of the *res gestæ*, the actors in which are not now supposed to be living. *Oldtown* v. *Shapleigh*, 33 Maine, 278; *Ward* v. *Oxford*, 8 Pick. 476.

The next item in the chain of proof is found in the records of the town clerk of Camden for 1791 and succeeding years. It is needless to argue that the town records are competent proof of the matters found therein. No matter whether they were kept with technical accuracy or not. They pertain to the *res gestæ*, are the acts of the town, and are ancient historical records. These records disclose that on April 15, 1791, the selectmen laid out a road, describing it as running, among other boundaries, "by John Gordon's lot," and "to John Gordon, Junior's, *house*." On the same day a road was laid out "from Clam Cove to John Gordon, Junior's." In the same year there was an article in the town meeting warrant, "to see if the town would accept a road laid out from Mr. Ott's to John Gordon, Junior's"; and the town voted to accept "a road laid out from Clam Cove to John Gordon, Junior's," and "not to accept a road laid out from Peter Ott's to John Gordon, Junior's." In 1791 there also appears a record of a road "leading to a road that leads to John Gordon, Junior's," and the town in that year "accepts the road which comes into the road that leads from Clam Cove to John Gordon, Junior's." In December, 1791, John Gordon (Senior,) of Camden, conveys land to William Thompson.

The town clerk's records and registry of deeds show the following facts: That "John Gordon, Junior, of Camden," on June 2, 1792, conveyed land to E. Gay; that on April 4, 1793, "John Gordon, Junior, of Camden," conveyed land to W. Hewitt; that, on April 1, 1793, the town accepted a road, running in one of its boundaries "to John Gordon, Junior's, fence;" that in the same year, John Gordon and John Gordon, Junior, were the first two signers of a petition for the call of a town meeting; that in 1794,

the selectmen make return of a road, "to the road that leads from Clam Cove to John Gordon, Junior's; that, on January 8, 1795, "John Gordon, Junior, of Camden," conveyed land to Robeson; that, on June 18, 1795, William Thompson conveyed land in Camden "to John Gordon, Junior, of Camden;" that, on April 23, 1798, Joseph Pierce conveyed land in Camden "to John Gordon, Junior, of Camden, ;" that, on October 30, 1800, "John Gordon, of Camden," conveyed land to E. G. Dodge, signing and acknowledging the deed as "John Gordon, Junior," and Mary the wife of John, Junior, joins in the deed to relinquish dower, while the wife of the father was not Mary but Jane Gordon; that, in 1806, John Gordon, Junior, was accepted by the town as a bondsman of a town collector; that, in 1807, land in Camden was conveyed to and also by "John Gordon, Junior, of Camden;" and that in the years 1808 and 1809, "John Gordon, Junior, was chosen hogreeve."

All the assessment and valuation lists of the town that can be found, up to the year 1813 inclusive, comprising the years 1801, 1804, 1805, 1806, 1807, 1808, 1809, 1811, 1812 and 1813, contain the names of John Gordon and John Gordon, Junior; and John Gordon, Junior, was constantly taxed as the possessor of a considerable real estate, and as a resident of the town. We think the tax exhibits sustain the position taken by the plaintiffs' counsel, that after 1808, the probable date of the death of John Gordon, Gordon, Junior, was taxed by the name of Gordon, Senior, and Gordon, Third, as Gordon, Junior. A glance at the lists shows it.

Then comes the question, do all of these facts combined prove, *prima facie*, that John Gordon, Junior, had his residence in Camden, on February 17, 1791? We think such a *prima facie* case is made out.

By the deed of October 17, 1786, John Gordon, Junior, declares that he was of Camden at that date. That meant more than that he was bodily there. We think it meant that he was residing and dwelling there. Those were days when a man was not apt to have different residences, or a domicile in one place and a residence in another. Best, in his work on evidence, says

that the place where a person lives must be taken, *prima facie*, to be his domicile. 2 Best Ev. *535. No doubt, such a declaration in a deed would amount under many circumstances to but slight evidence. But its importance here arises somewhat from the fact that probably not the slightest other legal evidence can ever be adduced in relation to the whereabouts or residence of the grantor at that time. Its importance is increased from the fact that it is not inconsistent with any other known event. And it is to be weighed with the further fact that the father of the grantor lived and died in Camden, and we have no information that he ever lived anywhere else.

Now what inference or presumption should be drawn from this statement in the deed? The plaintiffs claim that the presumption is, *prima facie*, that Gordon lived in Camden so long as the contrary does not appear. This position is resisted by the defendants, who say it cannot be possible that a continuous residence of five years can be inferred from the proof of one day's residence at the beginning of the five years. Some authorities seem to support the plaintiffs' proposition. But it may be difficult to lay down any general rule upon the question. Each case must stand upon its own circumstances. We have no doubt that the presumption of continuance applies to residence as to many other conditions in life, and that we should assume that Gordon's residence in Camden in 1786 was a continuing residence. The presumption is one of fact, or perhaps a mixed presumption, that is, a presumption of fact recognized by the law. And for how long any man's residence should be presumed to continue unchanged, must depend upon the circumstances and the judgment of the tribunal which is to draw a deduction from the circumstances. The less the opportunity to obtain evidence of actual continuance of residence, the stronger may the presumption be.

In 2 Whar. Ev. § 1285, it is said: "We may hold, as a presumption of fact, more or less strong according to the concrete case, that a party is presumed to continue to reside in the last place known to have been accepted by him as such residence. The same inference is applicable to the settlement of a pauper,

and to domicile." The same author says in the same volume, § 1284, under the head of "presumptions of uniformity and continuance:" "We are therefore to understand that the presumption of continuance is simply a presumption of fact, whose main use is in designating the party on whom lies the burden of proof. In this sense we are justified in holding that the continuance of an existing condition is a presumption of *fact*, dependent for its intensity on the circumstances of the particular case. But the question is one dependent upon the relation of conditions to time. In fact, so far from continuance being a *legal* presumption, in things dependent upon human purposes, the presumption, in the long run, is the other way. "Man never continueth in one stay." In Wood's edition of Best on Evidence, 2 vol. § 405, in note, the American editor says: "When a man's residence is once shown to have been in a place, it will be presumed to continue there until the contrary is proved. But presumptions of the continuance of a given state of things only exists in reference to such matters as are of a continuous nature. That is, such a state of things as would be likely to continue, unless interrupted by other causes outside of the relations themselves. The fact that a person is seen on the street to-day does not warrant the presumption that he will remain there forever, or even five minutes; but if a person is shown to be in the employment of a person to-day, he will be presumed to remain in that person's employment until the contrary is shown."

But we have no occasion to determine what the effect of the recital in the deed might be standing alone. We are called upon to pronounce what its force and effect shall be when taken in connection with other important facts which are a part of the evidence. It appears that Gordon, Junior, was in Camden in April, 1791, less than two months after the incorporation of the town, and for many years continuously afterwards, dealing in real estate, owning considerable real and personal estate, and taxed therefor. And it appears in several ways that during this period of time he was acting the part of a considerably important

citizen. It is evident enough that on April 15, 1791, he was the occupier if not the owner of a house. This fact throws much light upon the question of previous locality and condition. If we find a man living in a house to-day, we may very well infer that he was there yesterday, and there may be a presumption that he was there for days or weeks or months before that time. All would depend upon the surrounding circumstances.

The two conditions, a residence before February, 1791, and a residence so soon afterwards, when taken in co-operation, bear with great force upon the position that there was an intermediate and continuous residence. The maxim, *probatis extremis, præsumuntur media*, applies. The probability that there could have been no change is geometrically stronger. Added to this is the fact of a residence in the same town for two decades and more after 1791, and there is nothing to indicate a residence in any place out of the town till the removal in about 1813.

It certainly cannot be necessary to prove in any manner other than by circumstantial and presumptive evidence that he lived in the defendant town on the day of its incorporation. Any fact may be proved by indirect or circumstantial evidence. It could hardly be pretended that, if there were no question that a man was residing in a house of his own on the day before and on the day after a given day, he would be presumed to have been residing there on the intermediate day, if nothing exists to indicate the contrary. And it cannot be a breach of good reasoning to infer the same thing, where the gap to be supplied is a wider one, if the evidence is strong enough to justify it. Nor is a contrary doctrine upheld in *Kirkland* v. *Bradford*, 30 Maine, 452. The head-note in that case misrepresents the facts, as presented by the reporter.

The defendants further contend that, even if John Gordon, Junior, dwelt and had his residence in Camden on the day of its incorporation, he was not a legal inhabitant at the time. But this point is plainly overruled by the decisions in Maine and Massachusetts. The territory being a township or plantation merely, all citizens thereon were made thereby inhabitants with

privileges alike. *Fayette* v. *Hebron*, 21 Maine, 266, and cases there cited.

The defendants contend that it does not appear that Gordon, Junior, was a citizen even. The facts related in this opinion, which are admissible in evidence, are sufficient to show that he was. *Cummington* v. *Springfield*, 1 Pick. 394.

Action to stand for trial.

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

JAMES H. NORRIS, complainant, *vs.* OMER PILLSBURY.

Kennebec. Opinion July 5, 1882.

Mill dam. Flowage. Complaint. R. S., c. 92, § 19. Statute 1881, chapter 88, § 3.

The provisions of R. S., c. 92, § 19,—prohibiting a new complaint, when either party is dissatisfied with the annual compensation established for flowage, until the expiration of one month after payment of what may be due for the then last year, and without one month's notice to the other party,—have no application to a complaint for damages in gross under stat. 1881, chapter 88, § 3.

The complaint under stat. 1881, c. 88, § 3, may be filed without notice, and without reference to the provisions of R. S., c. 92, § 19.

ON EXCEPTIONS.

Complaint under the provisions of stat. 1881, c. 88, § 3.

(Complaint.)

"To the honorable Justices of the Supreme Judicial Court within and for the county of Kennebec, at their session to be held at Augusta, in and for the county of Kennebec, on the third Tuesday of October, A. D. 1881.

"Respectfully represents James Norris, of Monmouth, in said county of Kennebec, that he is the owner of a certain mill, mill privilege and dam, at East Monmouth, in said county, situated on a certain stream, which is not navigable, connecting the

Annabessacook and Cobbosseecontee Great ponds, so called, and is now operating the same.

"That on the seventeenth day of July, 1843, one Truxton Wood, of Winthrop, in said county, filed his complaint in the district court, within and for the county of Kennebec, against Samuel Noyes and Horatio G. Kelley, then the owners and occupants of the same mill, mill dam and water power now owned and occupied by the said complainant, therein alleging that the said dam and the head of water raised thereby flowed his land situated in said Winthrop, and described as follows: Being a part of Great Back Lot 22, on the west side of South pond, so called, and bounded on the north by land of Luther Cobb; on the east by said pond; on the south by land of Joseph Wood, and on the west by land of Elijah Wood, and that thirty acres of the above land lying near the west side of said pond were damaged by the flowing caused by said dam.

"That said complaint was entered at the August term, 1843, was defaulted and commissioners appointed at the December term, 1843, and that said commissioners made their report at the August term, 1844.

"That said complaint was afterward appealed to the June term, 1846, of the Supreme Judicial Court, within and for said county, and continued in said court from term to term, until the May term, 1850, when judgment was given for the complainant, and execution thereon opened December 9, 1850.

"That by the judgment of said court it was determined that the respondents should pay as annual damages occasioned by said flowing the sum of three dollars and twelve cents.

"And your petitioner further represents that he is now the owner of the mill, mill dam and privilege which was occupied by the respondents in the aforesaid complaint, and that as such owner is compelled to pay an annual damage for the flowage caused by said dam as specified in the report of said commissioners, and in the judgment of said court, and that he is put to great trouble and expense thereby.

"And that one Omer Pillsbury of Winthrop, in said county of Kennebec, now owns and occupies the land herein before described.

"Wherefore your petitioner prays that the damages, if any, caused by flowing such lands by the dam and head of water raised thereby at its present height, may be assessed in gross; that such notice may be given on this petition to the respondent, Omer Pillsbury, as to your honors may seem necessary, and that commissioners may be appointed to ascertain, determine and report the damages, if any, in gross, caused by the flowing of said land by said dam at its present height, according to the statute in such case made and provided.

Augusta, August 4, 1881. James H. Norris."

Defendant moved to dismiss because the time of payment of the annual damages was August 3, 1881, and one month did not thereafter elapse before bringing this complaint; also because the notice required by R. S., c. 92, § 19, to be given the respondent before bringing the complaint, was not given.

The presiding justice overruled the motion.

The defendant then filed a general demurrer, which was joined, and overruled by the presiding justice. The defendant alleged exceptions to the rulings on the motion and demurrer.

Orville D. Baker, for the plaintiff.

J. H. Potter, for the defendant.

The real question to be determined in this case is whether the notice prescribed by R. S., c. 92, § 19, should have been given.

If the notice should have been given, then it would be necessary to prove the same, and as the complaint contains no allegation that the notice was given, it is insufficient in law, and demurrer lies, for whatever it is necessary to prove it is necessary to allege.

The whole of stat. 1881, c. 88, (the amendment) is additional to and amendatory of R. S., c. 92, § 9. It relates to but one subject, viz.: the assessment of damages in gross. The amendment, neither expressly nor by implication, repeals any portion of c. 92 of the R. S., nor does it change, alter or modify any section thereof, except § 9. It simply provides that in addition to annual damages they may be assessed in gross, and even then the annual damage stands, unless the complainant elects within ten days after the commissioners' report is filed, to accept the damages

in gross. Therefore § 19, of c. 92 of the R. S., remains in full force. That section provides that "no new complaint shall be brought until the expiration of one month after the payment of the then last year is due, and one month after notice to the other party; and the other party may within that time make an offer or tender as herein after is provided."

The reason for the enactment of the last named section, or at least that part of it which relates to the notice to be given, is fully set forth in § § 20 and 21. It was enacted that the parties might compromise the matter without litigation, or at least that the party against whom the complaint was to be brought, could have the opportunity of making his offer, and, if reasonable, avoid costs.

Does not this reason still remain? Cannot damages in gross be adjusted between the parties as well as yearly damages? Cannot the mill owner now offer to pay a certain sum as damage for all future time, which offer if accepted by the land owner would be a perfect bar to all future complaints?

APPLETON, C. J. The motion and demurrer filed by the respondent must both be overruled.

There was no provision for the assessment of damages in gross before the passage of c. 88 of the acts of 1881. The first section by its terms is to be added to section nine of R. S., c. 92. By its provisions the commissioners are to determine the damages in gross as well as the yearly damages. The mill owners may elect within ten days after the report is presented to the court to pay the damages in gross, but if they fail to make the election, the annual damages shall stand as the judgment of the court.

By § 2, if the damages in gross are paid, the judgment is a bar to all further proceedings "so long as the dam and flash-boards remain at the same height." In case either are raised a new complaint may be made by the owner of land for such additional flowage.

By section third, "in any case where annual damages have been determined by a judgment of the court the owner of the dam or mills may apply to the court by a *new complaint* to have the damages assessed in gross." The *new* complaint is one first given

by this, and not by another and preceding act. The complaint before us sets forth all the facts required to authorize the owner of the dam or mills to apply to the court to have the damages in gross ascertained and determined, and is in strict accord with the provisions of the act.

It is urged in defence that this complaint is not maintainable because commenced "before the expiration of one month after payment" of what is due "of the then last year," and without one month's previous notice as required by R. S., c. 92, § 19. But this section has no relation to a complaint like the present. It refers exclusively to cases under § 18 where either party being dissatisfied with the annual compensation as established, seeks to increase or diminish such compensation for the future. But when damages have been once assessed in gross there can be no reassessment nor new complaint. The sections following section nineteen are obviously inapplicable to a complaint when it is sought to have damages assessed in gross.

The statute of 1881 is a new and independent act of legislation and is to be construed by its own provisions.

Exceptions overruled.

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

GEORGE W. WELCH and another, in equity,

vs.

SAMUEL STEARNS and others.

Androscoggin. Opinion July 5, 1882.

Mortgage. Foreclosure. Part payment.

All persons are bound to take notice of the boundaries of counties, and of any change in their limits by legislative action.

When a mortgage has been received and recorded in the registry of the county, and the town in which the mortgaged premises lay, becomes by

legislative enactment part of another county, the notice of foreclosure should be published in the county in which the land is situated when the notice is given.

The payment of part of a mortgage debt after the commencement of proceedings to foreclose the mortgage and before their termination, does not necessarily operate to delay or prevent the foreclosure becoming effectual at the end of the statutory period of three years.

The mortgagee after foreclosure sold a part of the mortgaged premises to A B, who on the same day gave a bond to the mortgagor to convey the land then purchased to him upon payment of the price and interest in four years; *Held*, That this did not open the foreclosure, nor give the mortgagor any rights to redeem the mortgage.

BILL IN EQUITY, heard on bill, answers and proof.

The opinion states the case.

John H. Webster, for the plaintiffs.

Angerona Welsh was married to Thomas S. Welsh, and became seized of whatever interest she had in the mortgaged premises long prior to March 22, 1844. She died August 3, 1851, and her interest descended to her children, charged with the burden, and possessed of the right of redeeming from the mortgage, but postponed as to the actual possession until the termination of the husband's and father's life estate by the courtesy. *Wass* v. *Bucknam*, 38 Maine, 356; 1 Wash. on Real Prop. 149, 151, 152, 154. A foreclosure is claimed by publication in a newspaper and recording, according to the first mode in R. S., 1841, c. 125, § 5. A mortgage cannot be foreclosed unless according to statute. *Ireland* v. *Abbott*, 24 Maine, 155; *Chamberlain* v. *Gardiner*, 38 Maine, 548. The notice to foreclose, as published, is fatally defective in its description. Could the children or their guardian take that notice and go into Minot and find the land, the mortgage of which was attempted to be foreclosed? R. S., 1841, c. 125, § 5; *Chase* v. *McLellan*, 49 Maine, 375; *Dela* v. *Stanwood*, 61 Maine, 51. It contains no claim to foreclose the mortgage, as required. The record is insufficient. No one can tell whether the date of the first, second or last paper in which it was published, is given. The last is required. R. S., 1841, c. 125, § 5. The record of the notice is the only proper evidence of the time when the right of re-

demption will be forever foreclosed. *Holbrook* v. *Thomas*, 38 Maine, 256; *Chase* v. *Savage et al.* 55 Maine, 543. This record cut off two weeks of the time of redemption. It does not appear from the record, whether published in the county where the land lays or not. *Blake* v. *Dennett*, 49 Maine, 102; *Freeman* v. *Atwood*, 50 Maine, 473; *Storer* v. *Little*, 41 Maine, 69; *Chamberlain* v. *Gardiner*, 38 Maine, 548. Had the attempted foreclosure been in perfect accordance with the provisions of the statute it would have been waived by the agreement or bond given Thomas S. Welch by Millett, when he took his conveyance from Stearns October 29, 1857. *Quint* v. *Little*, 4 Maine, 495; *Fisher* v. *Shaw*, 42 Maine, 32. In his answer Stearns admits a payment after foreclosure, which if properly made, would have been out, which waives the foreclosure. *Dow* v. *Moor*, 59 Maine, 118, and cases cited therein.

The debt secured by a mortgage is the substantial part, the mortgage is only an incident. The mortgagee can not convey a distinct parcel of the mortgaged premises to a stranger, until foreclosure; in so doing he would divide the debt. Nor can a joint mortgagor, by his consent to such conveyance, bind his co-mortgagor or her heirs without their knowledge. *Spring* v. *Haines*, 21 Maine, 126; *Smith* v. *People's Bank*, 24 Maine, 185. The defendants are bound by their answers, and must confine their proof to the allegations in their answers. What is alleged and not proved, and proved and not alleged, is alike to be disregarded. *Hunt* v. *Daniel et al.* 6 J. J. Marsh, 398 (7 ed.); 3 Greenl. Ev. 355; *Sidney* v. *Sidney*, 3 P. Wms. 269, 276; *Scudder* v. *Young*, 25 Maine, 155; *Boynton* v. *Brastow*, 38 Maine, 577; *Lovell* v. *Farrington*, 50 Maine, 239; *Stover* v. *Poole*, 67 Maine, 217.

The allegation of three defendants of title by disseizin, not responsive to bill and requires proof. If Stearns or Millett ever took any actual possession of their several parcels, they took it under their legal title, or by consent of, and not adverse to, the mortgagor, and not as disseizors, and must be adjudged to be in possession under an unforeclosed mortgage. *Tinkham* v. *Arnold*, 3 Maine, 120; *Varney* v. *Stevens*, 22 Maine, 331;

Alden et ux. v. *Gilmore*, 13 Maine, 178; *Eaton* v. *Jacobs*, 49 Maine, 559; *Worcester* v. *Lord*, 56 Maine, 265; *Kinsell et al.* v. *Daggett et al.* 11 Maine, 309; *Gardner* v. *Gooch*, 48 Maine, 487; *Wass* v. *Bucknam*, 38 Maine, 356.

Limitations in equity are in fact matters of presumption. But equity courts conform to the spirit of the statute, with all its qualifications and limitations so far as applicable. *Phillips* v. *Sinclair*, 20 Maine, 269; *Blethen* v. *Dwinal*, 35 Maine, 556; *Hurd* v. *Coleman*, 42 Maine, 182; *Chick* v. *Rollins*, 44 Maine, 104; *Roberts* v. *Littlefield*, 48 Maine, 61; *Lawrence* v. *Rokes*, 53 Maine, 110; *Randall* v *Bradley*, 65 Maine, 43.

By analogy to the statute of limitations, the twenty years necessary to raise a presumption of foreclosure would commence at the death of the complainant's father. R. S., 1857; also of 1871, c. 105, § 3; or at earliest at the sale to Washburn. But being seized of a reversion, they have such an interest, that they may redeem before the termination of the intermediate estate. As they hold under their mother one of the mortgagors.

Hutchinson and Savage, for the defendants, cited: *Eaton* v. *Nason*, 47 Maine, 132; *Harding* v. *Springer*, 14 Maine, 407; *Dow* v. *Moor*, 59 Maine, 118; *Chase* v. *Savage*, 54 Maine, 543; *Field* v. *Huston*, 21 Maine, 69; *Marr* v. *Hobson*, 22 Maine, 321; *Dela* v. *Stanwood*, 61 Maine, 57; *Phillips* v. *Sinclair*, 20 Maine, 269; *Hurd* v. *Coleman*, 42 Maine, 182; *Roberts* v. *Littlefield*, 48 Maine, 61; R. S., c. 105, § § 1, 7.

APPLETON, C. J. This is a bill in equity to redeem a mortgage, dated June, 2, 1848, given by Thomas S. Welch and Angerona, his wife, to Samuel Stearns, Junior, to secure their note to him for five hundred dollars, payable in five years with interest annually.

The mortgagee, Stearns, commenced to foreclose by publication in a newspaper, in June 2, 1854. On December 19, 1877, a demand was made on the defendants to render an account of rents, profits, &c.

Angerona Welch died on August 3, 1851, leaving seven children, of whom the complainant, George W. Welch, is one and the other claims title as the heir of her son, a grandchild of the

said Angerona. The remaining survivor is made with others, a party defendant.

The question for determination is whether or not the complainants are barred by the foreclosure in this case. The mortgagee, Stearns, on April 20, 1854, published the following notice in the Democratic Advocate, a paper printed in the county in which the land is situated, the first publication bearing date April 20. The notice was continued three weeks successively.

"Foreclosure of mortgage.

"Whereas, Thomas S. Welch and Angerona Welch of Minot, county of Cumberland and state of Maine, on the second day of June, A. D. 1848, made and executed to me, the undersigned, a mortgage deed of a certain tract or parcel of land, with the buildings thereon, in Minot aforesaid, which deed is recorded in the Cumberland registry, book 210, page 351, reference to said record being had for a more particular description of said deed and the premises therein conveyed, to secure the payment of a certain note, for five hundred dollars in five years, with annual interest. The conditions of the mortgage being broken, I hereby give this notice for the purpose of foreclosing the same, as by law provided. Minot, April 20, 1854. Samuel Stearns."

This notice is all that is required by R. S., 1840, c. 125, § 5. It states the claim of Stearns, by mortgage, by reference to the record, describes the estate intelligently, gives the names of the parties to the mortgage and its date, asserts a breach of the condition and claims a foreclosure.

It is denied that the notice given was sufficient. But it is a full compliance with the statute in force. A change had taken place in the boundaries of Cumberland county and a new county had been formed between the giving of the mortgage and the notice of foreclosure. But courts and parties are bound to take notice of the limits of counties and any changes of those limits by legislative action.

It is objected that the certificate of the register of deeds, as required by § 5, is insufficient. It is as follows.

"Certificate of register.

"The foregoing is a true copy as appears of the Democratic

Advocate, a public newspaper, printed at Lewiston and dated April 20, 1854, the same having been published three weeks successively in said paper and recorded from the same, May 12, 1854. By William C. Mitchell, register."

The notice of the foreclosure was printed "three weeks successively." The evidence shows the first publication to have been April 20, 1854, the second, April 27, the third, May 4. The name and date of the paper is given in which it was last published. The copy of the printed notice is recorded within thirty days of the last publication in the appropriate registry of deeds. *Clark* v. *Crosby*, 101 Mass. 184.

The right to redeem arises from the time of the last publication and that is sufficiently apparent from the record; "three weeks successively," indicates with certainty the date of the last publication. The notice and certificate are within the decision of this court in *Chase* v. *Savage*, 55 Maine, 543 and must be regarded as in accordance with the provisions of the statute.

The three years, in which the foreclosure would become perfected, expired on April 21, 1857. But before that time, thirteen dollars and ninety-four cents had been paid the mortgagee and by him indorsed November 27, 1855, on the note secured by the mortgage.

It appears in evidence that Stearns, claiming a perfected foreclosure, entered in possession of the mortgaged premises, that being in possession on October 29, 1857, he conveyed by quitclaim deed, a part of the same to Elbridge G. Millett, for four hundred and six dollars as stated in the deed, who, at the same time, gave Thomas S. Welch, the surviving mortgagor, a bond to convey to him the premises then deeded on payment of the consideration and interest within four years, just before the expiration of which period the obligee of the bond surrendered the same to the obligor.

Stearns continued in undisputed and unbroken possession of the residue of the mortgaged premises until November 1, 1871, when he conveyed the same by deed of warranty to Albert Quinby, who has remained in undisturbed possession till the institution of this bill.

Elbridge G. Millett continued in possession and controlling the premises conveyed him until November 13, 1861, when he conveyed the same by deed of warranty to James E. Washburn, whose possession was undisturbed while sole owner and who, on September 4, 1873, conveyed one undivided half of the same to the complainant, George W. Welch.

The title of Stearns and that of his grantors was not merely not disturbed, but was recognized by Thomas S. Welch, the surviving mortgagee, as valid, he holding under them and in subservience to their title. No question as to the validity of the title by foreclosure seems to have been made from April 20, 1857, to December 19, 1877, when a demand to render an account was made. It would seem that the title of Stearns would become perfect by a continued possession, claiming title for over twenty years, that title, having, during the intermediate period, been recognized as valid.

But the complainants insist that the foreclosure was opened by the payment of thirteen dollars and ninety-four cents, on November 27, 1855, within the three years required for its completion. In most, if not all cases, when a payment in part or on the whole has been regarded as a waiver of a foreclosure, the payment has been after its completion.

It is undoubtedly true that a payment of the debt and received as such, must, after foreclosure, be regarded as evidence tending to show a waiver of the rights thereby acquired. In the cases when part payment has been held a waiver, it will be found that there was an accompanying agreement that such should be its effect. In *Moore* v. *Beasom*, 44 N. H. 215, it was decided that the payment of part of the mortgage debt to the mortgagee, or a part of the purchase money to the purchaser of the equity of redemption, under a *verbal agreement* for the postponement of the payment of the balance due, would operate as the waiver of the forfeiture of the estate and prevent a foreclosure of the mortgage. In *McNeil* v. *Call*, 19 N. H. 413, there was an agreement that if the mortgage debt should be paid by a certain time after it became due and the money was tendered within the time stipulated, it was held the forfeiture was waived and the foreclosure opened.

In *Deming* v. *Comings*, 11 N. H. 475, the defendant to a lease in which was reserved to have "all the right in equity to redeem the premises during the time which he had at its date." The plaintiff at the same time gave a receipt of a certain sum "to apply to the redemption of a farm specified in a lease bearing date," &c. It was held that here was a waiver of the foreclosure. In *Dow* v. *Moor*, 59 Maine, 119, it was held that a receipt after foreclosure of part of a debt secured by mortgage, under an express understanding that the foreclosure was opened, was held to be a waiver. In the case at bar there was no agreement whatever, that there should be a stay or waiver of the forclosure then in process of perfection. It was simply a small payment towards a debt then due. Nothing indicates that it was under circumstances giving the payer anything more than a right to having his debt reduced to that extent. A mere simple payment after a foreclosure, without other evidence is not conclusive proof that it was the intention of the parties to open the mortgage. *Lawrence* v. *Fletcher*, 10 Met. 345. In *Smith* v. *Larrabee*, 58 Maine, 361, the reception of stumpage from permits on the land mortgaged after publishing notice for purpose of foreclosure, was held not to be a waiver of such attempted foreclosure. To the same effect is the decision in *Stetson* v. *Everett*, 59 Maine, 377.

The whole evidence and the acts of the parties manifestly show that this was simply a part payment of a debt due; that it was not intended either by the party paying or the party receiving to affect the foreclosure which was in the process of completion. Both are witnesses and they intimate nothing contradicting the view we have taken.

It is claimed that when Millett purchased a part of the mortgaged premises on October, 29, 1857, and gave a bond to Thomas S. Welch, the surviving mortgagor, to deed the premises conveyed to him on payment of the purchase money and interest in four years, that the foreclosure was thereby opened. But we think not. The bond related to only a part of the premises mortgaged. It was given by a stranger to the mortgage. The mortgagee was no party to it. It related to premises in which his interest had

ceased. The waiver of a foreclosure must be by the holder of the mortgage. It can be by no one else.

Even if the bond of Millett were to be held a waiver, it would not avail the complainant inasmuch as its terms were not complied with. Neither payment nor tender of payment is pretended. If the mortgagee would have availed himself, he should have made his tender or payment within the four years. *Chase* v. *McLellan*, 49 Maine, 375; *Lawrence* v. *Fletcher*, 10 Met. 344; *Capen* v. *Richardson*, 7 Gray, 364.

The conclusion to which we have arrived is, that there has been a perfected foreclosure of the mortgage; that neither payment of thirteen dollars and ninety-four cents made after the commencement of the foreclosure, nor the bond given by Millett to the mortgagor after it became perfected, can entitle the complainant to have the same opened.

There are numerous other questions presented for our consideration by the learned and indefatigable counsel for the complainants, but their examination, in the view we have taken of the case, is not necessary for its satisfactory determination.

Bill dismissed.

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

ALEXANDER H. HOWARD *vs.* CITY OF AUGUSTA.

Kennebec. Opinion July 7, 1882.

Tax on personal property mortgaged. Distress for taxes. Stat. 1878, c. 77.

Statute 1878, chapter 77, authorizes a distress for taxes levied on mortgaged property, but only upon the specific property mortgaged and taxed, and only for the specific tax laid; and if a poll tax and a tax upon other property is joined with such specific tax in the distress it is a waiver of the lien.

In an action to recover back a payment made to prevent an illegal distress of property for taxes, it is not necessary to show that the distress was actually

made; it is sufficient if the circumstances lead to the conclusion that such distress is impending and will certainly be made if the payment is not made.

H held a mortgage on a stock of goods and took from the mortgagor a release or bill of sale, and on the following day took the possession and delivered the same to B, to whom he had bargained it, and three days after paid to the collector of taxes a sum of money claimed as the taxes due from the mortgagor to prevent the distress of the stock of goods; *Held*, That whatever may have been the effect of the transaction with B upon the title, it left H at least, interested in the proceeds which he could not realize until the property was relieved of the impending distress. In either event, in regard to the distress, H had the interests and rights of an owner.

ON REPORT from the superior court.

Assumpsit to recover back eighty-one dollars and seventy-six cents, balance of a tax paid by the plaintiff to prevent the distress of certain personal property. The writ was dated May 27, 1881, and the plea was general issue.

The report shows that N. K. Howard was assessed in Augusta for the year 1879, one poll, on stock in trade valued at $2000, and piano $75; total valuation, $2075. And for the year 1880 same. The tax commitment book for 1879, gave "N. K. Howard, valuation of personal estate, $2075; tax, $44.09; poll tax, $3. Total, 47.09." The village school district tax, "valuation $2075; tax on personal, $5.71; poll tax, $1.75. Total, $7.46." For 1880, "N. K. Howard, 1880, state, county and city tax, $2075 valuation; $43.58, tax on personal property. $3 poll tax. Total, $46.58. Village district: $2075, valuation of personal property; $5.19 tax; $1.75, poll. Total, $6.94." Thirty dollars had been paid on account of these taxes and there remained due, $78.07. Adding interest to November 3, 1880, made the amount then due, $81.76, and this sum the plaintiff paid and took the following receipt:

"Received of A. H. Howard for N. K. Howard, the sum of eighty-one 76-100 dollars, tax on stock in trade at 142 Water street, balance city and village district tax 1879 and 1880. This tax is paid under protest by said A. H. Howard, who claims to own said stock, and that the same is not holden for said tax, and he pays this sum for the purpose of preventing a distress of said stock.

"Said collector agrees to request the city council to refer the question of the liability of said stock to a distress for said tax to competent parties. Guy Turner, Collector of Augusta, for the years 1879 and 1880."

Augusta, November 3, 1880."

N. K. Howard, mortgaged the same stock in trade and other property to the plaintiff November 17, 1879, to secure a note of $3126.75, payable in one year, and on October 27, 1880, he gave the following paper to the plaintiff.

"Know all men by these presents, that I, N. K. Howard of Augusta, county of Kennebec and state of Maine, do hereby sell and convey unto A. H. Howard of Hallowell, county and state aforesaid, all my right in title, to the stock of goods contained in store No. 142, Water street, in said Augusta, consisting of drugs and medicines and fixtures, of every description, being the same now occupied by me, subject to the mortgage held by Anna F. Howard, on one-half the fixtures in said store, which is in consideration of said Howard holding a mortgage on said store and one-half the fixtures in the same, the conditions of said mortgage not having been complied with, and I hereby give said Howard possession of said store and goods.

Augusta, October 27, 1880. N. K. Howard."

On the next day the plaintiff took possession of the property and turned it over to one or more members of the firm of Bowditch, Webster and Company, to whom he claimed he had bargained it.

The opinion states the other material facts.

L. C. Cornish (*Baker and Baker* with him,) for the plaintiff, cited: *Smith* v. *Readfield*, 27 Maine 145; *Abbott* v. *Bangor*, 56 Maine, 310; *Preston* v. *Boston*, 12 Pick. 7; *Look* v. *Industry*, 51 Maine, 375; *Lord* v. *Kennebunkport*, 61 Maine, 462; *Thurston* v. *Spratt*, 52 Maine, 202; *Coolidge* v. *Brigham*, 1 Met. 547; *Matheny* v. *Mason*, 25 Alb. L. J. 358; *Abbott* v. *Goodwin*, 20 Maine, 408; *Morrill* v. *Noyes*, 56 Maine, 458;

Allen v. *Goodnow*, 71 Maine, 420; *Lazarus* v. *Audrade*, 22 Alb. L. J. 293; *Parsons* v. *Allison*, 5 Watts, 72; *Moore* v. *Marsh et al.* 60 Pa. St. 46; Cooley on Taxation, 302; *Daniels* v. *Nelson*, 41 Vt. 161; *Bean* v. *Edge*, 84 N. Y. 510.

Winfield S. Choate, city solicitor, for the defendant.

The only interest the plaintiff had in the property November 3, 1880, was that of mortgagee under the mortgage of November 17, 1879, the only pretence of any other conveyance to him is the paper of October 27, 1880, which the counsel called a "release" and the report calls a "bill of sale." That paper was not put in the case and was printed by mistake and is not evidence. But if it were in the case, its only effect was to put the plaintiff in possession under his mortgage.

If the plaintiff took possession of the stock under his mortgage, or by release of N. K. Howard, he cannot recover because the statute gives a right to distrain so long as the title remains in either the mortgagor or mortgagee. If the title had passed to Bowditch, Webster and Company, then the plaintiff cannot recover because he did not pay under duress. *Rogers* v. *Greenbush*, 58 Maine, 390.

Plaintiff now says that the tax on piano and poll tax were included and were *non lien* claims. But the plaintiff did not object to paying those taxes. There was no protest to paying any other than the tax on the stock in trade.

It was tacitly agreed that the only question to be settled was the liability in the matter of the tax on "*stock in trade*," the other small items were not of enough importance to be considered. The court in the case of *Rogers* v. *Greenbush*, *supra*, said, "It must be a distinct and definite protest against paying the particular tax on the ground of its illegality;" there is not a word of protest except as to the tax on "stock in trade."

If the tax on personal property, other than "stock in trade" and the poll were improperly collected, then the same can be separated from the tax or "stock in trade" and the plaintiff recover that only. *Towey* v. *Millbury*, 21 Pick. 64. The payment of thirty dollars on the tax should be applied to the payment of the poll and piano tax.

DANFORTH, J. The object of this action is to recover a sum of money alleged to have been paid to the defendant to relieve the plaintiff's property from distraint for taxes assessed upon N. K. Howard, for the years 1879 and 1880. There is no conflict in the evidence and can be no dispute as to the material facts. Whether the plaintiff was the owner of the property or the title was in Bowditch, Webster and Company, is not important. When N. K. Howard gave to the plaintiff the release or bill of sale of October 27, 1880, and the plaintiff took possession under it as he did, the next day, he became the owner. If the transaction with Bowditch, Webster and Company, about the same time, amounted to a sale, it still left the plaintiff interested in the proceeds which he could not realize so long as the threatened distraint was pending. So that his rights would be the same in either case and in either case the title and all interest of N. K. Howard had ceased as early as October 28, 1880. Hence the goods could not be distrained as his property. Nor could they be for his tax unless by virtue of a lien therefor.

If the city had any such lien it must be under the law of 1878, c. 77, the material part of which is as follows: "When personal property is mortgaged or pledged, it shall, for the purposes of taxation, be deemed the property of the party who has it in possession and may be distrained for the tax thereon." Whether this statute would authorize a distress of property thus taxed for the tax thereon, after a change in the title, it is not necessary at this time to decide. The property in question was not under mortgage when the tax of 1879 was assessed; other property contributed to the tax of 1880, and in both years a poll tax was added. The collector proposed to make the distress not only for the tax assessed thereon, but for these other sums which were included. If there might have been a lien for the particular part of the tax assessed thereon, there certainly was not for the amount proposed to be, and which in fact was enforced. It is too well established to need the citation of authorities to show, that when non lien claims are joined with those which otherwise might be enforced by virtue of a lien, it is destructive of the lien. It was not for the plaintiff to select such as might be secured by a lien

and make a tender for that amount, or for the court at this time to distinguish between the two and give judgment for such an amount as was not secured. The defendant made its election to levy for the whole and it must abide the consequences.

Another consideration of weight, is the fact that this tax was assessed in April and so far as the mortgage is material, upon a stock of goods in a store undergoing a constant change. The statute evidently contemplates a distress upon the identical and specific property mortgaged and taxed. It is not enough that the mortgage should be so made that it would include as between the parties, other property purchased to take the place of that sold. Even if it were so, that subsequently purchased would not be the same and there are no means of ascertaining from the evidence in this case how much, if any of the property that was taxed, remained on the third of November, when the distress was made.

But it is objected that the protest under which the money was paid was not sufficient to take it out of the class of voluntary payments, or that no protest was made against the payment of any part of the tax except such as was assessed upon the stock. It is true that the receipt recognizes the whole amount as assessed upon the stock. But this is not in accordance with the truth and no estoppel arises from the admission. The collector testifies that his purpose was to levy the whole tax and that but a part of it was assessed upon this property.

But in fact no protest was necessary. As we have seen the plaintiff was, or stood in the place of the owner. If we can believe the collector and there is no reason to doubt his testimony, he was prepared to and would have made the levy but for the payment. That the full amount paid, was necessary to protect the property from distress. It was then a compulsory payment. A person is not bound to wait until his property is actually taken by a legal process, one which he cannot properly resist, and cost made before he pays the claim upon it. It is sufficient if the circumstances are such as fairly lead to the conclusion that the waste and expense can be avoided only by payment. Here, the distress was begun, the illegal claim paid to prevent its consumma-

tion and the plaintiff is entitled to recover it back. As the case does not show when the money was paid into the city treasury, interest can be recovered only from the date of the writ.

Judgment for the plaintiff for $81.76 and interest from the date of the writ.

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

NATHAN B. SAUNDERS, administrator of the estate of CHARLES T. HOPKINS, *vs.* WILLIAM WESTON.

Somerset. Opinion July 7, 1882.

Administrators. Assets. R. S., c. 63, § 6. Jurisdiction.

By R. S., c. 63, § 6, an administrator appointed on the estate of a person dying out of the state, is to administer not only upon such property as was in his locality at the time of the decease of the intestate, but such as might "afterwards be found therein."

The creditor while living represents the debt, and draws it as assets to his own residence; when dead, it is represented and drawn to the residence of the debtor and follows him wherever he goes.

S was duly appointed in this state as administrator on the estate of H upon a petition in which the residence of H was alleged to have been in the state of Michigan. S commenced an action against W, whose residence at the time of the death of H and ever since has been in the state of Wisconsin, to recover a debt alleged to have been contracted in Michigan and due from W to the estate. The writ was served upon W personally while he was commorant in this state. *Held*, That the action might be maintained; that when W became a resident of this state, though temporarily and as a visitor, he brought with him the debt in suit, and so far became subject to the jurisdiction of our courts.

ON EXCEPTIONS.

Assumpsit to recover for the personal services of the intestate, alleged to have been performed for the defendant at Whitehall in the state of Michigan, as foreman in charge of the defendant's

lumbering business, in 1864–5, $1500 with interest, making the whole claim $3031.25. The writ was dated July 15, 1880. The intestate died at Whitehall, December 5, 1865. The defendant's motion to dismiss for want of jurisdiction was overruled by the presiding justice and the defendant excepted.

The material facts are stated in the opinion.

D. D. Stewart, for the plaintiff, cited: R. S., c. 63, § § 6, 7; *Fay* v. *Haven*, 3 Met. 114; *Dawes* v. *Head*, 3 Pick. 145; *Pinney* v. *McGregory*, 102 Mass. 186; *Blake* v. *Williams*, 6 Pick. 308; *Goodall* v. *Marshall*, 14 N. H. 161; *Goodwin* v. *Jones*, 3 Mass. 514; *Stevens* v. *Gaylord*, 11 Mass. 263; *Davis* v. *Estey*, 8 Pick. 475; *May* v. *Breed*, 7 Cush. 34, 42; *Bowdoin* v. *Holland*, 10 Cush. 17; 2 Redf. Wills, 21 (note.) *Gallup* v. *Gallup*, 11 Met. 445; *Bulger* v. *Roche*, 11 Pick. 36; *Whitney* v. *Goddard*, 20 Pick. 311; *Thibodeau* v. *Levassuer*, 36 Maine, 362.

Joseph Baker and C. A. Harrington, for the defendant.

This alleged debt was, as shown by the declaration in the writ, a simple contract debt. A chose in action while the creditor lived is transitory, going with his person, but upon his decease becoming localized, fixed at the residence of the debtor as it existed at the precise moment of the intestate's death, there to remain and be there administered upon, for the benefit of local creditors, and after the satisfaction of their claims, the balance to be transmitted to the place of principal administration. *Hillard* v. *Cox*, 1 Ld. Ray. 562; *Yeoman* v. *Bradshaw*, 12 Mod. 107; *Rex* v. *Sutton*, 1 Saund. 274; 1 Williams on Exec. 178; *Taylor* v. *Barron*, 35 N. H. 484; Wentworth, Ex'rs, 46; *Stevens* v. *Gaylord*, 11 Mass. 256; *Goodwin* v. *Jones*, 3 Mass. 514; *Upton* v. *Hubbard*, 28 Conn. 274; *Hooker* v. *Olmstead*, 6 Pick. 481, 482; *Abbott, Adm'r*, v. *Coburn et als.* 28 Vt. 663, 670 and 671; Chitty on Bills, p. 2, title—administration. *Dial* v. *Gary*, 12 Reporter, 184; *Beers* v. *Shannon*, 73 N. Y. 292; *Sheldon* v. Rice, 30 Mich. 301; *Vaughan* v. *Northup*, 15 Peters, 1; *Rand, Adm'r*, v. *Hubbard*, 4 Met. 252; Story, Conflict of Laws, 5th ed. § 514; *Lee* v. *Havens*, Brayton, (Vt.) 93; *Stearns* v. *Burnham*, 5 Me.

261; *Leonard* v. *Putnam*, 51 N. H. 250; *Fletcher's adm'r*, v. *Sanders*, 7 Dana, Ky. 345, S. C. 32 Am. Decisions 96; *Purple and Burrows* v. *Whithed*, 49 Vt. 187; 2 Redfield on Wills, c. 1, § 2, p. 13; *Mothland* v. *Wireman*, 3 Penson and Watts, 185; S. C. 23 American Decisions, 71; see also, *Merrill* v. *N. E. Ins. Co.* 103 Mass. 245–49; *Low* v. *Bartlett et al.* 8 Allen, 259–262; *Ela* v. *Edwards*, 13 Allen, 48; *Vaughan* v. *Barret*, 5 Vt. 333; *Hedenberg* v. *Hedenberg*, 46 Conn. 30; *Glenn* v. *Smith*, 2d Gill and Johnson, 493; *Stevens* v. *Gaylord*, 11 Mass. 256; *Cutter* v. *Davenport*, 1 Pick. 81; *Stearns* v. *Burnham*, 5 Greenleaf, 261; *Pond* v. *Makepeace*, 2 Met. 114, 116; *Borden* v. *Borden*, 5 Mass. 77.

At the death of the creditor, the rights of all parties became fixed, localized and crystallized, and no movements of any party after that could change the state of things, or alter the rights and liabilites. The right of creditors in Wisconsin attached at once to this debt, and could not be divested by the defendant, or any movements of his. What was assets in Wisconsin at the death of the creditor, must remain *assets there*, and could only be enforced by legal process by an administrator appointed *there*. If the visit of the defendant to this state could entitle an administrator appointed here, where the debtor did not reside at the time of the intestate's death, and where the intestate did not then reside, to maintain an action for this debt, then administration might have been taken out with the same propriety and legal force in every state through which the defendant passed from Wisconsin to Maine, Illinois, Ohio, New York, Massachusetts and New Hampshire; and thus a debt due from a person would follow him in his travels over the country and be assets the world over, and he might leave the state of his domicile for the very purpose of defeating creditors in his own state. It would be a case of assets on trucks, and itinerant jurisdictions.

This would be entirely inconsistent with the well established rule that a debt is assets in the state where the debtor resided at the time the creditor died, and that the creditors of the debtor's domicile have a paramount right to the assets in their state.

Now to test this principle, suppose an administrator appointed

in Wisconsin had collected the debt sued for here, and *after that* the defendant had come into this state and been arrested, must he pay the claim over again, or would not the discharge of the administrator of the debtor's domicile be a complete bar. The two administrations are entirely independent of each other, and the discharge of the one not appointed where the debtor resided, would be no protection. If it is well settled law that the creditors or distributees residing in the state where assets exist at the time of the decedent's death, have a paramount claim, to all such assets, and only the residuum, if any, is to be transmitted to the administration of the domicile, and not to an ancillary administrator, by what principle of law is it that these assets can be seized and torn from those entitled to them, and brought into the county of Somerset and appropriated to the benefit of the creditors and distributees living in that county, where neither the debtor or creditor lived, and where the administration is merely ancillary.

If this debt can be collected by this plaintiff, it will be distributed here and neither the creditors in Wisconsin or Michigan will receive any share. Such a result is in direct conflict with the whole scope and tenor of law on this subject, as the cases already cited will show.

DANFORTH, J. This action was commenced by the plaintiff in his capacity of administrator, appointed by the judge of probate within and for the county of Somerset. In the petition for his appointment, it is alleged that the decedent was a resident at the time of his decease of the state of Michigan, and left property and owed debts exceeding twenty dollars in the county of Somerset. The defendant, at the time of the intestate's decease, was and still is a resident of Wisconsin, and this action is brought to recover a debt alleged to be due from him to the estate represented by the plaintiff. No question is raised as to the validity of the plaintiff's appointment. The defendant was found in the county of Somerset, and a personal service was made upon him by an arrest of his body. Under these circumstances, a motion is made by the defendant that the action be dismissed, on the ground that the debt claimed, if anything is

due, is assets in Wisconsin and not in Maine; and that therefore an administrator appointed in Maine can have no interest in, or control over it. It does not appear that any administration has ever been had in Wisconsin, or that the intestate left any creditors there.

Hence, the question involved, does not arise from a direct conflict between two administrators appointed by different local tribunals, representing different sets of creditors, but rather the rights of this plaintiff as against this defendant.

What, then, are the rights and duties of the plaintiff in this matter? for the one is clearly the test and measure of the other. These are pointed out by the statute, R. S., c. 63, § 6. Under this statute, the judge of probate is to grant letters of administration on the estate of persons dying out of the state, not only when they leave property to be administered in his county, but when such property "is afterwards found therein." It therefore became the plaintiff's duty, upon his appointment, not only to administer upon all such estate of his intestate, as he might find in his county at the time of his appointment, but such as might afterwards be found therein; and by § 7 of the same chapter the same rights and duties would devolve upon him in relation to any such property found within the state.

Was the debt sought to be recovered found within the county or state? That it is what under the laws of England would be called *bona notabilia*, and under our law assets to be administered upon, is conceded. It is, however, claimed that though while living the creditor draws to himself such debts as may be due him, so that they shall be localized wherever he is, yet, at his death, as he can no longer represent them, the debtor must, and they become localized wherever he may be, and therefore become *bona notabilia* at his place of residence. This is undoubtedly true. The numerous cases cited by counsel show this most abundantly; and it must be conceded that at the time of the intestate's death, this debt was assets subject to the jurisdiction of the probate court in Wisconsin. But it did not from that fact become so "fixed, localized and crystallized," that it could never afterwards be changed. None of the cases cited have gone

so far as that. True, some of them speak of debts as *bona notabilia*, or assets at the place of the debtor's residence at the date of the creditor's death, and so they are. But this language, even if it admits the inference that they would so remain, does not require that construction. Certainly if it were so, it would take something from the reputation of the common law as being the embodiment of the experience and wisdom of ages, for the result would, not infrequently, be a failure of justice. All the authorities agree that an administrator cannot maintain an action outside of the locality for which he is appointed. If, therefore, the law is as contended for, and the debtor should remove to another state, leaving no property behind, there would be no process known to the law by which the debt could be collected. The administrator appointed in his former place of residence, could not reach him, and if the principle contended for is correct, an ancillary administrator in the latter could not, for he would have no interest in or right to the debt; that, upon the theory contended for belonging to another location. Thus each would be powerless; nor could they assist each other, as there is no privity between them, — each acting in his own sphere, independent of the other, until the settlement of the estate is completed.

But we think the law is subject to no such defect. As the creditor while living represents and carries the debt with him wherever he goes, so he being dead the debtor as the only party who can do so, represents and carries it with him wherever he goes. Whatever his movements may be he cannot escape its obligation, or so long as he remains under any form of government his liability to such process as may be established by the law for its collection. None of the cases relied upon are inconsistent with this view. That of *Abbott, Adm'r*, v. *Coburn et al.* 28 Vt. 663, is apparently so, in some parts of the opinion, but the facts do not warrant such an inference. In that case the intestate died in California; the administrator was appointed in Vermont, where the decedent left no estate, and where none was afterwards found; and the defendant resided in Massachusetts, not only at the time of the decedent's death, but also at the time of the commencement of the action; and what is perhaps of more

importance, the defendant at the commencement of the action, was actually in Massachusetts, having neither presence nor residence, temporary or otherwise, in Vermont; and hence the process was not served upon her. Adopting the principle that the debtor represents and carries with him the debt, and as a necessary consequence the action could not be maintained. There was not only no debt but no other property of the intestate in Vermont, and no jurisdiction was obtained except by an attachment of the defendant's property.

But whatever may be the common law in regard to the possibility of a change in the location of the assets of an intestate after his death, there would seem to be no doubt about it under our statute. It does not assert in direct terms that such change may take place, but its provisions are utterly inconsistent with any other view. The administrator is to be appointed not only when there is property in the county at the time of the decedent's death, but when estate "is afterwards found therein." A provision utterly senseless and useless unless it refers to property brought into the county subsequent to the death of the intestate. Such is the view taken of a similar statute by the court in Massachusetts, in a very satisfactory opinion in *Pinney* v. *McGregory*, 102 Mass. 186. If an administrator can be appointed on finding such property in the county, having been so appointed, it becomes his duty to administer it.

Has such a change taken place in this case? If the defendant had become a permanent resident of the county of Somerset, there could have been no doubt about it. He residing there would bring the debt there. He was there in person. He in fact had a residence there, temporary to be sure and such as any visitor has, but nevertheless sufficient to subject him to the jurisdiction of our courts and our laws. "All persons, who are found within the limits of a government, whether his residence is permanent or temporary, are to be deemed subjects thereof." Story's Conflict of Laws, § 541. As the debt follows the person and cannot be separated from it, this brings the debt within the process and jurisdiction of the court. The person being "after-

wards found" in the county of Somerset, the debt is also "found therein."

It is objected that this would make the defendant liable in every state through which he might have occasion to pass. He might indeed be liable in any one such state in which a statute similar to ours and creditors of the intestate might be found, but not in all. That it is competent for the legislative power of this, or any state to pass such an act will probably not be denied. It may protect its creditors by the appropriation of any property within its jurisdiction, and if its legislation should not be in exact conformity with what is called the comity of nations, that would not detract from its authority. Nor does this construction of the statute subject the defendant to a liability of more than one payment. The judgment of any court having jurisdiction, must, by the constitution of the United States, be respected in every other state, and where several might take jurisdiction, that which first obtains must prevail.

Exceptions overruled.

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

JAMES WRIGHT, claimant and appellant, *vs.* JAMES F. BLUNT.

Somerset. Opinion August 1, 1882.

Trial justice. Appeal. Amendment. Complaint for costs. Judgment. Practice.

A magistrate before whom a recognizance is taken may, by leave of court amend the one returned or make a new one, so as to set out more accurately the contract of the party recognizing.

A judgment upon complaint for costs for not entering an action, denying the complainant's costs, is one from which an appeal may be taken.

The fact of the denial of costs, sufficiently shows that the party who appealed was aggrieved.

It is for the trial justice to determine the sufficiency of the surety and the reasonableness of the sum, in which the appellant is to recognize.

ON EXCEPTIONS.

This was an appeal from the judgment of a trial justice upon a complaint for costs for not entering an action before the justice, alleging that he had been duly summoned to appear as defendant in such action. Upon motion, the appeal was dismissed by the court for want of sufficient recognizance and the appellant alleged exceptions.

The material facts appear in the opinion.

James Wright, for the plaintiff, cited R. S., c. 83, § 18; *Commonwealth* v. *Field*, 11 Allen, 488; *Commonwealth* v. *Merriam*, 7 Allen, 356; *Hawkes* v. *Davenport*, 5 Allen, 390; *Benedict* v. *Cutting*, 13 Met. 181; *State* v. *Young*, 56 Maine, 219; *Ingalls* v. *Chase*, 68 Maine, 113, and cases cited.

Folsom and Merrill, for the defendant.

A recognizance should recite the cause of its caption, and so much of the judgment as would show that the magistrate had jurisdiction. *Commonwealth* v. *Downey*, 9 Mass. 520; Spauld. Prac. 513. See also, *Libby* v. *Main*, 11 Maine, 344; *Dodge* v. *Kellock*, 13 Maine, 136; *Green* v. *Haskell*, 24 Maine, 180; *French* v. *Snell*, 37 Maine, 102; *Owen* v. *Daniels*, 21 Maine, 180; *Harrington* v. *Brown*, 7 Pick. 232.

Without a proper recognizance an appeal cannot be sustained. *Hilton* v. *Longley*, 30 Maine, 220; *Dolloff* v. *Hartwell*, 38 Maine, 54.

The original recognizance, filed the first day of the term, does not show the cause of the caption, &c. The appeal was therefore not perfected and a motion to dismiss was properly granted. *French* v. *Snell*, 37 Maine, 100.

The original recognizance taken before the magistrate on an appeal from his judgment must be returned to the appellate court. A copy cannot be entered of record, neither is it admissible to contradict or show it defective. *Stetson* v. *Corinna*, 44 Maine, 29.

The justice certified that the recognizance filed the first day, was the original recognizance filed before him. There cannot be two original recognizances. The paper filed in court the sixteenth day cannot be the original. But that paper is insufficient as a recognizance. (1.) Because it does not show that the complainant was aggrieved at the judgment of the justice. R. S., c. 83, § 17. (2.) It does not show that the appeal was entered within twenty-four hours. *Ibid.* (3.) It does not show that the appellant recognized with sufficient surety or sureties to the adverse party in a reasonable sum. *Idem*, § 18. (4.) It does not show that the appeal was ever allowed by the justice. (5.) It does not show that the justice had jurisdiction. It only shows that it was a complaint for costs, but does not show what kind of an action it was that Blunt brought against the appellant.

APPLETON, C. J. The appellant having been sued by the appellee, who failed to enter and prosecute his action, filed at the return day before the magistrate issuing the writ his complaint for costs. The appellee, by his counsel, appeared and objected to their allowance and they were disallowed. From the judgment of the trial justice disallowing costs, an appeal was duly taken and entered in court with a copy of the case and the recognizance.

It appears by the docket entries, that on the sixteenth day of the term, a diminution of the record was suggested and the justice had leave to file his record and amend, a motion to dismiss for want of a sufficient recognizance having been made the same day. The record as now amended was duly filed on the same day on which leave was given to file it.

On the seventeenth day of the term, the counsel for the respondent, filed a motion to dismiss, "because the papers in the case do not show a case wherein an appeal lies from a decision of a trial justice to the Supreme Judicial Court."

The complaint was entered at the time and place and before the magistrate, before whom the writ was made returnable. The plaintiff in the original suit failing to enter and prosecute his action, the then defendant, was, by the statute, entitled to recover judgment for his costs. The counsel for the plaintiff

contested their allowance and the justice disallowed them. Here was a judgment determining the rights of contesting parties, from which an appeal could legally be taken.

The recognizance first filed, seems to be conceded to be insufficient and defective. Leave was then granted to amend. That the magistrate before whom a recognizance is taken, may, by leave of court, amend the one returned or make a new one, so as to set out more accurately and fully the contract of the parties recognizing, seems fully established by the authorities. *State* v. *Young*, 56 Maine, 219; *Ingalls* v. *Chase*, 68 Maine, 113; *Com.* v. *Field*, 11 Allen, 488.

A diminution of the record having been suggested and leave having been given to the justice to amend his record, his duty in the matter was plain and obvious. If the record was correct, he could properly make no change or amendment, for there was nothing to amend. If defective by reason of diminution, he should supply the deficiency. This he did, by furnishing under his hand, an amended recognizance, which was placed on the files of the court.

But the justice, returning an amended record in pursuance of leave granted, wrote on the recognizance first returned, these words: "I certify that this is the original recognizance *filed* with me and returned to the S. J. Court in the case *James Wright* v. *James F. Blunt*. W. H. Fuller, trial justice." By this, we cannot understand that the recognizance as last returned is incorrect. It is under his official signature and he would be guilty of official misconduct if he returned a false recognizance as an amended recognizance, when the one first returned was the true recognizance and the one taken. All that is meant by the language used, is that the first recognizance is the first, as it was made out and reduced to writing by him. The justice took a recognizance and he does not mean that he took a defective one.

But this certificate is no part of the records of the magistrate. It is not evidence of any fact therein stated. It is the unauthorized certificate of what is no part of his record and is no more evidence than any other outside fact he might choose to certify.

Leave to amend the recognizance having been granted and the

amended recognizance having been filed, the motion to dismiss was rendered on the following day and the presiding justice ordered the action dismissed for the insufficiency of the recognizance. The question to be determined is whether or not it was sufficient.

It is objected to the validity of the recognizance, that it does not appear that the party appealing, was aggrieved by the judgment of the magistrate. But that is abundantly shown by the fact that the judgment was adverse.

The recognizance was entered into, on the day on which the respondent's writ was returnable and on which the complaint for costs was filed, it must therefore have been within twenty-four hours after the rendition of judgment.

The statute requires the appellant to recognize with sufficient surety or sureties in a reasonable sum, with condition, &c. It was for the trial justice to determine as to the sufficiency of the surety and the reasonableness of the sum for which he has to recognize. If not, no question is made as to the surety. As for the sum, inasmuch as the costs were but one dollar and forty-nine cents, a recognizance in the sum of twenty dollars, furnishes no ground of complaint for the appellee as not being reasonable.

Exceptions sustained.

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

MARTHA A. GODFREY, administratrix of the estate of NAHUM GODFREY, *vs.* EDWARD F. HAYNES.

Penobscot. Opinion August 2, 1882.

Practice. Contract. Presumption.

The court is not required to give its instructions in words selected by the excepting counsel. It is enough if they are correct as applied to the circumstances of the case.

The presiding justice instructed the jury that, — "Whenever one person furnishes anything valuable to another, not being under legal obligation to

do so, generally the presumption or implication is that the thing furnished is to be paid for;" but this ordinary presumption may be "strengthened by the accompanying circumstances or weakened by them, or may be completely overpowered and rebutted by them." *Held*, That the instruction was in strict conformity with the law.

ON EXCEPTIONS.

Assumpsit upon an account annexed, for the board of the defendant and defendant's wife.

At the trial, the plaintiff contended that, if it was established that the defendant and wife were living continuously in the family of Godfrey for a period of time covering a winter season, at least six months, without rendering any services therefor, the defendant's business being independent of any business of Godfrey's, the presumption would be that their board was to be paid for, and that such presumption would stand until rebutted by other evidence. The presiding justice declined to so instruct the jury, but instructed them as follows:

"Whenever one person furnishes anything valuable to another, not being under legal obligation to do so, generally the presumption or implication is, that the thing furnished is to be paid for; that such is the general rule or implication; the rule of a case nakedly stated, naked of all qualifying circumstances; that we rarely see a case where the mere fact, that one person furnishes an article to another, is not accompanied by some circumstances which ordinarily show the terms and conditions upon which the article is furnished; that the ordinary presumption or inference, (that payment is to be made,) may in such case be strengthened by the accompanying circumstances, or may be weakened by them, or may be completely overpowered and rebutted by them; that the general rule bends to circumstances,—submits to them; that whether the general rule, or its exception, be applicable to this case was a question for the jury to decide; and that if it appeared to the jury from the facts and circumstances of the case, all of them taken together, that there was an implied promise to pay for the board furnished, if furnished,

the plaintiff would be entitled to recover; and that if it did not affirmatively appear to them from all the testimony in the case from both sides, that there was an implied promise to pay, then the plaintiff is not entitled to recover."

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

E. C. Brett, for the plaintiff.

The rule contended for by the plaintiff was just and proper.

The defendant came to Godfrey's house with his wife and goods and sat at Godfrey's table, day by day, for nearly a year, and his wife remained longer, and paid nothing for it, and rendered no services or return of any kind, and attended to his own business all the time; the law presumes that board was furnished on credit. *Edmunds* v. *Wiggin*, 24 Maine, 505; *Atwood* v. *Lucas*, 53 Maine, 508.

Chief Justice MARSHALL, in 12 Wheat. 341, says, that implied contracts are those stipulations which the parties are supposed to have made, and which as honest, fair and just men they ought to have made. See also Met. Contr. 4; *Abbot* v. *Hermon*, 7 Maine, 118; *Weston* v. *Davis*, 24 Maine, 374; *True* v. *McGilvery*, 43 Maine, 485; *Tebbetts* v. *Haskins*, 16 Maine, 283.

The requested instruction was good law and I contend counsel have a right to have requested instructions given as requested when good law, as applicable to the case on trial.

The instructions given, misled the jury, because there was more force spent in discussing exceptions to the rule, than upon the rule itself, and as to the case on trial, the exceptions did not exist in proof. There were no circumstances in evidence that "bent the rule" of implication at all.

In the case in 104 Mass. 591, there was evidence of service rendered by the plaintiff, in the family of the defendant; and in *Thurston* v. *Perry*, 130 Mass. 240, and *Boardman* v. *Silver*, 100 Mass. 330, there was evidence of services rendered the families by the parties sought to be charged with board, as well as a general air of helpless family dependence, wholly unlike the case at bar.

Barker, Vose and Barker, for the defendant.

APPLETON, C. J. A service may be rendered another gratuitously or under an express or implied promise of compensation. How rendered, whether gratuitously or under an express or implied promise of compensation will depend upon the facts and circumstances under which such services are rendered.

This action is brought for the board of the defendant and his wife by the administratrix on the estate of his father-in-law. The question in issue was whether he was residing in the house of the plaintiff's intestate as a boarder, or was there occasionally as a visitor. The law ordinarily implies a promise to pay for services rendered, though such implication may be rebutted by the circumstances accompanying their rendition. The relationship of the parties is an element of importance in determining whether the services were gratuitous or not, as well as the nature and character of those rendered.

The court is not required to give its instructions in words selected by the excepting counsel. It is enough if they are correct as applied to the circumstances of the case.

The presiding judge gave as the general rule, "nakedly stated, naked of all qualifying circumstances," that when one furnishes any thing valuable to another, not being under legal obligation to do so, the presumption or implication is, that the thing furnished is to be paid for; but that the ordinary presumption of payment may be strengthened or weakened by the accompanying circumstances, leaving it to the jury to determine, from all the circumstances and evidence in the case, whether there was an implied promise to pay for the defendant's board or not. The instructions given were in strict accordance with the legal rights of the parties, and the exceptions must be overruled. *Spring* v. *Hulett*, 104 Mass. 591; *Thurston* v. *Perry*, 130 Mass. 240.

Exceptions overruled.

WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.

JOSEPH H. MITCHELL *vs.* WILLIAM J. SUTHERLAND and others.

Piscataquis. Opinion August 2, 1882.

Practice. Demurrer. Attachment. Jurisdiction. Treble costs. R. S., c. 82, § 19.

When it is claimed that an attachment, by which to that extent jurisdiction is gained of an action in which the defendants are non-residents of this state, is of property exempt from attachment, that cannot be taken adyantage of by demurrer.

Such a demurrer would be deemed frivolous, and would entitle the plaintiff to treble costs under R. S., c. 82, § 19.

ON EXCEPTIONS.

Assumpsit on account annexed for twenty-three dollars and ten cents. The writ was dated March 26, 1878, and the officer attached "six one-half barrels of coal subject to former attachment of William Lane." The defendants are described as residing in Boston, Massachusetts,. co-partners in the business of quarrying slate in Monson, Maine, under the firm name of The Oakland Slate Quarry Company. The questions presented by the exceptions of the defendants to the ruling of the court in overruling their demurrer, are stated in the opinion.

Henry Hudson, for the plaintiff.

D. L. Savage, for the defendants.

APPLETON, C. J. This is a demurrer to a declaration in assumpsit on an account annexed and in the usual form.

One ground of demurrer is that there is no seal on the writ. But the copy furnished by the excepting party and certified by the clerk, must be deemed correct. In this it appears that there was a seal on the original writ.

It is next objected that the attachment of coal, by which to that extent jurisdiction is gained, the defendants residing out of the state, is of property which by R. S., c. 81, § 59, par. 4, is

exempt. But that cannot be taken advantage of by demurrer. It does not appear but that the defendants had coal to the amount of the exemption, which has not been attached. In such case no wrong is done.

The demurrer must be deemed frivolous, and the plaintiff is entitled to treble costs. R. S., c. 82, § 19.

Exceptions overruled. Plaintiff to recover treble costs.

WALTON, VIRGIN, PETERS and SYMONDS, JJ., concurred.

INHABITANTS OF LIBERTY, in review, *vs.* WILLIAM HURD.

Waldo. Opinion August 2, 1882.

Taxes. Collector.

When a collector of taxes arrests a tax-payer for non-payment of a tax which had already been once paid, and is thereupon paid a second time to procure a release from the arrest, the town is not liable for the arrest, nor for the money while in the hands of the collector.

ON REPORT.

An action of review. The original action was assumpsit for money had and received, upon which judgment was rendered on default, for twenty-two dollars and eighty-three cents debt and ten dollars and sixty-three cents costs. A review was granted at January term, 1882.

The material facts are stated in the opinion.

William H. Fogler, for the plaintiffs, cited: *Small* v. *Danville*, 51 Maine, 359; *Mitchell* v. *Rockland*, 52 Maine, 118; *Barbour* v. *Ellsworth*, 67 Maine, 294; *Davis* v. *Bangor*, 42 Maine, 522; *Dunbar* v. *Boston*, 112 Mass. 75; *Smith* v. *Readfield*, 27 Maine, 148; *Parsons* v. *Monmouth*, 70 Maine, 262; *Billings* v. *Monmouth*, 72 Maine, 174; *Belfast National Bank* v. *Stockton*, 72 Maine, 522.

J. W. Knowlton, for the defendant.

Towns have two officers or agents — a collector and a treasurer. Money paid for taxes to either is paid to the town and is in the possession of the town when in the hands of either agent.

In *Briggs* v. *Lewiston*, 29 Maine, 472, TENNEY, J., says, "the money paid to the jailor was only another mode of paying it to the collector and was in effect paying it to the town. It was then in the hands of the town, and being really the money of the plaintiff, the town had no right to retain it, and this action was rightfully brought to recover it back." See *Johnson* v. *Goodridge*, 15 Maine, 32; 2 Greenl. Ev. § 22; *Ware* v. *Percival*, 61 Maine, 391; *Hobbs* v. *Parker*, 31 Maine, 143.

APPLETON, C. J. William Hurd was legally assessed in, and liable to pay the plaintiffs in review, the sum of twenty-two dollars and fifty cents, for the year 1878. This tax he paid to William Lewis, the collector of taxes for that year, in March 1879.

On October 18, 1879, he was arrested by said Lewis, for the non-payment of the above mentioned tax, and to procure his release from arrest, paid the same to the collector and on the same day commenced this suit to recover the sum so paid, against the town of Liberty and recovered judgment by default on the same, of which suit this is a review.

The arrest was unlawful. The collector, Lewis, in making the arrest, was not an agent of the town, for the tax had been previously paid. He was a mere trespasser and as such is liable. The money was not in the possession of the town or its treasurer when this suit was commenced. The collector had no authority to collect it twice. If, since the original suit was commenced, it has gone into the hands of the treasurer, it will not avail to maintain it.

The action in review is maintained. The former judgment is to be wholly reversed, and judgment to be rendered for the plaintiffs in review for the amount of the original judgment debt and cost, with interest from its rendition and cost.

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

CORNELIUS E. DRISCOLL *vs.* JOHN F. STANFORD.

Cumberland. Opinion August 2, 1882.

Poor debtor's disclosure. Citation. Amendment. Stat. 1878, c. 59, § 2.

The citation to the creditor in a poor debtor's disclosure erroneously gave the date of the judgment as 1879 instead of 1878; the creditor had recovered no other judgment against the debtor, and on motion the justices allowed an amendment correcting the error. *Held*, That the amendment was properly within the provisions of stat. 1878, c. 59, § 2, and in strict accordance with the uniform current of authorities on the subject.

ON EXCEPTIONS.

Debt on poor debtor's bond. The writ was dated December 2, 1879; the plea was general issue, with brief statement setting up performance of one of the conditions of the bond.

The facts sufficiently appear in the opinion.

P. J. Larrabee, for the plaintiff.

The citation was fatally defective and the justices, therefore, never acquired jurisdiction. *Poor* v. *Knight*, 66 Maine, 482; *Knight* v. *Norton*, 15 Maine, 337; *Neil* v. *Ford*, 21 Maine, 440; *Slasson* v. *Brown*, 20 Pick. 436. Hence they could not allow the amendment. It was not of the nature intended to be authorized by stat. 1878, c. 59.

William Emery, for the defendant.

APPLETON, C. J. This is an action of debt on a poor debtor's bond. The defence relied upon, is a disclosure and discharge by the justices, before whom the disclosure was had.

The objection taken, is that the citation when served on the creditor, erroneously stated the year of the rendition of the judgment on which the execution was issued, by virtue of which, the defendant was arrested and gave the bond in suit.

The plaintiff was duly notified of the time and place of hearing the defendant's disclosure. He neglected to appear. Not

appearing, the debtor chose one justice and the other was chosen by the officer by whom the citation had been served.

The defendant then moved that the citation be amended by a change of the year in which judgment had been rendered, from 1879 to 1878. In all other respects the judgment was accurately described. The plaintiff had recovered no other judgment against the defendant and could hardly fail to perceive the mistake in the date of the judgment to which the citation referred.

The justices allowed the amendment. This, they could properly do, within the provisions of the statute of 1878, c. 59, § 2, which enacts that, "no citation shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes, when the person and case can be rightly understood. Such errors and defects may be amended on motion of either party."

Had the certificate of discharge followed the judgment as described in the citation, it would have constituted no bar to this suit, as was decided in *Poor* v. *Knight*, 66 Maine, 482, and cases there cited. It was to prevent such a result, by allowing the citation to be amended, that the act of 1878 was passed. The amendment permitted by the justices was in strict accordance with the uniform current of authorities on the subject. *Ripley* v. *Hebron*, 60 Maine, 379; *Prescott* v. *Prescott*, 65 Maine, 478; *Cooper* v. *Bailey*, 52 Maine, 230.

Exceptions overruled.

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

REBECCA MAKER *vs.* GEORGE L. MAKER, administrator on the estate of JAMES R. MAKER.

Knox. Opinion August 2, 1882.

Contract for maintenance. Evidence.

The reception of a deed of real estate by the grantee, wherein the consideration is declared to be the maintenance of the grantor during her natural

life, is sufficient proof of a promise on the part of the grantee to furnish that maintenance; and that promise is binding upon him and upon his estate in the hands of his administrator.

In such a case the formal receipt in the deed cannot be regarded as *prima facie* evidence of the payment of the consideration.

In August, 1870, M conveyed certain real estate to her son by a deed in which the consideration was stated the maintenance of the grantor and her husband during their natural lives. The maintenance was provided by the son in his family till his death in 1875, and after his death M continued to reside with the son's widow for more than a year, when she left and went to her daughter's. No administrator was appointed on the son's estate till 1880. *Held*, That the reception of support in the family of the son's widow under the circumstances would not constitute an election on the part of M to have her maintenance there; and that it was competent for her to elect to receive her support at her daughter's.

ON REPORT.

An action to recover damages for breach of contract of defendant's intestate to support the plaintiff. The writ was dated February 20, 1880. The plea was general issue, with a brief statement setting up that the plaintiff had made her election to receive her support with the widow of the deceased, and the defendant was ready and willing to support her there.

The report shows that the plaintiff gave her son, the defendant's intestate, a deed of certain real estate, dated August 23, 1870, and reciting, "That we, Rebecca Maker in her own right, married woman, and Joshua T. Maker her husband, residents of Rackliff's Island in the town of St. George, county of Knox and State of Maine, in consideration of the maintenance of the said Joshua T. Maker and his wife Rebecca, during their natural lives, paid by James R. Maker of Smith's Island, in Penobscot bay, in the county of Waldo, State of Maine, husbandman, the receipt whereof is hereby acknowledged."

The grantee was the son of the grantors. He accepted the deed and maintained the grantors in his family until the death of Joshua T. Maker, and continued to maintain the plaintiff until his own death, September 6, 1875. The plaintiff continued to receive her support in the family of the son's widow, till May, 1877, when she left and went to reside with her daughter.

The defendant was appointed administrator in January, 1880, prior to that time no administrator had been appointed.

C. E. Littlefield, for the plaintiff, cited: *Wilder* v. *Whittemore*, 15 Mass. 262; *Fiske* v. *Fiske*, 20 Pick. 499; *Flanders* v. *Lamphear*, 9 N. H. 201; *Holmes* v. *Fisher*, 13 N. H. 9; *Norton* v. *Webb*, 36 Maine, 272; *Mason* v. *Mason*, 67 Maine, 547; *How* v. *How*, 48 Maine, 428; *Philbrook* v. *Burgess*, 52 Maine, 271; *Sibley* v. *Rider*, 54 Maine, 463; *Fales* v. *Hemenway*, 64 Maine, 373; *Knight* v. *Bean*, 22 Maine, 536; *Harrison* v. *Conlan*, 10 Allen, 86; *Bryant* v. *Erskine*, 55 Maine, 153.

J. H. Montgomery, for the defendant.

The deed put in the case by the plaintiff, shows the nature of the consideration and it also acknowledges a full satisfaction for the same, which is *prima facie* evidence that the consideration for which the deed was executed, has been paid. *Goodspeed* v. *Fuller*, 46 Maine, 141; *Bassett* v. *Bassett*, 55 Maine, 130. Counsel further contended that the plaintiff had elected to receive her support in the family of her son James, and therefore neither he nor his estate was chargeable with her support elsewhere.

BARROWS, J. The reception by the defendant's intestate of a deed of real estate from his mother, the plaintiff, the consideration of which is therein declared to be the maintenance of the plaintiff and her husband during their natural lives, is sufficient proof of a promise on the part of the intestate to furnish that maintenance, which promise is binding upon him and his estate in the hands of his administrator. The nature of the consideration is such, that the formal receipt in the deed cannot be regarded as *prima facie* evidence of its payment. The testimony reported, shows that the son furnished the support while he lived and that after his death, the plaintiff, (her husband having deceased,) lived for more than a year with the son's widow upon the property conveyed, and left there in the spring of 1877 to reside with her daughter, no letters of administration being granted upon the son's estate, until January, 1880. Under

such circumstances, the reception of her support in the family of the son's widow up to the time of her removal to her daughter's, would not constitute an election on the part of the plaintiff to have her maintenance there, which would be binding on her. The obligation to support the plaintiff, constituted a debt against the son's estate, from which his widow might relieve it for the benefit of herself and her minor children, so long as she could make it agreeable to the plaintiff to live with her. But after the death of the son and while there was no legal representative of his estate, the relation of the parties would not be changed by any such tacit acceptance of support as is here shown; and it was competent, within the well settled rule of construction of these contracts in this state, for the plaintiff to elect to receive her support at her daughter's. *Norton* v. *Webb*, 36 Maine, 272. Even were it otherwise, the case furnishes sufficient evidence to justify the plaintiff in claiming a breach of the contract, for want of that civil and decent attention to her comfort and feelings, which is included in every undertaking for such maintenance.

Due demand upon the administrator was alleged and admitted. If the action was maintainable, it was agreed by the parties that judgment should be entered for the plaintiff, for three hundred and fifty dollars damages.

Judgment for plaintiff accordingly.

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

JAMES FISH *vs.* CHARLES BAKER.

Waldo. Opinion August 2, 1882.

Exceptions. Practice.

Upon a hearing on a writ of *habeas corpus*, the discharge of the petitioner was denied. After the close of that term, (October, 1881,) on June 1, 1882,

in vacation, exceptions were filed as of the October term, 1881, by permission of the justice presiding at that term. *Held*, That the exceptions were not seasonably filed.

The court will hardly entertain a case for the purpose of deciding questions which, so far as the parties are concerned, are merely speculative.

ON EXCEPTIONS.

Writ of *habeas corpus*. The respondent was the keeper of the jail. A hearing was had before the court at the October term, 1881, and the following are the docket entries:

"October term, 1881. Hearing had. Discharge refused. Prisoner remanded."

"June 1, 1882. Exceptions filed and allowed as of the last day of the October term, 1881, by order of the court."

At the time the exceptions were filed, the following statement and order of the justice who presided at the October term, 1881, were filed in the case:

"In this case exceptions were prepared at the term at which the rulings were given, October, 1881. They were then presented to me, but for some reason they were not allowed; and the docket does not show that they were filed. In the vacation after the April term, 1882, the exceptions were sent to me for my signature, by Judge Knowlton, attorney for petitioner, and I signed them, supposing the docket was right, and that the only error was on my part in omitting to sign. On my sending the exceptions so allowed, to Mr. Bliss, attorney for respondent, for his examination, he objects to their allowance on grounds stated in the protest which he has filed. I am satisfied from the statement of Judge Knowlton, that he intended to insist upon his exceptions, and that he supposed they were duly filed and allowed; the fault being either on my part or the result of a misapprehension between him and me. In order that the excepting party may not be deprived of any right through an omission on my part, I wish to allow the exceptions now as of the October term, if I have authority to do so.

"I therefore direct the clerk to enter them on the docket as allowed on the last day of the October term, 1881; and order

that the docket entries in the action, the protest of the respondent, and this statement make part of the exceptions as printed for the law court."

The following is the protest of the respondent's attorney:

"A hearing in the above matter was had at the October term, 1881, and the prayer of the petitioner denied. At that term no exceptions were filed or allowed, nor at the two intervening terms since. But on the first day of June, 1882, exceptions were allowed and filed to which I respectfullv protest. It appears on clerk's docket that 'hearing was had, discharge refused, and petitioner remanded.' There the case stopped. No exceptions were filed, neither does the docket show they were to be filed. Hiram Bliss, Jr. attorney for respondent."

Belfast, June 1, 1882."

J. W. Knowlton, for the petitioner.

Hiram Bliss, Jr. for the respondent.

APPLETON, C. J. The judgment denying a discharge of the petitioner and to which exceptions are now alleged, was rendered October T. 1881, but it does not appear from the docket that exceptions were then taken, or that any agreement was made or consent given, that they might be filed at a subsequent term. On their face they are not within the statute, not having been signed until June 1, 1882, and then in vacation. R. S., c. 77, § 21.

Further, it is conceded by both counsel that the petitioner has since been legally discharged from prison by taking the poor debtor's oath. The order for a discharge, if it could be legally made, has become unnecessary and the court will hardly entertain the case for the purpose of deciding questions, which so far as these parties are concerned, are merely speculative. *Tufts* v. *Maines*, 51 Maine, 393.

Neither is this a case reported by the presiding judge, within R. S., c. 77, § 13. It is simply a case of exceptions which

appear not to have been filed in season and when no delay was asked for or given.

Exceptions overruled.

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

METHODIST EPISCOPAL PARISH IN GUILFORD, and vicinity,

vs.

WILLIAM W. CLARKE.

Piscataquis. Opinion August 2, 1882.

Practice. New trial. Contract. Principal and agent. Ratification.

An action was tried to the jury in 1878. But beyond a naked entry on the law docket it did not make its appearance in the law court until the June term, 1882, when it was presented with written arguments upon exceptions, and motion filed by the defendant to set aside the verdict as against evidence. *Held*, That if there was ever any ground for the motion, the defendant had lost it by the delay.

A verdict will not be set aside for trivial faults, such as an error in the title of the case, when the identification of the finding is complete, and the merits and intelligibleness of the proceedings are not affected.

The defendant made and executed on his own part, in due form, an agreement under seal, to slate the roof of the plaintiffs' meeting-house in a good, substantial and workmanlike manner, and to warrant the same against leaking for ten years from the completion of the job, plaintiffs to pay him a certain sum therefor in stated installments. The instrument was executed by only one of the plaintiffs' building committee of three; and there was never any vote authorizing the committee to enter into a contract under seal. But the plaintiffs paid the sum agreed to the defendant, and allowed it in the settlement of its treasurer's accounts. *Held*, That the defendant was liable for any breach of his covenants, notwithstanding the contract was not so executed by the plaintiffs in the outset as to enable him to maintain an action of covenant against them thereon; and that he could not sustain exceptions to instructions authorizing the jury to find that the plaintiffs had ratified the contract, and made it a valid and binding contract between the parties, if their acts and doings satisfied the jury that such was their intention. *Held*, *further*, That proof that one of the leaks was caused by the negligence of

the plaintiffs' employees, would not preclude the plaintiffs from recovering for damage caused by other leakages elsewhere on the roof arising from causes for which the defendant was responsible on his covenants, and that the rule respecting the effect of contributory negligence on a plaintiffs' right to maintain an action did not apply to such a matter.

On exceptions and motion to set aside the verdict.

Action of covenant broken, in which the plaintiffs seek to recover damages for the non-performance, by the defendant, of his contract of July 23, 1872, under seal, in which he covenanted and agreed to slate the roof of the meeting-house, then in process of erection by the plaintiffs, in a good, substantial and workmanlike manner, and to furnish everything necessary therefor,—slate, paper, nails and zinc,—to complete the roof after it was boarded, "and to warrant it from leaking, for the space of ten years from the time the same is completed." And the parish, in the same contract which was signed on its part by one of its three members of its building committee, promised to pay the defendant therefor, the sum of two hundred and forty-five dollars in stated installments. And in accordance with that contract, the plaintiffs paid the defendant as provided by the contract.

There was never any vote of the parish authorizing the building committee to enter into a contract under seal.

The verdict which gave the title of the case as "*Methodist Episcopal Parish* v. *William W. Clarke*," was for plaintiffs, and damages were assessed at $285. And the following special finding was returned by the jury.

"State of Maine, Piscataquis, ss. Supreme Judicial Court, September term, 1878. *Methodist Episcopal Church* v. *William W. Clarke.* Did the defendant slate the roof of the plaintiffs' meetinghouse, in a good, substantial and workmanlike manner, as required by his contract? *Answer.* No."

Other material facts are stated in the opinion.

A. M. Robinson, for the plaintiffs, cited: Story on Agency, 247, 252; Parson's Contr. 2 ed. 47; *Dispatch line* v. *Bellany M'f'g Co.* 12 N. H. 205.

Josiah Crosby, for the defendant.

The presiding justice in his charge recognized the doctrine, that an unauthorized contract under seal, in order to be effectual, must be ratified by a sealed instrument in some cases; but he said that rule did not apply to this case, "for the reason that the subject matter of this contract, was one by which the parties might have contracted, and bound themselves by a simple contract not under seal, as by a sealed contract." This was clearly erroneous. Story, Agency, § § 242, and cases cited, 49, 252. The only exception is in cases of co-partnership. Story, Partnership, § 122; *Cady* v. *Shepherd*, 11 Pick. 400; *Gram* v. *Seton and Bunker*, 1 Hall, 262.

An action of covenant broken cannot be maintained upon a sealed contract, depending upon a ratification, unless that, also, is under seal. The question is not whether assumpsit might have been maintained upon the contract in suit, but it is whether this action — covenant broken, — can be maintained. That cannot be done. *Hanford* v. *McNair*, 9 Wend. 54.

Counsel further ably argued the questions arising upon his motion to set aside the verdict.

BARROWS, J. The record shows that this case was tried to the jury in 1878. But beyond a naked entry on the law docket, it did not make its appearance in the law court until the June term, 1882, when it was presented with written arguments upon exceptions and motion filed by the defendant, to set aside the verdict as against evidence.

If there was ever any ground for the motion, the defendant has lost it by this delay. The judge who tried the case and might have given us some light upon questions of credibility and the like, has completed his official term and left the bench; and the defendant's counsel expressly admits that the plaintiffs make a plausible case for damages, if the testimony favorable to them is selected, and that favorable to the defendant is ignored. The jury, if they believed the former and did not believe the latter, not only had the right but it was their duty to do this, and, with this admission, all foundation for the motion vanishes, unless it can be made to appear that the damages were excessive or that one

of the technical objections to the form of the verdict should be sustained. Defendant's counsel makes no point upon either of these matters in argument, except to suggest that the special finding should be thrown out because the word "church" is substituted for "parish," in the title or heading. But notwithstanding this mistake, the identification of the finding is complete. Defendant's counsel himself, expresses no doubt of the fact that it was made by the jury sitting upon this case and returned with the general verdict. We see no more reason to reject it than there is to set aside the general verdict because the entire appellation of the plaintiffs, as given in the writ, was not prefixed to that. In both cases, enough appears in the record to show the relation of the proceeding, which is called in question, to the suit as docketed, in the absence of anything indicating a chance of mistake.

To vacate the deliberate proceedings of judge and jury for such trivial faults not affecting their merits or their intelligibleness, would comport better with the never-ending subtleties of the schoolmen than with the sensible and discrete administration of justice, and would be, in spirit, at least a violation of the statute which forbids the arrest or reversal of any proceeding for circumstantial errors or mistakes, by law amendable, when the person and case can be rightly understood. Nor do we find anything in the exceptions which entitles the defendant to a new trial.

The most prominent exception is based upon a ruling allowing the jury to find a ratification by the plaintiffs of the contract on which their action is founded, under the following facts and circumstances. The subject matter of the contract was the sheathing and slating of the roof of plaintiffs' meetinghouse, in 1872, by the defendant, in a good, substantial and workmanlike manner, he to furnish all the materials as well as the work, and to warrant the roof from leaking, for ten years from the time of its completion and the plaintiffs were to pay him therefor, a certain sum in stated installments. This was the substance of what the parties mutually "covenanted and agreed,"—"in witness whereof, we the said Clarke and said parish, by their building committee,

have hereunto set our hands and seals," &c. The contract was made under seal and subscribed by the defendant and by one Young, of the building committee; but defendant denies his liability, because the building committee consisted of three persons, and so the contract was not well executed to bind the parish and he excepts to instructions which authorized the jury to find that the plaintiffs ratified the contract thus imperfectly executed and made it a valid and binding contract between the parties, though made under seal without authority, if, with a knowledge of the fact that its execution was thus deficient, they did acts which satisfied the jury of their intention to ratify it, such as allowing the payments made by their treasurer thereon— and this, on the ground that as the seal was not essential to the validity or effect of the contract, the contract itself might be ratified by parol.

There is nothing in these instructions which gives the defendant any just cause of complaint. The question presented, was not whether a parol ratification by a principal, whose agent had, without authority, entered into a contract under seal in his behalf, would make such contract binding, so that an action of covenant broken might be maintained against such principal thereupon, but whether a party who has duly executed a covenant under seal, after he has accepted the performance by the other party of all that was required on his part by the agreement, can be exonerated therefrom because the party who has performed was not originally legally bound. It is plain that the defendant after receiving the money which the plaintiffs were to pay for the performance of his undertaking, cannot avoid his own valid execution of the covenant, upon the ground that the party who has performed could not in the outset have been compelled to do so.

The case is well within the doctrine of *Worrall* v. *Munn and Prall*, 1 Selden, 229, where it was held that a contract for the sale of lands, executed by the vendor only, but delivered to and accepted by the purchaser and acted on by him, can be enforced against such purchaser; but, whether binding on such purchaser or not, such contract can be enforced either at law or in equity against

the vendor and want of mutuality is no defense. The party who subscribed and delivered the contract as his deed, is estopped by his signature from denying that it was well executed although not signed by the other party. In the discussion of that case, the court well say that "there is no solid foundation of reason or principle for a distinction between partners and other persons in the application of the rule, that if the instrument would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority, or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal." So, too, in *Grain* v. *Seton and Bunker*, 1 Hall, 283, it was held under like conditions, that subsequent ratification or adoption of the act of an agent, makes the agent's seal the seal of the principal and principal thereby becomes liable to an action of covenant on the contract as his own deed. And in note *a*, to *Hanford* v. *McNair*, 9 Wend. 56, it is said that the doctrine as it now prevails, may be stated as follows: "If a conveyance or any act is required to be by deed, the authority of the agent or attorney to execute it, must be conferred by deed. But if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary and if executed under a parol authority or subsequently adopted or ratified by parol, the instrument or act will be valid and binding on the principal as a simple contract." Hence, then, a good and sufficient consideration for the promise or agreement of the other party even if he had not bound himself by deed.

But this discussion may be superfluous; for, in any event, the defendant having well bound himself by an agreement under seal, is liable to an action for the breach of his covenant when he has had the full benefit of plaintiffs' performance.

There was some evidence tending to show that one of the leaks in the roof might have been produced by the carelessness of the plaintiffs' employees, in letting a piece of moulding, used for the construction of the belfry fall upon the roof, and thereupon defendant contended that there was contributory negligence on the part of the plaintiffs which would prevent the maintenance of this action and

excepts to instructions that the rule invoked by him would not apply to such a matter, and in substance, that, although the plaintiffs could not recover for a leak and damages thus caused, (or otherwise by their own negligence,) they would not be precluded thereby, from recovering for leakages elsewhere upon the roof, occasioned by causes for which the defendant would be responsible under his covenants. The instructions upon this topic were correct and carefully guarded.

Motion and exceptions overruled.

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

DENISON PAPER MANUFACTURING COMPANY, in equity,

vs.

ROBINSON MANUFACTURING COMPANY.

Androscoggin. Opinion August 2, 1882.

Equity. Mill dam.

In a proceeding in equity to restrain the defendants from a detention of the water flowing by their mill, the evidence showed the substance of the controversy to be whether the defendants, at a period of unusual drouth, were or were not guilty of an unreasonable detention; the defendants maintaining that they did not obstruct the natural flow except so far as was necessary to enable them to make repairs on their wheel, and the plaintiffs asserting the contrary. *Held*, That the issue is one to be tried at law, whether under all the circumstances during the drouth the acts of the defendants were or were not legally justifiable, and if not, what damage was there to the plaintiffs.

Where the evidence shows that there is a plain and adequate remedy at law, although not apparent upon the face of the bill, it is the duty of the court to decline equity jurisdiction and dismiss the bill.

BILL IN EQUITY.

Heard on bill, answer and proof.

The opinion states the case.

Strout and Holmes, for the plaintiffs.

To the point that this bill is maintainable we cite: Angell on Watercourses, p. 620, § § 444, 447; *Crittenden* v. *Field*, 8 Gray, 621–626; *Smith* v. *Adams*, 6 Paige, 435; *Burnham* v. *Kempton*, 44 N. H., 78; *Soc. Estab. Manufacturers* v. *Morris Canal Company*, 1 Saxton (N. J. ch.), 157.

That the complainants had a right to the natural and uniform flow of the water as it had been accustomed to flow for more than twenty years, as required by their mills, without wanton interruption or detention for purposes of sale by the respondent corporation, and subject only to a reasonable use of the water for the purposes of manufacture by said corporation, we cite: *Thurber* v. *Martin*, 2 Gray, 394; *Cary* v. *Daniels*, 8 Met. 466; *Chandler* v. *Howland*, 7 Gray, 350; *Bealey* v. *Shaw*, 6 East. 208, (see pp. 214, 219) and Bell's Law of Scotland, 641, cited and approved in Angell on Watercourses, p. 104, n. 1; *Davis* v. *Getchell*, 50 Maine, 602; *Lancey* v. *Clifford*, 54 Maine, 487; *Phillips* v. *Sherman*, 64 Maine, 174.

The complainants had a right to use the water as they had been accustomed to use it for over twenty years and that holding back the water in reservoir was adverse to the common law right of complainants. *Brace* v. *Yale*, 10 Allen, 441; *Clinton* v. *Myers*, 46 N. Y. 511; *Prentice* v. *Geiger*, 16 N. Y. (Hun.) 350.

Charles F. Libbey, for the defendants, cited: *Gould* v. *Boston Duck Company*, 13 Gray, 452; *Clinton* v. *Myers*, 46 N. Y. 518; *Davis* v. *Getchell*, 50 Maine, 605; *Burnham* v. *Kempton*, 44 N. H. 78.

SYMONDS, J. The bill alleges in substance that the plaintiffs, and those under whom they hold, for more than fifty years have owned and been in possession of valuable mills and mill privileges on the Little Androscoggin river, having the legal right to use and using, without other interruption than that now complained of, the natural flow of the waters of that stream for manufacturing purposes; that Thompson pond, having its outlet into the river above the plaintiffs' mills, is tributary to the Little Androscoggin, and they have been accustomed to receive the ordinary flow therefrom at their mills without hinderance from time immemorial; that

formerly a wooden dam was built across the outlet of Thompson pond, but that this did not prevent the water from flowing in its accustomed channel into the river; that this flow was ordinarily uniform and steady and sufficient to propel the machinery at the plaintiffs' mills; that about five years ago the defendants repaired and raised the dam at the outlet of the pond, and from time to time since have raised it and placed boards upon it, but were accustomed until the fall of 1874 to let the water pass the dam in quantities sufficient for the purposes of the plaintiffs' mills; that on November 14, and in December 1874, the defendants without necessity or justifiable cause closed their gates and sluice-ways at the dam across the outlet, thereby wrongfully obstructed and retained the waters of Thompson pond, and since December 30, 1874, contrary to their custom, have kept the gates and sluice-ways closed, refusing on request to open them, holding back the usual flow, and avowing their intention to continue to retain the water in disregard of the rights of the plaintiffs and to their great and irreparable injury, leaving them with their workmen and machinery idle and large quantities of materials on hand already contracted to be manufactured into paper; that an action at law is pending to recover for past damages, and that the bill is brought among other reasons to avoid multiplicity of suits and to prevent irreparable damage.

The prayer is for a perpetual injunction against the defendants restraining them from preventing the usual flow of waters into the river and to the plaintiffs' mills, in like quantity and with like steady and continuous flow as prior to their detention.

The substance of the answer is, that the dam and privileges of the defendant corporation are the oldest on the river, the original dam having been erected more than eighty years ago, and having been uninterruptedly maintained and used to the present time, for the purpose of operating mills and machinery; that about ten years ago for the purpose of storing the waste water in the wet season, the defendants strengthened their dam, placed boards upon it, so as to be able to accumulate two feet more than the original head, and bought flowage rights at large expense; and during all the time have freely vented through their gates to the

advantage of the plaintiffs in dry seasons this surplus water which would otherwise have run to waste; that they and those under whom they claim, from the erection of the original dam, have claimed and exercised the rights to control the waters of said pond appertaining to them as owners of said dam; "running generally, as was for their interest, all the machinery of their mills when there was water enough to do so, but when the water was low using it sparingly and husbanding it, sometimes in such case running their machinery on short time, and at others running only a part of their machinery, or shutting down entirely when there was not head enough to carry their machinery," and that the plaintiffs have always recognized these rights; that the flow of water from Thompson pond is not steady and uniform, but fluctuating and irregular, depending on the rainfall; that the defendants have never unjustifiably obstructed or retained the accustomed flow of the waters of Thompson pond, or avowed their intention to do so but on the contrary, being obliged to stop their mills, took great care to adjust their gates so that the full flow of the waters of said pond and all its tributaries should pass through into the river; that the cause for stopping their mills on November 14, 1874, was an extraordinary drouth during which the surface of the pond was lowered not only to the extent of the said two feet of additional head, but twenty inches below that, so that there was not head enough to run the defendants' factory, and a further reduction of the head would have prevented the use of the force pump in case of fire; that the plaintiffs did not deny the defendants' right to do this but on the contrary on November 20, purchased of the defendants a specified quantity of water for twelve days, which time was not extended, the parties failing to agree on the rates to be paid; that from December 5 to December 14,—the tenth only excepted,—the gates were closed for the same reason, after which till December 30, about one-third of the machinery was run, all that the low state of the water would permit, when, the drouth continuing and repairs being needed, advantage was taken of the opportunity to make them, by the exercise of due diligence they were completed on Saturday, January the sixteenth, the gates were hoisted on the eighteenth,

and so far as the water would allow the mills have been in operation since that time; that during the intervals in which the gates were so closed, the defendants adjusted them so that the natural flow was not detained, but all the water which flowed into the pond passed out at the outlet. The bill was filed December 31, 1874. A preliminary injunction was issued, on bond given, which expired at the close of the January term, 1875, and has not been renewed. The answer was filed February 1, 1875. About six years elapsed before the taking of the testimony was completed, and the case is now submitted upon written arguments filed since the law term in 1881. It does not appear that any progress has been made in the civil action which was pending at the filing of the bill.

A careful reading of the evidence shows the substance of the controversy to be, whether the defendants at a period of unusual drouth, in November and December, 1874, and January, 1875, were or were not guilty of an unreasonable detention of the water flowing by their mills through the outlet of Thompson pond; the defendants maintaining that they did not obstruct the natural flow, except so far as was necessary to enable them to make reasonable repairs on their wheel, and the plaintiffs asserting the contrary. This is precisely the question to be decided by the action at law which was instituted, and if the wrong is proved the appropriate remedy is by an adequate award of damages. The testimony is directed much more towards affording a basis for a correct determination of that question, than to the furnishing of data for a general decree regulating the future rights of mill owners on the river; defining what under all circumstances are to be the limits of the right of reasonable use by each. There are, also, mills between those of the plaintiffs and those of the defendants, the owners of which are not parties to the bill. It is not only a question of reasonable use at an exceptional stage of the waters, during a time of almost unprecedented drouth, but the defendants claim on the ground of prescriptive right, as well as on that of reasonable use, that they may lawfully husband the water when it is low, for the purpose of making it available to them in the running of part of their machinery only, or on short time, and

that, when occasion requires, they may close their gates and hold the water till it gets high enough to be capable of use at their mills. These are questions more proper to be tried and determined at law, than to be closed by the court by laying a perpetual injunction upon the defendants.

We think the weight of evidence is not in favor of the proposition that the defendants ever claimed more than has been stated; nor is reason shown to apprehend interference by them with any right of the plaintiffs which is undisputed, or which has been long established and enjoyed. The issue is one to be tried at law, whether under all the circumstances during the drouth the acts of the defendants were or were not legally justifiable on the ground of reasonable use or prescriptive right, and, if not, what damage was done to the plaintiffs. For the court in equity to assume jurisdiction of the case to prevent multiplicity of suits or irreparable damage, when seven years have elapsed since the preliminary injunction expired, during which the relations of the parties have been regulated by no order or decree of the court, and, so far as appears, no new dispute has risen, would be almost absurd.

In *Garnsey* v. *Springvale Mills*, decided in York last year, a case which furnishes almost a precise parallel to this, the bill was dismissed for the reason, as stated in the rescript of the court, that "The plaintiffs have a full and adequate remedy at law, and that the equitable interests of all parties concerned in the water flowing in the river cannot be decided on this bill."

The case of *Varney* v. *Pope*, 60 Maine, 192, is also in point, except that no action at law was there pending. But the pendency of such an action, in which legal rights are in controversy, delayed so long without approaching a decision of them and without cause shown for interference on the part of the court to stay immediate injury, is not a sufficient ground for equitable jurisdiction. In that case, the question was raised by demurrer to the bill, but "in general, if a demurrer would hold to a bill, the court, although the defendant answers, will not grant relief upon hearing the cause." Story's Eq. Plead. § 447.

"Even where it is not apparent upon the face of the bill, but the bill is framed so as to avoid the point, if in looking at the proofs it appears that the case is one for which there is a plain and adequate remedy at law, it is the duty of the court to decline jurisdiction and dismiss the bill." *Lewis* v. *Cocks*, 23 Wallace, 466; *Dumont* v. *Fry*, U. S. Cir. Court, S. D. New York, The Reporter, May 31, 1882, p. 677.

"Want of equity is not only good ground of demurrer to a bill, but is a good ground of defence when the case is established upon the merits; and this includes cases where the plaintiff's right proves to be one at law and not in equity." *Burnham* v. *Kempton*, 44 N. H. 78.

"In all cases in which doubt exists as to the legal right, a court of equity will compel the parties to go to trial at law without delay, either dissolving the injunction or maintaining it until such trial has taken place, as the justice of the case and the interests to be affected by the determination appear to require." Angell on Watercourses, § 452.

"This is not a case in which the proceedings ought to be suspended until the trial and decision of the trial at law. That would be a proper course to pursue, where a temporary injunction becomes necessary to prevent irreparable damages; but to justify such an interposition, the injury ought to be of such a nature as not to permit of delay. This is not such a case." *Dana* v. *Valentine*, 5 Metcalf, 14.

Bill dismissed with costs.

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

DANIEL W. FESSENDEN, assignee,

vs.

BENJAMIN B. OCKINGTON and another.

Cumberland. Opinion August 2, 1882.

Equity. Contracts, reforming of. Evidence.

To enable a court of equity to reform a contract on the ground of fraud or mistake, there must be full proof of the fraud or mistake. Relief will not be granted where the evidence is loose, equivocal or contradictory, or in its texture open to doubt or opposing presumptions.

BILL IN EQUITY.

Heard on bill, answer and proof.

This bill is brought by the assignee in bankruptcy of Thomas K. Law to reform three contracts made by the bankrupt with the defendants, in which they conveyed to him certain interests in letters patent for improvement in machinery for making clothes pins. One of the conditions of each of the contracts was as follows:

"But this sale is made by the party of the first part to the party of the second part, upon the express condition that the party of the second part shall pay to the party of the first part certain two promissory notes, . . . and if there shall be default in either or any of the payments, then this deed is to be and become void and of no effect to convey said patent rights and the party of the second part shall forfeit the money already paid at any stage when said default is made."

And the bill asked to have the following words inserted in each contract:

"It is further stipulated and agreed, by and between the parties hereto, that in case of any such default of payment as hereinbefore mentioned, that whatever notes given under this

contract shall remain unpaid at the date of such default, shall, in consideration of the forfeiture hereinbefore named, be and become null and void."

Charles P. Mattocks, for the plaintiff, cited: 1 Story's Eq. Jur. par. 138; *Hunt* v. *Rousmanier*, 8 Wheat. 211, S. C. 1 Pet. 1; *Jordan* v. *Stevens*, 51 Maine, 78; *Caned* v. *Marcy*, 13 Gray, 377; 3 Pars. Contr. 389; Met. Contr. 219; *Irving* v. *Thomas*, 18 Maine, 418; *Tilton* v. *Tilton*, 9 N. H. 385; *Bollinger* v. *Eckert*, 16 Serg. and R. 424; *Bellows* v. *Stone*, 14 N. H. 175; *Hyde* v. *Tanner*, 1 Barb. 75; *Webster* v. *Harris*, 16 Ohio, 490.

Drummond and Drummond, for the defendants.

SYMONDS, J. This is a bill in equity to reform three contracts, similar in terms and relating to the sale by the defendants to the bankrupt of certain interests in a patent right. In the respect to which the controversy relates, the contracts as drawn have a substantially similar legal effect, not very different from that of mortgages. Part of the purchase money was paid on delivery of the contracts, and negotiable notes were given for the balance. If the notes were not paid, the contracts were to be of no effect to convey the patent right and the bankrupt was to forfeit the money which had been paid. In *Ockington* v. *Law*, 66 Maine, 551, it was held also that according to the legal construction of these contracts, the present defendants had the option to waive the forfeiture, confirm the sale and collect the notes. This they have done.

The claim now is that in this last respect the contracts are not according to the intention and oral agreement of the parties; that it was expressly agreed when the papers were drawn that on default by Law in the payment of the notes, the forfeiture of his interests in the patent and of the payments which had then been made should release him from further liability; and that the omission of this stipulation from the written contracts was by mutual mistake, or by mistake on the part of Law and by fraud on the part of defendants.

The question, therefore, is whether the evidence in the case shows such a state of facts as will enable the court in equity to vary and reform the written contracts on the ground of fraud or mistake; and in this respect the clearness and strength of testimony required to justify such a decree are important to be considered.

"Mistake is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith and proceeds from a violation of the obligations which are imposed by law on the conscience of either party.

"In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties."

But this requirement of full proof is constantly insisted upon as the only ground on which the court can proceed to grant relief by reforming written instruments. It is variously stated, as that measure of proof which is equivalent to an admission, such as "to satisfy the mind of the court," "to leave little if any doubt," to establish the fact "beyond fair and reasonable controversy," "to strike all minds alike as being unquestionable and free from reasonable doubt." "The distinction is much the same as that which exists between civil and criminal cases; or that distinction which is expressed by a fair preponderance of evidence and full proof." Story's Eq. Jur. § § 151, 157; *Tucker* v. *Madden*, 44 Maine, 206; *Coale* v. *Merryman*, 35 Md. 382; *Miner* v. *Hess*, 47 Ill. 170; *Tufts* v. *Larned*, 27 Iowa, 330; *Edmond's Appeal*, 59 Penn. St. 220; *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290; *Shattuck* v. *Gay and Kelsey*, 45 Vt. 87.

In *Stockbridge Iron Co.* v. *Hudson Iron Co. supra*, the instructions given to the jury who were to pass upon such an issue in chancery was, "that the ordinary rule of evidence in civil actions, that a fact must be proved by a preponderance of evidence, does not apply to such a case as this; that the proof that both parties intended to have the precise agreement between them inserted in the deed, and omitted to do so by mistake,

must be made beyond a reasonable doubt, and so as to overcome the strong presumption arising from their signatures and seals that the contrary was the fact; and that in this case proof beyond a reasonable doubt was such a degree of proof as the jury would act upon in the most important affairs of life, and would satisfy their judgments and consciences of the fact to be proved." This instruction was approved in the following language: "It has always been held in courts of chancery, that in order to reform a written contract and make it conform to a variant oral agreement, the proofs must be full, clear and decisive; free from doubt or uncertainty; such as entirely to satisfy the conscience of the chancellor. This well established and salutary principle constitutes the difficulty of submitting such cases to a jury; the office of whose verdict is to inform and satisfy the conscience of the court. A verdict rendered upon mere preponderance of evidence would not do this. In order that a verdict, in cases of this nature, may answer its legitimate purpose, we know no better or safer rule than that laid down at the trial." See also, 102 Mass. 45.

In this case the weight of evidence does not seem to us to be in favor of the plaintiff on the essential point in controversy; certainly not in such a degree as would justify a decree making the proposed change in the terms of the written instruments. The evidence is not conclusive or satisfactory. The bankrupt may have understood it as he now states, but that the defendants so intended or that there was any fraud on their part or undue advantage taken by them is not proved. Negotiable notes were given, containing no condition and without any restriction upon the negotiation of them. This fact alone is radically at variance with the plaintiff's theory, renders it at least very improbable that such was the understanding of the parties. The rule which forbids relief where "the evidence is loose, equivocal or contradictory, or it is in its texture open to doubt or to opposing presumptions," seems to us very clearly to apply to this case.

The argument for the defendants concedes that the title to the eight-tenths of the patent is in the assignee, and as there is a

prayer for general relief, and as the answer submits to the court one branch of the question of title as a matter of law, we think a decree to that effect may properly be entered, but without costs, as the defendants are not shown to have clouded or resisted the title.

Decree accordingly.

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

GAUDALOUPE ELWELL and others,

vs

THOMAS CUNNINGHAM and others.

Waldo. Opinion August 11, 1882.

Evidence. Deed. Office copy.

To lay the foundation for the introduction of an office copy, instead of the original deed under which he claims, by the heir of the grantee in a suit for the land, it is incumbent on such heir to prove the execution and genuineness of the deed which he claims is lost, and also to show that he has exhausted his apparent means to produce the original.

ON REPORT.

Writ of entry dated October 9, 1880, to recover possession of certain real estate in Northport. The plaintiffs were the children and legal heirs of Robert Elwell, who died in California in 1853, and they claim title under a deed from Jonathan Elwell to Robert Elwell, dated May 13, 1803, recorded January 31, 1806, in Hancock registry of deeds, volume 17, page 402. At the trial the plaintiffs introduced the testimony of witnesses, the material parts of which are stated in the opinion, and then offered as evidence an office copy of the deed above mentioned from Jonathan Elwell to their father. Thereupon the case was reported

to the law court to determine upon the testimony whether the copy was admissible, with the stipulation that if such copy was not admissible, a nonsuit should be entered.

H. D. Hadlock, for the plaintiffs.

When a deed is beyond the control of a party desiring to offer it secondary evidence becomes admissible. *Poignard* v. *Smith*, 8 Pick. 272; *Hathaway* v. *Spooner*, 9 Pick. 23; *DeLane* v. *Moore*, 14 How. 264; *Bird* v. *Bird*, 40 Maine, 392.

The deed of 1803 is beyond the control of the plaintiffs and in the hands of the defendants. They have been notified and refuse to produce it. Therefore secondary evidence of its contents is admissible. See *Taylor* v. *Riggs*, 1 Pet. 596; Taylor's Ev. § 495; 1 Greenl. Ev. § 575; *Boardman* v. *Dean*, 10 Casey, 252; *Perkins* v. *Richardson*, 11 Allen, 538; *Whitmore* v. *Learned*, 70 Maine, 276; *Webster* v. *Calden*, 55 Maine, 171; *Moore* v. *Hazelton*, 9 Allen, 106; *Howe* v. *Howe*, 99 Mass. 88; *Johnson* v. *Moore*, 28 Mich. 3; *Stetson* v. *Gulliver*, 2 Cush. 494;.

Philo Hersey, for the defendants, cited: R. S., c. 82, § 99; Rule 26, S. J. C.; 33 Maine, 320; 40 Maine, 392.

BARROWS, J. This case cannot be distinguished in principle from *Bird* v. *Bird*, 40 Maine, 392, except as it lacks one more vital piece of evidence necessary to authorize the use of an office copy of the deed than was found wanting there. In *Bird* v. *Bird*, the existence of the original deed and its delivery to the grantee seem to have been established by such testimony as was then invariably received, *ex necessitate*, to prove the existence and loss of documentary evidence, the case arising before the passage of the statutes making parties to suits competent witnesses in general; and that testimony indicated further that the original deed was probably in the hands of the defendants' attorney who was not called, nor was any reason given for not calling him. Hereupon the plaintiff contended that unless the defendants produced the original or introduced evidence that it was not in their possession, he might put in an office copy. But the court in a terse opinion, adhered to the rule requiring a party to produce the best evidence or show that it is not in his

power so to do, and held that the plaintiff had not complied with it because he had indicated where the deed might be found and had not exhausted the means to produce it.

If now, upon the evidence here presented, it could be said that the existence of a genuine deed from Jona. Elwell to Robert Elwell, dated May 13, 1803, and actually delivered to the grantee, was established, and that the plaintiffs' witness, Mrs. Preston, was not mistaken in her testimony that Mr. Hersey told her a short time ago that he knew where it was, the case would be identical with *Bird* v. *Bird*, and should be decided as that was for the same reason.

The legislature of the state have signified their sense of the importance of the production of original deeds where the title to real estate is in controversy, by making the admission of office copies the subject of special statute provision, by which the heirs of grantees are in effect precluded from the use of copies without proof of the execution of the original deed. R. S., c. 82, § 99; Rule XXVI, S. J. C. Reg. Gen.

In *White* v. *Dwinel*, 33 Maine, 320, it was held that though all the persons purporting by the copy to have been the parties and subscribing witnesses and the register of deeds were dead, the heir claiming real estate under a deed to his ancestor could not prove its genuineness by the mere production of an office copy. To lay the foundation then for the introduction of an office copy by the heir of the grantee in a suit pertaining to the realty it is incumbent on such heir, besides showing that he has exhausted his apparent means of producing the original, to prove the execution and genuineness of the deed which he claims is lost. The plaintiffs here fail on this point as well as the other.

The only witness they offer thereto, testifying in 1881, says he is seventy years old [which would make 1811 the date of his birth]; that he saw the deed in question in 1814 or 1815 in the possession, not of the grantee but of Joshua Elwell (a brother of the grantee who by other testimony in the case seems to have asserted a title to the land in himself,) who was using it in a survey which he was directing; that he (witness,) was ten or

fifteen years old when he saw the deed; that he looked over his brother's shoulder and saw how it read and whose name was signed to it; that he thinks the name signed to the deed was his (witness') father's [his father was not the grantor]; and that he has never seen it since: and it is evident that he can give no description of it except by affirmative responses to the leading questions of plaintiffs' counsel. We cannot accept such contradictory and incredible testimony as proof of the execution and genuineness of the deed. It is worse than none.

According to the stipulations in the report,

Plaintiffs nonsuit.

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

ARETAS SHURTLEFF *vs.* INHABITANTS OF WISCASSET.

Cumberland. Opinion September 19, 1882.

Municipal bonds. Constitutional law. Private and special laws of 1864, chapter 370; 1871, chapter 511; 1872, chapter 1. Practice.

In a suit upon interest coupons cut from a municipal bond containing this recital: "In testimony whereof, we, the chairman of selectmen and treasurer of the town of Wiscasset, in behalf of said town, and in conformity with the act of the legislature of the state of Maine, approved March twenty-first, 1864, vesting in us authority to issue this bond for the benefit of the Knox and Lincoln Railroad Company have hereunto set our hands," and of interest coupons cut from other bonds containing the same recital excepting as to the date of the approval of the legislative act. *Held*, that the defendants are estopped by the recitals in the bonds from objections to their validity on the ground that there was no legal organization of the railroad company and no company authorized to receive the bonds and give a mortgage for them under private and special laws, 1864, c. 370, § 5; or because the certificate of the railroad company does not show that the required amount had actually been subscribed, paid in, and expended in the construction of the road; or because the treasurer's certificate was not sworn to until after the date of the bonds, and was not recorded until nearly two months after; or because the required amount of subscription and ex-

penditure was largely made up of the subscriptions of the cities and towns to whom the mortgage was given; or because some of them issued no bonds and so the condition of the vote of the defendant town was not complied with; or because the vote of the town was not passed at an annual meeting;— as to these and all objections that the legislative authority given to the town was not regularly exercised, or that any condition precedent to the issue of the bonds was not complied with, the defendants are precluded from asserting them by the familiar doctrines of equitable estoppel.

Private and special laws, 1871, c. 511, and 1872, c. 1, making valid votes of certain towns, are constitutional, and bonds issued in pursuance of them are valid.

The proposition that our statutes now provide no process by which a judgment rendered against a town can be legally enforced, if it were established, would constitute no reason why such judgment should not be rendered if the plaintiff is otherwise entitled to it.

Augusta Bank v. *Augusta*, 49 Maine, 507, confirmed.

ON REPORT from the superior court.

Assumpsit upon six coupons amounting in all to fifty-seven dollars, cut from certain bonds issued by the town of Wiscasset. The writ was dated March 26, 1880. The plea was the general issue and brief statement setting up the different defences indicated in the opinion.

The following are copies of bonds from which the coupons in suit were cut:

(Bond.)

Number.	United States of America.	Dollars.
7.	State of Maine.	1,000.
	Town of Wiscasset.	

Be it known that the town of Wiscasset will pay in the city of Boston to the holder of this bond, the sum of one thousand dollars in thirty years from the date hereof, and will also pay at the same place the semi-annual coupons hereto attached. Value received.

$1,000.

In testimony whereof, we, the chairman of selectmen and treasurer of the town of Wiscasset in behalf of said town, and in conformity with act of the legislature of the state of Maine, approved January tenth, 1872, vesting in us authority to issue

this bond for the benefit of the Knox and Lincon railroad company, have hereunto set our hands. Revenue
Dated at Wiscasset, this first day of February, 1872. Stamp.

Wm. P. Lennox, treasurer. Benj. F. Gibbs, chairman of selectmen.

Countersigned, Oliver Moses, president.

(Bond.)

Number.	United States of America.	Dollars.
30.	State of Maine.	500.

Town of Wiscasset.

Be it known that the town of Wiscasset will pay in the city of Boston to the holder of this bond, the sum of five hundred dollars in twenty-five years from the date hereof, and will also pay at the same place the semi-annual coupons hereto attached. Value received.

Five hundred dollars.

In testimony whereof, we, the chairman of selectmen and treasurer of the town of Wiscasset in behalf of said town, and in conformity with the act of the legislature of the state of Maine, approved March twenty-first, 1864, vesting in us authority to issue this bond for the benefit of the Knox and Lincoln railroad company, have hereunto set our hands. Revenue
Dated at said Wiscasset, this first day of July, A. D. 1869. stamp.

Wm. P. Lennox, treasurer. Joseph Tucker, chairman of selectmen.

Countersigned, Oliver Moses, president.

(Bond.)

Number.	United States of America.	Dollars.
31	State of Maine.	100

Town of Wiscasset.

Be it known that the town of Wiscasset will pay in the city of Boston to the holder of this bond, the sum of one hundred

dollars, in twenty years from the date hereof, and will also pay at the same place the semi-annual coupons hereto attached. Value received.

One hundred dollars.

In testimony whereof, we, the chairman of selectmen and treasurer of the town of Wiscasset, in behalf of said town, and in conformity with an act of the legislature of the state of Maine, approved January ninth, 1871, vesting in us authority to issue this bond for the benefit of the Knox and Lincoln railroad company, have hereunto set our hands. Revenue stamp.

Dated at said Wiscasset, this first day of March, A. D. 1871.

Wm. P. Lennox, treasurer. Joseph Tucker, chairman of selectmen.

Countersigned, Oliver Moses, president.

Other material facts stated in the opinion. The law court was to render such judgment as the legal rights of the parties required.

Webb and Haskell, for the plaintiff, cited: *Allen* v. *Archer*, 49 Maine, 346; *Winchester* v. *Corinna*, 55 Maine, 9; *Lane* v. *Embden*, 72 Maine, 354; *Merriwether* v. *Garrett*, 102 Otto, 519.

Henry Ingalls and *Strout and Holmes*, for the defendants, contended that the bonds from which the coupons in suit were cut were not valid obligations of the defendants for several reasons as stated in the opinion.

Upon the question of the authority of the legislature to ratify and make valid the votes of the town by which the second and third issues of the bonds were issued the counsel argued:

It is true, that during the struggle for the preservation of the government, many acts and things were done, permitted and ratified, which, under ordinary circumstances, would not have been allowed. The question of the constitutionality of the various acts of ratification for the purpose aforesaid, has not been raised, except in the case of *Winchester* v. *Inhabitants of Corinna*, 55 Maine, 9. Although the ratification in that case was

sustained, the decision was placed upon grounds, which render it an authority against the ratification of the vote in question. In that case, the court say: "It is unnecessary for us to consider the exact limit of this power to ratify and make valid the proceedings of corporations or individuals by subsequent legislation. We cannot doubt that where, as in this case, the action of the town was in relation entirely to public matters of high national concern, and did not in any way touch or affect vested rights or private interests, as distinct from public exigencies, the legislature might ratify and make valid whatever it might constitutionally authorize before action. The votes in question were, in their nature, of a political character, and not personal or affecting individual rights of property. The great objection in most of the cases is, that the rights of individuals in distinction from their citizenship or their relations to the whole community, are injuriously affected. No such objection exists in the case before us."

"The fact that one step of doubtful propriety has been taken is never a good reason for taking another in the same direction; but rather, on the contrary, induces us to pause and revert to fixed principles." Justice BARROWS, 58 Maine, 612.

The true doctrine of the constitutional power of ratification is laid down in *Allen* v. *Archer*, 49 Maine, 346. It is there said that "statutes, made to confirm acts by public officers, which would have been void for some informality, have never been questioned on constitutional grounds;" that "laws of this character, which are intended only to cure informalities and technical defects, and which do not interfere with vested rights, nor impair the obligation of contracts, are justly deemed statutes of repose."

A wide, and in this case vital distinction, exists between the validity of a healing statute, which is intended to cure informalities and defects in the execution of acts for which there is legal authority, and a statute which undertakes to authorize that which was done without law, and against the provisions of existing statutes. This distinction is recognized in the case of *Allen* v. *Archer*, above cited, and especially in the case of *Town of South Ottawa*, v. *Perkins*, 4 Otto, 270. In the case at bar, the

votes were without the authority of law and absolutely void. The citizens of the town of Wiscasset might well say, "we will not attend this unauthorized meeting." And as matter of fact, they did not attend it. Can the legislature afterwards say that the void act of a minority of the voters of the town shall bind the majority and impose burdens upon their property? The building of a railroad, by which private rights are affected, and to be paid for by taxation *in invitum* of individuals, can only be justified on the ground that such roads are for the public use. *State* v. *Noyes*, 47 Maine, 204; *Railroad Commissioners* v. *P. and O. R. R.* 63 Maine, 275.

No case like the one at bar has been before the court in this state. Here the question is new, but it is not so in other states. See *Marshall* v. *Silliman*, 61 Ill. 218; *Barnes* v. *Lacon*, 84 Ill. 461; *Ryan* v. *Lynch*, 68 Ill. 160; *Supervisors* v. *Schenck*, 5 Wal. 781; *Marsh* v. *Fulton County*, 10 Wal. 684.

Counsel further elaborately argued against the constitutionality of the statutes in relation to the enforcement of executions issued upon judgments against towns and contended that as there was no way of enforcing such a judgment, one could not be rendered.

BARROWS, J. A portion of the elaborate argument of defendants' counsel is devoted to an attempt to show that the authority given by the legislature to the inhabitants of Wiscasset to aid in the construction of a railroad running through that town, from which great public benefits were expected to flow, was not regularly exercised, or that this or that condition precedent to the issue of the bonds was not fulfilled: *e. g.*—the objection raised to the validity of the bonds of the first issue on the ground that there was no legal organization of the Knox and Lincoln railroad company, and no company authorized to receive the bonds or give a mortgage for them under § 5, c. 370, private and special laws of 1864, because in the original charter granted in 1849, private and special laws, c. 287, of the Penobscot, Lincoln and Kennebec railroad company (whose name was changed to Knox and Lincoln in the act of 1864) the capital stock was fixed at a million dollars and the case does not show that more than $370,000

had been subscribed; the objections that the certificate of the treasurer of the railroad company does not show that, at the time the bonds were delivered to the railroad company "at least $300,000 of the stock of the company had actually been subscribed, paid in and expended in the construction of the road," but only that "$334,528.25 had been collected from the subscribers to the stock" and "paid out in the construction of the road, bridges, timber, logs, &c. of said company;" that said treasurer's certificate does not appear to have been sworn to until twelve days after the date of the bonds and was not recorded until nearly two months after; and that of the $370,000 subscription $275,000 was subscribed by the same cities and town to whom the mortgage was to be given, so that the subscription was rather an evasion than a compliance with the act, which required that "said bonds shall not be delivered to said railroad company until at least three hundred thousand dollars of the stock of said company has actually been subscribed, paid in and expended in the construction of said road, which fact shall be determined by the certificate of the treasurer of said corporation under oath, a copy of which certificate shall be recorded by the town or city clerk of each town or city issuing bonds by authority of this act."

Now touching these and all objections of like character, — aside from reasons which will readily suggest themselves to show that upon the obvious facts there is small merit in most of the objections individually, — it is sufficient to say that a broad distinction has long been recognized and adhered to by the courts, in suits of this description, between contracts which are void for want of any valid authority in the corporation to make them, and those where the authority exists and the question raised is whether it has been regularly exercised, or the conditions precedent to its exercise have been fulfilled. Touching all objections of the latter class it is well settled that purchasers of securities thus put out to the public for sale, "will not be required to look beyond the face of the proceedings or the recitals of the instruments under which they claim;" and the corporations issuing them will be estopped to deny what their agents in the premises

have affirmed in order to place their securities on the market. *Aspinwall* v. *Com'rs of Knox Co.* 21 Howard, 539; *Zabriskie* v. *R. R. Co.* 23 Howard, 400; *Augusta Bank* v. *Augusta*, 49 Maine, 507; *Deming* v. *Houlton*, 64 Maine, 254, and cases there cited; *Lane* v. *Embden*, 72 Maine, 354, and cases there cited.

These decisions stand on the firm ground of equitable estoppel which has been recognized in the common law courts for centuries, and has its foundation in the immutable principles of natural justice. The bonds were signed as required by § 8 of the act, countersigned by the president of the railroad company, and the defendants through their municipal officers certified upon the face of each bond that their action was "in behalf of said town and in conformity with an act of the legislature of the state of Maine, approved March 21, 1864, vesting in us authority to issue this bond for the benefit of the Knox and Lincoln railroad company." Such recitals are conclusive against the defendants upon all that class of objections to which we have referred.

Another part of defendants' argument attacks the authority by which the second and third issues of bonds were made because the action of the town was in anticipation of the grant of authority from the legislature, and by the terms of the votes in each case the municipal officers of the town were directed to deliver the bonds to the officials of the railroad company "as soon as practicable after this vote shall be legalized by an act of the legislature of this state."

Hereupon it is strenuously contended by the defendants that the legislature had no power to do what they undertook to do by virtue of c. 511, private and special laws of Maine, 1871, and c. 1, private and special laws of 1872, which distinctly purport to ratify, confirm and make valid the acts and doings of the town of Wiscasset on October 15, 1870, and June 28, 1871, respectively, as well as the acts and doings of other towns and cities, respecting aid to the construction of the Knox and Lincoln railroad on the days and times mentioned in said acts, and to give authority to this and the other towns and cities named therein, to issue bonds in pursuance of the votes passed at their respective meetings specified in the acts. The passage of legis-

lative acts designed to impart validity to the doings of various municipal and other quasi corporations when they have not been in conformity with law and therefore are in fact without legal authority and without effect, is no new thing.

If marriages not celebrated according to the requirements of law or by those having authority to perform such a ceremony can be made valid, or sales of lands defectively made or acknowledged and in the absence of legislative ratification ineffectual, can be made effective to pass the title to real estate, there would seem to be little doubt that the legislature might confer the authority to issue these bonds which the town proposed and voted to issue when the necessary legislative authority could be obtained.

It is not an open question in this state whether the legislature is violating the constitution in authorizing by special act certain cities and towns to grant aid in the construction and equipment of railroads. It was determined in *Augusta Bank* v. *Augusta*, 49 Maine, 507, that such enactments were constitutional.

No good reason is perceived for holding that the legislature are precluded from authorizing a particular measure of this description which has assumed the shape of a definite proposition, when they can grant authority to do the same act in general terms without any knowledge of the precise nature of the action which may follow such grant of authority. Obviously there can be no better opportunity for the legislature to judge whether a measure will be conducive to the public welfare than when its precise terms are laid before them. If the question is whether an authority shall be granted it certainly tends to an intelligent decision to have it known precisely what use is to be made of it when granted. The sanction of the legislature is given to the particular transaction.

It cannot properly be said that the action of the town was without law or against law. It was the adoption of a vote at a legal meeting of the citizens under an article, clearly setting forth the business to be considered, which vote, by its terms, was to be operative only when legislative authority for it had been given. The vote and the authority under which it was given

took effect together. The principal practical argument against its propriety, is that the inhabitants of the town with the knowledge that they are presumed to have had of the want of legal authority (at the time of the meeting,) for a vote involving so large a sum may have absented themselves with the idea that no such vote could ever have any binding effect.

The argument does not commend itself as having any genuine force. If any ten taxable inhabitants of the town had questioned the legal right and power of the town to pledge its credit by these votes, there was a ready way to test it under c. 239, laws of 1864, § 1, but no such question seems to have been raised until evoked by the exigencies of this defence. The idea that any considerable number of voters absented themselves from the meeting from a doubt of the legality of its proposed action seems to be effectually rebutted.

Even where as in this instance, the objection is, that the action of the town was essentially void for want of any power to act in the premises whatever, and so cannot be ratified by subsequent legislative action, nor as a general rule made binding by the aid of the doctrine of estoppel it has been held that an estoppel may grow out of a long continued acquiescence in or enjoyment of the fruits of the contract. See note to *Doe* v. *Oliver*, in Smith's Leading Cases, 6th Am. Ed. vol. 2 p. 417, citing *Garrett* v. *VanHorne*, 7 Ohio, N. S. 327; *Goshen Township* v. *Shoemaker*, 12 *Id.* 624.

But we think there is no occasion to resort to the doctrine of estoppel touching this point. The legislative grant of authority was complete before the bonds were issued, and before, by the terms of the vote, they could be issued, and this issue, authorized by the legislature, perfected the liability which the plaintiff seeks to enforce, being an act on the part of the defendants, without which the liability could not have existed nor the money which the plaintiff and others invested in these bonds have been procured. Moreover, if the vote had been made without being conditioned as it was upon the procurement of legislative authority by its very terms, there are authorities which cannot be distinguished in principle from this case which hold that the subsequent

grant of powers from the legislature implied in a ratification of the doings of the town is equivalent to original authority. *Winchester* v. *Corinna*, 55 Maine, 9, where a vote expressly forbidden by an existing statute was confirmed by a subsequent legislature and declared valid by the court. Obviously there is no greater danger that an ill considered or unwise act will be thus ratified, than there is that authority should be given to do it before its precise scope and character have been declared and canvassed. If any wisdom comes with an early afterthought, both town and legislature will have had opportunity to profit by it. Every argument which a minority of the town may have to urge against the act can be deliberately presented to the legislature in a shape more likely to be effective than where the question for the legislature is touching the grant of a general power, and the way is still open for the town to reconsider their vote if they desire to do so, before the money of innocent third parties has been procured upon the strength of it.

No good reason is perceived why the maxim, *omnis ratihabitio mandato priori æquiparatur*, should not apply to an act of this description. The legislative act is after all only a grant of authority, *nunc pro tunc*,—a permission to the town to enter into the contract if they do not choose to reconsider their former action, and none the less valid because it was known to the legislature what the contract proposed was.

The objections against the second and third issues of bonds that Warren and Woolwich issued no bonds and so the condition in the vote of the town of Wiscasset was not complied with, and the objection against the third issue that the vote for it was not passed at an annual meeting of the town, both fall within that class as to which the defendants are estopped by the recitals in the bonds.

The issue here presented is whether the defendants made a binding promise to pay the plaintiff the amount of these coupons. The final proposition presented in defence is that if the plaintiff has judgment our statutes now provide no process by which it can be legally enforced. It is hardly necessary to say that if the proposition were established it would constitute no reason

why the issue here presented should not be adjudged in favor of the plaintiff. *Lyon* v. *City of Elizabeth*, New Jersey Supreme Court Abstract, Albany Law Journal, Sept. 10, 1881, vol. 24, p. 216, and cases there cited.

Certain decisions of the Supreme Court of the United States, especially, *Rees* v. *Watertown*, 19 Wallace, 122; and *Merriwether* v. *Garrett*, 102 U. S. 472, are relied on as establishing the doctrine that private property and especially that of non-residents, cannot be legally seized on execution, for the purpose of satisfying any judgment which the plaintiff may obtain here, in the manner prescribed by our existing statutes because such seizure would be in violation of the constitution of the United States, which declares that no man shall be deprived of his property without due process of law, and because the constitution of this state also forbids the taking of private property for public uses without just compensation, and permits it in cases of public exigency only. If the plaintiff does any illegal acts in attempting to enforce his judgment, it will be the pertinent subject of inquiry in some future suit what the duties, rights, and liabilities of parties owning property in one of our towns, and those of the creditors of such corporation who hold a judgment against it, respectively are. Interesting as the discussion of this topic might prove, we think it cannot properly find a place here. If the plaintiff has shown himself entitled to judgment against the defendants in this action, it is not a valid reason for withholding it that he may not be able to get it legally satisfied.

The defendants have shown no good defence to the *prima facie* case of the plaintiff. No sound legal reason appears why they should not pay the bonds they issued. The coupons stand or fall with the bonds.

Judgment for plaintiff for $57 and interest from date of writ.

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

HARRISON S. WALKER *vs.* JOHN W. FLETCHER.

Franklin. Opinion September 22, 1882.

Amendment.

In an action for damages for negligently burning "ash lumber," an amendment to the declaration was allowed substituting "birch" for "ash." *Held*, that the amendment was properly allowed.

ON EXCEPTIONS.

An action of the case to recover damages for negligently burning plaintiff's property.

The opinion states the case.

S. Clifford Belcher, for the plaintiff.

H. L. Whitcomb, for the defendant, contended that the amendment introduced a new cause of action.

It is true that trees are all different varieties of the vegetable kingdom. So are all our domestic animals different varieties of the animal kingdom. But when the defendant is sued for an injury to a horse an amendment could not be allowed showing an injury to a cow. There are different varieties of ash and of birch, but ash and birch are of different species. An amendment may be allowable changing from one variety to another, but not from one species to another. Thus an amendment substituting brown ash for white ash may be allowable, but not to substitute birch. Just as you may amend by substituting a Jersey or Hereford for a Durham cow, but not by substituting a horse. Counsel cited: *Robinson* v. *Miller*, 37 Maine, 312; *Wyman* v. *Kilgore*, 47 Maine, 184; *Gordan* v. *Merry*, 65 Maine, 168; *Wendall* v. *Greaton*, 63 Maine, 267; *Webb* v. *Goddard*, 46 Maine, 505.

DANFORTH, J. The declaration originally set out a claim for damages for negligently burning "ash lumber." At the trial an amendment was allowed by substituting "birch" in the place of

"ash". To this objection is made on the ground that it substitutes a new cause of action. The charge in either case is for burning lumber, and whether ash or birch, is mere matter of description. The subject matter remains the same. The lumber is lumber still, and in this case the same that was destroyed. The horse is not turned to a cow as contended in the argument, but only from a black horse to a white one. The change in principle is the same as that involved in the allowance of an amendment changing the description of a contract, or a judgment declared upon, which is clearly allowable. *Cummings* v. *B. B. R. R.* 35 Maine, 478; *Prescott* v. *Prescott*, 65 Maine, 478. In *Wilson* v. *Widenham*, 51 Maine, 566, an amendment was allowed substituting a breach of one covenant for that of another and different one in the same deed. The amendment was therefore discretionary with the presiding justice.

It is further objected that the action is local and should have been brought in the county of Oxford, and a motion was made to have it dismissed for that reason. It is true as alleged in the motion, that the fire was set and the property burned was in the county of Oxford; but it is not true that the property burned was real estate, or that the passing of the fire upon the plaintiff's land is the gist of the action. Were this so, the action might have been local. But this is a question which the facts do not require us to decide. The property burned was personal and the injury to that the sole cause of action. The land described is only to show where the lumber was situated and that it was rightfully there. The lumber had not only been severed from the land, but so far as appears had been cut up into logs and hauled from other places, merely to be piled up, kept and seasoned for use. Under these circumstances an action of trespass or trover for its conversion would not only have been personal but transitory and so must be an action on the case for its destruction. *Whidden* v. *Seelye*, 40 Maine, 247; *Darling* v. *Dodge*, 36 Maine, 370.

Exceptions overruled.

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

WILLIAM L. ROGERS *vs.* INHABITANTS OF SHIRLEY.

Piscataquis. Opinion October 17, 1882.

Ways. Notice of defect. Stat. 1877, c. 206. Notice of injury by defective way. Exceptions.

If a duly elected and qualified highway surveyor in the town has twenty-four hours actual notice of the existence of a defect in the highway before it is the cause of an accident, from one who in good faith supposes him to be the surveyor in the district where the defect exists, and the surveyor does not inform him that the place is not within his jurisdiction, such notice will be in legal effect a sufficient notice to the highway surveyors of the town, within the purview of chapter 206, laws of 1877.

While a naked general complaint of a piece of road a mile and a half long, giving no particulars of the nature and location of the defects, would not be sufficient, the notice would not be vitiated if it included other places as well as the one in question, and it is none the less a notice of the defect which causes the accident because it is at the same time a notice of others. It is for the jury to determine, upon the whole evidence, whether the proper officer had actual notice of the particular defect causing the accident. But it is not for the jury to determine the construction and sufficiency of the written notice given to the municipal officers within fourteen days after the accident. The court should settle that where there are no disputed facts upon which its sufficiency may depend. Where the only specification of location was that it was "on the highway in the town of Shirley, on the road leading from Shirley corner to Greenville, in Shirley woods, so-called," the road in Shirley woods being a mile and a half long, this notice is insufficient, and the jury should have been so instructed.

ON EXCEPTIONS.

The following are the exceptions:

Action for an injury to horse, alleged to have been caused by a defective road. Writ dated August 5, 1879. One written copy to be made for the use of the court. The accident which occasioned the injury happened on November 30, 1878.

The road through "Shirley woods," so-called, was about a mile and a half long, and the whole distance was much in the same condition, having been deeply rutted by heavy teaming,

thawing and freezing, and there were difficult places and spots in the road similar to the one where the accident happened.

The verdict was for the plaintiff, and no questions of law arise in the case excepting upon the rulings upon notice.

The written notice after the accident, dated December 10, 1878, is made a part of the case to be copied. Upon this branch of the case, the court remarked to the jury as follows:

"Was there notice to the defendants? Two notices are now required. One being a notice of the defect before the injury, the other being a notice of the injury afterwards.

"First: The statute provides that the highway surveyors must have actual notice of the defect or want of repair twenty-four hours at least before the accident. It appears that Mr. Dennin was chosen and qualified as a road surveyor for the year 1878, when the accident happened. Nothing further appears. If he had the required notice, and was applied to to remedy the piece of road where the defect was, and did not communicate the fact to those who complained to him of the defective road, that he had no jurisdiction of the limits within which the defective place was situated, then the notice to Mr. Dennin would be in legal effect a notice to "the surveyors," and would be sufficient. Was that so, and had he twenty-four hours at least actual notice? The notice was general, a notice of a bad road including other places as well as this in question. But it was none the less a notice of this place because at the same time a notice of others.

"Second: Had the town a written notice of the accident within fourteen days thereafter, the notice setting forth the claim for damages, and specifying the nature of the plaintiff's injuries and the nature and location of the defect which caused the injury. A notice in writing was seasonably served on one selectman. A notice to one was sufficient. It is objected by defendants that the notice is not definite enough of the location of the defect complained of, that it is too general. On the other hand the plaintiff contends that it could not be otherwise than somewhat general. I instruct you, that if the notice did not in fact mis-

lead the defendants, and was enough to lead the town into such inquiry and investigation as would result in their acquiring a full knowledge of the facts in the case, it would be sufficient."

To which rulings and directions the defendants except.

(Notice.)

"Greenville, December 10, 1878.

"To the municipal officers of the town of Shirley in the county of Piscataquis: — You are hereby notified that one of my horses got his foot caught in a hole on the highway leading from Shirley corner to Greenville, and that by reason thereof he broke his leg, thereby entirely injuring said horse; that the cause of the injury was a defect on the highway aforesaid, in the town of Shirley aforesaid, in Shirley woods, so-called, on said highway. That the defect was a large hole or rut in the road aforesaid, at the place aforesaid, and that I claim two hundred dollars as damages for the injury to the horse, to wit: the killing of the horse. The injury was on the thirtieth day of November, A. D. 1878.

William L. Rogers."

Henry Hudson and *Josiah Crosby*, for the plaintiff.

Upon the question of notice of the defect, counsel cited: *Porter* v. *Sevey*, 43 Maine, 530; *Newbit* v. *Appleton*, 63 Maine, 492; *Sawyer* v. *Naples*, 66 Maine, 453; *Rich* v. *Roberts*, 48 Maine, 550; *Cunningham* v. *Horton*, 57 Maine, 420; *Staples* v. *Wellington*, 58 Maine, 453.

The second notice or notice of the accident, was a sufficient compliance with the statute. *Blackington* v. *Rockland*, 66 Maine, 333; *Bradbury* v. *Benton*, 69 Maine, 197; *Hubbard* v. *Fayette*, 70 Maine, 124.

It is claimed that the location of the defect is not sufficiently specific. "Shirley woods" was a locality well known. There were a large number of defects similar to the one in which the injury was received. It would be nearly impossible to write a notice that would indicate the exact hole which caused the accident. If the notice had located the defect as at one side, or in the middle, or two-thirds through "Shirley woods," it would be no better notice in this case.

The sufficiency of the notice must depend on the circumstances. What would be a good description in one case might be wholly insufficient in another. Here the location was sufficiently definite to be understood by the municipal officers and that is what the law requires.

Robinson and Everett, for the defendants.

BARROWS, J. November 30, 1878, the plaintiff's horse broke his leg by getting it caught in a hole or rut, "in Shirley woods, so-called," "on the highway leading from Shirley corner to Greenville," and he brings this action against the town to recover damages therefor. The verdict was in his favor, and the case comes before us upon exceptions to the rulings of the presiding judge upon the questions of notice before and after the accident. The case arises under c. 206, laws of 1877, which gives the plaintiff a remedy if, before the accident occured, the municipal officers, highway surveyors or road commissioners of the town had "twenty-four hours actual notice of the defect or want of repair" which occasioned it, and the party sustaining the injury notified the municipal officers or some one of them within fourteen days after its occurrence, "in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused the injury."

I. As to the notice of the existence of the defect before the accident, the inquiry is not now what it was under R. S., c. 18, § 65, before it was amended, *i. e.* whether the town "had reasonable notice of the defect or want of repair." This phrase had in process of time become as well defined by judicial decisions as its nature would permit; but it is obvious that it is not what the statute now requires as a condition precedent to the maintenance of the action. The call now is for twenty-four hours actual notice to the municipal officers, highway surveyors or road commissioners of the town, of the defect or want of repair, which is the cause of the accident, provable as in other cases where actual notice is required, by circumstances showing personal knowledge on the part of the party to be notified, or information conveyed to him by others, of the existing facts. Nor can one be said to

have actual notice of such a thing as this statute has reference to, until both the character, and approximately the location upon the face of the earth, of that which constitutes the defect, is in some way made known to him, so as to distinguish it from parts of the road which are not thus defective, though it is not essential that he should appreciate the danger likely to arise therefrom.

The statement of the evidence upon which the ruling of the presiding judge, as to the notice prior to the accident was based, is very meagre, so much so that it is not easy to determine whether the defendants were or were not aggrieved by the instruction given on this point. The only information we have respecting it, is that "the road through Shirley woods, so called, was about a mile and a half long, and the whole distance was much in the same condition, having been deeply rutted by heavy teaming, thawing and freezing, and there were different places and spots in the road similar to the one where the accident happened."

The phraseology leaves us in doubt whether there were continuous ruts all the way amounting to a defect, or whether there were several different places within the distance of a mile and a half which needed repair, in one of which the accident occurred.

That such a road at that season of the year would grow worse every time a heavily loaded team passed over it, is reasonably certain. Whether it would be defective and dangerous might depend upon the changes occurring within twenty-four hours from freezing to thawing, or the reverse; and it would be almost certain that the holes made by the wheels would be deeper in some places than others, and probable enough that the depth might be increased within the twenty-four hours next preceding the accident.

The exceptions do not show the manner in which the accident occurred, nor whether the road was worse at the point where the horse broke his leg, than elsewhere in the vicinity. They are equally silent as to the manner in which the plaintiff attempted to prove the twenty-four hours notice except as we may infer it from the language of the charge, which was in substance, that if one Dennin who was chosen and qualified as a road surveyor for

1878, "had the required notice, and was applied to to remedy the piece of road where the defect was, and did not communicate the fact to those who complained to him of the defective road, that he had no jurisdiction of the limits within which the defective place was situated, then the notice to him would be, in legal effect, a notice to 'the surveyors,' and would be sufficient." With that he committed it to the jury, to decide whether Dennin withheld from those who complained to him of the defective road, the fact that he was not surveyor for that district, and whether he had at least twenty-four hours actual notice; and here the presiding justice added the instruction (which forms one of the chief grounds of complaint), that "the notice was general, a notice of a bad road including other places as well as this in question; but it was none the less a notice of this place because at the same time a notice of others."

Now as to the effect of giving "the required notice" to Dennin, in the contingency supposed, we think the instruction was correct. A notice required to be given to the municipal officers, was held in *Sawyer* v. *Naples*, 66 Maine, 455, to be sufficient if given to one of them. It is true that highway surveyors with definite limits to their districts, stand on a somewhat different footing. But while the legislature perhaps intended that the twenty-four hours actual notice contemplated in the act of 1877, c. 206, should be given either to one of the municipal officers having general superintendence of the affairs of the town, or to the surveyor of the district whose business it was to remedy the defect, they have not said so; and we have no doubt that if the information of the defect is given to either of the highway surveyors in good faith, in the belief that the defective place is within the limits of his district, and he allows his informant still to believe that it is so, and does not communicate the fact that it is not, the town would be estopped to dispute the sufficiency of the notice, so far as the question relates to the person to whom it should be given.

When the communication is oral, or the proof of actual notice is circumstantial, the question whether there has been actual notice is for the jury. *Porter* v. *Sevey*, 43 Maine, 530.

In the present case whether any of the officers named in the statute had "the required notice," was a question of fact for the jury, upon testimony of which we have no report. So far as appears, the plaintiff undertook to prove actual notice by verbal communications to Dennin as one of the highway surveyors of Shirley, by parties whom (whether he was or was not the surveyor of the district where the accident occurred,) he dismissed in the belief that he was so. There was no error in the ruling qualified as it was, that "if he had the required notice," it would be, in legal effect, a notice to the highway surveyors.

Nor in the absence of any statement of the communication made to him can we say that the remainder of the instruction was incorrect. The presumption is the other way, and it was for the excepting party to state enough in his exceptions, to show that the instruction was either incorrect as matter of law, or inapplicable to the evidence. Clearly it would not vitiate "the notice of this place," because at the same time notice of other defects was given. We do not mean to say that a naked general complaint of a bad road through Shirley woods, giving no particulars of the nature and location of the defects, would be sufficient, or that any notice would be sufficient which was not "a notice of *this place*," — but that these exceptions fairly construed do not show that such was the character of the notice given to Dennin. The language of the instruction would seem to imply, that there was "a notice of this place," and also of other defects given at one and the same time.

II. The notice of the claim upon the town to be given to the municipal officers within fourteen days after the accident, is now required to be in writing, and it was so given. The defendants objected to it as insufficient and except to an instruction given to the jury that "if it did not in fact mislead the defendants, and was enough to lead the town into such inquiry and investigation as would result in their acquiring a full knowledge of the facts in the case, it would be sufficient."

The cases of *Blackington* v. *Rockland*, 66 Maine, 332, and *Bradbury* v. *Benton*, 69 Maine, 194, relied on to support the ruling, both arose under the statute of 1874, c. 215, in which

the only notice of the existence of the defect before the accident required was the old "reasonable notice" called for in R. S., c. 18, § 65; and the notice of the claim for damages, not necessarily in writing, was to be given within sixty days "specifying the nature of his injuries." The reasoning of the court in those cases, was based upon the statutes as they then stood. The requirements of the present statutes are materially different. Under c. 206, laws of 1877, the subsequent notice must be in writing "setting forth his claim for damages and specifying the nature of his injuries and the nature and *location of the defect* which caused such injury."

The construction and sufficiency of the written notification should have been passed upon by the presiding judge as matter of law. He should not have put the jury upon the inquiry whether it was enough to lead the town to such investigation as would result in their learning the facts of the case. That is not the test of the sufficiency of the notice now required.

The notice might accomplish that without stating "the nature and location of the defect." But such a statement is none the less required by the present statute. The only attempt to meet that requirement in the notice here presented, is, that it was "a hole in the highway leading from Shirley corner to Greenville, . . . in the town of Shirley, aforesaid, in Shirley woods, so called." This is not specifying the location of the defect. It was an undisputed fact that the road through Shirley woods was about a mile and a half long, and we think the jury should have been instructed as matter of law that the notice was insufficient. *Hubbard* v. *Fayette*, 70 Maine, 121; *Larkin* v. *City of Boston*, 128 Mass. 521.

See *State* v. *Patterson*, 68 Maine, 473, for full discussion as to the respective provinces of court and jury where the meaning and effect of written evidence are in question.

It cannot truthfully be said that here was as good a specification of the location of the defect as the plaintiff under the circumstances could make. To say nothing of other modes, with reasonable attention to the requirements of the statute, he could

have made a statement of distances approximately correct which would have defined the location within less than a mile and a half. *Larkin* v. *Boston*, is exactly in point.

Exceptions sustained.

VIRGIN, PETERS and SYMONDS, JJ., concurred.

APPLETON, C. J., being interested, did not sit.

STATE OF MAINE *vs.* MARY L. GARING *alias* MADAM LOPEZ.

Cumberland. Opinion October 20, 1882.

Challenge. House of ill fame. Practice.

The finding of the presiding justice that no challenge has been made is conclusive.

A single act of illicit intercourse in a house is not sufficient to constitute it a house of ill fame, and a refusal so to instruct when requested is erroneous.

ON EXCEPTIONS from superior court.

The opinion states the case.

Ardon W. Coombs, county attorney, for the state, cited: *Com.* v. *Ballou*, 124 Mass. 26; R. S., c. 17, § 1; c. 134, § 20; c. 82, § 66.

The request was for a negative instruction. Such instruction is wholly unnecessary where full and appropriate affirmative instructions are given.

The complaint is not that the judge instructed affirmatively that one act of lewdness would be sufficient, but rather that having already fully and accurately instructed the jury as to the offense, he refused to instruct them as to what would not constitute the offense when there was nothing in the evidence to call for such instruction.

H. D. Hadlock, for the defendant.

Counsel cited: 2 Whart. Crim. Law, § 2395; *State* v. *Brunell*, 29 Wis. 435; *State* v. *Boardman*, 64 Maine, 529; *State* v. *Evans*, 5 Ind. 603; *Com.* v. *Lambert*, 12 Allen, 177; 2 Arch. Crim. Prac. § 1786.

APPLETON, C. J. The respondent is indicted for keeping and maintaining a nuisance under R. S., c. 17, § 1.

I. The respondent claims that the right of challenge was denied her.

By R. S., c. 82, § 66, in case of a drawn jury either party may peremptorily challenge two of the jurymen as they are sworn.

It not appearing in this case that there was a drawn jury, the respondent had the right by § 73, to peremptorily challenge one juror from the panel.

It appears that the clerk commenced reading the indictment when the respondent informed the court that she objected to one, Samuel Bell, who had been sworn as one of the jury. The presiding justice, not having heard the challenge and being informed by others that they had not heard it, ordered the clerk to proceed, who thereupon read the indictment and the trial was had and the jury with Bell as one of the panel, returned a verdict of guilty against the respondent.

This discussion related only to the past. The presiding justice found no challenge had been made. His finding is conclusive. None having been made, it does not appear after that fact had been ascertained that Bell was challenged, but that the trial proceeded without such challenge. The respondent fails to show that she has any ground of complaint in this respect.

II. The indictment is for a nuisance consisting in keeping a house of ill fame, "resorted to for lewdness and gambling" and "for the illegal sale and for the illegal keeping of intoxicating liquors," &c.

The respondent requested the court to instruct the jury "that one single act in a house is not sufficient to constitute it a house of ill fame," which the presiding justice refused.

The evidence, as reported in the bill of exceptions, tended to show that the house was kept as a house of ill fame "resorted to by lewd men and women for the purposes of prostitution,"

and that this was the principal issue. The request was pertinent. The instruction requested should have been given. A single act of illicit intercourse in a house is not the keeping a house of ill fame. It may, with other circumstantial evidence be sufficient to satisfy a jury that it was kept for the purposes of lewdness and gambling. But it is entirely insufficient, in the absence of all other evidence, to show the house was "resorted to" for the purposes forbidden by the statute. *Com.* v. *Lambert*, 12 Allen, 177.

Exceptions sustained.

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

INHABITANTS OF EAST LIVERMORE

vs.

INHABITANTS OF FARMINGTON.

Androscoggin. Opinion October 20, 1882.

Pauper. Residence. Voting.

The fact of voting in a town is not conclusive evidence of the residence of the voter therein at the time. The act and the circumstances under which the vote is given are proper facts for the consideration of the jury.

ON REPORT on motion to set aside the verdict.

Action to recover sixty-three dollars expended by the plaintiffs as pauper supplies to Cyrus Chase, whose residence was alleged to be in the defendant town. The writ was dated January 17, 1881. The plea was general issue. The verdict was for the plaintiffs, and the defendants moved to set it aside,

alleging it to be against evidence, the weight of evidence and the law.

The material facts are stated in the opinion.

Cyrus Knapp and George C. Wing, for the plaintiffs.

S. Clifford Belcher, for the defendants.

The pauper having claimed and exercised the right to vote in New Sharon in September, 1872, and also in November, 1872, thereby abandoned his residence, if any he had, in Farmington. Constitution of Maine, article 2, § 1; R. S., 1871, c. 24, § 1, spec. 6; R. S., 1841, c. 32, § 1, spec. 6.

If he determines to become a citizen of the town in which he abides, his former residence ceases. *Hampden* v. *Levant*, 59 Maine, 557.

Evidence will be weighed by the court, on motion to set aside the verdict as against the weight of evidence, according to the rules of established law. *Goddard* v. *Cutts et al.* 11 Maine, 440.

APPLETON, C. J. This case comes before us on a motion for a new trial.

The pauper had resided in the defendant town and voted there from 1868 to 1876, every year except 1872 when he voted at the September and November elections in New Sharon.

The following facts were proved by Cyrus Chase, whose settlement is in issue. While residing in Farmington, he hired out in the spring of 1872, to labor during the season in New Sharon, having his chest of tools and winter clothes in the former town and with the intention of returning there, which intention he never abandoned.

He attempted to vote in Farmington, but being advised that he had a "voter's residence" in New Sharon, he returned and voted there. It is claimed that thereby he lost his residence in Farmington.

The fact of voting in a town, while of importance as bearing on the question of settlement, is by no means conclusive. The vote may be without right and fraudulent. It may be through mistake on the part of the voter as to his legal rights. The

fraud or the mistake may be that of the voter or of the officers of the town or of both. It is obvious that the fact of voting in a place is not and cannot be conclusive of the fact of residence. It is not binding on the town contesting his settlement. It is simply a fact, with the other facts in the case, to be weighed by the jury, and their conclusion is binding.

Motion overruled.

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

EDWIN A. HILLS and another, *vs.* EDWARD E. CARLTON.

Cumberland. Opinion October 20, 1882.

Insolvency. Discharge. Creditors not residing in the state.

A discharge in insolvency by an insolvent court of this state to one of its citizens, is no bar to an action brought by a citizen of another state in the courts of this state, when such creditor was not a party to the insolvency proceedings.

ON EXCEPTIONS from superior court.

Assumpsit on an account annexed, contracted between October 4 and November 10, 1878, in the sum of $590.68, commenced December 3, 1878, and entered in the superior court for Cumberland county, at the March term, 1879. Plaintiffs are citizens of Massachusetts; defendant is citizen of Maine.

Insolvency of defendant was suggested, and assignee in insolvency appeared by his attorney.

The plea, *puis darrein continuance*, by defendant:

"And now comes the said defendant, and says that the said plaintiffs ought not further to have or maintain their aforesaid action against him, because he says that on the twenty-sixth day of March, A. D. 1879, he was by the court of insolvency for said county of Cumberland, duly adjudged to be an insolvent debtor,

under and according to the provisions of the statutes of said state, in such behalf made and provided. And defendant avers that thereafterwards, and since the last pleading in this action, that is to say, on the nineteenth day of January, A. D. 1880, a discharge in insolvency was duly granted to him in insolvency as aforesaid, and on the seventh day of February, A. D. 1881, a certificate thereof was given him by the said court of insolvency, under the seal of the said court, and of the following tenor, to wit:" . . .

"And defendant says that the plaintiffs' said claim might have been proved against his estate in insolvency as aforesaid. All which the defendant is ready to verify.

"And defendant pleads and says that said discharge operates as, and is a full and complete bar to the aforesaid suit, by force of the statutes of said state, in such behalf made and provided. Wherefore he prays judgment, if the plaintiffs ought further to have or maintain their aforesaid action against him.

Replication by plaintiffs:

"And now come the said plaintiffs and say that for anything pleaded by the defendant in his second plea aforesaid, they should not be precluded from further having and maintaining their action aforesaid, because they say that the defendant, at the time when his said debt and every part thereof was contracted, and when the defendant's promise was made, as aforesaid, was, and ever since has been, a citizen and resident of the state of Maine, and both the said plaintiffs were then and ever since have been, citizens and residents of the commonwealth of Massachusetts and not citizens and residents of Maine. And this they are ready to verify."

Rejoinder by defendant:

"And now comes defendant, and in rejoinder to the plaintiffs' replication, answers and says, that the plaintiffs, in said suit, have by their said action, submitted and subjected themselves, and their said cause of action, to the jurisdiction and the laws of the state of Maine, and having sought their said remedy in the courts of the state of Maine, the plaintiffs are bound by the laws of said state of Maine affecting their remedy and this cause of action. And that by virtue of the proceedings in said action, and by reason of the premises, the said plaintiffs have been and are made

subject in this said suit to, and are bound by the discharge of said defendant in insolvency, in manner and form as by defendant pleaded in his last plea. And of this defendant puts himself on trial."

A demurrer to this rejoinder was sustained and judgment ordered for the plaintiffs for amount claimed with interest by the court and the defendant alleged exceptions.

Drummond and Drummond, for the plaintiffs, cited: *Watson* v. *Bourne*, 10 Mass. 337; *McMillan* v. *McNeill*, 4 Wheat. 209; *Boyle* v. *Zacharie*, 6 Pet. 297; *Ogden* v. *Saunders*, 12 Wheat. 213; *Cook* v. *Moffat*, 5 How. 295; *Felch* v. *Bugbee*, 48 Maine, 9; *Palmer* v. *Goodwin*, 32 Maine, 535; *Baldwin* v. *Hale*, 1 Wall. 223; *Chase* v. *Flagg*, 48 Maine, 182; *Savoye* v. *Marsh*, 10 Met. 594; *Fiske* v. *Foster*, 10 Met. 597; *Scribner* v. *Fisher*, 2 Gray, 43; *Ilsley* v. *Merriam*, 7 Cush. 242; *Clark* v. *Hatch*, 7 Cush. 455; *Braynard* v. *Marshall*, 8 Pick. 194; *Houghton* v. *Maynard*, 5 Gray, 552; *Dinsmore* v. *Bradley*, 5 Gray, 487; *Gilman* v. *Lockwood*, 4 Wall. 409; *Kelley* v. *Drury*, 9 Allen, 27; *Towne* v. *Smith*, 1 Wood and Minot, 115; *Tebbetts* v. *Pickering*, 5 Cush. 83; *Choteau* v. *Richardson*, 12 Allen, 365; *Woodbridge* v. *Allen*, 12 Met. 470.

Henry W. Swasey, for the defendant.

There is ever to be kept in mind the well established distinction between a discharge of the debt and a bar to a suit on a debt, *i. e.* between the contract liability and the remedy, of which the statutes of limitation are a marked instance. 1 Kent's Com. 12th ed. p. 419, c. 393; *Von Hoffman* v. *City of Quincy*, 4 Wall. 553; 409.

The extra territorial inability of any legislation is the basis of the numerous decisions which are summarized in 15 Wall. 326, thus: "The extra territorial invalidity of state laws discharging a debtor from his contract with citizens of other states, although made and payable in the state after the passage of such laws, has been judicially determined by this court." Section 45 of our insolvent law, seems to be framed with the express purpose of avoiding the attempt to extend its operation beyond the jurisdic-

tion of our own courts. It is to be operative "within this state." The object of all law is to secure not simply exact but equal justice; and in the administration of the remedy in any jurisdiction, to make no discrimination for a foreign suitor and against its own citizens. Wharton's Conflict of Laws, § 749; 71 Maine, 516; *Missouri* v. *Lewis*, 101 U. S. 22.

The *lex fori* determines the time, mode and extent of the remedy. 18 Maine, 37, 109, 112. The state of Maine having power to pass an insolvent law, "it follows as a necessary consequence that such law must control the decisions of her own forum." See *Cook* v. *Moffat et al.* 5 How. 295; *Tennessee* v. *Sneed*, 96 U. S. 69, and *Penniman's case*, 103 U. S. 720; *Von Hoffman* v. *Quincy*, 4 Wall. 553, 554; *Douglass and Jackson* v. *Gaillard County Treasurer*, 14 A. L. R. p. 336 (3.)

The decision in 130 Mass. 503, was upon the position of the defendant that the contract was subject to the insolvent law of Massachusetts; and the cases cited therein all turn on the same defense. Nor does 48 Maine, 9, decide any further than that the insolvent law of Massachusetts does not discharge the debt of a citizen of Maine. In the case of *Cook* v. *Moffat et al.* 5 How. 205, counsel for creditor admits on p. 297, that a creditor may waive his constitutional rights. The following opinion is cited as an authorative exposition of defendant's position here. *Ruiz* v. *Eickermann*, Federal Reporter, vol. 11, p. 454; U. S. Circuit Court, E. D. Missouri, January 24, 1881.

APPLETON, C. J. The question presented for determination is whether a discharge in insolvency granted by an insolvent court of this state to one of its citizens, is a bar to an action brought by a citizen of another state in the courts of this state.

The plaintiffs were no parties to the proceedings before the insolvent court. Citizens of another state, it is not competent for the legislature of this state to pass any law suspending or discharging their right of action on a contract made with a citizen of this state. The insolvent laws of a state have no extra-territorial effect. They affect only contracts between citizens of the state by which they are enacted, as was tersely stated in

Cook v. *Moffat*, 5 How. 295: "A certificate of discharge will not bar an action brought by a citizen of another state, on a contract with him." Such was the conclusion of the court of this state, in *Felch* v. *Bugbee*, 48 Maine, 9, where this question is most carefully examined and conclusively determined. In *Baldwin* v. *Hale*, 1 Wall. 223, the case of *Felch* v. *Bugbee*, was cited with approbation; the court then deciding that a discharge obtained under the insolvent law of one state, is not a bar to an action on a note given and payable in the same state; the party to whom the note was given having been and being of a different state, and not having proved his debt against the defendant's estate in insolvency, nor in any manner been a party to those proceedings. To the same effect is the decision in *Guernsey* v. *Wood*, 130 Mass. 503.

The counsel for the defendant concedes that the debt is not absolutely discharged, but claims that by voluntarily submitting to the jurisdiction of the court, the plaintiffs are barred by § 45 of the insolvent law, from enforcing it. But this debt not being discharged, they have an equal right to enforce the payment of their debt with other citizens having claims to be enforced. The courts in the cases cited, like the present, have held that a discharge shall not be a bar. An absolute discharge of a debt and a prohibition against all remedies for its enforcement would seem to little differ in their consequences to the creditor. The discharge affords no defence to the plaintiffs' claim. As was well said by Mr. Justice CLIFFORD, in *Baldwin* v. *Hale*, 1 Wallace, 228, "unless it be claimed that constitutional questions must always remain open, it must be conceded, we think, there are some things . . . which must be regarded as settled and forever closed," and the question here raised is one of them. See also, *Bedell* v. *Scruton*, 54 Vermont, 493.

Exceptions overruled.

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

STATE OF MAINE *vs.* SAMUEL D. HAYNES.

Knox. Opinion October 20, 1882.

Solitary confinement in state prison. R. S., c. 140, § 34. Stat. 1872, c. 64.

The abolition of solitary confinement as a punishment by stat. 1872, c. 64, is entire and universal, "excepting for prison discipline," and that is to be enforced by the warden within the precincts of the prison, and by no one else.

ON REPORT.

The opinion states the case.

J. O. Robinson, county attorney, for the state.

D. N. Mortland, for the defendant.

APPLETON, C. J. The defendant, a prisoner confined in the state prison for life, being indicted for forcibly attempting to break said state prison and escape therefrom and likewise for a felonious assault with a dangerous weapon, to wit, a knife, upon Ira B. Northey an officer in said prison, with intent to kill and murder him, upon being arraigned, pleaded guilty to both indictments.

The question presented for our determination is whether the court can impose the sentence of solitary confinement.

By R. S., c. 140, § 2, "all punishment in the state prison by imprisonment shall be by confinement to hard labor, and *not* by solitary confinement, *unless otherwise specially provided;* but solitary imprisonment may be used as a prison discipline for the government of the convicts, as hereinafter mentioned."

The power of the court to impose solitary confinement is peremptorily prohibited, "unless otherwise specially provided."

The only exception to the general rule is to be found in § 34 of the same statute.

By that section (34) it is enacted that, "if any convict sentenced in the state prison for life assaults any officer or other person employed in the government thereof, or breaks or escapes therefrom, or forcibly attempts so to do, he may be punished by solitary imprisonment in the state prison not more than one year, and may be afterwards held in custody on his former sentence. . . . The warden shall certify the fact of a violation of the foregoing provisions to the county attorney of the county of Knox, who shall prosecute such convict, that he may be punished as provided in this section."

The prosecution for this offence is by indictment. It is to be tried as any other offence. There may be a verdict or the person indicted may plead guilty. A sentence is to be imposed, as a punishment for the crime committed. The solitary imprisonment prohibited by § 2, is authorized only by § 34. It can only be imposed by virtue of the provisions of these sections.

But by c. 64 of the acts of 1872 "solitary imprisonment in the state prison is hereby abolished excepting for prison discipline."

The sentence under § 34 is for a specific offence. It is authorized specially by the exception in § 2. There is no other statute by which this punishment could be imposed. Unless the punishment of solitary confinement under § 34 is prohibited by the act of 1872, c. 64, the latter act is utterly ineffectual. There is nothing on which it can operate. It might as well never have been passed. Its passage repealed solitary imprisonment as punishment to be imposed by the court.

The abolition of solitary confinement as a punishment is entire and universal "excepting for prison discipline," but prison discipline is to be enforced by the warden within the precincts of the prison and by no one else.

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

LOVE R. HATCH *vs.* NATHANIEL DONNELL.

Sagadahoc. Opinion November 17, 1882.

Trespass.

An entry on the land of another without license and without express or implied permission from the owner, is a trespass.

ON REPORT.

Trespass *quare clausum*. The declaration sets out different acts of trespass; that in 1880, the defendant, when plowing his own land, drove his horse and plow upon and over the plaintiff's land, injuring her trees, etc.; and in 1881, the defendant plowed and cultivated other lands of the plaintiff. The act of driving his horse upon plaintiff's land in 1880, was not denied by the defendant; but the acts of 1881, defendant claimed were upon his own land. The parties owned adjoining lots and the dividing line was in dispute; and the acts complained of in 1881, were upon the disputed territory which he plowed and cultivated.

William T. Hall, for the plaintiff.

J. W. Spaulding and F. J. Buker, for the defendant.

APPLETON, C. J. This is an action of trespass for breaking and entering the plaintiff's close. The lots of the plaintiff and defendant are adjacent. The defendant when plowing his land, brought his horse and plough on the plaintiff's land, treading down her grass and knocking off bark from her trees. This is the trespass complained of.

The defendant had no right of entry on the plaintiff's land. His entry was a trespass. Permission was not asked nor license given. The plaintiff in no way consented and the defendant never asked consent. The parties rely on their strict legal rights, neither asking of nor giving any favor to the other.

The relation of the parties, — the sedulous care of each to preserve existing rights, — negatives the idea of implied equally as of express permission or license.

In *Harmon* v. *Harmon*, 61 Maine, 222, and in *Lakin* v. *Ames*, 10 Cush. 198, there was the fact of relationship between the parties, from which with other circumstances license was inferred. Here, there was no such fact. No friendly relations were existing between the parties. Their attitude was mutually adverse.

The damages are merely nominal.

Judgment for the plaintiff for one dollar.

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

ALONZO F. CHESLEY *vs.* BRADBURY F. KING.

Kennebec. Opinion November 29, 1882.

Right to water percolating the soil. Digging of well, motive. Injuring water supply of another. Practice.

One has a legal right to dig a well anywhere on his own land for the purpose of obtaining water for his own use or for the benefit of his estate, and although the effect of it may be to withdraw the water percolating the ground to a spring from which another has the right to take water by an aqueduct, and dry up the spring; the owner of the soil will not be liable to an action on that account, so long as he acts in good faith with an honest purpose. But if he digs the well for the sole purpose of inflicting damage upon the party who has rights in the spring, he will be liable.

Where the jury give damages upon two distinct grounds, and do not return how much was given upon each, the only remedy is to set aside the verdict if it was against law or evidence as to either.

ON REPORT, on motion to set aside the verdict, from superior court.

The writ is dated October 6, 1880; in it the plaintiff alleges that on October 12, 1863, he was the owner of a certain farm, of ninety acres in Mount Vernon, and on that day sold the plaintiff ten acres therefrom, on which there was a valuable spring of living water so elevated and situated that the water from the same would run and could be conducted and conveyed in pipes to his dwelling, barn and pasture, and that in the conveyance he expressly reserved the right and privilege of taking and drawing water from the spring by an aqueduct to his dwelling, barn and pasture, for the use and supply of the same; that in June, 1870, he put an aqueduct into the spring to convey water to his premises and used the same till August, 1879, when the defendant cut off the aqueduct logs; that the plaintiff then run another aqueduct to the spring, when the defendant, "further intending to injure the said Chesley and to deprive him of his said right and privilege in said spring and water, wrongfully and unlawfully opened a well on his said land above said spring, and cut off and turned aside the vein of water supplying the same, diverted said vein of water from its natural course and flow to said spring, so that said spring became dry and useless to the plaintiff, and he was wholly deprived of the privilege and benefit of the same;" and that the defendant "unlawfully and wrongfully and injuriously opened and dug ditches over, through and across the premises of the plaintiff's said logs and pipes in the same to said spring and well, and drew off and subverted the water therefrom and continued such unlawful and injurious drawing and subversion, intending to deprive the plaintiff of the use and benefit of the same and greatly him injure and damage thereby."

The plea was the general issue.

At the trial the jury returned special verdicts that the defendant dug "the well in question and the trench connected with it, for the mere, sole and malicious purpose of diverting the veins of water which supplied the spring in question and not for the purpose of procuring a better supply of water for himself and improving his estate," and that the "defendant was liable for severing and disconnecting the aqueduct on his own land in 1879," and returned a general verdict for the plaintiff, for $52.95.

The deed from Chesley to King of the ten acre lot, contained this clause: "And I, the said Chesley, do reserve to myself the privilege of taking water from a spring on said land by an aqueduct to my house and barn, also to my pasture."

The opinion states the material facts.

Bean and Beane, for the plaintiff, contended that the aqueduct and tank made in 1870, was the property of both parties, that they were tenants in common, and therefore the acts of the defendant in 1879, in cutting the logs of this aqueduct were unauthorized and the jury were right in awarding damages to the plaintiff therefor.

The water in the spring was changed in quality and reduced in quantity by the acts of the defendant. The declaration covers this by the words "drew off and subverted the water," etc. To subvert is "to overthrow"; "to ruin utterly"; "to corrupt"; "to destroy". See Webster.

The defendant had no right to cut off the natural channels of water running to this spring, no right to change the underground currents and the cases cited by counsel do not apply to this case.

In all those cases the claim for damages was by one owner of real estate for the act of the adjoining owner done on his own land. Not this case.

The doctrine claimed as applicable to this case amounts to this: A grants to B a valuable right and yet he has the legal power to deprive him at once of the use and benefit of the thing granted by the exercise of a lawful act and upon the land in which the granted right exists and out of which it naturally and necessarily arises. That cannot be good law. *Vickerie* v. *Buswell*, 13 Maine, 289; *Ballard* v. *Butler*, 30 Maine, 94; *Pillsbury* v. *Moore*, 44 Maine, 154; *Winthrop* v. *Fairbanks*, 41 Maine 307; *Hammond* v. *Woodman*, 41 Maine, 177; *Jordan* v. *Mayo*, 41 Maine, 552; *Dolliff* v. *B. and M. R. R. Co.* 68 Maine, 173; *Mendell* v. *Delano*, 7 Met. 176; *Newell* v. *Hill*, 2 Met. 180; *Forbush* v. *Lombard*, 13 Met. 114, 526; *Allen* v. *Scott*, 21 Pick. 25; *Thayer* v. *Payne*, 2 Cush. 327; *Cocheco M. Co.* v. *Whittier*, 10 N. H. 305.

L. C. Cornish (Joseph Baker with him,) for the defendant, cited: *Greenleaf* v. *Francis*, 18 Pick. 117; Addison on Torts, c. 1, § 1; Angell on Watercourses, § § 95, 114; *Elliot* v. *Fitchburg R. R. Co.* 10 Cush. 193; *Pillsbury* v. *Moore*, 44 Maine, 154; Wash. Easements, 543, 475; *Foley* v. *Wyeth*, 2 Allen, 131; *Auburn Company* v. *Douglass*, 9 N. Y. 444; *Hunt* v. *Simonds*, 19 Mo. 583; *Glendon Iron Company* v. *Uhler*, 75 Pa. St. 467; S. C. 15 Am. Rep. 599; *Rawstron* v. *Taylor*, 11 Exch. 369; *Walker* v. *Cronin*, 107 Mass. 555; *Jenkins* v. *Fowler*, 24 Pa. St. 308; *Benjamin* v. *Wheeler*, 8 Gray, 409; *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505; *Mahan* v. *Brown*, 13 Wend. 261; *Roath* v. *Driscoll*, 20 Conn. 533; 25 Conn. 593; *Pixley* v. *Clark*, 35 N. Y. 520; *Chatfield* v. *Wilson*, 28 Vt. 49; *Acton* v. *Blundell*, 12 Mees. and W. 335; *Chase* v. *Silverstone*, 62 Maine, 175; *Phelps* v. *Nowlen*, 72 N. Y. 39; S. C. 28 Am. Rep. 93; *Chasemore* v. *Richards*, 7 H. L. Cas. 388; *Bliss* v. *Greeley*, 45 N. Y. 671; S. C. 6 Am. Rep. 157; *Brain* v. *Marfell*, Eng. Ct. of App. in Am. Law Reg. Feb. 1881, p. 93.

BARROWS, J. Damages were claimed by the plaintiff for two acts of the defendant alleged to be wrongful and injurious. I. The cutting off in August, 1879, of certain aqueduct logs lying in the defendant's land and leading from a spring at which the plaintiff had the right and privilege of taking and drawing water by an aqueduct, which aqueduct plaintiff alleges he put into the spring in 1870, for the purpose of supplying his premises. II. The digging a well in the defendant's land above said spring with the malicious intent of cutting off the sources of supply from said spring, the result of which was that it became dry and useless.

It appears by the special findings that the jury affirmed the plaintiff's right to recover on both grounds, and as the amount of damages found upon each is not ascertained, the general verdict must be set aside if either is found to be against law or evidence.

I. Touching the first claim for damages by reason of interference with the aqueduct in 1879. Very clearly the plaintiff did not put those aqueduct logs into the spring. The defendant did it and the assistance which the plaintiff rendered was but trifling.

But the plaintiff claims that under the circumstances it may be regarded as proved that he was an owner in common with the defendant in the aqueduct, and therefore entitled to maintain an action against his cotenant for the destruction of the common property. The jury must have so found, to give the plaintiff damages on this score. We think the finding was manifestly against the evidence. The plaintiff himself does not assert that there was any verbal arrangement even for a common proprietorship in the aqueduct. In the absence of any such arrangement or of any adjustment between the parties so as to equalize the labor and expense of putting in the aqueduct down to the point where it branched off to conduct the water to the respective homesteads, it seems improbable that either party contemplated an ownership of the aqueduct in common. Plaintiff sold the land to defendant in 1863, reserving a right to take water from the spring by an aqueduct to his house, barn and pasture. Up to 1870, neither party seems to have made any use of the spring except to conduct it in a spout two or three rods to the highway where they had a tub for a public watering place, and they shared the abatement of taxes thence accruing equally. For this purpose, shortly after the conveyance, they seem to have been jointly engaged in putting a wooden tank into the spring and laying the spout to the road, and the entire labor and expense was so trifling that, as to that, perhaps it might fairly be inferred that they were willing to let what one did offset what was furnished by the other, without a precise reckoning. But as to the more expensive and laborious job of putting in the aqueduct, years afterwards, it is not credible that they should have had any understanding for joint ownership without either previous arrangement or subsequent adjustment of the cost. The movement to put an aqueduct in the spring originated with the defendant in 1870, and his first plan was to come into the road from his own land. It is easy to see that the plaintiff had a strong interest to induce the defendant, if he could, to build his aqueduct in such a direction that he himself might supply his own premises by merely laying a branch of not more than ten or twelve rods in length, connecting with the defendant's. He did so induce him by suggesting to the defend-

ant that he would find the distance shorter and the digging easier by going through his (plaintiff's) field until he was opposite his own premises, and by promising some little assistance which he rendered and was largely compensated therefor by the use of the defendant's aqueduct down to the point of departure of his own, for eight or nine years and the subsequent abandonment to him of all that part which lay in his own field. But upon the whole evidence it is clear that there was no thought on the part of either of a common ownership in any part of the defendant's aqueduct. Plaintiff in his testimony speaks of it as "his," (defendant's), and not *ours*, and the labor and expense of constructing it was almost wholly borne by defendant. Defendant had a perfect right to discontinue the use of that part of it which went through plaintiff's field when he saw fit, and the verdict of the jury, so far as it gives damages for that act, is manifestly against the evidence.

II. The special finding that defendant dug the well, &c. in 1880, for the mere, sole, and malicious purpose of diverting the veins of water which supplied the spring, and not for the purpose of procuring a better supply of water for himself and improving his estate, is without any sufficient evidence to support it and must have been the offspring of an unreasoning bias or prejudice.

But if damages are recoverable for the *act* without the special finding, it would be idle to set aside the verdict on that account only. We proceed, therefore, to inquire whether there was any wrong to the plaintiff (which is covered by his declaration in this suit) in what the defendant did in the matter of digging the well, etc. in September, 1880. It is necessary throughout our discussion to bear in mind precisely what is charged in the writ as the wrongful act causing damage for which the plaintiff in this branch of the case seeks redress, as well as the evidence offered to support the charge. The plaintiff alleges his rights in the spring and supports his allegations by the production of his deed to the defendant, dated October 12, 1863, containing a reservation of "the privilege of taking water from a spring on said land by an aqueduct to my house and barn, also to my pasture." He alleges that the defendant on September 6, 1880, intending to injure him and deprive him of said right, "wrongfully and unlawfully opened

a well on his said land above said spring, and cut off and turned aside the vein of water supplying the same, diverted said vein of water from its natural course and flow to said spring, so that said spring became dry and useless," and that he "dug ditches, . . . and laid logs and pipes in the same to said spring and well and drew off and subverted the water therefrom."

We do not think these allegations give the defendant any notice that he would be called upon to answer any charge of corrupting the water in the spring. "Subvert" has no such natural signification as applied to material objects like a vein or stream of water, however it may be as to "the minds of the hearers" spoken of in 2 Tim. 2, 14, by which Webster illustrates the definition on which the plaintiff's counsel relies.

The allegations plainly relate to a diversion and consequent withdrawal of water from the spring and nothing more. No evidence could properly be introduced as to the effect produced upon the taste and properties of the spring water by the pipe through which the overflow from the well found its way into the spring. The evidence was received subject to objection, and cannot properly constitute an element of damages under this declaration. Neither does the evidence warrant the conclusion that the defendant, by means of the well and pipes, withdrew water from the spring which had once actually entered it, but only that he diverted that which was percolating through the ground to the spring, to his well and thence to his own premises.

Now touching the alleged claim for damages on account of such withdrawal of water from the spring, we regard it as settled law in this state that any one may, for the convenience of himself or the improvement of his property, dig a well or make other excavations within his own bounds, and will be subject to no claim for damages although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well or spring of his neighbor. The reasons of the rule have been heretofore so fully discussed that we have no occasion in this connection to do more than cite some of the authorities. *Chase* v. *Silverstone*, 62 Maine, 175; *Greenleaf* v. *Francis*, 18

Pick. 117; *Acton* v. *Blundell*, 12 Mees. and Wels. 335; *Broadbent* v. *Ramsbotham*, 11 Exch. 602; *Chasemore* v. *Richards*, 7 H. L. Cases, 349; *Wheatley* v. *Baugh*, 25 Penn. St. 528; *Ellis* v. *Duncan*, 21 Barb. 230; *Delhi* v. *Youmans*, 50 Barb. 316; *Radcliff's Ex'rs* v. *Mayor*, &c. 4 Comstock, 200; *Roath* v. *Driscoll*, 20 Conn. 533; and numerous other cases, both in England and this country, where the doctrine is amply discussed and affirmed by courts of the highest character.

As remarked by VIRGIN, J., in *Chase* v. *Silverstone*, "We see less difficulties in applying the rule *cujus solum*, &c. than that of *sic utere*, &c. to cases of this character." Manifestly the plaintiff here can have no greater right by reserving merely an easement in the spring than he would have had if he had excepted from his conveyance the ground in which it stands and a way to it from his own land. He cannot impose a heavier burden upon the property which he conveyed, by this reservation of an easement than he could by an exception of the land covered by the spring.

The same rule applies to cases where one has granted the right to use the waters of a spring, as in the case of adjacent proprietors. *Bliss* v. *Greeley*, 45 N. Y. 671; S. C. 6 Am. Rep. 157; *Brain* v. *Marfell*, Eng. Court of Appeals, given in Am. Law Register, (February, 1881,) N. S. vol. 20, p. 93.

III. Seeing it is settled that this injury of which the plaintiff complains, is, in ordinary cases, where the owner of the adjacent land exercises his paramount right in good faith for his own or the public convenience or advantage, merely *damnum absque injuria* and no proper foundation for an action, the next inquiry is, whether it becomes a good cause of action where the proprietor of the land makes his excavations not for the purpose of accommodating or benefiting himself or others, but merely to do a damage to his neighbor who has some qualified rights in the spring. There is a conflict of authority either in decisions or *dicta* upon this point, — some courts of high standing, notably those of New York, Pennsylvania and Vermont, having said in some of their cases broadly, in substance as in *Glendon Iron Co.* v. *Uhler*, 75 Penn. Stat. 467, S. C. 15 Am. Rep. 599, that

"the commission of a lawful act does not become actionable although it may proceed from a malicious motive."

In view of the very numerous cases where "the commission of a lawful act *does* become actionable" by reason of the mere carelessness of him who does it, when it results in damage to innocent parties, it sounds strangely to say that its commission for the sole purpose of inflicting damage upon another and without any design to secure a benefit to its doer or others, is not actionable when the damage intended is thereby actually caused. We rather incline to the view that there may be cases where an act, otherwise lawful, when thus done may combine the necessary elements of a tort, "an actual or legal damage to the plaintiff and a wrongful act committed by the defendant,"— or in other words may be an invasion of the legal rights of another accompanied by damages. One of the legal rights of every one in a civilized community would seem to be security in the possession of his property and privileges against purely wanton and needless attacks from those whose hostility he may have in some way incurred. We think there is more unexceptionable truth in the statement of the general principle in Com. Dig. Action on the Case, A: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages;" and in the remark of the court in *Walker* v. *Cronin*, 107 Mass. 562, thereupon: "The intentional causing of such loss to another without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong."

At all events it is worth while to examine the cases which are cited in support of the proposition above quoted from *Glendon Iron Co.* v. *Uhler*, to see how far the decision rests upon this doctrine, and how far upon other matters.

We think it will be found in most, if not all of them, the case was well disposed of, either on the ground that the plaintiff had not the right or property which he claimed in the subject of the injury, or that the defendant's acts might well be regarded as done not from the sole desire to inflict damage upon his neighbor, but partly at least, from a justifiable, perhaps laudable design, to promote his own advantage or that of others, or protect his own

property from subjection to some servitude by doing acts which, as between himself and the plaintiff, he lawfully might do, — or because for reasons of public policy the plaintiff was precluded from asserting an act to be maliciously done which was within the scope of the defendant's authority or right, and might well be referred to legitimate motives.

The particular case of *Glendon Iron Co.* v. *Uhler*, *ubi supra*, seems really to have turned upon the point that plaintiffs could have no exclusive right to use a mere geographical appellation as a trade mark, and that the defendant actually manufacturing the same article at the same place was equally entitled to consult his own advantage by using the same name as a trade mark. Where the plaintiff had no property to protect, it is perhaps not strange that the court should refuse to go into an inquiry as to the defendant's motives in doing an act which could not constitute an injury. That there was an admixture of what the law regards as a malicious motive for the defendant's act with other indifferent or laudable designs, could not be expected to confer a right of property on the plaintiff which he did not before possess. The case most relied upon to support the doctrine seems to be *Phelps* v. *Nowlen*, 72 N. Y. 39, and 28 Am. Rep. 93; and as it approaches the case at bar perhaps as nearly in its facts as any other citation on the same side, it should receive careful examination. It presents the case of the withdrawal of a favor which the plaintiff had previously received from defendant in the maintenance of an embankment around a spring on defendant's land, which embankment raised the water in the plaintiff's well. The defendant dug through the embankment with the knowledge that such digging would diminish the water in the plaintiff's well and with the intention to do it; and the case finds "that in so far as such intent and purpose under the circumstances above found can constitute malice, his motive was malicious." But it is difficult to see how the simple withdrawal of a favor which has conferred no vested right to its continuance, can constitute actionable malice. While the court, undoubtedly, *arguendo*, refer approvingly to the doctrine under consideration as laid down very broadly in the cases cited, it is noticeable that it adverts with

satisfaction to the probable existence of a lawful motive, thus: "It may have been lawfully done by the defendant to prevent a diversion of water, the use of which he claimed, and which, if allowed to continue, by lapse of time might ripen into a claim of right by prescription; and hence, although the ostensible object was to diminish water which has been unlawfully appropriated by another, the intent *cannot* well be considered as malicious, or the purpose a wrongful one. That it proves injurious to another is more the fault of the party who reaps a benefit from that which does not belong to him, than of the one who was originally entitled to it and is only claiming his just rights." In further discussion of cited cases, the learned court also advert to the doctrine imported from the civil into the common law, as stated in *Acton* v. *Blundell* and *Chasemore* v. *Richards*, *ubi supra*, and remark thereon, "The rules last stated may, perhaps, be applied in cases where it is entirely obvious that the act was done solely for the purpose of inflicting a wrong, and with no intention of vindicating a right or preventing a wrong being done to the interests of another." Certainly the support given by this case to the doctrine contended for is somewhat equivocal, and the case seems really to have turned upon the want of any right in the plaintiff, and the probability of lawful and not (properly speaking) malicious motives in the defendant. The same elements are obvious in other cases cited to maintain this questionable dogma.

Thus in *Auburn Plank Road Co.* v. *Douglass*, 5 Selden, 444, the court seem to have held that, in a case of the dedication of his land by a man to the public for use as a way, they would not inquire into his motives, at the instance of the corporation with a charter right to take toll, who alleged malicious injury. The motive might have been charitable and the court apparently would not repress benevolence or public spirit by such an inquiry into its motives. But upon the same facts it was held that equity would restrain the dedicator from keeping his road open in such a way as to enable those who travelled on the plank road to avoid the toll-gate. 12 Barb. 553.

We see no reason why a man should maintain an action against an underwriter or an insurance company for refusing to contract to insure his property because he has injected into his declaration an allegation that the refusal was malicious. Neither law nor equity could compel them to insure the property of those with whom they did not choose to contract. There is a plain lack of right in the plaintiff, and the proposed inquiry into motives is immaterial. *Hunt* v. *Simonds*, 19 Missouri, 583.

The general doctrine of *Walker* v. *Cronin*, 107 Mass. 555, is not what counsel claim, but rather that while a man has no right to protection against competition, he "has a right to be free from malicious and wanton interference, disturbance and annoyance." The *dictum* in *Walker* v. *Cronin*, adverse to this same doctrine as it was shadowed forth in *Greenleaf* v. *Francis*, 18 Pick. 117, seems to be based upon what we conceive to be the erroneous assumption that the owner of a spring has no rights whatever in water percolating through the soil of adjacent proprietors, because his rights therein are assuredly subject to the paramount claims of the owner of the soil, operating in good faith in his own land, "for a justifiable cause."

Why anybody should have supposed that the courts would deem it worth while to indulge a litigious spirit so far as to inquire into the motives of a man who has thrown down fences on his own land, put there to mark the lines of a road never lawfully laid out, is not apparent. Such an immaterial inquiry was properly enough refused in *Jenkins* v. *Fowler*, 24 Penn. St. 308.

Litigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry. It was rightly held they were not, in *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505. And this is in harmony with the doctrine that proof of malice alone, will not support an action for malicious prosecution when there is probable cause. Nor would it be wise as matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is

aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground, and it was rightly forbidden in *Benjamin* v. *Wheeler*, 8 Gray, 409. And here we come to the reasons well worthy to be considered, given for the rule in *Phelps* v. *Nowlen*: "A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. . . . Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well defined rights."

Apparently it is the danger of just such verdicts as that which was rendered in the case at bar, which has induced these courts of high standing, to make a sweeping denial of the right to inquire into motives in such cases as we have been reviewing, where no substantial right of the parties complaining has been infringed.

We are not satisfied, however, that the rule can be maintained as broadly as it has been asserted on this account, and we think there is a still greater danger of its being perverted into a bulwark of oppression and injustice, by the denial of a remedy where a substantial right has been invaded. It seems to us that the denial is broader than the cases required. We think it cannot be regarded as a maxim of universal application that "malicious motives cannot make that a wrong which in its own essence is lawful."

Chatfield v. *Wilson*, 28 Vermont, 49, is an authority not to be overlooked, for the instructions of POLAND, J., there considered and condemned, were not substantially different from those given in the case at bar, and the court say: "It may be laid down as a position not to be controverted that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it," — apparently assuming that the wanton infliction of damage is not a violation of legal right. Washburn in his Treatise on Easements, &c. has an instructive review of decisions touching this point, (pp. 488–492,

3d ed.) and notices (as do the court in *Phelps* v. *Nowlen*,) the fact that in the later case of *Harwood* v. *Benton*, 32 Vt. 737, the Vermont court remark upon the absence of any imputation of wanton and improper motive as an element in the defendant's liability, and seem purposely to avoid expressing any opinion as to the correctness of *Chatfield* v. *Wilson* on that point.

In commenting upon the general aspect of the question, Washburn says in substance, that courts unequivocally recognize one's right to have his well or spring supplied by underground sources so far as to protect it against invasion by a stranger, and he adds: "It would therefore seem to constitute a something of which *meum* and *tuum* might be predicated, and in regard to which the maxim *sic utere tuo*, &c. would not be wholly foreign, especially when the party destroying it does it by using his property, not for his own benefit, but solely for the purpose of depriving his neighbor of what he would otherwise have rightfully enjoyed."

Upon the whole we are better satisfied with the view of the law on this point which we get from *Acton* v. *Blundell*, *Roath* v. *Driscoll*, *Wheatley* v. *Baugh*, hereinbefore cited, and from *Panton* v. *Holland*, 17 Johns. 92, 98, and from the instructions approved in *Greenleaf* v. *Francis*, 18 Pick. 119, than with that given in *Chatfield* v. *Wilson*.

We think this plaintiff had rights in that spring, which, while they were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water, should not be ignored if it were true that defendant did it "for the mere, sole and malicious purpose" of cutting off the sources of the spring and injuring the plaintiff, and not for the improvement of his own estate.

But the testimony is of a character that conclusively negatives the defendant's guilt. The vital facts in the case show that he suffered from a short supply of water now and then during all the years that his aqueduct ran through the plaintiff's land

because the plaintiff's premises were lower than his, and the plaintiff persisted even in dry times in exercising the advantage which he thereby had. The conclusion upon the whole evidence is irresistible that the defendant, after a long trial, was justified in severing his aqueduct from that which ran to the plaintiff's premises. Upon his doing so, the plaintiff continued his aqueduct as he had a right to do to the spring, and entered it at a point lower than the defendant, and defendant was again deprived of a sufficient supply. There is no testimony which, fairly weighed, can lead to the conclusion that he dug the well for any purpose except to supply the deficiency that he experienced. The special finding on this point is altogether against the weight of evidence and must be set aside.

Motion sustained. Verdict set aside.
New trial granted.

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

APPLETON, C. J., concurred in the result.

JOHN G. HALL *vs.* ABEL STAPLES.

Hancock. Opinion December 7, 1882.

Levy. Appraisers, certificate of oath of; mistake in name of. R. S., c. 76, § 2.

The provisions of the statute, requiring the certificate of the oath administered to the appraisers, chosen to make a levy, to be written upon the back of the execution, is directory to the officer, and will not be considered as necessary to the validity of the levy in an action between the judgment debtor and an innocent purchaser from him in whose behalf the levy was made.

Where the papers clearly show that the person chosen and sworn as appraiser was the same as he who acted in that capacity, a clerical error in the initial letter of his name in the officer's return is not fatal to the levy.

ON REPORT.

Real action for the recovery of certain land situated in the town of Brooklin.

The opinion states the case.

H. A. Tripp, for the plaintiff.

The creditor attempts to obtain a title to the lands of the debtor by force of the statute. He "must see that all the requirements of the statutes are complied with and if he fail through any deficiency in description, or in any preliminary proceedings he will not succeed in his attempt to obtain a title." *Jewett* v. *Whitney*, 51 Maine, 244; *Lumbert* v. *Hill*, 41 Maine, 482; 14 Mass. 20.

In this case the requirements of R. S., c. 76, § 2, were not complied with. See *Brackett* v. *Ridlon*, 54 Maine, 435.

A. P. Wiswell, for the defendant, cited: *Brackett* v. *McKenney*, 55 Maine, 504; *Bamford* v. *Melvin*, 7 Green. 14; *Phillips* v. *Williams*, 14 Maine, 411; *Lumbert* v. *Hill*, 41 Maine, 475; *Williams* v. *Amory*, 14 Mass. 20; *Huntress* v. *Tiney*, 39 Maine, 241; *Emery* v. *Legro*, 63 Maine, 357; *Boynton* v. *Grant*, 52 Maine, 220; *Chase* v. *Williams*, 71 Maine, 190.

DANFORTH, J. It is admitted that the title to the land in question was originally in the plaintiff and so remains unless taken from him by a levy in favor of Haynes H. Harden, under whom the defendant claims, and the only question is, as to the validity of that levy.

The first objection is, that the certificate of the oath administered to the appraisers was not made upon the back of the execution, but on a separate piece of paper and attached to it. This cannot be considered a compliance with the statute under which this levy was made and as it now is. Under the statute of 1821, under which the decision in *Phillips* v. *Williams*, 14 Maine, 411, relied upon in the argument, was made, no certificate from the magistrate administering the oath was necessary. The return of the officer that he had caused the appraisers to be sworn was the sufficient and only evidence required of that fact. In the revision of 1841, c. 94, § 4, it is provided that the appraisers shall be sworn before a justice of the peace, "and such justice shall make his certificate on the back of said execution, of his having administered such oath." This provision, enlarged so as to authorize the officer to administer the oath, is continued to the present time. In R. S., c. 76, § 2, it reads, "and a certificate of the oath shall be made, stating the date of its administra-

tion, on the *back of the execution*, by the person who administered it." The meaning of this language would seem to be unmistakable. That which is written upon a separate piece of paper is not upon the "back of the execution" even though the paper may be, at one corner, affixed to it. If it were affixed throughout so that it could not be removed, it might become a part of the execution and a compliance with the law but not otherwise. That this construction of the statute is in accordance with the intention of the legislature, is evident, not only from the language used but also from another provision of the statute relating to the same general subject. By the revision of 1857, c. 76, § 3, the appraisers are to make their return "on the back of the execution." In 1863, c. 165, this was amended by adding the words, "or annexed to the execution," leaving the provision in relation to the certificate of the oath the same as before. Thus showing clearly that the legislature understood that a return "on the back" was not the same as one "annexed," and although it might seem desirable to change the law in respect to the return of the appraiser, it was not so in respect to the certificate.

But this provision may be considered as directory to the officer rather than vital to the levy. The oath is the essential thing. It is necessary, to authorize the appraisers to proceed, as much as the execution itself. It is proper therefore, that the evidence of it should be upon and a part of the execution, especially as that is the most certain way of preserving it. Possibly as against a subsequent attaching creditor, or *bona fide* purchaser it may be the only legitimate evidence. But in this case it is the debtor himself who seeks to take advantage of the omission. He has suffered no harm, for the evidence is abundant that the oath was duly administered and all that was necessary to secure his rights in this respect was done. On the other hand so far as appears the defendant is an innocent purchaser from him in whose behalf the levy was made. The levy was duly recorded and upon that record he had a right to rely. It does not appear that the record disclosed any such omission as is now claimed. Under these circumstances it would be proper to allow an amendment if one were needed. The lapse of time is no objection, for it does not

appear that the defendant is responsible for that, but rather the plaintiff. He is the moving party and it is not for him to complain of a delay caused by a neglect on his part to assert his rights. This alleged defect in the levy must therefore fail to assist the plaintiff in maintaining his action.

The other two objections to the levy may properly be considered as one. It is agreed that by the officer's return and certificate, it appears that George G. Allen was chosen and sworn as one of the appraisers, while their return is signed by G. R. Allen. The return of the officer and of the appraisers, which are admitted to be correct, must show that in fact the same man, who acted, was properly chosen and sworn. This is the only inference which can be drawn from the papers, and no harm can, therefore, have resulted to any one on account of the clerical mistake in the initial of the middle name. This cannot avail the plaintiff. *Boynton* v. *Grant*, 52 Maine, 220.

Judgment for defendant.

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

MELTIAH K. CHASE *vs.* EDGAR H. HINCKLEY.

Hancock. Opinion December 7, 1882.

Mortgage. Assignment. Tender. Cancellation. Equity.

C took from H a written assignment of a mortgage and notes in payment for real estate sold and conveyed by warranty deeds, the amount due upon the mortgage debt being less than the sum represented by H, C tendered back the mortgage and notes and assignment thereof to H and brought bill in equity to cancel his deed and note given therefor: *Held*, that as the mortgage can only be conveyed in writing it is not sufficient to tender it back without a written conveyance with covenants of warranty against all persons claim-

ing under C. *Held* further, that the decree asked for may be granted if C first restores to H, by such written conveyance, the mortgage and notes and pays the costs of suit.

BILL IN EQUITY.

Heard on bill, answer and proofs.

The bill sets out that the plaintiff sold and conveyed by warranty deed to the defendant, certain land in Bluehill, for the sum seven hundred dollars, and in payment for the same he took from the defendant a mortgage properly assigned and two notes upon which there was then due, after allowing for a twenty-seven dollar indorsement on one, the sum of one thousand eighty-two dollars and six cents, as appeared by the face of the papers and as the defendant represented; and the plaintiff agreed to allow defendant one thousand dollars for the mortgage and gave him a note of three hundred dollars for the balance over and above the seven hundred dollars; that in fact the mortgage notes, which were at that time overdue, were mostly paid, there being less than two hundred dollars due upon them instead of the sum of one thousand eighty-two dollars and six cents, represented by the defendant; that upon ascertaining the facts the plaintiff had tendered back to the defendant the mortgage and notes, and the assignment thereof, the same never having been recorded; and the bill asked that the contract be declared void and the defendant required to release to plaintiff his interest in the land conveyed and be enjoined from collecting the three hundred dollar note.

The facts found by the court are stated in the opinion.

A. P. Wiswell, for the plaintiff.

H. A. Tripp, for the defendant.

DANFORTH, J. This is a bill in equity asking for the recision of an executed contract for the purchase of a mortgage, and that the defendant may be required to restore the consideration received therefor, on the ground of fraud. The fraud alleged is that false representations were made as to the amount due upon the mortgage. The answer explicitly denies the falsehood, and alleges that the truth was stated so far as known; that no

specific sum was given as due, but substantially that the amount was in dispute.

The evidence in the case is clearly sufficient to overcome the answer and sustain the allegations in the bill. It is conceded that the plaintiff in the contract allowed substantially the amount which appeared to be due, and unless he so understood and believed, his conduct would be inexplicable; and the statement that he was informed that a less amount was due, or that the amount or a material part of it was in dispute would seem scarcely credible. This belief and conduct on the part of the plaintiff must have been induced by the acts and statements of the defendant, for he produced the notes with but the twenty-seven dollars indorsed. The defendant concedes that, that question as to the amount due was discussed and it does not appear that the plaintiff obtained any information from any other scource. Indeed it is now made an objection that he did not inquire otherwheres. But where should he inquire with more probability of obtaining the truth than of him who was the owner of the notes, who presented them without indorsements, and whose duty it was to give the information sought? True, the notes were overdue and thus calculated to excite suspicion. That suspicion was excited, the proper inquiries were made and at the proper place, and it is not for the defendant to say the plaintiff was negligent in putting confidence in his word. That the defendant knew the truth is shown by his own testimony and is not denied.

The testimony as to whether the whole amount as shown by the notes was due is conflicting. But that the amount was in dispute is free from doubt and the balance of testimony shows that a material part of the amount had been paid. But it is sufficient for the plaintiff that there are good grounds for contesting the notes. He was not bound to take them with the almost certainty of litigation and the evidence shows that he took the proper precautions to prevent it.

It is thus clear that the plaintiff has the right to rescind the contract and is entitled to the decree he asks, if he has taken the proper steps to do so. To do this it is incumbent for the rescinding party to restore the other to the position in which he was

before the contract. In this case he must return the consideration he received for the land conveyed and note given. That consideration was the notes and mortgage. The material part appears to have been the mortgage. The case shows that it was legally assigned to the plaintiff. The case also shows that the notes, mortgage and assignment, were tendered back to the defendant, but fails to show a reassignment of the mortgage. Nor does it appear that the assignment was cancelled any farther than the tender may have that effect. Was this sufficient? The mortgage conveyed an interest in real estate; the assignment conveyed the same interest, an interest which can only be conveyed in writing. Before the assignment the defendant was the owner of the premises covered by the mortgage subject to the right of redemption. By the assignment that interest passed to the plaintiff and under the law could pass from him only by a written instrument. It follows that a mere tender back of the assignment from the defendant would not in law convey the title, though with the tender of the notes if accepted it might in equity.

In *Hesseltine* v. *Seavey*, 16 Maine, 214, SHEPLEY J., says, "since the statute of frauds there is no doubt, that a surrender of a lease can be legally proved, only by deed or note in writing, or by act and operation of law." Washburn in his treatise on Real Property, vol. 3, p. 275, (3 ed.) says, "the cases in general, however, agree that mere cancelling or delivering back the grantor's deed, does not divest the grantee's title. In Sugden on Vendors, vol. 1, p. 256-7, 8th American edition, note *e*, it is said, "but it is clear from the above cases and others, that the mere cancellation of the deed, by the grantee without recourse, does not divest his title or vest it in the grantor." See also, *Barrett* v. *Thorndike*, 1 Maine, 73; *Nason* v. *Grant*, 21 Maine, 160; *Patterson* v. *Yeaton*, 47 Maine, 308; *Hatch* v. *Hatch*, 9 Mass. 311; 1 Green. Ev. § 265; Greenleaf's Cruise on Real Property, vol. 3, 8, note 1.

It is however true that the title to land may be changed, under certain circumstances, by cancelling the deed if not recorded in connection with other acts of the parties.

In New Hampshire it is held that where an unrecorded deed

is voluntarily surrendered up by the grantee to the grantor, with a view of thereby revesting the estate in the grantor, it would have that effect upon the principle of estoppel. *Bank* v. *Eastman*, 44 N. H. 438. "Having voluntarily destroyed his deed, he cannot be permitted to show its contents by secondary evidence," and thus the only evidence competent to sustain his title is gone. But cancellation is no reconveyance. *Farrar* v. *Farrar*, 4 N. H. 191; *Mussey* v. *Holt*, 4 Foster, 248.

So, when an unrecorded deed is cancelled and a new deed is given to another grantee, the title in him would undoubtedly be good, provided no rights of third persons had intervened. This principle is well stated by SHAW, C. J., in *Trull* v. *Skinner*, 17 Pick. 214, 215. On p. 215, he says, "such cancellation does not operate by way of transfer, nor strictly speaking by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence, by which alone the claim could be supported; like the cancellation of an unregistered deed, and a conveyance by the first grantor to a third person without notice. The cancellation reconveys no interest to the grantor, and yet taken together, such cancellation and conveyance to a third person make a good title to the latter by operation of law; . . . it is good against the grantor and his heirs by force of the second deed, and it is good against the first grantee and all claiming under him, by force of the registry acts." These two classes of cases are clearly sustained by the authorities already cited as well as others. They are not inconsistent but rest upon sound principle.

The result is that the defendant has not been placed in his former position. He then had a title to the mortgage by deed. If he had accepted the tender he would not now have a title, but would be in a condition to hold the mortgage only because the plaintiff had so conducted that he could not assert his title for the want of the legal evidence. The defendant had the written evidence required by law to sustain his former title. The latter, if title it may be called, is dependent to a great extent upon the uncertainties of oral testimony. Besides the rights of the mort-

gagor are to some extent involved. It is conceded that something is due on the mortgage. Against whom will a process for redemption lie? Shall the mortgagor at his peril ascertain from the testimony of different individuals of differing interests, to whom he shall make the necessary payment, or may he not rather look to that written evidence which the law provides for his protection? Were he now to make payment to the plaintiff, in whom is the legal title, must it not operate as a discharge of the mortgage? *Smith* v. *Kelley*, 27 Maine, 237; *Lyford* v. *Ross*, 33 *Ib.* 197.

It is therefore evident that the defendant has not only not been placed in his former condition, but he is in one not its equivalent, and for that reason he was not bound to accept the tender.

But this is a process in equity. Under our present statute this court has full equity powers, and we see nothing in this case, notwithstanding these principles of law, to prevent the decree asked for on such conditions as may secure equity to the defendant. These conditions are that the plaintiff shall first restore to the defendant the mortgage by a reassignment or quitclaim deed of the premises therein described, with covenants of warranty against all persons claiming under the grantor and pay the costs of this suit. He will then be entitled to the decree prayed for in his bill. The case is remanded to *nisi prius* for further proceedings in conformity herewith.

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

JOSEPH B. HUTCHINSON, assignee,

vs.

JAMES MURCHIE and others.

Aroostook. Opinion December 9, 1882.

Insolvency. Preference. Liens. Assignee. Creditors.

The giving of security when a debt is created, if free from fraud, is not against the provisions of the insolvent law.

A bill of sale given in good faith which would be binding on the vendor, is binding on his assignee.

The assignee in insolvency stands in the place of the insolvent, and takes the property subject to all valid claims and liens.

Creditors electing to avoid a fraudulent conveyance, take the property as it was when transferred and subject to all liens then existing.

An exchange of one set of securities for another of equal value, is no preference, and may be made by one though insolvent.

ON REPORT.

The plaintiff was assignee in insolvency of Marcellus Walker and Samuel E. Simpson, insolvents, and brought this action, the writ being dated September 5, 1881, to recover the value of certain real and personal property mortgaged to them within four months prior to the issuing of the warrant of insolvency to secure them for money before that time loaned the insolvents, and for other money advanced and paid by them to certain creditors of the insolvents, alleging that the defendants knew that such payments were a preference under the insolvent act, and advanced the money and took the mortgages, with a view to aid the insolvents to make such preference.

At the trial the insolvents testified that they borrowed the money of the defendants, to enable them to continue their business; that it was understood at the time that the lien claims were to be paid out of the money, but that "there was nothing

said about what I should do with the money at all, no restrictions to how I should use the money whatever."

The defendants did not testify.

Other material facts stated in the opinion.

By the terms of the report, "This case was submitted to the presiding judge without the intervention of the jury, with right of exception. . . . The presiding judge ruled that upon the law and evidence, the action is maintainable, and ordered judgment for the plaintiff for twelve hundred dollars and interest from the date of the writ. By consent of the parties the case is reported for the decision of the law court, and if the evidence is sufficient to reasonably sustain the finding of the judge, judgment is to be entered up as ordered, otherwise plaintiff nonsuit."

V. B. Wilson and Madigan and Donworth, for the plaintiff, contended that the memorandum of sale made June 10, 1881, was not valid as security. It was not attended by any delivery of goods, it was not recorded, and consequently invalid as security if ever intended to be such. 65 Maine, 485. The mortgage of June 17 shows that the memorandum of June 10 was not intended as security, for the mortgage was to secure the $1200, received June 10, and to that extent the mortgage was to secure a pre-existing debt. 11 Gray, 311; *Forbes* v. *Howe*, 102 Mass. 435.

The mortgage was not in the usual and ordinary course of business of the debtors, and the burden is upon the defendants to show that the transaction was not a fraud on the act. And they do not even take the stand as witnesses. *Collins* v. *Bell*, 3 B. R. 587; *Scammon* v. *Cole*, 3 B. R. 100. See Hamlin's Insolvent Law, 76, 83, and cases there cited. 3 Allen, 114; 4 Cush. 127; 13 Gray, 18; 2 Cush. 160; *Robinson* v. *Blen*, 20 Maine, 109; 55 Maine, 200.

The assignee is entitled to an action to recover the value of the property mortgaged. Insolvent Law, § § 13, 14; *Tapley* v. *Forbes*, 2 Allen, 20; *Crafts* v. *Belden*, 99 Mass. 535.

Powers and Powers, for the defendants, cited: *Paine* v. *Dwinel*, 53 Maine, 52; *Kidder* v. *Knox*, 48 Maine, 551; *Cur-*

tis v. *Hubbard*, 9 Met. 328; *Taft* v. *Boyd*, 13 Allen, 84; *Stevens* v. *Blanchard*, 3 Cush. 169; *Forbes* v. *Howe*, 102 Mass. 433.

APPLETON, C. J. This is an action brought by the plaintiff as assignee of the firm of Walker and Simpson, under the provisions of § 48 of the insolvent law of this state.

It appears that Walker and Simpson, having had previous dealings with defendants, and being then indebted to them, on June 10, 1881, believing they were solvent though in fact they were not, applied to these defendants for a loan of money, for which they agreed to furnish security.

Accordingly on that day, the defendants advanced twelve hundred dollars—a part of the loan,—taking a bill of sale in the following terms: "Houlton, June 10, 1881.

"I this day sell to James Murchie and Sons,—

600,000 feet sp. logs in my boom.
300,000 " hemlock " Mansur's boom.
10,000 " spr. bds. at my mill.
10,000 " ref. spr. scantling at my mill.
10,000 " hem. bds. " " " "

"The logs are marked: H and I H I; supposing to mean H and four stops. Walker & Simpson."

It is immaterial whether this bill of sale was good against attaching creditors, inasmuch as it was binding on the parties thereto. The giving of security when the debt is created, is not within the statute, and if the transaction be free from fraud, the party who loans the money can retain the security till his debt is paid. *Tiffany* v. *Boatman's Sav. Ins.* 18 Wall. 376. It cannot for a moment be pretended there was any fraud upon creditors. Here is no preference of one creditor over another. The preference referred to in the statute, relates to antecedent debts. A present equivalent is obtained for the security given. The estate of the insolvents is neither increased nor diminished.

The assignee in insolvency stands in the place of the insolvent debtor, and takes only the property which he had, subject to all valid claims, loans and equities. *Ex parte Dalby*, 1 Lowell, 431.

Assignees are not purchasers for a valuable consideration, in the proper sense of the words. In the absence of fraud, the assignee represents the bankrupt, and takes only what he has, subject to all incumbrances, liens and equities valid against him. *Winsor* v. *McLellan*, 2 Story, 492.

In the course of a few days, one of the defendants came to Houlton, bringing eleven hundred dollars, making the whole loan twenty-three hundred dollars, for which a note was given, and mortgages on real and personal estate to secure the same.

It is this conveyance the plaintiff claims to have set aside as giving a preference to these defendants, and as in fraud of the insolvent law, so far as relates to the sum of twelve hundred dollars advanced in June. It is conceded it is valid as to the money advanced at its date, even if invalid as to the rest. *Whiston* v. *Smith*, 2 Lowell, 101.

The plaintiff's evidence shows that there was due fifteen hundred eighty-three dollars and thirty-three cents, for stumpage on logs for which land owners had a lien. Of the last portion of loan, eight hundred three dollars and thirty-three cents was appropriated to discharge existing liens. Of the portion first advanced, seven hundred and seventy-five dollars was applied to the extinguishment of liens on the insolvents' lumber. The estate was in no way diminished. It mattered not, whether these debts were paid by the money of the defendants or not, — if not paid by them, the payment would come out of the funds of the estate.

Further, the defendants having relieved the estate, would be equitably entitled to be subrogated to the rights of the holders of the liens, which their funds have extinguished. If the conveyance were to be deemed fraudulent, still the defendants would be entitled to hold the property subject to the lien which their funds discharged. "The creditors," observes DAVIS, J., in *Avery* v. *Hackley*, 20 Wallace, 411, "having elected to avoid the fraudulent conveyance, take the property as though it had never been made, and subject to all lawful liens upon it. The assignee standing in the place of the bankrupt, acquired no greater rights than he possessed," &c.

This would have put four hundred and twenty-three dollars and thirty-three cents ($423.33) out of the first installment of the loan which is not shown to have been applied to the payment of lien claims.

But the transaction of June 17, when the notes and mortgage were given was but an exchange of security. No note had been given for the $1200 advanced June 10. Both advances were included in one note. The mortgage was upon the property included in the bill of sale of June 10. It included other property, but that is immaterial, as that was more than sufficient to secure the whole loan. The antecedent indebtedness of the insolvent debtors was in no way secured. It was carrying out in good faith the agreement of the parties. It was simply the change of security, so far as relates to the property of which a bill of sale had been given. The exchange of one set of securities for another of equal value is not a preference. *Burnhisel* v *Firman*, 22 Wall. 170. If more was subsequently given to secure than at first, the excess only will be deemed void. The exchange of values may be made at any time, though one of the parties to the transaction be insolvent. *Cook* v. *Tullis*, 18 Wall. 333; *Clarke* v. *Islelin*, 21 Wall. 361; *Sawyer* v. *Turpin*, 91 U. S. 114.

Here has been no sale or mortgage with a view of giving a preference. The estate of the insolvent debtors has not been impaired. The defendants obtained no preference for antecedent debts. It was an effort to aid struggling debtors. "There is nothing," remarks DAVIS, J., in *Tiffany* v. *Boatman's Institution*, 18 Wall. 388, "which interdicts the lending of money to a man in Darby's (defendant's) condition, if the purpose be honest and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure, the power to raise ready money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it

financial ruin would be inevitable." These remarks are just and equally apply to proceedings, under the insolvent act. To the same effect is the case of *Mercer* v. *Peterson*, L. R. 2 Ex. 364.

Plaintiff nonsuit.

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

THOMAS H. HASKELL, administrator of the estate of HELEN McLEOD ANGIER,

vs.

CALVIN HERVEY, administrator of the estate of OAKES ANGIER.

Cumberland. Opinion December 12, 1882.

Practice. Executor and administrator. Statute 1873, c. 145. Evidence. Trust. Limitations, statute of.

The judgment of the justice presiding to whom a case is referred, is conclusive as to the effect of the testimony.

When the executor or administrator of a deceased party is a party to a suit, he may by virtue of stat. 1873, c. 145, testify to any facts legally admissible upon the general rules of evidence happening before the death of such person.

An interested witness can testify in a suit in favor of one party when the other is an administrator.

The reception of inadmissible testimony *de bene esse* by the judge to whom a cause is referred, furnishes no ground of exception unless it appears that his decision was based in whole or in part on such testimony.

A husband received from his wife bonds belonging to her. *Held*, That the question, whether they were received by him as a gift or in trust for her use, is one of fact, as to which the decision of the presiding justice hearing the cause, is conclusive.

Time does not run against a *cestui que trust* until the trust is disavowed, and the disavowal made known to the *cestui que trust*.

ON EXCEPTIONS.

The opinion states the case.

Benjamin Thompson and Edward Woodman, for the plaintiff, cited: Stat. 1873, c. 145; R. S., c. 82, § 82; *Kelton* v. *Hill*, 59 Maine, 259; *Gunnison* v. *Lane*, 45 Maine, 165; *Rawson* v. *Knight*, 73 Maine, 342; *Blaisdell* v. *Cowell*, 14 Maine, 373; *Ward* v. *Chase*, 35 Maine, 515; *Jones* v. *Lowell*, 35 Maine, 538; *Paul* v. *Frost*, 40 Maine, 295; *Wright* v. *Boston*, 126 Mass. 164; *Corinth* v. *Lincoln*, 34 Maine, 312; *Stewart* v. *Hanson*, 35 Maine, 509; *Cogswell* v. *Doliver*, 2 Mass. 222; *Hooper* v. *Taylor*, 39 Maine, 224; *Silver* v. *Worcester*, 72 Maine, 322; *School District* v. *Ætna Ins. Co.* 62 Maine, 330; *Mussey* v. *Mussey*, 68 Maine, 346; *Keen* v. *Jordan*, 53 Maine, 146; *Berry* v. *Jordan*, 53 Maine, 402; *Curtis* v. *Downes*, 56 Maine, 25; *McCarthy* v. *Mansfield*, 56 Maine, 540; *Willard* v. *Randall*, 65 Maine, 81; *Frost* v. *Frost*, 63 Maine, 404; *Robinson* v. *Hook*, 4 Mason, 150; *Hemenway* v. *Gates*, 5 Pick. 321; *Sherwood* v. *Sutton*, 5 Mason, 143; *Bresnihan* v. *Sheehan*, 125 Mass. 13; *Blake* v. *Blake*, 64 Maine, 177; *Trowbridge* v. *Holden*, 58 Maine, 120; *Webster* v. *Webster*, 58 Maine, 139; *Junks* v. *Grover*, 57 Maine, 586.

William H. Fogler, for the defendant.

The case comes to the law court on exceptions. As the findings of the presiding justice as to the facts are final and conclusive, the office of the report of the evidence is merely to explain the exceptions.

At common law neither the plaintiff nor Fred W. Angier were competent witnesses, one being a party and the other interested.

The statutes admitting parties and interested persons to testify are in derogation of the common law and are to be strictly construed. The right of such persons to testify is not to be inferentially presumed. *Dwelley* v. *Dwelley*, 46 Maine, 377; *Kelton* v. *Hill*, 59 Maine, 261; *Berry* v. *Stevens*, 69 Maine, 291.

The statute, R. S., c. 82, § 82, removing disability of interested parties, does not apply to cases in which an administrator is a person. See *Berry* v. *Stevens*, 69 Maine, 290, 291; *Jones* v. *Simpson*, 59 Maine, 180.

Could the plaintiff testify to facts occurring before the death of the defendant's intestate? The plaintiff's intestate, if living, could not have so testified unless the defendant had first testified in relation thereto. The rule of exclusion applies to every party "adverse" to this defendant in his representative capacity, and that includes this plaintiff in his representative capacity. R. S., c. 82, § 87.

The extract from Mrs. Angier's diary and the letter of Ezekiel Whitman were inadmissible as evidence. It is no answer to our objections to the admission of this testimony that the presiding judge being a man learned in the law, may be presumed to have made his decision upon so much of the testimony as is legally admissible. Nor is it any answer that the testimony had no weight in the mind of the learned judge in the determination of the case.

His report does not show whether the evidence was considered or what weight it had. The point is here. This case was submitted "with the right to except," and it was the right of the defendant to have all inadmissible testimony excluded.

As to the finding that the bonds claimed came into Angier's hands to hold in trust for his wife. The finding of the presiding judge upon the facts is final. Whether or not the facts proved constitute a trust, is a question of law. And the finding of the judge is open to exceptions. *Kellogg* v. *Curtis*, 65 Maine, 59.

Counsel contended that the facts proved in this case did not constitute a trust.

If Angier converted the bonds or any of them fraudulently, the plaintiff can recover for such only as he proves were converted within six years prior to the death of his intestate, there being no proof of any act of concealment on his part and the plaintiff's claim not being for the fraud committed, but for the original cause of action. R. S., c. 81, § § 79, 92; *Cole* v. *McGlathry*, 9 Maine, 131; *Penobscot R. R. Co.* v. *Mayo*, 65 Maine, 566; *Wood* v. *Carpenter*, 101 U. S. 135.

APPLETON, C. J. This is an action of assumpsit for money had and received, brought under R. S., c. 66, § 13, by the plaintiff as administrator of the estate of Helen McLeod Angier,

against the defendant, administrator of the estate of Oakes Angier, to determine the claim of the plaintiff's intestate against the estate of the defendant's intestate, the claim having been disallowed in whole by the commissioners in insolvency.

The case was referred to the justice presiding, who found the following facts: That Helen M. Angier was, during the last thirty-five years of her life, the wife of Oakes Angier; that she died in May, 1879, and he about one year thereafter; that Mrs. Angier in 1863, received from her grandfather, Ezekiel Whitman, bonds of the city of Bangor and of the Atlantic and Saint Lawrence Railroad Company, of the par value of four thousand dollars, which went into the possession of her husband, to hold for her in trust, and that he in his lifetime, without her permission, converted them to his own use; that in August, 1866, Mrs. Angier received from William Willis, executor of the last will and testament of Ezekiel Whitman, six bonds of the city of Portland, of the par value of one thousand dollars each, which in like manner went into the possession of her husband, and were collected and converted to his own use, without the permission of Mrs. Angier.

Upon these findings he ruled that the statute of limitations constituted no bar to the claim, and that ten thousand dollars should be allowed against the estate of Oakes Angier.

Exceptions have been alleged, and the whole testimony has been reported. So far as relates to the effect of the testimony, if admissible, the judgment of the justice by whom the cause was heard, is conclusive. The questions to be determined have relation to the admission of evidence and his rulings in matter of law upon the same. All rulings during the progress of the trial which are not found in the exceptions are to be deemed as waived.

I. It is objected that the plaintiff, who represents Mrs. Angier, is not a competent witness. We think otherwise.

It is provided by c. 145 of the acts of 1873 that "in all cases in which an executor, administrator or other legal representative of a deceased person is a party, such party may testify to any facts legally admissible upon the general rules of evidence, happening before the death of such person; and when such person so

testifies, the adverse party shall neither be excluded nor excused from testifying in relation to such facts, and any such representative party or heir of a deceased party may testify to any facts legally admissible upon general rules of evidence, happening after the decease of the testator, intestate or ancestor; and in reference to such matters the adverse party may testify."

The language is most general. It applies in all cases when an executor, administrator or other legal representative of a deceased person is a party. The plaintiff assuredly is such. The wisdom of the statute is apparent, as without it material and important evidence necessary for the purposes of justice might otherwise be excluded.

II. Fred W. Angier, the son and heir of Mr. and Mrs. Angier, was properly admitted as a witness. The case of *Rawson, Adm'r*, v. *Knight, Adm'x*, 73 Maine, 340, is directly in point, as well as *Gunnison, Adm'r*, v. *Lane*, 45 Maine, 165. In the case first cited, both parties represented the estates of deceased persons, and it was held that an interested witness not a party, can testify in favor of one party in a suit where the other party is an administratrix.

III. To the question "What direction did your mother give?" the witness Angier answered: "She requested me to go to the bank and ask them (referring to the officers of the Belfast National Bank,) if they had any bonds pledged as collateral security for father." This is a mere statement of request, which of itself was utterly unimportant. It might, perhaps, if the inquiry had been pursued, have led to something material; but it was not.

IV. Portions of the diary of Mrs. Angier, were received *de bene*, subject to objection. They are as follows: "Received of grandpa, July 10, 1863, stock on city of Bangor, payable at Webster Bank, Boston.

"Atlantic and St Lawrence, payable on City Bank, Boston, every six months."

All that this would tend to prove was the reception of some stock, but how much is not stated. But that Mrs. Angier had received stock could hardly have been deemed a question in issue,

the evidence received without objection is so plenary on that point. No court would have set aside the verdict of a jury for such a cause. The evidence was not of the slightest importance. The same remark applies to the letter of Mr. Whitman.

Further, the evidence was only provisionally received. It was admitted *de bene*. If not forming in part the basis of his judgment, it did no harm. Whether it was considered by him, nowhere appears. If not regarded by him as evidence and constituting no ground for his decision, there is no cause for exception, for this would be tantamount to its rejection. *Bangor* v. *Brunswick*, 30 Maine, 398. The fact of the gift of the bonds was not in controversy.

V. That Mrs. Angier had certain bonds by gift from her grandfather, will hardly be disputed. That they were in the hands of her husband is not denied. Whether they were in his hands as the donee of his wife or as her agent or trustee, is the issue presented for determination. If he was her donee, there could have been no misappropriation. If he was acting for his wife and as her agent or trustee, there was a misappropriation, if without her assent or permission, he applied them or their proceeds to his own use.

Here was a question of fact. It was for the determination of the justice hearing the case. His finding as to the facts in issue, is conclusive. The evidence is ample on which it rests.

VI. The finding that there was a trust, is conclusive on the parties. There was no denial of the relation by the trustee, and no adverse possession. The finding the claim not barred, is in accordance with the decision in *Frost* v. *Frost*, 63 Maine, 399; Hale on Trustees, 264. Time does not begin to run until the trust is disavowed and the disavowal is made known to the *cestui que trust*.

Exceptions overruled.

WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.

STATE OF MAINE *vs.* INHABITANTS OF THOMASTON and ROCKLAND.

STATE OF MAINE *vs.* INHABITANTS OF THOMASTON.

STATE OF MAINE *vs.* INHABITANTS OF ROCKLAND.

Knox. Opinion December 12, 1882.

Ways between towns. Indictment. R. S., c. 18, § 41.

When the centre of a road is the divisional line between two towns, and no crosswise division has been made in pursuance of the provisions of R. S., c. 18, § 41, each town is liable for defects occuring within its limits, and is bound to repair them.

Towns so situated cannot be jointly indicted, and neither town is to be held liable for defects arising from the neglect of the other.

ON REPORT on agreed statement.

The opinion states the case.

J. O. Robinson, county attorney, for the state, submitted without argument.

D. N. Mortland, for the city of Rockland, upon the joint indictment, cited: Dillon's Municipal Corporations, vol. 1, § 184; R. S., c. 3, § § 41, 42, 43; R. S., c. 18, § § 40, 41, 42, 44, 70, 71, 72; *State* v. *Gorham*, 37 Maine, 451; *Davis* v. *Bangor*, 42 Maine, 522; *State* v. *Milo*, 32 Maine, 55; *Commonwealth* v. *North Brookfield*, 8 Pick. 463.

We contend the city of Rockland cannot be held under the special or separate indictment.

I. Because if said highway was not divided as required by R. S., c. 18, § § 41, 42, it was divided by mutual consent, which division has been acquiesced by both towns for thirty-two years, and that the bridge or portion of the road defective, has been wholly under the jurisdiction of the town of Thomaston during that time. *Chenery* v. *Waltham*, 8 Cush. 327: *Todd* v. *Rome*,

2 Green. 61; *State* v. *Wilson*, 42 Maine, 9; *State* v. *Bradbury*, 40 Maine, 154; *Rowell* v. *Montville*, 4 Maine, 270; *Gilpatrick* v. *Biddeford*, 54 Maine, 93.

II. Because the case shows that the defect, which caused the indictment, was wholly outside of the limits of the city of Rockland, and within the limits of the town of Thomaston. *Ham* v. *Sawyer*, 38 Maine, 37.

III. Because it appears that the town of Thomaston has within six years made repairs on the way or bridge, and they are estopped from denying the location. R. S., c. 18, § 66; *McCann* v. *Bangor*, 58 Maine, 348.

A. P. Gould, for the inhabitants of Thomaston, cited: R. S., c. 18, § 41; special stat. 1848, c. 131, § 5; *Ham* v. *Sawyer*, 38 Maine, 37; 2 Whart. Ev. 1334-1346; *Gilpatrick* v. *Biddeford*, 54 Maine, 93.

And counsel further contended: There having been no division of this road by the towns, or by the county commissioners as was authorized by the statute on application to them the duty to keep them in repair was joint.

There is no statute regulation touching it; but the court will look at the situation and the necessities of it. It must be one road and that road so constructed as to be safe and convenient. If each town was to build up to the line each might elect a method and you might not have a road, or a bridge, constructed of the same material, of a common level, or each half so adapted to the other as to make it safe and convenient.

This would especially apply to the construction of a bridge where a line between two towns runs in the centre of it lengthwise. The duty is imposed upon both towns to see that the bridge is constructed in a safe and convenient manner, and as it must be one bridge, the several parts upon the two sides of the line interlacing each other, it can only be constructed by a common authority. The towns must jointly participate in it, and if they fail in their duty, are liable to a joint indictment.

Admitting the duty to build the bridge and the liability upon both towns if it is not made safe, in the absence of any precedent or legal authority, the court should be governed by the obvious

necessities of the case. It would be impossible to build a bridge in any other way than by joint action, and the argument *ab inconvenienti* applies. Those liable (to repair) may be indicted. Section 40.

APPLETON, C. J. The three indictments, which are to be considered together, are for a defect in a bridge in the road, the center of which constitutes the dividing line between the towns of Thomaston and Rockland. The defect is on the Thomaston side of the center.

I. The indictment against Thomaston and Rockland for a joint neglect cannot be sustained. There is no joint liability. The limits of towns are fixed by the legislature. Each town is bound to keep the roads within its own boundaries in repair. Each is liable for its several defects, not for those of another town. Thomaston could assess no tax to repair roads in Rockland, nor could Rockland for repairing the roads of Thomaston. Neither could the surveyors of one town make repairs in the other. The liabilities and duties, the neglects and omissions, of towns are several and not joint. The fines to be imposed are to be paid by the assessments of the several town officers, not by any joint assessment to pay a joint liability.

Such are the necessary results, and they are in conformity with the authorities bearing on the subject. "In England," observes BELL, J., in *State* v. *Canterbury*, 28 N. H. 218, "if a part of a bridge is within one county and the other part in another county, each county shall repair that part of the bridge which is within it. Arch. Cr. Pl. 375; 3 Chitty Cr. Law, 595. If a difficulty should arise from this cause, it would seem to call for legislation as to the mode of building, rather than for a change of the law imposing liability." In *Com.* v. *Deerfield*, 6 Allen, 449, the defect was in the Deerfield part of the bridge. In delivering the opinion of the court, HOAR, J., remarks: "If they (defendants,) have neglected to repair a part of the road which it is their duty to maintain, it is no defence that this part would be of no practical use, because the bridge company have always been guilty of a neglect of duty. Otherwise, if a bridge

between two towns were carried away, neither of them could be compelled by indictment to restore the structure, and the public would be without remedy."

As it is obvious that there might be great inconvenience in making repairs when the line between towns is in the center of a road, provision is made for a division crosswise, by R. S., c. 18, § 41. This inconvenience was long ago recognized in England, whenever the boundaries of parishes were in the center of a highway, and the inconvenience was remedied by 34 Geo. 3, c. 60, which authorized justices to allot to each parish the portion to be repaired by it.

In 1848, the town of East Thomaston, since changed into Rockland, was set off from Thomaston. The commissioners named in the act of division to set up monuments on the line between the towns and perform other duties set forth in the act, in the return of their doings state, that "by request and desire of the selectmen of Thomaston and East Thomaston, they reviewed that portion of the public road which is divided lengthwise by the town line of Thomaston and East Thomaston, and made such division and assignment thereof to each of said towns, to be supported and maintained as in their opinion was equitable and fair;" then follows the assignment of the road crosswise, the bridge in question being assigned to Thomaston.

It is admitted that since 1848, the town of Thomaston has kept in repair that portion of the way assigned to them, which includes the bridge in question and that Rockland has kept in repair the portion assigned to them.

By R. S., c. 18, § 41, the municipal officers, "when a way is established on a line between towns," may divide the road crosswise and assign to each town its proportion, which assignment, being accepted in one year thereafter by each town at a legal meeting, "shall render such town liable in the same manner, as if the way were wholly within the town."

The division was not within the requirements of the statute. It was not made by the selectmen. It was not approved by the inhabitants of the respective towns to be thereby affected within a year.

True, the division was made at the request of the selectmen of both towns interested,— and has been acquiesced in,— but those facts without any vote of the town affirming the division, could not give jurisdiction,— and it may well be doubted if it could with.

II. No indictment can be maintained against Rockland except for defects occuring within its jurisdictional limits,—beyond, its liability for defects in a public highway ceases.

III. The defect occuring on the Thomaston side of the divisional line, it becomes the duty of that town to see to its repair. It may be inconvenient to do it. But the neglect of a town must be repaired by the town guilty of the negligence,—not by a town free from fault. Rockland cannot be liable for the neglects of Thomaston. It is for the party guilty of neglect to see to it that defects caused by its negligence be fully repaired.

IV. If there be defects on both sides of the divisional line, then each town is liable to indictment for its own neglects, and each must do what is necessary for the reparation of its own defects. In fixing the fines, the court will so apportion them that each town shall be made responsible for its own deficiencies of duty.

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

WILLIAM M. BEAN *vs.* GEORGE A. BACHELDER.

Penobscot. Opinion December 14, 1882.

Disseizin. Title by prescription. Mistake in a deed.

A disseizin by trespass is an incipient and not a completed title, and is not purged by an attempt to buy in the real title.

A mistake in a deed, by which premises different from those intended are described, does not prevent the grantee from acquiring a title to the land intended to be conveyed by prescription.

ON REPORT.

Writ of entry, dated March 15, 1881, to recover possession of lot number four, range three, in Greenfield. Plea, general issue.

The opinion states the facts.

D. F. Davis and C. A. Bailey, for the plaintiff, cited: *Rand* v. *Skillin*, 63 Maine, 103; *Small* v. *Procter*, 15 Mass. 498; *Poignard* v. *Smith*, 6 Pick. 178; *Overfield* v. *Christie*, 7 Serg. and R. 177; *Blanchard* v. *Chapman*, 7 Maine, 122; *Johnstone* v. *Scott*, 11 Mich. 232; *Patterson* v. *Stoddard*, 47 Maine, 355; *Proprietors of Kennebec Purchase* v. *Laboree*, 2 Greenl. 281; *Powers* v. *Patten*, 71 Maine, 585; *Brown* v. *Allen*, 43 Maine, 590; *Patterson* v. *Doe*, 8 Blackf. 238; *Hitchings* v. *Morrison*, 72 Maine, 331; *Ricker* v. *Hibbard*, 73 Maine, 105; *Frevall* v. *Fitch*, 5 Whart. 325; *Comstock* v. *Smith*, 13 Pick. 116; *Brewer* v. *B. and W. R. R. Co.* 5 Met. 478; *Osterhout* v. *Shoemaker*, 3 Hill, 518; *Gregory* v. *Hurrill*, 3 Bing. 251; *Right* v. *Bicknell*, 5 B. and Ad. 278; *Fenner* v. *Duplox*, 2 Bing. 10; *Rogers* v. *Pitcher*, 6 Taunt. 202; *Brook* v. *Biggs*, 2 Bing. (N. C.) 426; *Hall* v. *Butler*, 10 A. and E. 93; *Pratt* v. *Brown*, 7 A. and E. 373; *Miller* v. *Washburn*, 117 Mass. 371; *Atlanta Mills* v. *Morse*, 120 Mass. 249; *Hogan* v. *Smith*, 16 Ala. 600; Kerr on Fraud and Mistake, 436; *Harding* v. *Jewell*, 73 Maine, 426; *Savage* v. *Whitaker*, 15 Maine, 26; *Adams* v. *Stevens*, 49 Maine, 362; *Incorporated Irish Soc.* v. *Richards*, 4 Irish Eq. Rep. 197; *McManus* v. *O'Sullivan*, 48 Cal. 7.

A. W. Paine, for the defendant.

The defendant, and his wife who was a daughter of Pratt, became the owners of the mortgage from Garland to Pratt and in order to correct the error in the description in the Pratt deed which covered lot number five, they exchanged with Adams, the proprietor of lot number four, and conveyed the mortgage to him and took his deed of lot number four. This placed the parties legally on record where from the first they supposed they were, and where they had been all the time equitably. And the defendant took possession under this legal title.

Garland's occupancy was under the supposed title of Pratt, up to 1863, when Pratt died, and which Pratt, by contract July 21,

1860, agreed to convey to Garland, and did convey with mortgage back. Garland, after the mistake was discovered, still acknowledged the validity of the mortgage by making payments on it. Now here comes in the question in this case. Can title by disseizin be acquired in ignorance, or without intention, or by mistake? The question is exactly answered by that elaborately argued case, *Worcester* v. *Lord*, 56 Maine, 265, which was affirmed in *Dow* v. *McKenney*, 64 Maine, 138, and 73 Maine, 105.

"A disseizin cannot be committed by mistake, because the intention of the possessor to claim adversely is an essential ingredient in a disseizin. *Ross* v. *Gould*, 5 Greenl. 204.

There was no evidence in this case of adverse holding, no proof of an intention to hold adversely. "The party being in possession, the law will refer that possession to a rightful, rather than a wrongful title," and if his possession was adverse or other than lawful, it devolves on him to show it. *Page* v. *McGlinch*, 63 Maine, 472; *Doe* v. *Williams*, 13 E. C. L. 105.

Again, all parties supposed that the Pratt mortgage covered these premises. And there was enough of description to overcome the erroneous number of the lot. *Abbott* v. *Pike*, 33 Maine, 204; *Chesley* v. *Holmes*, 40 Maine, 536; 4 Mass. 196; 5 Met. 28; *Thornton* v. *York Bank*, 45 Maine, 158; Stearns on R. A. 41; *Colburn* v. *Mason*, 25 Maine, 434; 8 U. S. Dig. N. S. 816, § 148.

And as the mortgagor's possession is in law the possession of the mortgagee, Garland's possession for years was not adverse but in submission to Pratt. *Frye* v. *Gragg*, 35 Maine, 29; *Gray* v. *Hutchins*, 36 Maine, 142; *Simmons* v. *Nahant*, 3 Allen, 316. See *Hall* v. *Stevens*, 9 Met. 418; *Arnold* v. *Stevens*, 24 Pick. 110.

The cases of tenants making an effort to purchase the legal title, where the courts hold that such an offer shall not prejudice the possessory right of the party is not the case at bar. That is where the party had already acquired rights by possession.

Here, the original entry by Garland, was made under a purchase from LeBallister who was then under an agreement to

purchase, and it was that right which Garland bought. The distinction is plainly drawn in *Blanchard* v. *Chapman*, 7 Greenl. 122.

DANFORTH, J. This is an action to recover possession of lot numbered four in range three, in the town of Greenfield. The plaintiff claims under a deed of warranty from William T. Garland, dated November 15, 1880, under which he went into possession of the demanded premises. Garland claimed title by prescription.

The defendant claims title under a deed from S. and J. Adams, dated March 11, 1881, under which he took possession, disseizing the plaintiff. This title is traced through intervening conveyances to that of Appleton and Hill, who, it is admitted, became the owners of this and many other lots in Greenfield, one-half in 1846, and the other half in 1851. Thus the record title is in the defendant and the only question in the case, is as to the prescriptive title of Garland, the plaintiff's grantor.

It appears that more than thirty years ago, one Demmick B. Wright, went upon the lot, then wild and uncultivated, "as a squatter," cleared some of it, made improvements and after occupying three or four years, sold his interest to Joseph LeBallister. LeBallister remained in possession about six years receiving the rents and profits, accounting to no one for them and molested by no one. While in possession he made a bargain with his brother, Jeremiah LeBallister, who at one time had an interest in the lot, and probably at this time, for the purchase of the proprietor's interest and paid one hundred dollars in part for it, but got no deed. At the end of six years, LeBallister's wife acting for him, sold his rights to Garland, who entered upon the lot and whose "possession, occupation and improvement were open, notorious and comporting with the ordinary management of a farm," which he continued until his conveyance to the plaintiff. The evidence clearly shows a disseizin of the proprietors by Wright, which was continued through LeBallister to Garland. The contract of LeBallister with his brother did not purge the disseizin. Neither the possession nor his claim to possession were abandoned. True,

he acknowledged an interest in the proprietors, but an interest consistent with, and not opposed to his own rights. The contract was not for a future purchase, but was a present one for the purpose of protecting his rights and not as a waiver of them. A disseizin begun as a trespass is not a completed, but only an incipient title, and therefore there must until the end of twenty years, remain an interest in the proprietor, an acknowledgement of which can in no way affect the fact of disseizin. *Blanchard* v. *Chapman*, 7 Maine, 122.

Garland's possession was continued for a sufficient length of time to ripen into a title, but it is claimed that it cannot have that effect on account of certain transactions with Samuel Pratt.

It seems that July 21, 1860, Garland, with one Leighton, gave Pratt a written bill of sale of the grass growing on lot five, range three, in Greenfield, acknowledging that they were then occupying that lot and that it belonged to Pratt. On the same day they took from Pratt a written contract for the conveyance of the same lot, upon making the payments therein stipulated. The connection of Leighton with these papers has no significance as to the result of the case, for he appears no further, and the evidence shows that so far as he had any possession it was under Garland.

It further appears that on July 7, 1860, Pratt took a deed of lot five, range three, from Hill and others, and on May 28, 1863, in pursuance of his written agreement conveyed the same lot to Garland taking back from him a mortgage, also of the same lot, to secure an unpaid balance of the purchase money; which mortgage is so far as appears still unpaid.

It will be seen that all of these papers describes the lot as number five, range three, while the lot in question is four, range three. This as shown by the evidence is clearly a mistake. The parties intended to and supposed they did contract in relation to lot four, the land in dispute. Yet the papers and the deeds are still unreformed and while they remain so cannot convey or have any effect upon land not described. Do they then affect Garland's possession so as to qualify it and prevent his title as against the proprietors of lot four? So far as the paper contain-

ing the admission of Pratt's title is concerned, that may perhaps be properly construed as referring to the lot in question, for it describes the lot as the one occupied by Garland. It is then an admission that Pratt was at the time the owner of that lot. But as such an admission it was not true. Pratt had before that taken a conveyance of lot five, but not of four. Nor is the admission one which becomes an estoppel. If, in consequence of it he had obtained a title to four, or if by means of it Garland had obtained possession, it might have been such. But he neither obtained title to this lot nor five in consequence of it, for the first he never had and the second he had obtained two weeks before, and Garland was in possession without any assistance whatever from Pratt, for the money which he loaned him to pay LeBallister was after his possession and purchase, and was repaid by the hay.

Nor does the transaction in any degree show a change in the intention or purpose of Garland as to the nature of his possession. The possession begun in disseizin remains. He not only does not give it up but evidently intends to retain it, and permit Pratt to take the whole title, his and that of the proprietors as security. But Pratt does not get the title, and the adverse possession as against the proprietors continues. There is no yielding by Garland of his title, no acknowledgement of that of the proprietors to the exclusion of his incipient title by disseizin. There is a mistake in the deed, but there is no mistake in the lot in possession, and the intention and purpose of that possession. Thus stands Garland in relation to the proprietors. As against them his possession has ripened into a title.

But suppose no mistake had been made, Pratt under his mortgage would have taken a title as against Garland but only as mortgagee. Garland would still have had a title as against all persons except the mortgagee and those claiming under him. That title is in the plaintiff while the defendant has none. True, he did have the mortgage or a portion of it. But before he went into possession he disposed of that as the case shows, and instead took a deed from those whose title has gone by lapse of time. As the defendant did not when he took possession and does not now

hold under Pratt, he is not in privity with him and cannot avail himself of it, or of any transactions in relation to it. Were it otherwise it would work great injustice; for if the defendant should obtain possession of the land it would not discharge the mortgage and Garland would be liable on his covenants of warranty and for the mortgage debt. *McIntire* v. *Talbot*, 62 Maine, 312. See *Burr* v. *Hutchinson*, 61 Maine, 514.

Judgment for plaintiff.

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

JOSHUA TRASK, petitioner for review,

vs.

INHABITANTS OF UNITY.

Waldo. Opinion December 18, 1882.

Review. Second petition.

After the lapse of eight years from the time of the commencement of an action, after two verdicts adverse to the petitioner, and after one review had on account of the discovery of new testimony, a second review will not be granted unless the court is fully satisfied that the alleged newly discovered evidence was unattainable by the utmost diligence and that it would change the result.

It will not be granted to enable a party to discredit a witness, nor when the evidence is collateral.

ON report of the evidence upon a second petition for review.

The opinion states the case.

S. S. Brown, for the petitioner.

Thompson and Dunton, for the respondents.

APPLETON, C. J. This is a second petition for a review on the ground of newly discovered evidence, and after two verdicts against the petitioner.

On the seventh day of January, 1870, the plaintiff, while passing over a highway in the defendant town, was injured as he alleges, by a defect in the same. He thereupon brought an action to recover compensation for the injuries then sustained. The cause was tried at the January term, 1873, and a verdict was rendered for the defendants. At the January term, 1877, he filed a petition for a review of the action on the ground of the discovery of new and important testimony. The petition was granted and a review ordered. The cause was tried at the January term, 1878, and a second adverse verdict was rendered against the petitioner.

At the January term, 1880, having been fortunate in the second discovery of new and important testimony, as he thinks, the petitioner files the present petition, which by the statute, is to be heard and determined by the "full court." R. S. c. 89, § 6.

No exceptions appear to have been taken to the rulings of the justice presiding at the trials already had nor any motions made to set aside the verdicts as against law or evidence.

It may be assumed that the rulings were correct law, and the verdicts in accordance with the evidence, else the petitioner with his vigilant pertinacity would have filed his exceptions to the former or his motion to set aside the latter. If exceptions were alleged and motions filed and overruled, the correctness of the rulings and the propriety of the verdict would rest not on presumptions but on the deliberate judgment of the court.

Courts are reluctant to grant a new trial for the discovery of new testimony after one trial, — much more after two. They require vigilance on the part of those in litigation, in discovering and procuring material and important testimony. A new trial will not be granted for evidence newly discovered when the evidence was known to the party and by reasonable diligence it might have been procured. *Woodis* v. *Jordan*, 62 Maine, 490; *Gardner* v. *Gardner*, 2 Gray, 434. Nor unless there be reason to believe that it will change the result. *Handly* v. *Call*, 30 Maine, 9; *Snowman* v. *Wardwell*, 32 Maine, 275; *Todd* v.

Chipman, 62 Maine, 189. Nor when the evidence is collateral. *State* v. *Carr*, 21 N. H. 166. Nor when it is merely to discredit a witness. *Haskell* v. *Becket*, 3 Greenl. 93; *State* v. *Carr*, 21 N. H. 166. Nor by the common law when the evidence is merely cumulative, though it is otherwise by the statute. R. S., c. 89, § 4.

The newly discovered evidence on account of which a new trial is claimed, relates to the condition of the road; the injury the plaintiff sustained and his antecedent health; the fact of notice to the defendants of the dangerous condition of the road, and warnings of the danger of attempting to pass over it,—and an impeachment of some of the defendants' witnesses.

I. As to the dangerous condition of the road there is little dispute. No new facts are offered. The new evidence offered might have been obtained before, if deemed of importance, by the slightest diligence.

II. The petitioner, at the trials in 1873 and 1880, must have known of the previous condition of his health as well as of the consequences resulting from his alleged injuries. He could not at the second trial have been surprised as to the testimony of the defendants on these points, inasmuch as it is not pretended that it varied from that delivered in the first.

III. The petitioner alleges in his writ that the highway over which he was passing, was overflowed with water and ice to the depth of two feet or more, and for the distance of forty or fifty feet; that he had no knowledge of the condition of the way; that it was extremely cold; that he drove along to about midway of the ice and water, when his horse was forced to stop and could go no further; that he was obliged to leave his horse, and passing through the water and ice, to go a mile for help and return wet, with his clothing frozen to the middle, &c. in consequence of which he suffered in health, &c.

The principal ground of defense, was that the petitioner had full knowledge of the dangerous condition of the road, arising from previous rains; that he stopped at Vickery's store in Unity, between eight and nine o'clock, in the evening of the accident; that he was there told the road was overflowed; that he could

not get over; that it was not safe to go by the foot of the pond; that he could go by the head of the pond, where the distance would have been greater, but the road safe; that he replied he had travelled at all hours of night and day, and that he would risk but what he could pass safely.

These facts were proved by six witnesses: Fogg, Bagley, Harmon, Bartlett and the two Vickerys. This testimony was no surprise to the petitioner. It had been given before. It was contradicted by him, he testifying that he did not call at Vickery's and had no such conversation. But his testimony was not newly discovered.

To disprove the statements of the defendants' witnesses, he called witnesses who testify that they saw him at Freedom post office at half past eight, and that from the distance, he could not have been at Vickery's at the time stated by defendants' evidence. But nothing is so uncertain as testimony, as to a particular hour of a particular day, when there is no interest to remember it; and the attention of the witnesses is not called to the matter till ten or twelve years after. The difference of an hour in the statements of witnesses, is not a grave contradiction. It is reasonably explainable. Further, if the new witnesses saw the petitioner, he must have seen them, and it was his negligence that they were not called.

IV. Two of defendants' witnesses are proved to have made statements to the effect that Stevens said that he "swore to a damned lie," and Newman Vickery said he did "not know a damned thing about the case," &c. But these witnesses swear they never made such statements. It is hardly credible that they would voluntarily admit they had committed perjury.

There is much of the new proof offered, which relates merely to collateral points. Evidence newly discovered after ten years' search, is liable to grave suspicions. Courts should be strict in their requirements when new trials are sought for such cause. When the cause was tried in 1878, the petitioner had had eight years to seek out existing testimony. "In deciding motions for new trials on account of newly discovered evidence," remarks EASTMAN, J., in *State* v. *Carr*, 21 N. H. 166, "courts have

found it necessary to apply somewhat stringent rules, to prevent the endless mischief which a different course would produce. Careless preparation, tampering with witnesses, repeated and fruitless trials, and immense expense in litigation, would be a few of the many evils attendant upon a loose practice in this respect." There must be an end of litigation, and we know of no fitter time to put a final end to this than the present.

Petition denied. Costs for the defendants.

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

LAWRENCE HANLEY *vs.* WILLIAM J. SUTHERLAND and others.

Piscataquis. Opinion December 18, 1882.

Practice.

When judgment is rendered for the plaintiff on demurrer, the defendant has no right to have damages assessed by a jury.

ON exceptions taken to the ruling of the presiding justice at the September term, 1882, and certified to the law court under the provisions of R. S., c. 77, § 21.

The opinion states the case.

Henry Hudson, for the plaintiff, submitted without argument.

D. L. Savage, for the defendants.

APPLETON, C. J. This action was entered September, 1878. It remained on the docket, being continued from term to term. At the September term, 1880, a motion to dismiss was filed and overruled. At the September term, 1881, a motion to dismiss was again filed and overruled. The defendants then demurred.

The declaration was adjudged good, and exceptions were filed. The exceptions were overruled by the law court and judgment rendered for the plaintiff. This judgment is final.

The defendants now claim the right to have the damages assessed by the jury.

In the English practice, in case of a default, a writ of inquiry is directed to the sheriff commanding him "by the oaths of twelve honest and lawful men, to inquire into the (said) damages and return such inquisition into court." In *Bruce* v. *Rawlins*, 3 Wils. 62, which was trespass, referring to the subject, WILMOT, C. J., says: "This is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages." The damages on default, with the plaintiff's assent, may be taxed by the court. "But if the plaintiff will not assent to it he shall have a writ of inquiry of damages on occasion of the detention of the defendant, if he will; but it is in the election of the plaintiff and not of the defendant." *Holdipp* v. *Otway*, 2 Saund. 102. The election is with the plaintiff. *Blackmore* v. *Flemyng*, 7 T. R. 446.

In this state it has been repeatedly held that in case of default damages may be assessed by the court or by the jury, and that the option as to the mode of assessment was with the plaintiff and not the defendant. *Begg* v. *Whittier*, 48 Maine, 315; *Cummings* v. *Smith*, 50 Maine, 568; *Wood* v. *Leach*, 69 Maine, 560. The court, too, may appoint a master to assess damages, as is done in England by one of the officers of the court when a jury is not required. *Price* v. *Dearborn*, 34 N. H. 481; *Crommett* v. *Pearson*, 18 Maine, 345.

It was held in *Raymond* v. *D. and N. R. Co.* 14 Blachf. C. C. Rep. 133, where the defendant in a tort suffers a default, that the plaintiff has no constitutional right to have his damages assessed by a jury; and that the assessment of damages upon a default, either on contract or tort, stands upon a different footing from the trial of issues of fact. The assessment of damages by a jury, when done, is as a matter of practice rather than of right.

But in the present case, final judgment was rendered in favor of the plaintiff. All that remains is to determine the amount. The right of the plaintiff to recover is fixed. The cause of action is admitted, but not the amount of damages. The defendants' position is the same as if a default had been entered, and damages may be assessed in the same manner. *Frye* v. *Hinckley*, 18 Maine, 323. "The damages may be assessed," remarks WESTON, C. J., in the case last cited, "by the court as upon default, or when a plea is adjudged bad upon demurrer, or that question may be put to another jury." Damages, when judgment is rendered for the plaintiff, is to be assessed in the same manner as in case of default.

The defendants had no right to be heard by a jury. That right was waived. They have a right to be heard in the assessment of damages, and when the assessment is in court or by a jury, to except to any error in the admission of testimony, or the rules by which they are assessed.

Exceptions overruled.

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

JOSIAH TILTON *vs.* JAMES WRIGHT.

Somerset. Opinion August 2, 1882.

Attorney at law, liability for fees of officer and clerk. Evidence. Practice.

An attorney at law is liable to the officer for his fees for the service of writs delivered by him to such officer, although he is neither the plaintiff nor a party in interest; likewise to the clerk of courts for his fees on writs delivered by him to such clerk for entry. And neither the officer nor the clerk is required to perform the services without a prepayment of their respective fees.

In an action by an officer for fees, if the plaintiff's bill of particulars does not inform the defendant of what items his fees are composed, the court upon motion, will order a more specific statement thereof.

In such an action, if no notice has been given the defendant under rule twenty-seven of this court to produce his docket, comment upon its non-production before the jury will not be allowed in argument.

ON EXCEPTIONS.

Assumpsit on account annexed for fees as sheriff for the service of writs and other processes, received from the defendant, an attorney at law, amounting to one hundred eighty-eight dollars and fifty cents. The writ also contained a count for money had and received, and was dated September 5, 1881. The jury returned a verdict for seventy-two dollars and ninety-three cents; and the defendant alleged exceptions, which are sufficiently stated in the opinion.

Folsom and Merrill, for the plaintiff, cited: *Tarbell* v. *Dickinson*, 3 Cush. 351; *Perkins* v. *McDuffee*, 63 Maine, 182; 43 N. H. 270; *Adams* v. *Hopkins*, 5 Johns. 253; *Ousterhout* v. *Day*, 9 Johns. 114.

James Wright, for the defendant, cited: *Whitford* v. *Tutin*, 10 Bingham, 395; *Molton* v. *Harris*, 2 Esp. 549; *Hackett* v. *King*, 6 Allen, 58; *Greely* v. *Quimby*, 22 N. H. 335; 39 N. H. 268; 1 Greenl. Evidence, (11 ed.) § § 86, 87, 88; *Harris* v. *Whitcomb*, 4 Gray, 433; *Belchertown* v. *Dudley*, 6 Allen, 477; *Hobart* v. *County of Plymouth*, 100 Mass. 166; *Reynolds* v. *Brown*, 15 Barb. 226; *Thornton* v. *Moody*, 11 Maine, 253: *Wilson* v. *Hobbs*, 32 Maine, 85; 2 Denio, 26, 40; R. S., c. 80, § 19; c. 116, § 5; c. 122, § 22; Smith's Leading Cases, part 2, 358; *Judson* v. *Gray*, 11 N. Y. 408; *Jenney* v. *Delesdernier*, 20 Maine, 183; *Ducett* v. *Cunningham*, 39 Maine, 386; *White* v. *Johnson*, 67 Maine, 287; *Teele* v. *Otis*, 66 Maine, 329; 2 Pars. Contr. (5 ed.) 543; *Sawtelle* v. *Drew*, 122 Mass. 228; *Collins* v. *New Eng. Iron Co.* 115 Mass. 25; *Dodge* v. *Favor*, 15 Gray, 82; *Hinton* v. *Locke*, 5 Hill, 437; 14 Johnson, 316; 10 Wallace, 383; 10 Mass. 29; *Haskins* v. *Warren*, 115 Mass. 514; *Randall et al.* v. *Smith*, 63 Maine, 105; 27 Rule of this Court; *Emerson* v. *Fish et al.* 6 Maine, 200.

APPLETON, C. J. This is an action of assumpsit to recover fees due for the service of writs made by the defendant, and by him delivered to the plaintiff for service.

To the rulings of the justice presiding at *nisi prius*, various exceptions have been alleged.

I. It is insisted by the defendant, that as an attorney he was only responsible for the fees on writs handed an officer for service in suits where he was the plaintiff or the party in interest.

Writs are usually handed to the sheriff for service and to the clerk of courts for entry, by the attorney by whom they were made. The attorney has a lien on the judgment recovered, for his fees and disbursements included in the taxable bill of costs, which embraces both the service of the writ and the entry of the action. The attorney having such lien, hands the writ for service to the sheriff or to the clerk for entry. Neither the one nor the other is obliged to perform the services required, without a prepayment of their respective fees. The sheriff serving, and the clerk entering the action without prepayment, a promise on the part of the attorney to pay each their respective dues, may be reasonably inferred, unless notice to the contrary be seasonably given.

Accordingly, it has been repeatedly held, that the attorney is responsible to the sheriff and the clerk for the fees of writs handed by him to the one for service, and to the other for entry. In *Tarbell* v. *Dickinson*, 3 Cush. 345, it was held that an attorney, who employs an officer to serve a writ, and gives him directions therefor, is responsible for the officer's fees for such service. In *Towle* v. *Hatch*, 43 N. H. 270, it was decided, when writs of mesne or final process are committed to the sheriff for service, by the attorney who sues them out, that a promise by such attorney will ordinarily be implied unless repelled by the proof; but it is otherwise, when the writs are not so delivered by him, although he may have indorsed them. In 2 Gall, 101, an attachment was issued against an attorney, on the motion of the marshal, to compel the payment of his fees for the service of sundry writs, brought by an inhabitant of another state, but indorsed by such attorney. "We are satisfied," remarks STORY, J., "that an attach-

ment may issue to compel the payment of the fees due to the officers of the court for the performance of their official duties."

In *Adams* v. *Hopkins*, 5 Johns. 253, and in *Ousterhout* v. *Day*, 9 John. 114, it was decided that the attorney was liable to the sheriff for his fees. In *The Trustees of Watertown* v. *Cowen*, 5 Paige, 510, WALWORTH, C. J., says, that it has "been the uniform practice" in that state "for the sheriffs, clerks, masters, registers and other officers of the several courts of record, to charge their fees to the attorney or solicitor of the party, for whose benefit the service was performed; . . from the uniform practice on this subject, there is an implied assumpsit by the attorney or solicitor, to pay for services done for his client in the cause, by his express or implied request." In *Judson* v. *Gray*, 1 Kernan, 408, where it was attempted to hold an attorney for the fees of a referee, SELDEN, J., vigorously controverted the extensive liability of an attorney, as set forth by WALWORTH, C. J., in the case last cited. In the conclusion of his opinion, he expressly states that he does not intend to interfere with the doctrine advanced in the case of *Adams* v. *Hopkins*, above cited, where the liability of the attorney to the sheriff was fully recognized.

The attorney is the immediate employer of the sheriff, who cannot be expected to know the parties or their responsibility. There is no more reason for sending the sheriff to the party for his fees, than there is for sending the clerk to the party for his fees, as they may arise in the progress of the cause. They both stand on the same footing.

II. The defendant had a right to have an express statement of the items of the officer's charge for service, travel or expenses paid in the service of the writs in question. Without such information, he could not know what was a legal charge and what was not. If the bill of particulars failed to afford the needed information, he might ask for a specific statement, which on motion, the court would order. No such motion was made. The defendant might be satisfied with the fees as aggregated. The court ruled the items sufficient, no exceptions having been seasonably taken to their sufficiency.

III. By the twenty-seventh rule of court, 72 Maine, 576, "when 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 be 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."

No notice was given to the defendant to produce his docket or the writs served by plaintiff, yet the plaintiff was permitted to comment on their non production, notwithstanding the protests of the defendant. The docket of the defendant was not evidence admissible on his part. It was not called for by the plaintiff. Its non production could only be a matter of comment, when, upon notice to produce it, the defendant refused. *Emerson* v. *Fish*, 6 Maine, 200. Notice to produce, would not make the book evidence, but inspection of it would. *Penobscot Boom* v. *Lamson*, 16 Maine, 224. The docket not being evidence, its non production was not the proper subject of comment.

Exceptions sustained.

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

MARK ROLLINS, county treasurer, *vs.* LEVI LASHUS.

Kennebec. Opinion December 19, 1882.

Promissory notes. Intoxicating liquors. R. S., c. 135, § 12; c. 82, § 13; c. 27, § 29.

A note given in pursuance of the provisions of R. S., c. 135 § 12, payable to D P, treasurer of the county of K, may, under R. S., c. 82, § 13, be enforced by suit in the name of his successor though not expressly made payable to the successors of the payee.

Revised Statutes, c. 27 § 29, is not to be so construed as to inflict both fine and imprisonment of sixty days.

L was convicted of being a common seller of intoxicating liquor and was sentenced to pay a fine of one hundred dollars and costs, "and in default of

payment to stand committed according to law." *Held*, That when he had undergone sixty days imprisonment his note to the county treasurer for the amount of his fine and costs, if voluntarily given is without consideration, and if required as a condition of his release is void for duress.

ON REPORT on agreed statement.

The opinion states the case.

Herbert M. Heath, county attorney, for the plaintiff, submitted without argument.

F. A. Waldron, for the defendant.

BARROWS, J. The agreed statement upon which this case is presented, shows the following facts. The defendant was convicted of being a common seller of intoxicating liquors, at the March term of the Supreme Judicial Court in 1871, and on the first day of the following August term, (which by the record appears to have been the first day of said August,) was sentenced to pay a fine of one hundred dollars, and costs taxed at fifty-three dollars and forty-three cents, and in default of payment was committed to the county jail, from whence he was discharged on the twenty-ninth of September following, upon giving the note in suit.

The plaintiff is the successor in office of Daniel Pike, who was county treasurer when the note was given. One of the objections to the maintenance of the action suggested in argument by the defendant, is that the note not being expressly made payable to Pike's successors in office, the plaintiff is not the proper party. This objection is not tenable. R. S., c. 82, § 13. But there is another which we think is fatal to the suit. The mittimus shows that defendant was sentenced to pay the fine and cost, and "in default of payment to stand committed according to law." The law thus referred to, is R. S., c. 27, § 29, which orders that the offender "shall be punished by fine of one hundred dollars and costs of prosecution, and in default of the payment thereof he shall be imprisoned sixty days in the county jail," which punishment, according to the agreed statement, defendant seems to have undergone. This term of imprisonment was apparently regarded by the law makers as the proper alternative in case of

the non-payment of the fine. We do not think the provision can rightly be construed so as to subject the defendant to both punishments. It is notably different in its tenor from the provisions in § 28 of the same chapter, where special reference is made to R. S., c. 135, § 12, which provides for and regulates the taking of the notes of poor convicts for fines and costs.

It follows that if defendant gave the note in suit voluntarily, it is invalid for want of consideration. If compelled to do it in order to obtain his release at the end of sixty days' imprisonment, it is void for duress,—in either case not collectible. It is said in the agreed statement, that "the note declared on is claimed to have been given under § 12 of c. 135 of the R. S." But, under the provisions of that section, the defendant, if he had not been detained by an alternative sentence for a longer period, would seem to have been entitled to be liberated by the sheriff after thirty days from his commitment, upon giving his note, &c. The case does not show that the note was given under that section.

The foregoing view being decisive as to the result, it is not necessary to consider the other points made by defendant.

Plaintiff nonsuit.

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

STATE OF MAINE *vs.* GILBERT M. DAY.

Knox. Opinion December 19, 1882.

Indictment. Pleading.

An indictment alleging that a charter election was duly held in a certain ward in Rockland on the seventh of March, 1881, "and duly continued until and including the tenth of March aforesaid," and charging that D did then and there

knowingly, illegally "vote at the said election," without otherwise designating the day on which the offence was alleged to be committed, is bad.

ON EXCEPTIONS.

The opinion states the case.

H. B. Cleaves, attorney general, for the state.

C. E. Littlefield, for the defendant.

BARROWS, J. On demurrer. The indictment alleges that "a meeting of the inhabitants qualified to vote, of ward one in Rockland in the county of Knox, for the election of one alderman and three common councilmen, on the seventh day of March in the year of our Lord one thousand eight hundred and eighty-one, was then and there duly holden, *and was then and there duly continued until and including the tenth day of March aforesaid*," and "that Gilbert M. Day of Rockland in the said county of Knox, well knowing himself then and there not to be a qualified voter in said Rockland then and there where he had no legal right to vote, did vote at the said election for the officers aforesaid against the peace," &c. The indictment is fatally defective in not alleging with precision the day upon which the state claims that the offence was committed. It is essential that the time of the alleged commission of an offence should be stated in the indictment or complaint with precision and certainty. *State* v. *Baker*, 34 Maine, 52; *Commonwealth* v. *Adams*, 1 Gray, 483.

The word "then" by which alone, or in conjunction with the words "at said election," it is attempted to fix the time in this indictment, may refer to either of the four days from the seventh to the tenth of March, inclusive, upon which it is alleged that the meeting for the election was duly held. The allegation as to time is quite as uncertain as that in *State* v. *Baker*, *supra*.

The necessity of precision in the allegations as to time and place in criminal proceedings is recognized also in *State* v. *Thurstin*, 35 Maine, 206; *State* v. *Jackson*, 39 Maine, 296; (citing 3 Missouri, 61,) and *State* v. *Hurley*, 71 Maine, 355.

The authorities first above cited, however, and those referred to in them, will suffice to establish it as a fixed rule of criminal pleading, that "no indictment whatsoever can be good without

precisely showing a certain year and day of the material facts alleged in it."

This may be important to the defendant, as he might be able to show an *alibi*, or otherwise impeach the testimony in support of the prosecution, as to one day and not as to another; and when the precise day is alleged with certainty, if the government testimony varies from it, it is always regarded as a ground for postponing the trial, if the defence is thereby embarrassed or taken at a disadvantage. But if looseness in the allegation were permitted, he would be required to meet any testimony which might be offered under it, however much he might be surprised in the important particulars of time and place. By the laws respecting the charter election, it appears that different ballotings on different days may have been had "at said election." The defendant was entitled to have the day specified in the indictment.

Exceptions and demurrer sustained.
Indictment quashed.

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

WARREN BROOKINGS *vs.* GEORGE WOODIN.

Sagadahoc. Opinion December 20, 1882.

Tax-deed. Trespass. Possession.

Where a tax deed states that the whole lot upon which the tax was assessed was sold, and does not state that it was necessary to sell the whole to pay the taxes, the deed is void.

Possession of real estate shows a *prima facie* title. It is valid as to everybody but the legal owner.

A person entering real estate under the license or permission of a party in possession, is not a disseizor and cannot be treated as such.

ON EXCEPTIONS and motion to set aside the verdict.

Trespass. The writ was dated June 11, 1879. The verdict of the jury was for the plaintiff for four hundred four dollars and seventeen cents.

The opinion states the facts.

W. Gilbert, for the plaintiff.

Henry Tallman, for the defendant.

The plaintiff has been disseized, and a disseizee cannot maintain trespass for a wrong done after the disseizin and before re-entry. *Murray* v. *Fitchburg R. R. Co.* 130 Mass. 99.

In the case of *Kennebeck Purchase* v. *Call*, 1 Mass. 487, it is said that even nominal damages cannot be recovered against a person whose possession is open, notorious and exclusive, in an action of trespass. See *Brown* v. *Ware*, 25 Maine, 411.

In this case, the possession of this defendant was open, notorious and exclusive; and more than that the only claim of the plaintiff to the property is by possession, and when he lost that, there was and is no foundation to rest an action on.

APPLETON, C. J. This is an action of trespass, for breaking and entering the plaintiff's close, and tearing down his dwelling house. The destruction of the house by the defendant is admitted.

The case comes before us on exceptions and a motion for a new trial.

The plaintiff produces no title deed, but proves a continued possession of the premises for about seventeen years. Possession shows a *prima facie* title. It is enough against one having none. It is good as to every body but the legal owner.

The defendant claims under a deed from one having tax titles to the premises, by whom the possession of the same was delivered to him, by virtue of an agreement with the plaintiff, and with his consent.

In both the deeds, under which the defendant claims title, it appears that the whole lot was sold, and it nowhere appears that it was necessary to sell the whole, to pay the tax for which the land was sold. The highest bidder, means one who will pay the tax for the least quantity of land. The necessity of the sale of

the whole is nowhere shown. The deeds are both void on their face, the sale being illegal. *Lovejoy* v. *Lunt*, 48 Maine, 377; *Allen* v. *Morse*, 72 Maine, 502. The jury were so instructed, and properly.

The defendant requested the court to instruct the jury, that "as the plaintiff claimed no title, but only possession by his tenants, if Mr. Wiggin, having a tax title, whether legal or otherwise, entered into possession of the premises, and being so in possession, conveyed the premises for a valuable consideration to the defendant by a quitclaim deed and gave him possession of the premises, directing the tenants to pay rent to him (the defendant,) that the plaintiff cannot recover in this action."

This request was refused, and rightly. If the tax title was void, it gave no right to enter. It gave neither seizin nor title to the premises. *Wallingford* v. *Fiske*, 24 Maine, 387. The holder of the tax title, by entering on the premises, was a trespasser, and so was the defendant, who entered with and under him. They were both trespassers and nothing else.

It was claimed in defence, that an agreement, which is lost, was made between Wiggin, the owner of the tax title, and the plaintiff, by which, if the taxes were not paid within a specified time, subsequently extended, that he (Wiggin,) might enter and take possession and control of the premises. The contents of this agreement were in dispute. The presiding justice left it to the jury to determine what its terms were, and gave instructions accordingly. This was all he could do, and of this no complaint can be made.

The instruction given in substance was, that the vital questions were what were the terms of the paper which Brookings gave to Wiggin, and was Woodin in actual possession of the premises at the date of the alleged trespass, in accordance with the terms of the paper which Brookings gave Wiggin, and if he was, the action was not maintainable.

The defendant cannot complain of the instructions given in relation to the lost agreement, however it might be with the plaintiff. The defendant was to be discharged if he was there

under a license given Wiggin, and this though the tax title was utterly void and no better than waste paper.

No question as to disseizin arises. The defence is that the entry was by the license or permission of the plaintiff. But a person entering under the license or permission of a party in possession is not a disseizor, and cannot be treated as such. The defendant's story, if true, established a defence, but the jury negatived its correctness.

The value of the building was properly submitted to the jury, and though their verdict may be more than we might have allowed, the parties must abide by the judgment of the tribunal appointed to determine its value. The evidence was very contradictory, and no sufficient reason is shown for disturbing the verdict.

Motion and exceptions overruled.

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

JOSEPH NOBLE *vs.* CHARLES MILLIKEN.

Kennebec. Opinion December 20, 1882.

Husband and wife. Innkeeper. Personal baggage. Money. Stat. 1874, chapter 174.

A trunk containing property belonging, some of it to the husband and some of it to the wife, was broken open after it had been delivered to the servants of an innkeeper, and jewelry belonging to the wife, and gloves of the value of six dollars and forty dollars in money belonging to the husband, were stolen. In traveling, the husband looked after the baggage, receiving and holding the checks therefor. *Held*, —

1. That an action could not be maintained against the innkeeper by the husband alone for the value of the jewelry belonging to the wife.

2. That an action could be maintained by the husband against the innkeeper for the value of the gloves and the money.

Where the amount of money taken for a journey is no more than is reasonably prudent for the payment of expenses, including liabilities to accident, delays and sickness, it is exempted from the provisions of stat. 1874, c. 174, and may properly be carried as baggage, for the loss of which an innholder would be liable after delivery to him.

ON REPORT from the superior court.

An action to recover one hundred sixty-three dollars, for the value of jewelry belonging to plaintiff's wife, and six dollars for the value of gloves belonging to plaintiff and forty dollars in money belonging to the plaintiff, lost by them under the circumstances stated in the opinion.

The money consisted of four English sovereigns (gold), of the value of twenty dollars; one American half eagle (gold), of the value of five dollars; one Napoleon (twenty francs, gold), of the value of four dollars; one silver dollar and one ten dollar bill.

Other material facts are stated in the opinion.

By the terms of the report, the law court were to draw inferences as a jury might, and render such decision in the case as the law and the evidence required.

S. and L. Titcomb, for the plaintiff.

The trunk and contents were in the possession, and under the sole control of the plaintiff, and for all purposes of this suit he was the legal owner thereof, when he delivered the evidence of his ownership, to wit, the check, and property represented thereby, to the defendant's servant.

Counsel cited: 2 Kent's Com. 593; Story, Bail. § § 479, 471, 480, 499 and note; *Norcross* v. *Norcross*, 53 Maine, 170; *Mason* v. *Thompson*, 9 Pick. 284; 2 Hilliard, Torts, 529, 533; *Hulett et al.* v. *Swift*, 33 N. Y. 571; *Hotchkiss* v. *Platt*, 15 N. Y. Supreme Court, 46; *Berkshire Woollen Co.* v. *Proctor, et al.* 7 Cush. 426; Parsons, Laws of Business, 290; *Taylor* v. *Monnot*, 4 Duer, 116; 2 Redfield, Railways, 153; *Johnson* v. *Stone*, 11 Humph. 419; *Kent* v. *Shuckard*, 2 B. and Ad. 803; *Doyle* v. *Kiser*, 6 Porter, (Ind.) 242; Newberry's Admiralt. 494; *Pope* v. *Hall*, 14 La. Ann. R. 324; *Jones* v. *Voorhees*, 10 Ohio, 145; Webster's Dic. "Baggage"; *Collins* v. *B. and M. R. R.* 10 Cush. 507; *Jordan* v. *Fall River R. R.* 5 Cush.

69; *Maltley* v. *Chapman*, 25 Md. 310; *Stanton* v. *Leland*, 4 E. D. Smith's (N. Y.), 88; *Johnson* v. *Richardson*, 17 Ill. 302; *Rosenplaenter* v. *Roessle*, 54 N. Y. 262; *Ramaley* v. *Leland*, 43 N. Y. 539; *Roessle* v. *Earle*, 44 N. Y. 172; 7 American Decisions, 454; *Sasseen* v. *Clark*, 37 Ga. 242.

G. C. Vose, for the defendant.

That the defendant was an innholder, the plaintiff a guest, and the trunk lost and subsequently found, is not controverted.

Chapter 174, of the public laws of 1874, radically changes the common law rule, and provides as follows:

"Innholders shall not be liable for losses sustained by their guests, except wearing apparel, articles worn or carried upon the person, to a reasonable amount, personal baggage, and money necessary for traveling expenses and personal use, unless upon delivery, or offer of delivery, by such guests, of their money, jewelry or other property, to the innholder, his agents, or servants, for safe custody."

The burden is in all cases on the plaintiff to make out his case; especially is this so in a case like that under discussion (when so far as value of property is concerned) the innholder seems to be left entirely to the mercy of his guest. Any claim of loss may be made, and from the very nature of the case, the defendant can by no possibility know whether the articles claimed to be lost, were or not in the guest's trunk.

These coins are mostly foreign, and as appears from the testimony of the plaintiff, had been in his possession some four years; that "they were kept, thinking I might use them, and if I went back to Europe I might use them there." "I got them in London and during this time have kept them in my wife's trunk."

The proposition that a landlord is responsible for the loss of property, which for safe keeping is deposited in a trunk and carried about the country, is too absurd to require refutation.

As to the loss of property belonging to the wife, counsel cited *Green* v. *North Yarmouth*, 58 Maine, 55.

We claim therefore, that no wearing apparel is proved to have been lost; that the coins not having been delivered to the defend-

ant, were held at the risk of the owner, and that all other property claimed as lost, was the property of Mrs. Noble, and that no action can be maintained therefor by this plaintiff.

DANFORTH, J. On the tenth day of September, 1880, the defendant was an innkeeper in the city of Augusta. At that time the plaintiff with his wife and children were received as guests at the defendant's house. After their arrival, but before their baggage was carried into the house, one trunk was taken from the sidewalk, and when found a portion of its contents were missing, and have never been recovered. This action was brought to recover their value.

No objection is made to the maintenance of the action on the ground that the baggage had not been sufficiently delivered to the defendant or his servants. The articles lost consisted mainly of gloves, jewelry, and money. The jewelry is conceded to have been the property of the wife. The parties at that time resided in this State. In *Green* v. *North Yarmouth*, 58 Maine, 54, it was held that the husband could not alone maintain an action for an injury to his wife's personal property, though at the time he may have the exclusive possession and full control of it. There is less ground upon which to support this action for the jewelry, for the husband had neither possession nor control of it. What he did in relation to it was but an act of courtesy, while in reality the property was in the wife's custody, for her use, and subject to her direction. There are cases where persons are entrusted with property by the owner for a special purpose, as to perform some service upon or in relation to it, as in the case of common carriers, so as to give them a special ownership in it. In such cases, undoubtedly, the bailee may maintain an action for an injury to, or for the loss of it. But in this case, the husband had neither general nor special property in the jewelry, nor any interest in it such as would enable him to support an action for it.

The coin and gloves claimed, did belong to the plaintiff. It is, however, contended that the gloves were not lost. Both the plaintiff and his wife testify that they were. The only evidence

in conflict with this, is the statement of the same witnesses made on examining the contents of the trunk after its return, that no clothing was missing. This statement was not such as would estop them from asserting the truth, if, on refreshing their recollection and upon further examination they found they were in error, and under the circumstances of the case, the latter positive statement is entitled to greater weight than the former negative one. Hence the preponderance of evidence is clearly in favor of the loss.

It is further claimed, that the coin was not "personal baggage, or money necessary for traveling expenses and personal use," and should have been especially delivered to the innholder or his servants as required by c. 174, of the acts of 1874, otherwise no liability would attach.

There appears to be nothing peculiar about this coin which would render it especially valuable for keeping, for purposes other than money. The testimony of the plaintiff "that it was kept thinking I might use it, and if I went back to Europe, I might use it there," leads inevitably to the conclusion that it was to be used as money, and taken upon this journey, to be used as a last resource in case of need, for the payment of expenses when other resources should fail.

The ten dollar bill is claimed to have belonged to the wife. True, it was given to her by the husband, not absolutely, but for her use and that of the children, or "to be given back as occasion might require." It was therefore given in trust to pay bills for which the husband would be liable, and if lost, the loss would be his rather than that of the wife or children.

The statute referred to, does in certain cases, relieve innholders from their common law liability, unless the property is specially delivered to the innkeeper or his servants. But from its operation, among other things, "personal baggage, and money necessary for traveling expenses and personal use" are excepted. Such necessary amount of money is classed as personal baggage and may be carried as such baggage. *Dunlap* v. *Steamboat Company*, 98 Mass. 371. For such money, the liability of the innholder is the same as before the statute. The word "neces-

sary" in this connection, is not to be construed in its restricted meaning, but rather as indicating an amount of money, which a man of common prudence would deem it proper to take for such a journey, including the ordinary expenses, as well as the liabilities on account of sickness, accidents and necessary delays. *Merrill* v. *Grinnell*, 30 N. Y. 594.

That the amount of money taken in this case, was no more than reasonable prudence would dictate is sufficiently shown by the fact that in consequence of the loss, the plaintiff found it necessary to borrow before reaching his journey's end.

The result is, the plaintiff is entitled to recover for the gloves and money, the sum of forty-six dollars, to which should be added a sum equal to the interest on that amount from the tenth day of September, 1880, to the time when judgment is rendered.

Judgment for the plaintiff, for the sum of forty-six dollars, and interest from September 10, 1880, till judgment.

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

JOHN HAYDEN and others, in equity,

vs.

PARKER M. WHITMORE and others.

Sagadahoc. Opinion December 19, 1882.

Shipping. Demurrage. Practice. Equity.

Where under a charter party or contract of affreightment the duty of discharging the vessel rests upon the affreighters, and they unreasonably neglect to perform the same seasonably, they will not be relieved from the payment of just damages in the nature of demurrage by the omission of all express provisions in the contract for the payment of demurrage, or express agreement as to the number of lay days.

In such case due diligence in the performance of their duty is impliedly required of the charterers, and they will be answerable to the owners of the vessel for the want of it.

A person cannot be both a plaintiff and a defendant in the same suit at law. In such case the remedy is by bill in equity, in which such decree may be had as will effect a proper adjustment of the respective rights and liabilities of all the parties interested.

BILL IN EQUITY, in which plaintiffs seek to recover freight on a cargo of one thousand five hundred and fifty-six tons of ice from Bath to New Orleans, at $2.25, ... $3501.00.
And demurrage twenty-one days at New Orleans, 2100.00.

$5601.00.
Less amount of cash rec'd from def'ts or their agent, 1495.95.

$4105.05.

Heard on bill, answer and proof.

The material facts are stated in the opinion.

W. Gilbert, for the plaintiffs.

C. W. Larrabee, for the defendants.

The claim for demurrage cannot be sustained. Demurrage, properly so called, arises out of the express terms of a charter party or out of the express stipulations in a bill of lading entered into by the master and owners, and adopted and assumed by the consignee. Conkling, Admiralty, 133, note *b*; 1 Abb. Shipping, 383, *et seq.*

And when there is no agreement either by charter party or bill of lading for demurrage, none can be recovered. *Horn* v. *Bensusan*, 9 C. and P. 709.

The evidence in this case shows that demurrage, or damage in the nature of demurrage was waived. Again, the owners of the cargo have fifteen or twenty days as lay days, after the vessel reports at the custom house. *Schooner Volunteer*, 1 Sum. 570. And there is no evidence in this case, when the captain reported at the custom house or that he reported at all.

Counsel further contended that the defendants were not liable because of unseaworthiness of the vessel; and because the case

as reported, [the abstract of the bill did not disclose the names of the parties] showed that the plaintiffs had an adequate remedy at law.

BARROWS, J. The plaintiffs, owners of the ship *Marcia Greenleaf*, bring this bill against the defendants, who, with Charles H. McLellan, one of the plaintiffs, constitute the Spring Cove Ice Company, an unincorporated association, which, through Whitmore as their agent, chartered the plaintiffs' said ship September 12, 1878, to load with ice from the affreighters for New Orleans, to be delivered on payment of freight at the rate of two dollars and twenty-five cents per ton of two thousand pounds, intake weight. The charter party contains no express agreement as to demurrage. The plaintiffs claim a balance due them for freight under the agreement, and damages in the nature of demurrage, for delay on the part of the affreighters in discharging the vessel.

Defendants deny plaintiffs' right to freight, because, they say, the ship was unsuitable to carry the cargo by reason of her leaky condition; but their position is not sustained by the evidence, which shows only that the ship encountered heavy gales, and was leaking badly on her arrival at New Orleans, while it appears that just before loading she had been thoroughly repaired, and classed A, 1½, for five years on the record of the American Shipmasters' Association, under the inspection of Whitmore, one of the defendants, — an agent of said association; and there is no evidence that she was not staunch and amply seaworthy, or that she was not kept fairly free of water by pumping. The uncontradicted testimony of the master is that he "kept ship well pumped till ice discharged. There was no waste of ice by reason of leakage. In fact, the lower tier came out the best tier in the ship and in first rate order."

The communications which Hayden, acting for the owners of the ship, had with Whitmore, the manager for the defendants, the telegrams from and to the master at New Orleans, and the whole course of the business, ending in the disposition of the cargo by the defendants' agent, as well as the testimony of the

master himself, and the want of any contradictory testimony from the defendants, conclusively negative the matters set forth in the answer as the ground of defendants' denial of any liability for demurrage. It is clear that the delay and loss were not occasioned by any remissness on the part of the master in any duty which he owed the defendants by contract, or otherwise, but that they arose from the defendants' failure to provide for the reception and marketing of the cargo, and not from any fault of the plaintiffs, their servants or agents, or the vessel. Neither did the arrangement for the sale of the cargo, and the reception of the net proceeds by the master of the ship, or anything done by the master in pursuance of that arrangement, amount to a waiver or adjustment of any claim which the owners had for damages in the nature of demurrage, leaving only the balance of the freight to be adjusted with the defendants' treasurer.

Defendants' counsel further contends that a claim for demurrage can arise only out of the express terms of the charter party or express stipulations in the bill of lading, and that when both are silent respecting it as in the present case, none can be recovered. In support of this position, he cites *Horn* v. *Bensusan*, 9 C. and P. 709. But that case decides only that in the absence of an express contract as to demurrage, the owner of the vessel cannot *under the common counts* go into evidence to prove that she was detained beyond a reasonable time, and that, to entitle him to recover in such case a special count is necessary. The implication is strong against the position taken in defence.

We do not think that a failure to make an express agreement for a specific number of lay days, or for the payment of demurrage, will relieve the charterer from a liability to pay damages for detention, in the nature of demurrage, if he fails in the reasonable performance of his duty under the contract, and thereby unreasonably detains the vessel beyond the time when she ought to have been discharged. Certain mutual obligations rest upon both the parties to such a contract, one of which is due and reasonable diligence in the performance of what they have respectively undertaken; and in the absence of specific agreements of the parties themselves, as to the consequence of failure, or where

the contract is silent as to the precise latitude in the execution which is to be permitted, the law will always fall back upon the inquiry, what is reasonable and just under the circumstances, in view of which the parties may be presumed to have made their contract.

The only remaining objection to the maintenance of the bill, is that the claim is not properly cognizable in equity. But for the fact that there is one individual who seems to have an interest in the controversy, both as plaintiff and defendant, this objection would apparently be well taken, since our general equity jurisdiction is limited to cases "where there is not a plain, adequate and complete remedy at law." Laws of 1874, c. 175.

But it is familiar law, that the same person cannot in the same suit, sustain the two-fold character of plaintiff and defendant, to enforce a right or redress a wrong. *Denny* v. *Metcalf*, 28 Maine, 390; *Portland Bank* v. *Hyde*, 11 Maine, 198. Neither can one of two or more joint owners of a vessel maintain an action in his own name alone for freight, though he be also master. *Robinson* v. *Cushing*, 11 Maine, 480.

Since McLellan, who is a co-partowner in the vessel, and also a member of the ice company, would be a proper and necessary party, both as plaintiff and defendant to any suit at law brought for this cause, and this is not allowable; it follows that there is not here an adequate, or indeed *any* remedy at law, and resort must be had to equity. We are of the opinion, that where this condition as to the parties exists, in cases otherwise remediable at law, a bill in equity may be maintained. In equity, the conflicting interests of the common member may be adjusted, and such decree can be made as shall be found to conform to the rights and liabilities of all the parties.

The case, upon the view of it already taken, is free from question as to the right of the plaintiffs to receive the balance of the freight money, and whatever sum might be found just and equitable as damages in the nature of demurrage. But we think it would be well that the evidence upon that point should be made more full and complete, before a final decree is entered up, and accordingly, unless the parties can agree upon the

amount, (which, if they will consider the question in a proper temper and disposition, it would seem they might readily do,) the case must be sent to a master to examine and report thereupon.

The case as presented, does not show the extent of McLellan's interest, either as an owner in the vessel, or as a member of the ice company, and this also is indispensable before a final decree in order that there may be a proper adjustment of his rights and liabilities.

Bill sustained with costs for complainants.

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

JACOB WHITNEY *vs.* CLARA DOLLOFF.

Androscoggin. Opinion December 26, 1882.

Pleadings. Variance.

Between a declaration counting on a judgment against "Clara Dolloff of Lisbon," and a record of a judgment against "Clara Dolloff of Lisbon, married woman," there is no variance.

ON EXCEPTIONS.

Debt on judgment. Writ dated June 27, 1881. Plea, *nul tiel record.*

The opinion states the facts.

F. W. Dana, for the plaintiff, cited: *Longley* v. *Vose*, 27 Maine, 179; 1 Greenl. Ev. § 73.

Asa P. Moore, for the defendant, cited: *Chadwick* v. *Eastman*, 53 Maine, 17; 1 Greenl. Ev. § § 70, 565; R. S., c. 61, § 4; *Bryant* v. *Merrill*, 55 Maine, 516; *Farrar* v. *Fairbanks*, 53 Maine, 143; *Boyden* v. *Hastings*, 17 Pick. 200; *Com.* v. *Beckley*, 3 Met. 331.

VIRGIN, J. The defendant's plea of *nul tiel record* and the plaintiff's joinder present the question, — Whether there is a variance between a declaration counting on a judgment against "Clara Dolloff, of Lisbon", and a record of a judgment against "Clara Dolloff, of Lisbon, married woman." We have no doubt that the omission of the addition — "married woman" did not create a variance. There is no difference in the name, and the judgment is otherwise fully and truly set out.

It is urged, however, that if judgment be recovered upon the declaration as it now stands, the execution to be issued thereon, may run against the body of the judgment debtor contrary to the provisions of R. S., c. 61, § 4.

But that is a matter with which the judgment has no concern, but is governed by the provisions regulating the issuing of final process. Thus if a person, served with mesne process otherwise than by arrest, disclose before judgment, under the provisions of R. S., c. 113, § § 8, *et seq.* and the commissioner determines that the execution shall not issue against the body of the debtor, the judgment is in nowise affected thereby; and if the proper suggestion be made upon the docket, the execution will run against the debtor's property alone.

If, in the case at bar, the plaintiff omits to protect himself and officer by seeing to it that the proper execution shall issue, the defendant can do it.

Exceptions overruled.

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

INHABITANTS OF TOPSHAM *vs.* INHABITANTS OF LEWISTON.

Sagadahoc. Opinion December 26, 1882.

Paupers. Residence. Confinement in state prison.

An imprisonment for five years in the state prison, pursuant to a legal sentence, does not, of itself, interrupt the continuity of the residence of the

prisoner in the town where he had his home, and was supporting his family when imprisoned.

ON EXCEPTIONS.

An action for pauper supplies, furnished by the plaintiffs to the wife and children of Charles E. Coombs, who derived his settlement from his father, Charles E. Coombs, Senior.

The opinion states the material facts.

J. W. Spaulding and George D. Parks, for the plaintiffs, cited: *Greene* v. *Windham*, 13 Maine, 225; *Brewer* v. *Linnæus*, 36 Maine, 430; *Knox* v. *Waldoborough*, 3 Maine, 455; *Gorham* v. *Canton*, 5 Maine, 266; *Richmond* v. *Vassalboro'*, 5 Maine, 396; *Exeter* v. *Brighton*, 15 Maine, 60; *Wayne* v. *Greene*, 21 Maine, 357; *Jefferson* v. *Washington*, 19 Maine, 293; *Brewer* v. *Eddington*, 42 Maine, 549; *North Yarmouth* v. *West Gardiner*, 58 Maine, 207; *Hampden* v. *Levant*, 59 Maine, 557.

A. K. P. Knowlton, for the defendants, contended that if Charles E. Coombs, Senior, had begun to gain a settlement in Lewiston prior to his imprisonment, that the imprisonment interrupted his settlement, and that the period of his imprisonment for crime constituted no part of a successive residence, so that he could acquire a legal pauper settlement in Lewiston. *Washington* v. *Kent*, 38 Conn. 249; *Reading* v. *Westport*, 19 Conn. 561.

VIRGIN, J. The case assumes that if the pauper had a settlement in Lewiston, he derived it from his father; and if the father had one there he acquired it by the sixth mode—by "having his home there five successive years without receiving, directly or indirectly, supplies as a pauper." R. S., c. 24, § 1, par. VI; and there is no pretense that he received any supplies as a pauper during the period he resided there.

By their verdict for the plaintiffs, the jury must have found that the pauper's father had an established "home," and not a mere temporary residence, in Lewiston where he resided with his family for a year or two prior to May 11, 1869, when he was committed to the state prison in pursuance of a sentence for five

years; and the correctness of this finding is not challenged by any motion on the part of the defendants. But the question is raised—whether, assuming his "home" to have been in Lewiston, his imprisonment interrupted the continuity of his residence there, his family having continued to reside there during the term of his imprisonment and he having returned to, and resided several months with them there, at and after its expiration. And our opinion is that his absence in prison under the circumstances did not operate as an interruption.

When a residence has once been established by the concurrence of intention and personal presence, continuous personal presence thereafter is not essential to a continuous residence, especially when he whose residence is in question has a family between whom and him the mutual family relations are in full force; for absences of longer or shorter periods for temporary purposes, do not change the established home at which the family continue to reside with the consent of its head. *Knox* v. *Waldoborough*, 3 Maine, 455. The practical general rule that a man's home is where his family is has so few exceptions, that the place of the family's residence is *prima facie* evidence of the husband's. *Greene* v. *Windham*, 13 Maine, 225. And when the home is fixed it continues until it is changed or abandoned, although the acquiring of another is not essential. *Exeter* v. *Brighton*, 15 Maine, 58, But to change the established place of residence of a man having a family in full relations, a departure or absence therefrom with an intention not to return must concur (*Hampden* v. *Levant*, 59 Maine, 557); or departure or absence therefrom without any present intention of ever returning must co-exist. *Bangor* v. *Brewer*, 47 Maine, 97; *Corinth* v. *Bradley*, 51 Maine, 540.

Applying these principles to the case at bar there would seem to be no doubt the home continued, as the father left it, during the term of his confinement in prison, unless the imprisonment *per se*, unlike any other temporary absence, operated an interruption. And we fail to perceive how it can. Imprisonment for a term less than life does not render a prisoner *civiliter mortuus*. R. S., c. 64, § 18. Civil and criminal precepts may be

served on him. R. S., c. 140, § 16. In forming and executing an intention concerning his residence he is certainly in no worse condition than an insane person; and insanity does not prevent a continuous residence of five years from establishing a settlement provided the residence commenced before the insanity. *Auburn* v. *Hebron*, 48 Maine, 332; *Chicopee* v. *Whatley*, 6 Allen, 508. And enlistment and service in the United States army has no such effect. *Brewer* v. *Linnaeus*, 36 Maine, 428,

We are aware that a learned court in another state has come to a different conclusion (*Reading* v. *Westport*, 19 Conn. 561; *Washington* v. *Kent*, 38 Conn. 249); but the reasons given are based upon statutory provisions not found here, and upon principles in conflict with our decisions. But an earlier decision of that court is in accordance with our views, and we close our opinion by quoting from it. In deciding where a prisoner's place of abode was during his imprisonment, the court said: "Was it at Torrington, at the dwelling house where he with his family formerly resided, and where his family with his knowledge and consent had ever since continued to reside? . . Before his imprisonment, his usual place of abode was in Torrington, . . where his family dwelt, and to which as to his home, he returned upon his enlargement from prison. He had never abandoned this as his place of residence; he had left it by constraint. . . The state prison was not the place of his abode; it was his place of punishment; and while there he was absent from home." *Grant* v. *Dalliber*, 11 Conn. 234, 238.

Exceptions overruled.

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

GEORGE SANDS *vs.* JOHN SANDS AND CEDAR RIFT, appellants.

Aroostook. Opinion December 27, 1882.

Liens. Practice. R. S., c. 91, § 34. Shingle rift.

A lien may be preserved by amending the writ before judgment, striking out the non-lien items, and taking judgment for the lien claim items.

Revised statutes, chapter 91, § 34, gives a lien on shingle rift, cut four feet in length, for cutting and hauling the same to mill.

ON EXCEPTIONS.

An appeal from a judgment of a trial justice, in an action of assumpsit, for labor cutting and hauling cedar rift, and money count, and referred to presiding justice, on agreed statement, with right to except.

The exceptions state that "the presiding justice ruled that the writ was sufficient to create a valid lien; that the joinder of a money count in plaintiff's writ with a count for his services upon the lumber, which writ the plaintiff was allowed on return day of said writ to amend by striking out said money count, was no waiver of said lien; that the cedar rift described in said writ and officer's return thereon, was logs and lumber, within the meaning of section 34 of chapter 91 of the Revised Statutes and amendments thereto."

C. B. Roberts, for the plaintiff.

W. P. Allen, for the defendant.

VIRGIN, J. Numerous cases decide that a lien claim is lost when absorbed or merged in a judgment with a non-lien claim. But there is no objection to amending a writ before judgment by striking out a non-lien claim and taking judgment for the other and thus preserve the lien. On the contrary such an amendment was allowed in *Spofford* v. *True*, 33 Maine, 297.

We are of the opinion, also, that "cedar shingle rift," cut four feet in length and then hauled to the mill, is embraced by R. S., c. 91, § 34, giving a labor-lien on "logs or lumber" for cutting and hauling the same. If felled and hauled whole there could be no question about it; and sawing the logs into four feet sticks for convenience in hauling and handling cannot destroy the lien. Railroad ties have been considered "logs and timber" in *Kalloch* v. *Parcher*, Wis. See 26, Al. L. J. 402.

Exceptions overruled.

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

CITY OF PORTLAND

vs.

ATLANTIC AND ST. LAWRENCE RAILROAD COMPANY.

Cumberland. Opinion December 27, 1882.

Railroads. Municipal bonds. Railroad securities. Contract. Tender.

The city of Portland issued its bonds for a large amount, in aid of the defendant company, payable at a future time; the company giving mortgages and bonds to the city, conditioned "that the company would pay the interest and principal of all said bonds as the same should become payable and mature, and would save and hold the city harmless from the issue of the same." The company being unable to meet its engagements, the city at the instance of and with the co-operation of the company, obtained liberty from the legislature to issue new bonds for the balance due in renewal, payable at a specified time in the future, and the bonds and mortgages (securities) were extended; the priority of security and the lien of the city to be in no way impaired. *Held*;

1. The securities given by the company apply to and are available for the protection of the city for the new bonds issued by it, in renewal of unpaid balances.

2. That the provision in the act of the legislature (stat. 1868, c. 601,) for a sinking fund, and authorizing that such fund should be turned over to the city in full discharge of the unsatisfied indebtedness, when it shall equal the same, would not authorize the company to borrow money to add to the sinking fund; and that money obtained otherwise than as required by statute, is not to be regarded as belonging to the statutory sinking fund.

3. That the contract between the parties providing for the payment "of the accruing interest on all unsatisfied balances of the company's obligations to the city," negatives the obligation of the company to pay the interest or principal before they shall become due and mature; and that it equally negatives the obligation of the city to receive the same.

4. That the contract forbids a payment which would impose a loss upon the city.

A tender cannot be made to discharge a debt where the creditor could not enforce its payment.

ON REPORT.

Action of covenant broken.

The writ is dated August 4, 1881, and declares upon a breach of the following contract, by reason of the failure of the defendant corporation to pay $23,610 of interest, which accrued and became due and payable upon the unsatisfied balance of the company's obligation to the city, May 2, 1881.

(Contract.)

"Agreement entered into on the thirty-first day of October, 1868, between the city of Portland, and the Atlantic and St. Lawrence Railroad Company, under authority of an act of the legislature of Maine, passed March 3, 1868, entitled an act making further provisions respecting the loans of credit heretofore made by the city of Portland to the Atlantic and St. Lawrence Railroad Company.

"Whereas, the city heretofore, under the several acts of August 1, 1848, and July 27, 1850, issued and delivered its bonds to said company, which were negotiated for the use of the company, in aid of the construction and equipment of its Railroad, and were issued and dated as follows, namely, under the act of August 1, 1848:

On the first day of December, 1848, . .	$200,000
On the first day of May, 1849, . . .	100,000
On the first day of August, 1849, . .	100,000
On the first day of November, 1849, . .	75,000
On the first day of February, 1850, . .	200,000
On the first day of July, 1850, . . .	200,000
On the first day of November, 1850, . .	75,000
On the first day of January, 1851, . .	50,000
In all,	$1,000,000

And under the act of 1850, on the first day of February, 1851, in all $500,000, all of which bonds were payable in twenty years from their respective dates, and are now outstanding.

"And the railroad company, at the several dates of the aforesaid issues, gave to the city, as required by law, its several obligations, under the seal of the company and signatures of the directors, for the same several amounts, conditioned in substance that the company would pay the interest and princi-

pal of all said bonds, as the same should become payable and mature, and would save and hold the city harmless on account of the issue of the same.

"And whereas, the railroad company, afterwards, as required by the act of 1850, on the third day of February, 1851, executed and delivered to the city a mortgage of all its railroad, property and franchise, for security of performance of all the several obligations so given by the company to the city, and for the enforcement of the lien given by law to the city, upon the said railroad property and franchise; and afterwards, on the third day of April, 1853, in pursuance of a covenant in said mortgage, executed and delivered to the city, another mortgage on the same railroad property and franchise, as then existing, for further assurance, and additional security for performance of the same conditions.

"And whereas, it was further provided, by said acts of 1848, and 1850, that sinking funds should be established for the redemption of the bonds so issued by the city, which sinking funds were, in fact, so established, and had accumulated, on the thirty-first day of July last, to the sum of $455,290.73, for the fund under the act of 1848, and to the sum of $204,806.80, under the act of 1850, and it has now become evident, that the said funds will not, nor will either of them, at the maturity of the city bonds aforesaid, be of sufficient amount to redeem in full the city debts, to which the same are applicable, but will amount, severally, to very nearly one-half of the respective debts.

"And whereas, the railroad company has represented to the city, that it will be unable to fulfill its obligations so given to the city, by paying the principal of the city bonds aforesaid at maturity, beyond the amount that the respective sinking funds will supply therefor, and it appears that the city will be obliged to pay the balance of said bonds over and above the amount applied from the sinking funds towards redemption of the same, and will thereupon become entitled to demand from the company the immediate reinbursement of such balance, and in case of failure to make such reinbursement, will be entitled to pursue and enforce all its remedies, under the

said acts of 1848 and 1850, for such default; and the railroad company, in view of the premises, has requested the city to grant to it and its assigns, an extension of the company's several obligations aforesaid, and an extension of the mortgages given for security of the same, for all the amount of the principal of the bonds, which the city will be so obliged to pay; and the parties have united in procuring the enactment of the aforesaid act of March 3, 1868, to provide the requisite legal authority and power, for such arrangements as require to be made by the city, in this behalf.

"And whereas, it is contemplated by the parties to this agreement that the commissioners of the sinking funds established under the acts of 1848 and 1850, at the several times of the maturity of the city debts aforesaid, will be authorized to apply, and will apply, out of such respective funds, portions of the same, towards the redemption of the city debts so maturing, corresponding to the proportions, which the whole respective funds, as then existing, shall bear to the whole respective city debts to be redeemed, it being now estimated that the said proportion will be one-half part, very nearly, and the parties have agreed, that they will unite, if necessary, in such proceedings as may be suitable and requisite to give to the commissioners full authority to apply the existing sinking funds, in such proportional parts."

"Now, in consideration of the premises, in pursuance of the representation and request so made by the railroad company, and under the authority of the acts of March 3, 1868, subject to all the limitations, conditions and restrictions of said act, the city hereby agrees, that it will grant an extension of the balances aforesaid of the company's obligations hereinbefore mentioned, and an extension of the mortgages given for security of performance thereof; which extension shall be for the term of eighteen years from the first day of January, 1870, for all the balances of the obligations so given by the company to the city under the act of 1848, and for the term of eighteen years from the first day of February, 1871, for all the balances of the obligations so given under the act of 1850.

"And this agreement for extension shall be subject to all the arrangements, conditions and stipulations hereinafter provided and expressed as follows, that is to say:

"I. The railroad company engages that, notwithstanding anything contained in this agreement, it will continue to provide for and pay the interest which shall accrue and be payable on all the now outstanding bonds of the city, issued under the acts of 1848 and 1850, until the maturity of the principal of the same, and that it will continue to make all such contributions, as it is by law required to make, to the sinking funds established under those acts; and in case of default in either of these engagements, the city is to be at liberty to terminate the extension hereby granted, and may resort to all the legal remedies for such default, provided and existing under the acts of 1848 and 1850.

"II. The railroad company further engages, that it will semi-annually, provide for and pay to the city, or deposit to the use of the city, at such place as the city treasurer shall appoint, the accruing interest upon all the unsatisfied balances of the company's obligations given to the city as aforesaid, so long as any such balances shall remain undischarged; and that it will make and pay all the contributions required by the act of March 3, 1868, to be made to the new sinking fund established by that act; and in case of default in either of these engagements, the city shall be at liberty to terminate the extension hereby granted, and may resort to its legal remedies, provided and existing under the acts of 1848 and 1850, for enforcement of the company's obligations aforesaid.

"III. And inasmuch as it is understood by the parties, that the city will be obliged to issue its new bonds to an amount equal to the unsatisfied balances of the company's obligations aforesaid for the purpose of raising money, to discharge a corresponding balance of its prior bonds issued under the acts of 1848 and 1850, the railroad company, in consideration of the extension hereinbefore agreed to be given, engages that it will pay to the city all the cost of preparing and issuing such new bonds, and of negotiating the same, and will make up to the

city any loss that may be sustained by discount, in negotiating the same. And the city engages that it will offer to the railroad company the option of procuring the negotiation of the same at seasonable times and at the most favorable rates to be obtained in the market.

"IV. All the sums, which shall be applied by the commissioners of the sinking funds, under the acts of 1848 and 1850, towards the redemption of the bonds issued under these acts, shall be a discharge of so much of the railroad company's obligations aforesaid, and shall be appropriately indorsed thereon.

"V. And the parties to this instrument further agree, that their intention is, to provide for the ultimate performance and payment of all the balances of the company's obligations aforesaid, in the manner which shall be least burdensome and most advantageous to the parties, but without pecuniary loss or detriment to the city, in any event, and without diminishing or impairing any security held by the city; and that, in case of any want of authority in the commissioners of the sinking funds under the acts of 1848 and 1850, to apply these funds in the manner now contemplated and expressed in this instrument, or, in case of any other legal difficulty or impediment in effecting the object and intent of the parties, by the particular arrangements, now made therefor, they will negotiate further thereon, and will use all their reasonable and lawful endeavors, and enter into all such further proceedings and agreements, as may be necessary and deemed adequate to accomplish the true intent, meaning and object of this agreement, as hereinbefore declared. In witness whereof, this agreement is subscribed in behalf of the city, by Jacob McLellan, mayor, duly authorized by a vote of the city council, passed on the seventeenth day of September, 1868, and in behalf of the railroad company by St. John Smith, president, duly authorized by a vote of the directors passed on the twenty-second day of October, 1868, and the said parties have hereto affixed their respective seals, this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-eight." Duly signed, etc.

Other material facts are stated in the opinion.

William H. Looney, (*Clarence Hale* with him,) for the plaintiff.

J. and E. M. Rand, for the defendant.

Plaintiff complains only of non-payment of interest on May 2; this suit to collect it.

Now, in what part of agreement did defendant covenant to pay interest on May 2, 1881, or on May 2, in any year? If it is said that the interest on the new bonds issued by city became due and payable on May 2, no such evidence in case. And if there were, there is nothing in agreement about paying interest on new bonds. The defendant agreed to pay interest on its debt semi-annually,— on such day within every six months as it might elect.

Unless defendant was bound to pay on May 2, this action cannot be maintained.

Object and spirit of the act and agreement is, not to keep a claim and a liability alive and kicking for eighteen years, but to provide some collateral security for its payment as soon as possible. Nothing in the act or in agreement to prevent the company paying the debt at any time. Agreement fixes no particular time of payment; places no restriction upon time of payment; says nothing upon the subject; but act says, (section 6) — The fact (if it be a fact), that city hired money for eighteen years in connection with this matter, has no relevancy to this legal question. City hired upon such time as it pleased. Suppose city had hired it for one hundred years. We submit that defendant had a right to pay its debt to plaintiff at any time,—and as collateral to that debt, and as security for it, to pay at any time any amount it pleased into the sinking fund.

And having made the sinking fund equal to the debt, and having caused the amount to be tendered to the city, we have fully discharged our indebtedness.

APPLETON, C. J. This is an action on a contract entered into by these parties on the thirty-first of October, 1868.

The city of Portland had issued its bonds in aid of the defendant corporation to a large amount, between August 1, 1848, and the date of the contract in suit.

The contract, after stating specifically the several issues of bonds, further adds that the railroad company, as required by law, gave to the plaintiff "its several obligations, under the seal of the company and signatures of the directors, for the same several amounts, conditioned in substance that the company would pay the interest and principal of all said bonds, as the same should become payable and mature, and would save and hold the city harmless on account of the issue of the same."

A sinking fund had been provided by the acts of 1848 and 1850, under which the bonds of the city had been issued, to meet its liabilities as they should mature; but was found insufficient. After deducting the sinking fund, there was due from the defendant corporation, the sum of seven hundred and eighty-seven thousand dollars. The plaintiff had the right to demand the immediate reimbursement from the defendants of the sum advanced, and to enforce its payment by foreclosing their mortgages and by suits on the defendant's bonds.

Such being the condition of the railroad company, it represented to the city its inability to meet its obligations by paying the principal of the city bonds at maturity, beyond the amount of the sinking fund, and "requested the city to grant to it and its assigns, an extension of the company's several obligations, . . and an extension of the mortgages given for the security of the same for all the amount of the bond, which the city will be obliged to pay."

In pursuance of the united action of the city and the railroad company, the act of March, 1868, was passed, under the authority of which this contract was entered into, by which "subject to all the limitations, conditions and restrictions of said act, the city hereby agrees, that it will grant an extension of the balances aforesaid of the company's obligations hereinbefore mentioned, and an extension of the mortgages given for security of performance thereof; which extension shall be for the term of eighteen years from the first of January, 1870, for all the balances of the

obligations so given by the company to the city under the act of 1848, and for the term of eighteen years from the first of February, 1871, for all the balances of the obligations so given under the act of 1850."

The balances referred to in the contract were the bonds of the preceding issues which were then remaining unpaid, and which the company acknowledge they were unable to pay. New bonds corresponding to the "balances," that is, the unpaid bonds of the city, were issued. The act of 1868, was passed to enable the city to relieve the company by their issue. But it will be perceived no security of the city was to be relinquished. The time of payment of the indebtedness of the company and of the enforcement of the securities for their indebtedness, were extended; but nothing was discharged. But the securities given for the company's inbebtedness, are equally available to protect the indebtedness when extended, that is, the new bonds when given as the original bonds. Nothing but payment will discharge a mortgage. The renewal of a note, secured by a mortgage is not such a payment as will discharge the mortgage unless the parties so intended it. *Ellsworth* v. *Mitchell*, 31 Maine, 247; *Watkins* v. *Hill*, 8 Pick. 522; *Pomroy* v. *Rice*, 16 Pick. 22.

The new bonds given in renewal of those the company were unable to pay, are protected by the several obligations of the company specified in the contract, by which it is agreed "that the company would pay the principal and interest of said bonds, as the same should become payable and mature, and save the city harmless from the issue of the same."

The city, in pursuance of the act of 1868, issued at the instance and for the benefit of the company, its bonds payable at six per cent in eighteen years. The present rate of interest is three or four per cent. The company has on January 4, 1881, tendered the city "the full amount of said unsatisfied balances and of said unsatisfied indebtedness, to wit, the sum $787,000, the principal of said unsatisfied balances and unsatisfied indebtedness, and also the sum of $8,132.33, for the interest to that day upon said principal, in full discharge of such unsatisfied balance and indebtedness," which the city has refused to accept. If the tender is

available to the company in discharge of its obligations, then the city must be a loser by the difference between the interest it must pay and the interest it can obtain. It must provide for the investment of the funds to meet its maturing bonds and run the risk of its investments; a loss to be borne necessarily while the present rate of interest continues; a burden which no contract imposes upon it. It is obvious, if the position assumed by the learned counsel for the company be correct, the city will not be saved harmless as the company have agreed to do.

A creditor cannot enforce the payment of a debt before its maturity. A debtor cannot compel his creditor to receive his debt before it is due. The rights of the parties are equal and reciprocal. The city, if it wished, cannot compel the present payment of its outstanding liabilities for the company, nor can the company compel the city to receive at a loss what is neither due nor collectible.

The contract of these parties is made by its terms subject to certain "arrangements, conditions and stipulations."

By the first "the railroad company engages that, . . it will continue to provide for and pay the interest which shall accrue and be payable on all the now outstanding bonds of the city, issued under the acts of 1848 and 1850, until the maturity of the principal of the same," &c. "and in case of default, . . the city is to be at liberty to terminate the extension hereby granted, and may resort to all the legal remedies for such default, provided and existing under the acts of 1848 and 1850."

The provision to pay the accruing interest on outstanding bonds until their maturity, negatives any promise to pay the principal until such maturity. The city could not compel and were not bound to receive the payment of the principal. As new bonds were to be issued in extension of those which had been issued, and as the old bonds would be withdrawn by such issue, it cannot be doubted that these stipulations were, and were intended to be equally applicable to the new bonds as to those which they displaced. The company is to continue to pay the accruing interest, but the only interest which will accrue, is upon the bonds given under the extension which the city granted.

By the second stipulation "the company further engages, that it will semi-annually, provide for and pay to the city, or deposit to the use of the city, at such place as the treasurer shall appoint, the accruing interest upon all the unsatisfied balances of the company's obligations given to the city as aforesaid, so long as any balances shall remain undischarged, and that it will make and pay all the contributions required by the act of March 3, 1868, to be made to the new sinking fund established by that act," &c.

But "all the unsatisfied balances of the company's obligations given to the city" are represented by the bonds of the city whether old or new, "which shall remain undischarged." The payments are to be semi-annual and of the interest semi-annually accruing. There is no stipulation that more shall be paid to or received by the city.

The fourth stipulation recognizes the issue of new bonds "to an amount equal to the unsatisfied balances of the company's obligations," and provides for the issue of new bonds, and provides that "the company shall pay to the city all the cost of preparing and issuing such new bonds and of negotiating the same, and will make up to the city any loss that may be sustained by discount in negotiating the same."

By the fifth stipulation, the parties "further agree, that their intention is, to provide for the ultimate performance and payment of all the balances of the company's obligations aforesaid, in the manner which shall be least burdensome and most advantageous to the parties, but without pecuniary loss or detriment to the city, in any event, and without diminishing or impairing any security held by the city," &c.

The provision is for the ultimate, not the immediate payment of the balances of the company's obligations. But that payment is to be made "without pecuniary loss or detriment to the city, in any event." If the tender is a valid one and discharges the company's obligations, a loss is inevitable. The city cannot loan the funds tendered at a rate corresponding to the rate it has contracted to pay. But the contract provides against all loss, in any event. Hence the ground taken by the company is in direct opposition to the express language of its contract.

Provision is made for a new sinking fund by the act of 1868, c. 601, § 3. By the statute "the contributions to such further sinking fund shall be on each of the years 1869 and 1870, one thirty-second part of the average amount of such unsatisfied indebtedness, subsisting in those years; but afterwards, the sum of twenty-five thousand dollars annually, until the final re-imbursement and discharge of such indebtedness. All of such contributions shall be made by the railroad company in equal half yearly installments, on the first days of January and July in each year."

The statute determines precisely what shall constitute the sinking fund—how and by what payments it shall be created. Nothing but as provided by the statute, is a part of the sinking fund. The company are not authorized to contribute other sums to the fund. The sinking fund is obtained but in one way, in accordance with the statute. If sums other than prescribed by the statute, are paid to the fund for any purpose, they constitute no part of the statutory sinking fund.

By § 6 of chapter 601, "whenever the amount of the sinking fund hereby authorized . . shall be equal to the unsatisfied indebtedness aforesaid, the commissioners shall make over and deliver the same to the city, in full discharge of such indebtedness."

The company seek a discharge of their liability by a tender of the sinking fund But the statutory sinking fund created by § 3 was by the testimony of one of its commissioners, in round numbers, three hundred and fifty thousand dollars. The balance, four hundred and thirty thousand dollars, was no part of the sinking fund prescribed by the statute, § 6, and contemplated by the parties. The company had no authority to borrow and thus increase the fund. The city could not compel the company to enlarge the fund to the amount of its unsatisfied indebtedness. Neither can the company by funds obtained other than in accordance with the statute, compel the city to receive and discharge its claims against the company before their maturity.

The defence is not made out. The tender is not good. The city was to be fully indemnified "in any event." The defence is adverse to the spirit of the contract, which is equitable, and makes provision for the full and complete protection of the city. It is against the plain and natural meaning of the language used, which negatives the construction attempted to be put upon it.

Judgment for plaintiff.

BARROWS, DANFORTH and PETERS, JJ., concurred.

VIRGIN and SYMONDS, JJ., did not sit, being interested.

HULDAH ELLEN COBB, in equity,

vs.

CHARLES L. KNIGHT AND WIFE.

Cumberland. Opinion December 27, 1882.

Trusts. Trustees.

A widow set apart a portion of a sum of money received from insurance on her husband's life, in trust for her infant daughter, to be paid her on reaching her majority, and loaned the same, the notes and mortgages running to herself as trustee for the benefit of the daughter. With a portion of the fund she afterwards purchased land, the deed running to herself as trustee for the benefit of her daughter. The real estate so conveyed was by her procurement conveyed to her second husband (through a third person) without consideration on the part of the husband, he having full knowledge of the trust. Upon a bill in equity, brought by the daughter after arriving at full age, to compel her mother and step-father to convey the land, *Held;*

1. That the mother was trustee for her child.

2. That a trust of personal property is not within the statute of frauds, and may be created by parol.

3. That the trust was not revocable by the trustee.

4 That a trustee of personal property cannot rightfully change the same into real estate, but when so changed the *cestui que trust* may follow the substituted property, and such property will be subject to the trust origin-

ally created in the hands of a grantee without consideration and with notice of the trust.

5. That the complainant is entitled to a conveyance.

ON BILL IN EQUITY.

Heard on bill, answer and proof.

The material facts are stated in the opinion.

John C. Cobb, for the plaintiff.

Clifford and Clifford, for the defendants.

APPLETON, C. J. This is a bill in equity by the complainant, to enforce a trust in her favor, and to compel a conveyance to her of real estate conveyed to the female defendant in trust for her benefit, and through her (said defendant's) agency and procurement, conveyed to her husband without consideration and with a full knowledge of the trust on his part.

The evidence is very voluminous, but the following facts must be deemed as fully established.

Reuben G. Brackett, the father of Mrs. Cobb and the husband of Mrs. Knight (who married her co-defendant in 1853 or 1854), died on the twenty-fourth day of March, 1846. The complainant, their only child, was born May 6, 1843, and was married to her present husband January 1, 1862, so that she has ever been and still is under such disability as may arise either from infancy or coverture.

Mr. Brackett at his death owned a farm, (the homestead,) worth twenty-five hundred dollars, but subject to a mortgage of six hundred dollars, and another lot (Back Cove), subsequently sold for six hundred dollars, and farming utensils and other personal property of not great value. He had likewise effected an insurance of five thousand dollars on his life, payable in case of his decease to his wife, and in case of her decease to her children. The policy was procured in part, for the purpose of paying his debts, and was in his possession and under his control. That his debts were to be paid out of the sum received was well understood by his wife and received her assent.

Samuel Brackett was appointed administrator on the estate of his deceased brother. No guardian was appointed for Huldah

Ellen, his infant daughter. After consultation between the widow and the administrator, it was arranged that two thousand dollars should be reserved from the insurance fund and held in trust by the widow for her daughter till she should become of age, — that it should then be paid her without interest, the mother meanwhile having the interest and boarding and taking care of the daughter without charge, which was done. The mortgage on the homestead was paid from the insurance money, and the farm mortgaged was then conveyed by the administrator to the widow.

Shortly after this arrangement and undoubtedly in pursuance of it, the parties, the administrator and the widow, met on June 9, 1846, at the office of John Neal, through whose agency the policy of insurance had been effected, and then and there two thousand dollars were paid and placed in trust for the complainant. John Neal gave his note for fourteen hundred dollars, payable to Orilla L. Brackett as trustee, for the benefit of Huldah Ellen Brackett, payable in five years. He secured this note by his mortgage of the same date, in which he recites that "in consideration of the sum of fourteen hundred dollars, paid by Orilla L. Brackett, of Westbrook, Maine, widow, as trustee for the benefit of Huldah Ellen Brackett, infant daughter of said Orilla, by her late husband Reuben G. Brackett," he does hereby give, grant, bargain, sell and convey "unto the said Orilla, for the sole and exclusive use of the said Huldah Ellen Brackett," a certain tract of land, describing it, to have and to hold to the "said Orilla, her successors, assigns to her and their use forever as trustee, or trustees as aforesaid," &c. "provided nevertheless if the said Neal shall pay to said Orilla, trustee as aforesaid, her successors, his note of fourteen hundred dollars," &c. "then both to be void, otherwise to remain in full force."

On the same day James N. Winslow gave a note similar in its terms, for six hundred dollars, running to Orilla L. Brackett, trustee, &c. The mortgage by which this is secured, recites the consideration to be "the sum of six hundred dollars paid by John Neal of Portland, agent for Orilla L. Brackett, of Westbrook, Maine, trustee of Huldah Ellen Brackett, infant daughter of said

Orilla, and her late husband Reuben G. Brackett." The mortgaged premises were conveyed to "said Orilla L. Brackett, trustee as aforesaid, her successors and assigns, to the use of said Huldah Ellen, forever, &c. These mortgages are for the sum held in trust, and are both discharged on the record by the mortgagee, Orilla L. Brackett.

The first named mortgage was discharged May 7, 1851, on which day John Neal gave a new note to Mrs. Brackett, and a mortgage to her, "in consideration of four hundred and fifty dollars paid by her, as trustee for Huldah Ellen Brackett, infant daughter of the late Reuben G. Brackett," conveying the mortgaged premises to "said Orilla L. Brackett, her successors, forever, nevertheless in trust, to the sole use and behoof of the said infant, Huldah Ellen."

About the time of the marriage of this complainant, Mrs. Brackett, (now Knight,) gave her daughter the last named note of Neal, and the note of J. N. Winslow on which was due about three hundred dollars, which is all the respondent alleges her daughter has received. The balance received from the insurance (except what together with the proceeds of the Cove lot — six hundred dollars,— went to pay the debts of the estate), and the homestead farm went into the hands of the defendant, Orilla L. Brackett, (now Knight,) by a deed from the administrator of her first husband.

The defendant, Mrs. Knight, denies the existence of any trust, and says that she was not aware that the notes and mortgages were running to her as trustee for her daughter, but the inferences necessarily to be inferred from her conduct, her admissions, her evasions, as well as from the notes, the deed, and the mortgages to which she was a party, and from the testimony of Samuel Brackett, the administrator, and others, leave no doubt that her statements and denials are not entitled to credence. Indeed, she would seem to be estopped by the notes and mortgages to which she was a party, to sit up her present claim.

No formality is required to create a trust. It may be proved by letters, memoranda, recitals in a bond, or by any writing which shows the fiduciary relations between the parties. 1 Perry

on Trusts, § 82. But here the trust relates only to the personalty—the money or the notes. The mortgages were only for security. But where the trust is of personal property, it is not within the statute of frauds and may be created by parol. *Benbow* v. *Townsend*, 1 Mylne and Keene, 506. In *Jones* v. *Lock*, 1 L. R. Ch. Appeal Cases, 25, Lord CRANWORTH says that "a parol declaration of trust of personalty may be perfectly valid even when voluntary. If," he adds, "I give any chattel, that, of course, passes by delivery, and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed and capable of being enforced without consideration. I do not think it necessary to go into any of the authorities cited before me; they all turn upon the question, whether what has been said was a declaration of trust or an imperfect gift. . . But when there has been a declaration of trust, then it will be enforced, whether there has been consideration or not."

But upon the facts established here was a trust on ample consideration. Beside the love of a mother for a child, the pecuniary consideration was sufficient. The complainant was sole heir to her father. She was entitled to the homestead subject to the mortgage and dower, and to the Cove sold for six hundred dollars. By the arrangement between the administrator and the mother, the latter obtained the title to the homestead, which was sold by her for twenty-five hundred dollars, and the price of the Cove lot enured to her benefit by reducing the amount required to pay the debts of the estate.

Here, then, has been a trust created. It was a trust with full consideration. But if voluntary, having been perfectly created, it will be enforced, if the relation of trustee and *cestui que trust* has been once established. 1 Perry on Trusts, § 104.

It has been shown that here a legal trust, of personal property, enforceable in equity, has been created, which is not revocable.

The trustee holding the notes of Neal, took from him as she admits, six hundred dollars, with which she redeemed a levy made on the land of her father, taking a deed of the premises levied upon, dated September 14, 1847, from Daniel Winslow

to herself, "in trust for and to the use of Huldah Ellen Brackett, infant child of the said Orilla by the late Reuben G. Brackett," to hold "in trust as aforesaid."

The trust being of personal property, the trustee had no right to change it into real estate. But, the purchase of the real estate being, by the admission of the trustee, with funds derived from the Neal note running to her as trustee, it is to be regarded as virtually a purchase with the funds of the *cestui que trust.* In such case, the *cestui que trust* may follow the substituted property as long as it can be traced. Lewin on Trusts, 206, 753. The property substituted will be held subject to the trusts as originally created.

The fact that the trustee, having purchased the levy, gave a bond of the same to her father, who died shortly after, and who never paid a dollar towards the redemption of the levy, affords no answer to the complainant's claim. The bond, if there was one, is not produced. If it were, beside the limitation of over thirty years or more, it would not avail against the complainant. Even if its conditions had been performed, (which they were not,) and a deed had been given, the grantee would have taken it with a full knowledge of the trust patent upon record.

The title to the land in controversy thus being in the hands of the trustee, she, on the sixth day of July, 1863, conveyed to Robert Leighton, whom she regarded as a brother, for the consideration of twenty-nine hundred dollars, the homestead place and the premises in dispute, taking therefor two notes, — one for twenty-five hundred dollars as the price of the former, and four hundred as that of the latter. The small note was paid by a conveyance of the land in controversy by the procurement of Mrs. Knight to her husband, which these defendants have ever since occupied.

The bill charges that Charles L. Knight paid nothing for this conveyance to him. This is not denied by the answers, nor by Mrs. Knight in her deposition. The husband does not give his deposition. The consideration for the conveyance to him was the note running to his wife, so that he must be regarded as holding the estate without having paid any consideration there-

for, and in trust as did his wife, from whom as trustee the consideration was had. That he is chargeable, too, with notice of the trust, will hardly be denied.

The personal estate was converted into real estate. The original trust attached to the real estate in the hands of the trustee. The real estate was fraudulently and collusively conveyed to evade the trust. It was transferred by the act of the trustee to her husband, who holds with a full knowledge of the trust and is a purchaser without consideration. The trust as first created still remains, and the *cestui que trust* is entitled to the full enforcement of her rights.

It is urged that there has been no demand upon the trustee previous to the institution of this bill. But a demand can hardly be deemed necessary upon a trustee, who has wrongfully transferred the trust estate, nor upon one holding a title acquired without consideration, and with a full knowledge of the trust and for the purpose of aiding the trustee in defrauding the *cestui que trust* of her legal rights. But if a demand is required, the evidence, we think, shows one to have been made.

The statute of limitations is no bar between trustee and *cestui que trust.* Perry on Trusts, § § 863, 864. There must be an open and express denial of the trust by the *cestui que trust*, and what amounts to adverse possession. Hill on Trustees, 264.

The conclusion is, that the complainant, Huldah Ellen Cobb, is entitled to a conveyance of the premises deeded by Daniel Winslow, on September 14, 1846, to the defendant, Orilla L. Knight, (then Brackett,) in trust for this complainant, and that the defendants be decreed to convey the same to her by a deed of warranty against all persons claiming title under them or either of them; and that they be decreed to pay the rents and profits of said real estate, deducting therefrom taxes paid and any legal charges in the care of the same, from May 6, 1864, when this complainant became of age, and that a master be appointed to ascertain and report the amount due; and that the complainant recover costs.

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

SEWALL C. STROUT and another, *vs.* WILLIAM L. PENNELL.

Cumberland. Opinion December 27, 1882.

Officer, liability of. Levy. Practice. Amendment.

In cases where an officer is called upon by the nature of the service to be performed, to find some person or thing, or ascertain some fact, or determine some question, upon an inquiry and investigation to be instituted by him after the process comes into his hands, he is required to exercise reasonable care, skill and diligence in the performance of the duty, but he is not liable as an insurer.

A sheriff, who erroneously certifies in a levy upon land of an execution-debtor that the appraisers were disinterested, when they were in fact interested, is not liable in damages therefor to the debtor, or to the person standing in the condition of the debtor, if not guilty of negligence in making such erroneous return.

The remedy for an error thus committed by an officer, lies in a motion to the court for leave for the officer to amend his return, and in the power of the court, under such motion, to extend the necessary relief upon just and equitable principles.

In making a levy upon land, a sheriff returned that the appraisers were disinterested. The appraisers themselves were not aware that they were interested; the facts constituting their interest, if any, were not at the moment remembered by them; they declared to the officer that they had no interest; it was not suggested or suspected by any one present during the proceedings that they were interested; two of them were chosen respectively by the parties to the execution; the officer was required to act without much delay; and he testified, without any evidence to oppose his general statement, that he used great care and caution in making inquiry and investigation. An action for false return was brought by mortgagees of the execution-debtor, who got their mortgage after the attachment and before the levy;

Held, That the sheriff was exonerated from the charge of negligence, and that the action could not be maintained whether the appraisers were in fact interested or not.

ON REPORT.

This was an action of the case against the defendant as sheriff for the alleged misdoings of his deputy, in making a false return of a levy. The writ was dated May 28, 1880, and the plea was not guilty.

The facts are stated in the opinion.

S. C. Strout, *H. W. Gage* and *F. S. Strout*, for the plaintiffs.

James D. Fessenden, for the defendant.

PETERS, J. The case is this: The town of Otisfield levied an execution upon land of Joseph S. Mayberry, situated in that town. The plaintiffs in the present action, had at the time of the levy a mortgage from Mayberry of the same land, the mortgage being subsequent in date to the attachment under which the levy was made. The levying officer returned that the appraisers were disinterested men. Neither of the appraisers lived in Otisfield, but it turns out that one or two of them owned real estate in the town, and another had at the time a suit against Mayberry, in which was an attachment against his real estate made after the mortgage. These facts were not known at the time by the officer or to the parties to the execution. These plaintiffs sue the officer for a false return by his deputy, alleging that, had the deputy returned that the appraisers were interested instead of disinterested, the levy would have been bad, making their mortgage good.

The question, whether or not the appraisers were legally interested in the result of the levy, is elaborately discussed by counsel, but we give no opinion upon that point. The questions which we determine are these: *First*, is the officer answerable to these plaintiffs, a third party, as an insurer that his return in this respect is true, even though he has been guilty of no negligence? *Secondly*, if not liable as an insurer, was the officer guilty of negligence in view of all the facts disclosed?

It seems to be taken for granted by the plaintiffs that, if any material facts are erroneously stated in this return, the officer is responsible therefor to all persons concerned, whether he, the officer, be guilty of negligence or not. We do not accept this view of the law, but are of the opinion that the officer is not liable in the present action, unless he has been guilty of some fault or negligence, and we think further, that the officer is exculpated by the facts from the charge of negligence.

A sheriff is obliged, no doubt, to execute all the duties of his office with due skill and care. The law imposes upon him a.

high degree of care and diligence generally. Still, his liability varies with the varying conditions under which he acts. In some matters, without doubt, he stands in the condition of an insurer; he warrants the practical perfection of his work. In other matters his liabilities are not so great. But, upon examination, it will be found that, in all the classes of cases where the extremest responsibility falls upon him, the rule is founded upon some special reason or policy which does not apply to the present case.

For instance: A sheriff is answerable for the escape of a prisoner in execution, and can avail himself of nothing but the act of God, or the public enemies, as an excuse. Here his liability is akin to that of innkeepers and common carriers at common law. But this severe and exceptional requirement of the law is founded upon a public policy. The sheriff has the whole power of the county at his call, and that is supposed to be an answer to all excuses. This rule, however, was considered a hard one as early even as Lord MANSFIELD'S time, who said, as reported in *O'Neil* v. *Marson*, 5 Burr. 2812, "the cases are hard, but they are too strong to be got over. There is no going into the reason of them."

But the legislative and judicial tendencies in this state have been towards a relaxation of such rigorous rules. An officer is now answerable for an escape, "only in an action of case for the actual damages sustained," and not, as formerly, for the entire sum due from the debtor in an action of debt. R. S., c. 81, § 80. The same change was long ago adopted in England. The common law liabilities of innholders, too, have been greatly modified in this state. Acts of 1874, c. 174. Innholders are no longer such insurers as formerly. And common carriers are now-a-days allowed to limit their responsibilities to some extent. The judicial tendency towards a mitigation of some of the ancient rules respecting the liabilities of public agents, is seen in the able judgment pronounced for the court by Justice VIRGIN, in the case of *Cumberland County* v. *Pennell*, 69 Maine, 357, where it is held to be a valid defense against a suit upon a county

treasurer's bond, that he was robbed of the county's money without fault or negligence on his part. The doctrine of that case applies to the case before us.

There are other cases where a sheriff assumes the burdens of an insurer in some respects. He must not commit *legal* mistakes. There is good reason for this. He assumes to know the law, or to take the risk of it, by accepting the office. He engages that he has the skill and ability to do its duties. But a marked distinction may exist between a mistake of law and a mistake of fact. Again; an officer must at his peril see to it, that he does not arrest the wrong person or attach the wrong property. But even here an unusual risk may be avoided. In cases of doubt, an indemnity may be required from the creditor.

The sheriff must safely keep property seized upon execution. Anciently, he was regarded as an insurer of property taken upon final process. Some modern courts hold to this liability, unless the sheriff is excused by the act of God or some other overpowering and extraordinary force. Other courts do not go so far, and only require upon the part of an officer reasonable care. Here, too, a public policy, something like that relating to escape, applies. The officer has the power of the county to preserve or retake property. Story, Bailm. § 130; Edward's Bailm. 59; 2 Thompson's Neg. 826, cases in note; Sher. and Red. Neg. § 530. Ordinary care, however, it is generally held, will discharge an officer from responsibility in case of the loss of goods attached upon mesne process. *Mills* v. *Gilbreth*, 47 Maine, 320; *Dorman* v. *Kane*, 5 Allen, 38, and authorities before cited. Schouler, Bailm. 55. An officer cannot charge in his bill of fees for costs of insurance by him actually paid upon attached property. *Burke* v. *The Brig, M. P. Rich*, 1 Cliff. 509.

But whatever the liability of an attaching officer may be to the creditor for the loss of property attached on writ or seized upon execution, his liability to the debtor or owner, is only that of ordinary care,—such care and diligence as a prudent business man would bestow upon his own property. *Parrott* v. *Dearborn*, 104 Mass. 104; Whar. Neg. § 289; Cooley, Torts, 394; Sher. and Red. Neg. § 530, and cases in note. The plaintiffs in the case at bar stand in the condition of owner and not creditor.

We have alluded to most, if not all, of the classes of cases in which a sheriff's responsibilities are the severest imposed by law. Evidently enough, the present case does not fall within the principles or policies illustrated by them. It falls rather within the doctrine of many and various decisions of the courts, where it has been held that an officer shall be responsible merely for ordinary diligence, skill and care,—such care as seems reasonable to be required by the circumstances and exigencies of the given case,—but where the officer is in no sense an insurer. And these are generally cases where, as in the case at bar, the officer can demand no indemnity against error or mistake, is actuated by no wrong motive, and is called upon, by the nature of the service to be performed, *to find some person or thing, or ascertain some fact, or determine some question, upon inquiry and investigation to be made after the process is committed to him.*

Take a few cases in illustration of this view.

An officer is not bound to find a defendant, to arrest him, unless he can be found by a *reasonable diligence.* The officer does not warrant that he will find him. After a diligent search he may return *non est inventus*, although the defendant may really be within the officer's precinct. *Hinman* v. *Borden*, 10 Wend. 369; Sher. and Red. Neg. § 526; 1 Backus' Sher. 294. Nor is an officer bound at all events to find attachable property, if the defendant has such. *Nulla bona* may be returned, if goods are not found by the exercise of ordinary skill and diligence by the officer. Sher. and Red. Neg. § 521, and cases cited. *Tucker* v. *Bradley*, 15 Conn. 46.

A sheriff, who takes bail in a suit, does not warrant the sufficiency of the bail. He does warrant that the bail appeared to be good, and were so regarded by those most likely to be correctly informed. The same rule applies in taking sureties upon a replevin bond. Such is the law of England, and of the states in this country except where a statutory policy requires a warranty. 1 Backus' Sher. 234 and pages following; Sher. and Red. Neg. § § 540, 541, and cases cited; *Hindle* v. *Blades*, 5 Taunt. 225.

Generally an officer is not liable for attaching too much or too little property, if he exercises a sound discretion and acts in good faith. Sher. and Red. Neg. § 523, and cases. An officer's return in some cases, is not conclusive against him, where he states a thing which must necessarily be a matter of opinion or judgment merely. Drake, Attach. § 206. This applies to a statement of time. *Williams* v. *Cheesebrough*, 4 Conn. 356. Or to a statement of value. *Pierce* v. *Strickland*, 2 Story, 292. An officer should not be concluded by an expression of his judgment as to the value of property, "as it may prove to be of less value on account of some concealed infirmity or defect." *Denton* v. *Livingston*, 9 Johns. 97. Other illustrations are found in other cases. *Watson* v. *Brennan*, 39 Super. Ct. (N. Y.) 81. S. C. 66 N. Y. 621. *Lovick* v. *Crowder*, 8 B. and C. 132.

Richards v. *Gilmore*, 11 N. H. 493, is an important case touching the point at issue. There the creditor sued the officer for making an irregular levy by which his debt was lost. It was alleged that the officer was remiss in not ascertaining the full facts. It is there by the court said: "The requirement (to levy upon the estate,) upon the officer was not designed to be arbitrary in its character, or to impose an unreasonable or improper burden of responsibility. He is bound to the exercise of due care and diligence in obeying the command of the execution. The question of proper care and diligence necessary to exonerate the officer from such liability, can be determined only on a full consideration of the facts. If he was aware of the true state of the title at the time of the levy, or if he did not exercise due care and diligence in ascertaining how the estate was situated, he has failed in the proper discharge of his duty. He may have exercised all the care and diligence that could be required of him in making the proper inquiry as to the title, and may have been misled without such fault as should impute blame to him or render him liable for neglect."

We think, then, that the true question, in the case at bar, is, not whether the officer made an erroneous return, but whether he *negligently* made such a return. It would be a perilous business for officers, if the rule be otherwise. It is easy to conceive of

cases where the interest of an appraiser may not only be undisclosed by any record, but be beyond the reach of human ingenuity to find out. So, too, the appraiser must be a "discreet" person, or such used to be the law in this state. Should the officer in such case warrant to all persons that the appraiser was a man of discretion, and that he would exercise a good discretion in performing the duty undertaken by him? Or is the implied warranty of the officer that he has exercised, as an officer, a good judgment and sound discretion in the premises? In the case at bar, the officer's return does not warrant that the appraisers were disinterested, but it warrants that the officer by the use of due care and diligence could not *discover* that they were interested. We find no judicial decision affirming the contrary of this.

The *second* question is, was the officer guilty of negligence, *as to these plaintiffs?* Revert to the circumstances as they appeared upon the day assigned for the appraisal. The appraisers met at the place fixed for the purpose. There was nothing to suggest that they were interested, or to arouse a suspicion of it. The appraisers were not themselves aware that they had an interest. At any rate, if they were interested, the fact was not then present to their minds. They lived out of town. Two of them were chosen by the respective parties, who had a motive to watch the acts of each other. The mortgagees gave no notice to be heard or considered, and the officer knew nothing of their claim. There is always some presumption that an officer does his duty. He testifies that he "took every precaution in his power" to satisfy himself of the fitness of the appraisers, and there is nothing to contradict his statement. He also testifies that he inquired of the appraisers severally if they knew of any reason why they could not act as disinterested men, and they replied in the negative. The officer had no power to institute a judicial inquiry on the spot. He had no right to reject an appraiser chosen by a party, if not interested. The oath taken by an appraiser, by implication at least, asseverates that he is not interested. And the appraisers now swear that they were not conscious of any bias or interest; thought of none.

Do the plaintiffs say that the officer was *bound* to know that the appraisers were interested? Had he known that fact, he would have rejected their action *in toto*, in which case the plaintiffs would have reaped no advantages from the officer's error. And it is quite a question whether the plaintiffs should have more than nominal damages, if they could recover in this action. But we pass that question as an unnecessary element in this discussion, except as circumstantially affecting the equities and justice of the case. *Vide* these authorities. *Green* v. *Ferguson*, 14 Johns. 389; *Rich* v. *Bell*, 16 Mass. 294.

It cannot be pretended that the officer should have consulted the registry of deeds, to ascertain the property status of the appraisers. We venture to say that never in the world did an officer do such a thing. The records would not always reveal the fact of interest. But in this instance the records were thirty miles or more away. The moment assigned for action had arrived. The officer cannot know in advance who the appraisers may be. An officer is not a fit person to examine such records. An expert to do it for him must take time and receive compensation. The idea is impracticable.

What remedy, then, have the plaintiffs, for any injury alleged to have been by them sustained? The answer is obvious and not difficult. It lies perhaps in a bill of equity. Or, better than that, it lies in the motion for amendment and in the power of the court to extend the necessary relief, upon just and equitable principles. Even upon a motion of the appraisers, an amendment, to cure an error, could be made. *Chase* v. *Williams*, 71 Maine, 190.

Both officer and appraiser moved for leave to amend, in the interest of the plaintiffs, in a former litigation involving the facts now presented to us, and the motions were upon due consideration denied. It was held not to be in furtherance of justice to allow the amendment. The implication of that decision is that the sheriff had done no unlawful act. If he had, the court would have allowed him to confess it. In that litigation, the plaintiffs had a day in court, and have really suffered no injustice. Most certainly, the court would not have refused the officer the privilege

of amendment, had it been supposed that a refusal would entail upon him a liability to the present plaintiffs.

Judgment for defendant.

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

STATE OF MAINE *vs.* CITY OF PORTLAND.

Cumberland. Opinion January 4, 1883.

Indictment. Nuisance. Sewers.

A municipal corporation is liable to an indictment if they so construct their public sewers that the outfalls thereof create a public nuisance, noisome, and prejudicial to the public health, provided the accumulations of filth thence proceeding are not promptly removed.

It is not necessary in such an indictment to allege negligence in the adoption of the plan of their sewerage system or careless execution of the same. And it is no sufficient legal answer in such case that they exercised their best judgment, and proceeded with reasonable care in adopting their sewerage system and constructing their sewers.

ON EXCEPTIONS from superior court.

(Indictment.)

"The grand jurors for said state, upon their oath, present that the city of Portland, a municipal corporation in the county of Cumberland, on the first day of May, in the year of our Lord one thousand eight hundred and eighty-one, and on divers other days and times between that day and the day of the finding of this indictment at Portland aforesaid, in the county of Cumberland aforesaid, near to a certain public street and common highway known as Commercial street and near to the dwelling-houses, stores and tenements of divers citizens of said state there situate, unlawfully and injuriously did collect and did cause and suffer to be collected, and to remain large quantities, to wit: three hundred cubic yards of offal, dung, manure, dirt, excrement, filth and

scrapings, and outflowings from the wharves, gutters, streets and sewers in said city of Portland, by reason of which said collecting and causing, and suffering to be collected and to remain, of said large quantities of offal, dung, manure, dirt, excrement, filth and scrapings, and outflowings from said wharves, gutters, streets and sewers, divers fetid, noisome, hurtful, pernicious and unwholesome smells and exhalations, on said first day of May and on said divers other days and times, there did and still do arise and proceed, whereby the air then and on said divers other days and times there was and still is corrupted and the health of the citizens of said state there inhabiting, residing and passing, have been and still are endangered and impaired, to the prejudice, damage and common nuisance of all good citizens of said state there inhabiting, residing and passing, against the peace of said state, and contrary to the form of the statute in such case made and provided."

To this indictment the respondent demurred and the demurrer was overruled by the presiding justice and the respondent alleged exceptions.

Ardon W. Coombs, county attorney, for the state, cited: *State* v. *Payson*, 37 Maine, 361; R. S., c. 16, § § 2, 6. *Franklin Wharf* v. *Portland*, 67 Maine, 46; *Haskell* v. *New Bedford*, 108 Mass. 214; *Brayton* v. *Fall River*, 113 Mass. 225; *Merrifield* v. *Worcester*, 110 Mass. 216; *Manufacturing Company* v. *Worcester*, 116 Mass. 458; *Boston R. Mills* v. *Cambridge*, 117 Mass. 399; *State* v. *Freeport*, 43 Maine, 198; *State* v. *P. & K. R. R. Co.* 57 Maine, 402; *Rex* v. *Medley*, 6 C. and P. 403; *Regina* v. *Stephens*, L. R. 1 Q. B. Cas. 702; *Louisville, &c. R. R. Co.* v. *State*, 3 Head (Tenn.), 523; *State* v. *Morris & Essex R. R. Co.* 33 Zab. (N. J.) 360; *Com.* v. *Nashua & Lowell R. R. Co.* 2 Gray, 54; *Reg.* v. *G. N. &c. R. R. Co.* 9 Q. B. 315; *Com.* v. *New Bedford Bridge Co.* 2 Gray 339; 2 Dill. Mun. Corp. § 746.

William H. Looney, city solicitor, for the city of Portland.

It is a clear principle of the English law, that all corporations municipal as well as private, which owe duties to the public are

not liable to indictment for malfeasance, *unless the duty is devolved upon the corporation by prescription or by statute.* . . . . . "it must be a duty or obligation of a public nature, and one, mandatory in its nature, and not discretionary." Dillon on Mun. Corp. (3d ed.) vol. 2, § 931.

In this country the same principles have been recognized, and corporations are generally regarded as indictable for malfeasance as well as nonfeasance respecting duties of a public nature, plainly enjoined by the legislature for the benefit of the public. *Idem*, § 932.

Unless changed by statute the common law prevails. A municipal corporation can be indicted only for neglect of duties enjoined by law. *State* v. *Great Works M. & M. Co.* 20 Maine, 41; *Brown* v. *South Kennebec Ag. Soc.* 47 Maine, 275; *Small* v. *Danville*, 51 Maine, 359; *C. & O. Canal Cor.* v. *Portland*, 56 Maine, 77.

Municipal corporations have frequently been indicted for failure to discharge the duty with respect to the maintenance of public highways, but this is because the duty is imposed upon them by statute. *State* v. *Gorham*, 37 Maine, 451; *State* v. *Madison*, 63 Maine, 546; *State* v. *Beeman*, 35 Maine, 242. In *Blood* v. *Bangor*, 66 Maine, 154, the liability was imposed by statute. See *Darling* v. *Bangor*, 68 Maine, 111; *Child* v. *Boston*, 4 Allen, 41.

All that can be reasonably expected from the city is a due regard for the public interests and convenience. The city in the erection of public works which operate as a public benefit in improving the sanitary condition of the city is only liable for the negligent or careless execution of its duty. Woods' Law of Nuisances, p. 781, § 745.

BARROWS, J. The indictment charges, and the demurrer admits the unlawful commission of all the acts and facts which constitute a public nuisance, noisome, and prejudicial to the public health. The details indicate that it consists in fact of a great accumulation of filth around the outfall of a public sewer in the vicinity of a business street and wharves which are much frequented. The question is whether the public has a remedy

against the city by indictment. The city solicitor properly concedes that "corporations generally are regarded as indictable for malfeasance as well as non-feasance respecting duties of a public nature, plainly enjoined by the legislature, for the benefit of the public;" but he urges that the city ought not to be held to answer for a permissive nuisance arising from sewage matter deposited in tidewater, where there is no allegation of negligence or defect in the plan of the sewer (and all the difficulty there is, arises from the plan,) in adopting which the city has exercised its best judgment as to the proper location of the outfalls of the sewers, and has been guilty of no negligence, having constructed their sewers upon a system as good as any one knew how to build at the time of their construction.

While this plea, if supported by the proof, would suffice to relieve the city officials in the popular judgment from the blame of negligence, we do not think it amounts to a legal defence for the city upon a charge of creating and maintaining a public nuisance in the manner set forth in the indictment.

While evil intent, or negligence importing a greater or less degree of moral blame may and ordinarily does accompany the commission of a nuisance, it cannot be said that either is an essential element of the offence. On the contrary it is certain that there are cases where harm—"something that worketh hurt, inconvenience or damage,"—may occur either to the public or to individuals, when the actor is proceeding with good motives, and what would commonly be regarded as ordinary care. In other words there may be cases where the party in the exercise of his legal rights, is bound to afford absolute security to all not themselves in fault, from any evil consequences arising from his acts. Something more than the ordinary care, the want of which constitutes negligence in the ordinary acceptation of the term, is required. Thus, in *Drew* v. *The New River Company*, 6 Car. and Payne, 754, it was said that "where a public company has the right by law of taking up the pavements of the street for the purpose of laying down pipes, the workmen they employ are bound to use *such* care and caution in doing the work, as will *protect* the king's subjects, themselves using reasonable care,

from injury." So also, one may in the laudable pursuit of a manufacturing industry, unintentionally, and while acting according to his best light to prevent injury to the public or individuals therefrom, create a nuisance, of necessity, so to speak, on account of the place and character of the work, yet his good intentions and his care to avoid offence would not relieve him from legal liability to penalties, and the payment of damages to those who are in fact injuriously affected.

Or to use a different mode of expressing the same legal result and applying it to the facts of this case, the very act of accumulating, and permitting to remain, large masses of filth borne down by the sewers, in a place where they are prejudicial to public health, is *per se* proof conclusive of negligence, sufficient to sustain the charge of nuisance. Hence, in the suit of *The Franklin Wharf Company* v. *Portland*, 67 Maine, 46, where the cause of action was substantially the same which is here alleged to constitute a public nuisance, it is well said in summing up the discussion: "The right of the defendants to construct an outfall for their sewer in the sea does not include the right to create a nuisance public or private; it is a right to make deposits temporarily and not a right to obstruct navigation permanently." See also, *Haskell* v. *New Bedford*, 108 Mass. 214; and *Brayton* v. *Fall River*, 113 Mass. 218, 230. In short, the city must at its peril make the outfall of its sewers where the deposits from them will be promptly removed by the reflux of the tides, so that they will not create a nuisance, either to public health or the right of navigation, or they must provide for their speedy removal in some other mode.

Where a power is expressly conferred by statute upon a public corporation (as it is in the matter of sewers, by R. S., c. 16, § § 2, 6,) it carries with it by implication the powers necessary for its proper performance and also the corresponding duties and obligations which grow out of the exercise of the power. It cannot be said that here is no public duty imposed by statute.

It remains to be seen only whether the public have a remedy by indictment for a failure in the performance of the defendants'

duty here; and it seems to follow that they have, according to the general rule conceded to be correct, with the statement of which this discussion commenced.

The doctrine of *State* v. *Great Works M. & M. Corporation*, 20 Maine, 41, was denied in *State* v. *Vermont Central R. R. Co.* 27 Vt. 103, 108, and *State* v. *Morris & Essex R. R. Co.* 3 Zab. 360, 366, and it has been—not overlooked—but disregarded in this state, in *State* v. *Freeport*, 43 Maine, 198, and *State* v. *P. & K. R. R. Co.* 57 Maine, 402. In the first of these cases the indictment was sustained, and in the last it was held defective only for want of a particular allegation, and not because it must needs fail for the sweeping reason given in 20 Maine, 41.

The doctrine laid down in *State* v. *Great Works M. & M. Corporation*, so far as it relates to indictments of this character, is not merely obsolete, but properly overruled upon grounds so satisfactory and heretofore so well stated by other courts, that it is needless to reiterate them. See *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray, 345 and 346; *People* v. *Corporation of Albany*, 11 Wend. 539, and Freeman's note on that case, 27 Am. Dec. 99; *Mayor of New York* v. *Furze*, 3 Hill, 615.

Exceptions and demurrer overruled.

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

ALBERT M. CARTER *vs.* EDWARD SHIBLES.

Waldo. Opinion January 5, 1883.

Evidence. Estoppel. Res judicata.

Oral evidence, which does not contradict or vary the record, is admissible to prove that a particular fact, which might legally be in issue under the

pleadings, was submitted to the judgment of referees, by whom a case is heard, and determined by their award.

An action on an account annexed, for potatoes sold and delivered, was submitted to referees. At the hearing the defendant claimed as a payment a sum due him for corn sold and delivered the plaintiff, and this claim was resisted by the plaintiff, not on the ground that the amount due for the corn could not be allowed in payment for the potatoes, but on the ground that there was nothing due for the corn, and the referees awarded the amount claimed for the potatoes without deducting anything for the defendant's claim for corn;

Held, in an action subsequently brought by the former defendant to recover for the corn so sold and delivered, that the action was barred by the award of the referees, and that oral evidence was admissible to show that the claim for the corn was thus made and resisted at the hearing before the referees.

ON EXCEPTIONS.

Assumpsit to recover three hundred seventy-two dollars and seventy-two cents, for a car load of corn. The writ was dated March 30, 1881. The plea was general issue, with brief statement setting out that the claim sued had been heard and determined by referees.

The facts appear in the opinion.

Thompson and Dunton, for the plaintiff.

The court erred in admitting oral testimony as to what was submitted to and considered by the referees. If the grounds of a judgment appear by the record, they must be proved by the record alone. *Sturtevant* v. *Randall*, 53 Maine, 149; *Lander* v. *Arno*, 65 Maine, 26.

Parol evidence cannot be received to vary or explain a written submission or award. *McNear* v. *Bailey*, 18 Maine, 251; *Jones* v. *Perkins*, 54 Maine, 393; *Gay* v. *Welles*, 7 Pick. 217; *Furber* v. *Chamberlain*, 29 N. H. 405; *Buck* v. *Spofford*, 35 Maine, 526; *Wyman* v. *Hammond*, 55 Maine, 534; 2 Greenl. Ev. § 74; *York and Cumberland R. R. Co.* v. *Myers*, 41 Maine, 109; Tidd's Practice, 822; *Lyle* v. *Rodgers*, 5 Wheat. 394; *DeGroot* v. *U. S.* 5 Wall. 419; *Carnochan* v. *Christie*, 11 Wheat, 447; *Boynton* v. *Frye*, 33 Maine, 216; *Sawyer* v. *Freeman*, 35 Maine, 542.

The car load of corn in this suit was not filed in set-off, or submitted to the referees under the rule of reference in the former suit, as appears by the record. And if the car load of corn and damages were submitted to the referees by parol agreement of counsel in the former suit, the testimony does not show a valid and binding submission by the parties. To make an award upon a parol submission binding, it must be proved that the parties mutually and concurrently agreed to abide by it. *Houghton* v. *Houghton*, 37 Maine, 72; *Patterson* v. *Triumph Ins. Co.* 64 Maine, 500; 2 Greenl. Ev. § 72; *Stoddard* v. *Gage*, 41 Maine, 287.

Philo Hersey, for the defendant, cited: Whart. Ev. § 988; *Walker* v. *Chase*, 53 Maine, 260.

SYMONDS, J. In this action of assumpsit, to recover the price of a car load of corn, the defence was that the judgment in a previous suit by the defendant against the plaintiff to recover an amount due on an account for potatoes sold and delivered to the latter, in which case the price of the corn had been claimed as a credit, was an adjudication against the plaintiff's present claim. In this former action the writ contained no credit for the corn, and the case having been referred, the award of the referees gave to the present defendant, (then plaintiff,) the whole amount claimed. The record, therefore, showed no allowance of the price of the corn as a credit on the account for potatoes.

Still, at the trial of this case, the defendant undertook to prove by oral evidence that before the referees the present plaintiff claimed such credit; and that this was resisted, not on the ground that the sale of the corn was an independent transaction and the price of it not to be applied, therefore, in payment of the claim then in suit, but on the ground that the car of corn was delivered under a contract, by which Carter was bound to receive in payment therefor another quantity of potatoes, besides those included in the writ, and that by breach of that contract, on the part of Carter, Shibles sustained pecuniary damage, equalling or exceeding the price of the corn; so that in fact, under the contract for the delivery of corn by the one party and of potatoes

by the other, nothing was due to Carter for the corn, and therefore no credit was to be given therefor. The defendant claimed the right to show that both parties submitted the matter to the referees in this way, to determine what the contract was, whether under it anything was due to the plaintiff for the corn; and if so, to allow the amount due as a credit upon the account then under consideration.

The exceptions to the admission of oral evidence in support of this claim of the defendant cannot be sustained.

Only the pending action on an account annexed for potatoes sold and delivered by Shibles to Carter was within the jurisdiction of the referees, but when a payment on that account was claimed, and when this alleged payment was resisted on the ground, not that an amount due the then defendant, on account of a certain business transaction, was not to be applied in payment of the plaintiff's claim then in suit, but that in that transaction nothing was due to the defendant, and therefore there was no payment to be allowed; and when the two parties agreed in submitting this question to the referees, it was for the referees to determine whether the payment was proved or not; that is to say, whether there was anything due upon the contract, the application of which in payment, if due, was conceded. If they decided that the payment claimed by Carter was for a sum arising out of a contract on which, when considered as a whole, nothing was due to him, such decision was within the scope of their authority and the refusal by the referees, under such circumstances and upon that ground, to allow the payment claimed was an adjudication barring the plaintiff's right to recover for the car load of corn.

The oral evidence did not contradict or vary the record. It only tended to prove that a particular fact which might legally be in issue under the pleadings was submitted to the judgment of the referees and determined by the award. The authorities cited by counsel sustain its admissibility.

Exceptions overruled.

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

ALBERT G. WAKEFIELD and others, in equity,

vs.

SALLIE V. SMALL.

Penobscot. Opinion January 5, 1883.

Will.

The will of a testator contained these provisions: "The trustees under said will shall set aside and apart from the other assets of said estate, the sum of thirty thousand dollars, and to pay the whole annual income thereof to my said wife, (said Susan T. Veazie,) so long as she shall live." "Should any balance of assets and estate, real or personal, remain in their hands after having set aside said two sums of thirty thousand dollars each, and paying said legacies, and after fulfilling all other provisions of said will, I will and direct that the annual income of said balance shall be divided equally and paid to all my children, namely: Samuel, Edward, Sallie, Wildes, Louise, William, and such other child as may be born to me of my said wife, each receiving his or her equal share until the youngest of my said children that shall live to arrive at the age of twenty-one years, shall arrive at said age, and upon the arrival of said child at said age, I will and direct that said residue of said estate, including whatever of said sum set apart for the maintenance and education of said children, as aforesaid, shall remain unexpended, and also said thirty thousand dollars set aside for the support of my said wife, if she be not then living, shall be divided equally and paid to such of all my said children as shall then be living, and to the child or children of any one or more of my deceased child or children, the child or children of my deceased child or children taking the share of his, her or their deceased parent, and said trust estate shall cease. If, however, my said wife be then living, said trust estate shall not cease as to said thirty thousand, but shall continue till her decease, and upon her decease said sum shall be equally divided and paid in the manner and distributed as the aforesaid sum is required to be distributed." The widow having died while there are still three children who are minors; *Held*, That the thirty thousand dollars falls into the balance of assets mentioned in the second provision above quoted, the annual income of which is to be paid to all the children of the testator, "each receiving his or her equal share until the youngest of my said children that shall live to arrive at the age of twenty-one years shall arrive at that age."

BILL IN EQUITY brought to obtain a construction of the will of Jones P. Veazie, who died at Bangor, Febuary 16, 1875,

leaving a widow and six children, three of whom were minors.

The widow, Susan T. Veazie, died April 16, 1882, while the youngest child is only seven years of age.

The will provides as follows:

"Ninth. I will and direct that my said executors and trustees pay to my said wife, Susan, the interest or income of thirty thousand dollars in semi-annual payments during her natural life, from money invested and belonging to my estate and set aside for that purpose, which with other provisions and bequests I herein make for her, is to be in lieu of all allowance and dower, and distribution."

"Tenth. I give, bequeath and devise to my said executors and trustees, all the rest and residue of my said estate, real, personal and mixed, wherever the same may be found or situated, to have and to hold for the following purposes, to wit:" . . .

"4th. Should any balance of assets, and estate real or personal remain in their hands after having set aside said two sums of thirty thousand dollars each and paying said legacies, and after fulfilling all other provisions of said will, I will and direct that the annual income of said balance be divided equally and paid to all my children, viz: Samuel, Edward, Sallie, Wildes, Louise, William, and such other child as may be born to me of my said wife, each receiving his or her equal share until the youngest of my said children that shall live to arrive at the age of twenty-one years, shall arrive at said age, and upon the arrival of said child at said age, I will and direct that said residue of said estate including whatever of said sum set apart for the maintenance and education of said children as aforesaid, shall remain unexpended, and also said thirty thousand dollars set aside for the support of my said wife, if she be not then living, shall be divided equally and paid to such of all my said children as shall then be living, and to the child or children of any one or more of my deceased child or children, the child or children of my said deceased child or children taking the share of his, her or their deceased parent, and said trust estate shall cease. If, however, my said wife be then living said trust estate shall not cease as to said thirty thousand

dollars, but shall continue till her decease, and upon her decease said sum shall be divided equally and paid in the manner and distributed as the aforesaid sum is required to be distributed."

Charles P. Stetson, for the complainants.

SYMONDS, J. This is a bill in equity to determine the construction of a clause in the will of Jones P. Veazie. It presents the single question, what disposition is to be made of the income of thirty thousand dollars,— a sum set apart for the use of the widow, and the income of which she received annually during her life,— in the event (which has already occurred,) of her decease, before the arrival of the youngest child at the age of twenty-one years, the period of distribution fixed by the will.

It is the opinion of the court that under the will, upon the death of the widow, the application of the income of the thirty thousand dollars to her use during life having served its purpose, that sum, the thirty thousand dollars, falls into the balance of assets mentioned in the fourth section of the tenth clause of the will, the annual income of which is to be paid to all the children of the testator, "each receiving his or her equal share, until the youngest of my said children that shall live to arrive at the age of twenty-one years, shall arrive at said age."

The same result follows, if the income of the thirty thousand dollars, during the period between the widow's death and the time for distribution of the principal, were regarded as not disposed of by the will.

Nothing indicates that the testator intended the income to be invested and accumulate during such a period.

Decree accordingly.

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

INHABITANTS OF OLDTOWN *vs.* SAMUEL H. BLAKE.

Penobscot. Opinion January 5, 1883.

Taxes, action for. Stat. 1874, c. 232. Description. Collector.

Unimproved land may be taxed to an owner residing in another town in the state. He is liable to taxation for such land, and is precisely within the terms of stat. 1874, c. 232. That statute does not repeal the old method of collecting taxes nor is it limited by them.

A description by which the owner can know with reasonable certainty for what lands he is assessed, is sufficient.

When to a sufficient description of land bordering upon a river the words — "and boom," are added, they indicate with reasonable certainty a boom which extended along the river in front of the land.

A collector of taxes who was not sworn, is an officer *de facto*, having certain powers. Payment to him would discharge a tax. And a demand made by him is a sufficient demand to comply with the provisions of stat. 1874, c. 232, when the refusal to pay is put upon other grounds than any want of qualification on the part of the collector.

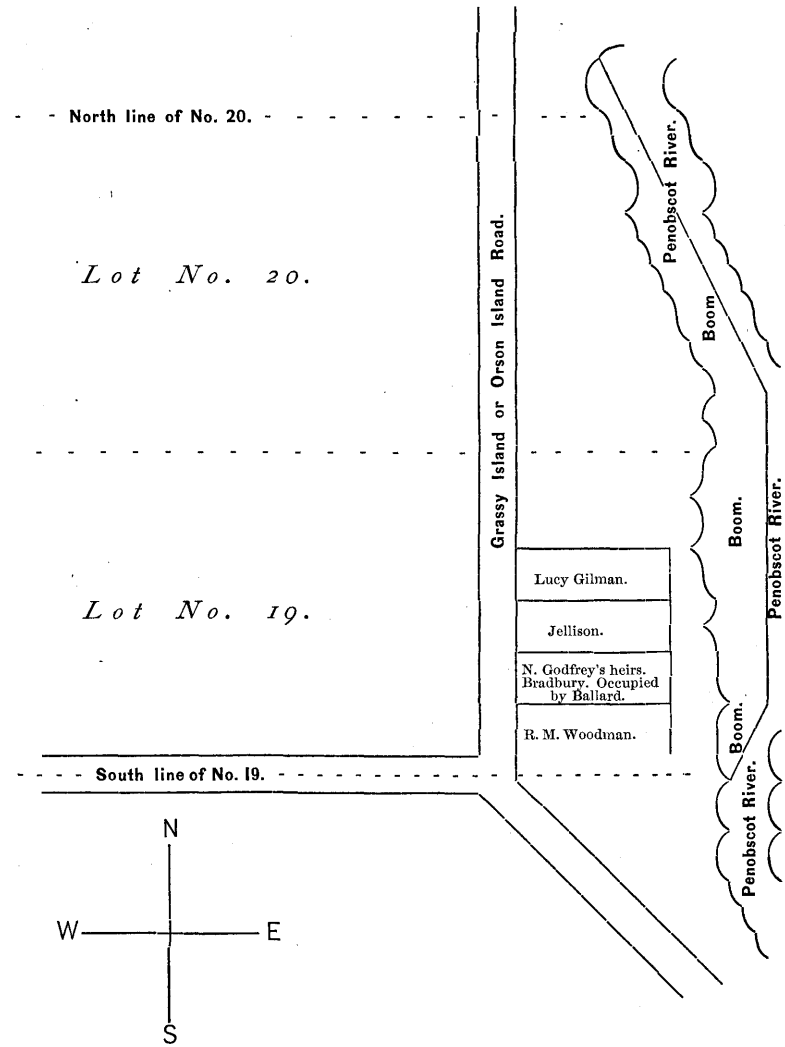
ON EXCEPTIONS.

Debt under stat. 1874, c. 232, to recover taxes assessed in the town of Oldtown, in 1880, to the defendant, a resident of Bangor, on property described in the list of assessments of said town, for that year, as follows:

"Description.	Acres.	Value.	Dol.	Cts.
"Lot No. 14, Walker tract,	50	100	3	10"
"So much of lots 19 and 20, Holland's plan, east side of Marsh Island, as lies east of Grass Island road, so-called, (except that part occupied by Theodore Jellison, Lucy Gilman, George Ballard, and R. M. Woodman, and that part taxed to N. Godfrey's heirs,) and boom,		1500	46	50"

The writ was dated March 18, 1881.

The following is a diagram of the premises used at the trial:



On the question of demand before commencing this suit the collector testified as follows:

"I made demand of Mr. Blake for his taxes, first, by sending him

by mail, about July 1, 1880, a schedule of his property, taxed for that year being same parcels hereinbefore set forth and described, including said lots thirteen and fifteen, and with the schedule, enclosed a notice filled out of which the following is the blank form:

"'Oldtown,..... 1880.

"Mr.....

"'The amount of your state, county and town taxes committed to me for collection for 1880, is $..... A discount of ten per cent will be made if paid on or before September 1st, 1880.

"'The delivery of this bill is considered a legal demand.

E. R. Alford, Collector.'

. . . "I afterward, about the last of December, 1880, went to Mr. Blake's office in Bangor, and made a demand in person for the balance of his tax. Did not specify any particular amount. Do not think I showed him the amount, nor what was due on either parcel, or ask him for the tax on either lot specifically. My demand was for the aggregate amount of his tax,—the balance that was due on the whole without naming any amount, and Mr. Blake declined to pay and found fault with the valuation and with the description."

Other material facts are stated in the opinion.

The presiding justice ruled, *pro forma*, that plaintiffs were entitled to recover the amount sued for, with interest and costs, and directed a verdict for the plaintiffs for fifty-two dollars and seventy cents, costs to follow, to which ruling and direction the defendant excepted.

Charles P. Stetson and *J. A. Blanchard*, for the plaintiffs, cited: *People* v. *Collins*, 7 Johns. 549; *Millett* v. *Millett*, 72 Maine, 117.

D. F. Davis and *C. A. Bailey*, for the defendant.

Without statutory provision a non-resident owner is not liable to taxation. The assessors have jurisdiction only of the inhabitants of their town and of property within it. *Herriman* v. *Stowers*, 43 Maine, 497; *Alvord* v. *Collin*, 20 Pick. 426; *Hartland* v. *Church*, 47 Maine, 169. R. S., c. 6, § 115, taxes the non-resident

owner of improved lands. And there is no allegation in the writ that this was improved land. *Drowne* v. *Stimpson*, 2 Mass. 444; *Williams* v. *Hingham Turnpike Co.* 4 Pick. 345.

This action is authorized only by § 115. It is not within stat. 1874, c. 232. That act applies to resident owners and such non-residents as are taxed under R. S., c. 6, § 116, for personal property. It would be monstrous to apply it to non-resident owners of real estate who have no voice in creating the liability. Hence nothing is to be presumed in favor of its application.

By § 115, an action is authorized after six months from the time the assessments are committed, and a written notice is required two months prior to commencing a suit. But this act allows a suit at any time—not even a demand being necessary except for the purpose of insuring costs; and as a failure to recover costs does not give them to the opposite party, it becomes a matter of comparative indifference whether a demand is made or not. In *Thompson* v. *Gardner*, 10 Johns. 404, the court say: "It would be an alarming doctrine to say that a collector of taxes might sue immediately every person upon his assessment roll without first demanding payment of the taxes." Yet this act contains within itself this "alarming doctrine" and is an arbitrary infringement of well established principles of jurisprudence.

The description was insufficient and the assessment void for uncertainty. *Orono* v. *Veazie*, 61 Maine, 431; *People* v. *Com.* 48 Cal. 427; *Greene* v. *Lunt*, 58 Maine, 533; *Rollins* v. *Clay*, 33 Maine, 132; Cooley on taxation, 279; *Boothbay* v. *Race*, 68 Maine, 356-7.

In any event no costs are recoverable in this suit because no proper demand was made. *York* v. *Goodwin*, 67 Maine, 262; Blackwell, Tax Titles, 170; *Cavis* v. *Robinson*, 9 N. H. 524; *Payson* v. *Hall*, 30 Maine, 319; *Gould* v. *Monroe*, 61 Maine, 547; *Farnsworth Co.* v. *Rand*, 65 Maine, 21; *Welles* v. *Battelle*, 11 Mass. 481.

SYMONDS, J. This is an action of debt, brought for the collection of taxes under the act of 1874, c. 232. The defendant was a resident of Bangor, owning real estate in Oldtown. Whether such real estate was improved or not, it was subject to

assessment for taxes. R. S., c. 6, § § 2, 3, 9, 28, 159. The provisions of the statutes of 1821, § 30, (Mass. Stat. March 16, 1786, § 7,) in regard to the unimproved lands of non-resident proprietors, under which it was held in *Rising* v. *Granger*, 1 Mass. 48, and in *Alvord* v. *Collin*, 20 Pick. 426, that the tax was a lien upon the land itself and not a personal charge against the owner, are not a part of our present statutes relating to taxation. Unimproved lands may be taxed to an owner residing in another town in the state. He is liable to taxation for them, and is therefore precisely within the terms of the act of 1874, c. 232, providing this further method for the collection of taxes. If the lands were improved, this act of 1874 affords a method of collecting the taxes upon them, additional to that given by R. S., c. 6, § 115. It is a new mode provided generally "for the collection of taxes legally assessed in towns, against the inhabitants thereof or parties liable to taxation therein." It does not repeal the old methods, nor is it limited by them. The question, whether these lands were improved or not, therefore, is of no importance in deciding the case.

In *French* v. *Patterson*, 61 Maine, 209, it is said, "The statute does not require, nor is it often practicable that the assessors of taxes should give a minute description of the non-resident lands assessed by them. It is sufficient if they so describe them in their assessment that they can be identified with reasonable certainty." The rule given in *Orono* v. *Veazie*, 61 Maine, 433, is that, "the description of the real estate assessed, in this class of cases, must be certain or refer to something by which it can be made certain."

In the present case, we think the description was such that the owner could know with certainty for what lands he was assessed. So much of two contiguous lots, numbered nineteen and twenty, on a plan known and mentioned, as lies east of a certain road, is a good description. There appears to have been but one road across the lots, and the evidence was, that what was called the Grass Island road by the assessors, was the same as the Orson Island road mentioned in the deed to the defendant.

The whole tract was sufficiently described, and the exceptions from it seem to be clear enough to be intelligible.

The assessors in their description of the premises except from the whole tract just mentioned, "that part occupied by Theodore Jellison, Lucy Gilman, George Ballard and R. M. Woodman;" while the deed to the defendant excepts from the tract conveyed to him, "the lot occupied by R. M. Woodman and the three lots adjoining, and north of said lot, each of which is four rods wide on said Orson Island road, and extending eight rods east according to the plan of said Wadleigh."

These exceptions are the same, and sufficiently stated in the assessment. The fact was, — and it must have been reasonably certain to the defendant, — that the parts excepted, were those to which his deed gave him no title.

The other exception in the description of the land taxed is of "that part taxed to N. Godfrey's heirs." This may be more doubtful. But it is to be noticed that this last exception is not in terms contained in the deed of these premises to the defendant. The whole tract is conveyed to him with the four exceptions previously stated. Whatever title or occupation the Godfrey heirs had, must have been out of the estate which the deed conveyed to him, or upon the lots excepted from the operation of the deed. This fact, we think, aids the last exception somewhat, and that the description, taken as a whole, was intelligible and reasonably definite.

It was one tract which was described in the deed and by the assessors, although consisting of parts of two contiguous lots on the Holland plan; and when to a sufficient description of such a tract, the words, "and boom", were added by the assessors, they seem to the court to identify with reasonable certainty the boom which is shown by the evidence and diagram to extend along the front of those lots, constituting the chief value of the premises. For purposes of taxation, the boom affixed to the land was real estate. R. S., c. 6, § 3. The assessment was in effect one upon a single parcel of real estate with the erections upon it, as if a lot of land were described and the words, "and buildings," were added.

Supposing the collector to have been duly qualified to act, the demand made by him in December, 1880, was a sufficient one.

It was a personal demand upon the defendant for the taxes due, the amount of them having been previously stated to him in writing; and he "declined to pay and found fault with the valuation and with the description."

The collector was duly chosen and had given bond but had not taken the oath of office. It may be true that a collector who has not been sworn has not that full authority required to enable him to make a legal sale of lands for non-payment of taxes. *Payson* v. *Hall*, 30 Maine, 319. But if he is acting under his warrant, with no other defect in his authority than that, he is at least an officer *de facto*, having certain powers. Payment to him would discharge the tax. The fact that the collector to whom the tax had once been paid was not sworn, would not enable the town to collect the tax a second time. Under the act of 1874, the defendant is not liable to costs, unless the tax was demanded before the action was brought. But when, prior to the suit, the demand had been made by an acting collector, having authority to discharge it, and when the refusal to pay was put upon other grounds than any want of qualification on his part, the court correctly awarded costs in favor of the plaintiffs. See *Greene* v. *Walker*, 63 Maine, 313; *Belfast* v. *Morrill* 65 Maine, 580.

Exceptions overruled. Judgment on the verdict.

Memorandum. It is understood by the parties that the plaintiffs are to remit the sum of $1.55 and interest thereon, from the amount of the verdict, before the above entries are made.

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

SARAH L. LIBBY *vs.* THADDEUS C. S. BERRY.

Penobscot. Opinion January 5, 1883.

Married woman, action by. Divorce. Stat. 1876, c. 112.

Stat. 1876, c. 112, does not so far modify the common law as to authorize a civil action by the wife against the husband to recover damages for an

assault, nor against those who act with the husband and under his directions in doing such a wrong. Nor does such right of action arise upon divorce.

ON REPORT.

The writ is dated March 4, 1881, and the declaration is as follows:

"In a plea of the case, for that the said defendant, at said Houlton, to wit, at said Bangor, on the fourth day of March, 1877, the plaintiff being then and there a married woman, by the name of Sarah L. Given, and being pregnant with child, unlawfully used upon her, so being pregnant aforesaid, an instrument whose name is to the plaintiff unknown, and inserted the same into her body, through and by the passage called the vagina, with intent to procure the miscarriage of herself, against her will and consent, her then husband, James C. Given, being then and there present, compelling and coercing her to endure the use of said instrument by the defendant, as aforesaid.

"And the plaintiff avers that she has since been legally divorced from her said husband, and resumed her maiden name; that she was greatly injured by the defendant, by the use of said instrument as aforesaid; that her health was very much injured thereby and she has suffered great pain of body and mind also, by means thereof.

"Also for that the defendant at said Houlton, to wit, at said Bangor, on the sixth day of March, 1877, unlawfully did use a certain other instrument unknown to the plaintiff, upon the plaintiff, there and then being pregnant with child, by inserting the same into her body, with intent to procure the miscarriage of the plaintiff. And the plaintiff avers that she was greatly injured by the defendant, by the use of said instrument as aforesaid; that her health was very much impaired, and she has suffered intense pain of body and mind thereby."

The plea was not guilty

At the trial, after the plaintiff had testified to the acts alleged in the declaration, the parties agreed to report the case to law court to determine whether the action could be maintained. If not, nonsuit was to be entered, otherwise the action was to stand for trial.

A. Sanborn, for the plaintiff.

Stat. 1876, c. 112, expressly gives the plaintiff the right to maintain this action. *Abbott* v. *Abbott* was sound as the law stood in 1869, and down to the act of 1876.

That case was governed by the common law which forbade it; this is governed by the statute law which upholds it.

Wilson and Woodard, for the defendant, cited: *Abbott* v. *Abbott*, 67 Maine, 304; *Smith* v. *Gorman*, 41 Maine, 405; *Dwelly* v. *Dwelly*, 46 Maine, 377; *Crowther* v. *Crowther*, 55 Maine, 358; *Hobbs* v. *Hobbs*, 70 Maine, 381; *Com.* v. *Parker*, 9 Met. 263; *Smith* v. *State*, 33 Maine, 48; R. S., c. 124, § 8; Add. Torts, 691; *Christophenson* v. *Bare*, 11 Ad. and El. 473, (63 E. C. L. 473); Broom's Leg. Max. 204; *Emerson* v. *Balch*, 5 Dane's Abr. 566; *Fitzgerald* v. *Cavin*, 110 Mass. 153.

SYMONDS, J. The opinion in *Abbott* v. *Abbott*, 67 Maine, 304, is decisive against the right of the plaintiff to recover, unless the change in the law introduced by the later act of 1876, c. 112, is such as to sustain the action.

But the amendment of 1876 has been held by the court, in *Hobbs* v. *Hobbs*, 70 Maine, 381, to relate to "cases where by the very assumption the husband may be a party with the wife or not, at her election. The design is to protect her from all marital interference in suits commenced by the wife alone or jointly with her husband, and to prevent his maintaining alone any action respecting his wife's property." *Smith* v. *Gorman*, 41 Maine, 405, 408; *Crowther* v. *Crowther*, 55 Maine, 359.

It is clear that in the case at bar the husband could not be a party plaintiff with the wife, for he was the principal and the defendant the agent in procuring the wrong to be done.

According to the construction already given to the act of 1876, it does not so far modify the common law as to authorize a civil action by the wife against the husband to recover damages for an assault, nor against those who act with the husband and under his direction in doing such a wrong. It only authorizes her to maintain alone such actions as previously could be sustained when brought by the husband alone or by the husband and wife jointly. It enlarges not her right of action, but her sole right of action. It does not enable her to maintain suits which could not

have been maintained before, but to bring in her own name those which before must have been brought in the husband's name, either alone or as a party plaintiff with her.

The reasoning in *Abbott* v. *Abbott*, is also conclusive upon the point that if such right of action does not exist during coverture it does not arise upon divorce. From the competency of married women to make legal contracts, and from the full recognition of their separate right of property, certain special instances have arisen in which after divorce actions of assumpsit by them against their former husbands have been sustained, as in *Webster* v. *Webster*, 58 Maine, 139; *Carlton* v. *Carlton*, 72 Maine, 115. See also, *Blake* v. *Blake*, 64 Maine, 177. But nothing in those cases indicates such right of action in tort.

Plaintiff nonsuit.

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

ORRA RICKER *vs.* GEORGE W. HORN and others.

Penobscot. Opinion January 9, 1883.

New trial.

When at the trial of a cause an issue is raised by false testimony, and the opposite party is taken by surprise thereby, and has no opportunity to move for delay because of his necessary absence from the court without fault on his part, a new trial will be granted when it appears that the verdict was influenced by such false testimony.

ON REPORT, on motion for new trial.

Assumpsit, to recover fifty dollars for board of workmen in mill, operated by the defendants, George W. Horn, Noah Gould and Joseph D. Sawyer. Gould and Sawyer submitted to a default before the trial. The plaintiff was unable to attend court at the time of the trial on account of her sickness. The defendant, Horn, defended on the ground that he had withdrawn from the

defendant firm before the bill in suit was contracted. The verdict was for the defendant.

At the trial the defendant, Horn, testified that prior to the date of the plaintiff's account in suit,—"I told Mrs. Ricker at that time, that I was out of the concern, and had nothing more to do with it, and should not be held responsible for any more bills; I told her that I had given what I had been there to the concern and that I should not be held responsible for any more bills." Mrs. Horn testified to this conversation.

On the motion for new trial on the ground of newly discovered evidence the plaintiff testified that no such notice was given her prior to the time when the bill was contracted, and that the conversation with Horn when Mrs. Horn was present was after the bill was contracted. Other witnesses confirmed the plaintiff.

Other material facts are stated in the opinion.

H. C. Goodenow, for the plaintiff.

D. F. Davis and *C. A. Bailey*, for the defendant.

DANFORTH, J. The defence in this case, is that the contesting defendant Horn had withdrawn from the firm before the plaintiff's claim had accrued and that the plaintiff had seasonable notice of that fact.

It is conceded that, during previous similar dealings between the plaintiff and the defendant firm, Horn was a member of it, and the evidence clearly shows, that the credit for the board now in suit was given to the three members though largely to Horn, and that while the debt was accruing the conduct of Horn in relation to the partnership business was such as abundantly to justify such credit, unless the plaintiff had previous notice of his withdrawal. The defendant asserts that such notice was given, and the burden of proof is upon him. The plaintiff admits a notice but says it was subsequent to the origin of the debt, and this presents the main issue between the parties. Upon this issue the preponderance of the evidence introduced at the trial would seem to be in favor of the plaintiff, but perhaps not sufficiently so to authorize a disturbance of the verdict.

But with the evidence now offered, especially if we consider the great improbability that the plaintiff, under the circumstances developed, should continue to give credit to a firm after notice of the withdrawal of the only responsible member, the case largely preponderates in favor of the plaintiff's theory.

True, the additional testimony is not newly discovered so as to authorize the setting aside the verdict on that ground. Nor should we deem it proper to set it aside on the ground of surprise alone. But the testimony of the defendant raised an issue which upon the plaintiff's theory she could not have been expected to have anticipated. She did anticipate the withdrawal as a defence, but not the prior notice of that withdrawal; and if, as she says, it is false, she had a very substantial reason for her failure. It is quite probable that she was surprised when she learned of the defence made, and had she been present at the trial should have moved for delay until she could procure the testimony she has now produced. But she was absent, and as appears for a very good reason, and therefore could not then or at any previous time have given her counsel information of a defence of which she had no knowledge. Thus without fault on her part, the action went to trial in the absence of testimony important to the issue, and such as might well change the result.

She evidently lost her verdict upon testimony which she alleges to have been false, whether wilfully or mistakenly so is immaterial, and the evidence she now offers tends strongly to prove it so. This has not been passed upon by the jury, and we think justice requires that it should be.

Motion sustained.

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

JOHN C. BARTLETT *vs.* MELVINA S. WARE and another.

Kennebec. Opinion January 19, 1883.

Attachment of real estate. Declaration.

Where the only count in the writ was upon an account annexed, which contained the following, among other items: "Balance as per s't'lement, 2123.54", "Mdse as per bill, 7.75", "Mdse as per bill, 39.75"; *Held*, That the nature and amount of the plaintiff's demands were not sufficiently set forth to justify and sustain an attachment of real estate.

ON REPORT.

Writ of entry, dated February 12, 1881. The plaintiff's title depended upon the validity of an attachment upon a writ which contained but one count, and that was upon an account annexed as follows:

"1877. John McGugin, In acc't with J. C. Bartlett.

Feb. 1,	Balance as per s't'lement,	2123 54	
3,	Pd note at Cobb. Nat. Bank,	227 61	
5,	Mdse. as per bill,	7 75	
6,	Discount on Moulton's note,	8 93	
"	2 bus. meal,	1 54	
8,	Mdse as per bill,	39 75	
			2409 12
	Int. on acc't,		50 00
			2459 12
	Cr.		
Feb. 3,	By O. Moulton's 6 mos. note,		248 26
			2210 86"

After the attachment and prior to the levy, the debtor conveyed the real estate and defendants' title rested upon that conveyance.

L. Clay, for the plaintiff.

The first item in the account annexed was balance found due upon a settlement. That was a sufficient specification of the nature and amount of that item. *Harrington* v. *Tuttle*, 64 Maine, 476. The other two items, "mdse as per bill", do not necessarily refer to any other paper not attached to the writ, as in *Bennett* v. *Davis*, 62 Maine, 544. They do not say "as per bill rendered." All the items are sufficient to give subsequent purchasers or attaching creditors the nature and amount of the plaintiff's claim. *Jordan* v. *Keen*, 54 Maine, 417; *Osgood* v. *Holyoke*, 48 Maine, 410; *Shaw* v. *Nickerson*, 60 Maine, 249.

Baker and *Baker*, for the defendants, cited: *Saco* v. *Hopkinton*, 29 Maine, 268; *Osgood* v. *Holyoke*, 48 Maine, 410; *Hanson* v. *Dow*, 51 Maine, 165; *Bennett* v. *Davis*, 62 Maine, 544; *Harrington* v. *Tuttle*, 64 Maine, 474; *Drew* v. *Alfred Bank*, 55 Maine, 450.

WALTON, J. The statutes of this state declare that no attachment of real estate on mesne process shall create any lien thereon, unless the nature and amount of the plaintiff's demand are set forth in proper counts, or a specification thereof is annexed to the writ. Act 1838, c. 344. R. S., c. 81, §56.

This is a real action, and the only question is whether the account annexed to the plaintiff's writ in a former suit of his, against the then owner of the land, contained a sufficient specification of the nature and amount of his demands to justify and sustain an attachment of real estate. We think it did not. The first item of the account was for "*Balance as per s'tlement, 2123.54.*" Settlement of what? Of an account for intoxicating liquors sold in violation of law, or of an account for goods lawfully sold? Surely, the *nature* of the demands settled is not so stated that upon an examination of the writ one could tell whether they were valid or invalid. We think such a specification is not sufficient. The third and sixth items were for "*mdse as per bill, 7.75*," and for "*mdse as per bill, 39.75.*" Could anything be more indefinite? In the construction of the statutes above cited it has been held that when an action is brought upon an account annexed to the writ, something more is required

than a statement that there is a certain "amount" or "balance" due to the plaintiff. *Saco* v. *Hopkinton*, 29 Maine, 268; *Savings Bank* v. *Land and Lumber Co.* 73 Maine, 404. And in *Bennett* v. *Davis*, 62 Maine, 544, where, in an action upon an account annexed, the only item in the account annexed was, "To groceries as per bill of particulars rendered, $28.52," the court held the declaration bad on demurrer.

Very clearly the account annexed to the plaintiff's writ in his suit against the then owner of the land demanded in this suit, was not sufficient to sustain the attachment, and such being the case, it is conceded by the plaintiff's counsel that judgment must be rendered for the defendants.

Judgment for defendants.

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

OAKLAND ICE COMPANY *vs.* SANFORD N. MAXCY and another.

Kennebec. Opinion January 23, 1883.

Evidence. Contract.

Conversation between the parties to a written contract, after it has been executed and delivered, relating to a change of some of its provisions, is admissible in evidence.

So, also, would messages sent by a third party and shown to have been communicated to the other party, when relating to a change in the contract. The order in which the facts shall be marshaled, which show the sending and delivery of the message, is subject to the discretion of the court.

Conversation between the parties, as to certain terms to be inserted in a written contract, is admissible in evidence when the opposite party on cross examination draws out a part of that conversation.

ON EXCEPTIONS AND REPORT from the superior court.

Assumpsit for cause stated in the opening of the opinion. The writ was dated May 20, 1881. Plea, general issue with brief statement.

The following are the exceptions, and so much of the evidence and charge, as are referred to in the exceptions.

To the following rulings, admissions of testimony against the objection of defendants' counsel, instructions and refusual to instruct, the defendants except.

"1. To the admission of the testimony of A. Rich on page seven of the report, as to what Maxcy said, commencing with the sentence 'I called Maxcy's attention to the fact,' and ending with the words 'and re-covering again.'

"2. To the admission of Rich's statement on pages eight and nine as to what message he sent by Davenport to the defendants and what Davenport told him that Maxcy said in reply. (This testimony was admitted on the statement by counsel that the message would be shown to have been communicated to the defendants.)

"3. To the admission of Rich's testimony on pages twenty and twenty-one relating to a pretended conversation with Maxcy as to the time of shipping the ice and as to how the clause 'In the month of August' came to be inserted in the contract.

"4. To the answer of Rich to the question by his counsel, 'How long a notice would you have required to open your houses and deliver five hundred tons of ice according to this contract and be ready to ship,' as appears on pages twenty-one and twenty-two.

"5. To that part of the charge of the judge on page sixty of the charge, commencing with the sentence, 'And I may here with respect to what constitutes a waiver of the terms in that contract,' and ending with the words and sentence, 'You have a right to infer the assent or the acquiescence of a party to a proposition from the language and his conduct and all the circumstances attending the occurance at the time. It is purely a matter of fact for the determination of the jury.'

"6. To the language of the judge on page sixty-three of the charge, beginning with, 'It was the duty of defendants,' and ending with the sentence, 'In order that it might be loaded.

"7. To the language of the judge, page sixty-seven of the charge, beginning with the sentence, 'I have already said it is not necessary' and ending with the words, 'Then the parties are estopped.'

"8. To the charge of the judge as to the rule of damages on pages sixty-eight and sixty-nine of the charge.

"9. To the instruction suggested and repeated by the plaintiffs' counsel at the close of the charge and allowed by the judge on page seventy-one of the charge."

Defendants' counsel requested the judge, to give the following instructions:

"1. That under this contract it was the duty of the plaintiffs to notify the defendants when they opened their houses and commenced shipping.

"2. That if the defendants were notified about the twenty-fifth of August, as stated by Maxcy, that the plaintiffs were not going to open their houses in August, it was a violation of the contract on the part of the plaintiffs and defendants were exonerated from taking the ice under the contract after that.

"3. That if the jury find that Maxcy called on Davenport and inquired when they were going to open the Oakland houses and told him that he had vessels in the river ready to place there any time as testified to by Maxcy, that was a sufficient demand and all that was required by defendants. Said requested instructions were refused except as appears in the charge.

"To which rulings, instructions and refusal to instruct the defendants except, and pray that their exceptions may be allowed."

Testimony of Abram Rich. "I called Maxcy's attention to the fact that it would be inconvenient for the Oakland Ice Company to open the ice houses to ship one cargo of ice. Mr. Maxcy's reply was, 'Well, you will be shipping ice at your place, and have shipped some ice there for the Oakland Ice Company. You could put the cargo in from there if you were not shipping at the Oakland Ice Company's buildings.' This was after the contract was drawn up, signed and delivered, and before we separated. Maxcy said he was a stockholder in the Oakland Ice Company and of course would want to make it as convenient as possible for the company to ship; would not want to cause any loss by opening for the purpose of one cargo, and re-covering again." . . .

"*Question.* You may state what directions you gave to Mr. Davenport, the treasurer, to be communicated to these defendants in reference to this contract, and when it was? (Objected to and admitted.) *Answer.* It was in the latter part of August, I think between the twenty-fifth and twenty-seventh, 1880. I instructed Mr. Davenport to see Sanford Maxcy and say to him from me that if he particularly desired that five hundred tons of ice in the month of August, to put a vessel at my place at Farmingdale and I would ship it there on account of the Oakland Ice Company if the Oakland Company were not shipping from their houses below; but if that would not do that we would open the Oakland Ice Company's houses and give it to him from there. I also told Davenport that I was going to put a crew down to ship the ice out from the Oaklands as soon as they finished a room that they were then at work on in my houses in Farmingdale. And they would probably get at work on the first day of September, which they did do. I directed him also to communicate that to Mr. Maxcy. I think I have now stated all the directions I gave to Mr. Davenport. The next day Mr. Davenport brought me the answer of Mr. Maxcy to my message. Davenport said he had communicated my message to Mr. Maxcy, and Maxcy said that was all right; that as they had held off to accommodate us they should expect that we should hold off a little while to accommodate them and let them have a little more time in which to take the ice, and that he (Davenport) had told Mr. Maxcy that we undoubtedly should do so. And I assented to it when he told me. Davenport said that Maxcy thought it was hardly worth while to open the Oakland houses for one cargo of ice; it was not a very material point with him." . .

"*Question.* You were asked by the counsel as to the clause of 'in the month of August,' and as to when the company were shipping ice. You may state all that was said on that subject, and how the clause was inserted. (Objected to and admitted.) *Answer.* When those contracts were being written there was some little talk over the time of shipment, and Maxcy wished to make it convenient for the Oakland Ice Company, and said he could take the ice most any time when the company were ship-

ping; a few days would make no particular difference, and asked me when I thought I would be taking the ice out there. I told him I anticipated shipping from there some time in the latter part of August. When I could spare one crew from Farmingdale I should put it down there and take the ice off, empty the houses. And he said a few days' time would make no difference to him, even if it was a little later than August. I am giving his language as near as I can recollect. Maxcy stated that he was a stockholder in the Oakland Ice Company and he wished to make it convenient for the company in taking the ice. That was the substance of the talk." . . .

Question. If any time during the month of August you had been requested to open your houses and deliver the five hundred tons of ice according to the contract, how long a notice would you have required to open your houses and be ready to ship? *Answer.* If the crew were there I should think some where from half an hour to an hour's time. (Answer objected to and admitted.) It would have required that time to open the houses and be ready to run the ice. I could have had a crew there within quarter or half a day after notice or request.

Charge of the presiding judge. . . . "And I may say here with respect to what constitutes a waiver of the terms in that contract, as in all other cases of contracts, it is not indispensable that this alteration, this change, or this waiver, should be in *express* terms. You have a right to infer the assent or the acquiescence of a party to a proposition, from his language and his conduct, and all the circumstances attending the occurrence at the time. It is purely a matter of fact for the determination of the jury." . . .

"Now, there is evidence here to which, perhaps at this point, it is my duty to call your attention, which should be considered in connection with the terms of this contract. There is evidence here, about which there is no controversy, that in the ice business on the Kennebec river it is the uniform and universal custom for the purchaser to furnish the vessel and give notice that the vessel is ready at a given time to receive the ice; that it is the duty of the seller to load the ice at his own expense on board of the

ship upon the notice which he has thus received. It is not in controversy that this custom has been of sufficiently long standing that it may be presumed to have been known to parties engaged in any transactions of this character. No controversy is raised upon that point, therefore you have a right to consider this contract in connection with this uniform universal custom. That is, it was the duty of the plaintiffs here to load this ice on shipboard in Pittston at the Oakland houses." . . .

"It was the duty of the defendants to notify the plaintiffs of their readiness to receive it on shipboard, notify them when the ship would be there, and request them to load accordingly. For, you will perceive that in case of a commodity of the peculiar character of ice it would not be reasonable to require the plaintiffs to keep their houses open during the whole month of August, waiting and hoping that some day the defendants' vessel would come along, in order that it might be loaded." . .

"I have already said it is not necessary that there should be express terms, express language to indicate a waiver by which parties may be bound. If the proposition is made on one side and silently acquiesced in, if from the circumstances and the conduct of the parties you are satisfied that they acquiesced in it, that would be a waiver. Or if the defendants by any conduct or language of theirs fairly authorized the plaintiffs regarded as men of average prudence, caution and discretion, to believe that they had waived this provision of the contract in respect to the place of delivery, and the plaintiffs did believe it, and did act upon it, and did not open their houses, relying upon it, the defendants would be bound by that language and conduct which caused the plaintiffs to act upon it, precisely as though there had been in fact a mutual agreement. That is on the principle of estoppel, and it is a principle of justice and fairness. If they have by their language or their conduct, which would have caused any prudent men to believe a certain thing, induced them to act upon it, and they did believe it and act upon it the parties are estopped." . . .

Mr. Baker. "I would request the instruction that it is competent for the jury to consider the instructions given by

Capt. Rich to Mr. Davenport as bearing upon the question of the probabilities of what the message really was that was communicated."

The Court. "Certainly. That is all a question of fact for you, gentlemen. You have a right to consider the evidence."

Other material facts stated in the opinion.

Baker, Baker and Cornish, for the plaintiffs.

Clay and Clay, for the defendants.

VIRGIN, J. Assumpsit for an alleged breach of a contract whereby the defendants were to purchase of the plaintiff company five hundred tons of ice, at five dollars per ton, to be shipped from the Oakland ice houses, in Pittston, "in the month of August, 1880, when the Oakland company are shipping ice."

The report discloses that one Rich was the president and business manager of the plaintiff company and owned ice houses at Farmingdale, some five or six miles above the plaintiffs', on the Kennebec river. The Oakland houses were not open in the month of August, 1880; and the plaintiffs contended that the reason was on account of a waiver, on the part of the defendants, as to the time and place of the delivery of the ice. That not wishing to open the Oakland houses simply to take out a single cargo, the plaintiffs, about August 25, proposed to Maxcy that if they wanted the ice during the month of August, it would be shipped at Rich's houses, in Farmingdale, where he was then shipping; or, if they insisted on having it from the Oakland houses, it should be shipped at them. That to the former alternative, Maxcy, one of the defendants and representing them, assented, with an understanding between the parties, that, as the defendants had thereby accommodated the plaintiffs as to the place, the latter should reciprocate as to the time of delivery, and hold the ice until it should be wanted. That all the ice was thereafter disposed of in the Oakland houses and five hundred tons held for the defendants in the Farmingdale.

The case is before us on motion and exceptions.

I. Rich's testimony as to a conversation relating to the change of the place of delivery, had with Maxcy after the execution and

delivery of the written contract, but before they separated, was clearly admissible. *Goss* v. *Lord Nugent*, 5 Barn. and Adol. 58; *Marshall* v. *Baker*, 19 Maine, 402; *Adams* v. *McFarlane*, 65 Maine, 143, 152, and cases cited there.

II. So was his testimony as to the message sent by him through Davenport to Maxcy. If he could deliver the message himself directly to Maxcy, he could send it by an agent duly authorized. To be sure, the message must be shown to have been communicated to the other party. But the order in which these facts shall be marshaled is subject to the discretion of the court.

III. So was his testimony as to a conversation he had with Maxcy, while the contract was being written, relating to the time of delivery to be inserted in the contract. If the defendant had desired to keep that conversation out, he should not have drawn out a portion of it in cross-examination, and thereby withdraw objections to the remainder of it. *Williams* v. *Gilman*, 71 Maine, 21.

IV. We can conceive no legal objection to the admissibility of Rich's testimony as to the length of time required to open the Oakland houses in August; and the defendants suggest none. Moreover the next succeeding testimony of the same witness covers the same facts, and it was not objected to.

V and VII. The instruction relating to waiver, is not questioned as to its legal quality; and it cannot be properly. *Adams* v. *McFarlane*, *supra*. But it is challenged upon the alleged ground that there was no testimony calling for it. If we looked only at the testimony introduced by the defendants we might conclude that the objection was well taken; but the plaintiffs' whole case is founded upon an alleged waiver as to the stipulated place of delivery; and there is an abundance of testimony from Rich and Davenport, coupled with the non-denials and non-action of the defendants to call for the instruction. Otherwise this testimony would have been kept from the jury.

VI. Nor is the instruction relating to the duty of the defendants to notify the plaintiffs when they were ready to receive the ice, questioned as a matter of law; but it is contended that it should not have been given in this case, for the reason that one

of the defendants' witnesses, testified that the plaintiffs said they should not open the Oakland houses in August. If that were an undisputed fact, perhaps the law would not have required the useless ceremony on the part of the defendants. But that statement was stoutly denied by the plaintiffs, and the presiding justice could not pass upon that question of fact.

VIII. The eighth exception seems to have been abandoned.

IX. The instruction at the close of the charge given at the request of the plaintiffs, furnishes no ground for exception on the part of the defendants.

X. The first requested instruction was rightfully refused. Appropriate instructions were given in connection with the custom as proved.

XI. The second request was fully covered by the charge.

XII. The third request was properly refused. Rich had the entire charge of the plaintiffs' business and Maxcy testifies that he knew it; and that when he (Maxcy) spoke to Davenport and asked him "when they were going to open the Oakland houses," and that the defendants "were ready to take it (ice) any time they opened in August." Davenport answered that "he did not know that Mr. Rich had charge of it." Maxcy also testified that he never made any such inquiry of Rich. The judge had fully explained all the necessary steps to be taken by the parties under the various phases of the testimony, and upon a careful reading of the entire charge of the learned judge, we fail to perceive how either party could be aggrieved by anything therein.

Motion. The testimony was very conflicting, coming almost entirely from interested parties or persons. The ice market began to fall in the fore part of August, and perhaps the jury could perceive the influence of that fact upon the testimony of the defendants. At any rate the verdict is founded upon sufficient testimony if true.

Motion and exceptions overruled.

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

JOSEPH BRADSTREET and others, *vs.* ABRAM RICH, Junior.

Kennebec. Opinion January 27, 1883.

Contract. Practice. Exceptions.

The defendant on the sixth of April, 1876, at New York, contracted with H. W. F. to sell him ten thousand tons of river ice of a certain description, deliverable at a specified time and place and price, H. W. F. to pay by accepting sight drafts on terms set forth in their contract. On the fifteenth of May, following, the plaintiffs at Gardiner, signed on the back of the defendant's contract with H. W. F. the following agreement: "We, the undersigned, hereby agree to furnish A. Rich, Jr. three thousand tons of ice, (3000 tons), per the within contract." *Held*;

1. That this agreement was with the defendant, and H. W. F. was no party to it.

2. That by the terms "per the within contract," the defendant's agreement with H. W. F. was so far incorporated in his contract with the plaintiffs, as to designate the quality of the ice, when and where deliverable and the price.

3. If the plaintiffs delivered ice to the defendant under this written contract signed by them, the title to the property passes to the defendant, and an obligation arises on his part to perform the terms and stipulations of the contract.

When one agrees in writing to deliver to another a chattel at a price and time, and in a manner specified, and the other party, though not signing the contract, takes it and claims execution of it on the part of the party signing it, he must be held as receiving it according to the terms of the written contract.

If the court errs in stating the grounds of the defence, it is for the counsel to correct such misapprehension, and a subsequent correction removes all grounds for complaint.

A party excepting must show affirmatively that an erroneous instruction was given or a proper request refused. It is not enough to show that possibly more full and accurate instructions might have been given, no request having been made for them.

Exceptions will not be allowed for an inaccurate or erroneous statement of the testimony of a witness. The attention of the court should be called to the matter at the time.

ON EXCEPTIONS AND REPORT upon motion to set aside the verdict.

Assumpsit on account annexed, for eleven cargoes of ice,

claiming the amount due with interest to be five thousand six hundred seventy-seven dollars and forty-three cents.

The writ was dated February 5, 1877.

This case has been once before at the law court and is reported in 72 Maine, 233.

The second trial was at the October term, 1881, and the verdict was for six thousand and fifteen dollars. It now comes to the law court on exceptions and motion of the defendant.

The material facts are stated in the opinion.

J. Baker and L. Clay, for the plaintiffs, cited: On the motion, *Warren* v. *Williams*, 52 Maine, 343; *Folsom* v. *Skofield*, 53 Maine, 171; *Staples* v. *Wellington*, 58 Maine, 453; *Enfield* v. *Buswell*, 62 Maine, 128. On the exceptions,—*Adams* v. *Hill*, 16 Maine, 215; *Sawyer* v. *Hammatt*, 15 Maine, 40; *Virgie* v. *Stetson*, 73 Maine, 452; *Stephenson* v. *Thayer*, 63 Maine, 143; *Smart* v. *White*, 73 Maine, 332.

H. M. Heath, for the defendant, contended that the court erred in the instruction that the indorsement adopted and incorporated into it, the "within contract." If so, then there was an absolute sale from plaintiffs to defendant, of three thousand tons of ice, upon the specified terms, and the parol evidence introduced on both sides affecting and changing the within contract was inadmissible. The position of the court in 72 Maine, 233, carries with it, *ex necessitate*, the idea that "the within contract" is *not* a part of the indorsement.

The court inaccurately stated the position of the defendant and the testimony of a witness. An instruction which misrepresents the evidence before the jury is erroneous. *Frame* v. *Badger*, 79 Ill. 441.

The court assumed the existence of facts which there was no evidence tending to prove, and gave undue prominence to such. *Sawyer* v. *Hannibal*, 37 Mo. 240; *Clarke* v. *Hammerle*, 27 Mo. 55; *Anderson* v. *Kincheloe*, 30 Mo. 520; *Fine* v. *St. Louis P. School*, 39 Mo. 59; *Rose* v. *Spies*, 44 Mo. 20; *Jones* v. *Jones*, 57 Mo. 138; *Parker* v. *Donaldson*, 6 Watts and S. 132.

We complain of the qualifications attached to our requests, because there was no evidence upon which to rest such qualifications.

The presiding judge assumed and held that the arrangement between the parties was a contract of sale. We deny it. It was of the nature of a partnership—the plaintiffs were to furnish three-tenths of the ice and the defendant was to manage the business, answerable only for due diligence and actual receipts. *Bethel Steam Mill Co.* v. *Brown*, 57 Maine, 9.

Counsel further elaborately argued the motion to set aside the verdict.

APPLETON, C. J. On May 6, 1876, at New York, the defendant made an agreement under seal, with Hixon W. Field, to sell him ten thousand tons of river ice of a certain description, delivered within a certain time, free on board of vessels at the place of landing on the Kennebec river or its vicinity, at two dollars and fifty cents per ton, for which Field was to pay on presentation of a sight draft with bill of lading and weigher's certificate attached thereto. For the contract in full, see *Bradstreet* v. *Rich*, 72 Maine, 233.

Subsequently the plaintiffs signed on the back of the defendant's contract with Field, the following agreement:

"We, the undersigned, hereby agree to furnish A. Rich, Jr., three thousand tons of ice, (3000 tons,) per the within contract.

Gardiner, May 15, 1876. Joseph Bradstreet.
L. D. Cook.
P. G. Bradstreet.
F. Stevens."

Before the delivery of ice under the contract between Field and defendant, bearing date May 6, 1876, was completed, Field failed. This action is brought to recover compensation for ice delivered the defendant under the agreement of May 15, 1876.

The defence is that the defendant procured the contract with Field at the solicitation and for the benefit of the plaintiffs as well

as himself—that they took equally with himself the risk of Field's insolvency, and that their indorsement on the same was to indicate their share in the contract, namely, three-tenths, and that his liability was contingent and not absolute, he being responsible only for the amounts received from Field, and that they were to furnish Rich ice to be sold to Field in fulfillment of his contract.

The plaintiffs claimed that the sale was made to the defendant, that it was absolute, and that they were not parties in any way to the defendant's contract with Field. The jury found for the plaintiffs, on this issue.

The contract under which the plaintiffs claim to recover, was with the defendant. Field was no party to the same. The plaintiffs performing it could not look to him for payment. They had no right to draw for funds. So far as the evidence disclosed, Field had never any dealings with the plaintiffs, nor was he even aware of their contract with the defendant. In case of its breach he had no right of action against them.

The issue presented was whether the plaintiffs were to share with the defendant the risks as well as the benefit of his contract with Field, or were to look to him as the purchaser of their ice. The jury rendered a verdict against the defendant, and he has filed exceptions to the rulings of the presiding justice, and a motion for a new trial, on the ground that the verdict is against evidence.

(1.) It is objected that the jury were instructed that the memorandum signed by the plaintiffs incorporated in it the contract of the defendant with Field. It reads, "per the within contract." When a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract. *Adams* v. *Hill*, 16 Maine, 215; *Sawyer* v. *Hammatt*, 15 Maine, 40. The reference to the contract was for some purpose. It was to designate the quality of the ice, when and where it was to be delivered, and its price. It indicated to the plaintiffs what they were to do, if it was a sale, to enable the defendant to perform his contract. If the plaintiffs were to be partners in the contract to the extent of three-tenths, it referred them to the contract in the performance

of which they were interested. Whether the hypothesis of the plaintiffs or the defendants be the true one, in either event, the contract was, with certain limitations, a part of the same.

(2.) It is said that the court erred in stating the ground of defence—that this was not a contract between himself and the plaintiffs, but that the contract, on the part of the plaintiffs, was really with Field. But if there was an error of this kind, it was the duty of counsel to advise the court that it misapprehended the nature of the defence. It appears, however, that the error was corrected, the court subsequently instructing the jury that "whatever contract there was in this case, was between the plaintiffs and the defendant." The jury were, in this respect, instructed in accordance with the claim of the defendant.

The court instructed the jury that "when a man agrees in writing to deliver to another a chattel at a price specified, and at a time and in a manner specified, and the other party, though not signing the contract himself, takes it and claims execution of it on the part of the party signing it, and receives the property under it, he must be held as receiving it according to the terms of the written contract signed by the vendor." This proposition, as matter of law, will hardly be questioned.

(3.) The court then proceeded to give this further instruction: "I instruct you as matter of law, that if the plaintiffs delivered ice to the defendant under this written contract by them signed, an obligation arises on the part of the defendant to perform on his part in accordance with the terms and stipulations of the plaintiffs' written contract; and when the property was delivered under that contract, the title passed to the defendant."

This instruction withdraws nothing from the jury. It is conditional. If the facts are so and so, a certain legal conclusion necessarily follows. Such is the instruction. In it we perceive no error of law. If correct instructions are given, it is no ground of exception that instructions not requested, but which might properly have been given, were not given. If the defendant had desired further and additional instructions applicable to the hypothesis upon which the defense rested, he should have requested them. "Upon a bill of exceptions," observes LORD,

J., in *Corrigan* v. *Conn. F. Ins. Co.* 122 Mass. 298, "it is not sufficient for a party to show that possibly full and accurate instructions were not given, but the party excepting must show affirmatively either that some instruction was given or ruling made which was erroneous in law, or that some proper request for instructions or rulings was refused." Here the instruction so far as given on the point was correct, and no additional one was requested. To the same effect is the case of *Hooksett* v. *Amoskeag Man. Co.* 44 N. H. 105.

(4.) A portion only of the ice sued for in this action came into Field's hands. As to such portion we do not understand that the defendant complains as to the finding of the jury.

(5.) The principal ground of complaint has relation to the cargoes received by McCausland, and by him shipped to New York. One grievance is that the presiding justice did not state accurately his testimony to the jury. If so, the obvious duty of counsel was to call the attention of the court to the alleged inaccuracy, that it might at once be corrected. *State* v. *Benner*, 64 Maine, 267. "No exception," remarks BELL, C. J., in *Cutler* v. *Welsh*, 43 N. H. 497, "can be taken on account of any defective or erroneous statement of the evidence by the judge, unless his attention is called to it at the time. . . The time to object was when the remark was made and the counsel must be understood as assenting that the error is unimportant, if he does not think it worth his while to correct it on the spot."

The exceptions relating to the testimony of McCausland must be regarded as relating to some supposed error of law in the portions of the charge to which exception is taken. It does not appear that the attention of the court was specifically called to any alleged mis-statements of the evidence, or that any corrections of the statements made were desired. If any were made, we must look to the exceptions for their correction and not elsewhere. But the exceptions give no means for determining whether error existed or not. *Smart* v. *White*, 73 Maine, 332.

In the remarks of the presiding judge in relation to and his comments on the testimony of McCausland, no error of law is perceived. It was the duty of the court to call the attention of the

jury to the testimony. The extent to which he should do it was matter of discretion. No expression of opinion as to any fact is stated. Nothing is withdrawn from the consideration of the jury. The whole is left to their deliberate judgment. *Virgie* v. *Stetson*, 73 Maine, 452.

If the defendant had the cargoes receipted for by McCausland, it matters not to these plaintiffs what he did with them. They did go to complete his contract with Field. Taking them and disposing of them according to his good will and pleasure, he should account for them.

(6.) The counsel for the defendant requested the court to give the following instruction: "If McCausland was not authorized to go to the plaintiffs and receive ice under this contract, but was directed to go there and load his vessels at the plaintiffs' houses, an equal amount of Rich's ice at the Farmingdale houses to be loaded in return therefor, then McCausland would have no authority to represent the defendant in receiving the ice under the contract and to give receipts for him specifying that the ice was received under the Field contract."

This instruction was given, the court remarking that he supposed he had already given it. He then added "that McCausland would have no right to take ice and bind the defendant unless the defendant authorized him to take under the contract between the parties. If McCausland was authorized by the defendant to take the ice at those houses under the contract between the parties, the defendant undertaking on his part to load like cargoes at the houses in Farmingdale, or to authorize McCausland to do so, to go to Field, then McCausland would be the agent of the defendant and would have authority to bind him in regard to these matters. If he had no such authority, then of course he could not bind the defendant, and the defendant would not be bound by his acts. If he had no authority to act for the defendant in these matters, he had no anthority to give a receipt for the cargoes as received under the contract. But if he had authority from the defendant to take those cargoes from the plaintiffs in part performance of the plaintiffs' contract, then whatever he did would be precisely the same as if the defendant himself did the same act."

The issue presented is as to the authority of McCausland. It is left for the jury to determine whether he acted under and by the authority of Rich. If he did, Rich should be bound by his acts. If Rich had a delivery of the cargoes shipped by McCausland by his order, no reason can be perceived why he should not pay for them, whatever Rich may have done with them. It is his duty to account for them to the plaintiffs.

A second request was made in these words: "That if McCausland was directed to go to the plaintiffs and load his vessels at the plaintiffs' houses, an equal amount of Rich's ice at the Farmingdale houses to be loaded in return therefor, then McCausland would have no authority to represent the defendant in receiving ice under any express or implied promise to pay for the same in money and to give receipts binding Rich to pay for the same."

This was given with the same qualifications as in the preceding request. The court gave the precise rule of law as desired by the defendant and submitted the question of authority or not to the jury.

(7.) The evidence bearing on the facts in issue is contradictory. Its force and effect was for the jury. Their conclusion is binding on the parties. No misconduct is shown on their part. It is not a case where the preponderance of evidence on the part of the defendant is such as to require our interference.

Motion and exceptions overruled.

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

ELLEN D. JONES in equity,

vs.

LORENZO A. BOWLER and WILLIAM STONE.

Penobscot. Opinion January 29, 1883.

Mortgage. Foreclosure. R. S., c. 90, § 3.

A mortgaged land to B and covenanted that the right of redeeming should be foreclosed in one year from the commencement of foreclosure. B undertook

to foreclose by the method provided in R. S., c. 90, § 3, article 2. The written consent of A was given and recorded. B's only entry upon the premises was before this consent was given and A had no notice of the entry. Subsequently B sent a lease of the premises to A signed by himself. A continued in possession but never signed the lease. After the lapse of a year from the time of giving the consent B conveyed the premises to C. A made a seasonable demand upon B and C to render a true account of the amount due upon the mortgage which they refused to do. Upon a bill in equity to redeem brought by A against B and C, *Held;*

1. That there must be an actual entry upon the mortgaged premises after consent in writing to avail the mortgagee, and that consent to enter is no proof of such entry.

2. That the sending the lease to A, and her taking it cannot be regarded as the entry of B, and hence A cannot be regarded as holding the possession for B.

3. That C stands in the position of his grantor B, as he had notice from the records that B acquired his title through a mortgage, and consequently took only the title which his grantor could convey.

4. That there has been no foreclosure, and that A is entitled to redeem.

BILL IN EQUITY.

Heard on bill, answers and proofs.

The case and material facts are stated in the opinion.

Jasper Hutchings, for the plaintiff.

Davis and Bailey, for the defendant, Bowler.

Barker, Vose and Barker, for the defendant, Stone.

APPLETON, C. J. This is a bill in equity to redeem two mortgages given by the complainant on her real estate, to secure the payment of two notes signed by her husband and herself. The first mortgage was dated May 27, 1876, and given to secure the payment of two notes, one for two hundred dollars in six months, and the other for eight hundred dollars in two years,—both notes bearing interest at nine per cent. The second mortgage is dated May 22, 1877, and was given to secure a note of three hundred dollars, payable in six months with nine per cent interest. The husband was a party to each mortgage, but had no title to the mortgaged premises.

It is admitted that a demand was duly made by this complainant on the defendants to render a "true account of the sum due under the mortgage," &c. in accordance with the provisions of

R. S., c. 90, § 3, which they unreasonably refused or neglected to render.

Each of these mortgages contained the covenant that the right of redeeming the mortgaged premises should "be forever foreclosed in one year next after the commencement of foreclosure by any of the methods provided by law."

The method adopted was to foreclose by virtue of the second way as provided in R. S., c. 90, § 3, which is in these words: "He (the mortgagee,) may enter possession and hold the same by consent in writing of the mortgager or the person holding under him." It was determined in *Ireland* v. *Abbott*, 24 Maine, 155, that a mortgage could not be foreclosed except by pursuing one of the modes provided by statute for that purpose, and the entry of the mortgagee, to be effective, should be in conformity with its provisions.

The consent in writing of the complainant is in these words: "Know all men by these presents: that I, Ellen D. Jones, of Bangor, Penobscot county, the mortgager in a certain mortgage given by me to Lorenzo A. Bowler, of Bangor, Maine, dated May 27, 1876, and recorded in vol. 466, page 467, Penobscot registry, reference to be had.

"In consideration of the non-fulfillment of the conditions therein named, I do hereby consent that he *may enter* upon said premises and take possession thereof for the purpose of foreclosing said mortgage, and do hereby surrender unto him full possession of the premises described in said deed for said purpose.

"The premises described in said mortgage is a certain parcel of land with the buildings thereon, in said Bangor, it being my present homestead.

"In witness whereof, I have hereunto set my hand and seal, this 26th day of October, A. D. 1878.

[Witness.] Ellen D. Jones."

The above was immediately entered of record in the registry of the county of Penobscot.

The consent to enter is no proof of an entry. The possession of the mortgagee is not proved by the consent of the mortgager that he may enter. The entry must be subsequent to the con-

sent given, and under it. *Chamberlain* v. *Gardiner*, 38 Maine, 551.

But there must be an actual entry to avail the mortgagee. The mortgagee must enter into possession of the mortgaged premises for condition broken. "If it was the intention of the parties to admit that an actual possession had been taken," observes SHEPLEY, J., in *Pease* v. *Benson*, 28 Maine, 353, "they could not cause a foreclosure in a manner not authorized by the statute. Could not substitute a fiction for the actual entry into possession required by the statute, and make it as effectual as the act required. . . . It is the actual entry into possession for condition broken, that may effect in due time a foreclosure, being made by the written consent of the mortgager or his assignee. The written consent is of no effect, but to make such entry lawful." The same view of the law was taken in *Storer* v. *Little*, 41 Maine, 69, the court holding that there could be no foreclosure of the right of redemption without an actual entry by the mortgagee into the mortgaged premises.

The evidence of Bowler fully proves that he made no actual entry into possession of the mortgaged premises under the consent given by the complainant. His account of his alleged entry is as follows: "I went up for the purpose of taking possession very near the time that the papers (referring to the written consent and lease,) were exchanged; it might have been a day or two before. When I drove there, it was a little before night, perhaps six o'clock or in that vicinity. When I went up to take possession, the house appeared to be closed. I drove into the dooryard and rapped on the door — rapped or rung the bell. I saw no one there. I saw Mr. Jones within a couple of days after. Very soon after I saw Jones, and the paper was executed to foreclose. · · I do not recollect that I had any talk with Mrs. Jones about the foreclosure."

This is the only entry ever made on the premises for the purpose of foreclosure — if made for that purpose. Neither the complainant nor her husband were ever informed of this supposed entry. It was made before any consent to enter, as required by the statute, had been given. It is utterly unavailing for the purpose of effecting a foreclosure.

All that the case shows is a consent by the mortgager that the mortgagee may enter on the mortgaged premises and that he never has entered under such consent. It is manifest there was no foreclosure under the statute and there could be no other.

The giving the lease as proved in the case, affords no evidence of any entry whatever. It was sent by Bowler, signed by himself, to the complainant, who never affixed her signature thereto. This was after the consent given. Bowler testifies that he never had any conversation with the complainant in regard to foreclosure. Now, whether the lease was signed or not, the sending the lease to the complainant and her taking it cannot be regarded as an entry. It is not pretended even that there ever was any entry except the one before the consent was given and that for the reasons given cannot be of any avail. The result is, there has been no foreclosure.

The defendant Stone acquired only the title of his grantor. True, the consent to enter was of record, but that afforded no proof that any entry had been made pursuant to its provisions. It could not do that, for none had been made. He was aware that the title of his grantor was by mortgage or he might have known it, had he examined the records. He stands in the position of his grantor.

As both defendants unreasonably refused or neglected to render a true account of the sum due on the mortgage, &c. as required by R. S., c. 90, § 13, the complainant is entitled to judgment for redemption and costs.

The bill is sustained. The complainant is entitled to redeem and to costs. A master is to be appointed to determine the amount due.

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

CHARLES MCCARTHY, Junior,

vs.

YORK COUNTY SAVINGS BANK.

Cumberland. Opinion February 2, 1883.

Water fixtures, liability of landlord for.

When a bowl is set by the landlord in a tenant's room for his exclusive use, in which the apertures for the outflow of the water are not sufficient to carry off all the water delivered by the faucet if left open, and this defect and the tenant's negligence in using the bowl are together the cause of damage, the landlord is subject only to the liability of an owner, as distinguished from that of an occupant.

The liability of the landlord does not follow, from the fact that the building does not contain the latest and most improved system of water pipes. He does not insure against the negligence of his tenants, nor is he bound to construct his building so as to reduce the possibilities of damage from such negligence to an absolute minimum.

There is no rule of law which forbids the use of faucets adjusted so as to be readily shut to prevent the escape of water, or which holds it an actionable negligence to maintain one in any instance without an outflow for all the water that the open faucet can deliver at full pressure, or a tort to put a tenant, who is responsible for his own acts in the possession of such a fixture.

ON EXCEPTIONS from superior court.

An action of the case, for injury to a stock of goods by overflow of water from a bowl set in an upper story.

The writ was dated October 2, 1880, and the plea was the general issue.

The case was tried without a jury by the presiding justice, who found the following facts.

The defendant bank on the ninth day of July, 1880, was the owner of a block of stores on Middle street in the city of Portland, and the plaintiff occupied one of the stores as the tenant of the defendant.

Directly over this store was a room occupied by one Allen Fisk also a tenant of the defendant, for the manufacture and

bottling of bitters. In this room a wash-bowl was set supplied with Sebago water. Sebago water was introduced into the building by the defendant bank in July, 1878. The faucet through which the water flowed into the bowl was a screw faucet without any self-acting stopcock. The apertures in the bowl for the outflow of the water were not of sufficient size to carry away the water coming from the faucet with the pressure which ordinarily existed in the night time. There was no metal pan under the bowl for the purpose of catching the overflow and from which by means of a gutter the water could be carried to a safe place.

The defendant bank in the construction and repair of the apparatus employed a plumber of good reputation for skill as a workman, but another plumber of like reputation testified that "there were not a great many faucets in that section of the city that would not overflow the bowls."

The defendant bank after the plumbing had been done had no knowledge of its insufficiency, nor did any one at any time under its direction ever make investigation to ascertain whether or not the apparatus was sufficient to carry away the water.

Fisk hired said room of the bank without any written lease, paying his rent therefor monthly. There had been no conversation about water between Fisk and any person representing the bank from the time of the commencement of the tenancy until after said ninth day of July. Fisk found the water and apparatus for its use in the room when he entered into possession and used them. The Water Company never called upon him for payment of water rate, nor did the bank ever specially demand any compensation for the use of water and apparatus, but it was admitted that the bank paid the Water Company for the water used in this room. The bowl had been used by Fisk during his tenancy prior to said ninth day of July. Two cork stoppers had become lodged in the overflow pipe which were allowed to reach there, through the negligence of Fisk or his servants. But after their removal, subsequent to said ninth day of July, the means for the outflow of the water were not sufficient to carry it away as it came from the faucet under the pressure hereinbefore referred

to. Late in the afternoon of July 9, 1880, the main pipe burst in the street, and the water was shut off from the defendant's block and other buildings in the vicinity.

In the evening of that day Fisk went to the faucet to obtain water and opened the same, but found no water on account of the shut off. Fisk claimed at the trial that he closed the faucet, but I find in view of all the circumstances that he negligently left the cock open. Sometime before morning the break in the main pipe was repaired, and the water let on. The water overflowed the bowl, flooded the plaintiff's store and injured his stock of goods.

"Upon these facts I rule as matter of law, as follows:

"*First.* That having introduced water into the block, it was the duty of the defendant, in the construction of the apparatus, to provide adequate means for the outflow of the same coming into the bowl through the open faucet under the pressure ordinarily existing in the night time.

"*Second.* That the defendant bank was negligent in the construction of the water apparatus.

"*Third.* That the negligence of the defendant in concurrence with the negligence of the tenant, Fisk, was the cause of the plaintiff's injury.

"*Fourth.* That the defendant is liable for the injury in this manner caused.

"After hearing the evidence and arguments of each party, and considering the same, I decide that said defendant is guilty in manner and form as said plaintiff has declared against it; and I award damages in the sum of six hundred eighty-three dollars and twenty-six cents."

To the foregoing rulings in matters of law, the defendant excepted.

W. L. Putnam, for the plaintiff.

In the case at bar, the water and water fixtures were not out of the control of the landlord. He furnished the water, paid the Water Company for it, put in the water fixtures; and was holden to keep them in repair during the tenancy, as he was

holden to keep in repair a common stairway, over which he retained control subject to use by all the various tenants.

In *Looney* v. *McLean*, 129 Mass. 33, the court says on page 35:—"Where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair; as to such portions he still retains the responsibilities of a general owner to all persons, including the tenants of his building."

We claim to bring ourselves within the principle stated in the closing paragraph of the foregoing extract. As we place our case, we are content with the law in *Mellen* v. *Morrill*, 126 Mass. 545, and *Leonard* v. *Storer*, 115 Mass. 86; but claim the benefit of the rules laid down in *Looney* v. *McLean*, *ante*; *Readman* v. *Conway*, 126 Mass. 374; *Priest* v. *Nichols*, 116 Mass. 401; *Shipley* v. *Fifty Associates*, 101 Mass. 251, and *Toole* v. *Beckett*, 67 Maine, 544, in all which the rule of the last paragraph of the above quotation from *Looney* v. *McLean* was applied.

We make no claim against defendant because it was landlord. We prove the fact that it was landlord in connection with other facts; because altogether they show what defendant assumed to do. We claim against defendant upon the same principle, and upon none other, upon which we would claim against the Water Company for negligence, if the Water Company, instead of defendant, had contracted with Fisk, not only to furnish water, but as incident thereto, to furnish and maintain suitable pipes and bowls, precisely upon the same principle which held a gas company liable for damage through insufficient service pipe,—the gas company having contracted to furnish not only gas but service pipe, as we shall see from *Burrows* v. *The March Gas and Coke Company*, 7 Exchequer, (Law Rep.) 96.

In the leading cases cited by defendant, there were no such allegations in the pleadings, nor such facts relied upon, as in the

case at bar; but an effort was made in each case to raise a liability out of the relation of landlord and tenant.

We claim that the decision of the court below can be sustained, upon either of two distinct principles. The first is that stated by the court in *Marshall* v. *Cohen*, 44 Georgia, 489 (9 American Reports, 170). *Treadwell* v. *Davis*, 39 Ga.; *Bower* v. *Peate*, Queen's Bench, Div. vol. 1, p. 321.

But there is another principle upon which we can more safely rest this suit. There is a great class of cases in which the intervention of the action, negligent or wilful, of some third person, would not relieve a negligent defendant from responsibility for injury, which, nevertheless, would not have followed without such intervention. *Kimmel* v. *Bamfeind*, *ante*, is one of that class of cases.

One of the most noticeable is *Burrows* v. *The March Gas and Coke Co.* already cited; which first appears in Law Reports, 5 Ex. p. 67, and afterwards in Law Reports, 7 Ex. p. 96. This case is of great authority. The verdict was rendered under direction of Chief Justice Cockburn, was next affirmed by all the barons of the exchequer, and unanimously re-affirmed in exchequer chamber by Cockburn, Willes, Blackburn, Mellen, Brett and Grove. *Bartlett* v. *Boston Gas Light Co.* 117 Mass. 533; *Kimmel* v. *Burfeind*, 2 Daly, 155; *Lane* v. *Atlantic Works*, 107 Mass. 104; *Carter* v. *Towne*, 98 Mass. 567; *Dixon* v. *Bell*, 5 M. and G. 198; *McMahon* v. *Henning*, 3 Fed. Rep. 353; *Bigelow* v. *Reed*, 51 Maine, 332; *Illidge* v. *Goodwin*, 5 Car. and P. 190; *Clark* v. *Chambers*, 3 Q. B. Div. 327.

The immediate cause of an injury is not necessarily in the eyes of the law the proximate one. *Harris* v. *Mobbs*, 3 Exch. Div. pp. 274-5; *Lane* v. *Atlantic Works*, 111 Mass. 139; *Cayzer* v. *Taylor*, 10 Gray, 274; Whart. on Neg. § 145.

Our positions therefore are:

1. That as defendant was itself supplying the water to the building, it was guilty of present negligence in not having the fixtures incident thereto in safe condition.

2. That by reason of its negligence when the overflow came, the overflow damaged plaintiff; and defendant is not excused by reason of Fisk's negligence, which negligence was of precisely that character which defendant should have expected as a common and frequent incident of the use of water, and which the suitable outflow or safety pan would have provided against, just as the safety valve in the Massachusetts case would have provided against the negligence of the engineer.

Wilbur F. Lunt, for the defendants, cited:

Mettlestadt v. *The Ninth Av. R. R. Co.* 4 Rob. 377; *Reichenbacker* v. *Pahmeyer*, Chicago Leg. News, July 16, 1881, p. 365; *Pickard* v. *Collins*, 23 Barb. 444; *The Rheola*, Fed. Rep. July 19, 1881, p. 783; *Anderson* v. *Kryter*, 9 Cent. Law J. 385; *Robbins* v. *Monnt*, 4 Rob. (N. Y.) 553; *Kay* v. *Pennsylvania R. Co.* 65 Penn. St. 269; *Blyth* v. *Birmingham Water Works*, 11 Exch. 781; *McGrew* v. *Stone*, 53 Penn. St. 436; Sher. and Red. on Neg. § 13, *Smith* v. *First Nat. Bank*, 99 Mass. 605; *Cotton* v. *Wood*, 8 C. B. (N. S.) 568; *Toomey* v. *Brighton, &c. R. Co.* 3 *Id.* 146; *Losee* v. *Buchannan*, 51 N. Y. 493; *Spencer* v. *Campbell*, 9 Watts and S. 32; *Moore* v. *Goedel*, 34 N. Y. 527; *Looney* v. *McLean*, Mass. Law Rep. June 10, 1880; *Stewart* v. *Putnam*, 127 Mass. 407; *Carstairs* v. *Taylor*, L. R. 6 Exch. 217; *Box* v. *Jubb*, 41 N. S. Law Times, 97.

SYMONDS, J. In the consideration of this case we shall assume, without deciding, that the relation of landlord and tenant between the plaintiff and the defendants has no effect to limit the right of action, that the restrictions upon the liability of lessors to lessees in such a case do not apply, that as to the water fixtures, their construction and condition, the defendants were subject towards the plaintiff to the ordinary responsibilities of a general owner of property in the possession of tenants to third persons alleging injury through its faulty or defective construction, ruinous condition, or by reason of a nuisance upon the premises at the date of the demise. The case will not bear a statement more strongly in favor of the plaintiff than this.

The occupancy by the tenant, Fiske, of the upper room in which the bowl was set is one of the facts stated in the findings. There is nothing to indicate that his control of the faucet which he negligently left open over night, thereby causing the damage alleged, was not as exclusive of any rightful exercise of authority by the landlord in regard to its use, as was his possession of any part of the leased premises. The bowl supplied with water was in the room when Fiske began his tenancy under the defendants. He used it and paid the rent. He was tenant of the bank as to the bowl and its appurtenances, as of the other parts of the room, and with such rights of possession and control as pertained to the tenancy. These fixtures were leased to him and as lessee he was the actual occupant of them.

They were not like roofs of buildings let to several tenants, nor like passageways, entries and staircases used in common by different lessees, in regard to which under some circumstances, it is held, the liability for failure to exercise reasonable care to keep them safe remains upon the landlord, because they do not pass from his control into the exclusive possession of either tenant. This distinction is a radical one and important to be observed, for it removes from further consideration a whole class of cases cited by the learned counsel for the plaintiff as the very basis of his claim. The damages here resulted from the tenant's use of a thing of which at the time, as tenant, he had full control. It would not be according to the fact to base the landlord's liability upon the ground that he retained the present possession of the faucet and bowl which are alleged to have been of improper construction by reason of the insufficiency of the apertures in the bowl to discharge the water delivered by the open faucet. These were let to the tenant as much as the floor of the room. The liability of the landlord, if it exists, must rest upon other grounds than that of occupancy, must lie further back than that.

That water was introduced into the building by the bank, that they caused the pipes to be laid and maintained and paid the

water-rates, are not facts which tend to show their direct and present contol of faucets within the rooms of their tenants. They may enter, if necessary, to change or repair the pipes, but while the room with its fixtures is in the possession of a tenant, it is he who sustains to third persons the liability of an occupant, as the landlord sustains that of owner.

It will be seen that we are not at present considering the measure of liability attaching to the bank for defects in the construction or condition of the water pipes generally throughout the building. It is not our purpose at this point to deny their liability in any respect, but only to limit it by excluding, as not pertinent to the facts of this case, one ground on which it is urged in argument, namely, the ground that the landlord, notwithstanding the tenancy, remained in the immediate possession of the water-fixtures in the room occupied by the tenant, which were let to the tenant for his use. When such a defect as is here alleged in the bowl set in the tenant's room for his exclusive use, and his negligence in using it, are together the causes of damage, it would be false to charge the landlord with the liability of an occupant as distinguished from that of an owner.

The question, then, reduced to terms as favorable to the plaintiff as the case will permit is this, was the construction of the water-fixtures, in the possession of a tenant, such as to render the landlord liable to occupants below for damages resulting to their property from the tenant's use of the fixtures, leaving the faucet open and letting the water overflow; such use of the fixtures being negligent in reference to the manner in which they were constructed, and the damage which followed not being the necessary or ordinary result of their use in the way in which they were designed to be used.

The fault with which the landlord is charged is stated to be that "the apertures in the bowl for the outflow of the water were not of sufficient size to carry away the water coming from the faucet with the pressure which ordinarily existed in the night-time. There was no metal pan under the bowl for the purpose of catching the overflow and from which by means of a gutter the water could be carried to a safe place."

Can the rulings which follow these findings of fact, that having introduced water into the building it was the duty of the defendants to provide adequate means for the outflow of all that the open faucet would send into the bowl under the usual heavy pressure at night; that the omission of this duty was negligence; that when this negligence concurred with that of the tenant in leaving the faucet open and thereby damage resulted to the plaintiff the defendants as matter of law were liable, be sustained? Is here a state of facts from which negligence and liability are the legal conclusion?

To state a stronger case, if the landlord of an upper tenement should cause a faucet of proper construction and capable of safe use with due care, but without any outflow at all, to be put in for the purpose only of drawing water, would it be a conclusion of law from that fact, without other evidence, that the landlord was negligent and liable for the damages resulting from his tenants carelessly leaving the faucet open?

We do not now refer to the intervening act of the tenant as precluding recovery against the landlord. We disregard, for the present, the distinction between remote cause and proximate cause, and confine ourselves strictly to the question whether in such case the law holds the landlord guilty of a wrong for putting his tenant in possession of such an appliance. The inquiry is, whether there is a rule of law which forbids the use of faucets intended to be closed and adjusted so as to be readily shut to prevent the escape of water; or which holds it an actionable negligence to maintain one in any instance without an outflow for all the water that the open faucet can deliver at full pressure, or a tort to put a tenant who is responsible for his own acts in the possession of such a fixture.

We think there is no such rule of law, and that legal liability for negligence does not result from the findings of fact in this case.

Nothing unusual in the construction of the fixtures is shown. The testimony appears to have been that most of the faucets in that part of the city would overflow the bowls, if left open during the heavy pressure at night. The tenant was familiar with this

faucet from frequent use. There was nothing concealed from him, no danger which he could not readily anticipate and guard against by such care as was proper to be exercised, by anybody who used it. It was not intended to be open, but closed, when not in use. It is found that the tenant's act in leaving it open was a negligent one. There was no reason for him to suppose it was safe to do that, nothing to induce him to believe that the outflow would carry away all the water that the open faucet would deliver at night. No harm would result to anybody from the use of it with reasonable care in the manner in which the tenant knew it was designed to be used. It was under his control. When damage resulted from the tenant's negligent use of such an appliance as that, what fault was there except in the tenant himself? *Simonton* v. *Loring*, 68 Maine, 164.

The liability of the landlord does not follow from the fact that the building does not contain the latest and most improved system of water-pipes. He does not insure against the negligence of his tenants, nor is he bound to construct his building so as to reduce the possibilities of damage from such negligence to an absolute minimum.

In *Fish* v. *Dodge*, 4 Denio, 317, it is said, "one who demises his property for the purpose of having it used in such a way as must prove offensive to others may himself be treated as the author of the mischief." But when the letting is for a lawful purpose which can create a nuisance only under special circumstances, "he cannot be justly charged with the wrong which was actually committed by others who were not in his employment, unless he knew or had reason to believe that he was letting the property for a use which must prove injurious to the plaintiff."

In the opinion of the court in *Pickard* v. *Collins*, 23 Barb. 460, it is said, "the instruction that if the barn was built to be used in a certain way and was let to a tenant who in fact used it in that way and such use proved noxious or injurious to the plaintiff, the defendant is responsible for the injury, I think required some modification. If the use in that way would necessarily, under ordinary circumstances, be a nuisance, the proposition is correct."

"While the lessor of premises who leases them when they are already a nuisance, and receives rent, is liable for damages to a

stranger happening therefrom, whether the owner be in possession or not, a lessor of premises not *per se* a nuisance, but which become so only by the manner in which they are used by the lessee, is not liable therefor." *Ditchett* v. *Railroad Company*, 68 N. Y. 427.

In *Gandy* v. *Jubber*, 5 B. and S. 78, it is said by CROMPTON J., "to bring liability home to the owner, the nuisance must be one which is in its very essence and nature a nuisance at the time of the letting, and not merely something which is capable of being thereafter rendered a nuisance by the tenant;" by BLACKBURN J., "it must be shown that there has been a demise of land, with the nuisance existing upon it; and the nuisance must be, if I may so term it, a normal one; not such for instance as a cellar with a flap which may be or not a nuisance, according as it is carefully closed or improperly left open."

The result of authority is stated in Taylor's Land. and Ten. § 175, to be that to render the landlord liable, "the nuisance must be one that necessarily arises from the tenant's ordinary use of the premises for the purposes for which they were let, and not to be avoided by reasonable care on the tenant's part." See, also, § 175 a. n. 6, where *Marshall* v. *Cohen*, 44 Ga. 489, one of the principal cases cited for the plaintiff, is said to have turned upon a requirement of statute. *Rich* v. *Basterfield*, 4 Man. Gran. and Scott, 783, 804; *Carstairs* v. *Taylor*, L. R. 6 Exch. 217; *Ross* v. *Fedden*, L. R. 7 Q. B. C. 661; *Lowell* v. *Spaulding*, 4 Cush. 277; *Saltonstall* v. *Banker*, 8 Gray, 197; *Murray* v. *Richards*, 1 Allen, 414; *Mellen* v. *Morrill*, 126 Mass. 545; *Stewart* v. *Putnam*, 127 Mass. 403.

The authorities upon this point are numerous and have been elaborately cited in the arguments. Under them, we think it must be held that the statement of this case does not sustain the ruling that the defendants are liable as matter of law, and does not contain the evidence upon which negligence on their part could legally be found as matter of fact.

Exceptions sustained.

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

INHABITANTS OF FREEMAN, appellants,

vs.

COUNTY COMMISSIONERS,

Franklin. Opinion February 2, 1883.

Ways. Appeal.

There is no right of appeal from the joint decision of the county commissioners of two or more counties to locate an inter-county road.

The case of *Banks* v. *County Commissioners*, 29 Maine, 288, as explained by *Detroit* v. *County Commissioners*, 52 Maine, 210, affirmed.

ON EXCEPTIONS.

An appeal from the decision of the county commissioners of Franklin and Somerset counties, locating a highway in said counties.

At the appellate court the petitioners for the way appeared and moved that the appeal be dismissed. The court *pro forma* overruled the motion to dismiss, and the respondents alleged exceptions.

S. Clifford Belcher, for the plaintiffs, contended that the material change in the statutes relating to ways since the opinion in *Banks* v. *Co. Com'rs*, 29 Maine, 288, renders that no longer authority; and that the case of *Detroit* v. *Co. Com'rs*, 52 Maine, 210, if it does not overrule *Banks* v. *Co. Com'rs* absolutely, does so in effect. It declares that the reasons given for that opinion are based upon a false interpretation of the law.

The "location" is made by the commissioners of the county in which the way lies,—an appeal from their decision locating cannot be an appeal from the decision of the commissioners of two or more counties.

It is an anomaly in our law, that the decision of an inferior court shall be final.

"It is a settled rule of construction, that cases out of the letter of a statute, yet within the same mischief, or cause of the making thereof, shall be within the remedy thereby provided." Broom's Maxims, 82; Co. Litt. 24, b.

Phillip H. Stubbs, for the defendants.

PETERS, J. It was determined, in 1849, in *Banks* v. *County Commissioners*, 29 Maine, 288, that, under the statutes of that day, there was no right of appeal from the joint decision of the county commissioners of two or more counties. The appellants, in the case before us, contend that since that case the law has been differently interpreted, or changed. But we see nothing that leads us to such a conclusion. It was held in *Detroit* v. *County Commissioners*, 52 Maine, 210, that, after a joint board of the county commissioners of two counties has decided to locate a way which will extend into their several counties, each board may act separately in locating so much of the way as lies within its own county. The cases do not really conflict. R. S., c. 18 § 17.

A full copy of the record is not presented to us in the present case, but the effort of the appellants is, clearly enough, to reverse the joint decision of the courts of the two counties, that the way prayed for should be laid out. They appeal from the adjudication of the joint court, "that common convenience and necessity require the location and establishment of the road prayed for in said petition; and from the return of the county commissioners of Franklin county, carrying the judgment of the county commissioners of said counties into effect."

The appeal cannot be sustained. The exceptions to the allowance of the appeal must be sustained, and the appeal be dismissed.

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

EBEN N. PERRY, and another,

vs.

PATRICK PLUNKETT, and another.

Cumberland. Opinion February 2, 1883.

Poor debtors. Citation. Certificate of justices. Amendment. Stat. 1878, c. 59. R. S., c. 113, § 40.

When the citation to the creditor given by a poor debtor, who has given bond on arrest conditioned as by law required, incorrectly states the amount of the judgment, and the error is not amended before the magistrates under the provisions of stat. 1878, c. 59, it is too late to move for an amendment in a suit on the bond which has been presented to the law court upon an agreed statement of facts.

The certificate of two justices of the peace and quorum, of the administration of the poor debtor's oath to one who has given bond on arrest conditioned as by law required, will not support a plea of performance of the condition of the bond in a suit thereon, if it incorrectly states the amount of the judgment and date of its rendition.

ON REPORT on agreed statement of facts from superior court.

Debt on poor debtor's bond. The writ was dated December 9, 1881, and returnable to the municipal court of Portland, and taken to the superior court on appeal by the plaintiffs. The plea was general issue with brief statement alleging performance.

The opinion states the material facts.

Drummond and Drummond, for the plaintiffs.

Bion Bradbury, for the defendants.

Perhaps upon the authority of the cases cited by the learned counsel for the plaintiffs this citation would not have given the justices jurisdiction prior to stat. 1878, c. 59. All the cases cited were determined prior to that year. This statute was designed to prevent a creditor from taking advantage of a poor debtor, who had honestly taken the oath, in consequence of circumstantial errors and mistakes. The act should be so

construed as to effectuate its object. "No citation shall be deemed incorrect for want of form only or for circumstantial errors or mistakes, when the person and case can be rightly understood — such errors and defects may be amended on motion of either party."

Here the person and case could be and was rightly understood and no amendment was necessary. The errors in the certificate of the justices are immaterial so far as this suit is concerned. The object of the certificate is merely to free the debtor from arrest and is not essential to a successful defence on the bond. *Kendrick* v. *Gregory*, 9 Maine, 22; *Kimball* v. *Irish*, 26 Maine, 444; R. S., c. 148, §§ 31, 32; c. 113, §§ 33, 34. And this certificate is amendable. *Burnham* v. *Howe*, 23 Maine, 489; *Ayer* v. *Woodman*, 24 Maine, 196.

BARROWS, J. A plea of performance of the first condition of a bond given by a debtor upon his arrest on an execution issued on a judgment recovered on the twenty-fifth day of September, A. D. 1876, for eighteen dollars and ninety-five cents debt or damage, and three dollars and one cent costs of suit, upon which judgment there remained to be collected the sum of thirteen dollars and ten cents, with ninety cents more, for six writs of execution, is not maintained by a justice's certificate of the taking of the oath by the debtor, on a judgment recovered on the twenty-fifth day of December, 1876, for the sum of thirteen dollars and ten cents debt, and three dollars and one cent costs. Neither the date nor the amount of the judgment is correctly stated in the certificate as required by R. S., c. 113, § 33. This is necessary in order to show that the execution is the same upon which the oath was taken. *Hathaway* v. *Stone*, 33 Maine, 500. Jurisdiction of these cases of disclosure by debtors who have given bond on arrest is conferred by R. S., c. 113, § 28, upon two disinterested justices of the peace and quorum, selected as provided in § 42 of the same chapter, and they are empowered "to examine the citation and return" provided for in § 27, "*and if found correct*," to examine the debtor on oath, and in proper cases upon regular proceedings prescribed, to administer the poor debtor's oath and grant a certificate in the form given

in § 33, which would at once, of itself, on being filed with the proper officer, relieve the debtor from all further liability to arrest for the debt, and serve as proof of the fulfillment of one of the conditions of his bond. But this is no mere idle form, to be carelessly gone through with, regardless of the requirements of law respecting it. The proceeding has a definite object, and that is the determination by a tribunal to be mutually selected by debtor and creditor (or otherwise as provided by law) of the true state of the debtor's affairs, his ability to pay the debt, and the propriety of administering the oath to him as a poor debtor honestly disposed but unable to pay his debt.

Obviously the notice to the creditor lies at the foundation of the proceedings. It must be substantially according to the requirement of the statutes, before the justices proceed to take the disclosure, and in order that they may have jurisdiction so to do. They are to "examine the citation and return, and if found correct," proceed—not otherwise. Hence, where there has been a failure to give a substantially correct notice to the creditor according to the requirements of the statute, or to have the justices selected as the statute provides, it has been well held that the justices had no jurisdiction of the case, and that the damages for the breach of the bond must be assessed according to c. 113, § 40, because the provisions of §52 apply only to cases where "the principal had legally notified the creditor" and taken the oath before two justices of the peace and quorum "having jurisdiction and legally competent to act in the matter. *Hackett* v. *Lane*, 61 Maine, 31; *Poor* v. *Knight*, 66 Maine, 482. Since these decisions, the legislature, by c. 59, laws of 1878, have amended § 28 of c. 113, by adding thereto as follows: "No citation shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes, where the person and case can be rightly understood. Such errors and defects may be amended on motion of either party." Obviously, this provision, as well as the section to which it is appended, relates to the proceedings before the magistrates. They are not absolved from the duty of examining the citation and return, and finding them correct before they proceed to examine the debtor, administer the oath,

and grant the certificate. They are, by virtue of this provision, authorized, in cases where the person and case can be rightly understood, to allow amendments in matters of form, or of circumstantial errors or defects, and thus make the proceedings correct. But the statute was not designed to give immunity to such a want of care as would permit the proceedings to go through without the requisite amendments, and then have the same effect as if the requirements of the statute had been complied with. The design of it was to prevent the attempted performance by the principal of this condition in his bond from failing, whenever there was so far a compliance with statute requirements that the person and case could be rightly understood, provided the applicant for the oath and discharge bestowed sufficient care upon the proceedings to make them correct, by amendments within the purview of the act. If it be conceded that the error in the present proceeding was of that circumstantial sort which would not prevent the person and case from being rightly understood, still no motion to correct it was made before the magistrates, so that it might ultimately appear by the record that they had jurisdiction. The suit on the bond comes before us without anything to distinguish it from the case of *Poor* v. *Knight*, *supra*. Defendants' counsel moves here in the law court, for leave to amend the certificate by substituting for the one presented, one which shall conform to the requirements of the statute. The amendment proposed is not within the scope of the authorities cited in support of it. The new certificate would present the case, not according to the facts of the proceeding before the magistrates, but would exhibit it as it ought to have been amended before they went on to examine the debtor and administer the oath.

That an amendment by law allowable may be allowed by a court having jurisdiction of the parties and the subject matter, where the effect of it is to give to that court a jurisdiction of the case which it would not otherwise have was well held in *Merrill* v. *Curtis*, 57 Maine, 152. If the proposed amendment related only to the error as to the date of the judgment, into which the magistrates fell in their certificate, it might well have been

allowed in the superior court before the case was made up for the consideration of the law court. But the proposition goes further than that, and covers an amendment of the citation in an essential particular, an amendment which should have been made, if at all, before the magistrates took any further cognizance of the case. In any event it comes too late here. Even if this court could be held to have a discretionary power to allow it, such power could not properly be exercised in a case deliberately presented upon an agreed statement of facts in a matter of no greater pecuniary importance than this. The plaintiffs should have judgment in accordance with the provisions of c. 113, § 40.

Judgment for plaintiffs.

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

ISAAC N. DEERING, Assignee,

vs.

HARLAN P. COBB and another.

York. Opinion February 2, 1883.

Mortgages, chattel. After-acquired property. Assignee in insolvency.

The clause in a chattel mortgage of a stock of goods to the effect that the mortgagees while remaining in possession, may sell from the stock at retail, appropriating the proceeds to replenish the stock with new goods which are to be held subject to the mortgage, is so far valid between the parties to the mortgage, as to rest in the mortgagees the title to the goods so purchased and put into the shop in pursuance thereof.

Where the mortgagors were a firm which was subsequently dissolved, and thereafter the power to sell was exercised and the duty to re-invest was performed by one partner alone without interference by the mortgagees, the mortgagees retain a lien upon the goods so purchased.

Where the evidence of fraud is wanting, an assignee in insolvency takes only the property rights and interests of the insolvent.

Griffith v. *Douglass*, 73 Maine, 532, considered and distinguished.

ON REPORT on agreed statement of facts.

Trover by the assignee in insolvency of Ebenezer G. Delano, to recover the value of a stock of goods.

By the agreed statement it appears that Harlan P. Cobb and Ebenezer G. Delano were partners in trade at Saco, and on March 4, 1876, gave Sweetsir, one of the defendants, a mortgage of their stock in trade, which contained this clause, "Provided also that it shall and may be lawful for said Cobb and Delano to continue in possession of said property until the said Sweetsir shall consider it for his interest to take possession under this bill of sale, and the said Cobb and Delano are to have the right to sell from said stock at retail, the proceeds of said sales to be appropriated to the purchase of new goods, said new goods to be held under this bill of sale."

February 1, 1877, the firm of Cobb and Delano dissolved, Delano continuing the business, and September 19, 1877, he gave Cobb a mortgage of his stock and fixtures, and it contained a clause like the first mortgage above written. Delano continued the business till March 21, 1879, when Sweetsir took possession under his mortgage with the knowledge of Delano and without objection. Three days later, Cobb by arrangement with Sweetsir with the knowledge of Delano, and without his objection, took possession under his mortgage for the purpose of selling and paying over proceeds to Sweetsir. Two days after that (March 26, 1879,) Delano was adjudicated an insolvent on his own petition. The opinion states other material facts.

R. P. Tapley, for the plaintiff.

So far as the Sweetsir mortgage is concerned, the power of sale is given to the firm of Cobb and Delano and not to the individual members. It does not appear that the after-acquired goods were purchased to replenish the stock of Cobb and Delano nor does it appear that they were purchased with proceeds of goods sold. *Chapin* v. *Cram*, 40 Maine, 561.

Beyond this we consider it well settled law in this state, that after-acquired goods do not pass under such a mortgage.

The case of *Emerson* v. *E. and N. A. R. Co.* 67 Maine, 387, fully considers the point and clearly lays down the rule that in actions at law such mortgages do not hold after-acquired

goods. The court review the cases in this state touching the question, citing *Chapin* v. *Cram*, 40 Maine, 561, as directly determining that a mortgage of a stock of goods would not transfer to a mortgagee goods afterward purchased and put in with the stock by the mortgagor, although the mortgage had a clause containing that agreement.

The assignment by operation of law vests in the assignee the title to all property and estate of the debtor. He succeeds to the rights of creditors as well as the insolvent. *Bradshaw* v. *Klein*, 1 B. R. 542; *In re Metzger*, 2 B. R. 355; *In re Eldridge*, 4 B. R. 498.

H. Fairfield, for the defendants, cited: *Kittridge* v. *McLaughlin*, 33 Maine, 327; *Goss* v. *Coffin*, 66 Maine, 432; *Hersey* v. *Elliot*, 67 Maine, 527; *Mitchell* v. *Winslow*, 2 Story, 630; *Briggs* v. *Parkman*, 2 Met. 258; *Clarke* v. *Minot*, 4 Met. 346.

Symonds, J. The clauses in the two mortgages under which the defendants as mortgagees claim to hold the stock of goods in question — to the effect that the mortgagors while remaining in possession may sell from the stock at retail, appropriating the proceeds to replenish the stock with new goods which are to be held subject to the mortgage — are so far valid between the parties to the mortgage as to vest in the mortgagees the title to goods so purchased and put into the shop in pursuance thereof. *Allen* v. *Goodnow*, 71 Maine, 420; Jones' Chat. Mort., § 138.

This is the law in this state, at least since the decision cited, in cases to which the rule applies; where there is a power to sell at retail, accompanied with a duty to use the proceeds of sale in buying other goods to supply the place of those sold. It cannot be said to be the uniform rule declared by the authorities, but there is a somewhat general recognition in them of the validity of such stipulations between the parties; while at law the general rule is that so long as the mortgagors remain in possession such clauses are void against attaching creditors and subsequent purchasers. It is this latter class of cases which has been most frequently before the courts. *Jones* v. *Richardson*, 10 Met. 481, is a leading case — and similar authorities are numerous and repeatedly cited. As to the effect of this stipula-

tion reserving to the mortgagee control of the proceeds of the property sold by the mortgagor, see also, *Williams* v. *Briggs*, 11 R. I. 476, 480. In comparatively few instances has attention been directed to this precise provision. The fact that after the dissolution of the firm this power to sell was exercised, and the duty to re-invest was performed, by one of the partners alone, without interference by the mortgagees, instead of by the firm to which the power was originally given, has no tendency to discharge the lien upon the goods, to the purchase of which the proceeds of the original stock were so applied.

Under each of these mortgages, the mortgagees had the right to take possession at will. They had in fact exercised this right and taken possession before the insolvency of the mortgagor. At that date without fraud they were in possession, under mortgages which had the legal effect to transfer to them, as against the mortgagor, the title to the property, the original stock and the substitutions by purchase with the proceeds. When it is considered that in the absence of fraud the assignee in insolvency takes only the property, rights and interests of the insolvent, it follows that under such circumstances the title of the mortgagees was not defeated, in the interest of the creditors generally, when the mortgagor was adjudged insolvent. There was neither actual fraud nor constructive fraud against the rights of creditors under the provisions of the act of insolvency. The mortgage debts are not denied. The mortgages were given in 1876 and 1877; the insolvency was in 1879. The assignee took only the title of the insolvent, against whom the mortgagees held by superior title, so far as that class of goods which we are considering is concerned.

It seems, also, that when as in this case, a mortgage is effective between the parties as a transfer of title to property to be subsequently acquired by the use of the proceeds of the original stock, and the mortgage contains a power to the mortgagee to enter and take possession of such future property when acquired, possession taken and retained in the exercise of that power makes the mortgage effective, without any new act

of the mortgagor, against third persons claiming under him by later attachment or conveyance.

A proposition at least as strong as this is sustained in Jones' Chat. Mort., §§ 160, 167, by a full citation of authorities, English and American, which there is no occasion here to examine more minutely. *Hope* v. *Hayley*, 5 El. and Bl. 830; *Moody* v. *Wright*, 13 Met. 17, 32; *Cook* v. *Corthell*, 11 R. I. 483; *Walker* v. *Vaughn*, 33 Conn. 577, 583.

But in a more recent case in Massachusetts, which has been one of the states to hold most closely to common law doctrines in regard to mortgages of this kind, it has been held that "if the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the provision of the mortgage in regard to it. . . . Such taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor, would not be the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under an instrument in writing made when the parties to it were both competent to contract, and when there was no qualification of the right of either to deal with the other." *Chase* v. *Denny*, 130 Mass. 566. The facts of that case resemble very closely those in the case at bar in material points.

The present case may be easily distinguished in almost all essential particulars from *Griffith* v. *Douglass*, 73 Maine, 532. There was no power of sale with the duty to invest the proceeds for the benefit of the mortgagee. It was a mortgage of the furniture "now owned or to be owned" by the mortgagor, without limitation to articles procured by the re-investment of the proceeds of an original stock authorized to be sold. The questions in that case, too, arose between the mortgagee and the attaching creditors of the mortgagor, not as here between the parties to the mortgage or their representatives; and lastly, in *Griffith* v. *Douglass*, the mortgagee, having accepted a formal delivery of the after-acquired property at the time of its

purchase, allowed it to remain in the possession of the mortgagor where it was attached by his creditors.

Whether under such a mortgage as that, and between those parties, possession of the after-purchased property taken and retained by the mortgagee in pursuance of an authority given by the mortgage would or would not have given the mortgagee superior title by force of the mortgage itself, is a question not decided by that case, nor is it here presented for decision. Not only in regard to the possession of the property, but also in regard to the parties and to the terms of the mortgage, the facts of this case are more favorable to the claim of the mortgagees, than they were in *Griffith* v. *Douglass*.

These mortgages convey the original stock and the replenishings made by the use of proceeds derived from sales. They do not purport to convey anything more. Under the stipulations of the report a nonsuit cannot be entered, for the statement that the purchases since the date of the mortgages have been "in the ordinary way of trade" might include additions procured by other means than the investment of such proceeds. At the date of the demand by the messenger, Cobb was in possession by arrangement with Sweetsir acting for him as well as for himself. There is no want of evidence of conversion of any property to which the mortgagees did not have title. A default must therefore be entered entitling the plaintiff to nominal damages at least. At the hearing for the assessment of damages the plaintiff will be entitled to recover the value of all goods in the shop at the time of the demand, which were not parts of the stock at the date of one or the other mortgage, nor purchased by proceeds of sales, according to the terms of either.

Judgment for plaintiff. Assessment of damages at nisi prius.

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

JOSEPH P. BASS *vs.* LLEWELLYN EMERY, administrator.

Penobscot. Opinion February 5, 1883.

Administrators, actions against. Partnership property. R. S., c. 69, § 4.

Where the administrator of a deceased member of a firm gave the bond and took possession of the partnership property as required by R. S., c. 69, § 4, the surviving partner having declined to give the bond, a creditor of the firm may maintain an action against him as such administrator in case of his refusal to pay the sum due such creditor.

ON EXCEPTIONS.

Assumpsit to recover upon accounts as due from the firm of M. Emery and Company. The firm consisted of Marcellus Emery and Millard E. Mudgett, and continued till 1879, when Emery died and the defendant was appointed administrator on his estate. The surviving partner declining to give bond provided by R. S., c. 69, § 2, the defendant gave bond required by § 4 of same chapter, and took possession and disposed of the partnership property, the case was referred to referee, the parties reserving the right to except. The referee reported that he found as fact that twenty-three dollars and five cents was due the plaintiff on the account sued, and as law that the action was maintainable against the defendant in his capacity as administrator of the debtor firm.

This report was accepted by the presiding justice, the defendant objecting thereto, and the defendant alleged exceptions.

Charles P. Stetson, for the plaintiff.

John Varney, for the defendant.

At common law the surviving partner was the only party to sue and be sued in respect of the debts and engagements of the firm. 2 Collyer's Part. (6 ed.)Wood's notes, 1060; *Cook* v. *Lewis*, 36 Maine, 340; ch. 69, R. S., does not change the common law rule. *Vide*, *Strang* v. *Hirst*, 61 Maine, 10.

In several cases such as *Putnam* v. *Parker*, 55 Maine, 235; actions have been maintained by firm administrators as plaintiffs, but they will be found to be for the possession of the firm assets, and in replevin, and not for the collection of debts due the firm. Such suits "must be prosecuted in the name of the survivors." APPLETON, C. J., in *Strang* v. *Hirst*, *ante*.

DANFORTH, J. By R. S., c. 69, § 1, "The executor or administrator of a deceased member of a partnership, is to include in the inventory the property of the partnership, appraised as in other cases, except that an amount is to be carried out equal only to the share of the deceased.

This property is to be retained and administered, unless the surviving partner gives bond to the judge as provided in the following section." This bond the surviving partner declined to give, and the administrator gave the bond, and took possession of the property as required by § 4. He alone has possession, and must hold it against all persons, for the purpose of administration. *Cook* v. *Lewis*, 36 Maine, 340; *Putnam* v. *Parker*, 55 Maine, 235. It then became his duty to administer upon the whole partnership property. This implies not only a right to collect the debts due to the firm, but the duty of paying what is due from it. This is confirmed by other provisions of the statute. Section 4, provides that "He may use the name of the survivor to collect the debts." Chapter 225 of the acts of 1871, authorizes him under a license to sell the real estate of the partnership, and "appropriate the proceeds to pay partnership debts." While by the statute he may, for obvious reasons, use the name of the survivor, to collect the debts, for equally obvious reasons he is no where exempt from an action for a neglect of duty in not paying the debts.

The plaintiff, as the case shows, has a just debt against the partnership. The defendant is the only representative of the property which ought to pay it, and the law makes it his duty to pay it, which duty he refuses to perform. Here if any where the well established maxim, "*ubi jus ibi remedium*", applies. In another form the expression is, "whenever the law gives any-

thing, it gives a remedy for the same." The only remedy in this case, is the appropriate action against the defendant, which the plaintiff has adopted. The surviving partner might be liable as joint contractor, but is not as a representative of the partnership property. The defendant might be liable as administrator of the deceased partner, but in such an action only the private property of the deceased, could be reached. Hence, this is the only remedy by which the partnership property as such can be reached.

Exceptions overruled.

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

SAMUEL NASH and others, in equity

vs.

JAMES M. BEAN and another.

Penobscot. Opinion February 5, 1883.

Deed. Release.

When the owner of land releases his right, title and interest to another, his subsequent deed of release to a third person conveys no title; and if the latter be recorded before the former, the former will still hold the title as against the subsequent release.

BILL IN EQUITY.

Heard on bill, answer and proof.

Barker, Vose and Barker, and *A. L. Simpson*, for the plaintiffs.

A. W. Paine, for the defendants.

VIRGIN J. This is a bill in equity, wherein the the plaintiffs, claiming title to certain land in Union Place, Bangor, complain that a deed of release of the premises given by the defendant

to his co-defendant Perry, creates such a cloud upon the title as prevents its sale; and they pray for its removal.

The case discloses the following leading facts: "On September 3, 1870, Samuel Nash, one of the plaintiffs, holding the legal title thereof, mortgaged the premises together with other lands, to Bean, the condition of the mortgage providing that the mortgage shall become void, if the said Nash shall well and truly indemnify and save harmless the said grantee from all loss, cost and damage which may accrue to him from having endorsed, for the accommodation of said Nash, three notes for two thousand dollars each, payable, &c., and shall pay said notes at maturity and also save him harmless from all loss, cost and damage from any subsequent endorsements or guaranties which said Bean may make for him, and shall repay to him, &c., all sums of money which said Bean may advance or repay for him, at his request."

On November 21, 1870, Bean, being about to go on a journey, executed a release of the mortgaged premises to Nash and deposited it, as an escrow, with his son, to be delivered to Nash upon surrender of the endorsed notes.

On September 21, 1871, Bean released his interest in the other lands to Nash who sold them and paid the proceeds thereof upon the endorsed notes, and on the same day, pursuant to an arrangement with one Webb and Bean, Nash released his interest in the Union Place land to Bean, who, at the same time, mortgaged it to Webb to secure Bean's note of one thousand dollars endorsed by Nash; and the money received therefor was also paid on the endorsed notes.

Of the original debt of six thousand dollars for which Bean was holden as endorser, there remained outstanding, on April 2, 1872, only two notes of one thousand dollars each. Just prior to that date, Nash had informed Bean that one Patten would take up the two outstanding notes provided he could have security. And on that day, Nash executed a mortgage of the Union Place premises, subject to the Webb mortgage, to Patten as indemnity for taking up the notes; and they were paid to the holder and surrendered, thereby discharging the remainder of

the debt, for the security of which the original mortgage, of September 3, 1870, was given.

Nash's mortgage to Patten, though executed on April 2, was not delivered until May 3. In relation to Nash's title and consequent right to mortgage to Patten, there is a conflict of testimony. Bean alleged in a bill in equity instituted against Nash in Boston, in 1874, and testified before referees who heard the bill, and alleged in his answer to these plaintiffs' bill, that in April or May, 1872, he released his interest in the Union Place lot, to Nash; he so wrote the insurance company and had the policy on the property cancelled. And he now unqualifiedly testifies to the same, and that the release contained certain conditions which would give Patten a good title "if he paid these notes" — meaning the two outstanding notes which Patten did pay — "and that the conditions of that deed were complied with." On the other hand Nash testifies that, instead of such a release being given, at the time mentioned, the escrow was reconstructed with Bean's consent, by changing the date and including in the premises the words, — "and also by deed of September 21, 1871;" that the deed thus amended, was re-acknowledged and delivered by Bean to him; and that he, on May 3, 1872, delivered it together with the mortgage of April 2, 1872, to Patten, who caused both to be recorded on the following day.

On March 5, 1874, Nash paid Patten the amount due on his mortgage and it was discharged. Thereupon, on the next day, Nash conveyed the premises to Eleanor Nash who died on December 6, 1875, leaving the complainants as her heirs.

On August 4, 1877, the Webb mortgage was discharged on payment by Nash of the balance due thereon and the note surrendered to Bean. Whereupon J. H. Bean, holder and assignee of the Webb mortgage, assigned the unpaid balance due for rent and surrendered the premises, to Patten, who as executor of the last will and testament of Eleanor Nash, controlled the premises and collected the rent thereafter for the heirs.

On June 23, 1880, Bean executed and delivered a naked release of the premises to his co-defendant F. R. Perry, and this is the deed complained of.

Unless all of the evidence bearing upon the question is false, Bean delivered a release of the premises to Nash, about the first of May, 1872. Before any controversy arose, he so wrote to the insurance company. Whether it was the escrow reformed, as Nash testifies, or another one, as Bean testifies, is quite immaterial so far as this suit is concerned. For if Bean is right, he had no title when he released to his wife's nephew, Perry, and therefore could convey none to Perry notwithstanding Perry's deed was recorded and the deed to Nash was not. *Coe* v. *Persons unknown*, 43 Maine, 432; *Walker* v. *Lincoln*, 45 Maine, 67; *May* v. *McClaire*, 11 Wall. 232. This release passed all the title Bean had, not only under the original mortgage, but also under Nash's deed to him of September 21, 1871; and hence the mortgage was in fact discharged.

The award of the referees, if conclusive upon the parties as the defendants contend, settles the fact that Nash owed Bean nothing; but also decided that Nash should pay Bean two hundred and fifty dollars for wrongfully recording the escrow. But that did not come within any of the provisions of the mortgage conditions.

The conduct of the defendant Bean and his son (to whom the father advanced the money to purchase the Webb mortgage) in surrendering possession of the premises on payment of the amount due on the Webb mortgage, demonstrates their understanding of the state of the title at the time. And our opinion is that that they were correct then and wrong now. To remove all doubt in relation to the title, the respondents should release to these complainants, all right, title and interest in the premises.

Bill sustained without costs.

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

SETH MCGUIRE *vs.* INHABITANTS OF LINNEUS.

Aroostook. Opinion February 5, 1883.

Soldiers' bounties. Trust. Limitations. Stat. 1868, c. 225.

The "surplus" mentioned in stat. 1868, c. 225, § 6, belongs to soldiers who served on the town's quota without receiving any bounty therefrom, to be shared among them in proportion to the length of time they served.

The town holds such surplus in trust until called for by the *cestui que trust*. The statute of limitations will not begin to run until the trust is disavowed by the town.

ON REPORT on agreed statement of facts.

Assumpsit. Writ, dated August 21, 1880.

Plea, general issue and statute of limitations.

The facts are stated in the opinion.

V. B. Wilson and *W. T. Spear*, for the plaintiff, cited: *Gilman* v. *Patten*, 70 Maine, 183; *Riggs* v. *Lee*, 61 Maine, 499; *Hosmer* v. *Clarke*, 2 Maine, 308; 9 Pick. 490; 1 *Sumner*, 478; 3 Pars. Contr. 92, 93; Hill on Trustees, 375, 64, 264; *Lee* v. *Lanahan*, 59 Maine, 478; 60 Maine, 158; Perry on Trusts, § § 850, 24, 42, 45, 30; 63 Maine, 404; 3 Bac. Abr. 510; Ang. Lim. 166, 168.

Powers and Powers for the defendants.

The demand in this case was not made within a reasonable time. Some nine or ten years elapsed after receipt of the money, before demand was made.

This demand must be made in a reasonable time,— six years. *Codman* v. *Rogers*, 10 Pick. 112. This doctrine is recognized in *Lee* v. *Lanahan*, 59 Maine, 478. *Gilman* v. *Patten*, 70 Maine, 183, differs very materially from the case. There the demand was made, and the defendants notified of the claim within a year.

VIRGIN, J. The plaintiff seeks to recover a share of the "surplus" of the sum received by the defendants, under the provisions of the equalization statute, above the amount actually paid

out by them for bounties. The defendants do not deny that the "facts agreed" would bring the plaintiff's case within the provisions of the statute as it has been construed by the court, and would entitle him to recover, provided, he had seasonably made his demand, and brought his action; but contend that his right of action was barred by the general statute of limitations before he made his demand. But our opinion is otherwise.

The provisions of the stat. 1868, c. 225, emphatically show that the legislature had in view the interests of its soldiers as well as of its municipal corporations. The main object of the legislature was to approximately equalize the then very unequal burden of the war debts of the towns, by a limited assumption and reimbursement thereof on the part of the state. In effecting the main purpose, regard was also had for those soldiers who had served on the quotas of their respective towns, without receiving any bounty therefrom. Accordingly, when upon the basis fixed for reimbursement, any town was to receive more than it had paid out for bounties, the legislature provided that the "surplus" should belong to the soldiers (and their legal representatives) who served on the town's quota without receiving any bounty therefrom, to be shared among them in proportion to the length of time they respectively served. *Riggs* v. *Lee*, 61 Maine, 499. And so careful was the legislature in the soldiers' behalf, that a positive vote of the town, appropriating such surplus to such soldiers, was made a condition precedent to the receipt by the town of its part of the reimbursement fund. St. 1868, c. 225, § 6. And no statute could be founded on more just and equitable considerations. The municipal war debts which the state undertook to equalize, arose from bounties paid to some of their soldiers. And while many towns, under the provisions of § 1 of the statute, would receive much less than they had paid out, quite a number of towns, among them the defendant, received more. And every soldier who, like the plaintiff, served upon the quota, added to the "surplus" in proportion to the length of his service. And the people, through their legislature, wisely concluded and so provided, in substance, that while there is no reason why a town shall make money out of the

proceedings, there is every reason why soldiers, who received no bounties from their town, but whose services helped swell the surplus, should share it in the same proportion as they had created it — according to the length of their respective service.

In carrying this secondary object into effect, the legislature created a trust in the surplus money received by the towns, and the towns by force of the statute and their vote of appropriation were constituted trustees, to hold the money for the soldiers until called for by them, or, in case of their death, by their legal representatives. The subject matter and purposes of the trust, as well as the persons to take the beneficial interests therein, are clearly ascertained. Although the *cestuis que trust* are not specifically named, they are so described that they can be ascertained, and the list furnished by the town to the equalization commissioners, must contain their names. The relation of trustee and *cestui que trust* being shown to have subsisted between these parties, the possession of the money by the town was not adverse to that of its *cestui que trust*, until repudiation of the trust evidenced by an intention to hold it adversely was proved. *Frost* v. *Frost*, 63 Maine, 399, 404; *Jones* v. *McDermott*, 114 Mass. 400. The only evidence of such intention is the refusal to perform on the demand made on August 20, 1880. Assuming this a sufficient disavowal of the trust, the statute would begin to run from that date. *Childs* v. *Jordan*, 106 Mass. 321.

What shall be the amount of the judgment? The sum received from the state was three thousand four hundred eighteen dollars and fifty cents of principal, and one hundred ninety eight dollars and sixty seven cents of interest. The town paid out for bounties, in 1862, the sum of five hundred dollars; and subsequently, reimbursed the state for bounties advanced to soldiers who actually served on the town's quota, to the amount of two thousand four hundred dollars. 69 Maine, 585, 589. A proper proportion of the above interest money belonged to the trust fund, and the plaintiff is entitled to his share of it. The two thousand four hundred dollars should be reckoned as money paid out for bounties for the same reason as the five hundred. The parties agree

that the plaintiff's share is forty-seven one thousand two hundred fiftieths of the surplus. Upon this basis there must be,

Judgment for plaintiff for forty-five dollars and seventy seven cents and interest from August 20, 1880.

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

CHARLES V. LOOK

vs.

FRANKLIN BRACKETT, AND THE INHABITANTS OF PHILLIPS, and others, trustees.

Franklin. Opinion February 5, 1883.

Trustee process.

Where the disclosure of a trustee shows that the fund in the hands of the alleged trustee is claimed by another than the principal defendant, it is the duty of the plaintiff in the trustee suit to take the necessary steps under R. S., c. 86, § 32, to make the claimant a party to the suit if he does not appear voluntarily. Failing in this, there can be no binding adjudication as to the validity of such third person's claim, and the trustee must be discharged.

ON EXCEPTIONS.

The only question presented by the exceptions, arises from the disclosure of the inhabitants of Phillips made by the chairman of their selectmen and attorney. The facts disclosed are stated in the opinion.

H. L. Whitcomb, for the plaintiff.

The letter from Anthony Brackett is not evidence and if it was it is dated July 2, 1881, nearly nine months after the writ was served on the trustees and it does not say to whom he paid nor when he paid. If he paid the defendant it was without authority, and voluntary, and therefore invalid. *Brown* v. *Chesterville*, 63

Maine, 241. The trustee must distinctly and unequivocally negative the idea that he had funds of the principal defendant on the day of the service of the writ upon him. *Toothaker* v. *Allen*, 41 Maine, 324; *Gould* v. *Newburyport R. Company*, 14 Gray, 472; *Kelly* v. *Bowman*, 12 Pick, 383; *Chase* v. *Bradley*, 17 Maine, 89.

James Morrison, Junior, for the trustees.

BARROWS, J. The plaintiff claims to hold the inhabitants of Phillips as trustee of *Franklin* Brackett upon a disclosure which presents the following facts. The writ was served on the trustee, October 9, 1880. Prior to that time for several years a pauper of Phillips had been supported in Starks under the supervision of the Starks overseers, and up to May 1, 1880, had been living at one Henry Williamson's. The town of Phillips had paid the bills up to that time, the last payment having been made May 20, 1880, by an order in favor of Williamson. As to the support between May 1, and October 9, 1880, for which only in any event could the trustee be chargeable here, the disclosure shows that for the year ending May 1, 1881, it was provided for by the overseers of the poor of Starks, one of whom, *Anthony* Brackett has notified the Phillips overseers that he has paid for it up to May 1, 1881, — that the Phillips overseers never made any contract with Franklin Brackett, the principal defendant, to support the pauper, nor did they know of such a man until May or June, 1881, more than six months after the service of the trustee writ, when one of them, going to look after the pauper, found her at Franklin Brackett's. How long she had been there does not appear. The only claim asserted against the town of Phillips seems to have been that of Anthony Brackett, and if the town of Phillips can be held as the trustee of anybody on account of support for their pauper so furnished, it would seem to be the party who "provided for" the support and says he has paid for it. But if it could be successfully contended that the overseers of Starks had the right to bind the town of Phillips, in the premises, as their agents to whomsoever they pleased, and that the furnishing of the support

from May 1, to October 9, 1880, by Franklin Brackett is not sufficiently negatived, there would still be an insuperable obstacle to charging the trustee. It sufficiently appears by the disclosure that the fund is claimed by Anthony Brackett, and it is well settled that the plaintiff in a trustee suit must clear the way of all such obstacles, by citing the claimant if he does not appear voluntarily, so that the question of the validity of the claim may be legally determined before he can have the trustee charged. He cannot put the burden of that possible litigation upon the trustee. If the plaintiff neglects to take the steps which the statute points out, the trustee must be discharged. *Burnell* v. *Weld*, 59 Maine, 423; *Jordan* v. *Harmon*, 73 Maine, 261.

Exceptions overruled.

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

LOUIS KING *vs.* CHARLES E. WARD and wife.

Somerset. Opinion February 8, 1883.

Fraudulent conveyance. R. S., c. 113, § 51. Practice.

In an action by a creditor of K against W and wife, under R. S., c. 113, § 51, for fraudulent conveyance to the wife by the aid and assistance of W of the property of K, the court, at the request of defendants' counsel, gave the following instruction to the jury: "If this conveyance was taken by W for his own security, without any knowledge as to the nature of the transaction so far as K was concerned, the jury cannot find a verdict for the plaintiff;" *Held*, That this request was inaccurate in its assumption of fact, unsound in its assumption of law, and ambiguously expressed, and should not have been given.

ON EXCEPTIONS AND REPORT.

An action under R. S., c. 113, § 51, for aiding a debtor to hinder, delay and defraud his creditors by taking of him a fraudulent conveyance of his property. The writ is dated

November 18, 1880. Plea, not guilty. The facts appear in the opinion.

E. W. and F. E. McFadden, for the plaintiff.

S. S. Brown, for the defendants.

The request which the court gave was a proper one. There is no legal ground of complaint in the fact that the instruction confined the question of guilty knowledge to Mr. Ward, because the whole case shows that Mrs. Ward was a mere passive grantee and had no knowledge of the transaction till the papers were made, had nothing to do with the negotiation, she took the conveyance as any good wife would at the request of her husband.

Good faith on the part of the grantee is all that is needed to sustain this conveyance and he is not to be affected by the *mala fides* of the grantor. *Bridge* v. *Eggleston*, 14 Mass. 245; *Harrison* v. *Trustees, etc.* 12 Mass. 456; *Reed* v. *Woodman*, 4 Maine, 400; *Davis* v. *Tibbetts*, 39 Maine, 279; *McLarren* v. *Thompson*, 40 Maine, 284; *Blodgett* v. *Chaplin*, 48 Maine, 322.

WALTON, J. There is a motion to have the verdict set aside upon the ground that it is against the weight of evidence. The verdict is probably wrong. But we do not find it necessary to determine whether or not it is so clearly wrong as to justify us in setting it aside; for we are satisfied that a new trial must be granted upon the exceptions.

It is an action against the defendants (husband and wife) for aiding a debtor in a fraudulent conveyance of his property. At the close of the judge's charge, which, so far as appears, was unexceptionable, the defendants' counsel requested the following instruction, which was given:

"If this conveyance was taken by Mr. Ward for his own security, without any knowledge as to the nature of the transaction, so far as Mr. Alexander King was concerned, the jury cannot find a verdict for the plaintiff."

Such an instruction could not properly be given. In the first place, it assumes that the conveyance in question "was taken by Mr. Ward." This is not true. It was taken by Mrs. Ward, the wife, and not by Mr. Ward, the husband. Again, it assumes that if one of the defendants was not guilty, a verdict could not be returned against the other. This is not correct. Being an action of tort, it was competent for the jury to find one of the defendants guilty and the other not guilty. Again, the phrase, "without any knowledge of the *nature* of the transaction," is ambiguous. It is clear that neither Mr. Ward, nor either of the other parties to the conveyance, had a very clear idea of the "nature of the transaction," in one particular, for they often speak of it as a mortgage, when it was in fact an absolute conveyance. Mrs. Ward took an absolute deed and gave a bond to Mrs. King (who was not the grantor), to convey to her upon the payment of twenty dollars and "future advances." Mr. Ward may not have had any knowledge of the "nature" of such a transaction, so far as Mr. King, or any one else, was concerned. He may have supposed the "transaction" constituted a mortgage. But very clearly it did not. He may have been mistaken as to the "nature" of the "transaction" in many other particulars. But did the defendants' counsel mean to have the jury understand that such ignorance would constitute a complete defense to the suit? Of course he did not. Our knowledge of the law, and of the absurdity of such a position, enables us to understand that such could not have been his meaning. But the jury may have so understood him. Clearly, the requested instruction, as it is worded, is one which ought not to have been given. It is unsound in its assumptions of law as well as of fact, and is ambiguously expressed.

Exceptions sustained.

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

D. M. Ross *vs.* William G. Brown.

Kennebec. Opinion February 8, 1883.

Promissory notes.

In an action upon a note reading as follows: "For value rec'd as treasurer of the town of Monmouth, I promise to pay D. M. Ross or order one hundred and sixty dollars in one year from date with interest. Wm. G. Brown, treasurer," it was not shown or claimed that the treasurer was authorized or had the permission of the town in its corporate capacity to issue the note in its behalf; *Held*, That the note must be regarded as the note of Brown, and not the note of the town.

On report.

Assumpsit upon the following note.

"$160.00. — No. 309. Monmouth, Oct. 26, 1876."

"For value received as treasurer of the town of Monmouth, I promise to pay D. M. Ross or order, one hundred and sixty dollars in one year from date, with interest."

Wm. G. Brown, treasurer."

The writ was dated August 30, 1878, and the plea was general issue.

At the trial evidence was introduced showing that Brown was the duly elected and qualified treasurer of the town of Monmouth, from March, 1876, to March, 1877. The law court was to render such judgment as the law and facts might require.

J. H. Potter, for the plaintiff.

G. C. Vose, for the defendant.

Was this the individual note of Brown?

To determine this we must ascertain the intent as gathered from the whole instrument, however inartificially drawn, or however informally the intent may be expressed. *Klosterman* v. *Loos*, 58 Mo. 290.

If a person describe himself in the body of a note as trustee and then sign his name adding the word trustee, he is not

personally liable thereon. *Blanchard* v. *Kaull*, 44 Cal. 440; *Jones* v. *Clark*, 42 Cal. 180. See also, *Chipman* v. *Foster*, 119 Mass. 189; *Carpenter* v. *Farnsworth*, 106 Mass. 561; *Whitney* v. *Stow*, 111 Mass. 368; *Sheridan* v. *Carpenter*, 61 Maine, 83; *Morell* v. *Codding*, 4 Allen, 403; *Barlow* v. *Cong. Soc. in Lee*, 8 Allen, 460.

In *Shoe and Leather Bank* v. *Dix*, 123 Mass. 148, the court say, "no case can be found in which a promise as agent or as trustee, accompanied with an express disclaimer of personal liability in the instrument would fail to exempt the signer."

It is well settled that, so far as an action on the note is concerned, the person who takes a negotiable promissory note, contracts only with those whose names appear upon the paper as parties. *Bank of British North America* v. *Hooper*, 5 Gray, 567; *Tucker M'f'g Co.* v. *Fairbanks*, 98 Mass. 101; *Brown* v. *Parker*, 7 Allen, 337; *Williams* v. *Robbins*, 16 Gray, 77.

The notes in question were in consideration of money received by defendant as treasurer, and were signed by him as treasurer.

If a person signs without authority, the signer is not liable on the note. His liability is in an action for falsely representing himself to be authorized to sign the note in behalf of the town. *Bartlett* v. *Tucker*, 104 Mass. 336; *Jefts v. York*, 4 Cush. 371; *Long* v. *Colburn*, 11 Mass. 97; *Jones* v. *Wolcott*, 2 Allen, 247; *Harper* v. *Little*, 2 Maine, 14.

WALTON, J. We think the note in suit must be regarded as the note of Wm. G. Brown and not the note of the town of Monmouth. In *Parsons* v. *Monmouth*, 70 Maine, 262, which was an action upon a note in the precise form of the note sued in this case, the court held that an action upon it could not be maintained against the town. It was not then necessary and the court did not decide whether the note was in form the note of the town or the note of the treasurer. The court held that an action upon it could not be maintained against the town, for the reason that no officer of a town is authorized to issue a note in behalf of the town without express permission from the town in

its corporate capacity. No such permission is shown or claimed in this case. Nor does the language of the note import a promise on the part of the town to pay the sum mentioned in it. The language of the note is, "I promise to pay," etc. This language does not purport to create an obligation on the part of any one but the signer of the note. True, the note says "for value received as treasurer of the town of Monmouth, I promise to pay," etc. It is immaterial whether this means that the consideration was received as treasurer, or the promise was made as treasurer, or both; for in whatever capacity he received the consideration, or in whatever capacity he made the promise, it is still the promise of the signer of the note, and not the promise of the town. The language will bear no other interpretation. The promise being in terms his promise and having no authority to make a promise binding upon the town (for no such authority is shown or claimed), we think the promise must be held to create, what the words used so clearly express, a personal obligation on the part of the signer of the note. In other words, that the note in suit must be regarded as the note of Wm. G. Brown, and not the note of the town of Monmouth. *Mellen* v. *Moore*, 68 Maine, 390, and cases there cited.

Judgment for plaintiff.

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

STATE OF MAINE *vs.* EDGAR R. SNOW.

Sagadahoc. Opinion February 8, 1883.

Practice, criminal law. Pleadings.

A motion in arrest of judgment is not the proper remedy for a wrong verdict. It should be a motion to have the verdict set aside and a new trial granted.

A motion in arrest of judgment is not the proper remedy for an illegal admission of evidence. The remedy for such an error is a bill of exceptions.

ON EXCEPTIONS.

The opinion states the case.

H. B. Cleaves, attorney general, for the state.

J. D. Simmons, for the respondent.

WALTON, J. This is a complaint charging the defendant with an illegal sale of intoxicating liquor. It also charges him with having been before convicted of a similar offense. Having been found guilty by the judge of the municipal court for the city of Bath, and, on appeal, by a jury, he moved for an arrest of judgment: First, because the verdict was against law and the weight of evidence. Second, because the court admitted the original complaint and docket entry of the judge of the municipal court (an extended record not having been completed) to prove his previous conviction, and it not being alleged in the complaint on which he was being tried that the former sale was made in this state or in violation of the laws thereof. The presiding justice overruled the motion, and the case is before the law court on exceptions to that ruling. The exceptions must be overruled. A motion in arrest of judgment is not the proper remedy for a wrong verdict. The remedy is not a motion to have the judgment arrested, but a motion to have the verdict set aside and a new trial granted. Nor is a motion in arrest of judgment the proper remedy for an illegal admission of evidence. The remedy for such an error is a bill of exceptions. Nor could a motion in arrest of judgment be sustained, if it be true, as the defendant contends, that his former conviction was not set forth with sufficient fullness. The effect of such an error would only be to prevent his being sentenced to the severer punishment. He would still be liable to be sentenced to the milder punishment. The motion was therefore properly overruled, and the exceptions to the overruling of it cannot be sustained. *State* v. *Murphy*, 72 Maine, 433.

Exceptions overruled. Judgment for the State.

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

HENRY A. JONES and another,

vs.

GRAND TRUNK RAILWAY COMPANY.

Cumberland. Opinion February 8, 1882.

Statute of limitations.

In an action for damages against a railroad company for unreasonable delay in the transportation of merchandise where a portion of such unreasonable delay occurred more than six years prior to the date of the writ and continued so that a portion of the delay was within the six years; *Held*, That whatever damage was occasioned by such delay as occurred more than six years before the commencement of the suit, was barred, but such damage as was occasioned by inexcusable delay within that time was recoverable.

ON EXCEPTIONS.

An action of the case brought by the surviving partners of the firm of Blake, Jones and Company, to recover damages for unreasonable delay in the transportation of several lots of flour, amounting in all to four thousand two hundred and twelve barrels, shipped over the defendants' road in the fall of 1866. Of this quantity twelve hundred barrels arrived at destination subsequent to December 24, 1866.

The writ was dated December 24, 1872. The plea was general issue and statute of limitations. The verdict was for two thousand and forty-seven dollars, and defendants alleged exceptions.

The opinion states the material facts.

Charles F. Libbey, for the plaintiffs, cited, upon the question considered in the opinion: *Betts* v. *Norris*, 21 Maine, 324; *Bank of Hartford County* v. *Waterman*, 26 Conn. 324; *Hardy* v. *Ryle*, 9 B. and C. 608; *Brotherton* v. *Wood*, 3 Brod. and Bing. 4 (54 E. C. L.); Angell, Lim. (6th ed.) 320, 321; 2 Redf. Railways (4th ed.) 14.

J. and E. M. Rand, for the defendants.

It appears that all the flour was (from some cause which defendants are now unable to explain) a long time in transit. It should have arrived and been delivered to plaintiffs in the month of October, 1866, except two lots due November 9 and 17. We submit that the plaintiffs' several causes of action accrued at the expiration of the time when the several lots of flour ought to have arrived; that all accrued prior to November 20, 1866. Yet plaintiffs did not commence their action until December 24, 1872, more than six years after their several causes of action accrued. And that their entire claim is barred by the statute of limitations.

We think it quite clear that plaintiffs' causes of action accrued at the expiration of a reasonable time for the transportation and delivery of the flour; that they could then have commenced their action; and that the failure to commence an action within six years of such expiration bars all claim. That such is the well-settled law. The elementary works all lay it down as a settled principle that the cause of action arises immediately on the happening of the default, and is not postponed to the damage thereby occasioned; that the statute begins to run from the breach of duty, and not from the damage thereby occasioned.

If one is guilty of negligence whereby injury occurs, six years from time of neglect will bar the action, although the injury has occurred within the six years. 3 Parsons, Contracts, part 2, sect. 6.

In *Wilcox* v. *Plummer*, 4 Peters, 172, the court say, the question is whether the statute runs from the time the action accrued, or from the time that the damage is developed or becomes definite. And court say, it is well settled that it runs from time action accrued. See also, Angell on Limit. sects. 42, 136, 137, 141, and cases there cited; *Battley* v. *Faulkner*, 3, B. and A. 288.

Plaintiffs were not obliged to receive the flour after the expiration of a reasonable time for its transportation and delivery; — could immediately have sued for its value, — and its receipt afterward would have affected amount of damage. Suppose flour never had arrived and never been delivered; when would plaintiffs

have had a right of action? We apprehend, at the expiration of a reasonable time for its transportation and delivery.

WALTON, J. The only question is whether the plaintiffs' claim is barred by the statute of limitations. It is a claim to recover damages for delay in the transportation of flour. The plaintiffs shipped several lots of flour during the fall of 1866. All of it ultimately arrived and was delivered to the plaintiffs; but none of it arrived in season. Some of it arrived more and some of it less than six years before the commencement of the suit. The plaintiffs concede that their claim for damages, with respect to so much of the flour as arrived more than six years before the commencement of the suit, is barred. The defendants claim that it is barred with respect to the remainder, because the delay had become unreasonable, and, consequently, a right of action had accrued, more than six years before the commencement of the suit. They contend that the subsequent delay — that is, the delay within six years — can have no other effect than to enhance the damages. The plaintiffs, on the contary, contend that the wrong was a continuing one; and that, it having been continued till within six years of the commencement of the suit, the action is maintainable.

We think the plaintiffs' view is the correct one. It must be remembered that the defendants had possession of the plaintiffs' property. So long as it was negligently withheld, so long the plaintiffs were wrongfully deprived of the use of it. It is not a case where the wrong is complete as soon as the delay becomes unreasonable. It is not a case where the lapse of time only makes manifest the injury which had before been committed. It is the case of a continuing wrong. Every day's delay may be the cause of additional damage. Every day's continuance of the delay, like the continuance of a nuisance, or the continuance of a trespass, by occasioning new damage, creates a new cause of action. One day's delay may occasion little or no damage. Another day's delay may create great damage. Whatever damage is occasioned by such delays as occurred more than six years before the commencement of the suit, is, of course, barred. But such damage as has been occasioned by inexcusable delays

within that time, may, we think, be recovered. Such, in substance, was the ruling of the judge who presided at the trial. We think the ruling was correct.

Exceptions overruled. Judgment on the verdict.

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

EBENEZER JORDON, administrator in equity,

vs.

CHARLES J. CHENEY and others.

Androscoggin. Opinion February 8, 1883.

Mortgages. Trusts. Transfer of mortgage debt. Merger.

One who takes a mortgagee's title holds it in trust for the owner of the debt to secure which the mortgage was given.

If a mortgage is given to secure negotiable promissory notes and the notes are transferred, the mortgagee and all claiming under him will hold the mortgaged property in trust for the holder of the notes.

In such case it is not necessary that there should be any recorded transfer of the notes or mortgage. Nor is an assignment of the mortgage necessary. Nor is a written declaration of trust necessary.

A merger takes place only when the whole title equitable as well as legal unites in the same person.

BILL IN EQUITY.

Heard on bill, answer and proof.

The bill was brought by the administrator of Ebenezer Jordan, deceased, against Charles J. Cheney, Henry W. Oakes, assignee in insolvency of Charles P. Jordan, Junior, and John Smith, and after stating the facts, the material parts of which are disclosed by the opinion, (Charles P. Jordan, Junior, was the mortgagee, who transferred and delivered the mortgage notes to the complainant, and John Smith was the mortgagor in the last

mortgage which was assigned to Cheney,) the complainant prayed "that said mortgage so held by said complainant in his said capacity as administrator may be decreed to constitute a prior lien on said real estate to the mortgage so held by said Charles J. Cheney; and that a just and true account of all sums due said complainant from said Charles P. Jordan, Junior, on the several notes aforesaid may be taken; and that said Charles J. Cheney be decreed to pay the same to your complainant; and in default thereof to place said complainant in possession of said real estate; and that said Charles J. Cheney, John Smith and Henry W. Oakes may be absolutely debarred and foreclosed of and from all right and equity of redemption in and to the said mortgaged premises or any and every interest in the same and every part thereof."

Charles J. Cheney was the only respondent who filed an answer.

Wm. P. Frye, John B. Cotton, Wallace H. White and Seth M. Carter, for the plaintiff, cited: *Moore* v. *Ware*, 38 Maine, 496; Jones, Mortgages, § § 817, 820, 870, 872, 874; *Eaton* v. *Simonds*, 14 Pick, 104; *Hunt* v. *Hunt*, 14 Pick. 384; *Simonton* v. *Gray*, 34 Maine, 50; *Stantons* v. *Thompson*, 49 N. H. 279; *Dexter* v. *Harris*, 2 Mason's C. C. 531; *Bailey* v. *Myrick*, 50 Maine, 171; *Purdy* v. *Huntington*, 42 N. Y. 334; *Edgarton* v. *Young*, 43 Ill. 464; *Wolcott* v. *Winchester*, 15 Gray, 461; *Greene* v. *Warnick*, 64 N. Y. 220; *Crooker* v. *Crooker*, 46 Maine, 250.

N. and J. A. Morrill, for the defendants, urged that the interest of the plaintiff in the mortgaged premises was only an equitable interest and that Mr. Cheney was a purchaser in good faith for a valuable consideration without notice of the trust and is therefore entitled to have the claim of the plaintiff postponed to his claim under the Smith mortgage. R. S., c. 73, § 12.

When a trustee sells a trust to a *bona fide* purchaser for a valuable consideration without notice of the trust such purchaser takes the estate discharged of the trust. 2 Story's Eq. Jur. (12 ed.) § 1264; *Pierce* v. *Faunce*, 47 Maine, 513; *Basset* v. *Nosworthy*, 2 White and Tudor's Lead. Cas. Eq. 57.

The rule laid down in *Greene* v. *Warnick*, 64 N. Y. 220, is not law in this state. See *Pierce* v. *Faunce, supra; Carpenter* v. *Longan*, 16 Wall. 271.

Mr. Cheney was not bound to take notice of an assignment of the notes alone. 1 Jones, Mortgages, § 820.

The statutes and decisions of this state require that for the due protection of the public, the assignment of a mortgage should be recorded. *Mitchell* v. *Burnham*, 44 Maine, 303.

Otherwise the purchaser would be held to the notice of a claim against which with the greatest diligence he could not guard.

It is to be noticed that Cheney was not taking an assignment of the mortgage, where a part of the notes secured by it had been previously assigned as in *Moore* v. *Ware*, 38 Maine, 496.

Nor does the case at bar resemble the case supposed, in 1 Jones, Mortg. § 474, where are cited cases relied upon by the plaintiff here.

The case of *Torrey, Adm'r*, v. *Deavitt, Adm'r*, recently decided in Vermont, is just in point; the court there say, "If the assignee of the mortgage debt fails to take such precaution (to take and record an assignment of the mortgage) he is guilty of negligence and places power in the hands of the original mortgagee to commit a fraud upon innocent parties and must be postponed to the rights acquired by such parties in good faith, without notice of his antecedent rights in the premises."

WALTON, J. One who takes a mortgagee's title holds it in trust for the owner of the debt to secure which the mortgage was given. If a mortgage is given to secure negotiable promissory notes, and the notes are transferred, the mortgagee and all claiming under him will hold the mortgaged property in trust for the holder of the notes. To secure this result it is not necessary that there should be any recorded transfer of the notes or mortgage. Nor is an assignment of the mortgage necessary. If the mortgage is duly recorded, the record is notice to all the world of the character of the mortgagee's title; and one taking title from or through him will obtain only a mortgagee's title, and be chargeable with notice that the notes are liable to be transferred, if they are not already transferred, and that he

must hold the estate in trust for the holder of the notes to secure which the mortgage was given, whoever that holder may be. No written declaration of the trust is necessary under the statute of frauds, because the trust arises by implication of law. Such is the settled law of this state. *Moore* v. *Ware*, 38 Maine, 496; *Buck* v. *Swazey*, 35 Maine, 41; *Johnson* v. *Candage*, 31 Maine, 28.

This rule of law is decisive in favor of the plaintiff. He is the holder of negotiable notes secured by a mortgage of real estate. They were transferred to him before they became payable. He thereby acquired an equitable title to the real estate which no act of the mortgagee could invalidate. True, he did not take a written assignment of the mortgage. Such an assignment was not necessary. His title in equity was complete without it. At law his title would be defective for the reason that our statutes declare that no interest in lands can be transferred except by deed. In equity, however, his title was complete when he became the holder of the notes. The case shows that the mortgagee afterward fraudulently obtained from the mortgagor a quitclaim deed of the premises, and that he (the mortgagee) then conveyed them to a third person, taking notes and a mortgage to secure the purchase money to the amount of three thousand dollars, and afterward assigned the notes, except one for one hundred dollars, and the mortgage, to the defendant (Cheney) as security for a loan of four hundred and thirty-five dollars. There is nothing to impeach the good faith of this defendant. But his title is inferior to the plaintiff's. In equity the plaintiff's title antedates his, and he must hold in subjection to it. There was no merger of the equity of redemption and the legal title in the mortgagee. The outstanding equitable title of the plaintiff would prevent such a result. A merger takes place only when the whole title, equitable as well as legal, unites in the same person. The cases cited and relied upon by the defendant's counsel (namely, *Mitchell* v. *Burnham*, 44 Maine, 286, and *Torrey* v. *Deavitt*, 12 Reporter, 508), are not in conflict with this conclusion. It is undoubtedly true, as held in these cases, that a mortgagor, and those claiming under him,

when exercising their right to redeem, may treat the mortgagee as still the holder of the mortgage notes or debt till notified to the contrary; and that they are chargeable with constructive notice of an assignment only when there is a duly recorded deed of assignment. But this rule is not applicable to mortgagees and those claiming under them. With respect to them it is enough that the original mortgage is recorded. We cannot doubt that in equity the plaintiff has the better title, and is entitled to the relief prayed for.

Bill sustained. Decree as prayed for with costs for the plaintiff against the defendant Cheney.

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

GEORGE H. HUNTER *vs.* JOSEPH B. PEAKS and another.

Somerset. Opinion February 8, 1883.

Action upon an officer's receipt. Damages.

In an action upon a receipt to an officer for property attached on a writ in which the receiptors promised to pay ninety dollars or redeliver the property on demand, or if no demand is made within thirty days after judgment is rendered, *Held;*

1. That the fact that the officer attached property greater in value than he was directed to in the writ is no defense.

2. The fact that the name of the defendant in the suit in which property was attached, was stated in the receipt to be C. Wood, when his true name was Robert C. Wood and was so stated in the writ, constituted no defense.

3. The fact that one of the receiptors supposed the suit was against Robert C. Wood, the son, when it was really against Robert C. Wood, the father, constituted no defense,— and an amendment of the writ by leave of court, adding the word "senior" to the defendant's name, would not discharge the receiptors.

4. The fact that no demand was made upon the receiptors would not discharge them, and no demand was necessary before bringing the suit.

5. The measure of damages was the amount stated in the receipt,— ninety dollars.

ON REPORT.

Assumpsit upon a receipt given by the defendants to the plaintiff, a deputy sheriff, for property attached by him. Plea, general issue and brief statement denying that any judgment had been rendered.

(Receipt.)

"Somerset, ss.—December 4th, A. D. 1875.

"For value received we promise to pay George H. Hunter, deputy sheriff of the county of Somerset, or his order, ninety dollars on demand; or to redeliver the goods and chattels following, viz.—

"One box of leaf tobacco valued at two hundred dollars, and four boxes of cigars valued at twenty-four dollars, and four boxes cigars valued at sixteen dollars.

"The above property being the same the said officer has taken by virtue of a writ in favor of Gideon A. Philbrick of Pittsfield in the county of Somerset, and against C. Wood of said Pittsfield in the county of Somerset, and we hereby agree safely to keep and on demand to redeliver all the goods and chattels above described to the said officer or to his successor in office, at Pittsfield in said county, in like good order and condition as the same are now in, free from expense to the above named officer, or to the creditor aforesaid, and I further agree that if no demand be made I will within thirty days from rendition of judgement in said action redeliver all the above described property as aforesaid at the place above named and forthwith notify said officer of said delivery. Joseph B. Peaks.
David Winslow."

Other facts stated in the opinion.

D. D. Stewart, for the plaintiff, cited: *Bruce* v. *Holden*, 21 Pick. 187; *Kincaid* v. *Howe*, 10 Mass. 203; *Cobb* v. *Lucas*, 15 Pick. 9; *Com.* v. *Parmenter*, 101 Mass. 211; *Colton* v. *Stanwood*, 67 Maine, 26; *Bangs* v. *Beacham*, 68 Maine, 425; *Hodskin* v. *Cox*, 7 Cush. 471; *Low* v. *Dunham*, 61 Maine, 566.

The only serious question in the case is the amount of damages. We claim the value of the goods attached, — one hundred forty-five dollars and seventy-six cents. The defendants

agreed to redeliver the goods within thirty days after judgment. They did not do so and we are entitled to our actual damage. "The amount which would have been received if the contract had been kept." *Hadley* v. *Buxendale*, 9 Exch. 354.

Joseph B. Peaks and *S. S. Brown*, for the defendants.

The attachment was dissolved by the receipt. *Waterman* v. *Treat*, 49 Maine, 309; *Stanley* v. *Drinkwater*, 43 Maine, 468; *Weston* v. *Dorr*, 25 Maine, 176.

The receipt for property attached on a writ against "C. Wood" incurs no liability until the rendition of a judgment against "C. Wood." Certainly not if the judgment is against *Robert C. Wood*. An attachment of real estate would be invalid where there was such an error in the name. *Dutton* v. *Simmons*, 65 Maine, 583; see *Com.* v. *Hall*, 3 Pick. 262; *Com.* v. *Shearman*, 11 Cush. 546; *Com.* v. *McAvoy*, 16 Gray, 235; *State* v. *Homer*, 40 Maine, 438; *State* v. *Dresser*, 54 Maine, 569; *Shaw* v. *O'Brion*, 69 Maine, 501.

The officer was a trespasser *ab initio* because he attached two hundred and forty dollars worth of property when he was commanded to attach but ninety dollars — the attachment was therefore void — hence there was no liability on the writ. *Harmon* v. *Moore*, 59 Maine, 428.

Counsel elaborately argued that the mistake of the receiptors as to the identity of the defendant in that action discharged them.

A demand should have been made before suit was brought. *Gilmore* v. *McNeil*, 45 Maine 599; 112 Mass. 254; 121 Mass. 449.

Again, this case is before the law court on report for such judgment as the legal rights of the parties require. And the report does not disclose a particle of evidence to show that the execution was ever in the hands of an officer competent to serve it, or any officer. And there was not any such evidence in the case. Yet that was necessary, and should have been shown to entitle plaintiff to recover. 33 Maine, 297; 46 Maine, 533; 61 Maine, 568; 21 Pick. 318; 7 Cush. 471; 12 Met. 527; 112 Mass. 254; 121 Mass. 449.

If the defendants are liable at all in this action it will be only for ninety dollars, the sum named in the receipt.

WALTON, J. This is an action upon a receipt given to an officer for property attached on a writ. The defendants agreed to pay ninety dollars or redeliver the property. They have done neither. *Prima facie* the plaintiff is entitled to recover. Is there anything shown in defense why he should not recover? We think not.

The fact that the officer attached property greater in value than he was directed to attach in the writ is no defense. *Merrill* v. *Curtis*, 18 Maine, 272.

The fact that the name of the defendant in the suit in which the property was attached is stated in the receipt to be C. Wood, when it was in fact Robert C. Wood, and was so stated in the writ, constitutes no defense. The error was made by one of the receiptors, who, being a lawyer, was allowed to write the receipt. He examined the writ before writing the receipt, and if he did not copy the name of the defendant correctly, it was his fault and not the fault of the officer. But we regard the error as wholly immaterial, by whomsoever made. It in no way increased or injuriously affected the liability of the receiptors. Enough remained to leave no doubt of the identity of the suit and of the property attached. The error therefore was entirely harmless.

Nor does the fact that one of the receiptors (Mr. Peaks) supposed the suit was against Robert C. Wood, the son, when it was in fact against Robert C. Wood, the father, constitute a defense. We are satisfied that the officer neither said nor did any thing to lead Mr. Peaks into such an error, and no reason is perceived why such a misunderstanding on the part of Mr. Peaks should defeat the security of the officer, when the officer was in no way responsible for it. Nor would an amendment of the writ by adding the word "senior" to the defendant's name, if made by leave of court (and it could not properly be made without the leave of court), discharge the receiptors. It did not increase or change their liability. It only put into the record what

was before true, namely, that the suit was against the father and not against the son. Such an amendment would not discharge the attachment.

Nor would the want of a demand discharge the receiptors. True, they had agreed to redeliver the property on demand. But it is also true that they had agreed that if no demand should be made they would within thirty days of the time when judgment should be rendered in the suit in which the property was attached, redeliver it without a demand. And it is now settled law that when such a receipt is given, the receiptors will be liable, although no demand is made. And it is also settled that the receiptors must ascertain at their peril when judgment in the suit is rendered; that it is no part of the duty of the officer to inform them. It is not therefore necessary to determine whether the officer's return upon the execution is or is not competent evidence of a demand. The receiptors are liable without a demand. *Shaw* v. *Laughton*, 20 Maine, 266; *Low* v. *Dunham*, 61 Maine, 566.

The only remaining question is the amount to be recovered. The defendants agreed to pay ninety dollars or redeliver the property. Not having redelivered the property within the time agreed upon, they became immediately liable to pay the ninety dollars. We think the plaintiff is entitled to recover that sum and interest from the date of the writ, and no more. No demand was necessary before bringing the suit. When money is payable on demand, the commencement of the suit is a sufficient demand.

Judgment for plaintiff for ninety dollars damages, and interest thereon from the date of the writ.

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

OSCAR STACEY *vs.* WILLIAM W. GRAVES.

Cumberland. Opinion February 8, 1883.

Constable. Bond. R. S., c. 80, § 43.

The clerk of a city is an officer to whom the bond of a constable required by R. S., c. 80, § 43, may in the first instance be properly delivered.

The penalty imposed by R. S., c. 80, § 43, is not incurred if a constable serves a writ after the delivery of his bond though before it is approved.

ON EXCEPTIONS from superior court.

Debt to recover the penalty provided by R. S., c. 80, § 43. Writ was dated April 10, 1880, and the plea was the general issue and a brief statement.

It was agreed between the parties that on or before the fifteenth day of March, A. D. 1880, the defendant had been duly elected a constable of the city of Portland; that on said fifteenth day of March he executed a bond with sureties to the city of Portland in the sum of five hundred dollars, in all respects in due form for the faithful performance of his duties as constable; that upon said fifteenth day of March he filed said bond with the city clerk of the city of Portland, who did not in fact present the same to the board of mayor and aldermen for their approval until their session held on the nineteenth day of said March. On said nineteenth day of March the board of mayor and aldermen approved the bond and sureties.

On the seventeenth day of said March, the defendant made the arrest of the plaintiff, complained of upon a writ issued out of this court on that day. Upon the foregoing facts, the presiding justice ruled as matter of law:

I. That the delivery of the bond on the fifteenth day of March, to the city clerk of the city of Portland, was a delivery of said bond to the board of mayor and aldermen.

II. That the arrest of the plaintiff by the defendant acting in his capacity of constable, on the seventeenth day of March was a legal arrest. The plaintiff alleged exceptions.

Emory S. Ridlon, for the plaintiff.

Irving W. Parker, for the defendant.

WALTON, J. The R. S., c. 80, § 43, declare that before a constable serves any process, "he shall give bond to the inhabitants of the town in the sum of five hundred dollars, with two sureties, approved by the municipal officers thereof, who shall indorse their approval thereon in their own hands, for the faithful performance of the duties of his office, as to all processes by him served or executed; and for every process he serves before giving such bond, he shall forfeit not less than twenty, nor more than fifty dollars, to the use of any person suing therefor."

This is an action to recover the penalty here provided for. The first question is whether the clerk of a city is an officer to whom such a bond may in the first instance be properly delivered. We think he is. It will be noticed that the statute is silent as to whom the bond shall be delivered. It is to be approved by the municipal officers, which, in the case of cities, means the mayor and aldermen. R. S., c. 1, § 4, cl. XXIII. The city clerk is their clerk and he has the custody and care of their papers. We think a delivery to him is, in contemplation of law, a delivery to the board of aldermen.

The next question is whether the penalty is incurred if a constable serves a writ after delivery of his bond and before it is approved. It was decided in *Eustis* v. *Kidder*, 26 Maine, 97, that it is not. It was there held that when a constable has executed and delivered a good and sufficient bond, he has performed all which the statute requires of him. "It could not have been the intention," say the court, "to make the constable responsible for the performance of duties required of the selectmen, and to subject him to a penalty for their neglect." It will be noticed that the language of the statute is that "for every process he serves *before giving such bond*, he shall forfeit," etc. It does not say that for every process he shall serve before such bond is approved, he shall forfeit the sum named. In this particular the statute differs from the one under consideration in *Rounds* v. *Mansfield*, 38 Maine, 586, and *Rounds* v. *Bangor*, 46 Maine, 541, cited by plaintiff's counsel. In these cases it

was held that a pound-keeper's bond must be approved before he could act, because such was the express requirement of the statute. The language of the statute was that the pound-keeper should give a bond with sufficient sureties "to be approved by the aldermen or selectmen, for the faithful performance of the duties of his office, before he shall be entitled to act as such pound-keeper." The pound-keeper cannot lawfully act till his bond is *approved*. The constable may lawfully act as soon as his bond is *given*. This distinction is pointed out by the court in *Rounds* v. *Mansfield*, 38 Maine, 586. There is, therefore, no conflict between these cases, and the case of *Eustis* v. *Kidder*, 26 Maine, 97. The results differ because the statutes which give the actions differ.

Exceptions overruled.
Judgment for defendant.

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

BENJAMIN B. FARNSWORTH *vs.* BENJAMIN F. WHITNEY.

Cumberland. Opinion February 8, 1883.

Partnership. Settlement. Fraud. Remedies. Practice.

When two members of which a firm is composed settle their partnership affairs and dissolve, and one of them takes an assignment of the other's interest in the partnership property, paying therefor, a sum agreed upon by them, and assumes the payment of the partnership debts, the effect of the arrangement is to extinguish the assignor's indebtedness to the firm and interest in it.

If one of the parties is defrauded in the settlement, he may rescind the settlement or bring an action on the case for the deceit, but he cannot adhere to the settlement and resort to an action of assumpsit to recover any sum which the settlement purported to adjust.

ON EXCEPTIONS from the superior court.

This was an action of assumpsit, commenced March 8, 1880, and tried by the justice without the intervention of a jury, at the September term, 1880, subject to exceptions in matters of law. Plea, the general issue.

For several years prior to January 17, 1879, the plaintiff and defendant were partners engaged in the boot and shoe business in the city of Portland.

On said seventeenth day of January, 1879, the partnership was dissolved and a settlement of partnership affairs made between the partners according to the terms of a written agreement, which is to be copied and made a part of the case.

Subsequent to the dissolution, the plaintiff ascertained that the defendant, while the partnership existed, had collected various sums of money from creditors of the firm as specified in the account annexed to the writ, [aggregating one hundred ninety-six dollars and thirty seven cents,] which were neither credited upon the books of the firm to the parties from whom the collections were made, nor charged to the defendant, nor did the collections otherwise appear upon any of the books of the firm, nor was the plaintiff, on the seventeenth day of January, 1879, aware that the collections had been made.

The plaintiff thereupon made a demand upon the defendant for the amount so collected.

The defendant paid the sum of one hundred eleven dollars and twenty four cents on the fourth day of April, 1879.

The plaintiff brings this action to recover the balance due on account of money so collected, and, as he claimed, fraudulently concealed and withheld by the defendant.

No evidence was offered tending to show that the partnership liabilities had been paid or the debts due the firm collected.

The defendant at the hearing claimed as matter of law that the plaintiff could not recover in this form of action. He further denied any liability, alleging that if ever liable, it was for only one half the amount withheld, and that for this the plaintiff had been more than compensated by the payment of one hundred eleven dollars and twenty four cents, made on the fourth day of April, 1879. Upon these facts the presiding justice ruled as matter of law that the action could not be maintained.

(Agreement.)

"This agreement made and entered into this seventeenth day of January, A. D. 1879, by and between B. B. Farnsworth and

B. F. Whitney, both of Portland, Maine, members of the firm of Farnsworth and Whitney. Witnesseth. That by mutual agreement the copartnership existing between said partners, under said firm name, is this day dissolved, and a full settlement of all the matters of said copartnership is this day adjusted upon the following basis, to wit:— All the assets of said firm of every kind, consisting of cash, stock, store fixtures and furniture, accounts and bills receivable, and notes due said firm, one horse, carriage and harness, robes, and all the property contributed to said firm by said Whitney, are to be taken by and become the property of said Farnsworth; and the said Whitney does hereby assign, transfer, set over, sell and convey to the said Farnsworth all the property, rights and credits, and assets of every kind, and wherever situate, of said copartnership, with full right to use his said Whitney's name in and about the collection and discharge of any and all accounts, notes and debts due the said firm at the expense of said Farnsworth. The said Whitney also acknowledges the receipt of two hundred dollars from the said Farnsworth.

"The said Farnsworth on his part hereby agrees to assume and pay all the debts and liabilites of every kind which appears upon the books of said firm, and to save and hold harmless the said Whitney therefrom, and also to assume all the obligations of the lessees in the lease of the store, occupied by said firm from Geo. W. Woodman to B. B. Farnsworth and R. L. Morse, dated January 1, 1876. And also as a part of this transaction, each of said partners hereby releases and discharges the other from all claims and liabilities growing out of the business matters of said firm, and entered upon its books except such as are made by this instrument. The debts and liabilites assumed by said Farnsworth are to include all the liabilities of the said firm, except such, if any, as have been contracted by said Whitney which do not appear upon said books and were contracted without the knowledge of the said Farnsworth, it being the intention of the said parties, that said Farnsworth shall have all the assets of every kind of said firm, and assume and pay all its liabilities except as herein stated, and that said Whitney in consideration of said two

hundred dollars has transferred all his interest of every kind in and to said copartnership assets and matters to said Farnsworth.

Witness, B. B. Farnsworth,
H. W. Gage. B. F. Whitney."

Clarence Hale, and Strout, Gage and Strout, for the plaintiff.

Whether the court adopted the defendant's theory, that the claim sued was a partnership matter, which could not be recovered in this form of action, or that if ever liable it was for only one-half, which he had more than paid, we do not know, but either position is unsound.

This action is of the proper form. The writ contains the common money counts, and when one has money which he ought to refund or pay over, he is liable in an action for money had and received. *Lewis* v. *Sawyer*, 44 Maine, 332; *Calais* v. *Whidden*, 64 Maine, 253.

The action is maintainable upon another ground. Defendant assigned to plaintiff all the accounts of the firm. Those of the persons named in the writ appeared on the books as of certain amounts. They were in fact much smaller, having been reduced by payments not credited by defendant who received them.

By such sale, by implication of law, he warranted the accounts to be as they appeared on the books, at least so far as any act of his own was concerned.

The count for money had and received is founded on principles of equity, and if the defendant has received more than he was justly entitled to claim, the plaintiff has the right to recover back the excess. *Dana* v. *Kemble*, 17 Pick. 549; *Goodspeed* v. *Fuller*, 46 Maine, 141.

Even if this could be held in any sense a partnership matter, the action can still be maintained. Parsons on Partnership, 282; Collyer on Partnership, § 274; *Gibson* v. *Moore*, 6 N. H. 547; *Fanning* v. *Chadwick*, 3 Pick. 420; *Daken* v. *Graves*, 48 N. H. 45; *Marshal* v. *Winslow*, 11 Maine, 58; *Dickinson* v. *Granger*, 18 Pick. 317.

The claim of the defendant, that if liable he could only be held for one-half, is without foundation. All the assets were conveyed to the plaintiff.

The defendant could not rescind it, the case showing no ground whatever for it. Neither could the plaintiff, for whether the defendant, through fraud or mistake, omitted to credit the payments made him, he transferred all the assets to the plaintiff, and it is immaterial to him whether they consisted in part of accounts against their customers, or of the proceeds thereof in the hands of the defendant. To rescind he must have been misled to his injury. Story's Eq. vol. 1, § 203. If he could ever have rescinded, it was too late when the facts first came to his knowledge, he could not then restore the parties to their original position. *Potter* v. *Titcomb*, 22 Maine, 306.

If the agreement remains in force, as we claim, the plaintiff's only remedy is at law, as here. Parsons on Partnership, 281 and note; Green. on Evidence, vol. 2, § 126; *Williams* v. *Henshaw*, 11 Pick. 81.

Webb and Haskell, for the defendant, cited: *Chase* v. *Garvin*; 19 Maine, 211; *Lane* v. *Tyler*, 49 Maine, 252; *Holyoke* v. *Mayo*, 50 Maine, 385.

WALTON, J. The presiding justice of the superior court ruled that upon the facts found and reported by him, the action could not be maintained. We think the ruling was correct.

When the two members of which a firm is composed, settle their partnership affairs and dissolve, and one of them takes an assignment of the other's interest in the partnership property, paying therefor a sum agreed upon by them, and assumes the payment of the partnership debts, the effect of the arrangement is to extinguish the assignor's indebtedness to the firm. Such an arrangement implies that the assignor is to retain whatever he has already received from the firm, in addition to the consideration mentioned in the assignment. It is in effect an agreement that the sum paid is a balance due him after deducting what he has already received. No other rational interpretation can be put upon such an arrangement. It is impossible to believe that the one would pay or the other receive the sum agreed upon, unless all existing claims between them were to be thereby adjusted and settled. So held in *Lesure* v. *Norris*, 11 Cush. 328.

In the case cited the partner's indebtedness had been charged upon the books of the firm. In this it had not. But we think this can make no difference in the result. A settlement operates as an accord and satisfaction of all indebtedness intended to be included in it, whether such indebtedness is evidenced by charges upon the books of the parties or not. The charges are only evidence of indebtedness. The indebtedness may exist without the charges. And when the evidence is satisfactory that the parties intended a full and complete settlement of all their affairs, it will operate as an accord and satisfaction of indebtedness which is not charged as well as that which is. If one of the parties is defrauded in the settlement (of which the want of proper entries upon the books may be strong evidence), the law furnishes him with two remedies; he may rescind the settlement, or bring an action on the case for the deceit. If he elects to rescind, he must do so promptly, upon discovery of the fraud, and restore whatever he has received under the settlement. If this is done, the parties are restored to their former rights, and made subject to their former liabilities. If, in consequence of the lapse of time, or a change of circumstances, a rescision has become impossible or undesirable, the injured party may still obtain ample redress by resort to an action on the case for the deceit. But the law does not allow him to adhere to the settlement and resort to an action of assumpsit to recover the whole or any portion of that indebtedness which it was the purpose of the settlement to adjust and extinguish. *Bisbee* v. *Ham*, 47 Maine, 543; *Potter* v. *Ins. Co.* 63 Maine, 440.

Upon the facts found and reported by the judge of the superior court, we think the ruling that the action could not be maintained, was correct.

Exceptions overruled.
Judgment for defendant.

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

STATE OF MAINE

vs.

THE MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion February 8, 1883.

Railroads. Taxation. Constitutional law. Stat. 1880, c. 249.

The tax authorized by stat. 1880, c. 249, entitled "an act relating to the taxation of railroads," is a tax upon railroad corporations on account of their franchises and not upon their real or personal estate; and the tax is one which it was constitutionally competent for the legislature to impose.

ON REPORT on agreed statement.

Debt under stat. 1880, c. 249, §4, to recover one-half the tax assessed by the Governor and Council against the defendant corporation, for the year 1880, which fell due July 1, 1880, and amounted to eleven thousand dollars — the whole tax being twenty-two thousand dollars.

The report stated: "The defendant denies the legality of said tax on the sole ground that the said act is in contravention of the constitution of the state."

"If the act is constitutional, judgment is to be rendered for the state for the sum of eleven thousand dollars, and interest from July 1, 1880; otherwise, judgment for the defendants."

Henry B. Cleaves, attorney general, for the state, cited: *Com.* v. *The Peoples' Five Cent Savings Bank*, 5 Allen, 428; *Lunt's case*, 6 Maine, 412; *Society for Savings* v. *Coit*, 6 Wall. 607; *State Freight and Tax Case*, 15 Wall. 232; *Com.* v. *Lowell Gas Light Co.* 12 Allen, 75; *Att'y General* v. *Bay State Mining Co.* 99 Mass. 148; *State Railroad Tax Cases*, 2 Otto, 603; 5 Allen, 432; 4 Wheat. 428; *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62; Opinion of Justices, 68 Maine, 582; *W. U. Tel. Co.* v. *Mayer, etc.* 28 Ohio St. 533; *Reeves* v.

Treas. Wood Co. 8 Ohio St. 333; *Baker* v. *Cincinnati*, 11 Ohio St. 534; *Home Ins. Co.* v. *Augusta*, 50 Ga. 543; 2 Head (Tenn.) 363; *Bright* v. *McCullough*, 27 Ind. 223; *Kitson* v. *Mayor*, 26 Mich. 325; *People* v. *B. and A. R. Co.* 70 N. Y. 569; *Albany N. R. Co.* v. *Brownell*, 24 N. Y. 345; *C. B. and Q. R. Co.* v. *Iowa*, 94 U. S. 155; *Ducat* v. *Chicago*, 48 Ill. 172; *Paul* v. *Virginia*, 8 Wall. 168; *Walker* v. *Springfield*, 10 The Reporter, Oct. 13, 1880 (Ill.); *Durach's Appeal*, 62 Penn. St. 491; Cooley, Taxation, 128, 328; *License Tax Cases*, 5 Wall. 472; *Railroad* v. *Penn.* 15 Wall. 282; *Catlin* v. *Hull*, 21 Vt. 152; *Duer* v. *Small*, 4 Blatch. 263; *Pullen* v. *Wake Co.* 66 N. C. 361; *Chicopee* v. *Hampden*, 16 Gray, 38; *Prov. Inst.* v. *Mass.* 6 Wall. 611; *Com.* v. *Hamilton M'f'g Co.* 12 Allen, 298; *Com.* v. *Cary Imp. Co.* 98 Mass. 19; *Prov. Bank* v. *Billings*, 4 Pet. 514; *DeCamp* v. *Eveland*, 19 Barb. 81; *Tappan* v. *Merchants*, 19 Wall. 490.

Drummond and Drummond, and Orville D. Baker, for defendants.

We agree with the attorney general that the presumption is that the act is constitutional; but if it appears otherwise, the court will not hesitate so to declare.

As the court say in the *Peoples' Five Cent Savings Bank* case, 5 Allen, 428, the authority to impose taxes "is to be exercised carefully and within the exact limits which are prescribed by that clause in the frame of government which creates the power and defines the extent to which the legislature may go in its exercise. If they have exceeded it, if the constitutional boundary has been overstepped, there can be no doubt of the rights of the citizens to resist such unauthorized exercise of power, *and of the duty of this court to declare such legislative action void*, and to protect all persons against its unlawful exactions."

The provisions of the constitution of Maine, which can be said to touch the matter of taxation, are the following: Article IV, Part III, § 1; Article I, § 22; Article IX, §§ 7, 8, 9.

General laws providing for the taxation of railroads: Laws of 1845, c. 165; R. S. of 1857, c. 6, § § 4, 5 and 11, par. 2; R. S. of 1871, c. 6, § § 4, 5 and 14, par. 2.

In 1874, (c. 258,) the taxation of the shares in the capital stock of railroad companies was transferred to the Governor and Council, who were to ascertain their value, and, after deducting the valuation of the real estate taxed by the towns, assess a tax of one and one-half per cent. upon the balance.

By the act under consideration the Governor and Council are "To appraise the several railroads in this state, with their franchises, rolling stock and fixtures, at their cash value, and upon this valuation to levy a tax of one per centum, so as to make said tax equal, as near as may be, to the taxes of all kinds upon other property, through which said roads may extend."

"The appraisal of the property of said railroad companies shall embrace only the road-ways, rolling stock and franchises. The land, buildings and fixtures outside of said road-ways shall be taxable in the towns where situated, as other property."

Like the preceding laws, it leaves all railroad property outside of the roadway to local taxation.

There is a mathematical paradox in the first section. They are to appraise the property at its cash value, and upon that levy one per cent tax; mathematically speaking, this fixes the amount of the tax; but the statute adds a further condition of the problem — making the tax equal as near as may be to the taxes of all kinds upon other property through which the roads may run! Now this condition is a mere "stump speech in the belly" of the act, or it is to limit the rate or the appraisal — but both of them are expressly fixed, the former at one per cent and the latter at the cash value of the property.

One imperative rule of taxation, under such constitutions as ours, is well stated by Chief Justice DOE, in an opinion upon the New Hampshire Statute: "A state tax must be uniform throughout the state, a county tax throughout the county, and a town tax throughout the town." This proposition is self-evident, but it is supported by the authority of text-books and judicial decisions. Cooley on Taxation, 180; Burroughs on Taxation,

§ 51 (p. 62) and § 26; *Banks* v. *Hines*, 3 Ohio, 1; *Gilman* v. *Sheboygan*, 2 Black, 510, 517; *Pine Grove* v. *Talcott*, 19 Wallace, 666, 675.

The application of this rule to the statute in question at once shows its unconstitutionality. The tax is of a triplicate character. One portion of the tax is a municipal tax of the towns where the property is situate; another portion of the tax is a municipal tax of the towns where the stockholders reside; the remainder is a state tax. The first portion is apportioned and assessed equally with the other property in the town where it is situate, and is, therefore, valid; another portion is assessed in the town where stock is owned, either by an arbitrary standard or by the valuation of a different town — that is, "the towns through which said roads may extend," and *not* the towns in which the stock is owned, and for which it is assessed; and the balance goes to the state for state purposes, at just two and one-half times the rate at which all the other state tax was assessed. Tax Act of 1880, Special Laws, c. 295, p. 312.

The New Hampshire statute provides that one-quarter of the tax shall be paid to the towns through which the railroad extends, and the other three-quarters are disposed of precisely as under our Maine statute. Of the New Hampshire statute, and the tax assessed under it, Chief Justice DOE, in *B. C. & M. R. R. Co.* v. *The State*, says (and his remarks as to the three-quarters of that tax apply to the whole of our tax):

"So much of the tax as does not go to the railroad towns is not a tax of those towns, in any sense or for any purpose, and cannot be assessed in proportion to their valuation and rates. The proportional rule of the constitution requires the municipal taxation of a town to be uniform throughout the town, and state taxation to be uniform throughout the state. A state tax and a municipal tax of stockholder's towns, assessed in proportion to the valuations and rates of railroad towns, is a perfect example of one form of disproportional taxation, and of one form of violation of the constitutional rule."

In *Portland Bank* v. *Apthorp*, 12 Mass. R. 252, a tax of one per cent was assessed upon a corporation; the court sustained

the tax as an excise tax upon the franchise of the corporation, but held that it could not be sustained as a tax upon property.

The court say, (page 255):

"Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for these taxes must be proportional upon all the inhabitants of persons resident and estates lying within the Commonwealth. The exercise of this duty requires an estimate, a valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution." This principle is affirmed in *Commonwealth* v. *The Peoples' Five Cent Savings Bank*, 5 Allen, 428; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Dorgan* v. *Boston*, 12 Allen, 223; *Commonwealth* v. *Hamilton Man'g Co.* 12 Allen, 298; *Commonwealth* v. *Provident Institutions for Savings*, 12 Allen, 312. See also, 101 Mass. p. 585; 118 Mass. 389; 125 Mass. 567; Opinion of the Justices, 4 N. H. 565, 568; *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62; *Jones* v. *Winthrop Savings Bank*, 66 Maine, 242; *Knowlton* v. *Supervisors*, 9 Wis. 410. 3 Ohio, 1; 11 Wis. 42.

In Michigan and Illinois, the constitution contains express provision by which special taxes upon such corporations may be assessed. Hence Illinois and Michigan decisions, and decisions of the United States courts in cases from those states, are inapplicable to the case at bar.

This act, if it assesses a tax upon real or personal property, is invalid, for at least three reasons:

1. It assesses a state tax of ten mills upon *this* property, while upon *other* property the law assesses a tax of but *four* mills.

2. It assesses a tax for general municipal purposes at a *fixed* rate instead of the rate in the towns where the tax is paid.

3. It assesses a tax of one town upon property situated in another town. *Dyar* v. *Farmington Village Corporation*, 70 Maine, 515.

But the attorney general argues that the legislature intended it as an excise or duty, or in the form of a license. No matter what they "intended." *Oliver* v. *Washington Mills*, 11 Allen, 268.

The history which we have given of the legislation of this state, in relation to the taxing of railroads, shows that this is a *tax* on property, and not an excise. What is an excise? Whatever it may be in any other state, inMaine it cannot be a tax upon real or personal property, in whole or in part. A tax upon real or personal estate, or upon franchises and real and personal estate, is not a constitutional excise.

Our statutes require full returns from all the railroad companies, covering all the particulars necessary to be had in order to make the appraisal required in the act of 1880. Laws of 1874, c. 258, § 1, (which is not repealed by act of 1880); Laws of 1877, c. 257; Railroad Com's Report for 1876, appendix.

So that our statute *does* provide a mode for ascertaining the value of the property, and the tax is assessed upon that valuation. Hence there is "no doubt that a tax, imposed upon the amount so ascertained, is a property tax."

In *Commonwealth* v. *Provident Institution for Savings*, 12 Allen, 312, the court expressly say that the tax is not assessed on the property held by the bank. But our statute, we repeat, *does* embrace a valuation of the market value of the property, and one is absolutely necessary to the assessment of the tax, and a valuation was in fact made. We submit that the cases of *Chicopee* v. *Hampden*, 16 Gray, 38, and *Commonwealth* v. *Cary Improvement Co.* 98 Mass. 19, cited by the attorney general, sustain our position. They hold that the market value of all the shares of the capital stock was not a proper measure of the value of the property of the corporation.

Some of these cases were carried to the Supreme Court of the United States and the tax was sustained upon the ground stated in the opinion of the state court; but Chief Justice CHASE and Justices GRIER and MILLER dissented upon the ground that in their opinion "the tax was a tax on the property and not upon

the franchises and privileges" of the corporation. 6 Wallace, 611, 632.

The constitution of Connecticut does not contain any limit upon the power of taxation by the legislature, and a tax on savings banks under a statute similar to that of Massachusetts, was sustained by the Supreme Court of Connecticut and by the Supreme Court of the United States on the same grounds as are relied upon in the Massachusetts cases. *Coite* v. *Conn. Savings Bank*, 32 Conn. 173; S. C. 6 Wallace, 594.

The act of 1874, in terms imposes an *excise*; the act of 1880, in terms imposes a *tax*. The fact that in both cases it is *to* the corporation, proves nothing. The test is, "*Upon what is the tax laid?*"

WALTON, J. The question is whether the tax authorized by the act of 1880, c. 249, entitled "An act relating to the taxation of railroads," is one which it was competent for the legislature to impose. If it is a tax upon real or personal estate, then it is one which it was not competent for the legislature to impose; for the constitution (Art. 9, § 8) requires all taxes upon real and personal estate to be apportioned and assessed equally, according to its just value; and we think it must be conceded that this tax is not so apportioned and assessed. But if it is a franchise tax — that is, a tax imposed upon railroad corporations on account of their powers and privileges — then it is one which it was competent for the legislature to impose; for the power of the legislature to impose such a tax is well settled, and is not denied by the defendants. The question, therefore, is, whether it must be regarded as a property tax or a franchise tax. We think it is clearly a franchise tax, and was so intended by the legislature. True, the amount of the tax is to be determined by an appraisal of the railroads, with their franchises, rolling stock and fixtures. The first section of the act so states. But this mention of the rolling stock and fixtures is not for the purpose of imposing a tax upon them; it is for the purpose of excluding from the valuation the remainder of the corporate property, namely, the land and buildings. This is made plain

by the second section, which declares that the appraisal shall embrace only the road-ways, rolling stock and franchises, and that the land, buildings and fixtures outside of the road-ways, shall be taxable in the towns where situated.

Now it is perfectly well settled that the amount of a franchise tax upon a corporation may be graduated or measured by an appraisal of the whole, or any portion, of the corporate property, without thereby making it a property tax. Most franchise taxes are so measured. Possessing the power to impose a franchise tax to any amount it deems proper, the legislature may measure the amount by any standard it pleases. It may fix the amount at a specified sum, as a poll tax is imposed upon an individual, and without regard to the amount of business the corporation does, or the amount of property it possesses, or it may graduate and measure the amount by an appraisal of the whole or any portion of its property, or by the amount of its business.

A careful examination of the act under consideration will show that what the legislature intended to do, and what, in the judgment of the court, it in fact did do, was to impose a franchise tax upon railroad corporations, and to measure the amount by the value of their franchises and their property exclusive of their real estate. Their reasons for this are obvious. The legislature believed that railroad property was not paying its fair share of the public taxes. True, the real estate was being taxed in the towns and cities where it was situated. But neither the shares in the hands of stockholders, nor the rolling stock, could be thus successfully reached. The legislature must be presumed to know, and most of its members, if not all, undoubtedly did know, that a specific tax could not be constitutionally imposed upon this class of property. It must also be presumed to have known that it did possess the power to impose a franchise tax upon railrord corporations to any extent it might deem proper, unless their charters expressly exempted them from such a tax. It therefore resolved to levy a franchise tax, which it clearly possessed the power to do, and to make it the exact equivalent of a just tax upon the value of their franchises and that portion of their property which would otherwise escape taxation, and

then enact that this franchise tax, thus justly and equitably graduated, should be in lieu of all taxes upon the shares of these companies; and this is precisely what the act under consideration accomplishes. It imposes a franchise tax, equitably and justly measured by an appraisal of that portion of the corporate property and the corporate franchises, which would otherwise be likely to escape taxation, and declares that this tax shall be in lieu of all taxes upon the shares. We fail to see anything oppressive or unconstitutional in this mode of taxing these corporations. In principle it does not differ from the mode sanctioned in *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 298. Same case, 6 Wallace, 632.

In that case, the corporation was required to pay a tax of one and one-sixth per cent on the entire value of its shares, less the value of its real estate and machinery. The court held that the reason for the deduction was obvious; that it was because the real estate and machinery were taxable in the towns where they were situated, and if their value was not deducted from the franchise tax, inequality or double taxation would be the result. So, in this case, railroad corporations are required to pay a tax of one per cent on the entire value of the corporate property and franchises, less the value of the real estate which is taxable in the towns where it is situated. A careful examination of the two statutes will show that the one under consideration in that case, and the one under consideration in this case, are identical in principle, although differing in form. It was conceded in that case that the tax could not be sustained as a tax upon property, because not "proportional," as required by their constitution.

But the court held that it could be sustained as a franchise tax; and it was so sustained by the Supreme Court of the United States as well as by the Supreme Court of the state. The same reasoning which sustained the tax in that case will sustain it in this. The reasoning seems to us sound; and our conclusion is, that the tax authorized by the act of 1880, c. 249, is a tax upon railroad corporations on account of their franchises, and not upon their real or personal estate; that while it is true that the amount of the tax is measured by the value of a portion

of the corporate property as well as the corporate franchises, still, it is not a tax upon real or personal estate, within the meaning of the constitution, but a tax upon the powers and privileges of these corporations; and that the tax is one which it was constitutionally competent for the legislature to impose.

Judgment for the State for the sum of eleven thousand dollars, and interest from July 1, 1880.

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

ATLANTIC MUTUAL FIRE INSURANCE COMPANY, appellants,

vs.

SAMUEL L. MOODY and another.

Androscoggin. Opinion February 15, 1883.

Insurance. Mutual companies. Assessments to meet losses.

The charter of a mutual fire insurance company required "that all property insured by the company shall be divided into four separate and distinct classes and each class shall be liable for its own. The premium notes of each class of risks shall be holden and assessed to pay the losses occurring in their respective classes and not each for the other." The directors voted "that an assessment be made upon the members of the company to cover losses that have occurred since October 17, 1867;" *Held*, That no action could be maintained to recover an assessment made by such vote upon a premium note in the company, because it ignored a separation into classes both as to members and losses.

ON REPORT.

An appeal from the judgment of the Lewiston municipal court upon an action of assumpsit on the following note:

"Exeter, N. H. November 8, 1868.

"For value received, in Policy No. 13,169, dated the 8th day of September, 1868, issued by the Atlantic Mutual Fire In-

surance Company, I promise to pay the said company or their treasurer for the time being, the sum of twenty-four dollars, in such portions and at such time or times, as the directors of said company may, agreeably to their act of incorporation and by-laws, require.

(Signed) Moody and Chamberlain."

The opinion states the material facts.

William P. Frye, *John B. Cotton* and *Wallace H. White*, for the plaintiffs.

Asa P. Moore, for the defendants.

DANFORTH, J. An action upon a premium note given in consideration of a policy of insurance, dated September 8, 1868. The note is for the sum of twenty-four dollars and payable " in such portions, and at such time or times, as the directors of said company may, agreeably to their act of incorporation and by-laws, require." It is claimed that two assessments have been made upon this note, which the plaintiff seeks to recover.

To maintain the action it is necessary by the terms of the contract, for the plaintiff to show that the directors, in making these assessments, have conformed to the provisions of its charter and by-laws.

Section two of the charter requires, " that all property insured by the company, shall be divided into four separate and distinct classes, and each class shall be liable for its own losses. The premium notes of each class of risks shall be holden and assessed to pay the losses occuring in their respective classes, and not each for the other, and the policy of each member of the company shall designate with which class of risks he is associated." By article six of the by-laws, such a classification is made. There is no evidence in the case tending to show in which class the defendants were placed; while it is quite evident that it must appear affirmatively that the note in suit was assessed only to pay the losses in the class designated in their policy.

But it is not from a want of evidence only that the plaintiff fails to make out its case, but the affirmative testimony is sufficient to show that in making the assessments no regard was

had to such, or any classification. The vote of the directors of October 16, 1869, by which the first assessment was imposed, as well as that of December 24, 1870, was, "that an assessment be made upon the members of this company to cover losses that have occurred since October 17, 1867," in the first instance, and in the second "since October 15, 1869," in both "to cover the liabilities of the company;" thus distinctly ignoring any separation into classes, both as to members and losses. Neither do we find anything in the list of losses upon the back of the receipts which gives us any information which relieves the difficulty, but rather tends to confirm the inference just drawn. The assessments are therefore void, and it is unnecessary to examine other objections made to them.

Judgment for defendants.

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

IVORY LITTLEFIELD *vs.* JAMES H. SMITH.

York. Opinion February 15, 1883.

Referees. Award.

So much of an award of referees, in a reference at common law, which provides as compensation for future damages for flowing land "that said S, his heirs *and assigns*, shall pay to said L, his heirs and assigns, the sum of nine dollars per annum, . . . so long as the land shall be flowed, . . . the said S, his heirs *and assigns*, to have the right to maintain flash-boards on said dam," &c. is not binding on the parties when in the agreement of reference the "assigns" of S are not referred to.

ON REPORT.

Complaint for flowage inserted in a writ dated April 29, 1880. At the trial the defendant relied upon the following agreement of reference and award of the referees thereon, marked A and B.

"*A.*—Know all men by these presents, that we, Ivory Littlefield and James Smith, both of Kennebunk, in the county of York, and state of Maine, have agreed to submit the demand made by

the said Littlefield against the said Smith for the flowage of land by reason of a mill and dam built by said Smith on Alewive brook in said Kennebunk, and the yearly damage, if any, hitherto sustained so far as recoverable, and the yearly damage, if any, which may be sustained in future years on the part of said Littlefield, his heirs and assigns, as owners of land flowed by reason of said mill and dam, and whether said Smith shall be allowed flash or flush boards upon said dam as heretofore used, to be taken off from May 1 to November 15, annually — the compensation or damage, if any, to be an annual sum, and any other questions connected therewith, to the determination of William H. Deering of Saco, Woodbury Goodwin of Kennebunk, and John B. Maling of Kennebunkport — and the decision of said referees or a majority of them shall be final.

"And if either party neglects to appear before the referees after proper notice given to him of the time and place appointed for the hearing, they shall proceed in his absence.

"Dated this twenty-eighth day of October, A. D. 1879.

Witness, William Allen, Justice of the Peace. Ivory Littlefield. James Smith."

"*B.* — We, the undersigned, together with Wm. H. Deering of Saco, being authorized by the annexed agreement of submission entered into by Ivory Littlefield of the one part, and James Smith of the other part, having notified and met the parties and heard their several allegations, proofs and arguments, and duly considered the same, do determine and award that the above-named Ivory Littlefield, his heirs and assigns, shall recover of the said James Smith, his heirs and assigns, in full of all damages up to date of said agreement, the sum of twenty-seven dollars ($27.00) and that said Smith, his heirs and assigns, shall pay to said Littlefield, his heirs and assigns, the sum of nine dollars ($9.00) per annum, reckoned from the date of said agreement, so long as the land shall be flowed by reason of the dam and mill mentioned in said ageement, the said Smith, his heirs and assigns to have the right to maintain flush boards on said dam as he has hitherto done, from November 15 to May 1, of each year in the future, the said William H. Deering not

agreeing to this award. The said Smith shall also put the road crossing the mill pond above said mill in repair to the acceptance of Woodbury Goodwin.

Woodbury Goodwin.
John B. Maling."

R. P. Tapley, for the plaintiff.

Bourne and Son, for the defendant.

A claim for damages for flowage is proper subject of arbitration. *Gordon* v. *Tucker*, 6 Maine, 253; *Duren* v. *Getchell*, 55 Maine, 241; *Quinn* v. *Besse*, 64Maine, 366.

And an arbitration is a bar to an action. R. S., c. 92, § 7.

This was a common law reference and cannot be avoided except for corruption, gross partiality or evident excess of power. *Tyler* v. *Dyer*, 13 Maine, 47. See *Wallis* v. *Carpenter*, 13 Allen, 19; *Adams* v. *McFarlane*, 65 Maine, 143.

It is unnecessary to prove a tender of performance of an award. *Duren* v *Getchell*, 55 Maine, 241.

The award as to repair of the road was beyond the authority of the arbitrators and so much of their award was void. *Day* v. *Hooper*, 51 Maine, 181; *Porter* v. *Buckfield*, 32 Maine, 539; *Merrill* v. *Gardiner*, 40 Maine, 232.

Of course it was not necessary to perform or tender performance of that part of the award which was bad.

The parol agreement as to future damages and use enlarged the powers of referees and was binding. *Vide*, *Snow* v. *Moses*, 53 Maine, 546; *Clement* v. *Durgin*, 5 Maine, 9; *Seymour* v. *Carter*, 2 Met. 520; *Smith* v. *Goulding*, 6 Cush. 154; *Cobb* v. *Fisher*, 121 Mass. 169.

DANFORTH, J. This is a complaint for flowage. The defence is a reference of the subject matter and an award of the referees. If the complainant is entitled to have commissioners appointed, the case is to be remanded for that purpose and for further proceedings, otherwise judgment for respondent. That it was competent for the parties to refer the subject matter cannot be questioned. No objection is made to the form of the reference

so far as it is in writing. The only question raised is as to the validity of the award.

Among many objections, it is claimed that the referees exceeded the authority given them, and it seems quite evident that they did so.

I. The submission is of a claim against Smith, the respondent, for past and future damage, the future to be an "annual sum," and also whether he "shall be allowed flash boards upon said dam as heretofore used." The award gives future damages at the rate of nine dollars per year "so long as the land shall be flowed by reason of the dam and mill mentioned in said agreement," and this is to be paid by "said Smith, his heirs and *assigns*," and further gives him and "his *assigns* the right to maintain flash boards on said dam as he has hitherto done." Thus the award gives rights to Smith's grantees whoever they may be, and compels the complainant to look to the same grantees for his compensation. That this is so at least at the option of Smith, is made certain from the fact that the time is limited only by the continuance of flowage by the dam and mill. This authority is not given by the submission. In that "assigns" of Smith are not referred to, neither is the time fixed; and we may well suppose that it was not intended to include assigns from the fact that an annual compensation was provided for. If a compensation was to be given for all time, it would have been more natural to have provided for a sale of the right and for a payment in a gross sum. It may well be doubted even if the parties had intended to have given this authority, if they could have done so. A judgment of court may have been a lien upon the mill for the yearly damage, but not so with the award of a referee under a common law submission, and it surely cannot bind the successor personally.

II. The referees award that "the said Smith shall also put the road, crossing the mill pond above said mill, in repair, to the acceptance of Woodbury Goodwin." Upon this matter the submission is silent. It is however claimed that this part of the award is authorized by a subsequent verbal agreement between the parties. This is denied by the complainant, and it is quite

clear that the evidence fails to sustain such an allegation. There was undoubtedly a talk between the parties about the road and what should be done to it, but nothing from which we can gather any distinct agreement as to a reference, or if so, what was to be referred. We could more easily find support for an allegation that the parties themselves agreed as to what should be done, and if there was to be any reference it was to some one or more to decide when it was repaired in accordance with such an agreement. But such an alleged agreement could hardly find support in the evidence reported, much less one that would authorize the award that the road was to be put in repair to the acceptance of Goodwin.

But if there was any such agreement it was never acted upon. It does not appear that Goodwin was appointed umpire in the matter by the other referees, or that Deering had any part in this matter, or that there was any authority here for less than the full number to act, and what is very significant, the referees in their award do not claim any such authority, but put it distinctly upon "being authorized by the annexed agreement," which agreement is in writing and makes no allusion to the road, unless it is found in the words, "and any other question connected therewith." But these words are too general and uncertain to enlarge the number of matters referred. But if thus found, the award would stand no better, for in those words there is no authority for Mr. Goodwin to make his judgment the test of the repairs to be made or for the other referees to appoint him to that position.

III. But another and equally serious objection to this part of the award, even if authorized by the written or by a verbal agreement, is the fact that it has not been performed. It is undoubtedly good law, as held in *Duren* v. *Getchell*, 55 Maine, 241, that "it is unnecessary to aver a tender of performance, unless the award is made conditional upon the performance of certain acts by the party claiming the benefit of it."

If the flowage affected this road in such manner as to make repairs necessary, as it appears from the report, its repair under the award would in effect be a condition precedent to the right

to flow. If the road is necessary, it is so in the beginning of the flowage as well as subsequently. It could not therefore be intended that the defendant should continue the flowing, thus making repairs necessary, then be permitted to compel the complainant to resort to an equity process to compel performance, or a suit at law to recover his damages. From the very nature of the case he must first prevent injury by repairs and thus save the necessity or danger of litigation and perhaps irreparable damage. It seems from the evidence that the road is still unrepaired and that the respondent does not propose to put it in repair in the future. His only excuse is that the complainant refuses to furnish the necessary gravel. This, however, cannot avail. The award puts the whole burden upon the respondent and that is not to be changed by oral evidence.

These objections are too material and are too closely connected with that part of the award which relates to the question of future damages to be separable from it. It is not perceived how they can have any bearing upon the amount awarded for past or why that part of the award should not be sustained. That, however, will not affect the maintenance of this process, and as provided in the report it may be remanded for further proceedings.

Case remanded for further proceedings.

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

JOHN G. TEBBETTS, in equity, *vs.* JOHN F. DEARBORN.

Androscoggin. Opinion February 8, 1883.

Partnership. Fire insurance.

Where insurance against loss by fire is effected by a member of a firm in the firm's name, upon property of the firm, and the premium therefor is paid for

from funds of the firm, though charged by such member to himself, the insurance will be for the benefit of the firm notwithstanding the member thus effecting it intends it for his own private benefit.

ON BILL IN EQUITY.

Heard on bill, answer and proof.

The material facts are stated in the opinion.

N. and J. A. Morrill, for the plaintiff, cited: Pars. Part. § § 231, 223-226; *Mitchell* v. *Reed*, 61 N. Y. 123; Story, Part. c. 9, § § 169-175; Story, Eq. Jur. § 329, *b*; Willard's Eq. Jur. 189; *Keech* v. *Sanford*, 1 Lead Cas. in Eq. 48; *Featherstonehaugh* v. *Fenwick*, 17 Ves. 311; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553; *Case* v. *Carroll*, 35 N. Y. 385; *Penman* v. *Slocum*, 41 N. Y. 53; *Lacy* v. *Hall*, 1 Wright, 360.

Enoch Foster, Junior, for the defendant, contended that the defendant had a legal right to effect an insurance on his interest in the firm; that one partner has an insurable interest in the property of the firm. Wood, Insurance, § § 292, 306; *Bailey* v. *Hope Insurance Co.* 56 Maine, 474; *Converse* v. *Citizens Insurance Co.* 10 Cush. 37; *Peck* v. *Insurance Co.* 22 Conn. 575; 2 Pars. Contr. 439.

And he contended further that the defendant contracted with the agent of the insurance companies to insure his (the defendant's) two-thirds interest in the property and it was the insurance agent who inserted the firm name. Defendant had nothing to do with that. His agreement with the agent was definite, clear, and binding on the companies. *Bailey* v. *Hope Insurance Co. ante*; R. S., c. 49 § 18; *Walker* v. *Metropolitan Insurance Co.* 56 Maine, 381.

A court of equity would have reformed the policies. 1 Story's Eq. Jur. § 158.

The analogy is the same as where one partner makes a contract to insure the whole of the firm property but through ignorance or mistake on the part of the insurer the policy is issued in the name of one owner when it should have been made in the name of all. Wood, Insurance, § § 283, 306; *Manhattan Insurance Co.* v. *Webster*, 59 Penn. St. 227; *Keith* v. *Globe Insurance Co.*

52 Ill. 518; *Murray* v. *Columbian Insurance Co.* 11 John, 334; *Page* v. *Frye*, 2 B. and P. 200; *Atlantic Insurance Co.* v. *Wight*, 22 Ill. 462.

Counsel further elaborately argued the questions of fact at issue in the case.

WALTON, J. The plaintiff and defendant were formerly copartners, doing business under the firm name of Dearborn and Tebbetts. Their business was the manufacture of spools and other articles of wood. Dearborn (the defendant) owned a two thirds interest and Tebbetts (the plaintiff) one-third. November 22, 1879, their buildings, stock and tools were burned. The defendant has received six thousand seven hundred dollars for insurance on the property. The plaintiff claims that he should account for this money as assets belonging to the firm. The defendant resists this claim. He says that the insurance was not upon the property of Dearborn and Tebbetts, but upon his (Dearborn's) interest in it; that he procured the insurance himself for his own individual benefit, and paid the premiums from his own individual money.

Such are the statements in the defendant's answer; but the proof does not sustain them. The insurance was upon the property of Dearborn and Tebbetts. The policies (six in number) so state. The insurance was not limited to Dearborn's interest; and by the terms of the policies could not be. One of the conditions is that it shall be optional with the insurance companies in case of loss, to repair, rebuild, or replace the property. It is impossible to apply such a condition to the undivided interest of one of the partners. It is impossible to rebuild or repair an undivided interest in property. It is the property of Dearborn and Tebbetts which, by the terms of the policies, was insured, and there is not a word in the policies to indicate that a less interest was intended. And by the terms of the policies Dearborn and Tebbetts are the parties insured. They are the parties insured, and the insurance is upon their property. In these particulars the averments in the plaintiff's bill are true, and the defendant's answer is not true.

Nor is it true, as asserted by the defendant in his answer, that the premiums were paid from his own individual money. The proof is that the premiums were paid in drafts drawn in the name of the firm upon copartnership funds; and if, for any reason, the drafts had not been paid, a suit against the firm could have been maintained upon them. It may be true, as the defendant testifies, that he charged himself with the amount of these drafts, but the payment, when made, was made by the firm, and from firm funds, and not from the individual money of the defendant. In this particular the allegation in the plaintiff's bill is true, and the defendant's answer is not true.

But the defendant says that when he procured the insurance he intended it for his own individual benefit. It is sufficient to say that such an intent would be fraudulent, and the law would not give effect to it. A partner has implied authority to effect insurance for his firm (Coll. on Part. § 438), and of course may use the firm's funds, or the firm's credit, for that purpose. But he has no right thus to use the firm's name, or the firm's funds, or the firm's credit, for his own private and individual benefit, without the consent of his copartners. It would be a fraud upon them to do so. And there is no pretense of such consent in this case. The insurance was in fact effected in the names of Dearborn and Tebbetts, —that is, Dearborn and Tebbetts were the parties insured. The insurance was upon their property. The loss was a joint loss. And notwithstanding the defendant may have intended the insurance should be for his own private benefit, and to that end caused the policies to be made payable to himself in case of loss, it is the opinion of the court that the law will not give effect to such an intent, and that he must account to his copartner for his *pro rata* share of the insurance money.

This conclusion apparently settles every matter in dispute between the parties. But, as the object of the bill is to close the affairs of the partnership, which is now dissolved, the case must go to a master, unless the parties otherwise agree. And it is

the opinion of the court that the case is one in which the plaintiff should recover costs.

Bill sustained. Decree as prayed for, with costs.

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

FRANCIS H. DUFFY *vs.* JOHN S. PATTEN and another.

Penobscot. Opinion February 15, 1883.

Pleadings. Contract. Statute of frauds. R. S., c. 111, § 1. Tender. Exceptions.

The general rule in torts and parol contracts is that the day when the tort was committed or the contract made, is not material. When made material by the defendant's plea, the plaintiff may reply by another day.

On a contract, which by its terms continues indefinitely, no cause of action can exist till its breach.

To bring a case within the statute of frauds, R. S., c. 111, § 1, it must affirmatively appear that it could not have been performed within a year.

When by the terms of a contract the rent of an old piano was to go in payment for a new piano, the change of the rent by the agreement of parties is no termination of the contract.

A tender, when necessary by the terms of a contract, becomes unnecessary to be made to a party who in advance announces that he will not receive it and denies the existence of such contract.

Remarks suggesting an explanation of the evidence but stating no principle of law and asserting the existence of no fact, are not the subject of exception.

ON EXCEPTIONS AND REPORT.

Assumpsit on an alleged contract, of October 26, 1873. The writ was dated December 20, 1881. Plea, general issue and statute of limitations.

The original declaration was, "In a plea of the case for that on the twenty-sixth day of October, A. D. 1873, at said Bangor, it was agreed between the plaintiff and said defendants in manner following to wit: that the said defendants should deliver to said

plaintiff one piano which the said plaintiff was to receive and keep and use at the plaintiff's dwelling house in said Bangor, and the plaintiff agreed to pay defendants, rent for the use of said piano, at the rate of four dollars per month, and it was further agreed on said twenty-sixth day of October, at said Bangor, in manner following, to wit: that said defendants would at the request of the said plaintiff sell and deliver at a fair market price to the plaintiff a new and other piano, and allow in part payment, all the rent that had been paid the defendants for the first named piano, and the plaintiff avers that the said first named piano was duly delivered to him by the said defendants on said twenty-sixth day of October, in pursuance of said agreement, and the plaintiff avers that he paid said defendants a large sum of money, namely, one hundred and fifty dollars rent for said first named rented piano, and the plaintiff avers that on the third day of June, 1879, he demanded of said defendants to sell and deliver him said piano in pursuance thereof, and defendants neglected and refused so to do."

At the commencement of the trial the plaintiff asked leave to file a new declaration to his writ, as follows:

"Also for that the said defendants at said Bangor heretofore, to wit: on the twenty-sixth day of October, A. D. 1873, in consideration that the plaintiff would buy of them when he bought a new piano, and pay them therefor a fair and reasonable price, undertook and promised the plaintiff that they would rent to him for use in his family till he desired to buy said new piano, a certain second-hand piano, then and there being in said defendants' possession, at the rate of twelve dollars per quarter, and at their own expense keep the same in tune, and that they would receive and allow to the plaintiff the rent paid to them by the plaintiff for the use of said second-hand piano, in part payment for the new piano so by the plaintiff to be bought of them as aforesaid, and the plaintiff avers that thereupon in pursuance of said agreement and undertaking on the part of said defendants, and in consideration thereof he received, and said defendants delivered to him said second-hand piano, and he thereafterwards kept and used the same in his family till the third day of June, A. D. 1879,

and that he paid the said defendants at different times, and in different sums, a large sum of money, to wit: the sum of one hundred and fifty dollars, as rent and for the use of said second-hand piano, and the plaintiff avers that afterwards, to wit: on said third day of June, A. D. 1879, he made a demand upon the defendants to sell to him then and there a new piano for a fair and reasonable price, and to allow in part payment therefor the said several sums so paid as aforesaid for the use and rent of said second-hand piano; and then and there offered to surrender said second-hand piano; yet the said defendents have heretofore wholly neglected and refused to sell to the plaintiff a new piano, and to allow in part payment therefor the rent so paid as aforesaid and still so neglect and refuse to do."

The court allowed the amendment against the defendants' objection.

In charging the jury the court made the following suggestions in regard to a receipt claimed to have been fraudulently altered:

"Now I wish to suggest to you whether this is not the true solution of the matter; two quarters' rent has been paid at the rate of twenty-four dollars. Then this, (referring to the receipt,) is dated 1874, but it is manifest it should not have been 1874, because it would be claiming rent when there was not any due. The truth is, the receipt of December twenty-sixth, runs into the last of March, so that this receipt was not in 1874, probably; you will consider whether it is not a receipt from June twenty-sixth, to December twenty sixth, 1875, and a mistake of the date; then if you look at the books; at the book at this time you find that the credit is twenty dollars. Now is not this the real solution of the matter; that Duffy had paid twenty-four dollars for the first half of the year, that when this came around, Duffy says to Mr. Patten, that is too much, twenty dollars is enough, and Mr. Patten just made an 0 crediting him twenty dollars, and that explains the matter without the slightest imputation of want of integrity on any body. That is to say, that this bill was presented at twenty-four dollars, that Duffy thought it was a little too much, that Patten altered it to twenty dollars, crediting him in his book for twenty dollars, and that solves the whole matter without the slightest imputation of wrong upon anybody. I

mention this because I have looked at the books; you can look at the books and see whether or not there is any question about this as being the true solution of the twenty-four dollars."

Other material facts are stated in the opinion.

Peregrine White, for the plaintiff.

A. L. Simpson, for the defendants.

APPLETON, C. J. The following facts may be regarded as established by the finding of the jury: That the plaintiff being about to purchase a piano called on the defendants, who proposed to let a piano at a reasonable price and that the rent of such piano they would allow in part payment of a new piano which he agreed to purchase—that he hired a piano paying the rent therefor—that on the third of June, 1879, he called on the defendants to purchase a new piano, offering to pay them the balance that would remain due after deducting the payments of rent already made,—that the defendants not merely refused to perform their agreement but denied its existence, whereupon this suit was brought.

The piano loaned was at the rate of four dollars per month, originally, but the rent was subsequently reduced by the mutual agreement of the parties.

The piano the plaintiff proposed purchasing, was one which would cost from two hundred to two hundred and twenty-five dollars. This he disclosed to the defendants. The effect of the agreement is that the plaintiff's rent is so much money in the defendants' hands which he has a right to have appropriated in part payment of a new piano, which the defendants were bound to furnish.

The evidence shows that contracts of this description have been frequently made by the defendants with their customers.

Numerous exceptions have been filed to the ruling of the presiding justice.

I. It is objected that the amendment should not have been allowed. It is for the same cause of action as the original count in the declaration, only it is therein more accurately set forth.

II. The contract was by parol. It was proved to have been made at a day subsequent to that stated in the declaration.

"But," observes WILDE, J., in *Little* v. *Blunt*, 16 Pick. 365, "the general rule is, that in all torts and parol contracts, the day when the tort is alleged to have been committed, or the contract made, is not material; and if the defendant by his plea makes it material, the plaintiff may reply by another day, and it will be no departure, and the same principle applies to a case where it becomes necessary to prove when a contract was made and it does not agree with the time specified in the declaration." Such was held to be the law in *Ripley* v. *Hebron*, 60 Maine, 388. The error in date was clearly amendable. If the contract was made, it is immaterial whether made in October or November.

III. It is claimed that the statute of limitations is a bar. Not so. The contract was a continuing one. It was in the course of its performance. The defendants were leasing and the plaintiff was paying rent. No cause of action existed until a breach of the contract, which, on the defendants refusing to perform their part of the contract, occurred on June third, 1879.

IV. The plaintiff might have called for his new piano at any time within the year. To bring a case within the statute of frauds, R. S., c. 111 § 1, it must appear that it was not to have been performed within that time. *Herrin* v. *Butters*, 20 Maine, 119. *Hearne* v. *Chadbourne*, 65 Maine, 302. Here the contract might have been terminated after the first month or quarter had the plaintiff so elected. *Linscott* v. *McIntire*, 15 Maine, 201. No question is raised under R. S., c. 111, § 4.

V. The contract was that the rent should go in payment of the piano. The rent was what the parties chose to make it. It was the rent which they might agree upon. Though it might vary it was none the less rent. An instruction that a change of rent by the agreement of the parties would terminate the contract, would have been erroneous.

VI. The counsel for the defendants requested the court to instruct the jury, "that if the defendants gave the plaintiff an opportunity to select a new piano, it was his duty to make the selection, and to tender or offer to pay the difference between the rent of the old and the price of the new before he could maintain an action for breach of contract."

To this the court said, "I have given you that; if the defendants were willing to comply with the terms of the contract and give the plaintiff an opportunity to select and he neglected to select he cannot maintain the action. If they denied the contract, and refused to perform it there was no need of tendering anything. There is no need of tendering anything to a man who says there is no such contract. I will not abide by it."

Of this the defendants cannot complain. The denial of all liability under the contract or a refusal to recognize its existence renders a tender unnecessary. It is not necessary to tender to a party what he in advance announces that he will not receive. *Mattocks* v. *Young*, 66 Maine, 459. The plaintiff could not select when the right of selection was denied. He could not tender, when the balance to be tendered was not ascertainable, — and that through the fault of the defendants.

VII. The remarks of the court in relation to the alteration of a receipt involve no question of law. They relate to an explanation of the receipt by a reference of the books and their purpose and tendency was to lessen the claim against the defendants. It was a suggested explanation submitted to the consideration of the jury and furnished no ground of exception.

VIII. No time was limited within which the plaintiff was to demand his new piano. No objection was made to the continuance of the contract. It was therefore for the plaintiff to select his own time. The court could not say as matter of law that the plaintiff delayed an unreasonable time in demanding his new piano.

The exceptions are overruled.

IX. The verdict we think was too large. A careful examination of the evidence satisfies us that the defendants should not account for more than one hundred and sixteen dollars and interest from the demand. If the plaintiff will release the excess the verdict is to stand, otherwise a new trial is to be had.

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

HENRY DUNLAP and others, Appellants,

vs.

AGNES T. DUNLAP and another.

Cumberland. Opinion February 15, 1883.

Will. Legacy.

The testator, a bachelor, eighty years of age, after bequeathing to one of his nephews with whom he had his home, certain stocks of the value of fifty dollars, made to the wife of this nephew a bequest in the following terms: "And to my beloved niece, A T D, who carefully nursed me and did all she could to alleviate my distress and contribute to my comfort, I hereby give and bequeath the remainder of the little property I shall have when I depart from this earth, a brief schedule of which bequest follows," comprising one hundred and thirty dollars and various articles, out of which is reserved two debts, leaving about seventy-five dollars in value. About eleven months after the execution of the will, and four months before his own decease, his only brother, resident in Massachusetts, died intestate. From his brother's estate he received nothing during his life-time; but his estate, some more than two year's after the testator's decease, received two thousand four hundred and four dollars as the distributive share belonging to it. *Held*, That the clause, "the remainder of the little property I shall leave," etc. considered in connection with the other portions of the will, and read by the light of the circumstances under which the will was made, the state of his property, his kindred and the like, does not include the money inherited from his brother's estate, but that the same is intestate property, to be distributed by the rules of descent.

ON REPORT on agreed statement of facts.

An appeal from the decree of the judge of probate in the estate of Abner Chapman.

The appellants, Henry Dunlap, Charles R. Dunlap, Betsey C. Brown and A. D. Manson, petitioned to the judge of probate that the sum of two thousand one hundred dollars and eighty-six cents be distributed among the heirs at law, alleging that it was not specifically bequeathed by the will of said Abner Chapman. This petition was denied and an appeal was taken.

The opinion states the facts.

William L. Putman, for the appellants, cited: *Cotton* v. *Smithwick*, 66 Maine, 360; *Lytle* v. *Beveridge*, 58 N. Y. 598; *Allen* v. *White*, 97 Mass. 507; *Dole* v. *Johnson*, 3 Allen, 367; Jarman on Wills, *759; Williams, Ex. (6 Am. ed.) 1157; *Goddard* v. *Brown*, 12 R. I. 31; *Turner* v. *Turner*, 14 Chanc. D. 829.

Clarence Hale, for the appellee.

We start with the presumption of law which is defined in a leading case as follows:—"It is a principle sanctioned alike by reason and by authority that when one engaged in an act so solemn and important, as the execution and publication of his last will and testament, he is not presumed as intending with reference to any portion of his estate to die intestate." Any construction of a will which will result in partial intestacy is to be avoided unless the language of the will compels it; for the very fact of making a will is strong evidence of the testator's purpose to dispose of his whole estate. *Jarnigan* v. *Conway*, 2 Humph. (Tenn.) 52; *Williams* v. *Williams*, 10 Yerger, (Tenn.) 25; *Cate* v. *Cramer*, 30 Md. 292; *Hanson* v. *Graham*, 6 Vesey, 248; Jarman on Wills — Ed. of 1881, p. 851. This presumption of law is borne out and strengthened by the language of the will and the facts of the case at bar.

The scheduling of certain articles which he then has and desires to constitute his bequest to Agnes, does not defeat the general bequest of "the remainder." Although on good terms with his other relatives — all of whom reside at a distance — his affection all goes toward Agnes, and the whole tenor of his words are to give her the bulk of his property. It will be a "little property" but such as it is he manifestly desires Agnes to have the greater part of it. See also, *Arnold* v. *Arnold*, 1 Mylne and Keene, 365; *Wafford* v. *Berriage*, 1 Eq. cases, ab. 201; *Stuart* v. *Earl of Bute*, 3 Vesey, 212; 2 Wms. on Executors, 711; Jarman on Wills, p. 762 and 767 and cases cited; *Byrnes* v. *Baer*, Al. Law Jour. vol. 24, p. 475, from N. Y. Court of Appeals; *Boyes* v. *Cook*, recent English case, Al. Jour. vol. 22, p. 158; *Winchester* v. *Foster*, 3 Cush. 366; *Brimmer* v. *Sohier*, 1 Cush. 118.

The opinion of the court in *Blaisdell* v. *Hight*, 69 Maine, 306, is not hostile to our position; for the question there was on a transfer of real estate; and the reasoning of the court is favorable to the construction which we ask in the case at bar.

The whole will is to be construed in arriving at the intention of the testator; but when we come to special words and phrases in the will, such as *remainder*, *property*, &c. see: Jarman on Wills, p. 721; *Howland* v. *Howland*, 100 Mass. 222; *Ely* v. *Ely*, 2 N. J. 43; *Myers* v. *Eddy*, 47 Barb. 263; *Hayes* v. *Foster*, 14 Pick. 539; *Perry* v. *Bland*, 4 Ind. 297; *Hurdle* v. *Oatlaw*, 2 Jones, N. C. Eq. 75.

It was clearly the intention of the testator to give his subsequently acquired property as well as that then in his possession to Agnes T. Dunlap.

Here again we start with a familiar presumption of law, namely: That a will "speaks" from the death of the testator. SHAW, C. J., in *Kimball* v. *Ellison*, 128 Mass. 41, says: "In general a will looks to the future" — "general words may as well include what the testator expects to acquire as what he then actually holds." See also, *Brimmer* v. *Sohier*, *supra*; *Sweet* v. *Brown*, 12 Met. 175; *Martindale* v. *Warner*, 15 Pa. 466; *Steleman* v. *Steleman*, 1 Watts (Pa.), 466.

In *Dennis* v. *Dennis*, 5 Richardson, S. C. 468, it was held that "all my wagons" and "all my stock" passed after-acquired horses and a wagon.

But the case is much stronger than the presumption of law leaves it. The testator says specifically, "property I shall leave when I shall depart from this earth," and after having opportunity to change the devise he does not make any limitation of it. In *Perry* v. *Hunter*, 2 R. I. 80, a testator at the time of his death was possessed of a large property in French government securities and in deposits of the savings bank in France under the will of his sister, then residing in France, of whose death he had not heard, though he knew she had made a will in his favor and had been dangerously ill, and knew also of what her property consisted; the testator gave and bequeathed by the ninth clause of his will, after certain specific provisions, "all the residue" of his funds,

and by the tenth clause gave, devised and bequeathed "all the residue and remainder of the estate of whatever nature, and whenever acquired of which I may die possessed." It was held that the property acquired under his sister's will was testate, and passed under the language of the ninth section. The case at bar is much stronger than the one last cited. This reasoning was applied in *Card* v. *Alexander*, Connecticut Court of Appeals, 1882. The Reporter, vol. 13, p. 716.

VIRGIN J. During the entire twenty-seven months of the testator's last sickness, he had his home, paying his board, with his nephew, the husband of the appellee, and required and received from the latter constant care, attention and nursing.

He was about eighty years of age, and had been sick about a year, when he executed the holographic will now before us for construction. At the date of it, the value of the specific property enumerated therein and bequeathed to the two legatees, would not exceed one hundred twenty-five dollars. Of this sum he gave fifty dollars to his nephew, who had furnished him a home, "in grateful remembrance of his kindness; and to his "beloved niece Agnes (appellee) who carefully nursed him and did all she could to alleviate his distress and contribute to his comfort," he gave "the remainder of the little property" which he should leave at his decease.

About eleven months after he executed his will, and four months before his own decease, his only brother, resident in Massachusetts, and ten years his junior, died of apoplexy, intestate. From his brother's estate, he received nothing during his life-time, but his estate, some more than two years after his own decease, received twenty-four hundred and four dollars as the distributive share belonging to it. And the question before us is — Does this sum, inherited from his brother's estate, come within the clause — "the remainder of the little property I shall leave when I depart from this earth," and thereby pass to the appellee? or, is it intestate property, which, by the rules of descent, should be distributed among the testator's three nephews and two nieces, his only next of kin? This is to be ascertained from the terms of the will itself, elucidated if may be, by the light of the

circumstances under which it was made, the state of his property, his kindred and the like. 2 Williams, Executors, (6 Am. ed.) 1240, and cases in note *u*.

When he executed his will, the testator had, as before seen, but very little property of any and all kinds, and no expectation whatever of ever receiving any addition thereto other than what, if anything, he might save from his small annuities above what was necessarily absorbed by his board and other necessary expenses incident to his physical condition. His will expressly declares the intention to do what testators generally intend — to dispose of all the property of which he should die possessed (*Lett* v. *Randall*, 10 Sim. 112; *Dole* v. *Johnson*, 3 Allen, 364); and that it should go, for the reasons suggested in the will, to the two legatees named. And this disposal, which, under the circumstances, is to a disinterested person, apparently so fair on the part of the testator and so well deserved on the part of the legatees, seemed to him so palpably right, that he did not omit to express the feeling that his heirs, residing in Washington, New York, and Massachusetts, to whom he had been no trouble and from whom he had received no care and attention during his painful and protracted sickness, could not reasonably challenge its "justice and propriety."

This plainly expressed intention, however, was predicated of property valued at one hundred twenty-five dollars, comprising ten shares of railroad stock and a scrip certificate, all worth only fifty dollars, and numerous small articles which he paraded before his mind by naming each in his will, and thereby realizing how little value there was except "as keepsakes" to be divided among five or six heirs, all except one of whom reside out of the state. Whether he would have used language of like import had he made his will after, instead of before, the death of his brother and the receipt of the twenty-four hundred and four dollars, can never be certainly known. It does appear, however, that he gave what was, at the date of his will and without expectation of any increase thereafter, his little all, to the legatees, and because it was so little, "as a token of gratitude," rather than as payment of valuable services rendered, in discharge of which the

annuities had evidently been used. This is made apparent also by the desire he expressed in the written memoranda made after the will and before the decease of his brother — that each of the other heirs, including his brother, should receive, "as keepsakes," one or more of the articles comprised in the residuary clause, including the watch, thereby reducing the value of his bequest to appellee one-third, and appealing to her for her "cheerful concurrence," without changing the terms of the will.

Looking at all the circumstances together with the whole will, and we find no clause which does not lead us to the opinion that by adopting the clause "the remainder of the little property I shall leave," &c. had reference only to the remainder of such property, including possible savings from his only income, as he owned when he made his will. The enumeration included all in fact. Nothing known or unknown was omitted from that schedule. If it be said that he did not change his will after his brother's death, and therefore intended that his will should carry the sum inherited,— the answer is — First, there is no evidence whatever in the case that information of his brother's death ever reached him; and second, or that he ever knew of the condition of his brother's property or even expected to receive any share of it. In fact nothing was received until more than two years after his decease. Our opinion, therefore, is that the decree of the probate court should be reversed, and that the balance of twenty-one hundred dollars and eighty-six cents, should be distributed among the heirs. Costs as by agreement.

Case remanded to probate court.

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

SAMUEL SNOW *vs.* JOHN P. WINCHELL.

Cumberland. Opinion February 16, 1883.

Trespass. Town treasurer's warrant against collector. Liability of Treasurer.

A certificate to a town treasurer by the assessors, that they have put into the hands of the collector a list of the assessments of a school district tax, "with a warrant in due form of law," justifies the treasurer in issuing a warrant of distress against the collector of taxes for a failure to collect such assessments and pay them into the treasury as required by law, whether the warrant from the assessors to the collector was in fact a good one or not.

Pearson v. *Canney* 64 Maine, 188, distinguished.

ON REPORT.

Trespass. Writ dated January 19, 1881.

Plea, general issue with brief statement.

The facts are sufficiently stated in the opinion.

Henry Orr, for the plaintiff.

With no regard to the plaintiff's requisition upon him to have recourse to what was due on account of the town tax toward the liquidation of the one in question, Winchell selected trespass to accomplish what he lawfully might have done by following the plaintiff's instructions. *Orneville* v. *Pearson*, 61 Maine, 552; *Frankfort* v. *White*, 41 Maine, 537; *Smyth et. al.* v. *Titcomb*, 31 Maine, 272. "Trespass lies against him who does the trespass and all aiding, for there is no accessory, but all are principals in trespass:—it lies against each severally, for it is joint and several in its nature;" Comyn's Digest, title Trespass, 392; Chitty Pl. 86, 95; Waterman on Trespass, § § 23, 24, 56; Burroughs on Taxation, 260; *Allen* v. *Archer*, 49 Maine, 346. We have therefore selected Mr. Winchell as the only mover in this trespass, and leave him to be fortified by school agents in such manner as they may choose to help him in his unlawful doings. *Gorham* v. *Hall*, 57 Maine, 58; *Pearson* v. *Canney*, 64 Maine, 188; Burroughs on Taxation, 264, 266, 267; R. S., c. 11, § 46; *Brunswick* v. *Snow*, 73 Maine, 177; *Adams* v. *McGlinchy*, 66 Maine, 474; 2 Greenl. Ev. § 302.

On the question of damages we ask leave to cite: Waterman on Trespass, § § 438, 445, 446, 509, 619, and note† at bottom of page 636, and § § 620, 621 and 624; *Hobart* v. *Hagget*, 12 Maine, 67; 6 Comyn's Digest, 395; *Woodbridge* v. *Connor*, 49 Maine, 353; *Bucknam* v. *Nash*, 12 Maine, 474.

We cite the foregoing authorities, because they exclude that doctrine which allows to trespassers a rebate in the form of what they realize as a fruit of their trespass, whether for themselves or others whom they may profess to serve; also because it follows the christian command, "You must not rob Peter to pay Paul."

"Tax collectors have always been held to the same measure of liability as sheriffs and constables." As to what that liability is, we cite the following authorities. *Blanchard* v. *Dow*, 32 Maine, 557; *Ross* v. *Philbrick*, 39 Maine, 29; *Knight* v. *Herrin*, 48 Maine, 533; *Sawyer* v. *Wilson*, 61 Maine, 529; *Mussey* v. *Cahoon*, 34 Maine, 74; *Farnsworth Co.* v. *Rand*, 65 Maine, 19; *Hunnewell* v. *Hobart*, 42 Maine, 565; *Everett* v. *Herrin*, 48 Maine, 537; *Moore* v. *Pennell*, 52 Maine, 162; *Guptill* v. *Richardson*, 62 Maine, 257; *Carpenter* v. *Dresser*, 72 Maine, 377; *Wallis* v. *Truesdell*, 6 Pick. 455;; *McGough* v. *Wellington*, 6 Allen, 505; *Brannin* v. *Johnson*, 19 Maine, 361; *Purrington* v. *Loring*, 7 Mass. 388; *Allen* v. *Hall*, 5 Met. 263.

Weston Thompson, for the defendant, cited: *Waldron* v. *Lee*, 5 Pick. 323; 55 Maine, 501; 6 Gray, 387; 13 Mass. 283; 40 Maine, 526; 7 Gray, 128; 99 Mass. 472; 62 Maine, 459; 19 Pick. 436; 113 Mass. 40; 20 Maine, 199; 1 Met. 328; 48 Maine, 386; 8 Met. 102; 17 Maine, 444; 5 Allen, 563; 61 Maine, 400; 21 Am. Dec. 181 and n., and numerous other authorities.

PETERS, J. The plaintiff was collector and the defendant treasurer of the town of Brunswick. Among the collections to be made by the plaintiff were the "village school district" taxes. The plaintiff had proceeded with the collection to some extent, but being remiss in collecting and paying into the treasury as required by law, the defendant, as treasurer of the town, issued his warrant of distress against him, directed to the sheriff. Upon

this warrant the sheriff seized and sold the plaintiff's goods. The plaintiff sues the defendant for the act of the sheriff. He alleges that the treasurer was a trespasser, because the assessors' warrant to himself as collector, authorizing the collection, was defective and insufficient. See *Brunswick* v. *Snow*, 73 Maine, 177.

The defense is, that the treasurer is not liable to the collector for issuing a warrant against him; that he was by law required to do so; that the certificate issued to him by the assessors, that they had issued to the collector a warrant in due form of law, justifies his act, whether the warrant is in fact a good one or not. We are of the opinion that the position taken by the defendant can be maintained.

By R. S., c. 6, § 94, assessors of towns are required to obey a warrant from the state treasurer, by assessing the state taxes, and committing the lists to a collector, with a warrant for their collection. By the same section, a form of certificate is provided for assessors to furnish to the state treasurer, in which they are to declare that they have assessed the polls and estates as directed, and have committed the bills, "with warrant in due form of law," to a collector for collection. This certificate is an official act, issued by sworn officers, who are presumed to properly perform their official duty. Upon the evidence furnished by this official return or certificate, the state treasurer is not only authorized, but he is compelled, to act. He must take it for granted that the certificate is true. By R. S., c. 6 § 123, he "*shall* issue a warrant of distress" against a collector who is negligent in paying into the public treasury the money required of him within the time limited by law. The assessors' certificate and this mandatory provision of the statute are of just as much authority to the state treasurer as any warrant from any court would be. It would be strange indeed, if a state treasurer must scan all the proceedings of town officers before he dares do the duties of his office, which the law in such plain terms imposes upon him. When a collector has accepted a warrant from the assessors and acted under it, a state treasurer has the right to assume, upon the strength of the certificate sent to him, that the warrant was rightfully issued and in lawful form. It would cripple the admin-

istration of the law and endanger the collection of the revenues of the state, if its treasurer may be liable as a trespasser for this performance of so plain a public duty.

By § 95, c. 6, R. S., warrants for the collection of county or town taxes are to be made out in the same tenor as warrants for the collection of state taxes, and, by implication, certificates of like tenor, *mutatis mutandis*, are required from the assessors to county and town treasurers. The same rule and reasoning, applicable to the collection of state taxes, apply as well to the collection of any and all other taxes. By R. S., c. 11, § 44, town assessors are to assess school district taxes, commit their collection to the town collector, and "give a certificate to the treasurer . . . as in the case of town taxes." Of course, the certificate, like all certificates from assessors to treasurers, are to be of the tenor of the example contained in § 94, c. 6, R. S., before cited. A certificate to the treasurer may be relied upon by him. It is his only means of official information. He cannot be responsible for the errors or mistakes of assessors. By R. S., c. 6, § 130, a town treasurer is compelled to issue his warrant against a collector for his delinquencies in not paying into the town treasury town and school district taxes. Precisely the same obligation in this respect rests upon him as upon a state or county treasurer.

In the certificate issued by the assessors to the defendant of the taxes in question, the assessors declare that they put into the hands of the collector a list of the assessments "with a warrant in due form of law." That certificate is the treasurer's justification. Standing upon that justification, his protection from any liability to the plaintiff is complete. *Pearson* v. *Canney*, 64 Maine, 188, relied upon by the plaintiff, does not decide to the contrary. The point taken here was not presented in that case by counsel nor considered by the court. The view we take in the present discussion is strongly supported by the remarks of Chief Justice PARKER in the case of *Waldron* v. *Lee*, 5 Pick. 323, cited and relied upon by the defendant, a case touching, as does the case at bar, the collection of school district taxes. In that case it is said: "The treasurer to whom the money is to be

paid over is required, if there be a failure, forthwith to issue his warrant of distress. This is prompt and summary, but it is essential to the well being of the community. If the subjects of this power suffer by the false return or certificate of the assessors they must seek redress by action. The wheels of government cannot be stopped to hear their complaints. The treasurer is merely a ministerial officer; he has no authority to pause in the execution of his duty on the suggestion of errors or mistakes in the proceedings. If the facts upon which he is to act are properly certified to him, he has no discretion, but is obliged to issue his warrant. Whether the tax be legal or illegal, whether duly assessed or not, are not subjects for him to inquire about. If there be a tax, an assessment, a warrant to the collector, *all certified to him by assessors duly qualified to act*, his duty is clear and he is peremptorily commanded by the law to discharge it." It is not amiss in this connection to quote a remark of REDFIELD, C. J., who in a case touching a similar question said: "Upon what rule of reciprocity, or courtesy, or justice, it was ever considered, that the judgments of courts of record were to be held exempt from all presumption of error, and that subordinate officers should be straightened up to a discipline before which no human sagacity is adequate to stand, I could never comprehend." *Stevens* v. *Kent*, 26 Vt. 503.

If a collector is threatened with injury from a treasurer's warrant of distress, he has his remedy by a petition in equity for a writ of injunction. He could have had a new or amended warrant, no doubt, in this case, had he wanted one. It is inferable, from the facts disclosed in this case, as is commonly the result in such cases, that neither assessors, collector, treasurer, or tax-payers knew that the assessors' warrant was defective, until the fact was set up by the collector in a suit against himself as a defaulter.

Judgment for defendant.

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

BARROWS, J., did not sit.

SARAH WOODBURY and others, in equity,

vs.

ORIN WOODBURY, and another.

Franklin. Opinion February 16, 1883.

Will.

A later clause in a will controls a preceding clause.

ON BILL IN EQUITY.

Heard on bill, answer and proof.

The opinion states the case.

H. Belcher, for the plaintiffs.

J. C. Holman, for the defendants.

APPLETON, C. J. This is a bill in equity to obtain the true construction of the will of Ruth Woodbury.

The will is as follows: "First, I give and bequeath to my daughter, Sarah Woodbury, one-third part of all my household furniture, beds and bedding, table covers, towels, and everything appertaining to cooking, such as crockery dishes, etc. also one-third part of my wearing apparel or of the proceeds thereof."

II. "I give and bequeath to my daughter, Polly Gould, an equal third part of all the articles specified above, a third of which is bequeathed to my daughter Sarah, or of the proceeds thereof."

III. "I also give and bequeath to Anne D. Farmer, an equal third part of all the articles specified in item first; meaning hereby to give and bequeath to each of my daughters an equal third part of all my personal *effects not otherwise disposed of*, or of the proceeds thereof."

IV. "I give and bequeath and devise to my son, Orin Woodbury, his heirs and assigns, all my real estate and all my personal property *not otherwise herein disposed of*."

V. "I authorize my executor herein named to distribute to my daughters above named, their distributive share in *kind* of the personal estate bequeathed them at the appraised value, provided they can agree on the division, otherwise I authorize him to convert the same into money, and to give to each of my three daughters, instead of the articles themselves, one-third part of the money derived from the sales."

The testator left other personal property beside that specified in the first three items in the will, and the question presented is whether her three daughters, the complainants, are entitled to their distributive share of the same.

We think they are not. Certain specific personal property is given to the complainants — a third each — "and an equal third part of all my personal effects not otherwise disposed of; or of the proceeds of the same." In the next item the testatrix disposes of the same. She intended to give her son personal estate — what she had not disposed of. A later clause in a will controls a preceding one. On the construction claimed by the bill, the bequest of personal property to the son becomes unmeaning and without effect. The son gets no personal estate.

This view is made more certain by the fifth item, which provides for a distribution *in kind* of the personal estate bequeathed to the complainants. The term "in kind" refers to the bequest in the first three items, and to nothing else. In case of a disagreement as to the division, the proceeds in money of those bequests is to be divided among, "instead of the articles themselves." No other property is to be divided either in kind or of the proceeds, but the "articles themselves," and this expression can only refer to the articles mentioned in the bequest to the complainants. Nothing else was to be divided between them because there was nothing else to divide.

According to the true construction of the will of Ruth Woodbury it is declared: that Orin Woodbury is entitled to all the personal property except property specifically described in the first three items of the will.

Bill dismissed.

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

JAMES G. MCCONNELL *vs.* JOHN L. LEIGHTON.

Aroostook. Opinion February 16, 1883.

Trover. Pleadings. Amendment.

Trover is an action of the case and may be joined with case. When the action is originally trover new counts in case may be added by way of amendment.

ON REPORT.

The opinion states the case.

Madigan and Donworth and *Wilson and Spear*, for the plaintiff, cited: Rule V, S. J. C.; 2 Chit. Pl. (16 ed.) 293; 2 Bouv. Inst. § 2881; Bouv. Law Dict. 672; 2 Saund. Pl. 117; *Moulton* v. *Witherell*, 52 Maine, 237; *Googins* v. *Gilmore*, 47 Maine, 9; *Ball* v. *Claflin*, 5 Pick. 304; *Smith* v. *Palmer*, 6 Cush. 513; *Solon* v. *Perry*, 54 Maine, 493.

Powers and Powers, for the defendant.

As the writ now stands the action cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it or destroy it. Nor can it be maintained by evidence of negligence alone. The cause of action in any case is the wrongful act which causes the injury and not the injury itself. *Hagar* v. *Randall*, 62 Maine, 439: *Spooner* v. *Holmes*, 102 Mass. 506; Bouv. Law Dict. Tit. "Action"; *Annis* v. *Gilmore*, 47 Maine, 158; *Milliken* v. *Whitehouse*, 49 Maine, 527.

APPLETON, C. J. This is an action of trover for the conversion of certain logs belonging to the plaintiff.

The plaintiff moved to amend by adding counts in case for the loss of the same logs through the wrongful action and inaction of the defendant. The propriety of the proposed amendments was submitted to the court as a question of law.

Trover is an action on the case. It may be joined with case. When the action is originally trover, new counts in case may be added by way of amendment. *Googins* v. *Gilmore*, 47 Maine, 9; *Moulton* v. *Witherell*, 52 Maine, 237.

It is objected that the new counts describe differently the grounds of the defendant's liability and that they would be sustained by proof varying from what would be required in trover. But all amendments vary from the declaration as originally drawn else they would be unnecessary.

Here the loss on all the counts is the same. A different description of the manner of its occurrence may necessitate a difference of proof. But in all the counts the defendant is alleged to be the cause of the loss. The statements of the liability of a defendant may vary when the wrong done and the loss occurring are the same. The amendments are clearly within the cases cited. *Swan* v. *Nesmith*, 7 Pick. 220; *Ball* v. *Claflin*, 5 Pick. 303; *Smith* v. *Palmer*, 6 Cush. 517; *Rand* v. *Webber*, 64 Maine, 191.

The amendments are to be allowed on terms to be fixed at Nisi Prius.

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

INHABITANTS OF FARMINGTON

vs.

DANIEL P. HOBERT and another.

Franklin. Opinion February 16, 1883.

Bond. Action. Parties to an action.

When the contract is under seal, the legal title is in the obligee, and the action must be brought in his name.

A suit in the name of the town cannot be maintained on a bond running to the treasurer though for the use of the town.

ON EXCEPTIONS.

Debt on bond of Daniel P. Hobert and Joel Hobert to "Louis Voter, treasurer of the town of Farmington," dated March 10, 1873. The writ was dated April 18, 1878. The presiding justice ruled that the action could not be maintained and ordered that a nonsuit be entered, and the plaintiffs alleged exceptions.

S. Clifford Belcher, for the plaintiffs.

It is settled that a contract not under seal may be enforced by a town or corporation, though made with an officer thereof. *New Castle* v. *Bellard*, 3 Maine, 369; *Garland* v. *Reynolds*, 20 Maine, 45; *Irish* v. *Webster*, 5 Maine, 171.

It is said that an action on a bond can be maintained at common law only by the obligee or his legal representative.

But in *Fairfax* v. *Soule*, 10 Vt. 154, it is held that an action may be sustained in the name of the inhabitants of the town on a bond given to the selectmen of the town. See *Bradley* v. *Baldwin*, 5 Conn. 288.

In *Hopkins* v. *Plainfield*, 7 Conn. 286, where a bond like the one in suit was given the town treasurer, it was held that a bond given to the town treasurer, is in law a bond to the town, and that a suit may be maintained on such a bond in the name of the inhabitants of the town.

In this last case the aid of no statute was invoked, but the decision was based on the law, reason and justice.

H. Belcher, for the defendants.

APPLETON, C. J. This is an action on a bond given to Louis Voter, treasurer of the town of Farmington, to indemnify the town against the costs in certain suits pending against it.

At the trial at *nisi prius*, the presiding justice ordered a nonsuit on the ground that the action should have been brought in the name of the obligee.

The contract was under seal. In such case none but a party can maintain an action upon it. *Flynn* v. *N. A. Life Ins. Co.* 115 Mass. 449. The legal title is in the obligee, and the action must be in his name. When the bond is for the use of the town,

but running to the commonwealth, no action can be maintained in the name of the town, though the forfeiture will accrue to its benefit. *Inhabitants of North Hampton* v. *Elwell*, 4 Gray, 81. An action on a contract with the warden of the state prison of Maine in his name, cannot be maintained in the name of the state. *State of Maine* v. *Gould*, 11 Met. 221.

Where the contract is by an agent or servant and not under seal, suits have been sustained in the name of the parties for whose use and benefit they were made. It is otherwise when they are under seal. *Ministerial and School Fund* v. *Parks*, 1 Fairf. 441; *Garland* v. *Reynolds*, 20 Maine, 45.

Nonsuit confirmed.

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

CHARLES H. TOURTELLOTT *vs.* THOMAS POLLARD.

Piscataquis. Opinion February 20, 1883.

Sale. Contract. Fraud.

A exchanged horses with B, then B exchanged with C without notice to C of any infirmity of title. It turned out that B did not own the horse he let A have, and A had to give him up to the true owner. Then A sought to reclaim from C the horse he (A) let B have; *Held*, That C's title to the horse was good against the claim of A.

ON REPORT.

Replevin of a sorrel mare. Writ dated May 3, 1880.

Plea, general issue, with brief statement claiming property in the defendant. The opinion states the facts.

Joseph B. Peaks, for the plaintiff.

A. G. Lebroke, and Willis E. Parsons, and C. A. Everett, for the defendant.

PETERS, J. This case lies within a narrow compass, although much immaterial matter is connected with it.

The defendant bought the horse in question of William Orcutt, in good faith and without notice of any defect of title, paying Orcutt full value therefor. Orcutt had purchased the horse of one Bowden, giving to Bowden in exchange a horse which, it turns out, Orcutt did not own. The consideration, therefore, for the trade between Orcutt and Bowden failed. To retrieve his loss, Bowden undertook to rescind his sale to Orcutt, who had sold to the defendant, by selling the same horse to the plaintiff. Then the plaintiff replevied the horse from the defendant.

This attempt at rescision does not succeed. When Bowden sold his horse to Orcutt, for a supposed consideration, he thereby legally authorized Orcutt to sell the horse to any person who might innocently purchase the same. Trusting Orcutt with the title of his horse, he is bound by any sale by Orcutt to an innocent vendee. It makes no difference whether Orcutt paid to Bowden a valid consideration, or any consideration, or not. And the result would be the same, even if the title had been fraudulently obtained from Bowden by Orcutt; if in fact obtained. The facts bring the case under the familiar and general rule of law, that an innocent purchaser of goods for a valuable consideration, of a vendee, obtains a good title against the first vendor. He has the superior equity. *Neal* v. *Williams*, 18 Maine, 391; *Ditson* v. *Randall*, 33 Maine, 202; *Titcomb* v. *Wood*, 38 Maine, 561.

Plaintiff nonsuit.

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

FRANCIS A. PRITCHARD *vs.* ISAAC YOUNG and another.

Penobscot. Opinion February 20, 1883.

Deed. Dividing line.

A, owning the whole of a lot or block of land, conveyed "the northerly half" to B, describing the half in general terms, and adding these words: "Being

the same half now occupied by B"; *Held*, That, *prima facie*, each would own a mathematical half; but if B was in occupation of the north half, and a definite line existed between the halves upon the face of the earth, such as was understood and reputed to be a dividing line between the two sections of the lot, then the parties would be bound by such line as their divisional boundary.

ON REPORT on motion to set aside the verdict.

Trespass *qu. cl.* Writ was dated November 6, 1879. Plea, general issue, and brief statement alleging that the acts complained of were committed, if at all, upon a narrow strip of land to which each party claimed title, the controversy growing out of the location of the dividing line.

The opinion states the material facts.

N. Wilson, for the plaintiff.

C. A. Bailey, for the defendant.

PETERS J. The plaintiff owned the north half of a lot of land and the defendant the south half. The question at the trial was, whether there was or not any binding divisional line between the halves upon the face of the earth. The jury found that there was none. The plaintiff moves against the verdict of the jury.

Prima facie, each would own a mathematical half of the whole. But the plaintiff insists that there was an established dividing line. He contended at the trial, that such a line had existed long enough to create a disseizin. The jury found to the contrary. A careful examination of the evidence satisfies us that we cannot disturb the finding upon that point.

The plaintiff strenuously insists that upon another ground the line claimed by him is proved to have been established. The plaintiff holds the northerly half under Thomas Young. Isaac Young, owning the whole lot, conveyed that half to his brother Thomas, adding to a general description the words following: "Said north half contains fifty acres more or less, and is the same now occupied by said Thomas." It seems that Thomas Young was occupying the north half when the deed was given, and the plaintiff contends that he can, by virtue of this language in the deed, rightfully hold to such a line as Thomas Young at the date of such deed was occupying up to.

If Thomas was in occupation of the north half, at the date of the deed, and at that time a definite line between the two parcels existed upon the face of the earth, such as was understood and reputed to be the dividing line between them, the point taken would be a good one.

The inquiry then arises, what evidence is there in the case of such a line on August 13, 1855, when the deed was dated and delivered. There is much said about a cedar fence for a portion of the way across the territory. This was erected by one Bagley, who says he built it in 1857 or 1858. This cannot help the plaintiff's position. As to what existed prior to the cedar fence the evidence is contradictory. It is contended that a brush fence preceded the cedar fence for a portion of the way, upon about the same line. This assertion is both supported and contradicted by testimony. There is much testimony to show that prior to the cedar fence, the fences were weak, irregular, variant and crooked, sometimes upon and sometimes off of any line which could be regarded as a central or divisional boundary.

Plaintiff's witness, Tibbetts, who was an owner of the north half at a time, informs us of the condition of the cedar-fence line as extended and continued by brush fence in 1861. "The fence that Bagley built, should say was some sixty rods (really but thirty-three rods); then there was a pitch pole fence from there up through the bushes; there was really no fence to amount to anything, but something to stop cattle. The fence might hit the line occasionally; and it might not hit the line at all; it was a very irregular fence; it went right through the bushes, old logs, merely to stop cattle." Bear in mind that the contention of the plaintiff is that there is a true line of occupation across the lot. Which shall be the test and guide to show it to us? Why should the cedar fence be the guide any more than the zig-zag structures beyond that. The defendant, Isaac Young, testifies that before Bagley came there he and his brother occupied mostly according to convenience, building brush fences which would come any where within from two to thirty feet of where the true line was supposed to be. We cannot, it is plain to be seen, overrule the verdict of the jury upon this point or position.

There is a good deal of testimony, principally from surveyors, which pertains to rectifying the outside lines of the whole lot, which the parties own in halves or shares. It is not relevant to the case.

Motions overruled.

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

LEWIS F. STRATTON *vs.* EUROPEAN AND NORTH AMERICAN RAILWAY.

SAME *vs.* HANNIBAL HAMLIN and another, trustees.

Penobscot. Opinion February 21, 1883.

Railroads. Fires set by locomotives. Trustees. R. S., c. 51, § § 32, 50, 51. Stat. 1876, c. 123.

An action was brought for an alleged injury to property by fire, under R. S., c. 51, § 32, which provides: "When a building or other property is injured by fire communicated by a locomotive engine the corporation using it is responsible for such injury." The injury occurred while the road was operated by the trustees named in a mortgage to secure the bondholders and before the mortgage was foreclosed. Subsequently the bondholders organized a new corporation and took possession of the road. No malfeasance or fraud was alleged on the part of any one, and there was no allegation of funds in the hands of the trustees. *Held;*

1. That the new corporation was not liable, because it was not then the owner of the road or using the engine.

2. That the trustees were not the agents of the bondholders, but were operating the road upon their own responsibilities as principals, subject only to the liabilities and obligations imposed by the terms of the trust.

3. That the trustees were not liable for the alleged injury, because R. S., c. 51, § 51, as amended by stat. 1876, c. 123, expressly limits their liability as such, to the moneys received, and their personal liability to malfeasance or fraud.

ON REPORT.

These two actions were for one and the same cause, being for an alleged injury suffered by the plaintiff to his woodland in Mattawamkeag, from fire communicated by a locomotive engine,

accidentally, while passing along its track across his land. No malfeasance or fraud is alleged or suggested on the part of any one. The first named action was commenced and writ dated December 2, 1880; the last named on October 21, 1881.

A single question was raised for the decision of the full court on law, viz: whether any action can be maintained against either of the defendants in said suits, and if so, against which?

The opinion states the material facts.

A. W. Paine, for the plaintiff.

The plaintiff has been injured in his property. It is the exact case provided for by R. S., c. 51, § 32.

"Every person for an injury done him in his person, property or immunities shall have a remedy by due course of law." Const. Art. 1, § 19.

This provision is imperative. *Preston* v. *Drew*, 33 Maine, 558. Indeed no maxim of the law is more familiar or better preserved in practice from the earliest time than *ubi jus, ibi remedium*. *Ashby* v. *White*, 2 Ld. Raymond, 953; Broom's Maxims, *193, *210, *211; *Stearns* v. *A. and St. L. R. R. Co.* 46 Maine, 95.

The counsel in an able argument contended that the new corporation was liable in that it was new only in name, and would prevent circuity of action and needless litigation. *Walmsby* v. *Cooper*, 11 A. and E. 216; *Charles* v. *Alton*, 15 C. B. 62. See also, *Hamlin* v. *Jerrard*, 72 Maine, 62; *State* v. *E. and N. A. R. R. Co.* 67 Maine, 479; *Bean* v. *A. and St. L. R. R. Co.* 63 Maine, 293; 44 Maine, 362; 46 Maine, 95.

The relation of principal and agent, for Hamlin and Hayford were really the agents of the bondholders who composed the new company, imposes the liability upon the company. So, too, would the relation of trustee and *cestui que trust*. *Pierce* v. *Emery*, 32 N. H. 484; 2 Redf. Ry. Cas. 631, 648. See *Shaw* v. *R. R. Co.* 5 Gray, 162; S. C. 16 Gray, 407.

The case at bar is very much of the same nature as that of national banks formed from state banks. *Bank* v. *Harris*, 118 Mass. 147. See *Bank* v. *Weeks*, 53 Vt. 119; *Langdon* v. *R. R. Co.* 53 Vt. 228; *Chaffin* v. *R. R. Co.* 53 Vt. 345.

But if the company are not liable and the action against them cannot be maintained, then that against the trustees must be. *Ubi injuriam, ibi remedium.*

C. P. Stetson, for the defendants, cited: Jones, Railroad Securities, c. 23, §§ 653, 656; *Sullivan* v. *P. and K. R. R. Co.* 94 U. S. 810; *Vilas* v. *Prairie Du Chien Ry. Co.* 17 Wis. 497; *Gilman* v. *Fond Du Lac R.* 37 Wis. 318; *Hopkins* v. *Railroad Co.* 2 Dillon, 396; *Morgan* v. *Thomas*, 76 Ill. 120; *Grand Tower M'f'g Co.* v. *Ulman*, 89 Ill. 244; *Ballou* v. *Farnum*, 9 Allen, 47; *Daniels* v. *Hart*, 118 Mass. 543; *Sprague* v. *Smith*, 29 Vt. 421; *Barton* v. *Wheeler*, 49 N. H. 9.

DANFORTH, J. Here are two actions for the same cause, and the question is presented upon a statement of facts, whether either of them can be maintained. They are founded upon R. S., c. 51, § 32, which provides that, "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury." The facts agreed show that the European and North American Railway Company was incorporated in 1850 and organized in 1853; that March 1, 1869, it mortgaged its railway, appurtenances and rolling stock to T. Edgar Thompson and Hannibal Hamlin as trustees, to secure bonds issued by the company to the amount of two million dollars. Subsequently Thompson died, and William P. Hayford was legally appointed in his place. Hamlin and Hayford took possession of the road for a breach of the condition of the mortgage, October 1, 1876, and operated it until October, 1880. On October 3, 1877, they commenced proceedings for the foreclosure of the mortgage, which was legally foreclosed October 3, 1880; and on October 13, 1880, the bondholders under the provisions of the statute organized a new corporation, adopting the name of the European and North American Railway, and immediately took possession of the road and have ever since managed it as owner. This corporation is the defendant in the first named action. The fire which caused the injury for which the plaintiff claims to

recover began June 16, 1880, and continued several days. Thus it appears that the injury complained of happened while the trustees were in possession, before the mortgage was foreclosed and before the defendant corporation had any existence as such.

It would seem to be quite evident that a non-existing corporation cannot be the owner or in possession of a railway, or be in the use of an engine, so as to make it liable after it comes into existence for injuries previously accruing. A non-existing body can neither make a contract or be guilty of a tort. Nor is this claimed; but it is said that the trustees who, in fact, were using the engine, were acting for, and were the agents of the bondholders who afterwards became the corporation. This, however, does not diminish the difficulty. They could not thus be the agents of the corporation, for that implies a principal and a contract. The corporation could neither be a principal nor make a contract until it was organized. The bondholders were individuals and if they were liable either individually or collectively, that liability would not be changed by a subsequent organization into a corporation. That could have no effect of itself upon previous individual indebtedness. It might be that not a single bondholder at the time the injury accrued would become a member of the corporation. That, by the law, is composed of those who were bondholders when the right of redemption was foreclosed, or as many of them as chose to come in. The bonds were negotiable and each of them might have and many of them probably did change hands after the injury and before the foreclosure.

But those who were bondholders at the time of the injury could not be held liable. They were not using the engine either by themselves, servants or agents. There was no such relationship existing between them and the trustees as would render them liable for their contracts or torts, no tests to show that the relationship of principal and agent existed. The trustees were not appointed by the bondholders, but by the original corporation before the bonds were issued. They could not discharge them, they could not fill vacancies, except by the sanction of the court, nor could they control their action except so far as such control shall be consistent with the terms of the trust. R. S., c. 51, § 47, as

amended in 1876, c. 105; and § 52; and yet these are tests to be applied to show the liability of a principal for the acts of a supposed agent. *Ballou* v. *Farnum*, 9 Allen, 47.

True, the trustees act for the bondholders, but they act for the original corporation as well, and are liable to account to it for their doings. R. S., c. 51, § 51. The legal title to the road is in them and when in their possession, is operated upon their own responsibility as trustees indeed, but controlled only by the terms of the trust as found in the mortgage and the statutes in relation thereto. Even after the foreclosure the new corporation obtains title only by a conveyance from the trustees. R. S., c. 51, § 55. They are principals rather than agents, operating the road as an independent body, as trustees, accountable to all persons interested for the faithful discharge of their trust, but not accountable to third persons for their doings in that respect. *State* v. *E. and N. A. R. Co.* 67 Maine, 479; *Daniels* v. *Hart*, 118 Mass. 543.

Another ground on which it is claimed to sustain this action against the new corporation is, that it takes the road subject to all the duties and obligations resting upon it, as well as the rights attached to it. R. S., c. 51, § 55. But these duties and obligations are by the express terms of the statute, such as arise from the charter and relate to the future and not the past management of road, or of paying any debts or damages which may have accrued by virtue of any contract or wrong doing by its predecessors. The new corporation takes its title from the conveyance of the trustees as of the date of the foreclosure, and necessarily subject to all prior incumbrances and liens upon the road, but clear of all debts or obligations which rest upon former owners and are not legally liens upon the property. Thus in any view we can take of the case, the new corporation is not liable.

Are the trustees, the defendants in the second action, liable? This question must also be answered in the negative. It is true they, through their servants, were using the engine which is said to have caused the injury, and for any negligence of those servants would have been liable. *Ballou* v. *Farnum*, *supra*. But in this case no negligence, or wrong doing, is alleged. The

trustees, though having the legal title to the road and using the engine not as agents but as principals, were still using it as trustees, liable to all the duties and obligations resting upon them as such, and no other, unless arising from personal contract or tort. These duties and obligations are defined by the mortgage and by the statutes applicable thereto. It is not pretended that there is any foundation for this suit by reason of anything contained in the mortgage. In R. S., c. 51, § 50, it is provided that after taking possession of the road and all property covered by the mortgage, they shall "have all the rights and powers and be subject to all the obligations of the directors and corporation of such road." If this were all, they would be liable in this suit, for such an obligation is imposed upon the corporation, as held in *Daniels* v. *Hart*, 118 Mass. 543. But in the next section we find their duties more fully defined. In this section, as amended by the statutes of 1876, c. 123, they are required to "keep an accurate account of the receipts and expenditures of such road, and exhibit it, on request, to any officer of the corporation, or other person interested. They shall, from the receipts, keep the road, buildings and equipments in repair, furnish such new rolling stock as is necessary, and the balance, after paying running expenses, shall be applied to the payment of any damages arising from misfeasance in the management of the road, and after that according to the rights of the parties under the mortgage. They shall not be personally liable except for malfeasance or fraud." Thus their liability as trustees is limited by the amount of money received, and their personal liability to "malfeasance or fraud." It is possible that in the proper process, under an allegation of receipts beyond what is necessary to liquidate prior claims, the trustees might be required to appropriate enough to pay this claim, either as an incident to and a part of the running expenses, or as "damages arising from misfeasance in the management of the road." But in this process there is no such allegation, nor any of "malfeasance or fraud." The suit therefore does not rest upon any liability of the defendants, personally or as trustees.

But, says the counsel, it is a "legal maxim that for every right there is a remedy," and therefore one of these actions must be maintainable. The maxim we admit in its full force, but the conclusion does not follow. In the legal sense there is no difficulty about the remedy, which is a "judicial means of enforcing a right or redressing a wrong." The trouble here is in establishing the right. The right to redress for such an injury as is here complained of, is given by the statute and by that alone. A railroad corporation in the exercise of its chartered and legal rights, without negligence, is not responsible for consequential damages except so far as they are given by statute, and when given it must necessarily include some agent who is accountable; otherwise the injury is one which must be borne where it falls. Here the statute gives the right against a specified corporation. What the statute gives it may take away. If then, the corporation which by the statute would be liable, has withdrawn and the road, as in this case, is operated by parties whom the legislature says shall not be liable, then what would have been a right but for the withdrawal, is not so now. It is not the remedy alone which fails, but the right also.

The principle involved here is the same as that in *State* v. *E. and N. A. R. Co. supra*, in which at the close of the opinion it is said, "This corporation cannot be held, and, for the act alleged, as the statute now stands, we do not see how any person or party can be."

In each case, plaintiff nonsuit.

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

WALTON, BARROWS and PETERS, JJ., did not sit.

EDWARD SMALL *vs.* MERRITT WRIGHT.

Washington. Opinion February 20, 1883.

Deed, construction of, reservation in.

Where the question is whether a certain creek or cove was included or excluded from the premises conveyed by deed, and the evidence renders

it possible for either hypothesis to be true, the fact that the deed reserves to the grantor the use of the cove for certain purposes, has an influence in favor of its inclusion which can be overcome only by other very satisfactory and convincing evidence.

ON REPORT.

Trespass *qu. cl.* and cutting and carrying off the plaintiff's grass and hay.

The writ was dated December 13, 1880. Plea, general issue and brief statement alleging title in Everett S. Wright, and that defendant was his tenant.

The question presented was, who was the owner of the flats from which the hay was cut? Each party claimed that such flats were embraced within the description in their respective deeds.

The title of Everett S. Wright was obtained through sundry conveyances from Edward F. Huson, who received his title by deed from Alpheus Crosby, August 24, 1854, and the following is the description in the deed:

"A certain tract of land, or farm, situated in said Machiasport and bounded as follows: Beginning at the west side of the road at the line of land formerly conveyed by Stephen Jones and others to Elisha Tobey, and running west by said line three hundred rods more or less to land formerly of Joseph Libby; thence north by the easterly side line of land last mentioned eighty-three rods more or less to land formerly of Ebenezer Gardiner; thence east by land last mentioned one hundred rods; thence north by the same land eighteen and three-fourths rods to land formerly of Jacob Palmer; thence by land last mentioned fifty four rods more or less to a pine tree or the place where the same stood on a point between the branches of the head of Mill Creek; thence east seven degrees north to the upland at high water mark; thence by high water mark to the west side of the bridge; thence by the west side of the bridge and road to a point due east by compass from the north-east corner of a large rock in the field; thence west about thirteen rods to said corner of said rock; thence south twelve and a half rods; thence east to the west side of the road; and thence by the side of the road to the place of beginning, together with a right appurtenant

to said farm in common with myself and others of landing upon the shore, below the mill dam or the beach or flats extending from high water mark to the creek and from the mill dam southward forty feet, but reserving and excepting from this conveyance to myself my heirs and assigns and the owners of the Butterfield (so called) Mills and mill privilege, the use of the flats of said mill creek, the right to exclude and to stop and to drain off the waters of said creek for operating said mill and for docking and securing timber, and also excepting all rights which Whitneyville and Machiasport Railroad Company have to maintain the railroad, and to use a certain spring near the road."

The plaintiff's title was from two quitclaim deeds from the same Alpheus Crosby; the first was dated January 24, 1855, and contained this description: "This following described real estate situated in said Machiasport and bounded thus: Beginning at the edge of the mill pond at the southern end and eastern side of the town bridge or causeway and running by same side of the bridge, northward across the creek to high water mark," &c. [bounding premises on the east side of the road and bridge,] "excepting the right of landing granted to Edward F. Huson in my deed to him and reconveyed to me in mortgage by his deed dated, . . . as appurtenant to the farm so conveyed and reconveyed to me. Upon which premises hereby conveyed stand the mills called the Butterfield Mills, which with all their privileges and appurtenances not inconsistent with the reservation aforesaid are included in this conveyance."

The second deed was dated December 16, 1865, and contained the following description: "All my right, title and interest, in and to the Butterfield mill pond and soil under the same not heretofore conveyed to Edward F. Huson or any other grantees to whom I or the persons under whom I claim may have conveyed subject to any mortgage now existing on said property running to me and in my name or in which I have any existing interest."

The opinion states other material facts.

J. C. Talbot, for the plaintiff.

A. McNichol and John F. Lynch, for the defendant.

PETERS, J. The question mooted in this case is, whether the call in the deed from Crosby to Huson, "thence east seven degrees north to the upland at high water mark," carries the boundary to the upper or to the southerly side of Butterfield cove. The line starts from the head of the cove and strikes upon the one side or the other. The next call, "thence by high water mark to the west side of the bridge," is consistent with either theory. The defendant, claiming under Huson, claims to go to the northerly or upper side of the cove. If he goes there, his land includes the cove; if not, it excludes it. We think he is right in his contention.

A reference to the history of some of the conveyances touching the premises will help elucidate the controversy. The proprietors of the town, as long ago as in 1804, conveyed to Butterfield and another a farm now owned by Huson, the mills and adjacent property, and included the cove within the description of the premises conveyed, by running on the upper shore at high water mark, on the line now claimed by Huson. The object of including the cove was that Butterfield and partner would have the benefit of controlling it for his mill. To one Day and others, the proprietors deeded the land northerly and easterly of Butterfield's line. So that the line between Butterfield and Day was the line at high water mark on the upper side of the cove. The Butterfield estate came back under a mortgage-foreclosure to the proprietors. In the conveyance of 1804 to Butterfield almost the same call occurs as in the deed to Huson, to wit, "thence east seven degrees north nineteen rods to the upland at high water mark." Probably the call was borrowed from this deed for the deed to Huson. The testimony renders it certain that, in the deed of 1804, the call, "east seven degrees north" ran over to the upper shore, or was intended to.

In 1854 the Butterfield estate was back in Crosby, representing the proprietors, and Crosby owned or represented the land and cove over to high water mark on the upper shore. In 1854 Crosby conveyed to Huson. In 1855 Crosby conveyed to the plaintiff the mill and mill privilege, and some adjacent land. If Crosby did not convey the cove to Huson, he retained the

title in it to himself. What did he want to reserve to himself such a parcel of property? If he did not convey the cove to Huson; he excluded Huson from any access to the flats and shore on either side of the cove. Why should he exclude Huson entirely from the shore?

In this situation of things, the plaintiff in 1865, ten years afterwards, gets a release of Crosby's title to the shores. There are implications in this deed that Crosby doubted his ownership in the shores or cove. He deeds his interest for a dollar. He cautiously describes the interest in the Butterfield Pond, "not heretofore conveyed to Edward L. Huson, or any other grantees to whom I or the persons under whom I claim may have conveyed."

The call in the deed next to the one already noticed, confirms the defendant's claim, namely, "thence westerly by the west side of the bridge and road to," &c. &c. This is not consistent with the plaintiff's pretension.

A powerful argument for the defendant's side of the case is the reservation in the deed of Crosby to Huson, which is this: "Reserving and excepting (from this conveyance) to myself, my heirs and assigns and the owners of the so-called Butterfield Mills and mill privilege, the use of the flats of said mill creek, the right to exclude and to stop and to drain off the waters of said creek for operating said mill, and for docking and securing timber." . . . This is most significant evidence of the intention and supposition of the parties. How could the use of flats be reserved if the flats were not conveyed? This use is probably what Crosby intended to pass by his deed to the plaintiff in 1865, not recorded until 1877. How could the grantor to Huson make such a mistake as the plaintiff's view necessarily imposes upon him, as to annex to his deed such a particular, careful and well studied reservation?

The plaintiff relies upon a long continued possession, and some indirect admissions, by Huson's immediate successors, of his right to the possession. This has force, but might naturally be, under the peculiar ownerships and reservations shown by the case. That the plaintiff is entitled to betterments

is not denied. Plaintiff relies upon testimony of witnesses that the course of "east seven degrees north," would strike the lower upland. We think the testimony of witnesses in favor of the contrary position is more satisfactory. Even if the course went in such a direction, there is evidence enough in the case to require its rejection as false demonstration.

The plaintiff very much relies upon his brother's testimony, which really makes strongly for the defendant. He says he run the line for the Huson deed, and run it on to the lower shore; that at the point where the line struck the lower shore he marked a pine tree "54," and that the tree so marked stood there for many years. This is undoubtedly true. But the description calls for no such landmark. It was discarded intentionally. The witness, brother of plaintiff, explains why. He lays it to the grantor's agent. He says that when he was running out the land for the deed to Huson, Charles Porter, Crosby's agent, was with him. He adds, "*He concluded to let that pool go in with the farm.*" He says in other places in his testimony, "I was not present when the deed was made, Crosby to Huson. *If I had been, I would have looked out.*" "*Porter did not make the deed as it was run out.*"

It is not difficult to see how the plaintiff's pretension grew up. Until the mill went down in 1865, or thereabouts, the flats were not of much consequence to any one. When Huson got his deed the grantor conveyed all but the mill and such privileges as appertained to the mill. The Smalls desired to exclude Huson from the cove at that time, but their wishes did not prevail. They controlled the waters of the cove until 1865, when they could use them no more. Then, to continue their possession, they got a deed of Crosby of such remaining title as he had, if any. He had none. The plaintiff has no case.

Judgment for defendant.

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

SUSAN S. FLETCHER, administratrix, in equity,

vs.

THE SOMERSET RAILROAD COMPANY and others.

Somerset. Opinion February 21, 1883.

Levy. Appraisers. Disinterested men.

Persons residing and having taxable estates in a town, which, in its corporate capacity, is a stockholder in a railroad company, are not incompetent from interest, to act as appraisers in the levy of an execution against such company.

ON REPORT on agreed statement.

The plaintiff brings this bill as administratrix on the estate of George A. Fletcher against the Somerset Railroad Company, John Ware and Fred A. Coolidge.

The bill sets out that the complainant as administratrix recovered judgment against the railroad company October 18, 1881, for one thousand two hundred and one dollars damages, and forty-eight dollars and nine cents costs of suit, and November 11, 1881, she caused the same to be levied on certain real estate of the company in Anson—a real estate attachment having been made on the original writ February 17, 1876.

That S. C. Mills and Company caused to be made a real estate attachment in an action in their favor, against the same railroad company January 26, 1876, and recovered judgment in that action against the company for two thousand eight hundred fifty-six dollars and sixty-seven cents damages, and thirty-nine dollars and three cents costs of suit, and caused the same to be levied by Fred A. Coolidge, one of the defendants, who was a deputy sheriff, upon the same real estate upon which the complainant's levy was subsequently made as above stated. That S. C. Mills and Company, July 12, 1881, conveyed their interest in the land levied upon to John Ayer, another of the defendants. That James J. Parlin and Sherman W. Hapgood, two of the appraisers at the time of the levy of the judgment of S. C. Mills and Company, were at

the time inhabitants of the town of Anson, and that town was at the same time a stockholder in The Somerset Railroad Company. And the bill prayed that Coolidge be required to amend his return of the levy of the judgment of S. C. Mills and Company, in accordance with the facts; that the levy be declared void and that Ayer be required to release to the complainant in order to remove the cloud from her title.

A. H. Ware, for the plaintiff.

The statute requires appraisers to be disinterested men. Were Parlin and Hapgood disinterested?

In a case in Massachusetts, *Boston* v. *Tileston*, 11 Mass. 468, the court say,

"As it is to be presumed in this case that the officer who served the execution returned that the appraisers were disinterested freeholders, perhaps on a trial between the parties that fact would not be traversable. But here the parties have agreed that the appraisers were inhabitants of the town of Boston. As such they were parties to the suit in which the execution issued, and as such they were certainly not disinterested. The statute referred to by the counsel for the demandants has removed the objection of incompetency as witnesses from corporators, which shows that they were not competent at common law. But it would be going far beyond the plain and apparent intent of the legislature to extend that provision to the case of appraisers on the extent of executions."

In *Norridgewock* v. *Sawtelle*, 72 Maine, 486, the court held that a justice of the peace, chosen by the officer to hear a poor debtor's disclosure, who resided in the town of Norridgewock, was not disinterested.

No juror can sit in a case where his town is interested. *Hawes* v. *Gustin*, 2 Allen, 403.

No judge is allowed to sit in the trial of an action in which the county or town in which he resides is a party or interested. R. S., c. 82, § 29; *Pearce* v. *Atwood*, 13 Mass. 324.

G. T. Stevens, for The Somerset Railroad Company.

C. A. Harrington, for John Ayer.

D. D. Stewart, for Fred A. Coolidge.

PETERS, J. Waiving all preliminary questions standing in the way of it, we will examine the question, whether the appraisers in the first levy were competent persons for the duty performed by them. It is alleged that they were not disinterested, because the town, in which they resided and where they possessed taxable estates, was a stockholder in the railroad corporation upon the property of which the execution was extended. The town of Anson was a stockholder in its corporate capacity in the Somerset Railroad Company. The execution was against the railroad company. Two of the appraisers were residents of and owners of property in Anson. The land levied upon was situated in Anson.

The complainant relies upon the case of *Boston* v. *Tileston*, 11 Mass. 468. It was held in that case that an inhabitant of Boston was not a competent person to be an appraiser of land upon an execution in favor of Boston. The facts of that case differ from the facts in this case. There the appraiser was in some sense a party to the execution. Here the appraiser was in no sense a party. In *State* v. *Stuart*, 23 Maine, 111, it was held that, by the common law, inhabitants of a town were competent witnesses to sustain a liquor prosecution, where the penalty to be recovered would go to the town. That case is directly relied upon as an authority and its doctrine affirmed in *State* v. *Woodard*, 34 Maine, 293. In *State* v. *Intoxicating Liquors*, 54 Maine, 564, the objection that a police judge was interested for the same cause, was overruled.

In the case at bar, if the appraisers had any interest, it was not against but in favor of the complainant. The creditor in the execution that was first levied, where the inhabitants of Anson were appraisers, was the first attacher. The complainant was a second attacher of the land of the railroad company, and both executions were levied upon the same parcel of land. It could make no difference to the company, nor to the town, nor to the appraisers living in the town, whether one creditor or another creditor should collect his debt out of the land levied on. The liabilities of the company would be the same, if the appraisals were alike. The only possible interest or bias which the

appraisers could have felt would be to give the first creditor as small an amount of land as they could for his debt. This would help the second attacher. The less the first attacher got, the more the second attacher would get. The complainant suffered no injury, and is entitled to no relief, if the interest of the appraisers was in his favor, nor if the interest in legal estimation was a balanced interest; inasmuch as all other parties are satisfied. *Cutting* v. *Rockwood*, 2 Pick. 442; *Com.* v. *Keenan*, 97 Mass. 589.

If the appraisers had any interest either way, it was too remote, uncertain, contingent, speculative, theoretic and unsubstantial, to be legally estimated.

Bill dismissed.

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

CITY OF AUBURN *vs.* INHABITANTS OF WILTON.

Androscoggin. Opinion February 21, 1883.

Pauper. Notice.

A pauper notice described the pauper as Benton L. Blackwell. The pauper's true name was Bennetto L. Blackwell; *Held*, That the town receiving such notice was under no obligation to answer; but answering, and knowing what person was intended, and not objecting on account of the error of name, they are bound thereby, their conduct constituting a waiver of the defect in the notice.

ON REPORT on agreed statement.

Assumpsit for pauper supplies furnished one "Benton L. Blackwell", amounting to two hundred fifty dollars and twenty cents. The writ was dated August 12, 1881.

The opinion states the material facts.

W. W. Bolster, for the plaintiffs, cited: *York* v. *Penobscot*, 2 Maine, 1; *Embden* v. *Augusta*, 12 Mass. 307; *Shutesbury* v. *Oxford*, 16 Mass. 102.

Frye, Cotton and White, for the defendants.

There is nothing in the writ to show that the pauper was any other than Benton L. Blackwell and a judgment founded upon such a writ would be no bar to a suit for supplies furnished Bennetto L. Blackwell. They have not asked to amend their writ and there is nothing to connect this Bennetto with the Benton declared on in the writ.

The recovery, if any, in this action, must be by reason of the statute, and the plaintiffs, to be entitled to such recovery, must show that they have strictly complied with the provisions of the statute. The notice contains nothing by which to identify the pauper except the name, and the christian name was entirely wrong. PARKER, C. J., remarking on the subject, says, "The mistake of the christian name gave them a right to refuse to answer the charge, though it can hardly be doubted that they were aware of their liability except for this mistake." *Shelbourne* v. *Rochester*, 1 Pick. 473.

It would be no unusual thing that there should be two Blackwells who had a pauper settlement in the same town, bearing the christian names of Benton and Bennetto, respectively.

It will be perceived that this is not the case of a defective, indefinite or incomplete description, which can be cured or the defect waived by an answer, but it is a notice distinct and free from ambiguity, yet false in a material and very important particular.

The cases cited by the counsel for the plaintiffs refer entirely to the former kind of notice, while the law with regard to the latter is laid down by the court in an equally well established line of decisions. *Lanesborough* v. *New Ashford*, 5 Pick. 190; *Holden* v. *Glenburn*, 63 Maine, 579.

PETERS, J. A notice was given to the defendant town that Benton L. Blackwell had fallen into distress, when the true name of the pauper was "Bennetto" and not "Benton." The defendants need not have answered the erroneous notice. They were not required to investigate, in order to find out whether Bennetto was intended by Benton or not. They were not required to respond, even if they believed an error had been committed.

A want of response might have led the notifying town to see and correct the error. *Shelbourne* v. *Rochester*, 1 Pick. 473.

But if the defendant town understood that Benton meant Bennetto, and made an answer, taking no exception to the notice on account of the error in it, then the notice should be regarded as a good one. The conduct of the overseers in such a case would be a waiver of the defective notice. They accept the notice, instead of rejecting it. They thereby admit that the pauper was sufficiently identified to them. Otherwise, the officers of one town could too easily mislead and deceive the officers of another town. *York* v. *Penobscot*, 2 Maine, 1.

As a matter of fact, we have no doubt that the officers of Wilton knew what person was intended to be described as the pauper. The official correspondence and other admissible facts show it.

Judgment for plaintiffs.

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

J. WINSLOW JONES AND COMPANY, (Limited,)

vs.

PETER W. BINFORD.

Cumberland. Opinion February 22, 1883.

Contract.

J and B agreed in writing, that B should "the present season plant and cultivate with sweet corn suitable for packing, . . . [four acres] and when the corn is in proper condition for packing, he will from time to time, upon reasonable notice from J, gather and deliver to J, as wanted by J, all the corn raised on said land," at a certain factory; and J agreed to pay B "for all his corn so received," at a price named; and B further agreed "as fixed and liquidated damages," to pay J a certain price "for each and every canister of corn which shall be raised or grown" on the four acres, "and

which shall be sold to and be taken by any other person in violation of this contract or in diminution of the quantities so contracted to be delivered." *Held*;

1. A proper construction of the contract in suit, imposes upon J the obligation to pay the stipulated price for all the corn raised by B and delivered in accordance with the contract.

2. That when so delivered it is "received" by J without any act on his part.

3. That the reasonable notice, named in the contract, is for the benefit of J, and he cannot neglect to give it to the injury of B; and if neglected, it does not prevent nor excuse J from delivering the corn when in proper condition for packing.

4. That the forfeiture is liquidated damages.

ON REPORT from the superior court.

Assumpsit upon the following contract:

"Contract for Sweet Corn Season of 1881.

"It is hereby agreed between J. Winslow Jones and Company, (limited) of the one part and the other subscribers hereto, each for himself, that each of said subscribers will the present season plant and cultivate with sweet corn suitable for packing, the quantity of land hereunto set against his name, and when the corn is in proper condition for packing, he will from time to time, upon reasonable notice from said company, gather and deliver to said company as wanted by them all the corn raised on said land, at their factory in Hiram, the same to be there delivered in the husks in the usual and customary manner upon the same morning it is gathered.

"And said company agrees with each of said subscribers to pay him for all his corn so received, two and one-half cents per canister, which shall be packed in merchantable order with corn of such party, to be paid for in January, 1882.

"And each of said subscribers hereby agree as fixed and liquidated damages, to pay to said J. Winslow Jones and company, (limited) two and one-half cents per canister for each and every canister of corn which shall be raised by or grown on the farm of such subscribers, and which shall be sold to and be taken by any other person in violation of this contract, or in diminution of the quantities so contracted to be delivered to said company.

"It is furthermore agreed, that instead of the cans being counted, the corn shall be weighed as soon as cut off, and one pound and eleven ounces be reckoned equal to one can.

J. Winslow Jones and Company, (limited).
By J. W. Jones,
Managing Director."

"Date.	Names.	Residence.	Acres.
	P. W. Binford.	W. Baldwin.	4"

The writ was dated September 28, 1881.

The plea was the general issue.

Other material facts stated in the opinion.

C. P. Mattocks, for the plaintiffs, cited: *Babcock* v. *Wilson*, 17 Maine, 372: *Bell* v. *Woodman*, 60 Maine, 465; *Osgood* v. *Davis*, 18 Maine, 146; *Hancock* v. *Fairfield*, 30 Maine, 299.

Drummond and Drummond, for the defendant.

The so-called contract is a *nudum pactum*. The plaintiffs only agreed to pay for the corn "received" by them, but they do not agree to receive. A promise is a good consideration for a promise, but it must be absolute on each side. Chitty, Contr. 52.

The contract is void as being against the policy of the law. It is an unconscionable contract. It provides for the forfeiture of the whole value of the corn in case the defendant sells the corn to anybody else. He may fail to keep his contract in any other respect — not plant, or plant and use the corn himself, or let it ripen — and only be liable for actual damages. *James* v. *Morgan*, 1 Lev. 111; *Thomberough* v. *Whiteacre*, 2 Ld. Raym. 1164.

This clause of the contract is in general restraint of trade and void for that reason. 2 Chit. Contr. 983, note; *Alger* v. *Thatcher*, 19 Pick. 51.

This is not a large case in itself, but it is one of great importance to farmers and packers of corn.

DANFORTH, J. A breach of the contract in suit is not denied; but the defence is its invalidity for want of consideration and

illegality. That one promise is a good consideration for another is conceded. But it is claimed that here there is virtually no promise on the part of the plaintiff; that the contract is so cunningly worded that while there is in it a distinct, unqualified promise to pay for the corn "so received," there is under it no obligation to receive any. This depends upon the meaning of the words "so received," and that is to be ascertained by consulting the previous clause, which imposes the obligation resting upon the defendant.

In that clause the defendant agrees to plant and cultivate four acres of sweet corn and when the corn is in proper condition for packing, he will upon proper notice deliver to the plaintiffs as wanted all the corn so raised, "at their factory in Hiram." In the next clause, the plaintiffs agree to pay a price specified for all the corn "so received." The necessary inference is that the delivery provided for is the reception referred to. The one is the same as the other, and when the delivery is completed, so is the reception. As the delivery is incumbent upon the defendant, he has only to perform his duty in that respect, and the obligation on the part of the plaintiffs to pay follows necessarily. The clause is the same in effect and imposes the same obligation upon the plaintiffs as though it was a promise to pay for all the corn so delivered.

It is, however, further objected that the corn is to be delivered upon reasonable notice from the company and "as wanted by them," and that the company may avoid all liability by neglecting to give any notice, or by making other arrangements so that it will not want the corn. But the company accepted and signed the contract. It provides for the production and delivery of the corn. The very object and purpose of it is to supply a contemplated want, and the law would hardly authorize a party so contracting, to say to the other who had fulfilled his part of the obligation, "I have changed my mind and do not now want the corn and shall give no notice for its delivery." A party attempting such a wrong would be likely to find his attempt a failure upon the familiar principles of estoppel.

But he would find a still more serious difficulty in his way. The delivery rests with the other party. It is to be made when the corn is fit for packing. So far it is absolute and unqualified. The notice applies to that time and that only. It is to be given for the benefit of the receiver and not of the one who is to deliver. If the party receiving chooses to waive it, it does not change or control the right to deliver within the specified period. Then the obligation to deliver is not conditional upon its being wanted; that is taken for granted. The language of the contract is not to deliver *if* wanted, but *as* wanted, that is, as it can be used during the time it is fit for packing.

The only fair construction which can be given to this contract and the one which expresses the meaning of the parties better than any other, is that the defendant undertakes to plant and cultivate a specified quantity of land to sweet corn and deliver what is so raised at the plaintiffs' factory when fit for packing, when notified if reasonable notice is given, or if no reasonable notice is given, he may still deliver it during the time specified, and for all the corn so raised and delivered, the plaintiffs must pay the stipulated price. Thus it is a simple contract for the production, sale and purchase of personal property. This construction relieves it from objection on the ground of any alleged illegality, as well as from want of consideration. The clause providing for damages in case of non-fulfillment must stand or fall upon its own merits, and though its proper construction may be, to some extent, controlled by the other provisions, yet it can not affect their validity.

The proper construction and the validity of the clause relating to damages is of much more doubt and difficulty. It is evident that if we are to construe it as simply a prohibition to sell corn to any other person, and a penalty attached for doing so, it would be against the policy of the law and void as in restraint of trade and tending to a monopoly. *Alger* v. *Thatcher*, 19 Pick. 51.

But this of itself is not a contract. It is simply an appendage to one. The contract is not in restraint of, but rather an encouragement to trade. There is sufficient in the provisions of the contract

and in the evidence reported to show that the plaintiffs were in the possession of a factory, with the necessary fixtures for canning corn; that corn fit for this purpose could not be obtained in the open market in sufficient quantities to authorize the necessary expense in building, machinery and preparations required to carry on this business, but that to make it a prudent and safe business resort must be had to contracts like the one under consideration. It is equally true that without these factories, there would be no sufficient market to warrant the raising of this kind of corn to any great extent, and no owner of land could prudently or safely devote it to any great extent to this purpose unless he first had a reasonable assurance of a market and such as would not be likely to be obtained except by contract. It is evident that these contracts are for the mutual interest of each party; on the one hand creating a market where none would otherwise exist and on the other producing a supply when otherwise none could be had. This has no tendency to prevent competition, for none could exist before a market is created, while the whole field for raising, selling or canning corn is open as broadly to the world as though no contracts were made, and public policy does not, nor does a wholesome competition require, that persons should be at liberty to sell their merchandize more than once.

An examination of this clause shows that the forfeiture is not for the sale of the corn raised by the defendant, to other persons, but for that which is sold "in violation of this contract, or in diminution of the quantities so contracted to be delivered to said company." The violation of the contract by a neglect to plant, the conversion to his own use, or the gratuitous supply of friends, is left to the general provisions of law. The forfeiture applies only where there is the greatest danger of a breach, and when the breach must necessarily be wilful on the part of the defendant with the means of compliance in his own hands. Surely of this, it is not for the defendant to complain.

It is evident, also, that this forfeiture must be considered as liquidated damages and not as a penalty. The defendant has so said, explicitly and without any qualification. True, this is not conclusive. Though this part of the contract, like all the others,

is to be construed so as to carry out the intention of the parties, yet to ascertain that intention we are to examine the words used, its nature, the purpose to be accomplished, and all its parts. For this purpose the statement of the parties, though not conclusive, is strong evidence and sufficient unless overcome by other tests which are to be applied. In this case the tests to be applied corroborate and confirm this statement rather than weaken it. One of the most usual and certain tests is, where otherwise the damages "would be wholly uncertain, and incapable, or very difficult of being ascertained except by mere conjecture." Another is, "where the agreement is in the alternative to do some particular thing or pay a sum of money" or the sum "is payable for one breach of contract." Sedgwick on Dam. 5th ed. 478, 481; 3 Parsons on Cont. 159; *Dwinel* v. *Brown*, 54 Maine, 468; *Lynde* v. *Thompson*, 2 Allen, 456; *Hall* v. *Crowley*, 5 *Id.* 304; *Chase* v. *Allen*, 13 Gray, 42; *Higginson* v. *Weld*, 14 *Id.* 165.

In this case we find all the tests clearly defined and emphatic. The damages caused by a breach must necessarily be uncertain and incapable of being ascertained. The plaintiffs could not go into a market and make up their loss. The profits could not be ascertained and the amount would be too uncertain and contingent to admit of proof; and it would be the same as to the loss, as the preparation for using the corn must be made in advance of its use, and involves so great a variety of matters that the loss arising from the failure of any particular contract would not be susceptible of satisfactory proof. Thus it is evident that the parties themselves could come to a very much more satisfactory conclusion as to the damages than would be possible for a jury. Here, too, the agreement is in the alternative, to deliver the corn or to pay a definite sum of money, wherein the defendant having deliberately elected not to perform one of the alternatives cannot now refuse to perform the other. The sum payable is for one breach, single in itself, though modified as to extent.

Nor can the forfeiture in this view be considered excessive or unjust. It is graduated so as to compare with the extent of the breach, and though the forfeiture equals the amount which would

have been paid for the corn, yet it by no means follows that it was the full value of the corn, for that has not been and probably cannot be shown. The price to be paid may have been a full compensation for all the defendant promised to do and yet the non-delivery may have been a greater loss to the plaintiffs than the compensation received. It may be for aught that appears, that the defendant has found more profit in the violation, than in the keeping of his contract. It is certain that for some reason he has elected the former rather than the latter, and the forfeiture does not appear to have been sufficient to have accomplished what was evidently intended, the prevention of that competition which is the result of rivalry or ill will and results in injuries inflicted rather than in honest dealing and a wholesome increase of business.

The defendant delivered to other parties one thousand eight hundred and eighty-one cans of twenty-six ounces each, equal to one thousand eight hundred and eleven cans of the size to be delivered the plaintiffs. Three-fourths of this grew upon the six acre lot, four acres of which were selected for the plaintiffs. It is a fair inference that the four acres produced two-thirds as much as the six. This would leave one-half the whole or nine hundred and five cans which the defendant should have delivered but did not. This number at two and one-half cents each makes twenty-two dollars and sixty-two cents.

Judgment for the plaintiffs for twenty-two dollars and sixty-two cents and interest from date of writ.

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

M. G. PALMER *vs.* HENRY C. HIXON.

Cumberland. Opinion February 22, 1883.

Insolvent law. Constitutional law.

The insolvent law of 1878 was a valid law when enacted, though its operation was suspended by the United States bankrupt law then existing. When the repeal of the bankrupt law took effect the insolvent law went into operation, and took cognizance of all acts within its provisions done while it was so suspended, and applied to contracts made during that time.

ON EXCEPTIONS from superior court.

Assumpsit on three promissory notes, dated April 26, 1878. Writ was dated January 23, 1880. Plea, discharge in insolvency. The presiding justice held that the discharge in insolvency relieved the defendant from liability on the notes in suit, and the plaintiff alleged exceptions.

J. H. Fogg, for the plaintiff.

The insolvent law of 1878 was in violation of Constitution of U. S. Art. 1, § 8; *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *Baldwin* v. *Hall*, 1 Wall. 223.

But this court has passed upon this point. *Damon's appeal*, 70 Maine, 153.

The case last cited fully sustains the position that the insolvent law did not go into operation till the repeal of the bankrupt law September 1, 1878.

The notes in suit were made before the insolvent law went into operation. It was at a time when that law was not in force. The contract was made with reference to the law in force at the time.

The bankrupt law as effectually postponed the operation of our state law as though the legislature had so specially provided in the act itself. *Damon's appeal*, *supra*. And if the act had thus provided, then debts contracted prior to September 1,

1878, would not be affected by it. *Washburn* v. *Bump*, 10 Met. 392; *Austin* v. *Caverly*, 10 Met. 332.

Drummond and Drummond, for the defendant, cited: *Atkins* v. *Spear*, 8 Met. 491; *Swan* v. *Littlefield*, 4 Cush. 574; *Ward* v. *Proctor*, 7 Met. 318; *Lothrop* v. *Highland Foundry Co.* 128 Mass. 120; *Rankins* v. *R. R.* 1 B. R. 647; *In re Bloss*, 4 B. R. 147.

DANFORTH, J. The notes in suit in this case are dated April 26, 1878. The defendant filed his petition in the insolvent court November 5, 1879, and on April 6, 1881, obtained his discharge from all debts provable under said law and which were existing at the time of filing said petition. These notes are so provable and were so existing. They, therefore, come within the terms of the discharge, which appears to be in conformity with the law and is therefore a good defence to the action, unless the law is invalid in whole, or so far as it is applicable to these notes. That the state has the constitutional power to pass an insolvent law, has been considered as settled since the case of *Sturgis* v. *Crowninshield*, 4 Wh. 122, and the validity of the act of 1878, was settled in *Damon's case*, 70 Maine, 153. The only qualification to this power is found in the constitution of the United States, giving congress power "to establish uniform laws on the subject of bankruptcies throughout the United States." In the cases referred to it is held that this clause is not prohibitory upon the states, but that the exercise by congress of the power thus granted suspends that of the states, and that the state law is not annulled, but its operation suspended while the national law is in force.

Admitting this proposition, it is still urged that it is inoperative as to these notes, as it was not in force when they were given, and if so applied it would be void as impairing the obligation of a contract.

The constitution of the United States provides that "no state shall pass any law impairing the obligation of contracts." Our own state has in its constitution a similar provision. It is beyond question that a state insolvent law so far as it is made

applicable to contracts made before its passage, is in violation of this provision of the constitution, and whatever may be its terms, it cannot be so applied, though it may be valid as to subsequent contracts.

Thus the simple question presented in this case is, whether the act of 1878, was, within the meaning of the constitution, passed before April 26, 1878. If we look at the act itself the question is easily settled. From that it appears that the last legislative act necessary to make it a complete law, including the approval of the Governor, was done as early as February 21, 1878. After that time nothing was left to be done to make it a completed act, so far as the legislature is concerned, and from this time it would seem to be a passed act. It certainly was never passed afterwards, and yet it is now in full force and operation. When approved it became an existing act, a statute of the state, a part of the policy of the state, and as such entered into the contracts made in the state so far as applicable, and in the sense of the constitution as defined in *McCracken* v. *Hayward*, 2 How. 612, where it is said, "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in *existence* when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other." It would seem to follow that the insolvent act entered into and became a part of the contract in suit, and its application to such contract does not impair its obligation. In *Smith* v. *Morrison*, 22 Pick. 430, it was held that a law limiting certain actions to six years, passed November 4, 1835, to take effect May 1, 1836, was valid, notwithstanding the limitation took effect at the same time the law did. This was on the ground that the statute was passed November 4, 1835, and the time between that and May 1, following, when it went into effect, was a reasonable time in which creditors might commence their actions. The necessary inference is, that the passage of the act was sufficient to give

notice and warning to all persons interested, to be prepared for the change which would result when it should take effect.

To the same effect is *Swan* v. *Littlefield*, 4 Cush. 574, in which it was held that a discharge under the bankrupt act may be impeached by proving fraudulent acts of the bankrupt which took place between the time when the act was passed, and the time when it took effect. In the opinion, quoting from Judge STORY, it is said, "The act became a law by the very terms of the constitution of the United States, as soon as it was approved by the President, although its operation was suspended until the first of Feburary, 1842." So the insolvent act of 1878 became a law when approved, though by a general law of the state its operation was suspended for thirty days after the adjournment of the legislature, and from that time became the policy of the state and a sufficient notice to all persons interested that contracts subsequently made would be subject to its provisions.

But if under the law of the state it is thought proper to allow the thirty days after the adjournment of the legislature for those interested to obtain a knowledge of its provisions and hold that until that time has elapsed the act shall not have any effect whatever, still it would become a law on March 24, 1878, and previous to the origin of the notes in suit. But it is claimed that it was still further suspended until the repeal of the bankrupt law which took effect September 1, 1878, subsequent to the date of the notes. But it is certain that this repeal of the bankrupt law did not create the insolvent law. It in fact had no influence whatever upon its provisions. They remained the same after as before. The one was the act of one government, the other the act of another government. But the bankrupt law having the superior authority while in force must prevail; when repealed it simply removes an obstacle to the operation of the insolvent law, and that at once, without any legislative act, of its own force, goes into operation. It had sufficient validity of its own, to be operative. It was then, by its own terms a law, suspended indeed, but unless a law, nothing to suspend, nothing

to become operative when the suspension ceased. This was decided in effect in *Damon's case*, *supra*, in which it is said, "It is urged that the law was invalid because it did not go into complete operation after its passage. But that is not requisite to its validity. It does go into partial operation on its passage. It was a law valid in all respects and to be obeyed, except so far as it was in conflict with the statute of the United States." If, then, it was a valid law, when permitted to operate, it must operate upon all acts done under it since its passage, or certainly while suspended.

In accordance with these views we find the decisions in Massachusetts, where similar questions have arisen. In *Ward* v. *Proctor*, 7 Met. 318, it was held that an attachment made while the insolvent law was suspended was dissolved by it, when the suspension ceased. On page, 321, SHAW, C. J., says, "The insolvent law, during its suspension, existed for many purposes. It was suspended only during the existence of another system of paramount authority, designed for the accomplishment of the same purpose. . . When, therefore, the operation of this suspending law ceased, the original act was reinstated in active operation, *and took effect from its original enactment.*" *Atkins* v. *Spear*, 8 Met. 490; *Austin* v. *Caverly*, 10 Met. 332; *Washburn* v. *Bump*, *Id.* 332; *Lothrop* v. *Highland Foundry*, 128 Mass. 120, are to the same effect, all holding that an insolvent law suspended by the superior authority of a bankrupt law, when the suspension ceases, will take effect from its enactment and take cognizance of all acts within its provisions though done while it was thus suspended.

Exceptions overruled.

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

GEORGE LIVERMORE, in replevin, *vs.* JOSEPH WHITE.

GEORGE M. RICHARDSON, in replevin, *vs.* SAME.

Kennebec. Opinion February 22, 1883.

Hides in vats. Property abandoned, derelict, lost. Treasure trove. Replevin.

The owner of a tannery, when removing his hides, omitted to remove all. The tannery was sold, and many years after, the plaintiff, while laboring for the defendant in erecting a factory on the premises, discovered the hides so left. *Held;*

1. That the owner of the hides or his representative, had not lost their title to the same.

2. That the finder acquired no title to the same, they being neither lost, abandoned, nor derelict, nor treasure trove.

ON EXCEPTIONS from the superior court.

These two actions depending upon the same facts were replevin for certain sides of unfinished leather. The plaintiffs claim title as finders.

The facts are stated in the opinion.

S. S. Brown, for the plaintiff in each case.

There can be no doubt that the hides were placed in the vats by some one forty or fifty years ago, for the purpose of tanning, and with the intention to take them out when sufficiently tanned. Two vats were discovered by Livermore, and one by Richardson.

There is no evidence that there was a person living, at the time of the discovery, who knew of the existence of this leather. The defendant claims no title only the right of possession.

The instruction of the presiding judge in relation to abandoned property was too restricted. It was confined to property designedly abandoned with the intention at the time of parting with it. We say that abandonment might have occurred after the hides were in the vats, and the fact that no one had called for them for forty-three years was evidence from which a jury

might have inferred such an abandonment. But the instruction took this consideration entirely from the jury.

In the case of *McLaughlin* v. *Waite*, 5 Wend. 405, the court say, "If chattels are found secreted in the earth or elsewhere, if the owner cannot be found, he is presumed to be dead, and that the secret died with him. In such cases the property belongs to the sovereign." In this case the property was found in the earth. We prove that the person whom defendant says was the owner, to be dead. The property then "belongs to the sovereign." That is, the people; and R. S., c. 98, § § 10 to 14, provides for its disposition.

The rules of law applicable to treasure trove apply to this property. See Dane's Abr. c. 76, art. 7.

This case differs from those where chattels are laid down and carelessly overlooked, and left by the owner on the desk of a banker, the table of a barber, the counter of a tradesman, the seat of a coach or car, where they have been regarded as left in the custody of the banker, barber, tradesman, coachman or conductor. See Wells, Replevin, § § 116, 117; 11 R. I. 588; 21 Ala. 240; 14 Johns. 293; 116 Mass. 42; 17 Wend. 460; 6 Phila. 18.

The owner of the soil is not the legal custodian of the property found within it. Such a rule would be directly in conflict with the long settled principles of law applicable to treasure trove. 2 Kent's Com. 356, 360; Dane's Abr. § 516; 1 Bl. Com. 295; 1 Met. 112; 7 E. Law and Eq. 424.

Baker, Baker and Cornish, and *Joseph E. Badger*, for the defendant, cited: Bouvier's L. Dict. "Treasurer trove"; 1 Bl. Com. * 295; 20 Vin. Abr. 414; 7 Com. Dig. 649; *Lawerence* v. *State*, 1 Humph. 228 (34 Am. Dec. 644); *Hamaker* v. *Blanchard*, 90 Penn. St. 377, (35 Am. Rep. 664); *State* v. *McCawn*, 19 Mo. 249; *Tancil* v. *Seaton*, 28 Gratt. 601, (26 Am. Rep. 380); *Haslem* v. *Lockwood*, 37 Conn. 500; *Regina* v. *Peters*; *Amory Delamivie*, 1 Strange, 505; *Bridges* v. *Hawkesworth*, 7 Eng. L. and Eq. 424; *Bowen* v. *Sullivan*, 62 Ind. 281, (30 Am. Rep. 172); *Lawerence* v. *Buck*, 62 Maine, 275; *McAvoy* v. *Medina*, 11 Allen, 548; *Kincaid* v. *Eaton*,

98 Mass. 139; *Regina* v. *Rowe*, Bell's C. C. 73; *Barker* v. *Bates*, 13 Pick. 255; 12 Am. Law Rev. 706; 2 Kent's Com. 357.

APPLETON, C. J. This is an action of replevin for certain hides of tanned leather. The plaintiff's only title is as finder of them as lost goods. The verdict being against him, exceptions were duly filed to the rulings of the presiding justice, which have been very elaborately and ably argued.

It is in proof that in 1840, Edward Southwick was then owning and carrying on a large tannery, containing seven hundred and eleven vats of which the vats in question were part; that he sold the tannery to Southwick and Weeks who occupied a portion of the vats, not occupying the outside vats; that Edward Southwick died shortly after his conveyance of his estate; that the same passed to the Vassalboro' Manufacturing Company, which erected its mills thereon over twenty years ago; that the defendant is their agent and servant; that while the company were digging to lay a foundation for a brick building in addition to their present erection, the plaintiff, a servant in their employ, discovered the vats and the leather therein, by virtue of which discovery he claims title thereto.

It further appeared that these hides were identified as hides placed in the vats by Edward Southwick, and omitted to be taken when his vats were emptied.

(I.) Upon the question of abandonment the jury were instructed that if they should "find that the owners, for any reason satisfactory to themselves (at that time) intentionally abandoned these hides, expecting that the first finder, the first explorer or excavator should take possession and enjoy the property and the benefit . . with an intention of the owner or agent not to resume possession, and not to claim any control or dominion over them thereafter, finally relinquishing all interest in them . . then these finders, under the rules given, would have a right to the possession as against all persons whatsoever," — but if they should find that Edward Southwick or his agent or . . . "any owner whoever he may have been, of these hides, intentionally, carefully, voluntarily and in the ordinary course of business, placed them there as his

property, and they were accidentally or inadvertently overlooked and forgotten, they remained the property of such owner or the heirs of such owner or of his estate to the present time."

This instruction is correct. Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. Here the act was one of preservation— the proprietor expending labor upon his property thereby to enhance its value. It was an act which excludes the very idea of abandonment.

In *McLaughlin* v. *White*, 2 Wendell, p. 405, Chancellor WALWORTH, says, "If chattels are found secreted in the earth or elsewhere, the common law presumes the owner placed them there for safety intending to reclaim them. If the owner cannot be found, he is presumed to be dead, and that the secret died with him. In such cases, the property belongs to the sovereign of the country as the heir to him who was the owner; but if they are found upon the surface of the earth or in the sea and if no owner appears to claim them, it is presumed they have been intentionally abandoned by the former proprietor and as such, they are returned into the common mass of things, as in a state of nature. They consequently belong to the finder or first occupant, who thinks fit to appropriate them to his own use. 1 Bl. Com. 308; 2 *Id.* 402." Here there was no secreting of the hides; no intentional abandonment and the estate to which the property belongs is known. The only title of the plaintiff is by finding, but under the circumstances, he acquires no right to the property.

The civil law recognizes the title by finding, by occupation, which gives property in a thing which previously had no proprietor. *Quod enim ante nullius est, id naturali ratione occupanti conceditur.* Inst. 2, 1, 12. If a thing already had an owner, it is only by dereliction by him that it can be appropriated by occupation. Dereliction or renunciation properly requires both the intention to abandon and external action. Thus the casting overboard of articles in a tempest to lighten the ship, is not dereliction as there is no intention of abandoning the property in the case of salvage. Inst. 2, 1, 48. Nor does the mere

intention of abandonment constitute dereliction of property without a throwing away or removal, or some other external acts, and herein dereliction of property differs from dereliction of possession, which does not require the second element. "There is this difference between dominion and possession, — that dominion continues after the will to own has ceased, whereas possession ceases with the will to possess." Poste's Gaius, 170.

By Hadrian's law, when treasure was found by any one on his own land, it became his property, but if found accidentally on the land of another, one-half belongs to the finder and the other half to the owner of the land. This rule is adopted in the French code. Code Civil Act, 713; Mackenzie's Roman Law, 170.

(II.) Nor can this be deemed treasure trove, which is thus defined in Jacob's Dictionary. It is "where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs." Nothing is treasure trove but gold or silver. "It is not treasure trove if the owner can be known. Nor though the owner be dead; for his executor or administrator shall have it." Com. Dig. Art. Warp. G. All the elements constituting treasure trove are wanting. Here was no hiding. Here was no secrecy. The owner was known. The deposit was not for concealment but in the usual and ordinary mode of business.

(III.) This is not a case of lost goods. The owner is shown. They belong to his estate. The title of the finders vanish when the owner is known. These goods were not lost. The facts negative a loss by the owner. The hides were through carelessness left in the vat. If the fact of their being there was forgotten by the owner, they are none the less his,— and though forgotten they are not lost. They remained in the vats subject to his control. In *McAvoy* v. *Medina*, 11 Allen, 548, it was held that placing a pocket book voluntarily by a customer upon a table in a shop, and accidentally leaving it there or forgetting to take it, is not to lose it within the sense in which the authorities speak of lost property. "To discover an article voluntarily laid down by the owner in a banking room and upon a desk provided for such persons having business there, is not the finding of a lost article," remarks WELLS, J., in *Kincaid* v. *Eaton*,

98 Mass. 139. "Property is not lost in the sense of the rule," observes TRUNKEY, J., in *Hamaker* v. *Blanchard*, 90 Penn. 577, "if it was intentionally laid on the table, counter or other place by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody." "The loss of goods," the court say, in *Lawrence* v. *State*, 1 Humphrey, 228, "in legal and common intendment, depends on something more than the knowledge or ignorance, the memory or want of memory of the owner as to their locality at any given moment. . . To lose is not to place anything carefully and voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder the owner's will was not employed in placing it there."

The instructions upon the controverted questions were correct. Hides in a vat for the purpose of tanning, though not removed when the other vats are cleared, are not to be deemed abandoned or derelict, — nor though remaining in the vats for a long period through the forgetfulness of their owner or the ignorance of his representative, are they to be considered lost, so that the finder thereby acquires a title to them. Nor can the finding be deemed treasure trove, for there was no gold or silver hidden, and no hiding. . .

Exceptions overruled.

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

JOHN F. SMITH *vs.* JOHN T. WEDGWOOD.

York. Opinion February 22, 1883.

Bond. Penalty. Liquidated damages.

When a bond is given in the sum of five hundred dollars, to be paid on the failure to make a drain for a certain purpose and in a specified time, the sum is to be regarded as a penalty and not liquidated damages.

A sum of money in gross, to be paid for the non-performance of a contract, is, as a general rule, to be considered as a penalty and not liquidated damages.

ON REPORT.

Debt on bond. Writ dated May 3, 1880.

The opinion states the case and material facts.

George T. Clifford and Henry Hyde Smith, for the plaintiff.

The defendant had his election to construct the drain or pay five hundred dollars.

Such a covenant the courts have no equitable ground for rescinding or disturbing, as will appear from the following citations: *Gammon* v. *Howe*, 14 Maine, 250; *Gowen* v. *Gerrish*, 15 Maine, 273; *Dwinel* v. *Brown*, 54 Maine, 468.

(In *Caswell* v. *Johnson*, 58 Maine, 164, a majority of the court, it is true, decide that the sum named in the bond is a penalty; but this case may be easily distinguishable from the one at bar, inasmuch as it is not difficult to determine the damages where a breach of the bond may consist in the sale at retail of a few oysters.) *Holbrook* v. *Tobey*, 66 Maine, 410, and cases cited and digested in the able opinion of the court. *Chamberlain* v. *Bagley*, 11 N. H. 234; *Brewster* v. *Edgerly*, 13 N. H. 275; *Mead* v. *Wheeler*, 13 N. H. 351; *White* v. *Dingley*, 4 Mass. 433; *Curtis* v. *Brewer*, 17 Pick. 513; *Hodges* v. *King*, 7 Met. 583; *Chase* v. *Allen*, 13 Gray, 42; *Lynde* v. *Thompson*, 2 Allen, 456; *Leary* v. *Laflin*, 101 Mass. 334; *Tingley* v. *Cutler*, 7 Conn. 291; *Slosson* v. *Beadle*, 7 Johns. 72; *Pearson* v. *Williams*, 26 Wend. 630; *Bagley* v. *Peddie*, 16 N. Y. 469; *Cotheal* v. *Talmage*, 5 Selden, 551; *Streeper* v. *Williams*. 48 Penn. St. 450; *Williams* v. *Green*, 14 Ark. 315; *Watts* v. *Sheppard*, 2 Ala. 425; *Durst* v. *Swift*, 11 Tex. 273; *Harris* v. *Miller*, 6 Sawyer, C. C. (Or.) 319; *Huband* v. *Grattan*, 1 Alcock and Napier, 389; *Fletcher* v. *Dyche*, 2 T. R. 32; *Wafer* v. *Mocato*, 9 Mod. 113; *Lowe* v. *Peers*, 4 Burr. 2225; 2 Greenl. Ev. § 259; Am. Law Review, January, 1878, p. 286.

L. S. Moore, for the defendant.

APPLETON, C. J. This is an action of debt on a bond, to which is filed a brief statement alleging full performance.

On January 1, 1877, the defendant, by deed of warranty, conveyed the plaintiff a lot of land and the buildings thereon in Cornish village.

On the same day the defendant gave the plaintiff a bond in the sum of five hundred dollars, the condition of which is in these words — "that whereas said Wedgwood has this day conveyed to said Smith a certain parcel of real estate situate in Cornish village, being the late homestead of said Wedgwood, reference being made to said deed for a particular description of the same. Now, if said Wedgwood shall make or cause to be made a drain suitable in make and capacity to conduct the surface water from said premises, without use or injury to said premises in doing the same and shall complete the same within a reasonable time from the commencement of suitable weather for a purpose of that kind, then this obligation is void."

The defendant claims that all he was required to do was to remove the water that found its way into the driveway from the street and that this was accomplished by a ditch on the street, which he dug or caused to be dug.

The drain was to be sufficient "in make and capacity to conduct the surface water from the premises." The whole lot, not a portion of the premises, were to be freed from surface water. There was no drain on the premises. There was none made which in any degree can be deemed a compliance with the conditions of the bond. There is a breach of the bond.

The main question seems to be, is the sum of five hundred dollars to be regarded as liquidated damages, or merely as security for the damages actually sustained.

The general rule is that in bonds of this form, the penal sum named in the bond is to be regarded as a penalty and not as liquidated damages. *Henry* v. *Davis*, 123 Mass. 345.

It contains no expressions indicating that the parties had fixed a sum as the stipulated and ascertained damages for a breach. The sum is entirely out of proportion to the probable cost of a drain whose length, if over the whole lot would be but eight or

nine rods. What would be the expense of such drain would be no very difficult matter of ascertainment. An agreement to perform certain work within a limited time, under a certain penalty, is not to be construed as liquidating the damages which the party is to pay for the breach of his covenant. In general a sum of money in gross, to be paid for the non-performance of an agreement is considered as a penalty and not as liquidated damages. *Taylor* v. *Sandiford*, 7 Wharton, 13.

The tendency of the decisions is to regard a sum stated to be payable in case of the non-fulfilment of a contract as a penalty rather than liquidated damages, because in such case the damages will be only the loss sustained. Such is the equity of the matter. Indeed, the court will frequently regard a sum specified as liquidated damages to be a penalty, as *Ex parte Coffer*, 4 L. R. Ch. Div. 724, when as in a building contract, the sum of one thousand pounds was stipulated to be paid in case the contract be not in all things performed "as and for liquidated damages." But the court held this sum to be in the nature of a penalty and that the actual damage only was recoverable. When it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages or a penalty to cover actual damages, the courts hold it to be the latter. Here nothing indicates that the sum mentioned in the bond was, or was intended to be more than a penalty to cover the actual damages sustained in case of its breach. It must be deemed therefore a penalty.

In the cases cited, it is either expressly stated that a certain sum is to be decreed as liquidated damages or such is the unavoidable inference from the language of the bond. In *Bagley* v. *Peddie*, 16 N. Y. 469, the bond declared the obligors to be bound "in the sum of three thousand dollars as liquidated damages and not by way of penalty or otherwise." In *Pearson* v. *Williams, administrators*, 26 Wend. 630, the covenant was to build two brick houses, "in default of erecting such houses to pay on demand four thousand dollars." The contract was in the alternative — to do or to pay, and the sum definitely set forth to be paid in case of not doing. In *Lynde* v. *Thompson*, 2 Allen,

456, by the terms of the covenant either party failing to comply with the terms of the agreement, "the party so failing shall forfeit to the other party the sum of three hundred dollars which shall be paid in full." In *Leary* v. *Laflin*, 101 Mass. 335, the bond was in express terms for the payment of one thousand dollars "as liquidated damages." In *Holbrook* v. *Tobey*, 66 Maine, 410, the defendant bound himself in the sum of five hundred dollars not to keep a public house for five years, and the sum specified was held to be liquidated damages from the utter impossibility of fixing the damages actually sustained. This principle, while applicable to a certain class of cases can hardly be deemed as applying to one like the present. Indeed, where the damages are uncertain and wholly incapable of estimation, the penal sum may be regarded as liquidated damages. *Williams* v. *Daken*, 22 Wend. 201.

But it is hardly necessary to examine the multitudinous cases cited by the learned counsel for the plaintiff. They mainly rest on the peculiar phraseology of the instruments in question or the impracticability of ascertaining the damages arising from their breach.

The report, though exceedingly voluminous, affords no sufficient data for the estimation of damages.

The plaintiff is entitled to recover of the defendant the cost of building the drain contracted to be built and the damages from the non-fulfilment of his contract to the date of the writ — to be ascertained by some one to be appointed by the court in accordance with the agreement of the parties.

Judgment for the plaintiff.

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

WALTER F. WOODBURY *vs.* INHABITANTS OF KNOX.

Waldo. Opinion February 22, 1883.

School teacher. School agent. Superintending school committee. Stats. of 1871, c. 229; 1872, c. 87.

Where a school agent acts for a year as such under color of his election, he is an agent *de facto*, and his contract with the teacher is sufficient to bind the town, though the meeting at which he was elected was not duly notified, and he was never sworn as agent.

When a town has not empowered district agents to employ teachers as provided by stats. of 1871, c. 229, and 1872, c. 87, the power to employ teachers is with the superintending school committee, under R. S., c. 11, § 54.

When the superintending school committee have the employment of teachers in a town, and they examine and give a certificate to a teacher employed by a district agent, and visit the school soon after the commencement and approve the teacher's management, their conduct was held to be a ratification of the teacher's employment.

When after one day's notice to the teacher, the superintending school committee visited the school and made a full examination into charges against the teacher, and the teacher and his witnesses were fully heard, and no objection was made by him for want of due notice, nor any request for delay or to be heard further, the teacher thereby waived any objection to the notice, if insufficient, and is not entitled to his wages for teaching after being notified by the committee of his dismissal as the result of such investigation.

ON REPORT.

Assumpsit on account annexed for services for teaching school in school district number six in the defendant town, ten weeks, at twenty-two dollars per month, fifty-five dollars. The bill annexed to writ was dated January 28, 1882; the writ, March 14, 1882. Plea, general issue.

The opinion states the material facts.

F. W. Brown, for the plaintiff.

Thompson and Dunton, for the defendants.

LIBBEY, J. The plaintiff was employed by S. W. Woodbury as agent, to teach the public school in district number six in Knox. He was duly examined by the superintending school committee of the town, and they gave him a certificate in due form, authorizing him to teach in that district. He claims to recover for his services for ten weeks.

The defendants set up several grounds of defence against his right to recover. It is necessary to notice the following only.

I. It does not appear that the district meeting at which S. W. Woodbury was chosen agent, was duly notified, nor that he was sworn as agent. Under color of his election he acted as agent during the year, and was at least agent *de facto*. That is sufficient to bind the town by his contract with the plaintiff.

II. It is claimed that, by law, the district agent had no power to employ a teacher without a special vote of the town at the annual meeting, conferring such power. By R. S., c. 11, § 54, the superintending school committee shall employ teachers for the several districts in the town, and notify the several school agents of the teachers employed and the compensation agreed to be paid. By act of 1871, c. 229, as amended by act of 1872, c. 87, a town at its annual meeting may empower the district agents to employ teachers instead of the superintending school committee; and the power thus granted shall continue until otherwise determined by vote of the town.

The plaintiff does not prove that the town ever passed such a vote, and hence fails to show that the agent had power to hire him; but the evidence authorizes the inference that the superintending school committee were informed of the employment before they examined the plaintiff and gave him a certificate, and that soon after the school was commenced they visited it and approved the plaintiff's management. We think this should be held a ratification of the plaintiff's employment by them if the town had not conferred the power on the agent. It was their duty to employ the teacher; we cannot presume that they neglected their duty.

III. It is claimed that the plaintiff was duly dismissed from the school by the committee, December 26, 1881; and it is

proved that such was the formal action of the committee. But the plaintiff replies that the action of the committee was not valid, because they did not give him due notice of the time when they would examine into the charges made against him; and because their action was fraudulent.

The committee caused the plaintiff to be notified on the twentieth of December that they would visit the school on the next day. He admits that he understood the purpose for which they were to make the visit, and he was prepared for the examination, having his friends and witnesses present. A full examination into the charges made against the teacher, was made by the committee on the twenty-first of December. The teacher and his witnesses were fully heard, no objection being made by him for want of due notice. He made no request for delay or to be heard further. The committee held the matter under consideration till the twenty-sixth when they gave the plaintiff his discharge. We think that if the notice was insufficient the plaintiff waived any objection to it, and it is too late for him now to raise that objection. Upon a careful examination of the evidence we are not satisfied that there was any fraud or improper conduct on the part of the committee in their action; and therefore the plaintiff had no authority to teach the school after December 26. For his services prior to that time he has a right to recover. But it nowhere appears in the case how long he had taught prior to that time.

The order therefore is,

Defendants defaulted. Damages to be assessed at nisi prius in accordance with the opinion.

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

WILLIAM DECKER *vs.* JOHN DECKER.

Somerset. Opinion February 22, 1883.

Executors and administrators. Sales of real estate. Probate practice.

When the administrator is next of kin, no notice is required prior to granting administration.

When an offer, made for the purchase of land, is deemed advantageous by the administrator and upon his petition, after publication of order of notice thereon, in accordance with R. S., c. 71, § 5, license is granted by the judge of probate to accept the same upon giving the required bond, the land is sold and a deed given to the purchaser, it is no defence to a real action brought by one holding under such deed, that the administrator did not account for the price of the land sold. In such case the remedy of the parties interested is on the bond.

When the judge of probate has jurisdiction his decree is conclusive where there is no appeal.

When the administrator purchases property of the estate collusively, by an agent, the heirs may avoid the sale by proceedings in equity.

ON REPORT.

Real action to obtain possession of certain premises in Smithfield. Writ dated August 2, 1880. Plea, *nul disseizin.*

The demandant claimed title to one-quarter part of the premises, which were the property of Thomas J. Decker at the time of his death, as an heir at law to said deceased. The defendant claimed title under the deed of the administrator on the estate of said deceased.

The opinion states the material facts.

John H. Webster and S. H. Willard, for the plaintiff.

The widow not choosing to administer, all the heirs were entitled to a voice in selecting an administrator, and notice should have been given for that purpose. None was given. Stat. of 1874, c. 169, § 2.

The provision in the form of the license, requiring the administrator to be paid or fully secured before the delivery of the deed, is left out, and it nowhere appears that the administrator received a dollar for the conveyance. In fact he never did.

As administrator had only the interest of a trustee for creditors and others, he could not become a purchaser directly or through the intervention of a friend. *Pratt* v. *Thornton*, 28 Maine, 355; *Wormly* v. *Wormly*, 8 Wheaton, 421; *Boynton* v. *Brastow*, 53 Maine, 363; *Litchfield* v. *Cudworth*, 15 Pick. 31; *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 198; *Jennison* v. *Hapgood*, 7 Pick. 1; *Arnold* v. *Brown*, 24 Pick. 89, 96.

After the probate records showing want of jurisdiction and defects in the proceedings and evident indications of collusion were in, it was certainly competent for us to show fraud in those proceedings. It is only where the proceedings on their face are all regular, that parties that might have been heard are precluded from showing fraud. We offered to prove fraud which was objected to and excluded, without any reason assigned for either. *Fairfield* v. *Gullifer*, 49 Maine, 360; *Gross* v. *Howard*, 52 Maine, 192; *Moody* v. *Moody*, 11 Maine, 247; *Fowle* v. *Coe*, 63 Maine, 245; *White* v. *Briggs*, 27 Maine, 114; *Record* v. *Howard*, 58 Maine, 225.

Walton and Walton, for the defendant, cited: R. S., c. 64, §17; Luce's Prob. Prac. 45; *Bean* v. *Bumpus*, 22 Maine, 549; *Bates* v. *Sargent*, 51 Maine, 423; *Potter* v. *Webb*, 2 Maine, 257; *Pierce* v. *Irish*, 31 Maine, 254; *Simpson* v. *Norton*, 45 Maine, 281; *Harlow* v. *Harlow*, 65 Maine, 449; *Laughton* v. *Atkins*, 1 Pick. 535; *Paine* v. *Stone*, 10 Pick. 75; *Loring* v. *Sterneman*, 1 Met. 208; *Parcher* v. *Bussell*, 11 Cush. 107; Freeman on Judgments, 443.

APPLETON, C. J. The demandant shows a good title by descent to a part of the premises in controversy.

The title of the tenant is by a sale by himself as administrator on the estate of Thomas J. Decker, the father of the parties to this litigation, to Lucinda Decker, and a deed from her to him of the demanded premises.

It is objected that notice was not given, upon the petition for the appointment of an administrator. But the administrator being one of the heirs, and next of kin, notice was not required. *Bean* v. *Bumpus*, 22 Maine, 549.

An offer, deemed advantageous by the administrator, was made, and he petitioned the judge of probate for license to accept the offer made and notice thereof was given to the public by publication three weeks in a newspaper printed in the county where the land lay. R. S., c. 71, § 5. Leave being granted after proof of publication, license was granted, the land sold, a deed given to the purchaser as well as the bond required to protect those interested as creditors or heirs in the estate.

It is urged that the administrator had not received anything for the land sold and conveyed and that he has not accounted for anything as paid. It is enough to say that he is liable on his bond to account for the proceeds of the sale, which he has returned as made.

The judge of probate had jurisdiction. Having jurisdiction and there being no appeal, his decree in matters within his jurisdiction is conclusive. Such has been the uniform current of authority from the case of *Potter* v. *Webb*, 2 Maine, 257, to that of *McLean* v. *Weeks*, 65 Maine, 411.

The parties are heirs of Thomas J. Decker. The complainant might have contested the proceedings in the probate court, and if dissatisfied appealed therefrom. But not appealing, he cannot afterwards impeach the proceedings from which he might have appealed. *Harlow* v. *Harlow*, 65 Maine, 448.

It is sometimes a matter of complaint that notice is not given to parties interested in the settlement of estates. It is the duty of the probate court to watch carefully over its proceedings to see that there is no failure of justice from that cause. If the present requirements of the statute are insufficient, all that remains is for the legislature to make further provisions for giving all persons notice.

It is argued the administrator is a trustee for the creditors and that he cannot directly or indirectly purchase in the trust property for his own benefit. That is undoubtedly correct. *Litch-*

field v. *Cudworth*, 15 Pick. 31; *Boynton* v. *Brastow*, 53 Maine, 363.

It is claimed that this sale was made to the plaintiff's mother collusively and for his benefit. If so, the heirs may avoid the sale or confirm it as they or any one of them may deem expedient. This may be done by bill in equity. *Boynton* v. *Brastow*.

Plaintiff nonsuit.

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

FRANKLIN SMITH and others, *vs.* JOSIAH DUTTON and others.

Kennebec. Opinion February 22, 1883.

Poor debtors. Bond. Damages. Insolvency.

Where a poor debtor's bond became technically forfeited on account of the non-observance of the statute requirement that a debtor shall assign to the creditor personal property disclosed by him, the damages cannot be more than nominal, it appearing that the title of the property at the time of the disclosure had vested in the assignee of the debtor through proceedings in insolvency.

ON EXCEPTIONS from the superior court.

Edmund F. Webb and *Appleton Webb*, for the plaintiffs.

The fact that a poor debtor has filed a petition in insolvency does not relieve him from having the property appraised and a written assignment thereof deposited with the magistrates, so that whatever title there may be in the debtor may enure to the benefit of the creditor. R. S., c. 113, § 32; *Patten* v. *Kelley*, 38 Maine, 215; *Robinson* v. *Barker*, 28 Maine, 310; *Fessenden* v. *Chesley*, 29 Maine, 368; *Bachelder* v. *Sanborn*, 34 Maine, 230.

The debtor may never go any further in insolvency than to file a petition, and having shielded himself while he takes the poor debtor's oath, then withdraws the petition.

Plaintiffs claim damages at least to the extent of the value of the property thus disclosed and not assigned.

Folsom and Merrill, for the defendants, cited: Stat. 1878, c. 10, § 6; *Randall* v. *Kehlor*, 60 Maine, 37; *Mosher* v. *Jewett*, 63 Maine, 84; *Hanson* v. *Millett*, 55 Maine 189; *Kneeland* v. *Webb*, 68 Maine, 540; *Hazen* v. *Jones*, 68 Maine, 343; *Montine* v. *Deake*, 57 Maine, 37.

PETERS, J. In this case it appears that a poor debtor in due time and manner, made a disclosure of his affairs, and was admitted to the oath. He disclosed certain personal property which was appraised by the justices, and for thirty days or more left in their possession. The ruling at the trial was, that the bond was forfeited because the debtor did not leave in the hands of the justices a written assignment of the property to the creditors. Inasmuch, however, as the debtor was in insolvency at the date of the disclosure, only one dollar was awarded as damages.

The plaintiffs contest the ruling which gave only nominal damages. They argue that the debtor had not gone into the court of insolvency so far that he could not have retraced his steps, and thus evade the responsibilities of his bond and of insolvency proceedings also. The argument is not good. The answer is, that, at the time of the trial, when damages were assessed, it appeared that the insolvency proceedings, which had been commenced prior to the disclosure, were then so far completed that all the debtor's property had been conveyed to the assignee. The assignee's title vested in him as of the date of the commencement of proceedings in insolvency. Insolvent act of 1878, § 30. Had the property been regularly assigned to the plaintiffs, they would have got no title thereby and received no sort of advantage therefrom. The damages could not well be more than nominal. R. S., c. 113, § 52.

Exceptions overruled.

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

OTTO SHARP *vs.* ERNESTO PONCE.

Cumberland. Opinion February 22, 1883.

Sales. False representations. Law and fact.

A seller falsely represented to a person who purchased spectacles of him "that the spectacles were a new invention, that they were brilliants, and that he had never sold them to any one else in Portland." *Held*, it was a question for the jury, not the court, to determine whether this was a representation of material facts or not.

The purchaser examined but one parcel out of several bought by him; but the spectacles in all the packages were alike. He inquired at two places in town before purchasing, but obtained no information. He could tell nothing by his own inspection. He had no immediate means of testing the seller's statements. *Held*, it could not be properly ruled as a matter of law, that the purchaser was guilty of contributory negligence.

The purchaser is not required to tender back the goods in order to be entitled to have his damages deducted from checks, given by him for the goods, and upon which he is sued.

ON EXCEPTIONS from superior court.

Assumpsit on a bank check drawn by the defendant for two hundred and sixty seven dollars, on the National Traders Bank of Portland, and payable to the order of one H. Rosenburg, and by said Rosenburg indorsed in blank.

The writ was dated October 11, 1880.

The verdict was for two hundred eighty-four dollars and seventy three cents.

The material facts are sufficiently stated in the opinion.

Clarence Hale, for the plaintiff.

The plaintiff is an innocent holder of the bank check.

We have only defendant's statement as to the representations of Rosenburg, but if true, such representations were only "dealers' talk" and *caveat emptor* applies as in *Bishop* v. *Small*, 63 Maine, 14.

See *Brown* v. *Leach*, 107 Mass. 368, and cases cited: *Farrell* v. *Loveitt*, 68 Maine, 326; *Morris* v. *Thompson*, 16

Alb. Law J. 166; *Stewart* v. *Dougherty*, 3 Dana (Ky.), 479; *Peers* v. *Davis*, 29 Mo. 184; *Staines* v. *Shore*, 16 Pa. St. 200; *West* v. *Cutting*, 19 Vt. 536; *Crabtree* v. *Kile*, 21 Ill. 180; *Ricketts* v. *Hayes*, 13 Ind. 181; *Fortune* v. *Lingham*, 2 Camp. 416.

M. P. Frank, for the defendant, cited: Byles' Bills (5 Am. ed.) 241, and cases cited: Story, Prom. Notes, (7 Am. ed.) 242; *Thompson* v. *Hinds*, 67 Maine, 177; *Bierce* v. *Stocking*, 11 Gray, 175; *Hammatt* v. *Emerson*, 27 Maine, 308; *Holbrook* v. *Burt*, 22 Pick. 546; Benjamin, Sales, (2 Eng. ed.) 566 and cases cited.

PETERS, J. It was testified, that the seller of the spectacles said to the purchaser, "that the spectacles were a new invention; that they were brilliants; that he had never sold them to any one else in Portland." We think it should have been submitted to the jury to say whether this was a statement of material facts or not. As the case is presented to us, we must regard the representations as false. The defendant said, "these representations were false in every respect." The plaintiff argues that this was dealers' talk and puffing merely. We think a jury might, if they saw fit under all the circumstances, declare the talk to be a representation of facts. Spectacles might sell, other things equal, for more, because newly invented. A jury might regard them of more value because brilliants. It may be that brilliants of a new invention would sell better than common spectacles. The case is not a very marked one, perhaps, but we cannot say conclusively that there was not a case to be submitted to a jury. In connection with these statements is a considerable amount of exaggeration and falsehood, which the law does not notice. The fact, however, that the representations which the law will examine are found in such association, makes them none the less significant. The fact that five hundred and thirty-seven dollars were given for fifty dollars' worth of the goods, shows clearly enough that the defendant was somehow deceived and cheated. It should not have been ruled, as matter of law, that no defence was made out. *Teague* v. *Irwin*, 127 Mass. 217.

"It is not a fraudulent misstatement which avoids a contract, to say untruly that a particular article is a very good one of its class; though it is a misstatement to say that an article belongs to a class when it does not." 1 Whar. Cont. § 259.

The plaintiff contends that the defendant's want of ordinary care and caution caused his injury; that he cheated himself. It is said that he was at fault in not examining all the parcels. He examined one and the packages were alike. And he could not discover the fraud from any inspection he could make. He did pursue inquiry at two places, but ascertained nothing. The defendant had no immediate means of testing the seller's statements. By no means, can it be said, as matter of law, that the defendant was guilty of contributory negligence.

The point is taken by the plaintiff, that the defendant cannot defend because he has not tendered back the articles purchased. He would be required to do that if he commenced an action in pursuance of an attempted rescission; not obliged to do so in the position of a defendant where he merely seeks to have his damages deducted from the amount of the check upon which he is sued.

Exceptions sustained.

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

OLIVER MOSES and another, *vs.* ALBION W. MORSE.

Sagadahoc. Opinion February 23, 1883.

Deed. Evidence. Description.

Parol evidence is admissible to prove the contents of an unrecorded deed lost after delivery.

A deed was admitted in evidence containing this description: "A certain piece of land situated in said Phipsburg, near the east end of the old Winnegance mill-dam, and being the same land said to have been conveyed to said Reuben S. by his late father, Wm. Morse, and reserved from a farm con-

veyed to Albion W. Morse, dated July 10, 1859, and recorded," &c. &c. *Held;* That the description is definite, and contains enough to let in parol evidence to identify the premises conveyed.

ON EXCEPTIONS.

Trespass *qu. cl.*

The writ was dated May 21, 1879.

Each party claimed title to the *locus in quo.*

Plaintiffs put into the case a deed of William Morse to defendant. This deed contained the following reservation: "Except the lot deeded to Reuben S. Morse, reference to deed from me to said Reuben, bearing even date with this deed." Having proved that William executed a deed at the same time purporting to convey a tract of land to Reuben S. Morse, and having given evidence tending to prove the delivery and loss of the last named deed, unrecorded, the plaintiffs offered parol evidence of the contents of the deed. To this last evidence defendant objected, for the reason that the deed had not been recorded. The court admitted the evidence. To prove their title plaintiffs put in evidence that Reuben S. Morse had been adjudged a bankrupt; and then put into the case, among other papers not hereto material, the appointment of James D. Robinson as his assignee, and his deed to the plaintiffs. The opinion gives a copy of the description in this deed.

The presiding justice, for the purpose of the trial, instructed the jury that the deed was sufficient to convey same land, that the proceedings in bankruptcy and the assignee's sale were regular, and with the deed sufficient in law to vest the title in plaintiffs to whatever land Reuben had by William's deed.

C. W. Larrabee, for the plaintiffs, cited: R. S., 1840, c. 91, §26; R. S., 1871, c. 73, § 8; *Buck* v. *Babcock,* 36 Maine, 491; *Merrill* v. *Ireland,* 40 Maine, 569; *Lawry* v. *Williams,* 13 Maine, 281; 1 Greenl. Ev. § 558; *Page* v. *Page,* 15 Pick. 368; 2 Greenl. Cruise, c. 21, § 55; *Field* v. *Hoston,* 21 Maine, 69; *Moore* v. *Griffin,* 22 Maine, 354.

W. Gilbert, for the defendant.

There is nothing in the deed from William Morse to defendant to identify the premises conveyed to Reuben. Nor is there anything in any of the bankruptcy papers to identify and locate the premises.

The only approach to an identification is the deed of the assignee to the plaintiffs. That was of land "said" to have been conveyed, &c. Who "said"? What did they say? It is safe to assume that no conveyance was ever upheld by a description so vague, uncertain and indefinite. See *Larrabee* v. *Hodgkins*, 58 Maine, 412.

PETERS, J. If an unrecorded deed be lost after delivery, is parol evidence of its contents admissible? Is there a distinction, in this respect, between a lost deed recorded and one not recorded? We think such proof admissible. No statute prevents it. The statutes seek, in several ways, to make an unrecorded deed valid and available to those interested in or under it. It is but a rule of evidence that requires deeds to be recorded before introduced as evidence. The rule cannot require a deed not in existence to be recorded. Impossibilities are not required. The necessity of the case establishes an exception to the rule. The reason of the rule does not apply with all its force in such a case. *Valentine* v. *Piper*, 22 Pick. 85; *Palmer* v. *Paine*, 9 Gray, 57.

Of course, the parol evidence, to establish the loss, should be plenary.

It is contended that the immediate deed under which the plaintiffs claim title to the land in question should have been rejected for its indefiniteness and uncertainty of description. The description is this: "A certain piece of land situated in said Phipsburg, near the east end of the old Winnegance Mill Dam, and being the same land said to have been conveyed to said Reuben S. (Morse) by his late father, Wm. Morse, and reserved from a farm conveyed to Albion W. Morse (defendant), dated July 10, 1859, and recorded," &c. &c. The deed was admitted in evidence, and we think rightly.

Of course, the deed without evidence *ab extra* would prove nothing. A description in a deed rarely proves itself. The question is, whether the description is sufficient to let in parol

evidence to identify the premises. The general rule governing the question, deducible from the leading authorities, as stated by BARROWS, J., in *Cilley* v. *Childs*, 73 Maine, 133, is this: "A deed shall not be held void for uncertainty, but shall be so construed, wherever possible, as to give effect to the intention of the parties and not defeat it; and this may be done whenever the court, placing itself in the situation of the grantor at the date of the transaction, with knowledge of the surrounding circumstances and of the force and import of the words used, can ascertain his meaning and intention from the language of his conveyance thus illustrated." We refer to the discussion and citations in that case as ample authority for the admission of the deed here. Under proper instructions the jury found what premises were thereby really conveyed. *Dow* v. *Jewell*, 18 N. H. 341; *Robinson* v. *Brennan*, 115 Mass. 582.

Exceptions overruled.

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

JOSEPH R. WARNER *vs.* THE ARCTIC ICE COMPANY.

Sagadahoc. Opinion February 23, 1883.

Contract. Sales. "Fairly merchantable." Ice.

In an action for failure to deliver ice of the quality called for in a contract to deliver a certain number of tons "of ice," it is correct to instruct the jury: "Where a purchaser has no sufficient and reasonable opportunity to inspect the goods, before or at the time of the sale, and there are no circumstances, such as the smallness of price for example, to negative the presumption that goods of merchantable quality of the kind bargained for were meant to be bought, the purchaser has a right to expect a salable article of the description mentioned in the contract between them. And while the purchaser without special warranty cannot insist that the article should be of any, especially, particularly, good, quality, there would be an implied warranty on the part of the seller that it is of fairly merchantable quality."

At the trial the presiding justice, without objection being made, submitted this question for special finding to the jury: "Was or was not the ice on

board these vessels, fair, merchantable ice for the market for which both the parties knew it was intended, when it was put on board at Woolwich?" and the jury answered, "It was." Exceptions being taken to the submission of this inquiry; *Held*, No error.

The received definitions of the word "fair," show that it is well adapted to convey the idea of mediocrity in quality, or something just above that.

ON EXCEPTIONS.

Assumpsit for failure to deliver ice called for by the following and one other similar contract:

"James B. Drake,
"Ship and Insurance Broker,
"Granite Block, Front Street,
"Bath, Me., Jan. 22, 1880.

"Sold to J. R. Warner, three thousand tons of ice, more or less, enough to load two ships, at $1.50 per ton, f. o. b. packed suitably for shipment to New Orleans. Said ice to be taken on or before November first, eighteen hundred and eighty.

Frank O. Moses, Treasurer Arctic Ice Co."

"Accepted as above.

J. R. Warner, by J. B. Drake."

"In consideration of five per cent. commission, I agree to pay for the above ice within thirty days from date of shipment.

Jas. B. Drake."

"Bath, May 10, 1880. It is agreed by the parties hereto, that 3200 tons fills this contract complete.

Frank O. Moses, Treasurer.
J. B. Drake."

The plea was general issue.

At the trial the presiding justice submitted the question recited in the head note for special finding of the jury, without objection from either party.

Other material facts are stated in the opinion.

W. Gilbert, for the plaintiff.

The question submitted to the jury was erroneous for two reasons: (1.) It assumes that both parties knew that the ice contracted for was intended for a certain market. It does

not follow because it was to be packed suitably for a voyage to New Orleans that both parties knew it was intended for that market. The fact assumed should have been submitted to the jury. It amounted to an expression of an opinion by the court. (2.) The qualification of merchantable ice by the use of the word "fair" or as expressed in the instructions by the word "fairly."

The counsel contended in an able argument that the use of those words was calculated to lower the obligations of the defendants, and cited: Kent's Com. 479, note a, — original ed. citing: *Howard* v. *Hoey*, 23 Wend. 350; *Moses* v. *Mead*, 1 Denio, 378.

C. W. Larrabee, for the defendants.

SYMONDS, J. In the trial of the present case, the court was dealing with what at its date was an executory contract for the delivery of ice at a future time; and with the question whether the defendants had broken the contract by a failure to deliver ice of the quality and in the condition required. The few sentences from the charge which are contained in the bill of exceptions show the following ruling to have been given. "Where the purchaser has no sufficient and reasonable opportunity to inspect the goods before or at the time of the sale, and there are no circumstances, such as the smallness of price for example, to negative the presumption that goods of a merchantable quality of the kind bargained for were meant to be bought, the purchaser has a right to expect a salable article of the kind mentioned in the contract; and while the purchaser without special warranty cannot insist that the article shall be of any especially, particularly, good quality, there would be an implied warranty on the part of the seller that it is of fairly merchantable quality."

No claim appearing to have been made that the price was inadequate, or that other circumstances existed to negative the presumption to which the court referred, that qualification of the ruling need not be considered. In all respects to which the exceptions relate, the instruction is fully sustained by authority.

"In every contract to supply goods of a specified description, which the buyer has no opportunity to inspect, the goods must not only answer the specific description, but must also be salable or marketable under that description. In the words of Lord ELLENBOROUGH, in *Gardiner* v. *Gray*, 4 Camp. 143, without any particular warranty this is an implied term in every such contract." *Jones* v. *Just*, L. R. 3 Q. B. 197, 205; *Morley* v. *Greyson*, L. R. 4 Ex. 49, 52; *Harris* v. *Waite*, 51 Vt. 480; *Merriam* v. *Field*, 39 Wis. 578; *Hastings* v. *Lovering*, 2 Pick. 220; *Swett* v. *Shumway*, 102 Mass. 365.

"The fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what in or according to the contract is the real mercantile or business description of the thing which is the subject matter of the bargain of purchase and sale, or, in other words, the contract. If that subject matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable." *Randall* v. *Nenson*, 2 Q. B. Div. 102.

The principal objection urged in argument by the plaintiff relates not to the general principle stated to the jury and supported by the authorities cited, but to the use of the words, fair and fairly, in the charge and in the special finding, to modify the term merchantable. It is said that thereby the force of that term was reduced, when the plaintiff was entitled to the full effect of it. That there may be and are different grades of merchantable ice, as of other merchandise, is not denied. One quality may be purer and finer than another, and both be merchantable. Clearly under the authorities an executory contract for the delivery of ice to the plaintiff did not necessarily entitle him to the first quality. Various terms are used in the cases cited to define the word merchantable in the sense in which it is to be applied in such cases, "ordinary quality," "marketable quality,

bringing the average price," "at least of medium quality or goodness," "good, lawful merchandize of suitable quality," "good and sufficient in its kind," "free from any remarkable defect."

Of a manufacturer, it is said in *Harris* v. *Waite*, *supra*, "Under a general order, he is not bound to furnish the best goods of the kind ordered that can be or are manufactured. He is only required to furnish goods of the kind and quality usually manufactured and used, and such as are reasonably fit and proper for the purpose for which they are ordered."

The received definitions of the word fair show that it is well adapted to convey this idea of mediocrity in quality, or something just above that. In *Swett* v. *Shumway*, *supra*, an action on a written contract for the manufacture and delivery of horn chains, the instruction was that "there being no stipulation in the contract that the horn chains were to be of the first quality, the law does not imply a warranty that they should be of the first quality, but does imply a warranty that they should be of fair merchantable quality and of good workmanship;" and this ruling was approved as sufficiently favorable to the defendant, who was there, as the plaintiff is here, the party to receive delivery of the goods under the contract.

The rules of law applicable to other classes of cases, to the giving of which to the jury exception is taken, were correct in themselves and the cases to which they applied were correctly defined. It need not be said that to state other cases than that on trial and to illustrate the application of rules of law to them, is not in itself an error. To state the law of analogous or contrasted cases may be the readiest method of distinguishing and explaining its application to the case on trial. Where exceptions contain only a brief summary of the case, and but a small part of the charge, it is not strange if the direct bearing of some of the rulings fails to appear. But exceptions can be sustained only when they show an error, and one by which the excepting party has been aggrieved.

Exceptions to the form of a special finding submitted to the jury are not tenable, unless the rulings in connection with it

appear in such a manner as to show that an error was committed. At least the case disclosed by the exceptions does not show that the form used in the present instance affected injuriously the rights of either party. The objection to the use of the word fair in the special finding has been already considered. What was said by the court in regard to the market for which this ice was intended, or the effect of the clause in the memorandum in regard to its being packed suitably for shipment to New Orleans, does not appear.

Exceptions overruled.

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

JAMES B. MCDONALD, Treasurer, *vs.* THOMAS S. LAUGHLIN.

Cumberland. Opinion February 24, 1883.

Promissory notes. Actions. Assignees of choses in actions. Stat. 1874, c. 235.

An action on a note made payable to the treasurer, without naming him, of a society, should be brought in the name of the treasurer in office at the date of the writ, if the note is then the property of the society; and may be so brought by the assignee, if the note has been assigned.

Stat. 1874, c. 235, authorizes but does not require, assignees of choses in action, assigned in writing, to bring actions upon them in their own names.

ON EXCEPTIONS from superior court.

Assumpsit on a promissory note payable to "the treasurer of the India Street Universalist Society, or order." The writ was dated July 14, 1881. McDonald was then the treasurer of the society, but was not the treasurer at the time the note was given. Plea, general issue. The opinion states other facts.

P. J. Larrabee, for the plaintiff, cited: *Stone* v. *Hubbard*, 7 Cush. 595; *Hodges* v. *Holland*, 19 Pick. 43; *Titcomb* v. *Thomas*, 5 Maine, 282; *Rockwood* v. *Brown*, 1 Gray, 261;

Penobscot R. R. Co. v. *Mayo*, 60 Maine, 313; *Pollard* v. *Somerset M. F. Ins. Co.* 42 Maine, 221.

T. H. Haskell, for the defendant.

The evidence shows a promise to the society, or its order, only. The action must be in its name, or the name of the indorsee. *Piggott* v. *Thompson*, 3 Bosanquet and Pullers, 147; *Gilmore* v. *Pope*, 5 Mass. 491; *Com. Bank* v. *French*, 21 Pick. 486.

In *Fisher* v. *Ellis*, 3 Pick. 321, and *Tainter* v. *Winter*, 53 Maine, 348, the promise was to the treasurer by name, and to his successors in office.

In *Thompson* v. *Page*, 1 Met. 565, the action was upon a special ageement to pay to the treasurer to be chosen by the majority of the subscribers to stock. The promise was not to an incorporated body, but to a particular person, when selected to receive the fruit of the promise.

The promise is negotiable. It is to the treasurer or order. When the society assigned the note it no longer had any interest in it. The courts have authorized a suit to be in the name of the assignor to protect an equitable assignment; but, since the statute the reason fails, because the assignee may now maintain an action in his own name, and the rule is extinguished. Moreover, the assignment negotiated the note.

There is no reason why the assignee should use the plaintiff's name to sue, without his consent. *Ticonic Bank* v. *Bagley*, 68 Maine, 252; *Marshall* v. *Perkins*, 72 Maine, 347.

SYMONDS, J. "According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit."

This rule, stated by SHAW, C. J., in *Palmer* v. *Merrill*, 6 Cush. 286, has been repeatedly recognized in this state, as the cases cited for the plaintiff sufficiently show.

The note in suit was payable to the order of the treasurer of

the India Street Universalist Society, and was the property of that society. It was never indorsed to the plaintiff in interest, Colesworthy, but was sold and assigned in writing to him, with other notes, by an authorized committee of the society on May 24, 1880, before this action was brought. While the note remained the property of the society, an action upon it might at any time after maturity have been brought in the name of the treasurer then in office. The legal liability nominally ran to the person who was treasurer at the date of the writ. He was a proper nominal plaintiff, just as if the note had been payable to the then acting treasurer by name, and to his successors in that office. *Tainter* v. *Winter*, 53 Maine, 348.

Upon assignment of the note, this right of action passed to the assignee, the right to sue in the name of the treasurer, just as the society might have done before they sold the note. It does not appear that either the treasurer or the society have ever objected to this use of the treasurer's name. Why should the debtor? "As a general rule, it is a right of the vendee, incidental to the sale of a chose in action not negotiable either in form or in fact, to sue in the name of the vendor. . . . At any rate, it is for the vendor of the chose in action to object, on account of the costs or for any reason, not for the debtor." *Pitts* v. *Holmes*, 10 Cush. 97; *Amherst Academy* v. *Cowles*, 6 Pick. 439.

The act of 1874, c. 235, authorizes, but does not require, assignees of choses in action assigned in writing to bring actions upon them in their own names. There is nothing in it to limit or exclude remedies previously existing.

Exceptions overruled.

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

G. H. WADLEIGH

vs.

ROSCOE G. JORDAN, and DAVID N. JORDAN, Trustee.

Cumberland. Opinion February 24, 1883.

Trustee process. Statute of limitations. Executors and administrators.

It is not sufficient to entitle an executor, summoned as trustee of a legatee named in the will of his testator, to be discharged, that he has a promissory note greater in amount than the legacy payable to himself, and signed by the principal defendant in the trustee suit as principal and by the testator as surety, when the note was barred by the statute of limitations, as against both the promisors before the death of the testator, and the testator has never paid anything as surety for the legatee therefor.

The executor cannot of his own motion revive the promise to himself against the estate of the testator, nor has he under such circumstances anything that would avail him as a defence to the demand of the legatee for the legacy, or that can defeat the attachment of it in his hands by the creditor of the legatee.

ON EXCEPTIONS from superior court.

The question presented to the court by the disclosure of the trustee is shown by the following facts: May 15, 1871, the principal defendant and the testator as surety by their promissory note of that date promised to pay the trustee or order on demand one hundred and fifty dollars with interest at nine per cent. And afterwards the principal defendant made to the trustee these payments upon the note, May 15, 1873, twenty-five dollars, and March 29, 1875, five dollars. Testator died August 4, 1881, the trustee was appointed executor of the will by the terms of which the principal defendant was entitled to a legacy of two hundred and fifty dollars.

The presiding justice charged the trustee and to this ruling he alleged exceptions.

Nathan W. Harris and Henry W. Oakes, for the plaintiff, cited: *Call* v. *Chapman*, 25 Maine, 128; R. S., c. 86, § 36;

R. S., c. 82, § 56; *Adams, Adm'r*, v. *Ware*, 33 Maine, 228 Waterman on Set-off, pp. 104, 74, 75; *Ingalls* v. *Dennett*, 6 Maine, 79; *Clark* v. *Foxcroft*, 7 Maine, 348; *Houghton* v. *Houghton*, 37 Maine, 72; *Robinson* v. *Safford*, 57 Maine, 163; 2 Chitty on Contracts, (11 Am. ed.) 1276; *Huges* v. *Littlefield*, 18 Maine, 400; *Rice* v. *Cook*, 71 Maine, 559; Maine Probate Practice, Waterman's Edition, 107; *Rogers* v. *Rogers*, 3 Wend. 503; *Richmond, Adm'r, Petitioner*, 2 Pick. 567.

T. H. Haskell, for the trustee.

The trustee knows the note is honestly due and unpaid. If it had been held by another he would be justified in not interposing the statute as a defence and his promise to pay the same would renew it against the estate in his hands. *Emerson* v. *Thompson*, 16 Mass. 428; *Manson* v. *Felton*, 13 Pick. 207; *Oaks* v. *Mitchell*, 15 Maine, 360.

In this proceeding the equitable rights of the parties may be determined. *Exchange Bank* v. *McLoon*, 73 Maine, 511.

Two cases which fully consider this question expressly hold that an executor may retain his own debt against the estate in his hands, although it was barred by the statute during the lifetime of the testator. *Hill* v. *Walker*, 4 Kay and Johnson, 166; *Staklochmidt* v. *Sett*, 1 Smale and Gifford, 415.

Executors have the same rights of set-off that their testators would have if living. *Adams* v. *Ware*, 33 Maine, 228.

Any pledgee may apply collateral in his hands to the payment of a debt after the same has become barred by the statute. *Hancock* v. *Franklin Fire Ins. Co.* 114 Mass. 155.

A legacy may be set off against the debt of the legatee to the testator, though such debt was barred by the statute at the death of the testator. *Coates* v. *Coates*, 33 Beavans, 249; *Courtnay* v. *William*, 3 Hane, 539; S. C. 25 Eng. Ch. 539.

BARROWS, J. There are insuperable objections to the disposition which the alleged trustee, as executor of the will of Ivory Jordan, proposes to make of a legacy therein given to David N. Jordan, the principal defendant.

Under R. S., chap. 86, § 36, it is liable to be held upon this process, payable when the settlement of the estate has sufficiently advanced, but not relieved from the attachment which this plaintiff has placed upon it unless the facts stated in the trustee's disclosure are such as would relieve the trustee from paying it to the principal defendant. The limitations of an executor's liability as trustee of a legatee are defined in R. S., chap. 86, § 42. See also, § 61.

An alleged trustee's right of set-off as against the principal defendant is also regulated by § 64, which would doubtless relieve such hard cases as that of *Ingalls* v. *Dennett*, 6 Maine, 80; *Stedman* v. *Vickery*, 42 Maine, 132.

But we look in vain to the statement of the trustee for any facts which would amount to a legal defence in any suit which the principal defendant might bring against him for the amount of the legacy given in the testator's will.

He holds a joint and several promissory note signed by the principal defendant as principal and by the testator as surety; but it was barred by the statute of limitations as against both the promisors before the death of the testator. The testator had never paid anything upon it, and so far as appears had no demands against the principal which were liable to be deducted from the legacy. The trustee, as executor, has nothing which would avail him against the principal defendant's demand for the legacy when it becomes payable. His position is that he has a right to waive in his own favor the bar of the statute of limitations and to bind the estate of his testator by a new promise to himself to pay a debt which at the date of his testator's death could not have been legally enforced.

In this state, however, claims against the estates of deceased persons thus barred do not seem to be regarded as debts; for while our statutes from the beginning have contained provisions for the sale or setting off upon execution of the real estate of deceased debtors in discharge of their debts, it was early held, in *Nowell* v. *Nowell*, 8 Maine, 220, that no license ought to be granted to sell such real estate to pay claims which appeared to be barred by the statute of limitations. Yet, to allow an execu-

tion to issue, upon which the personal or real estate of a deceased person may be taken, is *prima facie* waste in the executor or administrator, for it is his duty to provide seasonably by a regular course of proceeding for the distribution of the estate among the creditors, heirs or legatees, according to their respective rights. *Weeks* v. *Gibbs*, Cumberland Co. 9 Mass. 72; *Clark* v. *May*, Kennebec Co. 11 Mass. 233; *Sturgis* v. *Reed*, 2 Maine, 109.

From the dilemma in which executors and administrators are thus placed it would seem to follow that our court regards it as their duty to interpose the statute bar. *Oakes* v. *Mitchell*, 15 Maine, 360, cited for the trustee, expressly avoids holding otherwise after calling attention to the decisions in Connecticut and Pennsylvania as conflicting with those in England, Massachusetts and New York. What is said in *Oakes* v. *Mitchell*, amounts at most only to a query whether the representative of the deceased *can* charge the estate by any promise made by him to pay a debt thus barred.

We think it better that a careless creditor who suffers his claim to become thus barred should occasionally suffer a loss than it would be to open so wide a door for the plunder of dead men's estates.

In any event, even where it is held to be competent for an administrator by a new promise to revive as against the estate a debt barred by the general statute of limitations, it seems to be held that he cannot make a promise to himself so as to take his own claim out of the operation of the statute. *Richmond, Adm'r, petitioner*, &c. 2 Pick. 567.

Even his claims not thus barred must be specially passed upon by the probate judge, or the payment of them cannot be allowed. R. S., chap. 64, § 61; chap. 66, § 8.

It does not appear in the present case that this has been done, or that the executor has any claim against either the legatee or the estate of the deceased that can be regarded as available to defeat the attachment of the legatee's creditor.

Exceptions overruled.

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

JAMES P. GRANT *vs.* EDWARD P. RICKER.

Androscoggin. Opinion February 24, 1883.

R. S., c. 30, § 1. Dogs, damage by, keeper of. Practice.

The fact that others with the defendant, had some part in taking charge of a dog, does not prevent his being the keeper, within the meaning of R. S., c. 30, § 1.

Where a dog is owned by a member of a firm, and is in the keeping of the firm, an action may properly be maintained against the owner, as owner and keeper, under R. S., c. 30, § 1, for damages done by the dog, and it is not necessary to join the other members of the firm.

Whether the jury in a special finding, included in their verdict, took precisely the method the court would have adopted to reach the amount of damage, is not a material inquiry.

ON EXCEPTIONS AND REPORT.

Trespass under R. S., c. 30, § 1, to recover for double damages done by the defendant's dog to the plaintiff's sheep. The writ was dated August 28, 1881; the plea was general issue; and the jury rendered the following verdict:

"The jury find, that the defendant is guilty in manner and form as the plaintiff has declared against him, and assess damages for the plaintiff in the sum of twenty-four dollars and seventy-five cents, being double the value of three (3) sheep at four dollars twelve and one half cents each."

This verdict the defendant moved to set aside as against law and evidence and the weight of evidence, and also alleged exceptions to the instructions of the presiding justice.

The material facts appear in the opinion.

F. W. Dana, for the plaintiff, cited: *Barrett* v. *Malden and Melrose R. Co.* 3 Allen, 101; *Williams* v. *Buker*, 49 Maine, 427; *Googins* v. *Gilmore*, 47 Maine, 9; *Peabody* v. *Hewett*, 52 Maine, 33; *Farnum* v. *Virgin*, 52 Maine, 576; *Darby* v. *Hayford*, 56 Maine, 246; *Endfield* v. *Buswell*, 62 Maine, 128; *Woodis* v. *Jordan*, 62 Maine, 490; *Elliott* v.

Grant, 59 Maine, 418; *Staples* v. *Wellington*, 58 Maine, 454.

W. W. Bolster, for the defendant.

By R. S., c. 30, § 1, a person injured may bring his action against either the owner or keeper, but if he allege in the writ that the defendant is both owner and keeper he must prove it. *Buddington* v. *Shearer*, 20 Pick. 477; *Smith* v. *Montgomery*, 52 Maine, 178.

The statute being penal must be strictly construed. *Abbott* v. *Wood*, 22 Maine, 541; *Penley* v. *Jewell*, 26 Maine, 101. See also, *Russell* v. *Tomlinson*, 2 Conn. 206.

The counsel further ably argued his motion to set aside the verdict and for new trial.

SYMONDS, J. Under the statute, R. S., c. 30, § 1, double the amount of the damage which a dog has done to person or property may be recovered of his owner or keeper in an action of trespass. The liability is upon either the owner or the keeper. But in the present case the plaintiff having declared against the defendant as owner and keeper, this was regarded as a descriptive averment, and the ruling of the court required the plaintiff to sustain by evidence the full allegation, that the defendant was both owner and keeper, in accordance with the rather strict rule declared in *Buddington* v. *Shearer*, 20 Pick. 477, and cited in *Smith* v. *Montgomery*, 52 Maine, 178.

The damage was done by two dogs. The right of recovery was limited at the trial to the damage done by the one the defendant owned, and the question was whether he was the keeper of that dog.

A man is presumed to be the keeper of his own dog, except in so far as the contrary appears. This dog was kept at the Mansion House, a hotel owned and conducted by a firm, of which the defendant was a member. The non-joinder of the other members of the firm as defendants in the action afforded no ground of defence. The fact that others with the defendant may have had some part in taking charge of his dog, did not prevent his being the keeper within the meaning of the statute. The ruling that "if the dog under these circumstances was kept there

(at the Mansion House,) so that he was in the keeping of the firm, the action may properly be maintained against the defendant, as one of the members of the firm," was correct.

The plea was the general issue.

The amount of the double damages assessed by the jury was twenty-four dollars and seventy-five cents. The times when the dogs attacked the sheep, and the number of sheep killed were in dispute. There was also some evidence of injury to sheep that were not killed. The damages are not so clearly excessive as to compel a new trial. Whether the jury, in the special finding included in their verdict, took precisely the method the court would have adopted to reach the amount of damage, is not a material inquiry.

Motion and exceptions overruled.

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

ALBERT D. WHITE, petitioner, *vs.* GILMAN L. BLAKE and others.

Oxford. Opinion February 24, 1883.

Record, amendment of. Bond, judgment on. Practice. Costs.

When in an action of debt on bond where judgment should have been for the amount of the penalty, it was by mistake of the clerk entered up for the amount of damages in that suit (for which execution was to be issued), the mistake is one which no lapse of time will divest the court of the power, or relieve it from the duty to correct, in furtherance of justice, whenever attention is called to it and it is made to appear that the plaintiff in that suit may have occasion to resort to *scire facias* upon that judgment for further damages.

In a petition for an amendment of the record to correct a clerical error, the petitioner is entitled to costs, when he prevails, only from the time of the appearance of the respondent in court to resist the petition.

ON REPORT.

Petition for the amendment of the clerk's record of a judgment rendered at the August term, 1862. Petition filed at the September term, 1881.

The opinion states the facts.

Enoch Foster, for the plaintiff, cited: *Philbrook* v. *Burgess*, 52 Maine, 275; *Hathaway* v. *Crosby*, 17 Maine, 449; Stat. 1821, c. 50, § 3; *Lewis* v. *Warren*, 49 Maine, 322; *Wood* v. *Leach*, 69 Maine, 561; *Piper* v. *Goodwin*, 23 Maine, 255; *Baker* v. *Moor*, 63 Maine, 446; *Bean* v. *Ayers*, 70 Maine, 431; *Caldwell* v. *Blake*, 69 Maine, 458; *Hall* v. *Williams*, 10 Maine, 288; *Hayford* v. *Everett*, 68 Maine, 507; *Lewis* v. *Ross*, 37 Maine, 230; *Rockland Water Co.* v. *Pillsbury*, 60 Maine, 425.

R. A. Frye, for the defendants.

The petitioner misapprehends the law applicable to the case at that time. Stat. 1821, c. 50, § 3, was modified by stat. 1830, c. 463. If the action had not been taken from the jury and they had found for the plaintiff, judgment would have been entered for the penal sum and the jury would have assessed the damages, as in *Philbrook* v. *Burgess*, 52 Maine, 275. In the case under consideration the intervention of a jury was obviated by the agreement of the parties. They made the court their referee without reserving right to except.

No authority can be found among the citations of plaintiff's counsel where an award made by the court as referee was ever amended.

Amendments of clerical errors are to be allowed or disallowed according as it is or is not in the furtherance of justice. *Hayford* v. *Everett*, 68 Maine, 508; *Lewis* v. *Ross*, 37 Maine, 234. Freeman, Judgments, § § 74, 70.

But will not be allowed to express something the court did pronounce, although it ought to have been so pronounced. *McLean* v. *Stewart*, 21 N. Y. 472.

The court have no power to correct errors and omissions by treating them as clerical misprisions. *Gray* v. *Brignardello*, 1 Wall. 627; *Limerick, petitioners*, 18 Maine, 183; *Bank* v. *Moss*, 6 How. 31; *Sheppard* v. *Wilson*, 6 How. 260. See the Reporter, March 8, 1882. *Bronson* v. *Schulten*, 16 L. R. 416.

BARROWS, J. In 1861, the petitioner, then or formerly sheriff of the county, brought suit upon a bond given to him by the defendants in the penal sum of ten thousand dollars with condition that the same should be void if the principal, Gilman L. Blake, should faithfully perform his duties as a deputy sheriff under the plaintiff, and, among other things, should "save harmless the said [plaintiff] his heirs, executors and administrators from all suits, costs, damages and expenses whatsoever, by reason of the doings, wrongdoings or neglects of the said Blake, in the execution of his said office." The defendants made an offer of default and at the August term, 1862, the presiding judge assessed the plaintiff's damages at two hundred eighty-two dollars and twelve cents, and judgment was entered up for that sum and the taxable costs, and has been satisfied. In 1875, one Davis brought suit against the plaintiff upon a judgment originally rendered in 1859, in his favor, against the plaintiff, for the official neglect of Blake. This suit the plaintiff successfully defended upon the ground that the judgment had been paid by Blake; but the plaintiff's expenses in making the defence considerably exceeded the taxable costs which he recovered against Davis. In the present process he asks that there may be an amendment of the record of his judgment against Blake and his sureties, so that it may appear that he had judgment for the penalty of his bond, and he may thus be enabled on a *scire facias* to collect from Blake's sureties the expense he was at in defending the Davis suit brought in 1875. The respondents deny their liability for these expenses in any event, and further contend that the error if any was that of the court which assessed the damages, — that it is therefore too late to correct it after the close of the term, except by writ of error, the time for which has also gone by — and that the record exhibits nothing by which the correction asked for can be made.

Certainly there was error, either of the court or the recording officer in that judgment. It had then quite recently been determined by the court in *Lewis* v. *Warren*, 49 Maine, 325, in a carefully considered opinion, that with possibly a single exception (as to poor debtors' bonds in certain cases,)

we had no statute which authorized a judgment in actions of debt on bonds differing from that which must be rendered at common law. Hence in all cases of bonds with a penalty it was formerly always necessary in order to do justice between the parties, that the court should exercise a power which they had long had, under a succession of statutory enactments, to determine in equity how much the plaintiff was entitled to recover, and when this apparently resulted in just such judgments as that which the petitioner here seeks to have amended, it called forth the provincial act of 1735, chap. CLXXXIX, Ancient Charters, p. 499, under which the practice became settled (and except where modified by statute in particular cases it continues to the present time,) to enter judgment as at the common law for the full penalty, and award execution only for so much of the debt or damage as had become due or been sustained up to that time, and to permit the plaintiff to bring *scire facias* upon his judgment for further damages as they might accrue. And this course of proceeding was followed both in suits on bonds for the performance of covenants and agreements, and those with a condition of defeasance, although, in the former class, after the statute of 1830, chap. 463, and in some other cases by special statute provision, the damages were to be assessed by the jury, while in those where there was no special provision for such assessment by the jury, the power rested with the court. *Hathaway* v. *Crosby*, 17 Maine, 448; *Burbank* v. *Berry*, 22 Maine, 486; *Whitney* v. *Slayton*, 40 Maine, 232; *Lewis* v. *Warren*, *supra*.

The remark in *Philbrook* v. *Burgess*, 52 Maine, 277, that there can be in the case of bonds which are to be void upon conditions therein specified, "but one suit and one assessment of damages," is to be applied only to cases where all the damages accrue upon the first breach, or where, as in that case, there is a basis upon which *prospective* damages may be equitably and understandingly assessed by the court. Obviously no such assessment could be made upon such a bond as that here given by the defendants to the plaintiff. There might never be

another act of the deputy sheriff in his official capacity which would cause loss or expense to the sheriff; and, on the contrary the sheriff might be damaged through the deputy's future acts to the full amount of the penalty in the bond. The judgment was not such as could be legally entered up in the action. Was the error that of the court, or the recording officer?

The remarks of PETERS, J., in *Bean* v. *Ayers*, 70 Maine, 430 and 432, are apposite.

"The error is usually a clerical one." In the present case it cannot be doubted that it was so. The learned judge who presided at the term and to whom counsel on both sides refer with deserved respect, had shortly before taken part in the decision of *Lewis* v. *Warren*, *supra*, and knew perfectly well what the settled practice of the court was in such cases. But there was an offer of default and no controversy before him except as to the amount of damages. The judgment for the plaintiff was to be the legal judgment for the penalty, and doubtless the presiding judge gave the clerk the sum at which he assessed the damages and for which execution was to be issued. The clerk naturally assumed that that was the sum for which judgment should be entered up, as in most cases it would be, and thus the mistake occurred, — a mistake which no lapse of time will divest the court of the power (or relieve it from the duty,) to correct in furtherance of justice, whenever attention is called to it. *Lewis* v. *Ross*, 37 Maine, 235. Nor is it true that the record exhibits nothing by which the correction can be made. The law determines the amount of the judgment and that it shall be the amount of the penalty named in the bond declared on, and the cause of action being admitted by the default, the writ and docket entries of themselves furnish all necessary data. But the respondents urge that the correction is needless, because they say they are not responsible for the expenses incurred in defending the groundless suit of Davis against the plaintiff, brought in 1875. It is not necessary to decide now whether the petitioner can maintain *scire facias* for this cause, nor have we all the facts necessary for its proper determination. It is sufficient to entitle a petitioner in such a

case as this, to the correction of the record, if he shows that there *may* be occasion for him to resort to the *scire facias*.

As the question of respondent's liability for this expense, however, has been somewhat discussed by counsel, it may not be amiss to remark here, that the pivotal inquiry upon *scire facias* may be whether the judgment rendered against the plaintiff in 1859, for the official neglect of Blake, was or was not included in the assessment of the plaintiff's damages at the August term, 1862. If Blake had paid it before that time, there would be no occasion to include it. If it had not then been paid and *was* included in that assessment, (as it may or may not have been,) then, as between plaintiff and respondents, it would belong to plaintiff to pay it himself, and if he employed Blake as his agent to attend to this, the sureties would not be responsible for any remissness of Blake as to getting proper evidence of its discharge, which may have resulted in the suit on the judgment in which plaintiff prevailed,— because Blake's acts and omissions in such a contingency, would not be his official doings, neglects or misdoings, for which alone his sureties would be liable. *Smith* v. *Berry*, 37 Maine, 298, 302. The success or failure of the suit against the sheriff is not the true test of respondents' liability. It must be ascertained whether the doings of the deputy, out of which the suit grew, were his official acts or merely individual contracts and undertakings; for upon the latter, though clearly connected with his office, his sureties would not be liable. *Smith* v. *Berry*, *supra*. And this, because the sheriff can in no event be liable for his deputy in such matters. *Dyer* v. *Tilton*, 71 Maine, 413. At present, we decide only that the record of the original judgment should be so amended as to show a judgment for the penalty of the bond, and an order that execution should issue for the sum at which the damages were assessed and the taxable costs; and this amendment may be substantially accomplished by a record of this petition and the proceedings thereon, and a marginal reference thereto which the clerk is hereby authorized to make upon the original record.

Touching the costs of this proceeding. It does not appear that it was any fault of the respondents that a proper judgment was

not entered up. They are in the wrong in resisting the amendment. The petitioner may have only such taxable costs against them as have accrued since their appearance in court, and execution therefor.

Prayer of petition granted in accordance herewith.

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

JAMES WRIGHT

vs.

JOHN L. SMITH, HENRY S. DOYEN, trustee, and J. J. PARLIN, claimant.

Somerset. Opinion February 24, 1883.

Wages. Assignment. Stat. 1876, c. 93. Trustee process.

Stat. 1876, c. 93, requiring that an assignment of wages shall be recorded in order to be valid against third persons, does not apply to wages that are wholly earned when the assignment is made.

ON EXCEPTIONS.

Trustee process.

This case between the plaintiff and the claimant was submitted to the presiding judge with right to either party to except as to matters of law.

After hearing, the court found and ruled as follows, to wit: "It appears by the disclosure of the alleged trustee that at the time the writ was served upon him he was indebted to the principal defendant, in the sum of thirty-two dollars and eighty cents, as wages for labor previously performed for him. I find that before the service of the plaintiff's writ, the said principal defendant had left the demand with the claimant for collection, and had made to him a verbal assignment of the same for a valuable consideration. That subsequently to said service a written

assignment was made and dated back. The date was intended to correspond with that of the verbal assignment. The assignment was never recorded. Under these facts I rule that the attachment takes precedence of the assignment, and that the trustee be charged for the sum of thirty-two dollars eighty cents, less his taxable costs."

And the claimant alleged exceptions.

James Wright, for the plaintiff.

J. J. Parlin, for the claimant.

PETERS, J. Chapter 93, laws of 1876, runs thus: "No assignment of wages shall be valid against any other person than the parties thereto, unless such assignment is recorded by the clerk of the city, town or plantation organized for any purpose in which the assignor is commorant, while earning such wages." The question of this case is, whether the law applies to wages which have been wholly earned when the assignment is made.

At first view that would seem, perhaps, to be the proper construction of the statute. But that could not have been the purpose to be accomplished by it. It must be an inconvenience to a person, to whom wages fully earned are due, if he cannot assign his claim as other claims are assignable. It would add to his inconvenience, if he can never assign such a claim in any mode other than by a recorded writing, in order to make the assignment effectual against all persons. In such case, if he undertakes to assign his claim for wages by drawing a draft or order for them, then, to make the assignment fully valid, the draft or order must be recorded. And such a construction of the act would prevent valid equitable assignments, as such assignments are ordinarily of a nature not possible to be recorded.

But there was strong reason for the enactment as applicable to wages to be earned, either wholly or partially, upon some engagement for personal work or services. A habit exists in some communities in this state among woodsmen and lumbermen, seamen and other laborers, of giving assignments in advance of earning wages, for their own benefit, and for the use

of their families when absent from them, and for like purposes. To prevent the mischief of double assignments, and the uncertainty of assignments, the statute was passed, requiring them to be in writing and recorded.

The construction which we give the act is aided by the phrase, "while earning *such* wages," the meaning being, while earning the wages that have been assigned. The word "commorant" in the act tends in the same direction. It would be a difficult thing to know, if commorancy and residence were not the same place to the laborer, where to look for an assignment after the service at wages has terminated.

Exceptions sustained. Trustee discharged. Claimant's assignment adjudged good.

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

LUCY A. MOODY *vs.* JOSEPH R. KING.

Kennebec. Opinion February 24, 1883.

Actions. Lessor, action by for injury to premises. Mills. Pleadings.

The lessor of a mill cannot maintain an action for the diversion of water during the continuance of the lease.

The lessor cannot claim damages for a diminution of rent of a mill by reason of the diversion of the water, unless such diminution of rent is alleged in the writ.

ON REPORT.

An action of the case. The writ was dated November 26, 1880. Plea, general issue with brief statement.

The material facts upon which the opinion is based are sufficiently stated therein.

Jesse Jeffrey, for the plaintiff.

H. M. Heath, for the defendant.

APPLETON, C. J. This is an action of the case against the defendant for diverting water from her mill, between the nineteenth day of April, 1880, and the twenty-sixth of November following.

It appears from the testimony of Rufus Moody, the plaintiff's agent, that he let the mill, "just as it was;" that he "let the mill and the water, what we had a right to use;" that he "attached no conditions to the tenancy, nor anything of that kind. They had the right to use the same as the occupants had under the deeds." The lease was for the year 1880, and the stipulated rent was paid.

If there was a diversion of water by the defendant while the mill was under lease, the lessees were the sufferers thereby, not the plaintiff. The lessees have the right of action if one exists. The plaintiff has suffered no loss. She has sustained no injury. She rented her mill at her own price. Her rent was paid without diminution. She has no cause of complaint.

The writ alleges no diminution of rents in consequence of the alleged diversion of water. If there had been ever so wrongful a diversion, it not being alleged that rents had been thereby diminished, the plaintiff could not recover for any loss of rent thus occasioned. *Plimpton* v. *Gardiner*, 64 Maine, 361.

Plaintiff nonsuit.

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

WELCOME KINSLEY, in equity,

vs.

MARCELLUS J. DAVIS and NANCY E. DAVIS.

Oxford. Opinion February 24, 1883.

Mortgages. Discharge. Equity.

Where the discharge of a mortgage is the result of fraud or mistake, a court of equity will decree its cancellation when it can be done without interfering

with or infringing upon the just rights of parties interested, or where no rights of third persons have intervened.

ON REPORT.

Bill in equity. Heard on bill, answer and proofs.

The opinion states the case and material facts.

The case was elaborately and ably argued by

Enoch Foster, for the plaintiff, and

Bisbee and Hersey, for the defendants.

APPLETON, C. J. This is a bill in equity by which the complainant seeks to have the discharge of a mortgage cancelled, and the discharge being cancelled, that the mortgage remain, as against these respondents, a subsisting incumbrance upon the mortgaged premises.

On September 10, 1874, Marcellus J. Davis, one of the respondents, and the husband of the other, mortgaged the premises in controversy to the South Paris Savings Bank, to secure the payment of a note for four hundred and fifty dollars.

On November 30, 1877, Clarence A. Davis obtained judgment against Marcellus J. Davis, and caused his equity of redemption of the mortgaged premises to be sold on execution, and George C. Wing became the purchaser of the same for eighty-five dollars.

In this state of the title, the complainant, on the seventh of March 1878, purchased the farm in question of Marcellus J. Davis for eight hundred thirty-four dollars and ninety-six cents, and took from him a quitclaim deed of the same, paying him at the time two hundred and sixty-three dollars and forty-six cents, and thirty-six dollars as interest due on the mortgage note. The balance of the price was the mortgage note which he was to pay and the amount of the claim of Clarence A. Davis, which was called eighty-five dollars and fifty cents.

On the same seventh of March the complainant bargained the premises to Alvin How, giving him a bond for the conveyance of the same for the consideration of nine hundred and sixty-one dollars and thirty-four cents.

On the twenty-first of the same March the complainant conveyed by deed of warranty the premises to Mary A. Kinsley, his daughter, which was recorded. But this deed can have no effect on the result, because it was never delivered and his daughter conveyed back all her right by deed of quitclaim on the eighth of December, 1879.

On the twenty-first of November, 1878, the complainant, through his agent, pays the note due the South Paris Savings Bank and the mortgage was discharged by George A. Wilson, its treasurer, and the note surrendered.

On November 30, 1878, the equity of redeeming from the sale of the equity to Wing expired and on the twenty-first of the following December, he quitclaimed his interest to Nancy E. Davis, wife of Marcellus J. Davis, for the amount due.

The question for determination is whether the purchaser of the equity of redemption or his grantee shall hold the estate discharged of the mortgage without paying the mortgage debt, to which by the purchase itself, the equity was subject. It is true the mortgage has been discharged, but not by the owner of the equity. The law seems well settled that where the discharge is the result of fraud or mistake, a court of equity will decree its cancellation when it can be done without interfering with or infringing upon the just rights of parties interested. "The principle," observes BENNETT, J., in *Bullard* v. *Leach*, 27 Vt. 495, "which it seems may be abstracted from the cases is, that when money due upon a mortgage is paid, it may operate to cancel the mortgage, or in the nature of an assignment of it, placing the person who pays the money in the shoes of the mortgagee, as may best subserve the purposes of justice and the just and true interest of the parties. The purpose, however, must be innocent and injurious to no one."

The evidence in this case is very voluminous and contradictory. The result of an examination of the testimony seems to be this: The complainant, a feeble, infirm and ignorant old man, hardly competent to the transaction of business, sent an agent with the money to the savings bank holding the mortgage, telling him to have the mortgage "discharged" to him, and made

running to him so that he could hold the property and that G. A. Wilson, the treasurer of the bank, would know how it should be done. The agent paid the money and returned with the mortgage discharged. The next day, when the complainant saw what had been done he was dissatisfied and sent his daughter, Mrs. L. Barron, to have the discharge stricken out and the mortgage assigned — but nothing was done, the treasurer being absent. In a week or two after, he sent a messenger again for the same purpose, but the treasurer declined complying, doubting his right to do so and there the matter rested. The discharge was never entered of record.

The claim of the holder of the equity is most inequitable. He purchased subject to an existing incumbrance. The price is based upon its existence and probable enforcement. He has no equity as against this complainant that they should be removed. It matters not to him to whom the incumbrance is paid. If the complainant cannot set up this mortgage, injustice is done him. The payment is a total loss. But if the discharge be cancelled, the holder of the equity is bound to pay only what by the very terms of the purchase he was to pay.

The purchaser from Wing is in no better condition than he would have been. She took a naked release. The price paid was only that for which the equity was sold with interest and taxes. She paid nothing upon the ground that the mortgage was discharged. The title conveyed was equitably subject to the mortgage. The records show no discharge, and it may fairly be inferred that she and her husband, who acted as her agent, were conusant of all the facts.

The authorities are decisive that in a case like this courts of equity will cancel a discharge made by mistake, no rights of third persons having intervened. 2 Jones on Mortgages, § 966; *Bruce* v. *Bonney*, 12 Gray, 107.

The question has been fully discussed in *Cobb* v. *Dyer*, 69 Maine, 494, and it was then held that where the discharge of a mortgage was through accident, mistake or fraud, the court would afford relief by cancelling the discharge and giving effect to the mortgage. In *Wilson* v. *Kimball*, 27 N. H. 300, where

A, the purchaser of land, paid a subsisting mortgage upon the same, and it was duly discharged both upon the mortgage and the record, and B, the assignee of another but subsequent mortgage, brought a suit against A to recover the premises. Held, that the mortgage paid by A might be treated as assigned to him and not discharged; and that under it he could successfully defend against B until B should pay him. It was decided in *Bell* v. *Woodward*, 34 N. H. 91, that where there are two mortgages on land, and a purchaser of the equity of the first mortgage takes an assignment, that mortgage is not extinguished, but will be upheld as a subsisting security in the hands of the assignee against the second mortgage. Although the mortgage is in fact paid, yet equity will require it to subsist until every party who owes a duty under the mortgage shall have discharged it. *Wheeler* v. *Willard*, 44 Vt. 640.

And this is so, though there has been a receipt of the debt and a cancellation of the mortgage. *Robinson* v. *Leavitt*, 7 N. H. 95.

The court will see that a party is protected who has given up his note and taken in payment a worthless check. *Grimes* v. *Kimball*, 3 Allen, 518.

The payment of a debt by one having an interest to protect, may operate as an assignment even though the mortgage be formally discharged. *Rigney* v. *Lovejoy*, 13 N. H. 252.

Payment of a debt secured by a mortgage may operate as a discharge or an assignment as may best subserve the purposes of justice, even though the mortgage be formally discharged. *Wilson* v. *Kimball*, 27 N. H. 301.

It is undoubtedly true that an assignment of a mortgage to one who had assumed its payment, would not avail as against the party with whom the agreement to pay was made. The complainant, had the assignment been made and the notes been transferred, could not enforce either as against Davis, his grantor. As between them the note is part of the purchase money of the estate. It was as to him paid and could not be enforced against him. But this principle is not applicable to the case at bar. As between the complainant and the purchaser of the equity of

redemption, he was neither bound to pay the note nor procure the discharge of the mortgage. Wing had no equity to require him to pay the mortgage debt, nor has his grantee, who acquired no greater rights than he had. Purchasing an equity of redemption he has no legal nor equitable rights to have a mortgage held as paid, to the payment of which he has not contributed a farthing.

Bill sustained with costs.

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

CHARLES A. SMITH *vs.* CHARLES H. LOOMIS.

Somerset. Opinion February 24, 1883.

Statute of frauds.

Where parties to a written contract for leasing a mill, the rent being a certain sum payable for each thousand feet of lumber that should be sawn at the mill during the term, made an additional agreement to shorten the term originally agreed upon, a person, who in writing guaranteed the first agreement and verbally assented to the second, is not absolved from his liability upon the amended agreement by the effect of the statute of frauds.

ON EXCEPTIONS.

Assumpsit against the defendant as guarantor of a certain contract of one Benoice Loomis.

The material facts are stated in the opinion.

Folsom and Merrill, for the plaintiff, cited:

Smith v. *Loomis*, 72 Maine, 51; *Gamage* v. *Hutchins*, 23 Maine, 565; *Marshall* v. *Baker*, 19 Maine, 402; *Medomak Bank* v. *Curtis*, 24 Maine, 36; *Gilman* v. *Veazie*, 24 Maine, 202; *Low* v. *Treadwell*, 12 Maine, 441; *Courtenay* v. *Fuller*, 65 Maine, 156; *Richardson* v. *Cooper*, 25 Maine, 450; *Hutchinson* v. *Moody*, 18 Maine, 393; *Leavitt* v. *Savage*, 16 Maine, 72;

Sigourney v. *Witherell*, 6 Met. 553; Story, Prom. Notes, 638; 3 Add. Contr. 139, and notes on pp. 140, 141.

Walton and Walton, for the defendant.

The written evidence must establish the contract in all its terms, it can receive no aid from oral testimony, and yet satisfy the statute of frauds. R. S., c. 111, § 1; *Jenness* v. *Mount Hope Iron Co.* 53 Maine, 20; 1 Greenl. Ev. (Redfield's Ed.) § 268.

The new agreement of this defendant, if there was any, was not in writing. When the new agreement was made, the debt as it existed previous thereto, was merged in the new, and the action should be predicated on the altered contract. *Dana* v. *Hancock*, 30 Vt. 616; *Goss* v. *Lord Nugent*, 5 B. and Adol. 58.

Defendant's agreement made January 19, to answer for the debt of another, being within the statute of frauds, could not be altered before breach by an agreement not in writing. *Stead* v. *Dawber*, 10 Adol. and Ellis, 57; *Harvey* v. *Grabham*, 5 Adol. and Ellis, 61; *Noble* v. *Ward*, 1 L. R. Excq. 117; S. C. 2 L. R. Excq. 135; De Colyar on Guaranties, (Am. ed.) 387, 389.

There is a clear distinction between oral testimony of a substituted performance and oral testimony to state the contract in whole or in part. Browne, Stat. of Frauds, (2 ed.) 436, 409-428; Chitty, Contr. (5 Am. ed.) 111; *Marshall* v. *Lynn*, 6 Meeson and Welsby, 109; *Stowell* v. *Robinson*, 3 Bing. 928.

We offered testimony to show that by the new agreement the liability of the defendant was actually increased if that was a valid agreement against him, and we should have been permitted to show that. The presiding justice held that it was immaterial whether this liability was increased or diminished by the change in the contract.

PETERS, J. By written agreement, dated January 1, 1878, Benoice Loomis hired a mill of the plaintiff for every alternate two weeks, from January 28, to June 1, 1878; the rent to be a certain sum payable for each number of thousands of feet of lumber that might be sawed by Loomis at the mill. On February 16, 1878, the same parties made another agreement, by

which the lessee was to retain the mill under the terms of the lease long enough only to saw certain specified lumber, and to relinquish possession for any balance of the term. For this relinquishment the lessee received a credit of thirty dollars towards the rent already due to the lessor.

The defendant in writing, guaranteed for Benoice Loomis the first agreement, and verbally assented to the second. He is sued as guarantor for the balance of rent due for lumber sawed at the mill during the period named.

The alleged defence is, that the second arrangement was a new and independent contract, substituted for and canceling the first one, and not binding upon the defendant, on account of the statute of frauds.

The words of the second agreement, literally construed, have some tendency to warrant the interpretation contended for, but we think the intention of the parties was merely to waive a part of the first agreement, by an amendment thereto. The precise and only difference between the two agreements is, that, under the original agreement, the lessee was to have the mill until June 1, 1878, and, under the amended agreement, he was not to occupy so long as that, unless it took that time to saw certain quantities of lumber specially described.

The change might lessen the period of occupation or it might not. It might lessen, while it could not increase the defendant's liability. It preserves his rights as they stood upon the original undertaking. No new obligations are imposed. The old ones are merely cut down to some extent. The original guaranty promised that the principal should pay a specified rate for all lumber sawed by him at the mill prior to June 1, 1878. The plaintiff asks no more now. There was no necessity of the plaintiff's declaring upon the second contract or putting it in proof.

Here then is not a new or collateral contract, the operation of which can allow the defendant to invoke the statute of frauds. A surety can waive a full performance as well as a principal can. The principles of waiver and estoppel may apply to sureties as well as to other parties to contracts. If A. leases a mill to B. for twelve months at a monthly rent, and C. in writing guarantees

the rent, we see nothing to prevent B. and C. assenting with A. that the lease might be terminated at the end of half that period of time. The statute of frauds cannot affect such an act. That is substantially the case presented to us. There is strong reason to hold that, even without the consent of the surety, the contract was not invalidated. But we are not called upon to say as much as that, as the jury found that his consent was given. *Rice* v. *Filene*, 6 Allen, 230; *Insurance Co.* v. *Sedgwick*, 110 Mass. 163; *Cambridge Savings Bank* v. *Hyde*, 131 Mass. 77.

Exceptions overruled.

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

STATE OF MAINE

vs.

BENJAMIN CHADBOURNE and BENJAMIN WALLACE CHADBOURNE.

Piscataquis. Opinion February 24, 1883.

Challenges. R. S., c. 134, § 12; c. 82, § 66; stats. 1872, c. 78; 1879, c. 90.

At the trial of a person upon an indictment for murder, the state is entitled to five peremptory challenges.

Stat. 1872, c. 78, was an amendment of R. S., c. 134, § 12, and although its effect was for a time suspended by the abolition of the death penalty as a punishment for crime, it again became operative by virtue of stat. 1879, c. 90. Another effect of the stat. of 1879, was to deprive the state of the two peremptory challenges provided for in R. S., c. 82, § 66, in the trial of cases formerly capital.

ON EXCEPTIONS.

Indictment for murder.

The opinion states the case.

Henry B. Cleaves, Attorney General, and *Joseph B. Peaks*, County Attorney, for the State.

Josiah Crosby and *A. M. Robinson*, for defendants.

WALTON, J. The defendants have been tried and found guilty of murder. The case is before the law court on exceptions. The exceptions state that while a jury was being impaneled to try the defendants, the attorney for the State claimed and was allowed four peremptory challenges. The defendants contended that the State was entitled to only two peremptory challenges, and that the allowance of four was erroneous. We think not. We think the State was entitled to five peremptory challenges. The act of 1872, c. 78, gave the State that number in capital cases; and, notwithstanding this act was for a time rendered practically inoperative by the abolition of the death penalty, we think it has again become operative, and that it is now applicable to cases, which, though not now capital, were such when the act was passed.

In coming to this conclusion we have regarded the act of 1872 as an amendment of the Revised Statutes, c. 134, § 12. Originally that section related exclusively to the trial of capital cases. It directed how juries should be impaneled, how the right of challenge should be exercised, and how many peremptory challenges the person indicted should be entitled to; but it omitted to give any peremptory challenges to the State. This omission was probably accidental; for, at the time of the revision of the statutes, the act of 1867, c. 108, was in force, and that statute gave the State at least one peremptory challenge in all criminal cases, capital or otherwise; and this statute is cited in the margin of section twelve, but the right of peremptory challenge thereby secured to the State is omitted from the text. To remedy this omission and enlarge the number of peremptory challenges to which the State should be entitled, the act of 1872, c. 78, was passed. This act declared in brief terms that in the trial of capital cases the State should have the right to challenge peremptorily five persons. The effect of this statute was to amend section twelve of chapter one hundred and thirty-four of the revised statutes. That section directed how juries should be organized for the trial of capital cases, and this statute changed the mode of organization therein provided for, to the extent of allowing the State as well as the person indicted to

challenge peremptorily some of the jurors as their names should be drawn from the box, and before they should be sworn. This new right secured to the State was one which could not be exercised except in connection with the proceedings provided for in section twelve. It was a right which could not by any possibility be exercised independently of that section. It modified and materially affected the proceedings to be had under that section. In other words, it was, to all intents and purposes, an amendment of it. True, the act itself does not declare in terms that it is an amendment of any previous statute. But it was an amendment, and an amendment of the section we have named; for, by it, the proceedings to be had under that section were modified and changed. And it is the effect, not the name given to an act, that determines its character. If a subsequent statute does in fact modify and change the proceedings to be had under a former act, the later act is an amendment of the earlier act, and must be so regarded and treated, although it is not so called in the act itself.

Regarding the act of 1872, c. 78, as an amendment of the R. S., c. 134, § 12, we come to the question whether, when an act of the legislature declares that the proceedings in a certain class of cases shall be as required by a specified chapter of the Revised Statutes, the meaning is that the proceedings shall conform to that chapter in its original or its amended form. If there is nothing in the subject matter, or in the act itself, to indicate the contrary, we have no hesitation in saying that the proceedings should conform to the chapter named in its amended form.

To illustrate: This same chapter (c. 134) has been amended in another particular. Section nineteen, as originally enacted, declared that the husband or wife of the accused should be a competent witness, when called with the other's consent. This section was amended in 1873, (c. 137,) so as to make either a competent witness without the other's consent. Now, the act of 1879, c. 90, declares in general terms that in the trial of cases formerly capital, the proceedings shall be as set forth in chapter 134 of the revised statutes, excepting that the person indicted shall not challenge peremptorily more than five of the jurors

while the panel is being formed. Is the amendment of section nineteen lost in this class of cases? Is it possible to believe that the legislature intended to abrogate the important rule of evidence established by this amendment, and have one rule for the trial of cases formerly capital, and another and a different rule for all other cases? We think not. So with respect to section twelve. We cannot doubt that the legislature intended that the proceedings under that section should be conformable to it in its amended and not in its original form.

We are strengthened in this view by the circumstances under which the act of 1879, c. 90, was passed. From the time of the passage of the act of 1872 till 1876, the State was undoubtedly entitled to five peremptory challenges in all capital cases. During 1876 the death penalty as a punishment for crime was abolished. Act 1876, c. 114. This rendered the right of peremptory challenge existing in capital cases nugatory; not because the statutes giving it had been repealed, for they had not; but because there were no longer any cases to which it could be applied. This was a result probably not foreseen by the legislature. And when it was judicially declared in *State* v. *Smith*, 67 Maine, 328, the very next legislature passed the act of 1879, c. 90, declaring in effect that such should not be the result; that in the trial of cases formerly capital the proceedings as set forth in chapter 134 of the Revised Statutes should be observed in all cases, excepting that the person indicted should not challenge peremptorily more than five of the jurors while the panel was being formed. The exception in the act shows that the attention of the legislature was directed specifically to the matter of peremptory challenges. It was not overlooked. The number to which the person indicted should be entitled was reduced from ten to five—the very number to which the State was entitled under the act of 1872. That act remained unrepealed. Now, if the legislature had intended to deprive the State of the number of peremptory challenges to which it was entitled under that act, is it not almost certain that it would have said so? Would it have remained silent and left so important a change to be accomplished by a doubtful inference? We think not. We

think the act of 1879 itself, and especially the circumstances preceding and accompanying its passage, tend strongly to show that the legislature did not intend to deprive the State of the peremptory challenges to which it was entitled under the act of 1872; but, on the contrary, intended to place the State and the accused in this particular upon terms of equality, allowing to each the same number.

It is assumed in argument by the defendants' counsel, that the ruling at the trial that the State was entitled to four peremptory challenges, was based upon the idea that the State was entitled to two on account of each defendant; and it is against this doubling process that their arguments are particularly directed. They contend that the State is entitled to no more peremptory challenges when two are tried than when only one is tried. The exceptions show that the defendants' counsel so contended at the trial. But the exceptions do not show on what ground the attorney for the State based his claim to four peremptory challenges, nor on what ground the court ruled that he was entitled to that number. Nor is it important to know; for the defendants could only be aggrieved, if aggrieved at all, by the number actually allowed, and not by the reasoning by which the court came to the conclusion that the State was entitled to that number. If, as we hold, the State was entitled to five peremptory challenges, the defendants could not be aggrieved by the allowance of a less number, although the reduction was made upon erroneous grounds. It would be an error operating in their favor, not against them.

Our conclusion is that the State was entitled to five peremptory challenges; that although the right to this number was for a time suspended by the abolition of the death penalty, subsequent legislation has restored it. It seems to us that a contrary conclusion could be reached only by a very strict construction of the statutes bearing upon the question—in fact, a construction so strict that it would probably defeat the legislative will and render further legislation necessary. We are unwilling to adopt such a construction. Statutes giving to parties peremptory challenges are not penal. They impose no hardships. Their only

tendency is to secure fairness and impartiality. Every one acquainted with jury trials knows that unfit jurors will sometimes remain upon the panel after every effort to remove them for cause has failed. This is an evil that can only be remedied by peremptory challenges; and the statutes giving them should be liberally construed, so as best to accomplish the purpose for which they were intended.

Another consideration should not be overlooked. It seems to have been assumed at the time of the trial of this case that the State was entitled to at least two peremptory challenges by virtue of R. S., c. 82, § 66, and R. S. c. 134, § 20; and it was to the doubling of this number that the defendants objected. At least, such seems to have been the understanding of the defendants' counsel; and they assume that such is the law in their arguments before the law court. But this assumption is not well founded. The effect of the act of 1879 was to deprive the State of the two peremptory challenges provided for in § 66; for the challenges provided for in that section can be claimed only when a jury is drawn and impaneled as therein provided; and the act of 1879, by declaring in effect that juries must be drawn and impaneled as provided in chapter 134, § 12, virtually forbids their being drawn and impaneled as provided in chapter 82, § 66. Consequently, if the act of 1879 did not restore to the State the five peremptory challenges provided for in the act of 1872, it would seem to have left the State without any peremptory challenges in that important class of cases formerly capital, and now punishable by imprisonment in the State Prison for life; and the question whether the number provided for in c. 82, § 66, was properly doubled, on account of there being two defendants, becomes unimportant; for the State would be entitled to none under that section. It is impossible to believe that the legislature intended such a result. It is much more reasonable to believe that the legislature intended to restore to the State the five peremptory challenges to which it had formerly been entitled in this class of cases than to believe that it intended to leave the State with no peremptory challenges. We think the act of 1879 did restore to the State the five peremptory challenges

provided for in the act of 1872; that it did this by declaring that the proceedings in cases formerly capital should be as set forth in chapter 134; and that, by chapter 134, was meant that chapter in its amended and not in its original form.

Exceptions overruled.

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

JEREMIAH PAGE *vs.* WILLIAM H. FINSON and others.

Penobscot. Opinion February 24, 1883.

R. S., c. 104, § 43. Betterments.

The six years "actual possession" mentioned in R. S., c. 104, § 43, which entitles a tenant to maintain an action for betterments against a person who makes an entry into the lands or tenements of such tenant and withholds them from the possession of the tenant, means the six years immediately preceding such entry.

ON REPORT.

Assumpsit for money paid, laid out and expended. The writ was dated September 12, 1881. Plea general issue.

The opinion states the case and material facts.

A. Sanborn, for the plaintiff.

It is not necessary to show that the possession of Doane was adverse.

Actual possession only, for six years, is required by the statute to sustain the claim for betterments, so called, but actual and adverse possession for twenty years is expressly required to constitute a claim to the land on which they are made. R. S., c. 104, § 38; c. 105, § 10.

By the common law, buildings erected on the land of another, without claim thereto or any express permission of the owner, but with his knowledge, were held to be the personal property of the builder, though they were fixtures, and he could remove

them or recover their value of the owner of the land or any other person who converted the same to his own use.

It was the intention of the legislature to give to the builder who had actual possession of the land for six years a new remedy, namely: an action of assumpsit to recover the value of the buildings of any person who should make actual entry into the same and withhold possession thereof from him. I cannot conceive of an intention on the part of the legislature to deprive the builder of this remedy unless his possession was adverse. Its language negatives such intention. It expressly declares that actual possession is sufficient.

The defendants, in this action took actual possession of this house and the strip of land on which it stands, in November, 1876, and were removed therefrom in May, 1877, by the plaintiff with an officer. The plaintiff held actual possession thereafter till January, 1881, when the defendants again took such possession and have held it till after commencement of the action, September 12, 1881, and without doubt, hitherto.

The action is assumpsit and may be brought at any time within six years after the cause of action accrued. It is manifest that it was seasonably brought.

Kelley v. *Kelley*, 23 Maine, 192, was relied upon at the trial of the case. I submit that it has no application; and I will not waste time to comment upon it further than merely to add that to give such authority as to bar this action is simply to repeal the statute of limitations.

Charles P. Stetson, for the defendant.

WALTON, J. This is an action founded on R. S., c. 104, § 43, known as the betterment law. It is as follows:

"When any person makes entry into lands or tenements, of which the tenant in possession, or those under whom he claims, *have been in actual possession for six years or more before such entry*, and withholds their possession from such tenant, he shall have a right to recover of him so entering, or of his executor or administrator, in an action of assumpsit for money laid out and

expended, the increased value of the premises by reason of the buildings and improvements made by the tenant, or those under whom he claims, to be ascertained by the principles hereinbefore provided."

The case is before the law court on report. The court is to determine whether upon the evidence reported, and the facts admitted, the action is maintainable. If maintainable, it is to stand for trial. If not, the plaintiff is to become nonsuit.

The only objection to the maintenance of the suit is that the plaintiff had not been in the actual possession of the premises for six years before the entry of the defendants which is relied upon to maintain the suit. It appears that the plaintiff acquired his title to the premises in May, 1876; that in November or December following, Mrs. Doane, claiming title adversely to the plaintiff, entered and took possession of the premises and held it till the following May or June, when the plaintiff again entered and regained his possession; that in January, 1881, the defendants entered and took possession of the premises; and it is this entry of January, 1881, on which the plaintiff relies (so stated in the report) to maintain his suit. The fact that Mrs. Doane entered in November or December, 1876, claiming title adversely to the plaintiff, and occupied up to May or June following, before the plaintiff re-entered and regained the possession, is admitted. It is so stated in the report.

We must therefore regard it as an admitted fact that the plaintiff had not been in the actual possession of the premises, continuously, for six years immediately preceding the entry on which he relies for the maintenance of his action. How, then, can the action be maintained? We think it can not. True, the plaintiff and his grantor had been in the actual possession of the premises for more than six years when, in 1876, the plaintiff's possession was interrupted by Mrs. Doane; and if the plaintiff had yielded to that interruption, and had brought his action against Mrs. Doane, we see no reason why it could not have been maintained. But he did not yield to that possession. He re-entered; and apparently by force and against the will of Mrs. Doane, who claimed to own the premises.

And his action is not against Mrs. Doane, but against two other persons (husband and wife) who, so far as we can discover from the evidence reported, are in possession under Mrs. Doane, or a title derived from her. And the plaintiff does not rely upon Mrs. Doane's entry in 1876 to maintain his suit; but upon the entry of the defendants in 1881. It is so stated in the report. Now, it being an admitted fact that the plaintiff had not been in the actual possession of the premises for six years, continuously and immediately before the entry of the defendants on which he relies for the maintenance of his suit, the only question is whether such a possession by him and his grantor for six successive years or more before the interruption in 1876 took place, is sufficient to support the action. Clearly not. And for two reasons. First, his action is not against Mrs. Doane. If the plaintiff relies upon the entry of Mrs. Doane in 1876 to support an action, it must be an action against her. Her entry can not be relied upon to support an action against other parties. It is true that these defendants appear to have been upon the premises with her in 1876-7; but it does not appear that the entry was by them, or that they claimed any right, title, or interest in the premises at that time. On the contrary, it is admitted that the entry was by Mrs. Doane, and that she was the one who held the premises adversely to the plaintiff till the May or June following. And, secondly, we think the six years "actual possession," mentioned in the statute, means the six years immediately preceding the entry on which the plaintiff relies to support his action. "Not the language only," said the court, in *Kelley* v. *Kelley*, 23 Maine, 192, "but the spirit of the statute, required that such actual possession for the term of six years or more before the commencement of such action, should be immediately preceding, and not at some remote period." That was said of a claim for betterments made in an action brought by the owner to recover possession of his land. But the possession of the tenant which will sustain a claim for betterments in such an action, is the same as that which will sustain an action for betterments brought by the tenant when he is dispossessed without a judgment of the

court. If an action is brought against the tenant to dispossess him, he can enforce his claim to betterments by way of defense. If he is dispossessed by an entry without suit, then he may himself bring an action to enforce his claim. But, in either case, the character of the possession, which will support his claim to betterments, is the same, and must have continued for the same length of time. The only difference is that, in the one case it is computed from the commencement of the action, and in the other from the entry. In either case, the six years actual possession must immediately precede the event which secures to the tenant a valid claim for betterments. Consequently, upon the evidence reported, and the facts admitted, we think this action is not maintainable.

Plaintiff nonsuit.

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

PETERS, J., did not sit.

HULDAH M. LITTLEFIELD *vs.* JOSEPH D. EATON, administrator.

York. Opinion March 10, 1883.

Executors and administrators. Statute of limitations. New assets. R. S., c. 87, §§ 12, 13.

An administrator cannot waive the special statute of limitations provided by R. S., c. 87, § 12, as amended by stat. 1872, c. 85, and no promise on his part can revive a claim thus barred, or prevent its barring an action on a claim not presented or prosecuted within the time therein appointed.

As a general rule no property can be considered new assets within the provisions of R. S., c. 87, § 13, which has been in the hands and under the control of the administrator, or has been inventoried or which is the product of such property, although it may have assumed or been converted into a new form.

The earnings of a schooner, or the rent of a farm or mill, or the proceeds of logs and lumber sold from land belonging to the estate, received by the administrator after two years from his appointment, are not new assets when the schooner, farm, mill and land are contained in the inventory. And neither is money hired by the heirs on a mortgage of the intestate's real

estate and turned over to the administrator for the purpose of paying debts against the estate, when he has entered it on his account with the assent of the judge of probate.

ON REPORT.

Assumpsit on two promissory notes against the defendant as administrator on the estate of Jeremiah M. Eaton. His appointment as such administrator was made in January, 1876.

The writ was dated December 1, 1880.

The administrator settled his second account in probate court on the third Tuesday of November, 1880, in which the balance was stated to be five thousand eight hundred ninety-one dollars and twenty-five cents, and in which the administrator gives the estate credit for the following sums:

"Schedule A.

1876.	Received earnings of schooner 'J. M. Eaton,'	$ 406.86
	" for use of farm and mill in yr. 1876,	500.00
1877, March 15.	" " abatement of tax in Wells.	27.00
	" " use of farm and mill in yr. 1877,	500.00
	" " earnings of schooner 'J. M. Eaton,'	557.60
1876 and 1877.	" " logs from Goddard lot in Wells,	620.28
	" " oak timber from Jay lot in So. Berwick,	360.00
May 11, 1877.	" from Kennebunk Savings Bank, loan to pay debts,	9645.25
1878.	" for lumber sold town of Wells for Daniell Bridge,	21.51
	" " lumber sold town of Wells for Eaton Bridge,	40.00
	" " earnings schooner 'J. M. Eaton,'	171.50
	" " use of farm and mill in yr. 1878,	500.00
		$13,350.00

Other material facts are stated in the opinion.

R. P. Tapley, for the plaintiff.

A promise as administrator to pay the debt of his intestate need not be in writing and may be sustained upon the consideration of the debt due from the intestate. *Piper* v. *Goodwin*, 23

Maine, 251; *Davis* v. *French*, 20 Maine, 21; 3 Redf. Wills, § 41, p. 314.

The sum received from the heirs by their loan from Kennebunk Savings Bank was to pay the debts of the estate. These two notes in suit were then among the debts of the estate. From the time he received that money he owed the duty growing out of the transaction and the law raises all the promises necessary to support assumpsit.

A trust, a duty, an obligation arose from the moment he received the money in favor of the plaintiff and continued to the time of the commencement of the action.

Nearly all of the items in schedule A of the second account must be regarded as new assets. R. S., c. 64, § 55; *Fay* v. *Taylor*, 2 Gray, 160; *Stearns* v. *Stearns*, 1 Pick. 157.

Hence the special statute of limitations of two years does not apply. R. S., c. 87, § § 12, 13; Stat. 1872, c. 85.

W. J. Copeland and H. H. Burbank, for the plaintiff, cited: R. S., c. 81, §§ 79, 93, 96, 88; c. 87, § 12; Stat. 1872, c. 85; *Oakes* v. *Mitchell*, 15 Maine, 360; *Bunker* v. *Athearn*, 35 Maine, 364; *Faulkner* v. *Bailey*, 123 Mass. 588; *Pettingill* v. *Patterson*, 39 Maine, 498; *Lancey* v. *White*, 68 Maine, 28; *Whittier* v. *Woodward*, 71 Maine, 161; *Manson* v. *Gardiner*, 5 Maine, 114; *Brown* v. *Anderson*, 13 Mass. 201; *Emerson* v. *Thompson*, 16 Mass. 429; *Thurston* v. *Lowder*, 47 Maine, 72; *Eaton* v. *Buswell*, 69 Maine, 552; *Rawson* v. *Knight*, 71 Maine, 99; *Millett* v. *Millett*, 72 Maine, 117; *Stevens* v. *Haskell*, *Idem*, 244; *Marshall* v. *Perkins*, *Idem*, 343.

VIRGIN, J. Assumpsit on two promissory notes, dated January 9, 1873, signed by the defendant personally, as principal, and by his intestate, J. M. Eaton, as surety, payable on demand.

The surety, J. M. Eaton, died December 23, 1875, and the defendant was duly appointed and qualified, in January following, administrator on his estate, whereof he gave the proper notice within three months thereafter.

The writ bears date December 1, 1880. The declaration contains two counts on each note — one on an alleged promise

of the administrator as such, and the other on the promise of the intestate in the usual form. In addition to the general issue, the defendant pleads both the general and special statutes of limitation.

The defendant paid from his own funds, both before and after the decease of the intestate, various sums upon each note annually down to 1879, which prevented the notes from being barred by the general statute, as against him, but not as against the intestate. R. S., c. 81, § 93; *Faulkner* v. *Bailey*, 123 Mass. 588.

Had he paid these sums from the funds of his intestate's estate perhaps the result might have been different. *Foster* v. *Starkey*, 12 Cush. 324; *Fisher* v. *Metcalf*, 7 Allen, 210.

On the score of an alleged promise on the part of the defendant, as administrator, to pay the notes, the plaintiff seeks to recover judgment against the estate.

Assuming that the administrator may, by his promise, as such, prevent the general statute from barring the notes; and assuming further (what is very doubtful, *Perley* v. *Little*, 3 Maine, 97; *Oakes* v. *Mitchell*, 15 Maine, 360), that such a promise is satisfactorily proved by the testimony in this case; still the plaintiff is confronted by the special statute bar that, except in specified cases not material to our present inquiry, no action against an administrator, on a claim against the estate, shall be maintained unless commenced within two years and six months after notice is given by him of his appointment. R. S., c. 87, § 12, as amended by Stat. 1872, c. 85.

This provision, except as to the time mentioned, is as old as the state government. Its object and policy are to compel an early settlement of the estates of deceased persons by requiring creditors thereof to prosecute their claims with reasonable diligence, to the end, *inter alia*, that widows and orphans, dependent thereon for subsistence, may realize at as early a day as practicable, what belongs to them. *Thurston* v. *Lowder*, 47 Maine, 78.

In furtherance of its object, this statute has been considered to be a conclusive bar to, and a practical extinguishment of claims

not prosecuted within the time limited; that an administrator cannot waive it, but is bound to plead it; that no promise on his part can revive a claim thus barred, or prevent its barring an action not commenced within the appointed time. *Scott* v. *Hancock*, 13 Mass. 162; *Brown* v. *Anderson*, 13 Mass. 201; *Thompson* v. *Brown*, 16 Mass. 172; *Emerson* v. *Thompson*, 16 Mass. 429; *Heard* v. *Meader*, 1 Maine, 156; *Manson* v. *Gardiner*, 5 Maine, 108, 115; *Parkman* v. *Osgood*, 3 Maine, 16, 19; *McLellan* v. *Lunt*, 11 Maine, 150; *Nowell* v. *Bragdon*, 14 Maine, 324-5; *Thurston* v. *Lowdry*, 47 Maine, 72, 76; *Waltham Bank* v. *Wright*, 8 Allen, 122; *Bacon* v. *Pomroy*, 104 Mass. 585; *Hodgdon* v. *White*, 11 N. H. 208; Wood on Lim. 389, and cases in note 5; 3 Will. Ex. (6th Am. Ed.) 1904, note *q*, 2061, note *u*, where the authorities in the different states are collected.

In carrying out the logical consequences of this peremptory statute bar, it has been held that an action of debt, commenced after the lapse of the statutory limit, to revive a judgment recovered within it, is barred. *McLellan* v. *Lunt*, 11 Maine, 150; *Pettengill* v. *Patterson*, 39 Maine, 498; that a petition for a license to sell real estate on a claim barred, will not be granted, *Nowell* v. *Nowell*, 8 Maine, 220; *Lamson* v. *Schutt*, 4 Allen, 359; that if granted, it is void, since no lien of the creditor would remain on the real estate, of which the creditor could avail himself. *Riker* v. *Morse*, 104 Mass. 277; *Tarbell* v. *Parker*, 106 Mass. 347; that a levy under a judgment recovered on an action commenced after the limited period, is void as to all persons except the administrator who suffered it. *Thayer* v. *Hollis*, 3 Met. 369; *Amoskeag Man'f'g Co.* v. *Barnes*, 48 N. H. 25, 29; that a sum paid by the administrator to satisfy a judgment thus recovered would not be allowed in his official account. *Hodgdon* v. *White*, 11 N. H. 216; that no disability of the claimant, as by infancy, during the period prescribed, will prevent his claim, if due and payable, from being barred. *Hall* v. *Bumstead*, 20 Pick. 2, 8; and finally, it would seem, that in the absence of any statutory provision excusing the delay or new assets, no remedy exists for the claimant who has failed to avail

himself of his rights during the statute period, whatever may have been the reasons therefor. *Packard* v. *Swallow*, 29 Maine, 458.

The plaintiff's notes are, therefore, barred, unless he has a remedy within the exception specified in the second clause of R. S., c. 87, § 13 as amended by St. 1872, c. 85.

The plaintiff claims that the items specified in schedule "A" in the defendant's second probate account, are "assets," which have "come into the hands of the administrator after said term of two years," within the meaning of § 13. Such assets are commonly denominated "new assets." Assuming, however, (what does not fully appear) that the several items of property therein specified and the money therefor, were received, in fact, by the administrator after the expiration of two years from the notice of his appointment, still our opinion is that they cannot be considered new assets. As a general rule, no property can be considered such, which has been in the hands and under the control of the administrator, or has been inventoried, or which is the product of such property, although it may have assumed or been converted into a new form. Thus, where an intestate's interest in a partnership had been inventoried and sold by the administrator for notes, the notes received by him after the expiration of two years from the notice of his appointment, are not new assets. *Sturtevant* v. *Sturtevant*, 4 Allen, 122.

Nor is money accruing to the administrator, after the decease of the intestate, as royalties, or as proceeds of sales of inventoried patent rights. "It is the product of property included in the inventory; and, in the same sense as are the increase of stocks and the increase of animals, it was embraced as a potentiality in the valuation of the patent for the invention." *Robinson* v. *Hodge*, 117 Mass. 222.

Nor is property received by an administrator *de bonis* after two years from the date of the original administration, from a surety on the original administrator's bond in satisfaction of an action thereon, for failure of the administrator to account for a part of the estate inventoried — it being the proceeds of the estate embraced in the inventory. *Veazie* v. *Marrett*, 6 Allen, 372.

Nor is money received, after two years, in satisfaction of a judgment recovered by the executor, in a suit pending at the time of his testator's death. *Bradford* v. *Forbes*, 9 Allen, 365.

These decisions dispose of all the items in schedule "A" relating to the "earnings of the schooner" and to the "logs," "timber" and "lumber" sold from certain lots, the "lots" and the "schooner" being found on the inventory.

Nor are rents accruing on real estate sold under a license from the judge of probate for the payment of debts, two years after administration granted, down to the time of sale, new assets. *Alden* v. *Stebbins*, 99 Mass. 616.

Rents belong to the heirs who may enter and take them; yet, if taken by the administrator, they are the proceeds of the real estate, which is assets, (and not new assets) so far as it is necessary for the payment of debts, charges, etc. *Stearns* v. *Stearns*, 1 Pick. 157; *Chenery* v. *Webster*, 8 Allen, 76; *Alden* v. *Stebbins*, *supra*.

These cases dispose of the sums received as by schedule "A" for the "use of the farm and mill," the "farm and mill" being embraced in the inventory.

The only remaining item in schedule "A" is the sum received "from savings bank loan to pay debts." But this money cannot be considered new assets, on the ground that it is analogous to the avails of real estate sold under a license from the judge of probate, and hence, in substance, it is the proceeds of original assets. *Chenery* v. *Webster*, 8 Allen, 76.

The real estate was liable to be sold by license, for the payment of debts. The heirs and owners of the real estate, to prevent such sale, mortgaged it to the bank, procured the loan, turned it over to the administrator and it was accepted by the administrator for the purpose, and entered on his account with the approbation of the judge of probate. "The money thus received," says SHAW, C. J., "is, in a certain sense, the proceeds of the estate liable for the charges and convertible into money, as if sold by license, and then it would certainly be assets. . . It is true that the money contributed was never the money of the testator; but it was paid to redeem property, which had been

the property of the testator, bound by law for the payment of debts and legacies." *Fay* v. *Taylor*, 2 Gray, 154, 160.

So far as the question of estoppel is concerned, the estate would not be affected.

Neither can the estate be holden for money put into the hands of the administrator by the heirs. He will be held to account for it as he would for the avails of real estate sold under a license. He cannot be held, however, on any implied promise arising for the receipt of such money, for various reasons, among which is there is no count in the declaration on which such a promise can be sustained.

For the extreme hardship of this result on the part of the plaintiff, we perceive no remedy, unless it shall be found in the future "compunctious visitings" of the defendant and his co-heirs of the present existence of which this record discloses no evidence. The entry must therefore be,

Judgment for the defendant.

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

JOSIAH N. FOGG, petitioner for review in equity,

vs.

CHARLES MERRILL, administrator *de bonis non.*

Kennebec. Opinion March 10, 1883.

Review. Equity practice.

A suit in equity for the settlement of ship's accounts among the owners, may and should be reviewed when the original plaintiff has, by a supplemental bill or amendment filed after the default of the petitioner for review, and proceeded on without further notice to him, increased the amount alleged to be due from the co-owners, unless he remits all such excess and assents to a revision of the decree, so as to exclude from the amount for which the petitioner for review is chargeable, all except his proportional part of the balance as it was alleged at the time of the default, and gives all due credits for sums since received and pays the costs on petition for review.

A respondent in equity acknowledging due service of the bill, may fairly be held to have constructive notice of all amendments that are made before he is defaulted.

Bill in equity praying for review.

Heard on bill, answer and proofs.

The opinion states the case and material facts.

W. S. Choate, for the plaintiff.

J. W. Bradbury, for the defendant.

BARROWS, J. This is a petition for the review of a suit in equity commenced for the August term, 1867, by Ambrose Merrill, the respondent's intestate, by a bill alleging that said Ambrose and this petitioner and others there made respondents, were owners in certain respective proportions of the ship Dashaway, and that there were unsettled accounts between said Merrill and said ship and owners, and between said owners and the firm of Crocker, Wood and Company, merchants, who had been transacting the ship's business, which the parties were unable to settle, and demanding a settlement of the same in equity and "payment of such balance (if any) as shall be found due from any of them." Upon this bill the petitioner acknowledged service, but, so far as appears, paid no attention to it after it was entered in court. At the October term, 1867, the death of Ambrose Merrill was suggested, and Harriet Merrill, his administratrix, came in to prosecute, and subsequently, in June, 1868, (on condition that she should take no costs against defendants to that date) had leave to amend the bill by stating the amount she claimed as due from the defendant co-owners in the ship, and the amount due from Crocker, Wood and Company, and alleging that nothing was due to any of the other owners, and that she was entitled to whatever might be found due from Crocker, Wood and Company; and the amendment was filed accordingly; setting forth that said intestate on the ninth of August, 1861, advanced to the ship and owners, $5000, which had never been repaid, and was due with interest, and, in substance, that, as she was informed and believed, Crocker, Wood and Company on January 1, 1865, received a certain sum which was $5000 in

excess of any just demand that they had against the ship and owners, and this sum ought to be paid over to her, with interest from the last named date, as the owner entitled to receive it. The suit seems to have been defended by some of the respondents. On the second day of the August term, 1870, the administratrix again asked leave to amend, and for the entry of a default as to those who did not answer, and this petitioner and certain other owners were defaulted on the seventh day of the term. At the October term, in the same year, the administratrix, upon leave had, filed a supplemental bill repeating the allegations of the first and the amendment thereto, and further alleging collusion between Crocker, Wood and Company and one Hill, a co-part-owner and master of the vessel, to avoid paying what was due to said Merrill's estate and to appropriate it themselves though it appeared by the auditor's report in the case that said Hill was indebted to the ship and owners aside from his share of what was advanced by said Merrill, and that one of the co-owners had become bankrupt and others had failed, and that the other owners who had been notified, had been defaulted. It does not appear that notice of this supplemental bill was given to any of the respondents; and in January, 1871, the administratrix, upon leave gained, presented a second supplemental bill, reiterating the allegations of the original bill and amendment and further alleging that Ambrose Merrill, the intestate, had advanced for the ship-owners during the years 1858 and 1859, sundry sums amounting to about $4550 of which only about $1280 had been repaid to him, and that the balance with interest was due his estate, in addition to the $5000 previously claimed; and furthermore, that she had received from Crocker, Wood and Company $3500 of the funds in their hands, and therefore she discontinues as against them, and proposes to credit the $3500 against the sum that may be found due from the ship owners on account, and prays that each of the owners may be decreed to pay his proportionate share of the balance, and for an order upon certain of them to file their answer at the March term, 1871, when said second supplemental bill was duly filed, and the death of the administratrix suggested, and the case was further continued till the October term, 1874, when the present

respondent appeared to prosecute, an auditor was appointed who was not a master in chancery and received no special commission and who seems to have proceeded, without giving notice to this petitioner or any of owners of the vessel, to assess upon them their respective shares of the balance due upon the sums claimed as advanced in 1858 and 1859, as well as of the $5000 originally claimed by Ambrose Merrill; and his report was accepted and a decree in conformity therewith was entered up in favor of the plaintiff against the petitioner, (who had no notice of any of these proceedings except the original bill, unless he should be regarded as having constructive notice of the amendment which was made before he was defaulted,) and against the other owners for their respective proportions not only of the $5000 specified in the amendment, and the balance of the sums alleged to have been advanced in 1858 and 1859, but for certain costs, all of which accrued after the petitioner had been defaulted as appears by the taxation thereof.

The first principles of legal proceeding forbid the introduction, even by a supplemental bill, of an amendment which increases the claim of the plaintiff after the default of the defendant, unless he is notified of the change. It may well be that he is content to be defaulted for the amount originally claimed while he would resist the addition as unfounded and unjust whether it came in the form of a specification, as the respondent here contends, or a more bald increase of the sum demanded.

This petitioner had notice of the general object of the bill as it stood originally and that it called for an equitable settlement of the ship's accounts between the owners; and we think he may well be regarded as having notice of the first amendment stating Merrill's claim at $5000 and interest, so that, had nothing else been included, and the proper amount had been credited coming from Crocker, Wood and Company, he would have no cause of complaint, and at all events no remedy for the result of his own laches.

The respondent's answer admits there was error in the taxation of costs against the petitioner, but says that he has already

remitted the amount thereof upon the execution and by docket entry, and his counsel in argument claims that the case is not brought within any of the causes for which a review may be granted because it does not appear that injustice has been done the petitioner touching anything but the costs, and that has been rectified.

He offers, moreover, in view of the want of notice upon the second supplemental bill and of the hearing before the auditor, in behalf of the respondent to remit all that portion of the sum adjudged against the petitioner that rests upon any items of advances save the $5000 and interest thereon, specified in the amendment filed before the petitioner was defaulted, and thereupon claims that such remission would bring the case within the rules respecting the granting of reviews adverted to in *Hobbs* v. *Burns*, 33 Maine, 233; and *Parker* v. *Currier*, 24 Maine. 168.

It is clear that unless the respondent so remits within a reasonable time to be fixed by the judge at *nisi prius*, and pays the costs of these proceedings, and further stipulates that the $3500 paid by Crocker, Wood and Company shall be allowed as a partial payment on the $5000 and interest originally claimed, so that the petitioner should be held only for his proportion of the balance thus ascertained, the review ought to be granted unconditionally with costs upon this petition. If he does this, we see no good reason why the petitioner should gain by his remissness the advantage which he might have if he were now allowed, after the lapse of more than twenty years since the transaction, to put the representative of the deceased to the proof of a debt the justice of which he acknowledged by the default to which he so long submitted. He presents no testimony to suggest even a doubt that the $5000 was actually advanced by Ambrose Merrill. When the original suit was commenced if any part of the sum had been refunded, it would seem to have been readily susceptible of proof, but the petitioner then declined the contest; and in the absence of any testimony here tending to show that the claim was false, we think he should not be permitted to enter upon it now.

He bases his claim upon the irregularities in the proceedings. True, the appointment of an auditor in a proceeding of that description was not according to the ordinary course, and the acceptance of his report made without any notice to the respondents of a hearing before him can be accounted for only because it seemed that all he had to do was to make an arithmetical computation upon the facts admitted by the default. It is doubtless competent for the court to enter a decree upon a computation thus made by any one who can do it correctly, whether specially appointed or not, and the adoption of the calculation by the court would dispense with the necessity of a special appointment or commission to the servant of the court who made it.

Upon the case here presented our conclusion is that if the respondent fails to comply with the terms above prescribed, the review is to be granted. If he performs what is herein required of him so that the decree may be amended to conform herewith, justice will not require it.

Case remanded for further proceedings.

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

WARREN W. SPAULDING *vs.* INHABITANTS OF WINSLOW.

Kennebec. Opinion March 12, 1883.

Ways. Defects. Proximate cause.

The plaintiff was traveling with his horse and wagon upon a road in the defendant town, when the horse took fright at a hole in a culvert upon the road, and by the action of the horse the wagon was carried into the adjoining ditch, and the plaintiff was thereby injured. By a statutory provision the defective culvert imposed no liability upon the town, not having been in existence for twenty-four hours before the accident happened. The defect complained of in the writ is the want of a railing between the traveled way and the ditch. *Held;*

1. That if the fright of the horse at the hole was the proximate cause of the accident, or one of the proximate causes producing it, the plaintiff cannot recover; but that if a remote cause only, and another defect in the road was the only proximate cause of the accident, he can recover.

2. That if the horse became unmanageable, substantially freeing himself from the control of the driver, and the upset ensued from such unmanageableness, the defective culvert or the horse's fright at the culvert must be considered to have been a proximate cause of the accident or one of the proximate causes producing it.

3. That if the horse merely started or shied a few feet from the line of travel and, through only a momentary loss of control by the driver, threw the wagon into the ditch, the horse would not be considered unmanageable, and, in such case, the defective culvert, or the horse's conduct on account of it, would be only a remote and not a proximate cause of the accident.

4. That upon the question, whether the road was or was not defective for want of a railing at the time of the accident, the hole in the road should not be taken into consideration any more than if it had never existed, it being a temporary want of repair for which the town was not responsible.

On exceptions, and on report on motion to set aside the verdict.

An action to recover damages for personal injuries sustained by reason of a defect in a road in the defendant town. The writ was dated August 16, 1881. Plea, general issue.

The defect complained of was a want of a railing alongside the way, by reason of which the plaintiff's wagon was upset in the ditch, his horse having shied at a hole in a culvert. The accident occurred August 4, 1881.

At the trial the presiding justice instructed the jury as follows: . . . "It will be incumbent, then, upon the plaintiff, in the first instance, having the burden of proof, to satisfy you that the highway was not safe and convenient at the point where he claims the accident happened; and that it was not safe and convenient for the reasons and in the particulars named and specified in his notice to the town and in his writ which has been read to you. Secondly, it will be incumbent upon him to satisfy you that an accident happened there by reason of which he sustained an injury, and that at that time there was no want of ordinary care on his part which contributed to produce that injury; that the wagon in which he was then riding was reasonably and ordinarily safe and strong and suitable to be used in that manner and for that purpose, and that the horse was a reasonably and ordinarily kind, gentle and safe horse, and reasonably and ordinarily well

broken for travel upon the public way. Or, if the carriage was not of that character, or the horse was not of that character, then that the actual condition of the wagon or the actual character of the horse did not contribute to produce this injury.

"Then it will be incumbent upon him to show you in the third place that the defect in the highway, if there was one, was the sole cause of the injury to him. In other words, that the accident happened through the defect alone; that no want of care on his part, as I have said, and no independent, efficient cause directly and immediately contributed to produce the injury. It will then be incumbent upon him to show that the town had actual notice of the condition of the way as it was at the time of the accident; that he, after the accident, gave the notice within fourteen days. The statute I have read to you. I will not be more specific upon these points because there is no serious controversy in relation to them. I will speak of the plaintiff's notice further on.

. . . "Now, you will perceive that the court here [the judge had read from opinion of GRAY, C. J., in *Stone* v. *Hubbardston*, 100 Mass. 49,] have made a distinction which the courts in this state have not thus far made. That is, that while they uniformly adhere to the general rule, as in this state, that if any independent, efficient cause directly and immediately contributes to produce the injury, the plaintiff cannot recover; yet, you are to consider that in connection with the fact of a cause produced by or through the character of an animal that is reasonably and ordinarily gentle and safe, and reasonably and ordinarily well broken for use upon the public way; so that if the shying is not occasioned by any vicious habit of an animal of that kind, but that the object is of a character to startle and cause any animal of a reasonably and ordinarily well broken character to shy, then it does not preclude the plaintiff from recovering; that the two points are to be considered together; that the jury are not required to consider a cause which thus operates upon a well broken animal, an ordinarily safe and gentle animal, as a directly, efficiently and immediately contributing cause. They are not compelled so to consider it. I, therefore, for the purposes of

this trial, give you this rule with reference to the temporary covering placed upon the hole near the easterly end of the culvert by one of the selectmen of the town of Winslow a few hours prior to the alleged accident in this case; if you find that the temporary covering placed upon that hole near the easterly end of the culvert was placed there by one of the selectmen of the town of Winslow, acting in the capacity of a highway surveyor in making repairs on the highway, and find that it was not such a condition as would render the way unsafe and inconvenient for travel, regarded as an obstruction, and that the town did not have twenty-four hours' actual notice, as they would not have if it had not existed longer than a few hours, but find, nevertheless, that it was a condition, an object or a material calculated and likely to frighten a horse ordinarily and reasonably safe and gentle and well broken for use upon the public way, and that the plaintiff's horse was a reasonably safe, gentle and well broken horse for travel upon the public way, and that the horse shied by reason of this temporary covering upon the culvert near the easterly end, and not by reason of any vicious habit of shying, and at the moment the carriage went into the ditch on the westerly side of the highway the horse had not passed entirely beyond the control of the driver, so that if there had been no defect in the way he would immediately have recovered control of the horse, then I instruct you that with the other conditions to which your attention has been called or will be called, being fulfilled, the plaintiff may recover in this action for any damages he has sustained by reason of the injury received at that point. But, if, on the other hand, the object was not of a character calculated to frighten a horse of this gentle nature which I have repeatedly named, and you find that the horse shied by reason of his own vicious habits, then you would be authorized to find that that was a directly, and immediately contributing cause which would prevent the right of the plaintiff to recover, providing it did so contribute to produce the injury."

To this instruction the defendants excepted, and also moved to set aside the verdict, which was for the plaintiff in the sum of two hundred and twenty-five dollars.

The opinion states other material facts.

S. S. Brown, for the plaintiff, cited: *Macintosh* v. *Bartlett*, 67 Maine, 130; *Bacheller* v. *Pinkham*, 68 Maine, 252; *Lyman* v. *Amherst*, 107 Mass. 343; Hilliard, New Trials, 284; 97 Mass. 258; 101 Mass. 93; 100 Mass. 49; 114 Mass. 507; 111 Mass. 357; 64 Maine, 57; 66 Maine, 348; 18 Maine, 286.

L. C. Cornish, (*Orville D. Baker* with him) for the defendants.

The court erred in the citation and practical adoption of *Stone* v. *Hubbardston*, 100 Mass. 49, for two reasons, because the decisions of Massachusetts in this class of cases differ materially from those in our own state, and because the facts of that case were essentially unlike the case at bar.

In an early Vermont case, *Hunt* v. *Pownal*, 9 Vt. 411, it was decided that when one of the causes of an accident is a defect in the way and the other is one for which neither party is responsible, the town is liable.

Massachusetts adopted this rule. *Palmer* v. *Andover*, 2 Cush. 600; *Rowell* v. *Lowell*, 7 Gray, 100; *Titus* v. *Northbridge*, 97 Mass. 264.

Maine declared it unsound. *Moore* v. *Abbot*, 32 Maine, 46; *Coombs* v. *Topsham*, 38 Maine, 204; *Moulton* v. *Sandford*, 51 Maine, 127; *Perkins* v. *Fayette*, 68 Maine, 154; *Anderson* v. *Bath*, 42 Maine, 346.

And the tendency of our court has been to increase rather than to relax the stringency of this established rule.

Counsel further elaborately argued the case and contended upon the question of liability for injury when a horse becomes unmanageable, that where the unmanageableness is caused by fright at an object which in itself is a defect in the road then the town is or may be liable, but where the horse took fright at something which was not a defect, and the injury happened, then there would be no liability on the part of the town. *Clark* v. *Lebanon*, 63 Maine, 393.

The Massachusetts court recognizes the doctrine in *Cushing* v. *Bedford*, 125 Mass. 526; *Palmer* v. *Andover*, 2 Cush. 600; *Bemis* v. *Arlington*, 114 Mass. 507, that where the momentary

shying of the horse is a pure accident, for which the plaintiff is not responsible and an injury happens from a defect and this contributory shying of the horse, the town is liable.

But that doctrine was directly repudiated in this state in the case of *Moulton* v. *Sandford*, *supra*.

PETERS, J. The plaintiff was traveling with horse and wagon upon a road in the town of Winslow, when his horse took fright at a hole, or at the fresh covering of a hole, in a culvert crossing the road, and by the conduct of the horse the wagon was carried into the ditch, the plaintiff was thrown therefrom, and thereby received a personal injury. The plaintiff alleges that the road was defective for not having a railing between the traveled way and the ditch adjoining.

A question arises, whether the fright of the horse should be considered the legal cause or any part of the legal cause of the accident. It is admitted that the hole, or the temporary repairing of the hole, had not existed twenty-four hours before the accident happened. Inasmuch as the town would not be liable, as the law then stood, for an injury caused by a defect of which the municipal officers of the town had not twenty-four hours' actual notice, it is contended by the defendants that, if the hole in the culvert had any force or influence in causing the injury, the plaintiff cannot recover. In other words, one of the positions of law relied upon by the defendants is, that the town is to be regarded as being in the same or as good a condition and position as if no hole in the culvert had ever existed. In still another way the idea may be as well expressed. The town says, we were not responsible for the hole in the culvert, and, if the hole had not been there, the accident would not and could not have happened. Therefore, the defect for which we were not responsible, must, *ex necessitate*, be considered to be the legal cause of the accident.

We do not concur with the defendants in this view. We think the only purpose of the statute was to screen a town, not having the twenty-four hours' notice, from the consequences of a defect, in cases where the defect operates as a proximate cause of an injury. Our judgment is that the hole in the culvert might be

an object or thing without the existence of which the accident could not have happened, and still be no part of the legal cause of the accident. It might have its remote and indirect influence in the same manner that many other objects and things, which are not defects upon a highway, would have in many cases. The statute declares that, under the circumstances in proof, the hole in the culvert shall not be regarded as a defect. So the law says a bit of white paper shall not be. But the hole or the paper may be the remote, and some real defect be the proximate cause, of an accident.

Suppose, in the case at bar, the horse had not been affrighted, but the driver, using due care, had, under some misjudgment or miscalculation in driving by the hole, or in passing another team at the place of the hole, caused his team to be upset at the side of the road, where there should have been a railing, and such an accident would not have occurred but for the hole in the culvert. We think in that case the hole in the culvert could not be considered as the real and legal cause of the accident. Everything which induces or influences an accident, does not necessarily and legally cause it. In the case supposed, the unrepaired or improperly repaired culvert would have an accidental and casual but not a causal connection with the accident. It might be the "agency," or "medium," or "opportunity," or "occasion," or "situation," or "condition," as it is variously styled, through or by which the accident happened; but no part of its real and controlling cause. It would be the remote, but not the proximate cause. *O'Brien* v. *McGlinchy*, 68 Maine, at p. 557.

Here, then, must be the proper distinction. If the hole or the horse's fright at the hole, was the proximate cause of the injury the plaintiff cannot recover. If it by chance became merely an agency through which another defect operated to produce the injury, then he can recover.

Now, whether the fright of the horse at the hole shall be regarded as the true and real cause of the accident, or only a circumstance which permitted it to happen, must depend upon the extent of the misconduct of the horse. If the horse became by fright unmanageable, substantially freeing himself from the

control of the driver, and the upset ensued from such unmanageableness, then the fright of the horse should be regarded as a proximate cause, or one of the proximate causes, of the accident. The legal condition of the case would be essentially or precisely the same as existed in the cases cited. *Moulton* v. *Sandford*, 51 Maine, 127; *Perkins* v. *Fayette*, 68 Maine, 152. There were two causes in those cases, to produce the accident, for one of which the town was not legally responsible. So in the case at bar, under the conditions assumed, two proximate causes would exist, or if only one existed, then the fright of the horse would be the sole cause of the accident.

If, however, the horse, while being properly driven, upon sight of the hole suddenly started or shied, and swerved or sheared a few feet from the direct line of travel, and, through only a momentary loss of control by the driver, threw the wagon into the ditch on account of the want of a railing, and the road was defective for want of a railing, in such case the misadventure of the horse should not be considered as causing the accident. Every irregularity in the movement of a horse is not imputable to some fault or vice. Perfection of conduct is not to be expected. We think it was correctly said by CHAPMAN, J., in *Titus* v. *Northbridge*, 97 Mass. 266, that "a horse is not to be considered as uncontrollable that merely shies or starts, or is momentarily not controlled by the driver."

It is not a fault in a horse to be spirited, or to start up quickly, or to shy and shear from objects to a certain extent. Such things are very common occurrences, and are to be looked for and expected in the use of horses, and cannot be prevented or effectually guarded against by the owners or drivers of horses. It is not unreasonable to drive horses of such description upon our public roads. Therefore, it would not be reasonable to say that the fright of the horse, under such circumstances and conditions as we are now assuming, hypothetically, to be true, was a proximate cause of the plaintiff's injury. There can be no fixed rule defining proximate cause. Much must depend upon the circumstances of each particular case. *Page* v. *Bucksport*, 64 Maine, p. 53.

And much depends upon the common sense of the thing. *Willey* v. *Belfast*, 61 Maine, p. 575.

It is not an easy thing to establish a general rule as to what may be considered unmanageableness of horses, and much depends upon the circumstances of each case that arises. The distinctions which we make in this case are well established by the cases in Massachusetts and elsewhere. *Titus* v. *Northbridge*, *supra*; *Stone* v. *Hubbardston*, 100 Mass. 49; *Cushing* v. *Bedford*, 125 Mass. 526; *Wright* v. *Templeton*, 132 Mass. 49; *Hey* v. *Philadelphia*, 81 Pa. St. 50; *Kennedy* v. *New York*, 73 N. Y. 365; *Nichols* v. *Brunswick*, 3 Cliff. 81; 2 Thomp. on Neg. 1207, and cases in note.

Upon the motion, we are inclined to set the verdict aside. In our judgments, it did not belong to the plaintiff to complain that the way was defective. He knew what the road was. His horse declined to pass over it and stopped. He took the risk of forcing the horse along. To decide whether, as far as concerns the plaintiff, the road was defective or not, we must take it as it would have been without any hole in or repairs upon the culvert, inasmuch as for that temporary condition of the culvert the town was not then responsible. That element in the description of the road must be excluded from the consideration. Probably the jury failed to exclude it in forming their conclusion. The culvert itself is not complained of. The allegation in the writ is, that there was no railing at the side of the road, and not that there was none upon the culvert. The plaintiff testified: "It (wagon) dropped off before it got to the crossway. It was not the want of a railing to the crossway of which I complained. I complain of the want of a railing where I went into the ditch. That was six feet south of the crossway." The culvert was of an ordinary character. The opening of the culvert was only about two feet wide and seven inches in height, covered by a thickness of nineteen inches of earth, plank and ties. The road on both sides of the culvert was a level, smooth country road, twenty-three feet between its ditches. There was nothing to prevent travelers using that width of road. The plaintiff's vehicle required less than six feet of this space. The ditch on the south-

erly side is the only defect complained of. This was but twenty-seven inches deep at the most. The plaintiff contends that there should have been a railing between the ditch and the traveled way. There are many thousands of such places within this state. If railings were required for them, towns would have extraordinary burdens to maintain their roads. The plaintiff had twenty-three feet of width of road for his team about five feet wide, to pass over in the light of day. We feel well assured that some cause other than a defective way, for which the town was answerable, produced the accident.

Motion sustained.

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

BARROWS, J., concurred in the result.

CATHARINE A. REED

vs.

WILLIAMSBURG CITY FIRE INSURANCE COMPANY.

Cumberland. Opinion March 12, 1883.

Insurance. Insurable interest. Fraudulent representations. Practice.

A person who bargains for and takes into his possession an article of personal property, giving his note of hand therefor,— the note containing an agreement that the title to the property shall remain in the seller until the note be paid,— has an insurable interest in the property, although the note is not fully paid.

Where a judge in his charge to a jury states that there were no fraudulent misrepresentations to be considered because no representations were made, meaning no express representations, if a party desires that the jury shall know that a fraud may be committed by means of deception other than express representations, he should ask for more enlarged instructions before the cause is committed to the jury.

ON EXCEPTIONS, and on report on motion to set aside the verdict.

Assumpsit, writ dated June 24, 1880, on policy of insurance issued by the defendant company through its Portland agent, September 10, 1879, upon personal property, viz:

"Six hundred dollars on her household furniture; three hundred dollars on her printed books; seventy-five dollars on her parlor organ; twenty-five dollars on her sewing machine."

The verdict was for plaintiff, for eight hundred and four dollars.

The opinion states the material facts.

Ardon W. Coombs, for the plaintiff, on the exceptions, cited: R. S., c. 111, § 5; Stat. 1872, c. 71; Parson's Mer. Law, * 509; *Columbian Ins. Co.* v. *Lawrence*, 1 Peters, S. C. 25; *Cumberland Bone Co.* v. *Ins. Co.* 64 Maine, 470; Rule 18, S. J. C.; *State* v. *Reed*, 62 Maine, 129; *State* v. *Barnes*, 29 Maine, 561; *State* v. *Watson*, 63 Maine, 128; *Foye* v. *Southard*, 64 Maine, 389; *Roberts* v. *Plaisted*, 63 Maine, 335.

M. P. Frank and I. W. Parker, for the defendant.

The presiding justice in his charge to the jury touching the point as to whether the policy was procured by fraud, used the following language: "Then you will look to the proof and see what representations were made. The counsel on the part of the plaintiff says there were none. I do not recollect what the counsel on the part of the defendant state upon this part of the case. You will recollect if there were no representations made there could have been no false ones. If there were none, then on that part of the case you would have no trouble, but pass it over and look at the next." This language was suited to deceive the jury in this respect. It gave them to understand, and we believe they did so understand, that fraud can never be committed except by some active overt representation of the party committing it, precluding the idea that fraud may be committed by suppression of the truth and by the concealment of material facts, while that fraud may be so committed is a well established principle of law. *Fletcher* v. *Commonwealth Ins. Co.* 18 Pick. 419; *Prentiss* v. *Russ*, 16 Maine, 30. "Good faith," says LORD MANSFIELD, (as quoted in 1 vol. of Philips on

Insurance, page 233, second edition) "forbids either party by concealing what he knows, to draw the other into a bargain from his ignorance of the facts and he believing the contrary." See *Ingersoll* v. *Barker*, 21 Maine, 474.

PETERS, J. Among the articles of personal property insured was a parlor organ, given to the plaintiff by her husband, which the husband purchased of another person by giving a note therefor, the note containing an agreement that the title in the organ should remain in the seller until the note became paid. At the date of the injury by fire, the organ had been in part but not fully paid for. The plaintiff was in possession of the property. We think the plaintiff had an insurable interest in it. We are not informed by the case that any provision of the policy prevents a recovery for this article. At common law a common carrier — a warehouseman — and other bailees have an insurable interest in goods in their possession. *Eastern Railroad Co.* v. *Relief Fire Ins. Co.* 98 Mass. 425, and cases there cited; *Amsinck* v. *American Ins. Co.* 129 Mass. 185.

The defendants' counsel complains that the judge at the trial remarked, that, if there were no representations, there could be no false ones, in procuring the policy. The counsel argues that this observation would lead the jury to suppose that fraud could not be accomplished otherwise than by fraudulent misrepresentations expressly made. The judge at the moment was commenting upon and had in mind express representations. If more enlarged instructions were desired by the defendants, they should have been requested, and the distinction which counsel had in mind should have been presented to the mind of the judge.

No other points in the exceptions are dwelt upon by counsel. The minor rulings were correct.

We feel impressed with a belief that the loss of goods was less than the amount found by the jury, and that a new trial should be granted upon that account.

Exceptions overruled.

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

CHARLES W. SNOW *vs.* ALBERT P. GOULD and another.

York. Opinion March 12, 1883.

Evidence. Privileged communications. Divorce, an agreement between parties. Practice.

A client wrote to his counsel to commence a suit for divorce at an early day, so that his wife could have time to think the matter over, and perhaps consent to a private separation, and thereby avoid as much public scandal as possible. He also orally instructed his counsel to withdraw the libel, if a jury trial could not be avoided. In the trial of a suit between the counsel and client to determine the amount of compensation which the counsel should receive for services in obtaining a divorce, the counsel was allowed to put the written and oral instructions in evidence, to show the nature of the engagement and the services performed. *Held*, that the same should not have been excluded as confidential communications.

An agreement between parties to a divorce, declaring the terms upon which a divorce may be decreed, does not necessarily show connivance or collusion. Where no fraud is intended to be thereby practiced upon the court, and no facts are suppressed, such an agreement, although to be carefully looked into by the court, may be entirely unobjectionable.

Where a question arises as to the words of an interrogatory put to a witness, the judge, having not a personal recollection, and the counsel not agreeing about it, may adopt it as found in the court reporter's short hand notes.

ON EXCEPTIONS.

Assumpsit on account annexed for money had and received; viz: $1000, September 23, 1874, at Rockland, and interest, in all, $1345.33. The writ was dated June 28, 1880.

Plea, the general issue and brief statement that the money was received by defendants from plaintiff in payment and settlement for their services and disbursements in and about plaintiff's business in two divorce suits and matters and services pertaining thereto, covering a long period of time and involving great labor, skill, and responsibility.

The verdict was for the defendants.

Material facts stated in the opinion.

C. W. Goddard, for the plaintiff.

In reference to both letter and the admitted testimony of Mr. Gould, it is respectfully insisted that neither the law nor public policy nor the interests of the profession or of justice justify a learned counsellor in a suit touching his own professional services, to instruct or allow his attorney to assail vitally his former client's character and then follow up that accusation by the revelation of a confession made by that client to him under the seal of professional confidence and the protection of privilege.

Much less can he be permitted to evade the wholesome and immemorial safeguard which the law extends to clients by putting in evidence a letter to which his unlawful and excluded testimony has furnished a key which the mere dictum of the presiding judge "excluded" is powerless to banish from their mind.

Plaintiff's counsel has been unable to find a precedent for so dangerous an invasion of privilege. If the law really does warrant the proceedings practiced by the chief defendant in this case, privileged communications are a mockery, for our client's secrets are at our mercy whenever our fees are called in question.

The current of authorities is wholly in one direction.

"Communications made on the faith of that professional confidence which a client reposes in his counsel, attorney or solicitor, are not allowed to be revealed in a court of justice to the prejudice of the client." Phillips on Evidence, vol. 1, c. 7, § 1, and cases cited, (pp. 130-160, 10th Eng. edition;) *McLellan* v. *Longfellow*, 32 Maine, 495; *Sargent* v. *Hampden*, 38 Maine, 584.

To plaintiff's counsel "the agreement" for a divorce appears unlawful, collusive, contrary to public policy and a fraud upon the court. R. S., c. 60, § 8. It was as follows:

"S. J. C. Knox County, December Term, 1873, Charles W. Snow, libellant, *v.* Olinda A. Snow, Olinda A. Snow, libellant, *v.* Charles W. Snow.

"Decree of divorce to be entered in Charles W. Snow, libellant, *v.* Olinda A. Snow, and further entry to be made that no right or claim of Olinda A. Snow, either to dower or alimony in the estate of the said libellant shall be in any way changed or prejudiced thereby, and libellant agrees to refer the determina-

tion of the amount of such dower and alimony to Judge Barrows, and to pay or set out such alimony and dower as may be awarded by him, after a hearing of all the evidence either party may wish to offer, and decree is to be entered accordingly in the aforesaid actions."

A. P. Gould and *J. E. Moore*, for the defendants, cited: *Hatton* v. *Robinson*, 14 Pick. 416; 1 Whart. Ev. § § 591, 587, 446; *Jeanes* v. *Friedenberg*, 3 Pa. Law Jour. 199; *Odlin* v. *Stetson*, 17 Maine, 244; *Eggleston* v. *Boardman*, 37 Mich. 14; *Smith* v. *Lyford*, 24 Maine, 147; *Weston* v. *Davis*, 24 Maine, 374; *Perry* v. *Lord*, 111 Mass. 504; *Pierce* v. *Parker*, 121 Mass. 403; *Aldrich* v. *Brown*, 103 Mass. 527; Abbott's Trial Ev. 378; *Harland* v. *Lilienthal*, 53 N. Y. 438; *McLellan* v. *Hayford*, 72 Maine, 410; *Stanton* v. *Embrey*, 93 U. S. 548; *Vilas* v. *Downer*, 21 Vt. 419.

PETERS, J. The question was whether the defendant had or not overcharged the plaintiff for professional services in a suit for divorce. To show what the plaintiff's instructions were and the services performed, the defendant, against plaintiff's objection, was allowed to read to the jury the following letter written to the defendant by the plaintiff: "As I have not yet heard from you, I presume you have not commenced proceedings, which I wish you to do at your earliest convenience. My object is to give her (his wife) a plenty of time to think over the matter, so that she may consent to a mutual, quiet separation, and the affair may make as little public scandal as possible." The defendant was also allowed, against objection, to testify as follows: "He (plaintiff) instructed me, if I could not avoid a jury trial, to withdraw the libel. This was after I had made known to him the interview I had with counsel on the other side." The objection is that the admitted evidence consisted of professional and confidential communications between client and counsel.

The defendant contends that the rule, invoked by the plaintiff, does not apply where the litigation is not with a stranger, but is between the attorney and client themselves. We do not deem it necessary to decide this latter question, inasmuch as we are of

opinion that the evidence was admissible irrespectively of any such distinction.

All that a client says to his attorney is not to be rejected as privileged communication. The privilege does not extend to extraneous or impertinent communications. It does not reach cases where the matter is not of a private nature. Nor where the "attorney was directed to plead the facts to which he is called to testify." And privileged communications may lose their privileged character by the lapse of time. That which may be private at a time may not be private at an after-time. Directions to an attorney to make a certain contract are a confidential communication before, but not after, the contract is made. A solicitor cannot be compelled to disclose the contents of an answer in equity before it is filed, but may be afterwards. There are numerous examples of these principles in the books. Bouv. Dic. Con. Com.; 1 Green. Ev. § 244; *Neal* v. *Patten*, 47 Ga. 73; *Nave* v. *Baird*, 12 Ind. 318. See, as bearing significantly upon this case, *Rochester City Bank* v. *Suydam*, 5 How. (N. Y.) Prac. 254.

The substance of the evidence objected to would seem to be this: Plaintiff writes to the defendant, instructing him to commence a suit at an early day, so that his wife would have time for reflection and perhaps allow a divorce without a public opposition to it. And the plaintiff orally instructs his counsel to withdraw the libel if a jury trial could not be avoided. It will be seen that this was mostly of the nature of instructions, and instructions that have been executed. No fact in the case is exposed. No secret is let loose. There is nothing in all of it that, at this day, can be prejudicial to the plaintiff. Such a letter might come decorously from any petitioner for divorce. It would not have been an improper paper to exhibit before the court. The oral evidence should be regarded as a private matter before divorce, but has not importance after the divorce. In the case under consideration, it was competent for the defendant to show the nature of his engagement and of the services performed. We do not see that the evidence exceeded these bounds. The counsel for the plaintiff complains that the evidence became injurious to his client by an adroit and improper use made of it

by the opposite counsel in their address to the jury. The remedy for any transgression such as is complained of, should be sought for at *nisi prius* and not here.

Plaintiff objects to the admission of a paper, signed by counsel upon both sides of the divorce suits, which stated the terms upon which a divorce might be decreed. The objection is that the paper shows a collusion between the parties to the suits for divorce and that public policy disallows such agreements. While public policy might not permit such an instrument to be used as evidence in the case for divorce, it does not necessarily follow that it would not be receivable in this case. Here it was introduced as a part of the *res gestæ* to prove the extent and kind of services performed. But it is not a necessary implication of the paper that the parties were conspiring to obtain a divorce. Each party filed a libel. Each party desired a divorce. The question of the most consequence related to allowances and alimony. By the agreement that question was to be referred to a member of the court. An agreement of divorce is not necessarily collusion or connivance. It depends upon whether it is an attempt to obtain a divorce not justified by the real facts; whether it is intended to practice a fraud upon the court. Mr. Bishop deduces from the authorities this rule upon the subject: "An agreement between the parties, not involving an imposition upon the court or a suppression of facts, to facilitate the proofs and smooth the asperities of the litigation, is, though liable to be looked into by the court, not collusion or otherwise objectionable. It may be meritorious." 2 Bish. Mar. and Div. (6th ed.) § 28. Our own court has said as much. *Burnett* v. *Paine*, 62 Maine, 122; *Badger* v. *Hatch*, 71 Maine, 562.

In making up the bill of exceptions a difference arose between counsel as to the form of a question to a witness. The judge, having not a personal recollection, allowed it to be transcribed as found in the court reporter's short hand notes. No objection can lie to that. The answer was in part objectionable, but was not objected to.

Exceptions overruled.

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

UNION PARISH SOCIETY *vs.* THE INHABITANTS OF UPTON.

Oxford. Opinion March 12, 1883.

Constitutional law. Ministerial fund. Stat, 1832, c. 39. R. S., c. 12, § 43, et seq.

The legislation of this State which diverts the proceeds of sales of lands reserved for public uses from the ministerial fund to the fund for public schools, in cases where the fee to such lots has not vested in any beneficiary, is constitutional.

In 1788 a resolve of the legislature of Massachusetts, declared that there be reserved, in each of certain townships in the then District of Maine, four lots for public uses, one of which should be for the ministry in the township, when incorporated. In 1804 that Commonweath, by its agents, conveyed one of the townships to a purchaser, the deed to be valid upon the performance of certain conditions imposed upon the purchaser, and containing a reservation of the public lots. The law diverting the funds was passed by the legislature of Maine in 1832. The township was incorporated as the town of Upton in 1860. The first parish was incorporated in 1879. *Held*, that the parish is not entitled to the proceeds of the sale of the timber and grass upon the lot in such town originally declared to be designed for the ministry; and that the funds may properly be applied by the town to the use of its public schools.

BILL IN EQUITY.

Heard on bill, answer and proof.

The opinion states the facts.

The case was very ably and elaborately argued by *John J. Perry*, for the plaintiffs, and by

Enoch Foster, for the defendants.

PETERS, J. The question presented is this: Was the law of 1832, which diverted the proceeds of sales of reserved lands from the ministerial fund to the fund for public schools, constitutional? The law, by its terms, was to apply only to lands where the title had not vested in any beneficiary. The law of 1832, has been preserved through different enactments,

and is contained in several sections of our present revised statutes. R. S., c. 12, § 43, sections following.

The facts which govern the case are these: On March 26, 1788, the commonwealth of Massachusetts passed resolves in relation to the unappropriated public lands in Cumberland and Lincoln counties. One of the resolves authorized the committee on eastern lands "to mark out the unlocated lands into townships." Another resolve declared "that there be reserved in each township four lots of 320 acres each, for public uses," —naming the uses. A third resolve authorized the committee to make sales of lands in such quantities and upon such terms as they should judge to be most for the interest of the commonwealth. On June 14, 1804, a special resolve of the commonwealth empowered the committee to convey township B, now the town of Upton, to the assignees of a party who had previously bargained for its purchase. On June 30, 1804, the committee delivered a deed as directed by the resolve, the deed containing this clause, "Excepting and reserving, however, four lots of 320 acres each for the following uses, viz. — One lot for the first settled minister, his heirs and assigns, — one lot for the use of the ministry, — one lot for the use of schools in said township, — and one lot for the future disposition of the general court," &c. &c. The deed was to be valid upon the performance by the grantee of certain conditions respecting payment and in obtaining settlements upon the township. The township was incorporated into a town by the name of Upton in 1860. The plaintiffs were incorporated as a parish in 1879. The reserved lots have been located, the growth and timber thereon sold, payment therefor received, and the money arising therefrom has been wholly disbursed to schools and no part to the minister or ministry. The bill seeks to obtain a share thereof for ministerial purposes.

After the district of Maine became a state, it was found that there was a variety of acts and resolves of Massachusetts, passed in pursuance of the policy of appropriating lands for public purposes, the lands situated mostly in Maine, different enactments having different charitable objects in view, and

extending different legal rights to beneficiaries. It was deemed impracticable and inexpedient to carry all of the purposes of the commonwealth expressed in its legislation into literal effect. While the charities were to be upheld, it was thought best to turn all of them that could be into the channel of the public schools. So the law of 1832, c. 39, was passed, some legislation, in 1824 and 1831, preceding the law of 1832, and leading to it. Acts of 1824, c. 254, § 4. Of 1831, c. 492. The act of 1832, in its substance kept alive from then till now, provides that the proceeds arising from the sales of such ministerial lands as had "not vested in any parish or individual," should be applied to the support of public schools. This act is declared, by the complainants in this bill, to be unconstitutional, as altering or attempting to alter vested rights. We think otherwise.

No doubt, Maine could do in relation to these lands within her boundaries what Massachusetts could have done had there been no act of separation. The commonwealth's sovereignty over the lands, by the bargain of separation, or as a consequence of it, fell upon the state of Maine. This proposition, we think, needs no discussion for its proof. *State of Maine* v. *Cutler*, 16 Maine, 349; *Dillingham* v. *Smith*, 30 Maine, 370, 381.

What had occurred prior to 1832, to take from either Massachusetts or Maine, the fee, or control of the fee, of the reserved lots in Upton?

In 1788, Massachusetts resolved that there should be reserved from a conveyance of the land certain lots for public uses. This resolve conveys no lots or land. There are no words of grant in it. It merely establishes or declares a policy to except from the conveyance of the public lands certain lots when conveyances should be made. Land may be conveyed by a legislative resolve, but not by such a resolve as this. *Cary* v. *Whitney*, 48 Maine, 516, and at pp. 526, 527; and cases there cited.

In 1804, the deed passed to the grantees named therein. This deed contains an exception, and it is stated in the deed what the lots are excepted for. But this exception enures to the grantor; not to a stranger. It grants nothing to any parish or minister

in Upton. No trust was perfectly created by it. There might never be an incorporated town or parish. The deed itself might not remain operative. It might become forfeited for the conditions named in it. The deed did not, *ipso facto*, create an appropriation of land for ministerial purposes. It merely reserved to the grantors the right and means of creating a trust, according to their declared public policy, should opportunity offer. By means of the exception, something was to be or might in the future be appropriated. It was a prospective provision for a gift, but not a gift *per se*. The nature of such a reservation of lots for public uses is well and clearly described by SEWALL, J., in *Rice* v. *Osgood*, 9 Mass. 38, 43, in accordance with our own views, although in that case another form of reservation, in substance the same, was under discussion. If not for legal reasons, certainly for great moral and political considerations, the state of Maine has ever been willing to effectuate the designs and policy of the parent commonwealth in relation to all of the lands reserved or appropriated by her for public uses within the limits of this state, — modifying the original plan in such respects only as the growth of society and the needs and the sentiments of the community would seem to demand and make reasonable.

The complainants rely upon certain cases to establish the point of unconstitutionality. We think the cases do not sustain the position taken. The cases cited are: *Richardson* v. *Brown*, 6 Maine, 355; *Trustees of New Gloucester* v. *Bradbury*, 11 Maine, 125; *Yarmouth* v. *North Yarmouth*, 34 Maine, 411; and *Humphrey* v. *Whitney*, 3 Pick. 158. The facts in those cases differ from the facts of this case. In those cases the lands had vested in the beneficiaries. Here it was not so. In those cases the gift had been executed. In all the cases where any act of legislation has been declared by the courts to be invalid as affecting or disturbing rights which had become vested in the public or reserved lands, an examination will show that the right had vested in the beneficiary, either by express deed, or by legislative act declaring a grant, or by an incorporation of the town or parish, or by an actual acceptance and long enjoyment

of the gift with the express or implied acquiescence of the grantor or giver. The case at bar falls outside of those classes of cases.

Bill dismissed with costs.

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

NELSON T. PHILLIPS *vs.* WALLACE C. BROWN.

Piscataquis. Opinion March 13, 1883.

Officer's sale on execution. R. S., c. 91, § 27.

When an execution issued on a judgment recovered under R. S., c. 91, § 27, is to be levied on a building standing on land in which the debtor has no legal interest, the general statutory provisions governing the levy of executions on personal property should be observed.

Generally, property sold on execution should be present at the place of sale, in order that persons desirous of purchasing may examine it; but a barn situated in a sparsely settled place, may in the absence of any unfair practices, be sold at some convenient place in its neighborhood, especially when the sale takes place in an inclement season of the year.

ON REPORT on agreed statement of facts.

Trover for the value of a barn. The writ was dated July 9, 1880. Plea, general issue.

The plaintiff purchased the barn at an officer's sale on execution. The following is the officer's return on the execution.

"Piscataquis, ss. On the fifth day of April, A. D. 1877, by virtue of the within execution, I have this day taken and seized as the property of the within named defendant, the goods and chattels, to wit: One small barn standing near William S. Knowlton's house between the Cove Slate Quarry and S. Bray's.

Levi C. Flint, Deputy Sheriff."

"Piscataquis, ss. On the fourteenth day of April, A. D. 1877, by virtue of this execution, on the fifth day of April, inst. I took

as the property of the within named Gilman W. Frost, one small barn or stable, being the same that was attached on the original writ, and having safely kept the same for the space of four days, and having on the eleventh day of April given public notice that said barn or stable would be sold at C. A. Packard's office in Monson, on the fourteenth day of April, at one and one-half o'clock, P. M. by posting up two notices of the said time and place of sale more than forty-eight hours before said time of the sale aforesaid, one at the Post Office, and one at the store of J. H. Pullen, two public places in said Monson. Pursuant to said notices, on the fourteenth day of April, at one and one-half o'clock, P. M. at C. A. Packard's office in said town of Monson, I sold said barn or stable by public auction to Nelson T. Phillips, he being the highest bidder therefor, for the sum of three dollars, from which sum I have deducted the lawful charges for keeping and selling said barn or stable, being two and forty-six one hundredths dollars, and the residue thereof being fifty-four cents, I have applied in part payment of this execution, and I return this execution not satisfied.

Levi C. Flint, Deputy Sheriff."

Other material facts stated in the opinion.

Henry Hudson, for the plaintiff.

J. F. Sprague, for the defendant, cited numerous authorities to the point that the officer's return must show definitely that he took all the steps necessary to constitute a sale. But the return does not show there was any keeper in possession. Nor does the return show that there was any delivery from the officer to the purchaser. There should have been a delivery of some kind to complete the sale. *Vining* v. *Gilbreth*, 39 Maine, 496; *Haskell* v. *Greely*, 3 Maine, 425; *Boynton* v. *Veazie*, 24 Maine, 286; *Wheeler* v. *Nichols*, 32 Maine, 233.

The property sold must be present at the time and place of the sale or it will be void. Freeman on Void Judicial Sales, § 31, and cases cited; Freeman, Executions, § 290; Rorer on Judicial Sale, § 1283, and cases cited; Cowan on Attachments, 611, and cases cited.

VIRGIN, J. Trover to recover the value of a certain barn, the title to which is involved. The case comes before us on an agreed statement, from which it appears that the barn was erected by one Frost, on land of another, with the latter's consent. The plaintiff brought an action to enforce his lien for materials furnished in its construction and recovered judgment thereon, on March 9, 1877. The return of the officer on the execution issued on the judgment shows, that on April 5, following, he seized the barn, and having safely kept it for the space of four days, and given the proper notices therefor, he sold it, on April 14, to the plaintiff, he being the highest bidder. Hence the plaintiff's title.

The case also finds that Frost, who erected and owned the barn, sold it to one Knowlton, who also sold it to the defendant. This constitutes all of the evidence of the defendant's title. The date of neither of these sales is disclosed, although very material. For if Frost's sale to Knowlton was subsequent to the seizure on execution, then assuming the officer's sale to have been regular, the plaintiff would be entitled to prevail. If, however, Frost's sale to Knowlton was prior to the officer's seizure, then the title would depend upon facts which the case does not affirmatively disclose, viz: whether the plaintiff's attachment was seasonably made, and was kept alive until the seizure, by the officer's retaining possession by himself or keeper, or by filing the certificate prescribed in R. S., c. 81, § 24. But, from the fact that the defendant confines his objections to matters which took place subsequent to the seizure and in the absence of anything appearing to the contrary, assuming that, everything necessary to enforcing the lien prior to and including the seizure, was properly done, we come to the defendant's objections to the officer's proceedings thereafter.

I. It is urged that the return does not show that, after the seizure, the officer placed a keeper over the barn or filed a certificate under the provisions of R. S., c. 81, § 24.

The answer is that neither of these facts needs to appear — especially when his return recites that "he safely kept" the barn. The certificate is usable only in case of attachment.

II. It is also contended that the phrase "enforced as before provided," in the first clause of the last sentence of R. S., c. 91, § 27, means that the execution shall be levied on a building, erected on land in which "the debtor has no legal interest," and is therefore personal estate, in the same manner as when he owns both land and building, and is therefore real estate. We do not so understand the provisions of this section. The phrase, "as before provided," refers to the phrase a few lines above — "enforced by attachment." The latter phrase is repeatedly used in the same chapter, prescribing the mode of initiating proceedings for continuing a lien beyond the statutory period of ninety days after the lienor has finished his work or furnished his materials, so that no subsequent sale or attachment shall intervene against him who had added value to the property on which a lien is given. Moreover section twenty-seven contains no provision prescribing the mode of executing the judgment by means of an execution, whether the property to which the lien attaches is real or personal; but leaves that to the general statutory provisions regulating the levy of executions, with the additional provision in section twenty-seven, that when the execution is levied on land and building, the "appraisers may set out a suitable lot," etc.

III. Again, it is said that the sale is void for the reason that it did not take place at the barn, but at an office, three-quarters of a mile distant, and not visible, therefrom. It did take place, however, at the place fixed in the notices.

The law, doubtless, requires auction sales of this nature to be conducted openly and fairly in all respects, with the property present or so near to the place of sale that it may be conveniently examined by persons desirous or willing to purchase it. This is especially essential, when the property comprises a variety of chattels, each of which is to be sold separately. And any conduct of the officer or creditor tending to show any questionable practices in this regard, like refusing, or neglecting on request, to exhibit property to be sold, and giving reasonable time for its examination, will vitiate the sale. But property like a barn, situated as this was, which every body in the vicinity of

it and likely to purchase it, must have frequently seen and known ever since its erection, may, in the absence of any evidence tending to impeach the fairness of the sale, be sold at some convenient place in its neighborhood, especially when the sale takes place at such an inclement season of the year. We see no rational distinction in this respect, whether the place of sale of *such* property is fixed, in the first instance, within a reasonable distance of the property, or the sale is adjourned to such a place for want of bidders. *Russell* v. *Richards*, 11 Maine, 371, 375, and cases there cited. Such an adjournment to any place in the same town is now allowed by R. S., c. 84, § 6.

There is no evidence or suggestion of unfairness in the sale, unless the small price at which the barn was bid off be so considered. This can have no probative force, inasmuch as there is no other evidence of its real value. And assuming that the barn was struck off for a very small sum compared with its intrinsic value, this mere fact is no cause for avoiding a fair sale at public auction, (*Webster* v. *Calden*, 53 Maine, 203; *Fowle* v. *Coe*, 63 Maine, 245, 252); more especially when the inadequacy of the price finds ample explanation in the fact, demonstrated by the bringing of this action, that the title of the barn was in question and no one desired to bid off a law suit. We do not think the cases cited by the defendant are in conflict with the foregoing. In accordance with the stipulation in the case, the entry must be,

Defendant defaulted. Damages to be assessed at Nisi Prius.

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

JOHN VALLIER *vs.* THOMAS DITSON.

Somerset. Opinion March 14, 1883.

Payment. False representations. Promissory notes.

The receipt, by the vendor of a chattel, of the worthless note of a third person, falsely and fraudulently represented by the vendee to be solvent, is no pay-

ment; and the vendor may maintain an action for the balance due according to the bargain.

ON REPORT.

Assumpsit on account annexed for a wagon, fifty dollars; interest, two dollars and twenty cents; in the account is a credit of a wagon, fifteen dollars, and cash ten dollars; leaving balance due twenty-seven dollars and twenty cents. The writ was dated August 29, 1879.

Plea, general issue.

The opinion states other material facts.

Ben S. Collins, for the plaintiff.

Walton and Walton, for the defendant, contended that the trade between the parties was a barter trade, and one transaction — an entirety — and could not be rescinded in part. If the plaintiff would rescind any part of the trade he must the whole of it. *Bisbee* v. *Ham*, 47 Maine, 543; *Potter* v. *Monmouth Ins. Co.* 63 Maine, 440; *Houghton* v. *Nash*, 64 Maine, 477; Story, Sales, (3 ed.) 552, 553.

There was no debt existing for which the plaintiff accepted the Hutchins note in payment, as in *Martin* v. *Roberts*, 5 Cush. 126. Here it was a swap of the note and other items named for plaintiff's wagon. He cannot rescind as to the note. *Morse* v. *Brackett*, 98 Mass. 205; *Mansfield* v. *Trigg*, 113 Mass. 350; *Clark* v. *Baker*, 5 Met. 460; *Miner* v. *Bradley*, 22 Pick. 457; *Herrin* v. *Libbey*, 36 Maine, 350; *Emerson* v. *McNamara*, 41 Maine, 565; *Pratt* v. *Philbrook*, 33 Maine, 17; Kerr on Fraud and Mistake, (Bump's ed.) 328.

BARROWS, J. The defendant, not attempting to controvert, qualify or add to the testimony produced for the plaintiff, consents that the case shall be reported to this court for determination with the stipulation that if the presiding judge was right in overruling his motion for a nonsuit, and holding that the testimony if believed was sufficient to maintain the action, he is to be defaulted for the balance of the account sued and interest from the date of the writ.

The plaintiff claims to recover twenty-five dollars as the balance due on the price of a wagon which he sold the defendant as he says for fifty dollars, receiving in payment therefor defendant's wagon valued at fifteen dollars, the note of one Hutchins for twenty-five dollars, (which the testimony shows the defendant represented as perfectly good and as received by himself in payment for sheep, when it was in fact entirely worthless and defendant had taken it from the payee upon a bargain to give half what he could get for it if he succeeded in trading it off, and otherwise, nothing) and defendant's due bill for ten dollars which has been paid. Plaintiff gives credit for defendant's wagon at fifteen dollars, and the ten dollars paid on his due bill and seeks here to recover the remaining twenty-five dollars represented in the transaction by the Hutchins note, on the ground that he was induced to accept it by the defendant's false and fraudulent representations, upon the discovery of which he offered to return it to the defendant.

The gloss which defendant seeks to put upon the transaction is that the trade was a simple barter of his wagon, the Hutchins note and his own due bill, for plaintiff's wagon, and that this suit is an attempt on the part of the plaintiff to rescind the bargain in part only, which he cannot legally do. It is only by an ingenious perversion of the testimony that it can be made to wear this aspect. The plaintiff states the trade thus, "The wagon I sold to Mr. Ditson, I *called* fifty dollars. In exchange for my wagon I received his buggy, *called* fifteen dollars, his note for ten dollars, and the note shown me for twenty-five dollars." The defendant makes no attempt to modify this version by testimony, but argues that these several valuations were merely mental operations of the plaintiff in which he did not concur. Such is not the fair interpretation. In the absence of any contradiction or explanation, we infer that these values were mutually agreed upon. The case in its essential facts and in the principles involved, is substantially identical with *Martin* v. *Roberts*, 5 Cush. 126, where the same defence to a similar action was attempted and failed. Here, as there, "the plaintiff does not seek to rescind the contract of sale or to reclaim the property sold by him to

defendant. He gives full effect to the sale; he counts upon it in his writ, and only seeks to recover damages by reason of non-payment for the same. . . . The supposed payment has proved delusive. The vendor received in payment an article of no value, and this through the fraudulent representation of the defendant." The case is not one of attempted rescission of a contract, and the authorites cited by the defendant are inapplicable.

As the vendee, in a suit brought by the vendor against him for the stipulated price may (without rescinding the contract,) show, in reduction of damages, the false representations of the vendor as to the quality of the article and recoup to the amount of the injury he has suffered thereby, the vendor is entitled to show that he was defrauded in the matter of payment by the false pretences of the vendee, and received that which was of no value by reason of his false and fraudulent representations.

It is no more a payment than payment with a counterfeit bill would be. *Bridge* v. *Batchelder*, 9 Allen, 394.

The subsequent promise of the defendant to make it good was not necessary to enable the plaintiff to recover the balance of the price of his wagon.

Judgment for plaintiff for twenty-five dollars and interest from the date of the writ.

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

GEORGE A. DULEY *vs.* DRUMMOND KELLEY.

Sagadahoc. Opinion March 14, 1883.

Lease. Exceptions. Practice.

Where one, who has sent a verbal message to the owner of a landing-place inquiring whether and upon what terms he can have the use of the landing

to pile wood upon for the market, has received a verbal response from the owner that he can pile his wood there for six cents per cord, and in pursuance of such permission has entered upon the landing and begun to pile his wood thereon without any objection interposed by the proprietor, such action constitutes an acceptance of the terms; and he becomes a tenant at will of such proprietor to the extent of the contract without a written or verbal acceptance of the terms communicated by him to the proprietor.

In such case the contract of letting is complete, and the rights of the hirer cannot be terminated except by his consent or thirty days written notice in accordance with R. S., c. 94, § 2. If he afterwards consents that another person shall take from the proprietor a written lease of the landing in which his occupancy is made to depend upon his paying a certain sum to such other person he cannot set up his rights thus acquired against such lessee. But in a suit between him and such subsequent lessee as to their rights in the premises, any requests for instructions as to the effect of the lease must be predicated upon a finding by the jury of his consent to the taking of such lease or of the legal termination of his tenancy, by written notice. In the absence of such consent or legal termination of his tenancy, the lessee acquires no rights as against the original hirer by the taking of the lease.

Exceptions cannot be sustained for the refusal of a requested instruction unless such instruction be in itself complete and made applicable to the case on trial nor where it is necessary to prefix proper conditions as to the facts to be found by the jury before they apply the rule enunciated therein.

Nor will exceptions be sustained for the refusal of a request predicated upon a hypothesis touching the correctness of which the party whose counsel makes the request has himself given contradictory testimony on the stand.

ON EXCEPTIONS.

Trespass. Writ dated March 17, 1881.

The exceptions state that plaintiff gave testimony tending to show that he had a conversation with defendant respecting the premises to be used by plaintiff and defendant as a landing place for wood and timber; that defendant told him that Reed [the owner of the premises] had offered to let him pile cord wood on the premises for shipment, at six cents a cord, that he would not give so much, and finally expressed a desire that plaintiff would negotiate to obtain the privilege of the landing for the use of plaintiff and defendant to the best advantage; that accordingly he did agree with Mr. Reed for the use of the premises for five dollars; that he so informed defendant, who was satisfied, and that Reed afterwards gave plaintiff a memorandum, which was subsequently read to defendant.

Plaintiff further testified that defendant after the agreement with Reed was made, without any partition or assignment of the

parts to be used by each or either of the parties, began to pile tiers of cord wood along the front of the landing from one side; that plaintiff went upon the ground and they agreed that defendant should extend his tiers to a point in the middle; that when defendant reached that point with his tiers, he wanted more room and plaintiff yielded ten feet more, and when that was full defendant wanted more and plaintiff yielded five feet more, and that finally defendant covered the whole front with his tiers.

Defendant gave evidence that before plaintiff's transactions he had sent a verbal message by Duley, the stage driver, to Reed, inquiring whether he could pile his wood upon the landing and upon what terms; that Reed returned answer by the same messenger that he might pile his wood there for six cents a cord. No acceptance of the offer was made and communicated to Reed. Defendant denied the conversation with plaintiff as above stated by him, and claimed and introduced evidence tending to show that by virtue of Reed's message returned to him, he had entered upon the landing and commenced piling his wood on it before the plaintiff hired it of Reed. Plaintiff certified that no division of the landing was made between him and defendant.

Plaintiff requested the presiding judge to give the jury the following instructions:

First. That under Reed's memorandum, defendant had no rights in the premises until he had arranged the matter with plaintiff as to payment or waiving payment.

Second. That if the parties agreed as to what part each should use, their rights were thereby fixed and neither had thereafter the right to occupy the part assigned to the other.

Third. That Reed's proposition sent by defendant by the stage driver to let him pile the wood on the landing for six cents a cord, was of no force without acceptance given by defendant to Reed.

Fourth. That if it had been accepted, Reed could lawfully terminate the license by letting the premises to plaintiff.

Fifth. That even though Reed might thus render himself liable to defendant in damages, his letting to plaintiff would transfer the use of the premises to plaintiff.

These requests were severally refused except as given in the charge, which is sufficiently stated in the opinion.

(Memorandum.)

"Bath, January 17, 1881.

"Received of Geo. H. Duley, five dollars, for the use of the Kelley shipyard landing to land wood, logs, etc. the present winter, with the agreement that if the wood or lumber remains on the landing after the first day of October next, said Duley agrees to pay me five dollars in addition.

"It is understood that Drummond Kelley is to occupy one-half of said landing by paying said Duley two dollars and a half and not to occupy more than one-half the frontage of said landing instead of the above agreement in regard to paying five dollars additional it 's agreed that this lease agreement expires on the first day of said October next.

G. H. Duley,

T. M. Reed."

W. Gilbert, for the plaintiff.

Henry Tallman, for the defendant.

BARROWS, J. The first question which it became important for the jury to determine was whether the plaintiff acquired, by virtue of his memorandum from Thomas M. Reed, any paramount rights in the premises as against the defendant. If the defendant, previously to any negotiations between the plaintiff and Reed, had received Reed's verbal permission to pile his wood upon that landing for six cents a cord, in reply to defendant's verbal inquiry whether and upon what terms he could have the use of the landing for that purpose, and in pursuance of such permission had entered upon the landing and commenced piling his wood there without any objection interposed by Reed, as was seemingly the case, that contract between Reed and the defendant was complete, and he became Reed's tenant at will there to that extent, though he had not made and communicated to Reed

any acceptance, verbal or written, of Reed's terms. The act of entering upon the premises and commencing to occupy them, in pursuance of the verbal permission amounted to an acceptance of the terms, and both parties to that negotiation were bound to take notice of it, and conform their action to the rights thus respectively acquired.

Without the defendant's consent Reed could not terminate the defendant's rights there except by written notice in accordance with R. S., c. 94, § 2.

Nor by such verbal negotiation and action could the defendant acquire any rights beyond those of a tenant at will, by reason of R. S., c. 73, § 10.

But he would have the rights of such a tenant to the extent of his contract until the tenancy was legally terminated either with his consent or by written notice from Reed. The third, fourth and fifth requests of the plaintiff were therefore rightly refused, and the instructions given upon these points were substantially correct, and at all events afford the plaintiff no just cause of complaint.

Now, touching the plaintiff's hypothesis, to support which he offered testimony to the effect that defendant, not being satisfied with the terms which he had secured from Reed, requested the plaintiff to negotiate with Reed to obtain the privilege of the landing for the use of plaintiff and defendant, and that he accordingly did arrange with Reed and procure the memorandum, with the defendant's assent, the jury were instructed that "if the defendant yielded his right to the plaintiff — permitted the plaintiff *to go and hire the whole*, independent of his right which he had acquired under the permission of Mr. Reed to enter and occupy, then he could not set up that right as against the plaintiff;" and again it was said in substance that such consent on the part of defendant would be sufficient as between him and the plaintiff, while without such consent the action could not be maintained. Thus it appears that so far as the defendant has seen fit to report the instructions, the right of the plaintiff to maintain the action was made to depend upon the consent of the defendant that the plaintiff should go and procure the memoran-

dum from Reed. The instruction quoted imports that the memorandum from Reed should be construed as a letting of the whole to the plaintiff. The jury must have so understood it, and they surely could not misunderstand the recital that "it is understood that Drummond Kelley is to occupy one half of said landing by paying said Duley two dollars and a half, and not occupy more than one-half of the frontage of said landing," whether any special instruction was given with respect to it or not. But if the plaintiff desired a special instruction touching the effect of a provision so intelligible, he should have prefixed to his first request enough to show that it was to be applied by the jury only in case they found that the defendant consented to the plaintiff's taking the memorandum from Reed. The requested instruction as it stands, without this qualification, would certainly convey to the jury the erroneous idea that the rights of the parties in the landing were to be governed in any event by the memorandum from Reed. The plaintiff evidently intended that the jury should so understand it, as appears by his third, fourth and fifth requests, which, as we have before said, were rightly refused. The presiding judge is under no obligation to amend a party's requests for instructions, and unless they are complete and applicable to the case as they stand, his refusal to give them is no ground for exceptions.

The propriety and applicability of the second request depend upon the same contingency as to the defendant's consent that the plaintiff should hire the landing of Reed after he had taken possession and begun to pile his wood there. The plaintiff seems to have persistently ignored, at the trial at *nisi prius*, the necessity of that consent, but it was indispensable to the rightful introduction of any of his hypotheses, or his acquisition of any rights in the premises as against the defendant. But there is still another valid reason for the refusal of the second request. It seems that the plaintiff testified that "no division of the landing was made between him and the defendant." This being so, we see no ground upon which the action of trespass could be regarded as the proper remedy for the plaintiff to pursue. True, his astute

counsel contends that he testified to certain agreements between himself and the defendant, which the counsel argues amounted to a division, but where the subject matter consists of what men even of a low order of intelligence must needs understand, it would be unreasonable to permit exceptions to be sustained for the refusal of a request based upon a hypothesis the truth of which had been explicitly denied by the party whose counsel prefers the request.

As to such matters the counsel's complaint should be — not of the presiding judge — but of his own client, who has cut the ground from under him by testimony which at the best is self-contradictory. The correctness of the jury's apparent conclusion upon the question of defendant's consent that plaintiff should take the lease from Reed is not here and now an open one.

Exceptions overruled.

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

STATE OF MAINE *vs.* WILLIAM M. ROACH.

York. Opinion March 19, 1883.

Intoxicating liquors. Search and seizure. R. S., c. 27, § 35. Stat. 1875, c. 42.

In a liquor seizure case, the proof must establish the seizure to have been in the town where alleged. The offense is local. If alleged to have been in Sandford, it is a variance to show that it was in Lebanon in the same county.

Liquors are not to be considered as deposited and kept in a particular place, which are captured by force from the respondent's wagon while he is traveling upon the public way. In such case the prosecution should not be under R. S., c. 27, § 35, but under stat. 1875, c. 42, which authorizes the seizure of liquors *in transitu*. The penalties in the two cases are different.

ON EXCEPTIONS.

Search and seizure.

The opinion states the material facts.

Henry B. Cleaves, attorney general, for the state.

Asa Low, for the defendant.

PETERS, J. The complaint alleges that the liquors were kept or deposited in the town of Sandford. The proof was that it was in the town of Lebanon. The ruling at the trial was, that the variance between allegation and proof was not material. We think it was material. The offense was in its nature and consequences local. The place must be proved as laid, "where the penalty is given to the poor of a town or place where the offense is committed." 3 Greenl. Ev. § 12. In this case the vessels containing the liquors became forfeited to the town, where the liquors were seized. R. S., c. 27, § 39. All the notices are to be posted and published in such town. R. S., c. 27, § 36. The place where seized has much to do with the description of the offense. In Massachusetts, cases under the liquor-nuisance acts are regarded as local offenses. *Com.* v. *Heffron*, 102 Massachusetts, 148. The exceptions, therefore, must be sustained.

But the case may as well be dismissed. The evidence in another respect does not sustain the complaint. The liquors were not taken by the officer from any place where they were kept or deposited, but were captured by force from the wagon of the respondent, in his use and personal possession, while driving his team upon the highway. The liquors were not, at the time, kept or deposited, but were being carried for the purpose of being afterwards deposited and kept in some place. In *State* v. *Grames*, 68 Maine, 418, it was held that the search and seizure process, such as this, would not apply to a traveling rum seller, who carried his liquors upon his person. For the reasons in that case given, we think the present process does not apply to the facts proven in the case at bar. The word "place" in the statute, refers to some fixed situation, spot, station, ground or locality. It may be a stationary wagon upon some particular ground, but not one in motion and constantly changing its position upon the road. The statute of 1875, c. 42, which provides for seizing liquors while "in transit," meets this case, but a different complaint would be required. The penalties are different. Under a complaint against liquors *in transitu* the fine is fifty dollars, while under the present complaint the fine must be one hundred dollars, and imprisonment may be added.

And there are other differences between the two kinds of offenses and their consequences. Laws of 1880, c. 247. *State* v. *Knowlton*, 70 Maine, 200; *State* v. *Woods*, 68 Maine, 409.

Exceptions sustained.
Proceedings dismissed.

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

SAMUEL R. JACKSON, in review, *vs.* ALBERT P. GOULD.

Knox. Opinion March 23, 1883.

Removal of causes. Action of review. Original actions.

The statute of the United States for the removal of causes from the State to the federal courts, where the alleged reason for removal is that a controversy between citizens of different States is involved, authorizes such removal only when the action could have been originally entered in the federal court and tried there as an original action.

An action of review is not an original action but arises out of and is supplemental to an original action which has been ended by a final judgment.

An action to review a judgment of a State court is not one of which the United States court has original jurisdiction, or which could be entered and tried in such court.

That statute, for the removal of causes, removes them for trial, but gives the federal court no authority to review the doings of the State court, and certainly not to restrain or modify the execution of any judgment in the State court.

ON EXCEPTIONS.

An action of review.

The plaintiff in review, filed a petition to remove the action to the circuit court of the United States, for the district of Maine, alleging that the plaintiff in review at the time of the commencement of the original action was, and ever since has been a citizen of the state of New Jersey, and that the defendant at the same time was and ever since has been a citizen of Maine; that the

original action and the action of review are suits of a civil nature, in each of which the matter in dispute exceeds the sum or value of five hundred dollars exclusive of costs.

The defendant filed the following answer to petition for removal.

"Knox County, Supreme Judicial Court, September term, 1881; *Samuel R. Jackson in review*, v. *Albert P. Gould.*

"The answer of the said Albert P. Gould to the petition of said Samuel R. Jackson for the removal of the above entitled action or matter, and of the original suit mentioned in said petition, wherein a review has been granted, to the Circuit Court of the United States."

"The said Gould contests and denies the right of removal as prayed for in said petition, and says there is no authority in law therefor, for the following reasons, to wit:—

"I. The said Gould denies that the said Jackson was a citizen of the state of New Jersey on the twenty-sixth day of April, A. D. 1874, being the day on which the action of the said Gould against the said Jackson was commenced in the Supreme Judicial Court of the State of Maine for the county of Knox, as is alleged in said petition; and he says that on that day the said Jackson was and for a long time thereafterwards continued to be, a citizen of the State of Maine, and resident at Brunswick in the county of Cumberland.

"II. Said Gould further denies the right of said Jackson to remove the cause or matter as prayed for in said petition:— Because, in the said suit of Gould against Jackson, commenced on the said twenty-sixth day of April, A. D. 1874, judgment was recovered by said Gould in the said Supreme Judicial Court of the State of Maine for the county of Knox, on the second day of April, A. D. 1879, which judgment is now remaining in said court unreversed and unsatisfied, and that the said Jackson by his petition for a review thereof filed in said Supreme Judicial Court on the twenty-eighth day of August, A. D. 1879, has been granted the privilege by said court of a review of said action, and a rehearing in the same, the purpose, object and effect of which is, according to the laws of the State of Maine, to enable the said Jackson, if he can show

good cause therefor in the law in fact, to obtain a reversal or reduction of said judgment; which hearing and trial for the purpose aforesaid, can only be had in the said Supreme Judicial Court, where said judgment must remain, and that all the proceedings for a review and rehearing mentioned in said petition for removal, are merely incidental to, and a graft upon, said original suit and judgment; and that said action of review is not a litigation separate and independent thereof; and that the reversal and annulling, or modification of said judgment can only be ordered by said Supreme Judicial Court by a direction to its clerk to enter a cancellation or reduction by set-off, upon its records; over which record and original judgment said Circuit Court would have no authority or power of reversal, modification, reduction or set-off if said proceedings for a review should be removed thereto; and that said Circuit Court could not enter the order or judgment required by the statutes of the State of Maine, if said proceedings for review and reversal should be removed to that court, and said Jackson should be successful in proving his right thereto.

"III. Said Gould further denies that said petition ought to be granted. Because, he says, said petition was not filed before or at the term at which said cause or matter could be first tried, and before the trial thereof; and he says that that matter has been already partially tried in said Supreme Judicial Court; that said Jackson's petition for a review was filed in said State court on the twenty-eighth day of August, A. D. 1879, and that a trial was had thereon in said court, at the March term thereof A. D. 1880, and the same reported to the law court of said State for decision, wherein a hearing was had by said law court, at its term held in the western district in July, 1880, upon which said court rendered a subsequent decision granting the right of review upon certain conditions. And said Gould says that the writ of review, authorized by the court, under the statutes of said state is not a new or separate action, but is simply part of the proceedings for review, and a continuation thereof, which were commenced by said Jackson in August, 1879, and that its effect, by said statute, was simply to bring said original judg-

ment and the record thereof, before said state court for rehearing, that said court might determine whether said judgment might be reversed, or modified, and that by said statute, and by force of the laws of the state of Maine, no issue can be formed or tried upon any allegation in said writ of review, but that the trial is to proceed upon the pleadings in the original action, or such other pleadings therein as said court shall order; and he further says, that all the proceedings for review under the statutes of said state, are in the nature of a writ of error, and that their only object is the reversal or modification of the original judgment."

"IV. Said Gould further says that said circuit court has no jurisdiction over the matter or cause mentioned in said petition, because the said judgment recovered by him, was not against the said Jackson personally, but was a judgment *in rem* only, and against the property attached in the original writ in said action.

A. P. Gould."

The presiding justice granted the petition, and ordered the action removed, and the defendant alleged exceptions.

Strout and Holmes, for the plaintiff.

The defendant has filed an "answer" to the petition for removal in the state court, in which the character of the process, by which this suit is begun, is set up in various forms, and under various aspects as an insurmountable obstacle to removal.

He says the purpose of the writ of review is "to obtain a reversal or reduction of said (original) judgment", that "this can only be done by direction to the clerk to enter a cancellation or reduction by set-off" on the record of the state court, and that this, the circuit court has no right to do.

Such is not the purpose of the writ as stated in the usual form of declaration. It is for the "recovering back of said sum," which has already been recovered from the plaintiff in review, and for recovering costs. R. S., c. 89, § § 11, 12; R. S., 1841, c. 124, § 9; *Crehore* v. *Pike*, 47 Maine, 435; *Whittaker* v.

Berry, 64 Maine, 236; *Curtis* v. *Curtis*, 47 Maine, 525; *Dunlap* v. *Burnham*, 38 Maine, 112; *Bradstreet* v. *Partridge*, 59 Maine, 155; *Dyer* v. *Wilbur*, 48 Maine, 287.

But it is contended that the provision of the statute (originating in the act of 1864) that where the plaintiff in review, recovers the whole amount of the former judgment, that judgment *shall* be set off against the original judgment if unpaid, is such a constituent part of the remedy that review can be maintained in no court, where such set-off cannot be ordered by a direction to the clerk of the court rendering the original judgment.

This position proves too much to be sound.

The fact that the method of enforcing a judgment is different in the United States Court, can be no bar to removal. Bail given on mesne process is discharged by a removal. U. S. Stat. 1875-6, c. 137, § 3.

The Supreme Judicial Court has jurisdiction in review of all causes of action upon which judgment has been rendered in *any judicial tribunal* of the state, which includes judgment of superior and municipal courts, and of justices of the peace. R. S., c. 89, § 1.

Now it seems to us that the Supreme Judicial Court is just as powerless to control dockets and records of other courts, to give instructions to their clerks, or direct entries to be made, (save as a law court), as the federal court is as to the Supreme Judicial Court of the state. But that is not the only method of set-off.

It has been undertaken to set-off judgments of different courts in two cases in this state. In one of them we find no reasons given for it. *Moody* v. *Towle*, 5 Maine, 415.

In the other, reference is made to the foregoing case, and to Stephen's Nisi Prius, 1188, and cases there cited. *Hooper* v. *Brundage*, 22 Maine, 460.

It is also alleged that "this suit is, and all the proceedings on review are, merely incidental to and a graft upon the former suit, and that said action of review is not a litigation separate, and independent thereof."

There is no foundation for this proposition.

The suit is begun by a separate and distinct writ, made, served

and entered independently, standing alone upon the docket, and upon the record. The issues may or may not be the same as in the former suit. If none were made up there, then pleadings have to be filed in this action. If there were pleadings there, a change may be made here. R. S., c. 89, § 10.

It is a "process to correct a former judgment by means of a new one" with "a distinct judgment" and "is a new and independent action." *Dyer* v. *Wilbur*, 48 Maine, 287; *Crehore* v. *Pike*, 47 Maine, 435; *Bradstreet* v. *Partridge*, 59 Maine, 155.

The rules laid down in following cases, do not apply to this case: *Bank* v. *Turnbull*, 16 Wall. 190; *West* v. *Aurora City*, 6 Wall. 139; *Gwin* v. *Breedlove*, 2 How. 29; *Freeman* v. *Howe*, 24 How. 450; *Oglesby* v. *Attrell*, 12 Fed. Rep. 227; *Barrow* v. *Hunton*, 99 U. S., 80, (83); *Nougue* v. *Clapp*, 101 U. S., 551.

"If the proceedings are tantamount to a bill in equity, to set aside a decree for fraud in obtaining thereof, then they constitute an original and independent process, and . . . the case might be within the cognizance of the federal courts." *Barrow* v. *Hunton*, 99 U. S., 80.

Probate proceedings, as such have been held not to be cognizable by those courts, because they are proceedings *in rem*, or of that nature, a contest with the whole world, and the whole world is bound by them, and are not begun by a suit, by one party against another. But where a *new suit* is given in the state court to annul the probate of a will by a *separate judgment*, such suit may be removed to the circuit court. *Gaines* v. *Fuentes*, 92 U. S., 10, (21).

In a case precisely in point, proceedings were had to condemn land for a boom company, first by appraisal by commissioners. This the court say "was in the nature of an inquest . . . and not a suit at law in the ordinary sense of the term. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute, the form of a suit, and was thenceforth subject to its ordinary rules and incidents." *Boom Co.* v. *Patterson*, 98 U. S., 403, (406).

Here we have a specific remedy which, in this case, for a

specific reason, we take by order of court, but it was open to this plaintiff "when his petition was entered in court, without application for leave to bring an action of review." *Jackson* v. *Gould*, 72 Maine, 335; R. S., c. 82, § 4; c. 89, § 7.

Here is a right given by the state legislature to bring an independent suit, in which there is a distinct judgment, in which there is no change or reversal of a former judgment, but which allows that to stand, and which is simply for the recovery of a sum of money from the defendant in review for which judgment will be rendered, if it is successful, in precisely the form that it would be entered upon any ordinary suit. Such a remedy is enforceable in the federal courts. For where a state legislature has given a right and a remedy, it may be enforced in the federal courts, whether it be in equity, law, or admiralty, where the proper citizenship exists. *Clark* v. *Smith*, 13 Pet. 195; *Parker* v. *Overman*, 18 How. 137; *Van Norden* v. *Morton*, 99 U. S., 378; *Cummings* v. *Nat. Bank*, 101 *Id.* 153.

It cannot be withdrawn from the cognizance of such federal court by any provision of the state legislature, that it shall only be enforced in a state court. *Railroad Co.* v. *Whitton*, 13 Wall. 270; *Holmes* v. *O. & C. R. R. Co.* 5 Fed. Rep. 75.

That this action is not a part of the proceedings on the petition is sufficiently established by the fact that, as already shown, it could have been brought without it, and that where the petition is necessary, it must have been finished and go off the docket before the writ could be brought. It "cannot be entered, heard or determined under the petition." *Bradstreet* v. *Partridge*, 59 Maine, 155.

A. P. Gould, for the defendant.

DANFORTH, J. The question involved in this case, arises upon a petition for the removal of the action from the State court to the United States court. The petition fully sets out the original action, the proceedings therein, the history and pendency of the writ of review, and alleges among other things, that both the original suit, and the action of review, "are suits of a civil nature

at law, in each of which the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, and the whole controversy therein, is between . . citizens of different States." The petition closes by asking that the court will accept the petition and bond, "and proceed no further in said cause" in review now pending and will cause the record therein to be removed into said Circuit Court of the United States."

It thus appears that while the original action, and that in review, are described and treated as two actions and are claimed in the argument, as separate and distinct, the prayer of the petition is that one only be removed. This perhaps could not have been otherwise for that one and not the other, is alone pending. The original action has gone to judgment and that judgment is binding upon the parties and must remain so whatever may be the result of the review. *Curtis* v. *Curtis*, 47 Maine, 525; *Dyer* v. *Wilbur*, 48 *Id.* 287; *Whittaker* v. *Berry*, 64 *Id.* 238. If this were all the case, it would be seen to be of little consequence whether the prayer of the petition were granted or denied, for if granted it would carry with it only the writ of review and the proceedings under that, which would present to the court no pleading, no issue, and none could be made without the papers in the original action and hence no trial could be had, no judgment rendered.

But while it is claimed that the writ of review is a distinct process and the foundation of a distinct and independent action for the purpose of removal, yet on removal it takes with it the records of the original action for the purpose of trial and judgment, and this is clearly necessary in order to render the removal effectual for any useful purpose. The question then arises, and it is the only question in the case, whether such an action in review is removable within the meaning of the acts of Congress applicable. For it is certain that unless authorized by such an act no removal can be had. *Insurance Co.* v. *Pechner*, 95 U. S. 183.

The ground upon which the removal is claimed, is that of citizenship; the right must therefore be found in, U. S. R. S., § 639, or in the act of Congress of March 3, 1875, c. 137. It

cannot be under the R. S., for that provides only for a removal on petition of a defendant in an action by a citizen of the State wherein it is brought. It must therefore be under the act of 1875, which authorizes a removal upon the petition of either party. This act was passed for the purpose of fixing the jurisdiction of the courts of the United States, as well as to make provision for the removal of causes from the State courts thereto, and so far as material to this case is in substance as follows:

Section one provides that the United States courts shall have original cognizance, concurrent with the courts of the several States in suits of a civil nature at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, in which there shall be a controversy between citizens of different States.

"Section 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, arising under the constitution of the United States, &c. . . . and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be wholly determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

"Section 3. "That whenever either party . . . entitled to remove any suit, mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he . . may make or file a petition in such suit in such state court, before or at the term at which such cause could be first tried and before the trial thereof, for the removal of such suit . . . and file therewith a bond . . for his entering in such circuit court, ... a copy of the record in such suit. . . . It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. . . . And the said copy being entered as aforesaid, in said circuit court of the United States, the cause shall then proceed

in the same manner as if it had been originally commenced in the said circuit court."

"Section 6. The circuit court of the United States shall in all suits removed under the provisions of this act proceed therein as if the suit had been originally commenced in said circuit court and the same proceedings had been taken in such suit as shall have been had in said state court prior to its removal."

This statute gives the circuit court concurrent jurisdiction with the state court in certain cases where the controversy is between citizens of different states. Such cases and such only can be removed when commenced in the state court and when removed they are to be tried in the United States court as if originally commenced there. To secure this right of removal the petition therefor "must be filed in the state court before or at the time at which such cause could be first tried and before the trial thereof."

The original action comes within the description in every respect unless it may be the residence of the party seeking the removal. It is claimed that when that action was commenced, both parties were citizens of the same state and the change of residence subsequent to that would not authorize a removal. In reply to this, it is said that the fact is otherwise and testimony upon this point has been offered by each party; and further, that it is sufficient if the parties were residents of different states at the time of filing the petition. Upon this question there is a conflict in the decisions of different courts of the United States and as in the view we take of this case it is immaterial we give no opinion upon it.

It is, however, very evident that so far as the original case is concerned the petition came too late. That case was not then pending; the controversy involved in it had ceased, for it had gone to judgment and that judgment, as we have seen, is in full force and effect. True, it is alleged in the petition that the petitioner never had any notice of the pendency of that action and that the term at which the petition was filed was the "first term at which the controversy in said original suit could be tried."

The record shows that no actual notice was given, and the petitioner, though a party, did not appear in the case. But

being a non-resident, he had such notice as the law requires, and having property in the state which was attached upon the writ, the court acquired jurisdiction to the extent of that property and to render the judgment that was rendered. This in fact is not denied, but is the ground upon which the petition for review and all the proceedings under it are predicated. It is therefore not open to the petitioner to deny the jurisdiction of the court in rendering that judgment, or its validity. Whatever may have been the literal fact as to the appearance of the petitioner, or his opportunity for trying the case, no statute of the United States can be found authorizing the removal of any case after final judgment. The remarks of MILLER, J., in *Nougue* v. *Clapp*, 101 U. S. 554, are applicable in this connection: "We think that for this court, after all that has been done, to undertake to decree that what that court did is void, to sit in *review on its judgment*, and reverse its decree and set aside its sale, in a case *where its jurisdiction is undoubted*, is unwarranted by the relations which subsist between the two courts. It would be an invasion of the powers belonging to that court, and such doctrine would, upon the simple allegation of fraud practiced in the court, enable a party to retry in the federal court any case decided against him in the state court." In *Railroad Company* v. *McKinley*, 99 U. S. 147, the petition for removal was filed while the question for new trial was pending, and the court held that the state court retained jurisdiction and refused to interfere.

The case of *Harter* v. *Kernochan*, 103 U. S. 562, relied upon in the argument, confirms this view rather than otherwise. Though in that case the defendant came in for the first time after a final decree had been entered, yet under the facts of the case and by virtue of a statute of Illinois, this coming in vacated the decree and the case was re-docketed and stood for trial the same as though no decree had ever been entered. It was upon this ground that the removal was allowed. The inference is inevitable that but for the effect of the statute in vacating the decree, it would have stood and have been considered final and conclusive, and the removal denied.

In *Stevenson* v. *Williams*, 19 Wallace, 576, FIELD, J., says,

"After a final judgment has been rendered in the state court, the case cannot be removed to the circuit court of the United States, and there proceed as the statute provides, in the same manner as if brought there by original process without setting aside the trial and judgment of the state court as of no validity. No such proceeding is contemplated by the act." In *Insurance Company* v. *Dunn*, 19 Wallace, 224, the question was whether the action of the state court was a final judgment, and the court held if it was so it could not be removed, otherwise it might be.

The principle involved is simple and well established. The case is one of which, under the statute of 1875, the state and United States courts have original and concurrent jurisdiction, and that jurisdiction which is properly exercised by either will be respected by the other. That of the state court may be interrupted by the removal, but even then so far as it has been exercised, by the express terms of § 6 of the statute, the case is to be taken as if "the same proceedings had been taken in such suit" in the circuit court. If those proceedings have resulted in a final judgment, that must be an end.

It remains to be seen whether the writ of review as an independent and distinct process can be removed under the statute, or whether it has so changed the status of the original action that the whole may be removed together. If both must go together, it would seem that the foregoing considerations would be fatal to the removal, for if the one cannot go, certainly both cannot.

The petition asks for the removal "of the said cause in review." If a review it must be a review of something; and that something is shown by the record to be the original action. The two in fact are so combined that they cannot be separated. The new process is but a supplement to, a continuance of the old one. It is but a review of that, not for the purpose of annulling or changing the judgment therein rendered but certainly to modify and control its force and effect and to prevent its due execution. It may be as claimed, a distinct process, but it can not be an independent one, for the original action is the sole foundation upon which it rests, and take that away, and the superstructure must necessarily fall.

In this view, it is clearly not within the statute of removals. Whether it would be competent for Congress to pass an act which would authorize its removal, or whether it should or should not have done so, is not now the question. It is enough that we find no such statute.

As already seen, the statute so far as applicable to this case authorizes the removal of such suits only as could have been entered originally in the United States court. This could not have been so entered. It is entirely the creation of the statute and the procedure under it must be in conformity thereto. If the petitioner would avail himself of the advantages to be derived from it, he must submit to the conditions and limitations imposed; one of which is that it must be entered at the term specified of the court which granted it. It is immaterial that at one time the petitioner was entitled to the writ as a matter of right. If any advantage could have been derived from that fact it was waived and the writ was obtained on petition and at the discretion of the court. In the exercise of that discretion a condition was imposed, which is not a part of the proceedings under the writ but prior to it. *Jackson* v. *Gould*, 72 Maine, 335.

The statute of removals further provides that after entry in the circuit court the proceedings shall be the same as if originally entered there. This surely can only refer to such proceedings as the rules of that court require and not to such as may be prescribed for the state court by statute or otherwise. Nothing is required to be entered in the circuit court but a copy of the process removed and the proceedings so far as they have been had under that process. So far, perhaps the circuit court would be bound by force of the statute, but no farther, and especially it would not be bound by the conditions imposed upon the granting the writ, as that was no part of the proceedings under it and nowhere appears in any record to be produced. Then, too, the judgment to be rendered is not in accordance with any rules of procedure in the circuit court. It is not made up from the verdict rendered upon the issue tried, but from a comparison of that with the original judgment, which is not removed, but remains and must remain in the state court.

It is claimed that the United States courts will proceed as the state court would because the state statute requires it. It may be true that where a state statute gives a new right, or a new remedy for an old right, in a proper case the United States will enforce it. But in doing so they will be governed by their own rules of proceeding. *Van Norden* v. *Morton*, 99 U. S. 378.

But the removal depends upon a particular statute, which nowhere authorizes but prohibits the circuit court to review the doings of the state courts, and permits no judgments except such as follow the issue in an original process in the ordinary course of proceeding.

It is claimed that this would oust the state court of its jurisdiction in review of cases tried in the lower courts. But that jurisdiction is especially authorized by the statute, R. S., c. 89, § 1, and to enable it to exercise that jurisdiction, § 7 of the same chapter requires the plaintiff in review to "produce and file an attested copy of the writ, *judgment*, proceedings and depositions, or their originals, in the former suit." There is no such provision in the United States statute, as there certainly would have been if it had been the intention to have given that court the power to review cases tried in the state courts.

Thus it is very evident that the statute of removal was not intended to give the United States courts any supervisory power of state courts, or make them a court of appeal, but simply to take from them a certain class of cases in which the parties were residents of different states, and in which they had original jurisdiction, with authority to try them as original entries and as original cases, and in many cases the only question involved is whether that for which the removal is asked is an original process or supplemental, or incidental to or a review of some other case. *West* v. *Aurora City*, 6 Wallace, 139; *Barrow* v. *Hunton*, 99 U. S. 80; *Bank* v. *Turnbull & Company*, 16 Wallace, 190; *Vannevar* v. *Bryant*, 21 *Id.* 41.

It is equally fatal to the petitioner's right of removal, whether we consider the action of review a distinct process, or connected with and supplemental to the original action. If distinct it is but a part of the case and comes within the principle laid

down in *West* v. *Aurora City*, *supra*, in which it is said on page 142, "It is equally fatal to the supposed right of removal that the record presents only a fragment of a cause, unintelligible except by reference to other matters not sent up from the state court and through explanations of counsel." So in this case as already seen upon the theory that the review is distinct and independent, the law does not contemplate the production of the records in the original case, and yet without them the part which is produced would be unmeaning and unintelligible.

If on the other hand it is supplemental to and a continuance of the original action, as it evidently is, then it is but a review of the original action, intended as a correction or restraint of the judgment therein rendered, and can be sustained only in accordance with the statute creating it, or of some other statute applicable. But no other is found giving the United States authority to review actions disposed of in the state courts by way of removal.

In *Freeman* v. *Howe*, 24 Howard, 450, NELSON, J., in the opinion on page 460, after referring to several cases, says: "The principle is, that a bill filed on the equity side of this court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, *is not an original suit*, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties." This writ of review is equivalent to a bill in equity, granted for the sole purpose of restraining or regulating the judgment in the the original suit, that injustice may not be done thereby.

Dillon, in his work on the Removal of Causes, page 56, says: "Causes cannot be removed to the circuit court for a review of the action of the state court, but only for trial." In *Whittier* v. *Hartford Fire Ins. Co.* 55 N. H. 141, a case of review like the present, it was held that it was not removable, that in substance it would remove the original action and it was too late for that. LADD, J., who delivered one of the opinions, put it upon a broader ground, remarking that "There has been a trial of the

case upon its merits in the state court, and *a final and irreversible judgment rendered therein.* Availing themselves of a right conferred by a statute of this state the defendants have brought a review, and the cause may now be tried over again here, in accordance with the provisions of the statute, which imposes various qualifications and conditions upon the exercise of that right. Unless the cause is to be tried and judgment rendered in the federal court on review, the same as though it had not been tried at all, (which I suppose nobody will pretend) I do not see how it can be tried there at all, unless the federal court will undertake to administer the municipal law of New Hampshire, and communicate with the state court for the purpose of ascertaining what the final judgment there shall be."

In *Du Vivier* v. *Hopkins*, 116 Mass. 125, GRAY, C. J., in the opinion on page 128, says: "When a cause is legally removed into the circuit court of the United States, the jurisdiction of the state courts over it ceases, and the suit is thenceforth to proceed *to trial, judgment and execution* in the federal courts, and cannot afterwards be remanded to the state courts for any purpose." If the review cannot be remanded, it is difficult to see in what way it or any judgment the circuit court can render, can restrain or modify the execution of the judgment in the state court. Thus in any view we can take of the case, we find no authority for its removal, but both principle and authority are against it.

Exceptions sustained.

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

VIRGIN and SYMONDS, JJ., concurred in the result.

EDMUND SAWYER *vs.* JOEL SAWYER.

Piscataquis. Opinion March 24, 1883.

Statute of limitations. Subsequent attaching creditor.

Where a subsequent attaching creditor has obtained leave of court to defend

the suit of a prior attaching creditor he may set up the statute of limitations as a ground of defense.

On exceptions.

Assumpsit on account annexed, dated November 28, 1876, for "eleven years' labor, one hundred and twenty-five dollars per year, thirteen hundred and seventy-five dollars." The writ was dated November 28, 1876. At the February term of court, 1880, James P. Farrell, a subsequent attaching creditor, obtained leave of the court to defend this action. The defendant failing to plead, Farrell pleaded the general issue and statute of limitations.

The presiding justice instructed the jury that it was not competent for Farrell, as subsequent attaching creditor, to set up the statute of limitations as a defense. To this ruling exceptions were taken, the verdict being for the plaintiff in the sum of sixteen hundred and forty-three dollars.

H. Hudson, for the plaintiff.

E. Flint, for the subsequent attaching creditor.

Walton, J. When property has been attached, a plaintiff who has caused it to be attached in a subsequent suit, may, by himself or his attorney, petition the court for leave to defend the prior suit, and set forth therein the facts, as he believes them to be, under oath; and the court may grant or refuse such leave. R. S., c. 82, § 39.

In this suit, a subsequent attaching creditor obtained leave of the court to defend it; and the only question is whether it was competent for him to set up the statute of limitations to a part of the plaintiff's claim as one of the grounds of his defense.

We think it was. The statute places no limitation or restriction upon the defending creditor. It does not say in terms or by implication that he may defend upon some grounds, but not upon others. The language used is general, that he may, upon leave obtained, "defend the prior suit." Presumably his purpose is to defeat the suit, so as to release the prior attachment and thus make his own attachment available for the recovery of

his debt. We fail to perceive any reason why he should not be allowed to defend upon one ground as well as another; why he should not be allowed to set up the statute of limitations as a ground of defense, as well as payment, or want of consideration.

By the terms of the statute it is discretionary with the court to grant or refuse leave to the subsequent attaching creditor to defend the prior suit. And it is only upon petition setting forth the facts as the petitioner believes them to be, that such leave can be granted. Perhaps the court, in the exercise of its discretion, might be justified in refusing to grant the leave prayed for, if the only ground of defense set forth in the petition should be the statute of limitations. And yet, in all insolvency proceedings, one creditor has a right to object to the allowance of another creditor's claim upon the ground that it is barred by the statute of limitations. And why should not the same defense be allowed in this form of proceeding? We have been referred to no authority for holding otherwise, and we fail to perceive any reason for so holding. True, it is often said that the right to set up the statute of limitations as a ground of defense is the personal privilege of the debtor; and so it is, so long as he is allowed to manage the defense; but when, for good and sufficient reasons shown, the court, acting under the authority of the statute, takes from him the right to control the defense, and gives it to another, this privilege can no longer be exercised. It has ceased to be his privilege; it is then the privilege of another.

The exceptions in this case state that the court instructed the jury that it was not competent for the subsequent attaching creditor to set up the statute of limitations by way of defense to any part of the claim in suit. We think this ruling was erroneous.

Exceptions sustained.

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

JOSEPH D. TAYLOR and another, in equity,

vs.

LORENZO TAYLOR.

Cumberland. Opinion March 28, 1883.

Corporations, officers of. Insolvency. Equity. R. S., c. 77, § 5.

The treasurer of a corporation has no title to the money in his possession as such and owes no duties to the corporation as such, except that of safely keeping and disbursing in accordance with the directions of the proper officers. He is a mere depositary and his possession is that of the corporation for whom he acts.

The assignee in insolvency represents the creditors as well as the insolvent.

A bill in equity may be maintained by an assignee in insolvency against one holding money or property of the insolvent under a contract fraudulent and void as to creditors, when the bill seeks to have the contract annulled and the consideration restored.

This court has by force of the statute full equity jurisdiction in cases of fraud, limited only by the usage and practice of chancery courts, concurrent with courts of law or exclusive of them.

Smith v. *Sullivan*, 71 Maine, 155, distinguished and confirmed.

ON EXCEPTIONS.

The exceptions were to the ruling of the court in overruling a demurrer to a bill in equity. The case is sufficiently stated in the opinion.

William L. Putnam, for the plaintiffs, cited: *Bradley* v. *Farwell*, Holmes' Rep. 433; *Coons* v. *Tome*, 9 Fed. Rep. 533; *Koehler* v. *Iron Company*, 2 Black, 715; *Insurance Company* v. *Hill*, 60 Maine, 178; *McLean* v. *Weeks*, 61 Maine, 277; S. C., 65 Maine, 411; *Crocker* v. *Smith*, 32 Maine, 244; *Brown* v. *Whitmore*, 71 Maine, 65; *Simpson* v. *Warren*, 55 Maine, 18; *Doe* v. *Cribner*, 41 Maine, 277; *Bayard* v. *Hoffman*, 4 John. Ch. 450; *Winsor* v. *Kendall*, 3 Story, 507; *Carr* v. *Gale*, 3 W. and M. 38; *Sawyer* v. *Hoag*, 17 Wall. 610; *Carr* v. *Hilton et als.* 1 Curtis, 230; *First Con. Church* v. *Trustees*, 23 Pick. 153; *Goodell* v. *Buck*, 67 Maine, 514; R. S., c. 77, § 5,

Cl. 4; *McLaren* v. *Brewer*, 51 Maine, 402; *E. & N. Am. Railway Co.* v. *Poor*, 59 Maine, 277; *Pratt* v. *Curtis*, 2 Lowell, 87; Bump on Bankruptcy, (10 ed.) pp. 347, 348; *Scamman* v. *Cole*, 3 Cliff. 472; *Flanders* v. *Abbey*, 6 Bissell, 19; Judge Fox, in *Goodenow* v. *Deering et als.* (not reported).

J. and E. M. Rand, for the defendant.

In this bill in equity, Joseph D. Taylor and William B. Tobey, assignees in insolvency of the Dirigo Slate Quarry Company, seek to recover of Lorenzo Taylor a sum of money received by him of the treasurer of said company in payment of a debt due to him from said company. The bill is against Lorenzo, individually; and is for the mere collection of a sum of money.

Respondent, by demurrer, objects that complainants have a plain, adequate and complete remedy at law.

The claim is one of which a court of common law would take cognizance in an action for money had and received. We submit that complainants have a plain, adequate and complete remedy at law; and, if so, a court of equity will decline jurisdiction. 1 Daniell's Chancery (3d Am. ed. 1865), p. 574; Story's Equity Pleadings, § § 472, 473; *Thayer and al.* v. *Smith*, 9 Metc. 469.

We submit that the insolvent law of Maine confers upon this court no jurisdiction in equity to enforce the payment of this claim against respondent.

Under that law, the Supreme Judicial Court has "full equity jurisdiction;" the assignee has "power to maintain all suits at law and in equity," and by § 48 (under which this claim arises), "the assignee may recover the property or the value of it from the person so receiving it or so to be benefitted."

The last bankrupt act conferred upon the United States courts equally full equity powers, and the precise words of § 48, insolvent law above quoted, were used in the bankrupt law. Bump's Bankruptcy (9th ed. 1877), 795.

Yet a bill in equity to recover the value of a stock of goods was dismissed because the remedy was at law. *Garrison* v. *Markley*, 7 N. B. R. 246.

DANFORTH, J. This is a bill in equity, in which the complainants, as assignees of an insolvent corporation, seek to set aside a payment made by the insolvent to the respondent, a creditor, as a fraudulent preference under the law, and to recover the amount so paid. The allegations in the bill show that the respondent was not only a creditor, but also the treasurer of the insolvent corporation, and as such, within four months of the insolvency, had executed a mortgage of the company's lands, upon the credit of which and in behalf of the corporation, he borrowed the sum of seventy-five hundred dollars, and "unlawfully, inequitably and unjustly applied the whole of said seventy-five hundred dollars" in payment of his own debt against said corporation, excluding the other creditors from any share in, or benefit from said sum. There are other allegations sufficient to show, if true, a fraudulent preference to this respondent. It is also alleged that by reason of his acts thus set out, this respondent "became in equity trustee of said seventy-five hundred dollars, and in equity held and now holds said sum in trust for all said creditors of said corporation, and for your orators as their representatives," and that said payment was made in fraud of the other creditors of said corporation. To this bill there is a general demurrer on the ground that, if true, "there is a plain, adequate and complete remedy at law."

That in such cases the assignees represent the creditors and are competent effectually to assert their rights to all the property of the insolvent fraudulently conveyed, cannot be, and in this case, is not denied, and the real question in issue here is, whether they have adopted the proper remedy or must be turned over to that which the law may afford them.

It is claimed that the bill may be sustained upon either of two grounds, namely: I, a breach of trust, and II, a fraudulent preference under the insolvent law. Under the allegations in this bill, it cannot be supported upon the first. The respondent's possession of the money as treasurer, does not render him a trustee of the company for whom he acts. As treasurer he is a mere depositary of the money, having no title to it, no control over, or duty in relation to it, except that of safe keeping, and

no discretion in paying out or otherwise disposing of it, but in these respects is governed and controlled by the corporation which is the real owner. The treasurer is an agent and his possession is that of his principal. *Insurance Company* v. *Hill*, 60 Maine, 183; *Sprague* v. *Steam Nav. Co.* 52 *id.* 592; *Pettingill* v. *Androscoggin R. R. Co.* 51 *id.* 370; Angell and Ames on Cor. 8th ed, § 312.

Very different from this is that trust over which equity has jurisdiction; a trust which is "defined to be an equitable right, title or interest in property, real or personal, distinct from the real ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits or benefits thereof in his hands belong wholly, or in part, to others." 2 Story's Eq. Jurisprudence, 9th ed. § 964.

Further, this respondent as treasurer, is accountable to the company and to that alone. But to the company, and to these complainants, so far as they represent the company, he has done no wrong. There is no allegation in the bill that he did not safely keep the money, or that he made any disposition of it without the consent and direction of the proper officers. On the other hand it is claimed that the appropriation, which is the real cause of complaint, was made by the company itself. Hence there is no dereliction of duty on the part of the respondent to the company. Nor is there any such dereliction as treasurer toward the creditors. His possession of the funds of the corporation imposed upon him no duty toward them. He could not without the direction of the proper officers pay any debts of the corporation, nor could the creditors maintain any process against him for the collection of their debts, and the complainants as their representatives stand in no better condition. With the directors the case might be somewhat different. They have the control and disposition of the funds. In this respect to a great extent, they represent the company and have a duty to perform toward it which is substantially a trust and for a violation of which the proper process would unquestionably lie in favor of those directly interested, as held in *Koehler* v. *The Black River Falls*

Iron Company, 2 Black, 715, and other similar cases. But even here it is not intimated that any process could be sustained against the directors except by such persons as were legally interested in the property misappropriated.

It is, indeed, alleged in the bill that this respondent having received the money, it became "his duty to apply it upon equitable principles to the benefit of all the creditors of the corporation." But as already seen, this duty did not arise from his possession of the funds as treasurer, but if at all, by virtue of having received them as a creditor in payment of his debt under such circumstances as rendered it a fraud under the insolvent law upon the other creditors; and the allegations in the bill so show. Thus when that duty has arisen, if at all, the money has been misappropriated by the company, or its officers, and the respondent is no longer in possession of it as treasurer, has no duty to perform in regard to it as such, but holds it under the authority of the corporation as one of its creditors. To hold property in trust is one thing; to have obtained it by fraud is another and a very different thing. Thus all the allegations in this bill show that the liability of the respondent, if any, rests upon a fraud and not upon a trust, and the question involved is not one of duty on the part of the respondent, but of title to the money.

That the allegations in the bill sufficiently show that the respondent received the payment of his debt in fraud of the other creditors of the insolvent, is certain; and upon this branch of the case, we think the bill must be sustained.

In coming to this conclusion we lay no stress upon the provisions of the insolvent act, except so far as it declares the facts set out to be a fraud. It has been decided by this court that § 11 of the insolvent act does not determine the nature of the process to which an assignee may, or must, resort to enforce his rights to property alleged to belong to the insolvent estate, for the purposes of distribution among the creditors, against a person claiming an adverse interest. That section refers to cases involving the rights of the assignees, debtors and creditors, as among

themselves, regulating the management and distribution of the assets. *Smith* v. *Sullivan*, 71 Maine, 155.

It was further held in that case that the remedy by which an assignee should enforce his title to property against a person claiming adversely, is found in section thirty-two of the same act, by which it is provided that "any assignee shall have power to maintain in his own name all suits in law and in equity, for the recovery and preservation of the insolvent estate." This does not settle the question as to the precise remedy to be resorted to, that is, whether it shall be in law or equity, but leaves that to be determined by the general principles applicable to the facts of each case. *Smith* v. *Mason*, 14 Wallace, 419; *Marshall* v. *Knox*, 16 *id.* 551.

In this case the respondent, though alleged to have obtained the property in question, as a creditor and through a fraudulent preference, is, nevertheless, an adverse claimant and the suit is simply for the recovery of the insolvent estate.

Nor do we mean to say that the assignee might not have had a remedy at law and possibly a plain and adequate one, and in this case if the facts alleged were proved in an action at law the amount recovered would clearly be the same as in equity. Still the method of proof and the form of the judgment is somewhat different.

The ground of our decision is that in most cases resting upon fraud courts of equity and of law have concurrent jurisdiction, unless controlled by statute provision, and in such cases the complainant may have his election as to which he will resort.

Story in his work on equity jurisprudence, ninth ed. § 184, says, "It is a rule subject to few exceptions, that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of other courts . . . and with the exceptions of wills as above stated, courts of equity may be said to possess a general, and perhaps universal, concurrent jurisdiction with courts of law in cases of fraud, cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law."

Daniell, in his Chancery Practice, vol. 1, p. 576, says, "Among other cases in which courts of equity and courts of law entertain concurrent jurisdiction, are those arising upon frauds; therefore where fraud is made the ground for the interference of this court, a demurrer will not hold."

In Massachusetts the decisions are somewhat different, as there, in cases of fraud as well as in others, it is provided by statute that the jurisdiction in equity shall not attach when there is "a plain, adequate and complete remedy at law;" the courts holding that the statute limits the rule, as to jurisdiction, applicable to courts having full equity powers. *Pratt* v. *Pond*, 5 Allen, 59; *Law* v. *Thorndike*, 20 Pick. 317; *Thayer* v. *Smith*, 9 Met. 469: *Suter* v. *Matthews*, 115 Mass. 253.

On the other hand the courts of the United States notwithstanding a provision in the judiciary act in regard to their equity jurisdiction the same as that in Massachusetts, maintain the doctrine of the English courts as laid down by Story and Daniell, as well as other writers, holding that this clause in the judiciary act is "merely affirmative of the general doctrine of courts of equity and in no sense intended to narrow the jurisdiction of such courts." *Bean* v. *Smith*, 2 Mason, 270; *Robinson* v. *Campbell*, 3 Wh. 221; *U. S.* v. *Howland*, 4 Wh. 115; *Smith* v. *McIves*, 9 Wh. 532; *Jones* v. *Boller*, 9 Wall. 369.

In our state we have no occasion to enquire which of these two courts is in the right, or into the force and effect of the statutory clause limiting the jurisdiction of the equity courts to those cases where there is no complete and adequate remedy at law, for the reason that in cases of fraud our statutes contain no such clause. In the revision of 1841, there was such a clause made applicable as in Massachusetts, to all classes of cases cognizable in equity. In the revision of 1857, that clause was omitted, thus giving to the courts full equity powers in all cases in which they had equity jurisdiction.

In 1874, by chapter 175 of the acts of that year, ch. 77, § 5, of R. S., of 1871, was amended by adding the following specification, "Tenth, and shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all

other cases where there is not a plain, adequate and complete remedy at law." As this is but an addition to the previous specifications named in § 5, it is evident that the limiting clause applies only to the additional jurisdiction herein given and in no respects affects that given before.

Thus this court has by force of the statute, full equity jurisdiction in cases of fraud, limited only by the usage and practice of chancery courts. This as we have seen is concurrent with the courts of law, or exclusive of them, "subject" as Judge STORY says, "to few exceptions." What those exceptions are we find in the note to the section of Story's Equity Jurisprudence before cited. These are "cases of warranties, misrepresentations, and frauds on the sale of personal property," and other like cases in which there is no prayer for rescinding the contract and a return of the specific property, but in which the only object to be obtained, is the recovery of damages for the injury suffered. It is very evident that this case does not come within any of the exceptions mentioned or any others which can take it out of equity jurisdiction. On the other hand it involves principles which render it appropriate for such jurisdiction. The bill asks for a full answer to the charges therein made. This answer the plaintiffs are entitled to, for it is evident that as to a portion of them, at least, the defendant must have better knowledge than can be found elsewhere. Here, too, is alleged a payment which is in effect a contract and which the plaintiffs seek to have annulled and the consideration restored. True, this consideration was money, but, though the same money may not be restored, it is not damages which are asked for, but a specific sum which was in the treasury and therefore the property of the corporation, and obtained by a fraudulent contract. It is only the recovery of damages as such, when that is the only object to be obtained, which is objectionable in a court of equity. But the mere fact that the property to be recovered is money is not objectionable especially when the contract upon which it was obtained is first to be rescinded on the ground of fraud.

That the proper remedy in a case like this is in equity, is sustained by *Simpson* v. *Warren*, 55 Maine, 18.

The conclusion to which we have arrived, is in no respect inconsistent with that of *Smith* v. *Sullivan*, *supra*. That was decided upon the facts set out, independent of any allegations of fraud, with no contract to rescind, and presented only a question of damages or of title which could properly be settled in an action of replevin. This case is presented upon a contract the validity of which depends upon the charges of fraud.

Demurrer overruled. Defendant to answer.

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

L. W. HOUGHTON and another, in equity,

vs.

CHARLES DAVENPORT.

Sagadahoc. Opinion April 17, 1883.

Trusts. Attachment. Property held in trust mingled with other property.

It is a general rule in equity, that trust property is not liable to attachment for the debt of the trustee, even in cases where the land attached stands of record in the name of the trustee, and the attaching creditor has not, prior to his attachment, any knowledge or notice of the trust; equity will enjoin against the attachment.

To this rule the recording act in this state, creates an exception, applicable to cases where a debtor conveys real estate by deed, which is not recorded before the estate is attached as the debtor's property, the creditor having no notice of the conveyance prior to the attachment.

The mere act, by a trustee, of mingling trust money with his own money, by depositing the different moneys in a bank in his individual name, with nothing done by the banker to distinguish the trust money from the individual money, does not necessarily prevent an identification of the trust fund. Equity will undertake to disentangle the accounts, and give to the *cestui que trust* the portion that belongs to him.

If a trustee commingles trust money with money of his own, and afterwards separates from the common fund a proper portion of it as the property of the *cestui que trust*, and with such portion of the fund, purchases real estate in his own name, the trust becomes impressed upon and attaches to the money thus set aside and the real estate purchased with such money.

A trustee need not purchase property with the very dollars received from the trust fund, nor give any notice to the *cestui que trust* of the purchase, nor make any delivery to him, in order to create a trust estate. If he uses or loses the trust fund, he may afterwards, by some proceeding or act of his own, substitute his own money therefor, and the substituted money will be subject to the same trust that was imposed upon the money by the trustee used or lost.

BILL IN EQUITY.

Heard on bill, answer and proof.

The opinion states the case and material facts.

Charles W. Larrabee, for the plaintiffs, cited:

Perry on Trusts, § § 127, 128, p. 68, and cases there cited; *Crooker* v. *Crooker*, 46 Maine, 250.

Adams and Coombs, for the defendant, contended that there was so much of a commingling by Bovey of his ward's money and property with his own, that it was impossible to identify the trust funds.

"When the means of identification fails, as where an executor converted an estate into money and mixes it with the general mass of his own money and there is no identifying the particular money of the trust, the distributees or legatees have no preference over his other creditors." Perry on Trusts, § 128.

There is no equity in the plaintiffs' position here.

They received from Bovey, a voluntary assignment of all his other property, and then waited till four months had elapsed before they commenced this suit and before they in any way conveyed to this defendant information of any claim upon the land in question as property held in trust, when it was too late for the defendant by resort to insolvency proceedings to share in the other property.

It may be proper for a creditor who has received a preference by receiving an assignment of a part of an insolvent debtor's

estate, to wait the time limited by the statute without giving other creditors notice or doing anything to stimulate their diligence. But when he sees another creditor relying upon an attachment of other property upon which he claims a right to enforce a trust or other lien unknown to the attaching creditor, if he waits till his title to the assigned property becomes indefeasible, and then undertakes to enforce his claim upon the property attached which until then he has kept secret, it is not such good faith as a court of equity will aid. Perry on Trusts, § 870.

PETERS, J. The complainants in this bill allege, and we think prove, that Henry M. Bovey in 1873, was appointed guardian of Richard O. Morse, a minor, and gave bond as required by law; that in 1879, when his ward became of age, Bovey's settlement in the probate court disclosed a deficiency in his accounts of twenty thousand dollars or more; that prior to the settlement he had purchased certain real estate with his ward's money, taking a deed thereof to himself individually, a portion of which shortly prior to this bill was still standing in his own name; that, to save as far as he could loss to his ward and disaster to his bondsmen, he conveyed such real estate to these complainants in trust for his ward; that the respondent has an attachment upon the real estate in a suit instituted for the purpose of collecting a private debt due to him from Bovey; and the complainants seek to have the attachment nullified, and thereby the cloud upon their title removed.

At the threshhold of the case, the suggestion comes from the respondent, that any creditor, who attaches land standing of record in the name of his debtor, nothing indicating that he is not the owner, although the land equitably belongs to another, has a better right than the *cestui que trust*, if the creditor, prior to his attachment, has not knowledge or notice of the trust. To this we do not agree. In proceedings at law, the creditor might have the superior right. Not so in equity.

The precise question has never been determined in any reported case in this state, although we deem the point virtually determined in the case of *Crooker* v. *Crooker*, 46 Maine, 250.

It was there held that, where partners purchased lands with partnership funds, taking deeds thereof in their individual names and not as partners, an attachment of one partner's interest in such lands by his private creditor, should in equity be vacated, in order to give a preference to the claims of partnership creditors and of the other members of the firm. The principle established in that case admits the complainants' position in this case to be a correct one. To effectuate the same sort of equity, it is held by our court that the widow of a member of a firm is not entitled to dower, nor his heirs to an inheritance, in lands standing in his name, purchased with the funds of the partnership and needed for partnership purposes. *Buffum* v. *Buffum*, 49 Maine, 108. Essentially the same principle is recognized in a class of litigations arising between the sellers of goods and the creditors of the purchasers, where the goods are obtained by the purchasers by means of false pretenses. In such cases the equity of the seller is superior to that of the attaching creditor. *Ayers* v. *Hewett*, 19 Maine, 281. Substantially the question at bar is quite elaborately and cogently argued, favorably to the present complainants, by SHEPLEY, J., in *Warren* v. *Ireland*, 29 Maine, 62, although the case was decided upon other grounds, and by WALTON, J., in *Carter* v. *Porter*, 55 Maine, 337, 343.

The present case must not be confounded with a class of cases in this state, in which it has been held that the title of an execution creditor, under a levy upon the real estate of his debtor, is not affected by a notice of a prior conveyance not recorded, the creditor having no knowledge thereof at the time of his attachment upon his writ; as was decided in *Stanley* v. *Perley*, 5 Maine, 369. See *Emerson* v. *Littlefield*, 12 Maine, 148. Those cases must be regarded as exceptional, and are decided upon the peculiar language of our recording acts. R. S., c. 73, § 8, declares that "no conveyance . . . will be effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided." This language has been regarded as prohibitory. It is clear and positive. Massachusetts has a similar statute, and her court has made similar decisions.

Woodward v. *Sartwell*, 129 Mass. 210; and cases cited. But the Massachusetts and Maine cases, upon even what we call an exceptional phase of the question, find not much support in the decisions of other courts.

We think the principle contended for in the present case by the complainants is admitted by most courts that have any chancery jurisdiction. Says the court, in *Williams* v. *Fullerton*, 20 Vt. 346, "The general rule that trust property is not liable to be levied upon and sold for the debt of the trustee, will hardly be questioned by any one." The remarks upon this question by the same court in *Hackett* v. *Callander*, 32 Vt. 97, are valuable enough to be to some extent quoted. It is there said: "There is an obvious difference in the equities of a subsequent *bona fide* purchaser of land without notice of a trust, and of a creditor who attaches to secure an antecedent debt. The purchaser advances his money to buy the land. He gives a new consideration. He parts with a new value upon the credit of the apparant record title. The attaching creditor merely seeks to secure an old debt. He advances nothing upon the strength of the record title. He is not made worse by relying upon it. The omission of the real owner to record his deed has not been the means of depriving him of any value. It is for these reasons that courts generally have treated them as standing upon equities materially different."

The following American authorities may be said to support the complainants' side of this question, and some of them very explicitly and strongly so. *Bostick* v. *Keizer*, 4 J. J. Marsh, 597; *Manley* v. *Hunt*, 1 Ohio, 257; *Vandermark* v. *Jackson*, 21 Kan. 263; *Plant* v. *Smythe*, 45 Cal. 161; *Ells* v. *Tonsley*, 1 Paige, 280; *Padgett* v. *Lawrence*, 10 Paige, 170; *Moger* v. *Hinman*, 3 Ker. 180, and cases there cited; *Arnold* v. *Patrick*, 6 Paige, 310; *McCann* v. *Taylor*, 10 Md. 418; *Elliott* v. *Armstrong*, 2 Blackf. 198; *Baker* v. *Copenbarger*, 15 Ill. 103; *Davis* v. *Garrett*, 3 Ired. 457; *Piatt* v. *Oliver*, 2 McLean, 267; *Cox* v. *Milner*, 23 Ill. 476; *Savery* v. *Browning*, 18 Iowa, 246; *Reed* v. *Ownby*, 44 Mo. 204. Drake Att. 6 ed. § 234. Most of the English cases support the same view.

Laughton v. *Horton*, 1 Hare, 549; *Loge* v. *Lyseley*, 4 Sim. 70. Among the effective decisions upon the subject matter, is the case of *Whitworth* v. *Gaugain*, 3 Hare, 416. In that case SHADWELL, V. C., draws this distinction between the right of the purchaser and that of the creditor: "In one case the party contracts for a specific thing — in the other he merely takes a judgment, that gives him nothing more than a right to that which belongs to his debtor." Upon these authorities, English and American, and for the soundest reasons, we are brought to the conclusion that the complainants' position in the case at bar must be sustained. Equity disdains to take the property of one man to pay another's debt.

But the respondent contends that the facts screen him from the operation of the general rule. Of course, there may be exceptions to this doctrine or rule. An exception might, perhaps, arise in a case where a creditor, relying upon his attachment and record, without notice of the trust, has surrendered other securities, or given new value or consideration in some way. Counsel says that the respondent could have attached personal property, instead of land, had he known of the trust. It does not, however, appear that he forbore to attach goods for the reason that he attached land, or that he made any inquiry into the situation of either kind of the debtor's property. We think the circumstances of this case do not establish an exception.

The present case only requires us to decide whether an *attachment* shall be vacated. We are not called upon to say what the situation of the parties would be, if the creditor had actually levied an execution before the bill of complaint was filed. That question cannot be decided by us here.

But it may not be amiss to remark that the great bulk of the cases recognize no distinction between levies and attachments, in making an application of the rule. The point is exhaustively discussed in the case of *Hart* v. *Farmers Bank*, 33 Vt. 250, in which there is an intimation that equity might accord to the levying creditor the amount of the costs of making the levy. In this connection, *vide* R. S., c. 76, § 7, and the peculiar wording of c. 73, § 12.

Then comes another objection to the bill, urged by the respondent. The evidence of the case is Bovey's deposition. He swears that the property, upon which the attachment rests, was purchased with the funds of the trust estate. He says, however, that, when he received the moneys of the estate, instead of keeping them separately, he mingled with them some small amount of money of his own. The respondent contends that this act obliterated the trust fund as a trust fund, and that its identity has not been in any part regained. We do not agree with the respondent in this position.

The mere act of commingling different moneys does not necessarily prevent identification. It may make it difficult. The question is met in 2 Perry's Trusts, (second ed.) § 837, thus: "If trust money is mixed in the same parcel with the trustee's own money, it may be said that the trust money has run into the general mass and has become absorbed, and that the *cestui que trust* has no lien; but such cannot be the case. Although every identical piece of coin cannot be ascertained in a given mass, yet there being so much trust money in the parcel, the *cestui que trust* is entitled to so much of it. If a trustee deposits trust moneys in bank to his own credit, the court will disentangle the accounts, and give the *cestuis que trust* what belongs to them." This doctrine has lately undergone a most exhaustive and masterly examination in England in the case of *Knatchbull* v. *Hallett*, (*In re Hallett's estate*) L. R. 13 Chan. Div. 696. And that case, in turn, and its doctrines have been elaborately considered and emphatically endorsed in the later case of *National Bank* v. *Insurance Co.* 104 U. S. 54. In the English case it is determined that, if money held by a trustee has been paid into his private account at his bankers, the *cestui que trust* can follow it, and has a charge on the balance in the bankers' hands. It was further held, that the rule attributing the first drawings out to the first payments in, does not apply excepting as between the moneys of different *cestuis que trust*, whose moneys are commingled by the common trustee, and that, as between the individual funds and trust funds, the

drawer must be taken to have drawn his own money in preference to the trust money.

Some passages in the reasoning of the judges in that case, upon the general proposition that mere mingling of moneys will not dissipate a trust, are exceedingly satisfactory. JESSEL, M. R., says: "Supposing the trust money was one thousand sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take one thousand sovereigns out of the bag? I do not like to call it a charge of one thousand sovereigns on the one thousand one sovereigns, but that is the effect of it. It would make no difference if, instead of one sovereign, it was another one thousand sovereigns. But if instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a third person, you can follow it. If in the case supposed the trustee had lent the one thousand pounds to a man without security, you could follow the debt, and take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond, if it were a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added five hundred pounds of his own to the one thousand pounds, the only difference is this, that instead of taking the bond or the promissory note, the *cestui que trust* would have a charge for the amount of the trust money on the bond or promissory note. So it would be, on the simple contract debt (due from the banker). If you could not sever the debt into two, so as to show what part was trust money, then the *cestui que trust* would have a right to a charge upon the whole. Therefore, there is no difficulty in following out the rules of equity and deciding that you can follow the money." He further says: "When we come to apply the principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had

a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they cannot be distinguished, and the next day he draws out for his own purposes one hundred pounds, is it tolerable for anybody to allege that what he drew out was the first one hundred pounds, the trust money, and that he misappropriated it, and left his own one hundred pounds in the bag? What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money?" There is a lucid exposition of the same doctrine by CHURCH, Ch. J., in *Van Alen* v. *American Bank*, 52 N. Y. 1.

Now comes the question, how can we identify the purchase-money that went into the real estate in controversy as money of the trust estate? The trustee testifies that he made the purchase with the estate's money; that the money came from the sale of bonds which he had held for four years; that the bonds were bought with his ward's money; that he had a very little money of his own at the time; that he had been county treasurer, and his county accounts had been settled yearly; that he purchased no bonds for any other estate; and that when he purchased these bonds for his ward, he had but little other money. Can there be any doubt that the bonds belonged to the estate? If the identity of the fund was lost for a time, does it not clearly reappear? Here is the intention and the act. By this executed intention so much money became appropriated to his ward's estate. The trust became impressed upon and attaches to the bonds. Equity finds the ear-mark upon them. If he purchased the bonds for the estate and as its property could he afterwards repudiate the act? As between himself and his ward, could he deny the ward's ownership? And we must bear in mind that the creditor's right cannot be greater than his right. The creditor stands in the place of his debtor. He merely steps into his shoes. He only takes the property of his debtor, subject

to every liability under which the debtor holds it. Would equity, then, say that the bonds really belonged to the trustee rather than to the beneficiary?

It matters not that the trustee did not buy the bonds with the very dollars received into his hands from the trust estate. Nor was it necessary to communicate the fact of his purchase to any one. It is seen from the doctrine already quoted, that the want of these acts does not alter the fact. Of course, the existence of them might make the proof of the fact more conclusive. In *Van Alen* v. *American Bank*, *supra*, it was held to be immaterial whether a trustee deposits the identical moneys received from the trust, or substitutes other moneys therefor. It is there said by CHURCH, Ch. J.: "My agent collects one hundred dollars rent for me and puts the bills in one pocket and takes the same amount from another pocket and deposits it and notifies me. Are my rights gone by the change of money?" Cannot a trustee borrow of his ward's funds and restore them again? When he separates the amount, to be returned, from his general assets, does not the trust attach again? Suppose I hold four thousand dollars of your money to purchase certain bonds with, and I use your money for my own purposes, and afterwards with my own money purchase the bonds for you, are the bonds in equity your property or mine, as soon as purchased? The question is its own answer. A trust may be declared without passing the possession of the property to the *cestui que trust* or notifying him of the trust. *Martin* v. *Funk*, 75 N. Y. 134; *People* v. *Merchants and Mec. Bank*, 78 N. Y. 273; 1 Perry's Trusts, § 105.

There is no occasion of our adopting the doctrine of any of the cases cited by us, further than may be required to sustain the bill in the present case. To that extent we go. The doctrines herein enunicated do not necessarily clash with the decision in *Goodell* v. *Buck*, 67 Maine, 514. In that case it did not appear that all the money was not drawn from the bank after the trust money was deposited. The facts may have been rather closely construed by the court, but the opinion turns upon a finding of fact, "that it did not appear by the facts agreed that

this credit (money in bank) was made up, in any part, of the money received from the earnings of the ship."

Bill sustained.

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

WALTON, J. I concur in holding that, if the guardian of a minor mingles his ward's funds with his own, or uses them in his business, he may afterward appropriate from his own funds a sum equal to what is due from him to his ward, and invest it in bonds or other property, taking the title to himself, but intending to hold it in trust for his ward, and that equity will protect such property against the general creditors of the guardian. And I understand the opinion of Judge PETERS to go no further than that. I therefore concur. Such a decision is not in conflict with *Goodell* v. *Buck*, 67 Maine, 514, nor *Steamboat Company* v. *Locke*, 73 Maine, 370. In these cases no such separation or investment had been made. The funds remained mingled, and their identity thus destroyed, when the attempts to fasten a trust upon them were made.

APPENDIX.

Supreme Judicial Court, Androscoggin.

IN MEMORIAM.

HON. SETH MAY.

At the coming in of the Court on Thursday afternoon, October 6, 1881, the death of the Honorable Seth May was announced, as follows:

REMARKS OF JUDGE MORRILL.

May it please your Honor:

It again becomes my duty to announce to your Honor the decease of another member of the Bar of this County. On the day that this Court began the business of the present term, our esteemed and venerable brother, Judge Seth May, passed to the better land; the light of his cheerful face has gone out; his hearty and cordial greetings have died away upon the shores of time; and this Court, of which he was once an honored member, and the places that have known him, will know him no more.

Those of us assembled here to-day — to do honor to his memory, and to express our sensibility of the loss we have sustained, and our high estimation of his character as a man and a lawyer — have known him only after he became a lawyer and Judge. He came to the Bar long before any of us. When we entered the profession, he had won an exalted reputation as an honest and able counsellor and advocate, known throughout the State to this day.

Judge May was born in Winthrop, July 2, 1802. He had almost completed his four score years, when he was gathered to his fathers. After finishing a course of study in the academies at Monmouth and Hallowell, institutions of high repute at that period, he engaged in business as an accountant, and somewhat in trade; but that course of life was not satisfactory to him, and was pursued only for the purpose of acquiring the means to enable him to study his profession, for which he early had a strong predilection. In 1828, when almost twenty-six years of age, he began the study of law in the office of Dudley Todd, Esq., in Wayne; was admitted to the Bar in 1831, and commenced the practice of law in Winthrop, his native town, and pursued his chosen profession in that place until 1855, at which time he was appointed one of the Justices of this Court. The appointment was unsolicited, and was accepted with some hesitation on his part. He held the office for the term of seven years, when he retired from the bench, again resuming the practice of his profession.

As a lawyer, he rapidly gained and firmly held the confidence of the community. His Christian character, sound learning, strict integrity, his love of exact justice, his quick perception of the merits of the causes in which he was retained, and his ability as an advocate placed him in the front rank of the profession. He was the friend and associate of the Fessendens, of Evans, Boutelle, Paine, Moor, and other distinguished lawyers of his day. As a Judge, he heard every suitor with patience, and sought to apply the pure principles of law to every case brought before him, without fear, favor, affection, or hope of any reward, other than that which comes of an approving mind

and conscience. When he put off the ermine, it was unsullied by any act inconsistent with the duties of the high office he had so well filed.

After returning to the practice of law in 1863, he moved to this city, and was associated in business with his son, J. W. May, Esq. In 1867, he was appointed Register in Bankruptcy, which office he held until 1873. In the meantime, death had taken away his wife, a woman of marked excellence of character, to whom he was ardently devoted. She was his friend of all others, the one upon whose judgment and advice he relied above every one else. This severance of domestic ties afflicted him sorely, and in 1875 he retired from the active duties of life. His mind, once strong, became weakened and clouded, and the cloud grew more and more dense until thick darkness entirely obscured the once brilliant intellect. The silver cord of life was loosened, and now the golden bowl is broken, — the mourners go about our streets.

I am requested by the members of the Androscoggin Bar Association to present to your Honor the resolves adopted by them, expressing their esteem for our departed brother, to move that they be entered upon the records of this Court in perpetual memory thereof, and that this Court, out of respect for the memory of the deceased, do adjourn.

Resolved, That the members of this Bar have heard with regret of the decease of the Honorable Seth May, a member of this Court and a distinguished member of the Bar, and who has adorned the profession by an upright and honored life; and in the discharge of a public duty, as well as in accord with the dictates of our private feelings, we think it proper to mark the occasion by attempting to record our estimate of his manly life, his abilities, and his high character.

Resolved, That the character and public services of the Hon. Seth May demand esteem, and a fitting commemoration; that although his life was in part obscured by disease, throughout his active and business days, whether in private or public, he maintained a wide and varied intercourse with the public men of our

State and Nation, and cherished a deep interest in public affairs; and by his deep convictions in favor of right, and his constant and earnest labors in favor of liberating slaves, and by his advocacy of temperance, he exerted, at all times, a great and most salutary influence upon the sentiments and policy of the community and country.

Resolved, That the President of the Bar be requested to present these resolutions to the Supreme Judicial Court now sitting at Auburn, in and for the County of Androscoggin.

Resolved, That our sympathy with the family and friends of our deceased brother is profound, and our prayer is that his children may receive the blessings of Almighty God in their great sorrow and affliction.

Resolved, That the Clerk of the Court communicate to the family of Honorable Seth May a copy of these resolutions, together with the deep sympathy of the Bar, should the Honorable Judge, who presides, grant the motion to record the resolutions.

REMARKS OF HONORABLE M. T. LUDDEN.

May it please your Honor:

I rise to second the motion of Judge Morrill, that the resolutions presented by him may be ordered by your Honor to be placed upon the records of this Court. It has been my good pleasure to know Judge May in his practice at the Bar, and in his subsequent career as a Justice of this Court. It was by his order in 1855, I believe, that I was admitted a member of this Bar. When we reflect upon the active life of Judge May, and his subsequent loss of reason, and his continuation in that condition for a long time after the calamity of paralysis came upon him, we are reminded that we are all fearfully and wonderfully made; that death and disability come at an hour when we think not. It is the highest and noblest characteristic of life that it is in the fullest sympathy with its Almighty Creator, and that religion has impressed upon it its benign and saving grace. Standing in this presence, I believe he whose loss we deplore,

and whose memory we revere, led an exemplary Christian life. It is the best commemoration I can suggest to his memory. One by one we are going home to be seen and known here no more.

"Beyond the farewell and the greeting,
Beyond the pulse's fever-beating
We shall be soon."

These recollections and memorials will remind us that we go hence. God's love alone shall bear us in peace to the regions of the great unknown.

RESPONSE OF JUDGE WALTON.

I have known our deceased brother long and well. I can remember him as long ago as 1836. I was then a boy, residing in Paris, the shire town of Oxford County, and he came there to attend the Courts. There was a vigor, a freshness, and a zeal in his manner of conducting trials, which at once attracted attention and rendered him noted as a lawyer. He was quick at repartee, and never in the slightest degree disconcerted by the answers of an adverse witness, however unexpected. He was often employed to aid in the prosecution or defense of suits without an hour's time for preparation. This is a dangerous practice, and will not, as a rule, be successful. But his familiarity with the rules of practice, his self-reliance, and especially his quickness of perception, and the readiness with which he could grasp all the material facts in a case, enabled him to try cases, and to try them successfully, with very little or no preparation. He was unusually sharp and acute in the cross-examination of witnesses; and while such a course does not always very much contribute to the success of a client's cause, it is always pleasing to him, and very much increases his respect for his lawyer. The client always likes to have his adversary and his adversary's witnesses handled without gloves. This, Judge May was always ready to do; and it made him very popular with his clients, and secured to him an extensive practice.

He early ranked among the best lawyers in the State; and this position he maintained as long as he continued in practice.

His elevation to the bench was without effort or solicitation on his part. This is a fact within my personal knowledge. I was among the first, if not the very first, to sign a petition to the Governor for his appointment. The petition was prepared and signed without Judge May's knowledge or solicitation, and while I am not prepared to say that he was not pleased by this manifestation of esteem and good-will on the part of his brethren of the Bar, I know that it was entirely voluntary, and without solicitation on his part. His appointment gave great satisfaction, and when, at the end of his term, he left the bench and again resumed practice at the Bar, he carried with him the respect of his associates, and the confidence and esteem and good-will of all who knew him. He was honored while living, and now that he has passed from us it is proper that a testimonial of his worth, and of the estimation in which he was held by his brethren of the Bar, should be permanently placed upon the records of the Court. The motion to have the resolves entered upon the records of the Court is granted; and as a further mark of respect to the memory of the deceased, the Court will now adjourn.

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Page v. *Finson*, 512.

BONDS.

1. The clerk of a city is an officer to whom the bond of a constable required by R. S., c. 80, § 43, may in the first instance be properly delivered.

Stacey v. *Graves*, 368.

2. The penalty imposed by R. S., c. 80, § 43, is not incurred if a constable serves a writ after the delivery of his bond though before it is approved.

Ib.

3. When the contract is under seal, the legal title is in the obligee, and the action must be brought in his name.

Farmington v. *Hobert*, 416.

4. A suit in the name of the town cannot be maintained on a bond running to the treasurer though for the use of the town.

Ib.

5. When a bond is given in the sum of five hundred dollars, to be paid on the failure to make a drain for a certain purpose and in a specified time, the sum is to be regarded as a penalty and not liquidated damages.

Smith v. *Wedgwood*, 457.

6. When in an action of debt on bond where judgment should have been for the amount of the penalty, it was by mistake of the clerk entered up for the amount of damages in that suit (for which execution was to be issued), the mistake is one which no lapse of time will divest the court of the power, or relieve it from the duty to correct, in furtherance of justice, whenever attention is called to it and it is made to appear that the plaintiff in that suit may have occasion to resort to *scire facias* upon that judgment for further damages.

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1. The clerk of a city is an officer to whom the bond of a constable required by R. S., c. 80, § 43, may in the first instance be properly delivered.

Stacey v. *Graves*, 368.

2. The penalty imposed by R. S., c. 80, § 43, is not incurred if a constable serves a writ after the delivery of his bond though before it is approved.

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CONSTITUTIONAL LAW.

1. Private and special laws, 1871, c. 511, and 1872, c: 1, making valid votes of certain towns, are constitutional, and bonds issued in pursuance of them are valid.

Shurtleff v. *Wiscasset*, 131.

2. The tax authorized by stat. 1880, c. 249, entitled "an act relating to the taxation of railroads," is a tax upon railroad corporations on account of their franchises and not upon their real or personal estate; and the tax is one which it was constitutionally competent for the legislature to impose.

State v. *M. C. R. R. Co.* 376.

3. The legislation of this State which diverts the proceeds of sales of lands reserved for public uses from the ministerial fund to the fund for public schools, in cases where the fee to such lots has not vested in any beneficiary, is constitutional.

Union Parish Society v. *Upton*, 545.

4. In 1788 a resolve of the legislature of Massachusetts, declared that there be reserved, in each of certain townships in the then District of Maine, four lots for public uses, one of which should be for the ministry in the township, when incorporated. In 1804 that Commonweath, by its agents, conveyed one of the townships to a purchaser, the deed to be valid upon the performance of certain conditions imposed upon the purchaser, and containing a reservation of the public lots. The law diverting the funds was passed by the legislature of Maine in 1832. The township was incorporated as the town of Upton in 1860. The first parish was incorporated in 1879. *Held*, that the parish is not entitled to the proceeds of the sale of the timber and

CONTRACTS.

the legislature to issue new bonds for the balance due in renewal, payable at a specified time in the future, and the bonds and mortgages (securities) were extended; the priority of security and the lien of the city to be in no way impaired. *Held*;

1. The securities given by the company apply to and are available for the protection of the city for the new bonds issued by it, in renewal of unpaid balances.

2. That the provision in the act of the legislature (stat. 1868, c. 601,) for a sinking fund, and authorizing that such fund should be turned over to the city in full discharge of the unsatisfied indebtedness, when it shall equal the same, would not authorize the company to borrow money to add to the sinking fund; and that money obtained otherwise than as required by statute, is not to be regarded as belonging to the statutory sinking fund.

3. That the contract between the parties providing for the payment "of the accruing interest on all unsatisfied balances of the company's obligations to the city," negatives the obligation of the company to pay the interest or principal before they shall become due and mature; and that it equally negatives the obligation of the city to receive the same.

4. That the contract forbids a payment which would impose a loss upon the city.

Portland v. *A. & St L. R. R. Co.* 241.

4. The defendant on the sixth of April, 1876, at New York, contracted with H. W. F. to sell him ten thousand tons of river ice of a certain description, deliverable at a specified time and place and price, H. W. F. to pay by accepting sight drafts on terms set forth in their contract. On the fifteenth of May, following, the plaintiffs at Gardiner, signed on the back of the defendant's contract with H. W. F. the following agreement: "We, the undersigned, hereby agree to furnish A. Rich, Jr. three thousand tons of ice, (3000 tons), per the within contract." *Held*;

1. That this agreement was with the defendant, and H. W. F. was no party to it.

2. That by the terms "per the within contract," the defendant's agreement with H. W. F. was so far incorporated in his contract with the plaintiffs, as to designate the quality of the ice, when and where deliverable and the price.

3. If the plaintiffs delivered ice to the defendant under this written contract signed by them, the title to the property passes to the defendant, and an obligation arises on his part to perform the terms and stipulations of the contract.

Bradstreet v. *Rich*, 303.

5. When one agrees in writing to deliver to another a chattel at a price and time, and in a manner specified, and the other party, though not signing the contract, takes it and claims execution of it on the part of the party signing it, he must be held as receiving it according to the terms of the written contract.

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1. A disseizin by trespass is an incipient and not a completed title, and is not purged by an attempt to buy in the real title.

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2. A person entering real estate under the license or permission of a party in possession, is not a disseizor and cannot be treated as such.

Brookings v. *Woodin*, 222.

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1. An agreement between parties to a divorce, declaring the terms upon which a divorce may be decreed, does not necessarily show connivance or collusion. Where no fraud is intended to be thereby practiced upon the court, and no facts are suppressed, such an agreement, although to be carefully looked into by the court, may be entirely unobjectionable.

Snow v. *Gould*, 540.

See HUSBAND AND WIFE, 1.

DOGS.

1. The fact that others with the defendant, had some part in taking charge of a dog, does not prevent his being the keeper, within the meaning of R. S., c. 30, § 1.

Grant v. *Ricker*, 487.

2. Where a dog is owned by a member of a firm, and is in the keeping of the firm, an action may properly be maintained against the owner, as owner and keeper, under R. S., c. 30, § 1, for damages done by the dog, and it is not necessary to join the other members of the firm.

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To enable a court of equity to reform a contract on the ground of fraud or mistake, there must be full proof of the fraud or mistake. Relief will not be granted where the evidence is loose, equivocal or contradictory, or in its texture open to doubt or opposing presumptions.

Fessenden v. *Ockington*, 123.

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EVIDENCE.

1. In settlement cases, evidence of the declarations of a deceased person is admissible to show when, but not where, such person was born.

Greenfield v. Camden, 56.

2. The recital in an ancient deed that the grantor was of a certain place, is competent evidence of his residence in such place at the date of the deed. It is an act done *ante litem motam*, a part of the *res gestæ*, the actors in which are dead.

Ib.

3. In a pauper suit, the ancient books of records belonging to a town which is a party to the litigation, reciting facts bearing upon the residence of the pauper's ancestor in such town, although the books are not kept with technical accuracy, are competent evidence of the facts recited; they are a part of the *res gestæ*, and partake of the character of declarations made by the town.

Ib.

4. Where it is shown that a person was residing at a certain place at a certain time, the ordinary presumption is that such residence was a continuing residence. For what period of time such presumption would last must depend upon all the associated circumstances.

Ib.

5. The fact that a pauper's ancestor lived and had his home upon the territory of a town upon the day of its incorporation, thereby acquiring his settle-

HUSBAND AND WIFE.

1. Stat. 1876, c. 112, does not so far modify the common law as to authorize a civil action by the wife against the husband to recover damages for an assault, nor against those who act with the husband and under his directions in doing such a wrong. Nor does such right of action arise upon divorce.
Libby v. *Berry*, 286.

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1. An indictment alleging that a charter election was duly held in a certain ward in Rockland on the seventh of March, 1881, "and duly continued until and including the tenth of March aforesaid," and charging that D did then and there, knowingly, illegally "vote at the said election," without otherwise designating the day on which the offence was alleged to be committed, is bad.
State v. *Day*, 220.

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1. A discharge in insolvency by an insolvent court of this state to one of its citizens, is no bar to an action brought by a citizen of another state in the courts of this state, when such creditor was not a party to the insolvency proceedings. *Hills* v. *Carlton*, 156.

2. The giving of security when a debt is created, if free from fraud, is not against the provisions of the insolvent law.
Hutchinson v. *Murchie*, 187.

3. A bill of sale given in good faith which would be binding on the vendor, is binding on his assignee. *Ib.*

4. The assignee in insolvency stands in the place of the insolvent, and takes the property subject to all valid claims and liens. *Ib.*

5. Creditors electing to avoid a fraudulent conveyance, take the property as it was when transferred and subject to all liens then existing. *Ib.*

6. An exchange of one set of securities for another of equal value, is no preference, and may be made by one though insolvent. *Ib.*

7. Where the evidence of fraud is wanting, an assignee in insolvency takes only the property rights and interests of the insolvent. *Deering* v. *Cobb*, 332.

8. The insolvent law of 1878 was a valid law when enacted, though its operation was suspended by the United States bankrupt law then existing. When the repeal of the bankrupt law took effect the insolvent law went into operation, and took cognizance of all acts within its provisions done while it was so

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1. The abolition of solitary confinement as a punishment by stat. 1872, c. 64, is entire and universal, "excepting for prison discipline," and that is to be enforced by the warden within the precincts of the prison, and by no one else. *State* v. *Haynes*, 161.

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2. In an action to recover back a payment made to prevent an illegal distress of property for taxes, it is not necessary to show that the distress was actually made; it is sufficient if the circumstances lead to the conclusion that such distress is impending and will certainly be made if the payment is not made. *Ib.*
3. H held a mortgage on a stock of goods and took from the mortgagor a release or bill of sale, and on the following day took the possession and delivered the same to B, to whom he had bargained it, and three days after paid to the collector of taxes a sum of money claimed as the taxes due from the mortgagor to prevent the distress of the stock of goods; *Held*, That whatever may have been the effect of the transaction with B upon the title, it left H at least, interested in the proceeds which he could not realize until the property was relieved of the impending distress. In either event, in regard to the distress, H had the interests and rights of an owner. *Ib.*
4. When a collector of taxes arrests a tax-payer for non-payment of a tax which had already been once paid, and is thereupon paid a second time to procure a

TAX TITLE.

WELLS.

WILLS.

ERRATA.

In the third line from the bottom of the opinion on page 197, for "*Hale*," read "*Hill*."
In the fifth line of the first head note on page 332, for "*rest*," read "*vest*."
In the nineteenth line from the top on page 456, for "*warp*," read "*waif*."
In the eighth line from the top on page 460, for "*Wharton*," read "*Wheaton*."