REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSEPH WHITMAN SPAULDING,

REPORTER OF DECISIONS.

MAINE REPORTS,

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN APPLETON, LL.D., CHIEF JUSTICE.[1]

HON. JOHN A. PETERS, CHIEF JUSTICE.[2]

HON. CHARLES W. WALTON.

HON. WILLIAM G. BARROWS, LL.D.[3]

HON. CHARLES DANFORTH.

HON. WILLIAM WIRT VIRGIN.

HON. ARTEMAS LIBBEY.

HON. JOSEPH W. SYMONDS.[4]

HON. LUCILIUS A. EMERY.[5]

HON. ENOCH FOSTER, JR.[6]

HON. THOMAS H. HASKELL.[7]

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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(1) Term expired September 20, 1883.
(2) Appointed Chief Justice, September 20, 1883.
(3) Term expired March 24, 1884.
(4) Resigned to date from March 31, 1884.
(5) Appointed October 5, 1883.
(6) Appointed March 24, 1884.
(7) Appointed March 31, 1884.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

HENRY RHODA *vs.* MARGARET ANNIS.

Piscataquis. Opinion February 16, 1883.

Tort. Principal and agent. Fraudulent misrepresentations. Sales. Deceit. Evidence.

A principal is liable in an action of tort for the fraudulent misrepresentation of his agent made within the scope of his authority.

In an action on the case for fraudulent misrepresentations in the sale of a farm, which were alleged in the writ to be among others, "that said farm for several years then last past had produced and cut eighteen tons of hay each year," that a certain portion of the farm "was almost entirely free from rocks and stones and of smooth surface," and "that in the season preceding, to wit, of A. D. 1878, forty sheep, two horses, three cows and six young cattle were pastured through the whole pasturing season upon said farm," it was held that the representations were statements of material facts, and sufficiently definite to be actionable.

In such an action, evidence in relation to the quantity of snow on the ground, and the opportunity the plaintiff had to inquire of the neighbors and the refusal of the agent to go a second time upon the land, is admissible not as tending to show a substantive cause of action, but as bearing upon the negligence of the purchaser.

In such an action it was held that the question of due care on the part of the purchaser was properly left to the jury.

ON EXCEPTIONS.

Case, for deceit in the sale of a farm. The writ was dated January 21, 1880. Plea, general issue. Verdict for the plaintiff.

(Declaration.)

"In a plea of the case, for that on the twelfth day of April, A. D. 1879, at said Sebec, in consideration that the plaintiff, at the special instance and request of said defendant, would buy, and take conveyance from said defendant of a certain farm or tract of land situated in said Sebec, hereinafter described, for the sum of nine hundred dollars, to be paid by plaintiff to said defendant, the said defendant, in order to induce the plaintiff to make such purchase and take such conveyance, and contriving and intending to cheat and defraud the plaintiff, then and there knowingly, falsely and fraudulently and deceitfully represented and warranted to the plaintiff that said farm for several years then last past had produced and cut eighteen tons of hay each year, that eighteen tons of hay had been and were in the years immediately preceding annually cut and taken from said farm; that that part of said farm which was down to grass, and upon which said eighteen tons of hay were so represented to have been cut as aforesaid, was almost entirely free from rocks and stones, and of smooth surface, and could be easily plowed with a span of horses, no stones interfering with said plowing; that there were then fifty acres of cleared land upon said farm, twenty-five acres of which were under a high state of cultivation; that there was a good amount of pasturage upon said farm, and that in the season preceding, to wit: of A. D. 1878, forty sheep, two horses, three cows and six young cattle were pastured through the whole pasturing season upon said farm; that there were

standing upon said farm certain valuable ash trees, to wit: a large lot of ash trees, worth more than one hundred dollars, that she had been offered one hundred dollars for said trees, but considered them worth more to the farm, as the cutting of said trees would greatly depreciate the value of said farm; that said ash trees were growing very rapidly, and were annually increasing in value by a large per centum of their then value, and that said farm was then worth nine hundred dollars ($900); and plaintiff says if said representations and warranty had been true, said farm would then have been worth a large sum, to wit: the sum of nine hundred dollars; and the plaintiff avers that he, being ignorant of the premises, and giving full credit to said false and fraudulent and deceitful warranties and representations of the said defendant, and being thereby induced to purchase the same, he did then and there purchase and take a conveyance of said farm or real estate of said defendant, and did then and there pay therefor to said defendant said sum of nine hundred dollars, as said defendant had specially requested as aforesaid, said conveyance from said defendant to the plaintiff being by her warranty deed. . . And now the plaintiff avers that in truth and in fact said farm or tract of land, at the time of the false, fraudulent and deceitful representations and warranty aforesaid, and at the time of the said conveyance thereof to the plaintiff, did not cut or produce eighteen tons of hay each year, and for several years then last past, and preceding said purchase of said farm by the plaintiff, had not produced and cut eighteen tons of hay annually or at any one season, but in truth and in fact during said times produced but eight tons of hay annually; that in truth and in fact, that portion of said farm upon which said eighteen tons of hay were alleged to have been so cut as aforesaid was not then almost or nearly free from rocks and stones, and could not be easily plowed with a span of horses, but in truth and in fact was then exceedingly stony and covered and filled with large rocks and stones, rendering it exceedingly difficult to plow or cultivate said land; and in truth and in fact, there were not fifty acres of cleared land upon said farm, but in truth and in fact, there were but thirty-five acres of cleared land upon said farm; and in truth

and in fact twenty-five acres of said land were not then under a high state of cultivation, but in truth and in fact there were then only ten acres thereof under a fair state of cultivation, and the remainder of the cleared land of said farm was very poor and barren; that in truth and in fact there was not a good amount of pasturage upon said farm, and forty sheep, two horses, three cows, and six young cattle, were not pastured during the whole of the season preceding, upon said farm, but in truth and in fact the pasture land upon said farm was exceedingly poor and barren, and incapable of producing sufficient grazing for said stock any considerable length of time, and in truth and in fact, but twenty-four sheep, three cows, and two horses, were pastured there in a small portion of said season of 1878; and in truth and in fact, there were not valuable ash trees growing upon said farm, worth a large sum of money, to wit, one hundred dollars and increasing rapidly in value, and for which defendant had been offered one hundred dollars; but on the contrary, there were but a small number of ash trees thereon, worth fifteen dollars only, and for which said defendant had never been offered one hundred dollars; and in truth and in fact, said farm, at the time of said false, fraudulent and deceitful warranties, representations and conveyance, so made as aforesaid, was not worth a large sum of money, to wit, nine hundred dollars, but in truth and in fact, was then and there worth no more than four hundred dollars, at most,—of all which the said defendant was then and there well knowing; whereby the plaintiff, upon said representations and warranties of said defendant, and upon said conveyance of said land, and said payment therefor as aforesaid, was then and there greatly deceived and defrauded, whereby an action has accrued to said plaintiff to recover of said defendant the loss and damage which the said plaintiff has sustained, by reason of the false, fraudulent and deceitful representations and warranty of said defendant, as aforesaid, which loss and damages he alleges to be the sum of five hundred dollars."

At the trial the defendant contended that none of the allegations in the writ of misrepresentations made were sufficiently formal and definite to require the defendant to answer, and that the

alleged representations were so indefinite, and so clearly the expression of an opinion, that they were not actionable, if false and fraudulent, and further, that some of them were not sufficiently negatived in the declaration, and for these reasons objected to the introduction of any evidence upon either and each of them. But the presiding justice overruled the objection, received the evidence, and instructed the jury that they might consider the evidence as bearing upon the following, viz:

1st. The representation as to the quantity of hay produced the preceding and for several years then last past.

2d. The representation that the land upon which the grass was cut was almost entirely free from rocks and of smooth surface.

3d. The representation as to the stock pastured on the farm the preceding year, and that if the plaintiff had satisfied them by a preponderance of evidence in his favor of the truth of the several elements of fraud necessary for him to establish in accordance with instructions given in regard to either of said allegations, then upon such they should assess the damages resulting.

Other material facts in the defendant's exceptions are sufficiently stated in the opinion.

A. G. Lebroke and *W. E. Parsons*, for the plaintiff, cited: 2 Greenl. Ev. (10 ed.) § 121; *Locke* v. *Stearns*, 1 Met. 562; *Fitzherbert* v. *Mather*, 1 T. R. 12; *Lobdell* v. *Baker*, 1 Met. 203; *Bryant* v. *Moore*, 26 Maine, 84; *Weed* v. *Panama R. R. Co.* 17 N. Y. 363; *Goddard* v. *G. T. Ry.* 57 Maine, 202; *Howe* v. *Newmarch*, 12 Allen, 55; *Union Bank* v. *Campbell*, 4 Hump. 394; *Concord Bank* v. *Gregg*, 14 N. H. 331; *Linsley* v. *Lovely*, 26 Vt. 123; *Barber* v. *Britton et al.* 26 Vt. 112; *Hunter* v. *H. R. I. & M. Co.* 20 Barb. 493; *Fishback* v. *Brown*, 16 Ill. 74; *Moir* v. *Hopkins*, 16 Ill. 313; *N. Y. &c. Tel. Co.* v. *Dryburg*, 35 Pa. St. 298; *Chouteaux* v. *Leech*, 18 Pa. St. 224; *Ezell* v. *Franklin*, 2 Sneed, 236; *Williams* v. *Getty*, 31 Pa. St. 461; *Henderson* v. *R. R. Co.* 17 Tex. 560; *Stickney* v. *Munroe*, 44 Maine, 204; 1 Pars. Contr. § § 1, 9, (4th ed.)

J. B. Peaks, for the defendant.

Defendant does not deny but that she is liable for any deceit used by her agent in the sale of the farm, but she is not liable in this form of action until it is shown that she knew of the deceit or ratified it. No question of her knowledge of the alleged deceit or of her ratification was presented to the jury, but they were instructed that she was liable for all the acts of her agent in making the sale.

It would seem to be a queer principle of law that a person could be convicted of a fraud committed by an agent and about which the principal knew nothing till he was arrested. Yet such is the logical result.

It appears to be settled law that a principal is not liable in an action of deceit for the fraudulent representations of an agent made without the knowledge of the principal. *Chandelor* v. *Lopus*, 1 Smith's L. Cas. 238; *Dyer* v. *Lewis*, 7 Mass. 284; *Pearson* v. *Howe*, 1 Allen, 207; *Tryon* v. *Whitmarsh*, 1 Met. 1; Benj. Sales, 436–454.

I submit if a person can be liable in an action of deceit for a legal fraud without any intention to commit fraud. *Lobdell* v. *Baker*, 1 Met. 201; *Fitzsimmons* v. *Joslin*, 21 Vt. 129.

The allegations in relation to the representation as to the hay cut is too indefinite. *Kingsley* v. *Bill*, 9 Mass. 198; Kerr on Fraud, 82; *Keller* v. *State*, 51 Ind. 111, (1 Am. Crim. R.)

The plaintiff could have examined for himself as to the representations and the rule of *caveat emptor* applies. *Parlin* v. *Small*, 68 Maine, 291; 23 Pick. 256; 3 Allen, 380.

The testimony as to matters not alleged in the writ was inadmissible. *Parker* v. *Moulton*, 114 Mass. 99; *Bishop* v. *Small*, 63 Maine, 12; *Burleigh* v. *White*, 64 Maine, 23.

DANFORTH, J. This is an action to recover damages for deceit in the sale of a farm. The representations complained of were made by the defendant's son acting in her behalf. The jury were instructed that the "defendant was responsible for all the acts and representations of her agent in making the sale." This instruction does not make her responsible for the acts or representations of any person who was not her agent, or for such as were not

made in furtherance of the sale, or to accomplish that end. These things were first to be found by the jury under proper instructions as to the law. We must then assume that the son had authority as agent for his mother to make a sale of the farm, that the representations so far as they were submitted to the jury were made by him as a part of the negotiation for the purpose of bringing about the sale, that by means of them it was brought about, the conveyance was made, and that the defendant received the proceeds of the sale. In fact, all these things are conceded. The verdict affirms the fraudulent character of the representations, and that in making them the agent acted within the scope of his authority. This would seem to bring the case within the well established law, that the principal is responsible for such acts of his agent as are done within the scope of his authority, whether authorized or not, except by the general authority, to do the principal act.

In fact, this principle of law is conceded in this case, but it is denied that the defendant is liable in this form of action. It is said that being personally innocent of the fraud, she cannot be convicted of that which has been committed by another with no authority from her, except that which results from his agency. This may be true in a criminal prosecution, but not in a civil action. If she is liable that liability must be ascertained in the proper form of action. Here is no contract of any kind, express or implied, between the parties which can afford any remedy for the injury of which the plaintiff complains. He claims that a wrong, for which the defendant is responsible, has been done him. For that wrong he seeks a remedy. What remedy can he have except an action of tort? The counsel says two. He may rescind the contract, and recover back the consideration paid, or in an action for money had and received, recover the profits accruing from the fraud. But neither of these may be adequate to his injury. If he rescinds the contract he may perhaps lose all the consideration paid, and it would be difficult if not impossible to ascertain the amount received on account of the fraud, if that should be held to differ from the amount of damages recoverable in this form of action. But how does this change of

form relieve the defendant's feelings or reputation? In either case the action is founded upon a fraud, and one which must be proved. In either case it is not her own fraud but that of another for whose doings she is legally, though perhaps, not morally responsible.

The counsel relies largely, if not entirely, upon the English cases to support his views and some of them do so. But an examination of them will show that they are conflicting, many of them decidedly sustaining the instruction given to the jury in this case. It will, however, be noticed that in the most, if not all of them, the form of the action is not considered material. The object is to limit the extent of the liability to the advantages received from the fraud, applying a somewhat different test to the amount of damages to be recovered. It is unnecessary to refer to these cases in detail. They will be found collected and commented upon in Benjamin on Sales, § § 462–467; Bigelow's Leading Cases on Torts, pages 25–33.

The American cases are more uniform, and sustain the instruction complained of, both as to the form of action and extent of liability. Bigelow on page 23, says: "In America it has generally been held that an action of deceit may be maintained against the principal; but the cases are at variance as to the ground of liability." As are the cases, so we find the text books uniform in sustaining the liability of the principal in actions of tort for the wrongful acts of the agent done within the scope of his authority, even though the principal himself is innocent. In a note on page 443 in Benjamin on Sales, it is said: "Where an agent makes a false representation, or in any other manner commits a fraud in a purchase or sale, with or without the privity, or knowledge, or assent, of his principal, and the principal adopts the bargain and attempts to reap an advantage from it, he will be held bound by the fraud of the agent, and relief will be given to the other party to the transaction. The principle is that fraud by an agent is fraud by the principal; that the principal should be bound by the fraud or misconduct of his own agent, rather than that another should suffer." To the same effect are the following authorities some of which are directly in point, and all

recognize the principle; 1 Chitty on Pleading, 16 ed. 91; 2 Green. Ev. § 68; 1 Parsons on Contracts, 73; Kerr on Fraud and Mistake, 111–112; Story on Agency, § § 308, 452; *Locke* v. *Stearns*, 1 Met. 560; *White* v. *Sawyer*, 16 Gray, 586; *Howe* v. *Newmarch*, 12 Allen, 49; *P. & R. R. Co.* v. *Derby*, 14 Howard, 468–486; *Pratt* v. *Bunker*, 45 Maine, 569; *Stickney* v. *Munroe*, 44 Maine, 195; *Goddard* v. *G. T. R.* 57 Maine, 202. In *Holbrook* v. *Connor*, 60 Maine, 578, the misrepresentations were made by an agent, but that fact was not even suggested as a defence, though the action was of the same form as the present. Numerous decisions in other States and in England, to the same effect will be found cited in the text books above referred to.

As already seen all the cases, both here and in England, hold the principal liable for the fraud of the agent to some extent when he has adopted the contract into which that fraud has entered, and if liable we see no good reason why that liability should not be co-extensive with the injury in accordance with the great weight of authority. If he would avoid this he may, as undoubtedly the law would authorize him to do, repudiate the contract, and restore to the injured party what has been taken from him. But in this case no such offer has been made, but defendant still holding the fruits of what the jury have pronounced a fraud denies any liability on her part.

Out of quite a number of alleged misrepresentations set out in the writ the presiding justice, under instructions to which no exceptions were filed either for omission of any law applicable or erroneous statement of that given, submitted three to the consideration of the jury excluding the remainder. An objection is made to these, that they are too indefinite to be actionable though in other respects accompanied with all the facts necessary to constitute fraud. That which refers to the quantity of hay cut the preceding years comes within the case of *Martin* v. *Jordan*, 60 Maine, 531, and is there held sufficient. The words fixing the time during which this quantity was cut, though somewhat indefinite do not make the material fact as to the quantity any less certain; nor is there any doubt that it includes the years

immediately preceding the sale. If no preceding year can be found in which that quantity was cut, and none appears in this case the falsehood of the statement would seem to be sufficiently apparent. If any such year had been found it would certainly not operate against the defendant. How far it would have been a defence or how many years the plaintiff must have proved are questions not raised here.

The second allegation submitted may be somewhat uncertain as to the number of the rocks which might be found consistent with the truth and honesty of the statement made. But difficulty in proof does not change the principle. The statement is clearly one of an existent fact and not a matter of opinion. It is a fact too, which is material to the value of the land. Whether it was sufficiently proved to have been false and fraudulent is not now the question.

The representation as to the amount of stock pastured the preceding year does not now seem to be questioned.

It is said that the second representation is not negatived in the declaration. Good pleading would undoubtedly require this. That part of it which relates to the absence of rocks is abundantly so. The evenness of the surface is part of the same representation and the whole is averred to have been false and fraudulent. If this is not sufficient there is no suggestion that in that respect the defendant did not have all her rights at the trial. The defect, if any, is amendable and there is no occasion for a new trial upon that point.

What representations are sufficient are pretty fully discussed in *Long* v. *Woodman*, 58 Maine 49; *Martin* v. *Jordan*, *supra*; *Savage* v. *Stevens*, 126 Mass. 207, and these representations so far as submitted to the jury clearly come within the principles there laid down.

It is further objected that the representation as to the rocks should not have been submitted to the jury for the reason that it appears that the plaintiff went upon the land and should have seen its condition, and therefore in this matter the maxim *caveat emptor* applies to him. This may be true as a proposition of fact or perhaps of law even, if there had been nothing to have

prevented his seeing them. But the case shows that there was an obstruction. There was considerable testimony tending to show that there was snow upon the ground. There may have been a conflict as the counsel says as to the depth, but it does not appear that any existed as to the fact itself. It follows then that whether the plaintiff was bound to look out for himself, or in other words was in the exercise of due care, depended upon the inference to be drawn from this testimony.

It is however objected that this testimony should not have been admitted because there is no allegation in the writ upon which it can be founded. There is no occasion for any. It is not offered to prove a substantive fraud against the defendant. She was responsible for the representation made and not for the fact that the land was covered with snow. This fact may have imposed an additional burden upon her for the misstatement. Nevertheless her responsibility is for that and that alone. The presence or absence of snow may have affected the duty of the plaintiff, but not that of the defendant. This view is perfectly consistent with the case of *Parker* v. *Moulton* 114 Mass. 99, relied upon by the defendant. In that case the representations set out in the writ were not actionable but the attempt was made to sustain them by other acts or statements of the defendant alleged to be fraudulent and done or made for the purpose of preventing the plaintiff from ascertaining the truth. In this case the representation is actionable, and the proof offered is not of any act or statement of the defendant, fraudulent or otherwise, but of a fact existing without the agency of either party and is important only as it has a bearing upon the question of care on the part of the plaintiff.

It is still further insisted that even with this evidence in, the question of care should have been ruled upon as a matter of law and not submitted as fact to the jury, but it is quite clear that whether the plaintiff negligently permitted himself to be deceived by the alleged false statements, or without due care, was an inference to be drawn from the evidence and was therefore for the jury. *Savage* v. *Stevens*, *supra*, settles this question and in accordance with well established principles.

The testimony in regard to the plaintiff's request to go upon the land the second time and what the neighbors might have told him is to the same effect. It was not introduced to show a substantive cause of action but as bearing upon the question of due care; a portion of it was also pertinent as giving additional force and emphasis to the statements previously made.

The testimony as to the number of acres in the pasture was not objectionable. There was an allegation of the number of acres of cleared land. That allegation however was excluded from the consideration of the jury, and when so excluded it necessarily carried with it all the testimony offered in its support. It is therefore immaterial, except so far as it may have some tendency to show the capacity of the pasture to support the amount of stock alleged. For this purpose it would seem to be admissible. If it has no such tendency it does not appear how the defendant can by any possibility have been aggrieved by its admission.

The testimony as to the condition of the pasture and the hay raised prior to and immediately following the sale was relevant as bearing upon the truth, or falsehood of the representations made. They were circumstances only the weight of which were for the jury.

Loring Town had testified as to the value of the farm without objection. There is no reason perceivable why he should not be permitted to state how that value was made up. Certainly no harm to the defendant could come from it.

Exceptions overruled.

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

EDWARD BARKER, in equity, *vs.* WILLIAM A. FRYE.

Penobscot. Opinion February 16, 1883.

Savings bank deposit. Trust. Gift,

F informed the treasurer of a savings bank that she desired to make a deposit for each of four grandchildren, naming B as one, to which she proposed to make additions from time to time and expressed the hope that with the accumulated interest, the deposits might amount to enough to be of advantage to them when they should reach a suitable age to take charge of the money. She wanted "to do something for the children." The treasurer gave her pass books in the names of each of the grandchildren and entered in each and in the bank books "subject to the order of F during her lifetime." Subsequently she informed B of what she had done and that the money was intended for him and the other children, and she made other deposits and withdrew one dividend. Afterwards F took the several books to the bank and informed the treasurer "that the time had come when she desired to make such a change in the terms of the deposits made for her grandchildren, . . . as would give them full control over them, and the amounts on each book become the absolute property of the parties named therein, and her right to control them should cease. Her expressed wish was, that her claim over the amount of the deposits should be withdrawn as to each case and the books so changed that they would stand in the names of the grandchildren without any restriction whatever," and the treasurer then and there, at her request, erased from the pass books and bank books the original entry "subject to the order of F." She notified B by letter of this change and that the pass books would be delivered the first time they met. B replied with the request that the books might be sent to him. A short time before F's death, she delivered the pass books to W. A. F. with a written order to enable him to draw the amount of each deposit. *Held*,—

1. That the deposit in the first instance created a valid trust and that F controlled the same in trust for B.

2. That the acts and declarations of F at the time of the change in the entry upon the books show a complete and executed gift and divested F of any interest in the deposit as trustee or otherwise, and that she thereafter held the pass book in trust for B.

3. That as W. A. F. subsequently took the book without consideration and with full knowledge of the plaintiff's prior title, he took it subject to that trust, and that it is necessary to B for the more beneficial enjoyment of his gift.

BILL IN EQUITY.

Heard on bill, answer and proof.

The opinion states the material facts.

A. W. Paine, for the plaintiff, cited: *Northrop* v. *Hale*, 72 Maine, 275; *Gerrish* v. *N. B. Ins. for Savings*, 128 Mass. 159; *Blasdel* v. *Locke*, 52 N. H. 238; *Howard* v. *Windham Bank*, 40 Vt. 597; *Gardner* v. *Merritt*, 32 Md. 78; *Minor* v. *Rogers*, 40 Conn. 512; *Ray* v. *Simmons*, 11 R. I. 266; *Brabrook* v. *Bost. Five Cents Sav. Bank*, 104 Mass. 228; *Clark* v. *Clark*, 108 Mass. 522; *Davis* v. *Ney*, 125 Mass. 590; *Pierce* v. *Boston Sav. Bank*, 129 Mass. 425; *Robinson* v. *Ring*, 72 Maine, 140; *Hill* v. *Stevenson*, 63 Maine, 364; *Welsch* v. *Belleville Sav. Bank*, 94 Ill. 191; *Millspagh* v. *Putnam*, 16 Abb. Pr. 380; *Martin* v. *Funk*, 75 N. Y. 134; *Milroy* v. *Lord*, 4 De Gex F. and J. 264; *Stone* v. *Bishop*, 4 Cliff. 593; *Stone* v. *Hackett*, 12 Gray, 227; *Gould* v. *Emerson*, 99 Mass. 154; *Knickerbocker L. Ins. Co.* v. *Weitz*, 99 Mass. 157; *Wall* v. *Prov. Inst.* 3 Allen, 96; *Taylor* v. *Henry*, 48 Md. 550.

Drummond and Drummond, for the defendant.

That no legal or equitable title passed to the complainant prior to the change in the books, is conclusively settled by *Northrop* v. *Hale*, 73 Maine, 66.

After the change in the deposit, the title would vest in the complainant on delivery of the pass book. Mrs. Frye knew a delivery of the book was necessary to complete the gift. Mr. Barker so understood it and wrote her to send him the books, yet she did not, but retained the control herself.

The cases cited by counsel for complainant were cited to the court in *Northrop* v. *Hale*, *supra*, but the court there followed the decisions which conflicted with these.

"There must be an intention to give and this must be carried into effect by an actual delivery." *Robinson* v. *Ring*, 72 Maine, 140.

As nothing less than what the law deems "an actual delivery" will make an intended gift an actual gift, it matters not how far in the direction of carrying out the intention the parties may go if they fall short of "actual delivery." We find no case in which it has been held that any declaration of intentions, whether to the intended donee or vendee or to third persons, is equivalent to "actual delivery."

In *Davis* v. *Ney*, 125 Mass. 590, and *Pierce* v. *Savings Bank*, 129 Mass. 425, there was an actual delivery; and *Gerrish* v. *Savings Bank*, 128 Mass. 159, was decided by force of a statute which does not exist in Maine.

The cases cited from New Hampshire, Vermont, Rhode Island, Connecticut, New York, &c. are in conflict with the decisions in Massachusetts and Maine.

DANFORTH, J. The plaintiff seeks to recover possession of a book issued by the Augusta Savings Bank, showing a deposit of money in that bank in his favor. Both parties claim the deposit and the question involved is upon the validity of the plaintiff's title.

It appears from the evidence in the case, and the facts are undisputed, that in May, 1870, Lydia P. Frye, the grandmother of the plaintiff, made four distinct but equal deposits, taking a book for each with the same heading, except the name. That now in question reads as follows, viz; "Augusta Savings Bank in account with Edward Barker, subject to the order of Lydia P. Frye, during her lifetime."

Then follows the deposit. Subsequently she made other deposits, which with the accumulated interest, were duly entered upon the book. Each book had upon it the same amount. The dividend for August 1, 1872, was withdrawn. It also appears that at the time of making the first deposit, Mrs. Frye said to the treasurer of the bank in substance that she desired to make a deposit for each of her grandchildren, of whom she named the plaintiff as one, to which she proposed to make additions from time to time and expressed the hope that with the accumulated interest, the deposits might amount to enough to be of advantage to them, when they should reach a suitable age to take charge of the money themselves. She said she wanted "to do something for the children."

She subsequently informed this complainant of what she had done and that the money was intended for him and the other children.

Under the decision of *Northrop* v. *Hale*, 72 Maine, 275, holding that evidence, aside from the bank book, is admissible to

vary the effect of the entries and show the intention of the depositor, it is difficult to perceive how that intention could be more clearly shown, or how a trust in favor of the children could be more certainly declared than is shown by this evidence. The facts thus proved very decidedly distinguish this case from that of *Northrop* v. *Hale*, 73 Maine, 66, and cases relied upon by the defence, and bring it within the principles there laid down as necessary to constitute a valid trust, even to the notice to and the acceptance by the *cestui que trust*. *Gerrish* v. *Ins. for Savings*, 128 Mass. 159, after an elaborate review of the authorities, sustains this view.

Subsequently, however, it seems that in the opinion of Mrs. Frye the time anticipated by her when the children "should reach a suitable age to take charge of the money themselves," did arrive, and she divested herself of her trusteeship as well as of all interest in, or control over the money and invested them with the absolute title to and control over it.

On September 19, 1881, Mrs. Frye appeared at the bank with the several books and informed the treasurer "that the time had come when she desired to make such a change in the terms of the deposits made for her grandchildren . . as would give them full control over them, and the amounts on each book become the absolute property of the parties named therein, and her right to control them should cease. Her expressed wish was, that her claim over the amount of the deposits should be withdrawn as to each case, and the books so changed that they would stand in the names of her grandchildren without any restriction whatever."

The treasurer, then and there at her request, erased from the books the original entry "subject to the order of Lydia P. Frye," and erased the same entry from the books of the bank. Of this change the plaintiff was immediately notified by letter with the additional information that the books would be delivered the first time they met. The plaintiff replied with the request that the books might be sent to him, which was an acceptance of the gift.

So far as necessary to make a valid gift of the money and divest Mrs. Frye of any interest in it as trustee or otherwise,

everything was done and completed. No condition remained attached to the deposit; nothing to be done in the future. The intention that the gift was then to take effect cannot be disputed. Under the by-law of the bank, in view of which Mrs. Frye's act must be construed, by which all deposits are entered upon the books of the bank and a book given to each depositor in which every deposit made by him will be entered, which will be his voucher and the evidence of his property in the institution, the person whose name appears unconditionally upon the books, must, by the bank, be considered the depositor, and alone, in person or by order, be authorized to withdraw the deposit. After this change Mrs. Frye could not and the plaintiff could withdraw the money credited to him upon the books. Applying the strictest rules laid down in the decided cases, as necessary to constitute a valid gift and this would stand the test. *Hill* v. *Stevenson*, 63 Maine, 364; *Dole* v. *Lincoln*, 31 Maine, 422; *Urann* v. *Coates*, 109 Mass. 581; *Pierce* v. *Savings Bank*, 129 Mass. 425; *Grangiac* v. *Arden*, 10 Johns. *293; *Wing* v. *Merchant*, 57 Maine, 383; *Trowbridge* v. *Holden*, 58 Maine, 117; *Stone* v. *Bishop*, 4 Cliff. 593.

But much stress is laid upon the fact that the deposit book was not delivered to the plaintiff. This was not necessary. A delivery of the property given, actual or constructive, is undoubtedly necessary to a valid gift, as evidence that the donor has parted with all control of and interest in the property. But the nature of this delivery must depend upon the facts of each case. The law does not require impossibilities or useless ceremonies. When the deposit stood upon the books subject to Mrs. Frye's order, a declaration of trust in herself and an acceptance by the *cestui que trust* was sufficient, for she could not deliver the money to herself and a delivery to the beneficiary would defeat the trust intended. *Urann* v. *Coates*, *supra*; *Gerrish* v. *Ins. for Savings*, *supra*.

It is however conceded that a delivery of the pass book would have been sufficient and the cases show that it is so, even without an assignment. *Pierce* v. *Savings Bank*, *supra*. But the

book is only evidence of the right to the property. Its delivery is not a delivery of the thing itself but the evidence of it. The bank's books are just as good evidence of the title to the deposit as the book given to the depositor. When the change of entry was made thus giving authority to the bank to pay to the depositor, it was a more effectual delivery than if an unassigned pass book had been given to the donee. In any event the delivery need not be directly to the donee, but may be to another for him. *Hill* v. *Stevenson*, *supra*. Here the evidence of title was given to the treasurer, and as the evidence clearly shows, for the sole benefit of the donee. But this is not all. The deposit was the subject of the gift. The act and declarations of Mrs. Frye with the change in the books were equivalent to a withdrawing and redepositing the money for the donee. If this had been done the delivery could hardly have been questioned. But the ceremony would have been a useless one and would have added no force to the evidence of a change of property. *Wing* v. *Merchant*, *supra*, holds directly that where property "is already in the hands of the donee, proof of an actual manual tradition at the time of making the gift, is not essential." Such a delivery to the bank under like circumstances is held sufficient in a very satisfactory opinion in *Blasdel* v. *Locke*, 52 N. H. 238.

Here the title to the deposit is in the plaintiff. The possession of the pass book, one of the evidences of that title and his voucher, is in the hands of the defendant. How it came there is not material. His assignment from Mrs. Frye however obtained cannot avail. The property having been previously conveyed to the plaintiff though by gift, that gift could not be revoked. *Stover* v. *Poole*, 67 Maine, 217. It will not be set aside except in behalf of a creditor or a subsequent *bona fide* purchaser. The defendant is neither. There is no pretence that he was a creditor, or that he paid any consideration for the assignment; and the book itself gave him sufficient notice of the previous conveyance. He then has no title to the money or the book and can stand in no better position than Mrs. Frye or her representative. After she had done all that was necessary to complete the gift she notified the plaintiff that she held the book for him.

She then at best held it in trust. That trust would follow it into whosesoever hands it might go with notice. *Stone* v. *Bishop*, *supra*. This notice defendant had. "If the contract is executed wholly, or, if not wholly, yet in a substantial degree, and there remains something to be done to complete the title, or otherwise render the enjoyment more beneficial to the plaintiff, equity will require that thing to be done, although the promise was wholly voluntary." 3 Parsons on Contracts, 360, 6th ed. and cases cited.

Here the contract was wholly completed. To "render the enjoyment of the thing more beneficial to the plaintiff" it is necessary that he should have the book withheld by the defendant. This is on the same principle by which, in *Hill* v. *Stevenson*, *supra*, the respondent was required to collect the money for the benefit of the plaintiffs, or to give them such an order as would enable them to do so.

Bill sustained with costs.

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

JOSEPH WILLIAMSON, petitioner for partition,

vs.

ABBIE E. WRIGHT and another.

Waldo. Opinion February 16, 1883.

Levy. Officer's return. Amendment.

Where the officer's return of a levy upon the land of an absent debtor discloses that the officer selected two appraisers, and does not show that the debtor had no attorney within the county, or that the attorney neglected to appoint an appraiser, the levy will be invalid.

An amendment to the return will not be allowed in such a case where there is a subsequent attaching creditor who has levied upon the same property, even though he had notice of the facts to be stated in the amendment at the time of making his levy, if he did not have notice of such facts at the time of making his attachment.

On agreed statement of facts.

Petition for partition of certain land in Northport, wherein the petitioner claimed to own one-twelfth part by virtue of a levy of an execution in his favor, upon the same as the property of Thomas A. Cunningham within thirty days after judgment, and that the property was attached February 21, 1878. One of the respondents claimed to own the part claimed by the petitioner, by virtue of a deed from William M. Rust, who caused the same to be attached March 23, 1876, as the property of the same Cunningham, the admitted owner, and that suit was duly answered to, by the petitioner in this case, as attorney for Cunningham up to the January term, 1878; that judgment was rendered in favor of Rust, and within thirty days thereafter, May 24, 1878, levy was made. The officer's return showed that he selected two of the appraisers, "the said Cunningham having no residence nor stopping in the State of Maine." After this petition at the October term of court, 1881, the officer made application to amend his return by adding after the word "Maine," the following: "I therefore gave notice to Joseph Williamson, his, the said Cunningham's, attorney of record, who neglected and refused to select an appraiser, although allowed a reasonable time so to do, to wit: forty-eight hours." And this amendment, if permissible, was to be considered as made.

Joseph Williamson, plaintiff, *pro se*.

Philo Hersey, for the defendants.

The petitioner claims the Rust levy to be fatally defective, through the insufficiency of the officer's return. The officer petitions for permission to amend his return to correspond with the facts. No question is made as to its truth.

The general rule undoubtedly is, that any change in the record shall not affect a previous *bona fide* purchaser, without notice. But the petitioner was attorney for the execution debtor in the suit by Rust. The officer's return shows all the requirements of law to have been complied with, unless it be the giving notice to the attorney to choose an appraiser; and of this compliance with

the statute by the officer, the petitioner had actual notice as he was the attorney, and acknowledges the notice to have been seasonably given by the officer, and a reasonable time allowed him to have chosen an appraiser. He had not only such notice as the record affords, but aside from that, actual notice of all the facts proposed to be supplied by the amendment. He does not, therefore, stand in the position of a subsequent purchaser without notice. Nor does it change the result that the petitioner, at the time notice was given him as attorney for execution debtor, claimed that he had ceased to be attorney upon default.

The amendment, if necessary, is allowable, and the levy is valid against the petitioner.

In support of the positions held by the respondents, the case of *Knight* v. *Taylor*, 67 Maine, 591, and other cases therein named are brought to the attention of the court.

DANFORTH, J. Petition for partition, in which the title to the land claimed by the petitioner is put in issue. Both parties claim by levies under Thomas A. Cunningham. The first was made May 24, 1878, under an attachment dated March 23, 1876, in favor of William M. Rust, who conveyed his interest to one of the respondents by deed, dated May 26, 1879. The petitioner's levy was made under an attachment dated February 21, 1878. Thus if the Rust levy was valid the petitioner must fail. Otherwise he is entitled to judgment for partition as prayed for, as it is conceded that his attachment was valid, and his levy seasonable and in compliance with the law.

To the first levy it is objected that the officer's return fails to show any authority on his part to choose an appraiser in behalf of the debtor, but does show that he did so. It appears from the return and by the record, that the debtor was not a resident of this state, but it does not appear that he had no attorney within the county, or that any one was notified as an attorney, and neglected or refused to choose an appraiser. It is conceded that as the record now stands, the levy is fatally defective. But it is claimed that the return fails to give the whole truth, and the officer asks leave to amend. The amendment asked, if allowable, would heal the defect, and the evidence offered, satisfactorily

shows that it is in accordance with the truth. But the objection to it is, that it comes too late. Another levy has been made in behalf of a subsequent attaching creditor. When this last was made the records shew no valid levy before it, and so far as they appeared, the title was still in the debtor. The amendment, if allowed, changes the record title from one to another, and makes the record to which the petitioner had a right to look for the title, and upon which the law authorized him to rely, of no effect. *Lumbert* v. *Hill*, 41 Maine, 475; *Boynton* v. *Grant*, 52 Maine, 220.

It is, however, claimed that this principle, though well settled, does not apply here, because the petitioner, who is the creditor in the second levy, had actual notice of the facts, that the amendment proposes to add, and, therefore, had notice that the law was fully complied with. This is, perhaps, true. The case shows that he was the attorney of the debtor, and as such, had due notice to choose an appraiser, and *Knight* v. *Taylor*, 67 Maine, 591 is relied upon. That case is undoubtedly good law, but is not applicable to this. In that the respondent was a subsequent purchaser, and took his title with the full knowledge that in fact the levy was legally made. As against him, therefore, the amendment was allowable. In this case the petitioner is a subsequent attaching creditor. His title does not date from his levy. That was only the completion of what was begun by the attachment, and from that is his title dated. This attachment was prior to the levy, proposed to be amended. He did not, therefore, take his title with a knowledge of the proceedings in question, but in fact before they had taken place. Hence, the notice he did have, can in no way affect his rights. *Emerson* v. *Littlefield*, 12 Maine, 148.

Nor is the respondent in a condition to ask any benefit from the amendment. Her deed is since the levy and the record. She took her title with the return and record, as it now is, and legally with a knowledge of its defect. She must, therefore, abide the result.

As the first defect is fatal it is unnecessary to examine the other.

Judgment for partition.

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

MARY K. KIMBALL in equity *vs.* WILLIAM A. TATE and others.

Knox. Opinion March 24, 1883.

Equity. Amendment. Partition of an estate.

A bill in equity by an heir, who has been evicted of his share of the real estate after partition because of want of title of the deceased thereto, to compel contribution from the other heirs in land or money should include the widow, who has had her dower set off, as a party defendant.

In such a case an amendment was allowed on terms making the widow a party defendant.

AGREED STATEMENT.

Bill in equity. Heard on bill, answer and agreed statement. The opinion states the material facts.

D. N. Mortland, for the plaintiff, contended that the bill could be maintained against the other heirs and that the widow had no interest in the question and should not be made a party thereto, though it might perhaps be necessary if the bill sought to recover a distributive share of the personal estate. Stats. 1874, c. 175; 1873, c. 140; R. S., c. 74, § 14; c. 77, § 5; 1 Story's Eq. Jur. 92, 93, 170, 180, 505; *Holyoke* v. *Mayo*, 50 Maine, 385; *Chase* v. *Garvin*, 19 Maine, 211; Story's Eq. Pl. 76, 90, 105, 148, 170, 205, 230.

Rice and Hall, for Angeline E. Clifton, one of the defendants, cited: Story's Eq. Pl. § 77; *Hussey* v. *Dole*, 24 Maine, 20; *Morse* v. *Machias W. P. & M. Co.* 42 Maine, 119; *Pierce v. Faunce*, 47 Maine, 507; *Williams* v. *Russell*, 19 Pick. 165.

WALTON, J. This is a bill in equity. It is before the law court on an agreed statement of facts; from which it appears that in making partition of real estate among the heirs of Iddo K. Kimball, late of Rockland, deceased, the commissioners acted under the mistaken belief that a parcel of real estate belonged to the deceased, which subsequent litigation has shown did not; and that this parcel was set out to the plaintiff as a portion of her share of the estate; and the prayer of the plaintiff's bill is that the other heirs may be required to make her such contribution in land or money as will make her share equal to theirs.

In defense it is insisted that the widow of the deceased (Mrs. Mary S. Kimball) should have been made a party to the bill; and the questions submitted to the court are whether the bill can be maintained without making her a party; and, if not, whether the bill can now be amended by making her a party.

Undoubtedly the bill may now be amended by making the widow a party, upon such terms as the court may deem just and proper; and the only remaining question is whether such an amendment is necessary. We think it is. It is admitted that her dower was assigned before making the partition among the heirs, and that, at the time of setting off her dower, the same erroneous belief existed in relation to the parcel of real estate afterward assigned to the plaintiff, as when the partition was made, and that the estimated value of this parcel was taken into account in determining how large her dower estate should be. She has therefore profited by the mistake as well as the other heirs who have been made defendants, and no reason is perceived why she should not be made a co-defendant with them. Beside, the widow administered upon the estate, and it is alleged in defense that in settling her last account she reserved in her hands $417.57, after settling all claims against the estate; and that this sum, so reserved, was intended to be used to compensate the plaintiff for her loss in case she failed to hold the parcel of real estate which had been assigned to her, and in relation to which a dispute had then arisen; and this is urged as an additional reason why the administratrix ought to be made a party. We think it is an additional reason, and a very strong one, why she

should be made a party; for, in this class of cases the court exercises a very large discretion in moulding the remedy to meet the exigencies of the case; and, in this case, it is by no means improbable that the court might decree compensation to the plaintiff from the money of the estate in the administratrix's hands, and thus leave the partition and the assignment of dower undisturbed. But, of course, this can not be done till the administratrix is made a party, and it is ascertained if she has assets in her hands which can be used for the purpose.

The opinion of the court is that Mrs. Mary S. Kimball, widow, and administratrix of the estate of, Iddo K. Kimball, must be made a party to the suit, or the bill be dismissed; and the plaintiff has leave to amend by making her a party, if she moves to do so when the decision of the court is made known to her; and the court reserves the right to impose such terms as it may hereafter deem proper; and if leave thus to amend is not moved for, then the bill is to be dismissed with costs.

Decree accordingly.

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

IRA WEYMOUTH, surviving partner,

vs.

PENOBSCOT LOG DRIVING COMPANY, and trustees.

Penobscot. Opinion March 24, 1883.

Trustee process. Penobscot Log Driving Company.

A trustee disclosed that he was indebted to the Penobscot Log Driving Company for driving his logs in the sum of $4170.34. The charter of the company, as amended, provided that the company "may assess a toll not exceeding two dollars per thousand feet, board measure, on all logs and lumber of the respective owners, which may be driven by them, sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company." And the testimony of the officers of the company disclosed

that the directors intended to assess enough for making the drive, and then something more to pay the debts; *Held*, that the trustee was chargeable for the amount of his indebtedness disclosed, for driving of his logs.

ON REPORT.

Debt on a judgment rendered by the Supreme Judicial Court, Penobscot county, on the first Tuesday of January, 1880, for $1611.74 debt or damages, and $74.10 costs of suit. The only question presented to the court related to the trustee, and the material facts upon that question are stated in the opinion.

John Varney and *Wm. H. McCrillis*, for the plaintiff, cited: *Dartmouth College* v. *Woodward*, 4 Wheaton, 518; *Moor* v. *Veazie*, 31 Maine, 360; *Same* v. *Same*, 32 Maine, 343; *Riddle* v. *Locks & Canal Co.* 7 Mass. 169; 9 Howard, 259; *U. S.* v. *The Ship Recorder*, 1 Blatch. C. C. 223; Ang. & Ames, Corp. 121, 151, 164, 207; 3 Met. 530; 2 Story, 449, 451; *Kortright* v. *Buffalo Com. Bank*, 20 Wend. 91; *Nat. Bank* v. *Graham*, 100 U. S. 699; *Bank of Columbia* v. *Patterson*, 7 Cranch, 299.

A. W. Paine, for the defendants.

The trustee in this case is sought to be charged by reason of an assessment made by the company, as his proportionate part of the expense of driving the logs in 1880 and 1881. The judgment upon which the suit was brought was rendered prior to that time.

The only method the company have of raising money is by assessments made upon the owners of logs in the drive, each his proportionate part of the whole expense. The company has no capital stock and no means of acquiring any.

In the former case, between these parties reported, 71 Maine, 29, the court said "the liability of the log owners to be assessed, and its limits are fixed by law, as also the purposes to which such assessments may be applied. Any recovery against the defendant will not change that law in the slightest degree. No assessment hereafter made can be increased to meet any contingency not contemplated by the charter."

The debt in suit was not such a contingency. It was upon a judgment in an action of tort, or a misfeasance of the company committed in 1873, in not driving plaintiff's logs that year.

The assessment upon the trustee is not a debt to the company of a character which can be trusteed as its property, absolute and unconditional and uncontingent, but the company is only an agent to collect and disburse the money for a particular purpose excluding all others, and thus the assessment is not trusteeable.

Because it is not the debtor's property.

Because the trustee has the right to have his money go to pay his liability for his part of the expense of the drive.

Because other owners of logs in the drive have the same right of appropriation.

Because the company as now composed is altogether another and different body from that which existed when the liability in suit was contracted. Counsel cited: *Bowler* v. *E. & N. A. R. Co.* 67 Maine, 395; *Chapin* v. *Conn. River R. Co.* 16 Gray, 69; *Gould* v. *Newburyport R. Co.* 14 Gray, 472; *Granite Nat. Bank* v. *Neal*, 71 Maine, 125; *Thompson* v. *Lewis*, 34 Maine, 167; *Burnell* v. *Weld*, 59 Maine, 423; *Parker* v. *Wright*, 66 Maine, 392; *Tobey* v. *McFarlin*, 115 Mass. 98; *Whitney* v. *Munroe*, 19 Maine, 45; *Prov. Co. Bank* v. *Benson*, 24 Pick. 204; *Gardiner* v. *Hoeg*, 18 Pick. 168; *Whiting* v. *Earle*, 3 Pick. 201; *Richardson* v. *Whiting*, 18 Pick. 530; *Webber* v. *Doran*, 70 Maine, 140; *Godfrey* v. *Macomber*, 128 Mass. 188; *Bryant* v. *Erskine*, 50 Maine, 296; *Hancock* v. *Colyer*, 99 Mass. 187; *Hitchcock* v. *Lancto*, 127 Mass. 514.

WALTON, J. This is an action against the Penobscot Log Driving Company, and John Ross, trustee; and the only question is whether the trustee is chargeable. We think he is. He discloses that he owes the log driving company $4170.34, and we can find no valid reason for holding that he is not chargeable.

It is said that he ought not to be charged because his indebtedness is for tolls for driving his logs; and that, by the organic law of this corporation, all money due for tolls is appropriated to the payment of the expenses of driving, and can not be lawfully used for any other purpose.

We fail to find any thing in the organic law of this corporation to sustain this proposition. It would have some support if the charter had remained as originally enacted; for it then limited the amount of tolls to a sum sufficient to pay the expenses of driving logs, and provided that if more should be collected the balance should be refunded. But it seems to have been early discovered that this was an inconvenient limitation; and, in 1865, the charter was amended by an additional act declaring that the company "may assess a toll not exceeding two dollars per thousand feet, board measure, on all logs and lumber of the respective owners, which may be driven by them, sufficient to cover all expenses, *and such other sums as may be necessary for the purposes of the company;*" and the act further declares that all acts and parts of acts inconsistent therewith, are repealed. This act invests the corporation with new powers. Its tolls are no longer limited to the expenses of driving logs. Within the limits named, they may be made large enough to meet all legal liabilities of the corporation.

And such has been the understanding of its officers. Mr. Moore, clerk and treasurer of the corporation, testifies that "in every drive that has been made the intention of the directors has been to assess enough for making the drive, and then something more to pay the debts." And Mr. Strickland, one of the directors, testifies that the sum so added has been ten, fifteen, and twenty cents per thousand feet, board measure.

And Mr. Ross testifies that the tolls for which he is trusteed in this suit include fifteen and twenty cents per thousand feet more than sufficient to cover the expenses of driving.

It is not, therefore, true that the trustee's indebtedness is for an assessment made for the sole purpose of defraying the expenses of the drive of which his logs were a part. It is an assessment largely in excess of such expenses. And made so intentionally, for the very purpose of providing for the general indebtedness of the company. And there is nothing in the organic law of this corporation or the acts of its officers to justify the court in holding that this assessment is appropriated to the payment of one

debt of the corporation more than another. It is a debt due absolutely, and the amount is certain. We can not doubt that such a debt is attachable.

Trustee charged for $4170.34.

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

PETERS, J., did not sit.

RICHARD D. RICE, in *scire facias*, *vs.* FULLER G. COOK.

Knox. Opinion March 24, 1883.

Levy. Scire facias. Debt. Practice.

When execution has been satisfied by a levy upon real estate, part of which can, and part of which cannot, be held by the levy, the levying creditor may obtain an *alias* execution for that portion of the debt which remains unsatisfied by the levy, without surrendering his title to that portion of the estate which he can hold by the levy.

Scire facias, as well as debt, is a proper form of action in which to obtain an *alias* execution in such a case.

ON EXCEPTIONS to the ruling of the court in overruling the defendant's demurrer to the plaintiff's writ of *scire facias*.

The opinion states the material facts.

Rice and Hall, for the plaintiff.

True P. Pierce, for the defendant.

Revised Statutes c. 76, § § 17, 18, does not confer authority to issue the execution sued for. "The levy may be set aside," but it cannot be divided as the plaintiff asks in this case. Remedy is given when the levy is totally defective, not when defective in part. *Grosvenor* v. *Chesley*, 48 Maine, 369; *Soule* v. *Buck*, 55 Maine, 30.

WALTON, J. When an execution has been returned satisfied, in whole or in part, by a levy upon real estate, which, for any cause, can not be held by the levy, the creditor may obtain a new execution on scire facias or by an action of debt. These remedies are concurrent, and either of them is proper. This is not denied. But it is insisted that in such a case the creditor must waive his entire levy; that he can not treat the levy as valid in part and void for the remainder. We perceive no reason for such a distinction; and the law seems to be settled otherwise.

In *Ware* v. *Pike*, 12 Maine, 303, where a levy had been made upon real estate, and it was afterward discovered that the debtor owned only an undivided half of the estate levied upon, it was held that the creditor was entitled to a new judgment and a new execution for one half the appraised value of the estate, leaving the former judgment and execution satisfied for the other half. In that case a remedy was sought by an action of debt, and, in defense, it was insisted that scire facias was the only remedy; but the court held that these two remedies were cumulative, or, more properly speaking, concurrent, and that either could be resorted to. And it was so held in *Piscataquis* v. *Kingsbury*, 73 Maine, 326.

In this case, a levy having been made upon real estate appraised at $884, the creditor asks for an alias execution for $373, averring that, by virtue of an attachment made four days earlier than his, and a subsequent levy, that much in value of the estate levied upon by him has been taken from him; and the form of his action is a writ of scire facias. We think the action is correct in form, and that the plaintiff is entitled to an alias execution for the balance of his debt without waiving his levy upon that portion of the estate which he can hold by it.

Exceptions overruled.

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

LEMUEL COUNCE, petitioner for partition, *vs.* JOHN R. STUDLEY.

Knox. Opinion March 24, 1883.

Partition of real estate. Description. Amendment. Practice.

A lot of land, the south line of which is described in a petition for partition as running from a certain point at the north east corner of C's lot, thence westerly by said C's north line two hundred and five rods and fifteen links, to land of another party, is not legally identical with a lot the south line of which beginning at the same point, at the north east corner of C's lot, thence runs westerly by C's north line one hundred and nine rods to land owned by said C, thence north easterly by said C's land, a certain distance exceeding two rods and fifteen links at right angles with said C's north line and thence westerly again by said C's north line to the bounds mentioned in the petition; and under an interlocutory judgment authorizing partition of the lot as described in the petition a report of commissioners describing the lot as thus bounded on the south cannot be accepted.

In such a case where there is no controversy as to the petitioner's right to the proportion which he claims of the lot however bounded, while the report must be rejected the case will still be before the court at *nisi prius* and the order for interlocutory judgment may be stricken off, the petition amended on such terms as the judge presiding thinks proper under R. S., c. 82, § 9, so as to describe the lot correctly and an interlocutory judgment given for the partition of the lot as it actually exists, and a new warrant for partition issued.

ON EXCEPTIONS.

Petition for partition, dated September 15, 1880, in which the petitioner alleged "that he is the owner in fee simple of nine undivided tenth parts of the following described real estate situate in Warren, in said county of Knox, bounded and described as follows, viz: beginning at the westerly shore of North Pond, and at the northeast corner of Edwin Cushing's lot; thence westerly by said Cushing's north line two hundred and five rods and fifteen links to the south west corner of the home farm of the late Benjamin Gerrish, and at land formerly owned by Daniel Newcomb, deceased; thence north twenty-six and a half degrees east eighteen rods to stake and stones; thence south sixty-three and one-half degrees parallel with said Cushing's north line, about two hundred and thirty rods,

to said North Pond; thence southerly by said pond, being twenty-two rods at right angles to the first bounds, containing twenty-seven acres and eighty-five square rods."

Judgment for partition was given and commissioners were appointed, who made the following report:

(Commissioners' report.)

"Pursuant to the annexed warrant, we, the undersigned commissioners, having given the parties due notice of the time and place of hearing, and having been sworn according to law, and heard the wishes of the parties interested therein, do make this partition and assignment as follows, to wit: we set off and assign to the said Lemuel Counce, of Warren, in said county of Knox, to hold in severalty the following described real estate bounded and described as follows, viz: beginning at the westerly shore of North Pond, two rods and fifteen links northeasterly from the north east corner of Edwin Cushing's lot, at right angles with said Cushing's north line; thence westerly parallel with said Cushing's north line one hundred and nine rods, to land owned by said Cushing; thence north easterly partly by said Cushing's land four rods at right angles with said Cushing's north line; thence westerly parallel with said Cushing's north line ninety-six rods to land formerly owned by Daniel Newcomb, deceased; thence north twenty-six and a half degrees east, fifteen rods and ten links to stake and stones; thence south sixty-three and one-half degrees east about two hundred and thirty rods by land set off to the heirs of the late Benjamin Gerrish, being land owned and occupied by said Counce, to said North Pond; thence southerly by said North Pond to the first bounds, and the residue of the land described in the foregoing warrant, being that part thereof lying between the part by us set off and assigned as aforesaid to the said Counce, and the land of the said Edwin Cushing, we do hereby assign to the said John R. Studley.

(Signed.) John U. Cutting,
Miles Davis,
Robert Hull,
} Commissioners."

The respondent filed written objections to the acceptance of the report and moved to dismiss the petition. This motion was overruled and the report of the commissioners accepted and the partition decreed and the respondent alleged exceptions. The material facts stated in the exceptions appear in the opinion.

A. P. Gould, for the plaintiff.

J. H. H. Hewett and C. E. Littlefield, for the defendant.

BARROWS, J. The description in the petition of the parcel of land of which partition is sought in this process appears to be sufficiently definite; but if the report of the commissioners appointed to make partition be accurate in its description of the lot as they found it (and this does not seem to be disputed) then the description in the petition is *incorrect*; and the commissioners have divided a lot which does not conform to that described in the petition. According to the call in the petition, the south line of the lot in question should be a straight line two hundred and five rods and fifteen links in length, beginning at the westerly shore of North Pond at the north east corner of Edwin Cushing's lot and running westerly (which means west, *Brandt* v. *Ogden*, 1 Johns. 158; 2 Washburn's R. E. 1st ed. 631,) by said Cushing's north line to the south west corner of the home farm of the late Benjamin Gerrish and at land formerly owned by Daniel Newcomb, deceased. But it appears by the commissioners' report and the statement in the exceptions that Cushing's north line was not a continuous westerly line from the point begun at to the southwest corner of the Gerrish farm, but that there was a jog in it running north easterly at right angles with its general course, somewhat more than two rods and fifteen links; so that after running westerly a distance of one hundred and nine rods upon a line parallel with Cushing's north line and distant two rods and fifteen links at right angles therefrom at the point of beginning the commissioners came to land of said Cushing and thence ran "*north easterly partly by said Cushing's land*, four rods at right angles with said Cushing's line," in order to

make the division line between the parties, and again westerly and parallel with Cushing's line ninety-six rods to reach the land formerly owned by Daniel Newcomb, deceased. One of the consequences is, that as the land south of the division line thus established was assigned to the respondent he has his portion in two pieces, to one of which he can have no access except on the land assigned to the petitioner, or land belonging to third persons and the report of the commissioners provides no way by which he can reach this strip. That this would always be a grave objection to the acceptance of a report, especially where the omission of all mention of the fact by the commissioners would seem to indicate that their attention had not been called to it as affecting the value of the parcel so situated, cannot be doubted. Whether it is an objection which is necessarily fatal, or whether it is one which is addressed to the discretion of the judge who hears the case at nisi prius, and is not the subject of exceptions, we have no occasion now to decide. The report cannot be accepted on account of the error in the description of the lots partition of which was ordered. Inasmuch, however, as there appears to be no controversy as to the petitioner's ownership of the share which he claims in the lot, however the same may be bounded, and as the case will still be before the court at nisi prius, we see no reason why the order for an interlocutory judgment may not be stricken off, the petition amended so as to describe the lot correctly, and a new warrant issued. The case differs herein from *Swanton* v. *Crooker*, 52 Maine, 415, where the petitioner's title was disputed and might depend upon the description given.

There is nothing before us to justify the respondent's motion to dismiss; but so far as the order at nisi prius included the acceptance of the report, and the confirmation of the partition,

The exceptions are sustained.

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

STATE *vs.* ADELBERT DAWES.

Somerset. Opinion March 24, 1883.

Indictment. Larceny.

An indictment for larceny, which describes the property stolen as "one case of merchandise of the value of six dollars," and contains no excuse for the want of a more full and definite description, is not sufficient.

ON EXCEPTIONS.

The defendant was found guilty of larceny by the jury, and his motion in arrest of judgment being overruled, he alleged exceptions.

The opinion states the material facts.

H. B. Cleaves, attorney general, for the state.

A. H. Ware, for the defendant.

WALTON, J. The question is whether an indictment for larceny, which describes the property stolen as "one case of merchandise of the value of six dollars," and contains no excuse for the want of a more full and definite description, is sufficient.

We think not. True, very great particularity is not required. But the articles alleged to have been stolen should be described with reasonable certainty — "certainty to a common intent," as it is technically called — and by which is meant such certainty as will enable the court and the jury to determine whether the evidence offered in support of the indictment relates to the same property on which the indictment was founded, and thus prevent one from being tried for an offense other than that for which the grand jury indicted him; and will also enable the defendant to plead the judgment in bar of another prosecution for the same offense. Or, if, for any reason, this can not be done, then the reason why it can not be done should be stated in the indictment, as in *Com.* v. *Sawtelle*, 11 Cush. 142.

In this case, the only description of the property alleged to have been stolen is — "one case of merchandise of the value of

six dollars,"— and no excuse is given for the want of a more full or particular description. It would seem as if the knowledge that a larceny had been committed, must, necessarily, include a more particular description of the property stolen than the one here given. It would seem as if, at least, the kind of merchandise might have been stated, or the size, color, or some of the marks upon the package, been given. But this was not done, and no excuse is given for not doing it. In fact, if an illustration were wanted of a description of property stolen, which, under the rules of criminal pleading, would not be sufficient, we doubt if one could be found or invented more suitable for the purpose than the one here given.

Exceptions sustained.
Judgment arrested.

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

THE AMERICAN BUTTON HOLE, OVERSEAMING AND SEWING MACHINE COMPANY

vs.

GEORGE W. BURGESS, and HIRAM F. BURGESS, trustee.

Somerset. Opinion March 24, 1883.

Trustee process. Exceptions. Practice. R. S., c. 86, § 79.

An alleged trustee has no right to disclose further while his exceptions to the ruling of the court, charging him, are pending.

The law court will not remand a case for the further disclosure of a trustee under R. S., c. 86, § 79, when the disclosure already made, is apparently truthful and sufficiently full to enable the court to pass upon it understandingly.

ON EXCEPTIONS.

The opinion states the case and material facts.

Folsom and Merrill, for the plaintiff.

S. S. Brown, for the trustee.

WALTON, J. This is an action against George W. Burgess, and Henry F. Burgess, trustee. The trustee (Henry F. Burgess) disclosed at the December term, 1881, and was charged for $850. To the action of the court in charging him, he excepted, and his exceptions were duly filed and allowed. At the next term (March term, 1882) he moved for leave to disclose further, and was refused. To this refusal he excepted. We thus have two bills of exceptions for consideration.

1. Of the first bill of exceptions. It is claimed that the trustee was rightfully charged because his disclosure showed that he had in his possession goods, effects, and credits, of the principal defendant, which he held under a conveyance, fraudulent and void as to the defendant's creditors. Upon this point the trustee's disclosure is apparently frank, truthful, and full. He says in substance that he and George (the principal defendant) are brothers; that their father died July 14, 1881, leaving them quite an estate, consisting in part of bank stock, money on deposit in a savings bank, notes secured by mortgage, etc.; that four days after their father's death, George was at his house; that an officer called to see George, but did not succeed in seeing him; that the officer then served a trustee writ on him (Henry); that he (Henry) went that night to see a lawyer; that the lawyer came to his house the next morning as early as nine o'clock; that a conveyance was then made by George to him of all of George's interest in their father's estate, in consideration of which he gave George a negotiable note for $1800; that George avoided the officer, and, by an indirect route, left the state and has not since returned to his knowledge; that the writ in this suit was served on him (the trustee) October 29, 1881. Being asked what George stated his purpose to be in selling, and what his purpose was in buying, George's interest in their father's estate, he answered that it was to prevent the attachment of the property by George's creditors. No one can read the disclosure, and

doubt, for a moment, that such was the purpose of both of them; and that the trustee was rightfully charged. R. S., c. 86, § 63.

2. Of the second bill of exceptions. The question here presented is whether a trustee, who has made one disclosure, and been charged, and has filed exceptions to the action of the court in charging him, has a right to disclose further at a subsequent term, and before his exceptions have been acted upon by the law court, or been withdrawn. Clearly, he has no such right. The effect of holding otherwise would be to have the question of his liability pending before two different courts at the same time, and upon two different disclosures. In *Stedman* v. *Vickery*, 42 Maine, 132, the trustee having disclosed and been charged, excepted thereto; and then, at the next term following, moved for leave to disclose further, and the motion was denied. He then, by leave of court, withdrew his exceptions, and was allowed to disclose further. And if, in this case, the trustee had, by leave of court, first withdrawn his exceptions filed at the preceding term, we entertain no doubt it would then have been within the discretion of the court to allow him to disclose further. But, pending his former bill of exceptions, very clearly he had no such right.

3. The law court is urged by counsel to remand the case for a further disclosure. No doubt the court has the power to do so. R. S., c. 86, § 79. But this is a power to be exercised only when the court can see that justice would probably be thereby promoted. The court can not see that such would be the effect in this case. The disclosure of the trustee is apparently truthful, and sufficiently full to enable the court to pass upon it understandingly. The hinge on which the case turns is the motive of the parties to the conveyance from George to Henry. The circumstances are such as to leave little, if any, doubt upon the point. And in addition thereto, the trustee has frankly admitted that their motives were such as, by operation of law, to make him chargeable. If he should now, after knowing the opinion of the court upon this point, change his statements, or attempt to explain them away, there would be more danger of injury to his reputation for truth than of probability that the judgment of

the court would be thereby affected. The court, therefore, declines to remand the case for a further disclosure.

Both bills of exceptions overruled.
Trustee charged for $850.

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

HERBERT L. THOMPSON

vs.

PHŒNIX INSURANCE COMPANY, of New York.

Franklin. Opinion March 30, 1883.

Insurance. Fraudulent representations. Fraud.

In an action by the assured, alleging that he had sustained a loss by fire upon property insured to the amount of one thousand dollars, and was induced by the false representations of the company's agent, to the effect that the non-occupancy of the building insured, rendered the policy void, to settle and discharge his claim for two hundred and fifty dollars, and had thereby sustained a loss of seven hundred and fifty dollars. *Held:*

1. That if the declarations of the agent are regarded as statements of the law of insurance, they are not actionable, though false;

2. If it be said that the representation of an increased risk, by non-occupancy, rendering the policy void, was one of fact, and not of law, still it was only the expression of an opinion and does not sustain an action.

When the whole subject in fact rests upon the opinion of the parties and cannot reasonably be understood otherwise, false expressions on either hand do not generally constitute fraud in law.

ON EXCEPTIONS.

The writ was dated February 4, 1882, and contained the following declaration:

"In a plea of the case; for that whereas on the seventeenth day of December, A. D. 1878, at Wilton, in said county of Franklin, one Vinal T. Thompson, then of said Wilton, now of Mt. Vernon, in the county of Kennebec and state of Maine, bargained with

the said Phœnix Insurance Company, to purchase of said company a policy of insurance against loss by fire, as follows, to wit: Four hundred and fifty dollars on his one story frame dwelling house and ell, situated in said Wilton, fifty dollars on his household furniture, wearing apparel, produce and provisions therein, fifty dollars on his woodshed attached, three hundred dollars on his barn and sheep shed, and one hundred and fifty dollars on his hay, grain, and farming implements, all in said Wilton, by which the defendant company agreed to insure said property against loss, or damage by fire, for the term of four years from the date of said policy, for, and in consideration of, a certain sum of money, then and there paid by said Vinal T. Thompson to said company therefor. And did then and there purchase such policy of insurance of said company for said sum of money paid as aforesaid. And afterwards, to wit, on the second day of March, A. D. 1880, said Vinal T. Thompson sold and conveyed said property, together with certain land on which said buildings stood, to the plaintiff, Herbert L. Thompson, and on the eighth day of June, A. D. 1880, said Vinal T. Thompson transferred and delivered said policy of insurance to the plaintiff. All of which said company then and there had due notice. By reason and in consideration of said transfer and delivery, said company became liable, and agreed to insure the above described property, against all loss or damage by fire, to him, the said plaintiff.

"And afterwards, on the sixth day of December, A. D. 1881, said house and all the other property, before described, were accidentally burned and destroyed by fire; of which fact the defendant company was notified according to law, and proper proof of said loss was duly made out and delivered to said company, which, thereby, became liable to pay the plaintiff the sums aforesaid on demand. Yet the said company, well knowing the premises, but intending to cheat and defraud the plaintiff out of the benefit of his said policy, and the money due him thereon, fraudulently and deceitfully represented to the plaintiff, that by reason of his not living in the house at the time of its being burned, he had so increased the risk, that the company was not bound to pay anything, that the policy was null and void, and of

no effect, use or benefit to the plaintiff. And by reason of said false, fraudulent and deceitful representations, the plaintiff was induced to believe, and did believe, that his said policy was null and void and of no value, and was thereby induced to take, and did take of said company, the sum of two hundred and fifty dollars, in full of all claims that he had against said company for said loss; though the sum to which the plaintiff was entitled on account of said loss was one thousand dollars; so that the plaintiff was thereby defrauded out of the sum of seven hundred and fifty dollars, by the false and fraudulent representations aforesaid.

"Also for that on the fourteenth day of December, A. D. 1881, at said Wilton, the said company was owing the plaintiff the sum of one thousand dollars, on a policy of insurance, number two hundred and forty, issued by said company on the buildings, and property of the plaintiff, situated in said Wilton, which buildings have been previously, to wit, on the sixth day of December, A. D. 1881, accidentally burned without any fault of the plaintiff; and afterwards, on the same day, the said company was notified of the said loss, and the proofs of said loss had been duly made out and delivered to said company, or its authorized agent. And the said company, intending to cheat and defraud the said plaintiff out of said money, did, by H. C. Eddy, its authorized agent, falsely, fraudulently and deceitfully represent, and did affirm to the plaintiff, that by reason of his not living in the house at the time of its being burned, had so increased the risk, that the company was not holden or bound in any way, and that his policy was null and void and of no value, and that nothing could be collected by the plaintiff thereon. By reason of said false, deceitful and fraudulent representations, the plaintiff was induced to believe, and did believe, that said policy was void and of no value to the plaintiff, and by reason thereof, was induced to take, and did take of said company the sum of two hundred and fifty dollars, in full discharge of his claim of one thousand dollars. Though the said company, then and there, well knew that the alleged facts for said representations did not render the said policy void or of no value."

The defendants filed a demurrer to this declaration, which was overruled, and the defendants alleged exceptions.

E. O. Greenleaf, for the plaintiff.

The defendants in this suit by demurring to the plaintiff's declaration admitted all matters of fact that were sufficiently pleaded. Stephen on Pl. 143; *State of Maine* v. *Peck*, 60 Maine, 501; *Lowell* v. *Morse*, 1 Met. 475. They admit that "the said company well knowing the premises, but intending to defraud and cheat the plaintiff out of the benefit of his said policy and the money due him thereon, fraudulently and deceitfully represented to the plaintiff, that by reason of his not living in the house at the time of its being burned, he had so increased the risk that the company was not bound to pay anything, that the policy was null and void and of no effect, use or benefit to the plaintiff," as alleged by the plaintiff. How then can the defendants now be permitted to rely upon the assertion that the representation upon which the plaintiff's action is based, was a mere matter of opinion. The rule that statements of opinion do not in law amount to a breach of duty is not a rule without exceptions. This rule is undoubtedly based upon the hypothesis that the opinion is honestly entertained, and in such situations, if the opinion be dishonestly expressed, the statement of it may afford a ground of redress. Such a situation may well be deemed to exist when the defendant, as an expert, puts forth to the plaintiff, in the form of opinion, that concerning which he has positive knowledge at variance with the opinion. *Pike* v. *Fay*, 101 Mass. 134; *Kost* v. *Bender*, 25 Mich. 515; and *Picard* v. *McCormick*, 11 Mich. 68.

The chief position behind which the defendants take refuge is that the representations of the company, though false, were of a matter of law for which they are not responsible. The representations made by the defendant company to the plaintiff, as admitted by them, was that he, the plaintiff, by not living in the house at the time of its being burned had so increased the risk, that the company was not bound to pay him anything. Now as to whether the plaintiff's not living in the house when it was

burned did increase the risk and danger of destruction of the house by fire, or did not, is clearly a question of fact to be determined by the jury from the evidence in the case, and not a question of law. *Newhall* v. *Union Mut. Fire Ins. Co.* 52 Maine, 184, and cases cited.

Nathan and Henry B. Cleaves, for the defendants, cited: *Fish* v. *Clelland*, 33 Ill. 238; *Star* v. *Bennett*, 5 Hill, 303; *Ætna Ins. Co.* v. *Reed*, 33 Ohio St. 283; *Foley* v. *Cowgill*, 5 Blackf. 18; *Gatling* v. *Newell*, 9 Ind. 572; *Saunders* v. *Hatterman*, 2 Ired. 32; *Salem India Rubber Co.* v. *Adams*, 23 Pick. 256; *Reel* v. *Ewing*, 4 Mo. App. 569; Kerr on Fraud and Mistake, 90; *Upton* v. *Tribilcoch*, 1 Otto, 45; 4 Jacob's Fisher's Digest, 5569, and cases cited; *Mayhew* v. *Phœnix Ins. Co.* 23 Mich. 105.

SYMONDS, J. On demurrer, to a declaration in case alleging that the defendants, by fraud, induced the plaintiff to cancel for two hundred and fifty dollars a policy of fire insurance for one thousand dollars, after the loss insured against had occurred.

The arguments upon the demurrer raise the single question, whether the representations made by the defendants to procure the settlement, admitting all that the declaration avers in this respect, were in the legal sense fraudulent, so as to support an action to recover the damages which the plaintiff sustained, by relying and acting upon them.

The first count of the declaration sets forth that the company, "well knowing the premises, but intending to cheat and defraud the plaintiff out of the benefit of his said policy, and the money due him thereon, fraudulently and deceitfully represented to the plaintiff, that by reason of his not living in the house at the time of its being burned, he had so increased the risk that the company was not bound to pay anything, that the policy was null and void and of no effect, benefit or use to the plaintiff." The second count charges, substantially, the same fraudulent representation on the part of the authorized agent of the company.

I. If these declarations of the agent of the insurance company are regarded as statements of the law of insurance, of the legal conditions on which the right of recovery in such cases depends,

they are not actionable, though false. The cases cited for the defendants are sufficient, if authority or argument were needed, to support the statement that under such circumstances a man has not a right to rely, except at his own peril, upon the representations of the avowed agent of the adverse interest, as to what the law will or will not do, or will or will not permit to be done. Common prudence and common sense would seem to be, in all ordinary cases, sufficient safeguards against frauds of that character; and the declaration does not aver exceptional circumstances to give the right of action in the present instance. Compare *Rashdall* v. *Ford*, L. R. 2 Eq. 750.

II. If it be said that the representation of an increased risk by non-occupancy, rendering the policy void, was one of fact, and not of law, still if it was only the expression of an opinion, it does not sustain the action, though the other facts alleged are conceded. Upon this branch of the case the question is, then, are the averments of the declaration such that the plaintiff has a right to go to the jury upon the claim that the false representation was made as a statement of fact, or is it a conclusion of law upon the demurrer that the declaration charges an expression of opinion only. In *Stubbs* v. *Johnson*, 127 Mass. 219, it is said: "It is often impossible to determine, as matter of law, whether a statement is a representation of a fact, which the defendant intended should be understood as true of his own knowledge, or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used, as applied to the subject matter, and as interpreted by the surrounding circumstances, in each case. The question is generally to be submitted to the jury." But as the language of the court implies, this is not always true. In *Belcher* v. *Costello*, 122 Mass. 189, it is said, as matter of law, that the representation that a man is good, financially, "taken by itself, is not the statement of a fact, but the expression of an opinion merely."

In the present case we think the latter alternative proposed, that the declaration alleges only an expression of opinion, is the true one. Whether in point of fact, in a particular case, the circumstances of which are equally in the knowledge of both

parties, the risk from fire was increased by non-occupancy of a building, or not, can be nothing more than a matter of judgment; and a representation in regard to it cannot reasonably be understood as having any more weight than that which attaches to the opinion of the man who makes the statement, It is true that, in the trial of a case, the question might be submitted to the jury as one of fact for them to determine, but a witness would not be asked the direct question, whether the risk was increased or not. It would be submitted to the judgment of the jury upon the facts of the case. So of the insurance agent, if he represented the risk as increased in that way, he might be stating his opinion falsely, and with intent to deceive, but the falsehood was in stating one opinion when he held another, not in putting a statement into the form of an opinion when he had positive knowledge to the contrary. If an opinion is untrue in this latter sense, it may be actionable, as in *Birdsey* v. *Butterfield*, 34 Wis. 52, where the plaintiff, selling cattle, expressed the opinion that they would weigh nine hundred pounds or more per head, when he had already weighed them and found that their average weight was considerably less. But where the whole subject, in fact, rests in the opinion of the parties, and cannot reasonably be understood otherwise, false expressions on either hand do not generally constitute fraud in law.

Our conclusion is, that whether the representations set forth in the declaration, be regarded as of law, or of fact, they are not sufficient to support the action. In either case they were expressions of opinion from the agents of a corporation whose interests were known to be directly hostile to the plaintiff, and as a prudent man he ought not to have relied upon them. The valuable opinions in *Ætna Ins. Co.* v. *Reed*, 33 Ohio St. 283, and *Mayhew* v. *Phœnix Ins. Co.* 23 Mich. 105, cited for the defendants, were rendered upon facts approaching more or less nearly to the facts of this case as set forth in the pleadings, and tend strongly to support the conclusion we have reached.

Exceptions sustained.

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

LAURISTON R. KING, assignee,

vs.

HORACE P. STORER and others.

Aroostook. Opinion March 31, 1883.

Insolvency. Preference.

In order to invalidate security taken for a debt as being a preference under the clause of the insolvent law which makes such provision in case the creditor has reasonable cause to believe the debtor insolvent, it is not enough that the creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency.

ON REPORT.

Assumpsit by the assignee of Charles B. Varnum, insolvent debtor, to recover of Storer Brothers and Company, the sum of one thousand five hundred seventy-two dollars and eighty-three cents paid to them by the insolvent debtor in notes (of third persons for seven hundred and fifty dollars, and his own and his wife's notes for the balance,) February 8, 1881, when it was alleged Varnum was in fact insolvent and unable to pay his debts and when the defendants had reasonable cause to believe him to be insolvent and in contemplation of insolvency.

Varnum filed his petition in the insolvent court May 4, 1881, and the plaintiff was chosen his assignee May 17, 1881.

The writ was dated August 30, 1881, and the plea was general issue.

The opinion states the material facts.

Powers and Powers, for the plaintiff, in an able argument contended that "insolvency" as used in the law meant present inability to pay one's debts as they become due, and that the circumstances and mode of payment were such as to give the defendants reasonable cause to believe the debtor insolvent and cited: *Denny*

v. *Dana*, 2 Cush. 160; *Thompson* v. *Thompson*, 4 Cush. 127; *Lee* v. *Kilburn*, 3 Gray, 595; *Hamlin's Insolvent Law*, 81; *Floyd* v. *Day*, 3 Mass. 403: *Hall* v. *Huckins*, 41 Maine, 574; *Calais* v. *Whidden*, 64 Maine, 249.

Charles P. Stetson, for the defendants, cited: Bump's Bankruptcy, (10 ed.) § 820; *Ex parte Ames*, 1 Lowell, 561; *Lakin* v. *First Nat. Bank*, 13 Blatchf. 83; *Hall* v. *Wager et al.* 5 N. B. R. 182; *Grant* v. *Nat. Bank*, 7 Otto, 80; *Barbour* v. *Priest*, 13 Otto, 293; *Stewart* v. *Platt*, 11 Otto, 731; *Schuman* v. *Fleckenstein*, 15 N. B. R. 224.

SYMONDS, J. In *Grant* v. *Nat. Bank*, 97 U. S. 80, in reference to the true meaning and application under the bankrupt law of the phrase "having reasonable cause to believe such a person is insolvent," it is said by the court, "it is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. . . . A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting."

That the law did not intend to make mere suspicion a ground of nullity in such a case, and the insecurity which would attend business transactions if such a construction were adopted, are clearly shown and strongly stated in that opinion.

This authoritative construction of a provision of the recent bankrupt law, which for a long time was the subject of almost constant consideration before the federal courts and in regard to which it is recognized in the case cited that some confusion in the authorities has existed, was subsequently approved in direct terms in *Barbour* v. *Priest*, 103 U. S. 293. Under the same phrase contained in the insolvent law of this state, it is urged that the delivery of certain notes to the defendants in the early part of February, 1881, by Charles B. Varnum, who was

adjudged insolvent in the following May and of whose estate the plaintiff is the assignee, was void, as a fraudulent preference. The rule cited undoubtedly affords the correct construction of the insolvent law in this respect, and, applied to the facts of this case, we think it decides it against the claim of the assignee.

If Varnum was in fact insolvent at the date when the defendants' agent procured a settlement of their claim against him by taking the notes of his wife and of other persons who owed him, it is evident he did not so regard or represent himself. According to his own account he was solvent, and expected to meet all his liabilities. His own statements were the principal source of information which the defendants had in regard to his affairs. Their place of business was at a distance from his. We do not perceive that sufficient facts were within their knowledge to induce a reasonable belief that his representations were false or unfounded. He kept on from one to two months afterwards, making purchases and payments.

He met with subsequent losses, some of them relatively large. The defendants were doubtful about him, anxious for payment or security and diligent in securing it; but that they had reasonable cause to believe him insolvent or in contemplation of insolvency, is not proved. *Stucky, assignee*, v. *Masonic Sav. Bank*, 2 Sup. Ct. Rep. 219.

Judgment for the defendants.

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

EDWARD N. MERRILL, assignee, in equity,

vs.

CHARLES MCLAUGHLIN, and others.

Somerset. Opinion April 3, 1883.

Insolvency. Preferred creditor. Equity.

A payment made by an insolvent debtor to his creditor within four months before the filing of the petition may be invalidated as a preference made in fraud

of the insolvent law, when the bill alleges, and the evidence proves: (1) That the debtor was insolvent at the time of the payment, (2) that the debtor made it directly or indirectly, with a view to give a preference to the creditor, (3) that the creditor then had reasonable cause to believe the debtor to be insolvent, (4) that the creditor also had reasonable cause to believe the payment to be made in fraud of the insolvent law.

An insolvent debtor on the attachment of his entire stock of goods, sold the same to a third person, who, at the request of the debtor, and as a part of the consideration of the sale, paid the attaching creditor's debt and costs, whereupon the attachment was released, and the evidence of the debt surrendered to the debtor. The assignee of the debtor brought bill in equity against the creditor to recover the amount of the payment, upon the ground that it was made as a preference. *Held*, that the purchaser of the stock was not a necessary party.

BILL IN EQUITY by the plaintiff, as assignee in insolvency of Willis P. Ayer, to recover the sum of five hundred dollars paid to the defendants at the request of Ayer, by Joshua Burns.

Heard on bill, answer and proofs.

The opinion states the facts.

Folsom and Merrill, for the plaintiff, cited: *Gattman* v. *Honea*, 12 N. B. R. 493; *Foster* v. *Hackley*, 2 N. B. R. 414; *Miller* v. *Keys*, 3 N. B. R. 224; *London* v. *1st Nat. Bank*, 15 N. B. R. 476; *Denny* v. *Dana*, 2 Cush. 170; *Forbes* v. *Howe*, 102 Mass. 436; *Leonard* v. *Strong*, 11 Gray, 187.

H. and W. J. Knowlton, for the defendants.

Complainant must exhaust his remedy at law before he is entitled to relief by bill in equity. *Caswell* v. *Caswell*, 28 Maine, 232; *Spofford* v. *B. & B. Railroad*, 66 Maine, 51; *Fletcher* v. *Holmes*, 40 Maine, 364.

Plaintiff could recover, if defendant is liable, in an action for money had and received. *Crooker* v. *Rogers*, 58 Maine, 342.

Burns is shown by the testimony to have the possession of all the assets of the insolvent, holds a mortgage of the entire estate, personal and real, and should have been made a party. All interested in the subject of a suit in equity should be made a party. *Hussey* v. *Dole*, 24 Maine, 20, and cases cited; *Morse*

v. *Machias W. P. Mill Co.* 42 Maine, 129; *Evans* v. *Chism*, 18 Maine, 223.

"Bill cannot be sustained without proper parties, and the court will take notice if they are not before it." *Pierce* v. *Faunce*, 47 Maine, 513.

There was no sale, transfer or assignment of any property of the insolvent to the defendants. The note and money were not a part of the assets of insolvent when delivered to Allbee, the sheriff, and the note was subsequently endorsed by defendants to a third party.

VIRGIN, J. This is a bill in equity, brought by the assignee of an insolvent, to recover a certain sum of money alleged to have been paid, within two months prior to the commencement of proceedings in insolvency, by the insolvent to the defendants, in discharge of a pre-existing debt.

The bill contains no allegation that the alleged payment was "received by the creditors as a preference," and hence it does not present a case within the provisions of St. 1878, c. 74, § 30, as amended by St. 1879, c. 154, § 13. Does it contain sufficient allegations to bring the plaintiff's case within the provisions of any other section of the statute relating to insolvency?

The material provisions of § 48 as amended by St. 1879, c. 154, § 22, so far as they are applicable to the plaintiff's case, are in substance: If any debtor, being insolvent, shall, within four months before the filing of the petition against him, make any payment either directly or indirectly, with a view to give a preference to any creditor, the person receiving such payment having reasonable cause to believe such debtor to be insolvent, and that such payment is made in fraud of the laws relating to insolvency, the same shall be void; and the assignee may recover it or its value from the person so receiving it. And after setting out the filing of the petition in April, 1880; the adjudication of the debtor's insolvency, in May following; the appointment and qualification as assignee of the plaintiff, and the due execution and record of the assignment to him, in June succeeding, the bill proceeds to allege, in substance: 1st, that on March 27, 1880, the debtor was insolvent; 2d, that he then paid his debt

of $500 to the defendants, with a view to give them a preference; 3d, that the defendants then had reasonable cause to believe the debtor to be insolvent; and 4th, that they, also, then had reasonable cause to believe the payment to be made in fraud of the statute. These are the substantive conditions, which, under § 35, of the late bankrupt act of the U. S. invalidated a payment made within the specified time (*Forbes* v. *Howe*, 102 Mass. 433; *Toof* v. *Martin*, 13 Wall. 40, 46; *Wager* v. *Hall*, 16 Wall. 584); and the provisions of our statute above alluded to, are a substantial transcript of § 35. Our opinion that the bill is sufficient is thus sustained.

Are these allegations proved?

1. That the debtor, who was then engaged in trade in a country village, was hopelessly insolvent is not denied. He not only could not meet and pay his debts as they became due, in the ordinary course of business (*Lee* v. *Kilburn*, 3 Gray, 595; *Toof* v. *Martin*, 13 Wall. 40), but the defendants' attachment wound up his business.

2. The defendants deny that the debtor made any payment to them, but claim that they received from Burns the money and note for which they discharged their attachment and debt. But the payment came "indirectly," at least, from the debtor. It was made by Burns in person, but by the request of the debtor, and as part of the consideration of the sale of the debtor's stock, he being obliged to close up in order to raise funds to pay the defendants' debt against him. Under these, and various other attending circumstances, the allegation, that Burns and not the debtor made the payment, is too transparent for our satisfaction. Moreover the payment, while thus insolvent, of such a sum without property or funds to satisfy the debtor's other creditors, must be considered as made with a legal view to give a preference to the defendants. *Toof* v. *Martin*, *supra*; *Wager* v. *Hall*, *supra*.

3. Before, at the time of and after the defendants' attachment, their attorney was in the village where the debtor was trading. Wisely concluding that, a debtor, with successive mortgages on his little stock, could not go on with his business or even pay the defendants, the attorney placed the writ in the hands of the officer who

attached the stock and closed the store on the 24th. Thus matters remained until the 27th, when, on receiving the debt and costs in full from the consideration of the sale to Burns, the officer (of course by directions of the attorney) surrendered the note sued on together with the receipted bill, and released the attachment. Most assuredly these facts were calculated to produce a reasonable belief of the debtor's insolvency in the mind of an ordinarily intelligent man; and that is what and all that the law requires in respect to this branch of the case. Cases above cited. *Grant* v. *National Bank*, 97 U. S. 80, 82; *Barbour* v. *Priest*, 103 U. S. 293, 297.

4. It is the general purpose of the statute of insolvency to obtain a surrender of an insolvent debtor's property, and to effect a *pro rata* distribution thereof, among his creditors, resident in this state, and such others as voluntarily come in and prove their debts. The statute thus becomes a part of the obligation of contracts completed between citizens of this state since its enactment. And now when a debtor becomes insolvent, his creditors are entitled to such a distribution, and when it is made, the debtor is entitled to be discharged or absolved from such contracts. When, therefore, a creditor of such a debtor, either by voluntary payment on the part of the latter, or by proceedings *in invitum*, within the time prescribed in the statute, obtains more than his share of the debtor's property, he thereby thwarts the wise purpose of the law. And if the facts and circumstances attending the obtaining of his pay, are such as afford him reasonable cause to believe that he thereby prevents other creditors from obtaining theirs, and such is the effect in fact, the law will not permit him to reap the advantages of his legal wrong, but will cause him to surrender whatever he obtained to the assignee.

From the facts heretofore stated, it would seem to necessarily follow that, the obtaining of their entire pay by the defendants, when and under the circumstances attending it, was ample evidence that they had reasonable cause to believe the payment was in violation of the act. The defendants finding their debtor insolvent, attached his stock, retained it three days and until their debtor was obliged to sell out and pay out of the proceeds

of the sale their entire debt and costs. That the effect of this was to prevent a *pro rata* distribution among the other creditors, does not admit of any reasonable doubt, and that the defendants knew it, seems equally certain, though they probably hoped to escape through the indirect path which they pursued.

It is urged that the plaintiff has a plain, adequate and complete remedy at law, and that, therefore, this bill in equity cannot be maintained. But fraud being the gravamen of the complaint, equity and law have a concurrent jurisdiction with certain exceptions which do not include this case. This subject has so recently been examined by this court in *Taylor* v. *Taylor*, 74 Maine, 582, that we need only to refer to that case.

Burns is not a necessary party. The money is sought to be recovered from the defendants, because it was wrongfully received by them from Ayer in payment of their debt against him. That Ayer used the hand of Burns, making him agent *pro hac*, to deliver the money, in nowise renders Burns interested in the result of this suit. A complete decree can be made between the defendants and the assignee, without touching the rights of Burns, inasmuch as the sale of the goods from Ayer to him, is not involved here.

Bill sustained with costs.

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

NATHAN B. MILBERY *vs.* HALL E. STORER and others.

Aroostook. Opinion April 3, 1883.

Promissory notes. Alteration. Witness.

If a person, who saw the maker sign a note, afterwards, at the instigation of the payee, but without the knowledge or consent of the maker, sign his own name thereto as a witness, such alteration will not avoid the note if done or procured to be done without any wrongful or improper intent.

ON EXCEPTIONS.

Assumpsit on a promissory note.

The opinion states the material facts.

Madigan and Donworth, for the plaintiff.

Powers and Powers, for the defendant, Weed, contended, upon the point considered in the opinion, that the addition of an attesting witness made a material alteration of the note and brought it within the law laid down in *Chadwick* v. *Eastman*, 53 Maine, 12.

Suppose the payee and attesting witness dies and after the lapse of more than six years the administrator of the payee brings suit on the note, the defendant could not testify and upon proof of the signature of the subscribing witness judgment must go against the defendant. He can truly say that he entered into no such a contract.

It matters not whether the person thus signing as a witness was actually present when the maker signed. That fact may be of value in determining the motive which induced the witness to sign, but the attestation none the less alters the contract and, as we have seen, it may become a very material alteration, and it is the material alteration of the contract that discharges the party; all the recent decisions place it on that ground.

Eddy v. *Bond*, 19 Maine, 461, will be found, upon an examination of the opinion, not to conflict with the position we take.

PETERS, J. The action is upon the following note:

"Littleton, Me. Oct. 26, 1880.

"For value received we jointly or separately agree to pay Nathan B. Milbery, of Wicklow, N. B. or order, the sum of nine hundred dollars with interest, at nine per cent. the same is for eighteen thousand fruit trees, the same to be paid June 1, 1881.

Witnessed by
George C. Hayward, Jr.

Hall E. Storer,
John R. Weed,
George C. Hayward, Jr."

The note was not witnessed in the presence or with the consent of Weed. The witness saw him sign the note, and afterwards, before the note was accepted by the payee, put his own

name upon it as a witness. The evidence tends strongly to show that the act was done, by those concerned in it, through a mistake of their legal rights and without any wrongful or improper intent. It was ruled at the trial, that, if Weed signed the note without its being witnessed, and after he had parted with it, without his knowledge or consent, it was witnessed so as to be or appear to be a witnessed note, it was a material alteration that would relieve him from liability upon it.

This enunciation correctly states the general rule, but the rule admits of an exception. The rule does not apply to a case where a person sees the maker sign, and afterwards adds his own name as a witness, behind the back of the maker, without his knowledge and consent, the act having been done or procured to be done through honest motives and without any wrongful intent. The law shrinks from applying the severest rule in such a case, but pardons the act upon the grounds of expediency and for the public good. It is a somewhat common belief among the masses of the people that, if a person sees another sign an instrument, or if he knows his hand writing, such person may attest his knowledge of the fact by signing the instrument as a witness without the maker's knowledge or consent. This is often the case with contracts, bonds and deeds, as well as with promissory notes. It is better that a maker or promisor should occasionally and accidentally have such a slight risk or chance of injury imposed upon him, than that many important deeds and notes should become through innocent mistake invalidated and lost.

The general rule was reluctantly sustained by the Massachusetts court in the case of *Homer* v. *Wallis*, 11 Mass. 309. In that case the witness did not see the maker sign the note. In *Smith* v. *Dunham*, 8 Pick. 246, the exception to the rule, or its qualification, was established. The court held that, the act being innocently done, it did not amount to a technical alteration. In *Ford* v. *Ford*, 17 Pick. 418, it was held to be a harmless act to add a witness to an instrument without the maker's consent, the instrument having been witnessed before. In that case no fraud was suggested. In *Adams* v. *Frye*, 3 Metc. 103, the obligee of an unattested bond got a person, who knew the hand writing

of the obligor, but was not present when the bond was signed, to add his name as a witness to the bond; and in that case the bond was held not to be avoided, it being shown that the act was done without any wrongful intent. It is there said by the court: "We think it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would, in all cases, discharge the obligor from the performance of his contract or obligation. If an alteration, like that made in the present case, can be shown to have been made honestly, if it can be reasonably accounted for, as done under some misapprehension or mistake, or with the supposed consent of the obligor, it should not operate to avoid the obligation." *Willard* v. *Clarke*, 7 Metc. 435, affirms the doctrine of the Massachusetts cases preceding that case.

We regard the doctrine as fully established by our own adjudications. In *Brackett* v. *Mountfort*, 11 Maine, 115, it was held that the note was avoided by such an unauthorized alteration. In that case the witness did not see the maker of the note sign his name, and he added his own name thereto more than ten years after the note was made. The court evidently regarded it as a fraudulent alteration. In *Rollins* v. *Bartlett*, 20 Maine, 319, it was held that the validity of a note would not be destroyed by a subscribing witness attesting the note generally, when he saw only one of the three promisors execute the note, the act being done without a wrongful intention. In *Thornton* v. *Appleton*, 29 Maine, 298, the attesting witness saw the maker sign the note, and afterwards, without the knowledge and consent of the maker, at the request of the payee witnessed the same. But this act, it was held, did not annul the note, it being done without an intention to defraud. Mr. Parsons (2 Bills and Notes, 555,) approves the doctrine unhesitatingly. Other authorities could be added. Procuring such an attestation would be *prima facie* evidence of fraudulent intent. But that may be rebutted and disproved.

What may be the effect of adding a new maker to the note before delivery, without the consent of the other promisors, is

not now a question before us. Upon that point the authorities are divided.

Exceptions sustained.

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

CHARLES A. DRISKO *vs.* INHABITANTS OF COLUMBIA.

Washington. Opinion April 3, 1883.

Towns. Warrant for town meeting. Articles. Votes.

An article in a town warrant, "to see if the town will pay Charles A. Drisko a certain sum which was actually reimbursed to the town for his enlisting for three years," does not authorize the town to vote, "to pay a compensation to Charles A. Drisko, of four hundred dollars, in satisfaction of services he claims to have rendered the town for enlisting in the United States service for three years instead of one year," it appearing that the town had not received any reimbursement on that account.

ON EXCEPTIONS.

Assumpsit to recover the sum of four hundred dollars in accordance with a vote of the defendant town, at their March meeting in the year 1874. The writ was dated February 7, 1880. The plea was general issue.

At the trial after the plaintiff's evidence was out, the presiding justice ordered a nonsuit, and the plaintiff alleged exceptions.

The facts appear in the opinion.

Charles Peabody, for the plaintiff.

The warrant must give notice with reasonable certainty of the subject matter to be acted upon. *B. & M. L. R. R. Co.* v. *Brooks*, 60 Maine, 568.

This was done in this case. The only difference between the warrant and the vote is, that the latter is a little more specific as

it should be. The word "reimburse" in the warrant may be objectionable. A different word might have been in better taste, or better English. But a profession that endures law Latin should not quarrel with bad English.

J. A. Milliken, for the defendants.

PETERS, J. The plaintiff enlisted towards the close of the late war for three years, and was credited to the quota of the town of Columbia. By the closing of the war he was in the service less than a year. He received a bounty of three hundred dollars from the town, and the same amount from the state. It is claimed that he was enlisted under a bargain which would require the town to pay him nine hundred dollars instead of three hundred. The contract, if there was such a one, not being authorized by any law in existence at the time, could be validated by the town. R. S., c. 3, § § 37, 39.

In 1874, this article was inserted in a warrant for town meeting: "To see if the town will pay Charles A. Drisko a certain sum which was actually reimbursed to the town by his enlisting for three years." And the following vote was passed: "Voted to pay a compensation to Charles A. Drisko of four hundred dollars in satisfaction of services he claims to have rendered the town for enlisting in the United States service for three, instead of one year." Is the vote within the purview of the warrant, in the light of the admission, upon the briefs of counsel, that no such reimbursement had ever been made to the town? We say it is not.

The warrant was to see if the town would pay out of the treasury a certain sum which had been actually paid into the treasury. It calls for a certain sum already received, (by implication) received from the state; received on account of, and to some extent if not wholly, for the plaintiff. The warrant implies that the town had collected money which it could not justly keep. At the meeting it was, no doubt, ascertained that no money had been paid to the town on account of the plaintiff's enlistment, and so the vote was worded as it is. The vote calls for one thing, and the warrant for another. This is not a case where an idea

has been blindly or illiterately expressed. Both the warrant and vote are couched in clear and concise terms, and neither could be easily misunderstood.

Nonsuit confirmed.

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

WILLIAM H. DUSTIN *vs.* JOSIAH CROSBY.

Penobscot. Opinion April 4, 1883.

Attachment. Liens.

A made a verbal contract to purchase a lot of land of B, took possession of it, erected a building upon it, and failed to pay for the labor and materials which entered into the construction of the building. One lien-creditor attached the building as personal property, and another attached the building with the lot of land as real estate.

Held, that the building became a part of the real estate of B, and that as against him neither creditor obtained a valid attachment upon the building.

Held, also, that B was not estopped from asserting title to the building by verbally disclaiming any interest in it beyond an amount of damages occasioned by an injury to his land by erecting the building upon it.

In actions to enforce a statutory lien upon buildings, if the debtor's interest be realty, it must be attached as such; and be attached as personalty when it is personalty; the same distinction, as to the mode of attachment, to be preserved as in ordinary suits.

Pullen v. *Bell*, 40 Maine, 314, overruled.

ON REPORT.

Trover for the value of a building erected in the summer of 1876 on land of Benjamin F. Mills, by George W. Dearborn, who was in possession of the land under a verbal contract to purchase. Plaintiff claims as purchaser at an officer's sale as personal property on an execution rendered in a lien claim suit against Dearborn, in favor of a material man. Defendant claimed under a deed from Mills, which he procured as attorney for a Mr. Kendall, who furnished labor in erecting the building, and for

whom he prosecuted a lien claim suit to final judgment and execution, and levied upon the building and lot as realty.

The writ was dated December 16, 1879, and the plea was the general issue.

By the terms of the report, if the action could be maintained, the case was to be sent back for an assessment of damages; otherwise, nonsuit to be entered.

Other material facts stated in the opinion.

Thomas H. B. Pierce, for the plaintiff, contended that Dearborn had no legal interest in the land, greater than a tenancy at will, which is neither assignable nor attachable, citing: R. S., c. 73, § 10; *Dingley* v. *Buffum*, 57 Maine, 381, and commenting upon *Pulsifer* v. *Waterman*, 73 Maine, 233.

And where, as here, the debtor has no legal interest in the land the lien attaches to the building. R. S., c. 91, § 27. Counsel further contended that the building alone could be attached, seized and sold only as personal property, and that an attachment as really was void.

Counsel further contented that the report showed that Mills, before his conveyance to defendant, recognized plaintiff's title to the building and leased the building, and, therefore, he and the defendant were estopped by the tenancy of Mills, from denying the plaintiff's title. *Longfellow* v. *Longfellow*, 61 Maine, 590; *Ryder* v. *Mansell*, 66 Maine, 167.

J. Crosby, for the defendant.

PETERS, J. Section 27, c. 91, R. S., gives a lien for labor and materials furnished in the erection, alteration and repairing of houses and other buildings. It is a lien upon the realty if the debtor owns realty, and upon the building as personalty if the debtor owns the building only.

It appears that the debtor, under whom both parties claim in the present controversy, made a verbal purchase of a parcel of land, partly paid for it, took possession of it, erected a building upon it, and failed to pay for the labor and materials expended in erecting the building. One creditor attached the building as personal proporty, and another attached the building together

with the lot of land as real estate, to establish their lien claims thereon. Much has been said in the case about the propriety of the different modes of attachment. We have no doubt that the ordinary rule governs. Real estate must be attached as real estate, and personalty as personalty. The distinction between the two modes of attachment is not to be disregarded by a lien-creditor, any more than by other creditors. Both classes of creditors may have attachments upon the property at the same time. This construction, it is replied, will prevent a lien-creditor from attaching equitable interests in land. But it no more prevents lien-creditors than it does other creditors. Equitable interests that are not attachable by one class of creditors, are not attachable by any creditor. The legislature has merely given the lien-creditor a preference in the pursuit of remedies that are open to all creditors. Any different construction would lead inevitably to confusion.

The result of this view of the case, is, that neither of the attaching creditors got a valid attachment upon the building in controversy. The building became legally a part of the real estate of the party (Mr. Mills) who verbally contracted to sell the land. The debtor may have had some equitable right in the property, but not of a nature to be attached in a suit at law. Mere possession, without title, may be subject to execution. Possession is evidence of title. But where possession is held by means of some equitable title purely, it may be subject to an equitable, but not a legal, attachment. Freem. Judg. § 175; *Russell* v. *Lewis*, 2 Pick. 508. By force of the bargain between the parties the building became attached to and a part of the soil. It could neither be sold as the debtor's personal property, nor levied upon as his real estate. This is not the case of a building placed upon land by the permission of the owner of the land, with an understanding of the parties that the title to the structure is to remain in the builder. Of course, a person who verbally sells land to be built upon, may superadd such an agreement or permission to the verbal sale. But nothing of that kind appears here.

The doctrine applicable to the present case is that maintained in *Hemenway* v. *Cutler*, 51 Maine, 407, where it was decided, that erections made by one occupying land under a bond for a deed must be regarded as real estate, and cannot be removed by the occupant or be attached as his property. This rule must apply with as much force where the bargain of purchase is verbal instead of written. *Russell* v. *Richards*, 1 Fair. 429, is not an opposing authority. That case was decided upon the ground of estoppel, and even that case has been a good deal criticised by other courts. Certainly, its doctrine is not to be extended. See *Fifield* v. *Railroad*, 62 Maine, at p. 80. *Pullen* v. *Bell*, 40 Maine, 314, an opposing authority, was a briefly considered case and an erroneous decision. It was determined upon the authority of *Russell* v. *Richards*, *supra*, and wrongfully so, for the facts of the two cases are not alike. The case is undoubtedly overruled by later decisions. *Hinckley* v. *Black*, 70 Maine, 473; *Lapham* v. *Norton*, 71 Maine, 83. The doctrine of *Hemenway* v. *Cutler*, *supra*, is sustained by the Massachusetts court in quite a number of cases. *Poor* v. *Oakman*, 104 Mass. 309; *Westgate* v. *Wixon*, 128 Mass. 304, and cases cited. And such is the doctrine of the American and English cases generally.

But the counsel for the plaintiff ably argues the point presented upon his brief, that the facts bring this case within the operation of the principle established in the case of *Russell* v. *Richards*, cited *supra*. He contends that the cord of title which held the building to the soil, was severed, and that two separate ownerships were created, by the admissions and conduct of Mr. Mills, the owner of the soil. We think, however, that the most favorable view that can be taken of the facts will not sustain the position claimed by him. What did the owner do or say to prevent title accruing to himself, or to divest it from himself, up to the date of his deed to the defendant? It is not pretended that there was any original bargain that the builder should retain title to the structure to be erected. Nor is there any tangible evidence that can be construed into a complete disclaimer of ownership at any time. Mr. Mills himself states the matter as favorably for the plaintiff as any witness, and he denies, and his denial is not

overcome by other evidence, that he ever renounced all claim to the building. He constantly asserted that he would not release the building until certain damages, fifty dollars or so, for an injury to the lot, should be paid to him. He at no time fully let go of a claim upon the whole estate, building included. The principle must be the same whether he retained the title to secure a few dollars or many dollars.

The effect of the owner's consenting, if he did, to furnishing the supplies and labor, as provided for in R. S., c. 91, § 28, and laws of 1876, c. 140, is not spoken of upon the briefs of counsel. But the result would be the same. If any estate would be bound by the consent of the owner, it would be, *prima facie*, such estate as the owner had. Here he had the whole.

Plaintiff nonsuit.

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

SYMONDS, J., concurred in the result.

ALTON M. WADLEIGH *vs.* INHABITANTS OF MOUNT VERNON. 75 79 94 235

Kennebec. Opinion April 5, 1883.

Ways. Stat. 1877, c. 206. Notice. Evidence.

Upon a reasonable construction of the phrase, "specifying the nature of his injuries" in stat. 1877, c. 206, requiring a notice to be given by one injured by reason of a defect in a highway, the plaintiff is not confined in his declaration and proof to the precise statement of his injuries contained in his notice. Results may have followed, not anticipated at the time the notice was given.

Where such a notice specifies among other things that the plaintiff was "violently shaken up and jarred in his fall to the ground," it is sufficiently specific to include all the injuries to his person which resulted therefrom.

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

An action to recover damages sustained by the plaintiff by an injury to his person and to his horse, caused by a defect in a way in the town of Mount Vernon.

The accident occurred September 30, 1879; the writ was dated June 1, 1880; the plea was general issue, and brief statement denying that the defendants had notice of the defect, and alleging that no legal notice was given of the injury and defect, and claim for damages, and that the plaintiff had knowledge of the alleged defect before the date of the alleged injury.

The following is a copy of the notice given by the plaintiff to the defendants in compliance with stat. 1877, c. 206:

"To the town officers of the town of Mount Vernon, in the county of Kennebec, and state of Maine.

"You are hereby notified that I, Alton M. Wadleigh, of Belgrade, on the thirtieth day of September, A. D. 1879, at about the hour of six and one-half o'clock in the afternoon of that day, was thrown violently from his carriage, to wit: wagon, and seriously injured in the thigh, and internally injured in his right lung, and otherwise injured, by being violently shaken up and jarred in his fall to the ground, caused by his horse stepping into a defect, to wit: a hole in the highway at the small water course which crosses the bog road at a point about seventy-five rods easterly from the Ingraham brook bridge in said Mount Vernon; said defect being a hole in the middle of said bog road at said water course, about four feet long, two to three feet deep, and four to eight inches wide; his horse was also at same time violently thrown to the ground, and received serious injury in the right fore leg, and foot, and shoulder, for which injury to himself and horse, the said Alton M. Wadleigh claims the sum of five thousand dollars ($5000) damages therefor. And you are hereby notified to settle and make payment of the same forthwith, October 6, 1879. Alton M. Wadleigh,

By E. W. Whitehouse, his attorney."

The verdict was for the plaintiff for $254.20.

The material facts are stated in the opinion.

E. W. Whitehouse, for the plaintiff.

Bean and Beane, for the defendants, contended that a notice specifying the nature of an injury to the person, should name the organs or parts of the body injured, as was done in this case by

naming the thigh and lung. It is to enable the town officers to investigate and ascertain the facts.

The principal personal injury for which the plaintiff claimed to recover at the trial, was not named in the notice, nor in the plaintiff's declaration. Of such an injury the defendants had no notice nor intimation. Evidence of such an injury did not sustain any allegation in plaintiff's declaration and should have been excluded.

BARROWS, J. The only point insisted on in the exceptions is, the objection to the admission of testimony respecting an injury to one of the plaintiff's testicles, offered and admitted under a declaration, alleging among other things that he was "thrown violently to the ground and received severe contusions, bruises and injuries about his head, side, chest, thighs, legs and arms, and was severely injured internally, from effects of which injuries he . . . has suffered much, both in body and mind . . . and has been rendered permanently disabled in his body," &c. and under a written notice seasonably given to the municipal officers, setting out among other things that he was "thrown violently from his wagon and seriously injured in the thigh, and internally injured in his right lung, and *otherwise injured* by being violently shaken up and jarred in his fall to the ground." We think the testimony was admissible, and the objection cannot be sustained. It is true that the cases of *Blackington* v. *Rockland*, 66 Maine, 332, and *Bradbury* v. *Benton*, 69 Maine, 194, arose under the statute of 1874, c. 215, and that other provisions respecting the notice to be given by the injured party, have been superadded by the statute of 1877, chapter 206. The time within which the notice of the claim shall be given has been shortened. It must now be in writing, and it must include a notice of the nature and location of the defect, causing the injury. But so far as the objection here made is concerned, there has been no change. Then, as now, the injured party was required to give a notice "specifying the nature of his injuries." The doctrine and reasoning of the court in those cases apply still to

the point here raised, and we think they justify and require the overruling of these exceptions. The declaration is comprehensive enough to warrant the introduction of proof of any bodily injury resulting from his being "violently shaken up and jarred in his fall to the ground." It is not necessary to detail all the results thence accruing in the declaration, nor in the notice. The medical and other testimony may be considered as fairly establishing the fact that the varicocele was one of the results produced by the jar and shock of the fall, and so embraced in the terms of the declaration and notice, and coming within the reasonable construction of the statute requirement adopted in the cases above referred to. The reasoning applies all the more forcibly now that the notice must be given within fourteen days after the accident.

Under the motion for a new trial it is claimed that the verdict is against the evidence upon the questions of actual notice to either of the town officers named in the statute, of the existence of the defect twenty-four hours before the occurrence of the accident, and notice to the plaintiff of the condition of the way previous to the time of the injury.

It is easy to see how in the setting up of these two defences, one might tend to neutralize the other. If the condition of the culvert for so long a time prior to the accident, was as bad as described by the witnesses who testify to the notice to the plaintiff (and by many other witnesses, some called by defendants and others by the plaintiff) indicating that travellers there had sheered out of the ordinary current of travel, it will be readily seen how the jury might be led to disbelieve the road surveyor of the district when he swore that he was often over the road during that season, and for the last time within two weeks before the accident, and yet noticed no defect, and did not even know that there was a culvert there, until called upon to go down and repair it the day after the accident.

Moreover there was testimony coming from inhabitants of the defendant town, tending to show that the attention of both the road surveyor and one of the selectmen had been called to the place as needing repairs by others, so that it did not rest purely

upon the opportunity they had had of observing the condition of the way in passing over it.

Upon both the points here presented the testimony was so positively and directly conflicting that the case must have turned upon the opinion which the jury entertained of the veracity of the witnesses. We find nothing which can be said to demonstrate with much force that they erred. It is not sufficient to entitle the defendants to a new trial, that the court might come to a different conclusion from that reached by the jury. The jury saw and heard the witnesses. They were drawn from the vicinage and commissioned to decide the facts, because it is assumed by the law that they are less liable to mistake in passing upon the credibility of witnesses and testimony. The defendants must abide by their decision.

Motion and exceptions overruled.

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

CHARLES ABBOTT, Treasurer of Ministerial and School Fund in Upton,

vs.

CHARLES CHASE and others.

Oxford. Opinion April 6, 1883.

Pleadings. Promissory notes. Officers de facto. Deeds.

The capacity and legal authority of one to whom the defendants have given a promissory note as treasurer of the ministerial and school fund of a town cannot be questioned by them in a suit on the note under a brief statement accompanying the general issue. His want of authority is to be pleaded, if at all, in abatement.

When it appears that certain individuals have been the acting municipal officers, town clerk and treasurer in a certain town, and also the acting trustees,

clerk and treasurer of the ministerial and school fund in the town, at any period, their acts in those capacities during such period in the disposition of the ministerial and school lands in that town, so far as the rights of the public and third parties interested therein are concerned, will be as valid as if it appeared that they were officers *de jure* as well as *de facto*.

In the absence of all fraud and collusion a deed duly executed by such acting treasurer of such acting trustees, by order of the trustees, purporting to convey all the right, title and interest of the trustees of the ministerial and school lands in that town, in a parcel of such lands, will convey whatever title there is vested in the inhabitants of that town to the parcel therein described.

The reception of such a deed by those who have bargained with such trustees for the land, agreeing "to run their own risk against any title which anybody else had, except the legal trustees," is a good consideration for the note given therefor.

ON REPORT.

Assumpsit. Writ dated February 16, 1881. The plea was general issue and brief statement.

The opinion states the case and material facts.

Enoch Foster, for the plaintiff, cited: *Tainter* v. *Winter*, 53 Maine, 348; *Page* v. *McGlinch*, 63 Maine, 472; *Brown* v. *Nourse*, 55 Maine, 232; *Clark* v. *Pishon*, 31 Maine, 503; *Commonwealth* v. *Kane*, 108 Mass. 425; R. S., c. 12, § § 41, 42, 43; *Brown* v. *Lunt*, 37 Maine, 423; *Woodside* v. *Wagg*, 71 Maine, 210; *Nason* v. *Dillingham*, 15 Mass. 171; *Greene* v. *Walker*, 63 Maine, 312; *Warner* v. *Mower*, 11 Vt. 385; Personal Liberty Laws, 46 Maine, 591; *Hughes* v. *Farrar*, 45 Maine, 73; *Wentworth* v. *Grenier*, 70 Maine, 243; *Thompson* v. *Carr*, 5 N. H. 510; *Nobleboro* v. *Clark*, 68 Maine, 92; *Knox* v. *Jenks*, 7 Mass. 488; *Purington* v. *Dunning*, 11 Maine, 176; *Stewart* v. *Crosby*, 50 Maine, 136; *Clark* v. *Sigourney*, 17 Conn. 510; *Higley* v. *Smith*, 1 Chip. 409; *Trustees of Dutton* v. *Kendrick*, 12 Maine, 381.

R. A. Frye, for the defendants.

The statutes provide who shall be trustees of ministerial and school funds, and how the first meeting shall be called. R. S., c. 12, § § 41, 42, 50.

Such trustees are a private corporation. *Yarmouth* v. *No. Yarmouth*, 34 Maine, 411. And the records of a corporation

are the only evidence to prove notice and doings of meetings. *Moor* v. *Newfield*, 4 Maine, 44; *Jordan* v. *Lisbon*, 38 Maine, 170; *Reeves* v. *Ferguson*, 31 N. J. 107; *Jackson* v. *Hampden*, 20 Maine, 37.

There is no evidence in this case of a notice for the meeting of trustees.

The vote that was passed was insufficient to authorize the treasurer to give a deed to these defendants. The court has held that a vote of a corporation authorizing an agent to convey lands must specify the tract or give some description by which it can be ascertained. The power ought to be as certain as it is necessary for the deed to be. *Lumbard* v. *Aldrich*, 8 N. H. 31.

Apt words must be used in a deed to show the intention to convey the estate to the grantees and unless words are contained in the deed expressing an intention to convey such estate, no title is passed. *Bank* v. *Rice*, 4 How. * 241; Martindale on Con. § 68; *Elwell* v. *Shaw*, 1 Maine, 339; *Stinchfield* v. *Little*, 1 Maine, 231; *Hatch* v. *Barr*, 1 Ohio, 390; *Brinley* v. *Mann*, 2 Cush. 337; *Coburn* v. *Ellenwood*, 4 N. H. 99; *Atkinson* v. *Bemis*, 11 N. H. 44; *Treat* v. *Smith*, 68 Maine, 394; *Sturdivant* v. *Hull*, 59 Maine, 172.

This deed does not assume to convey the title of any party except the trustees and they held no title. That was in the inhabitants of the town. *Warren* v. *Stetson*, 30 Maine, 231; *Argyle* v. *Dwinel*, 29 Maine, 46; *Crafts* v. *Elliotsville*, 47 Maine, 141.

The deed being void there was no consideration for the note. *Howard* v. *Witham*, 2 Maine, 390; *Jenness* v. *Parker*, 24 Maine, 289; *Fowler* v. *Shearer*, 7 Mass. 14; *Warder* v. *Tucker*, 7 Mass. 449; *Wentworth* v. *Goodwin*, 21 Maine, 150; *Homes* v. *Smyth*, 16 Maine, 177; *Greenleaf* v. *Cook*, 2 Wheat. 13.

The mistake by the parties to this transaction, as to the sufficiency of the deed to pass the title to the fee, was undoubtedly mutual, and it is a universal rule of law that a mistake of both parties avoids the contract. Waterman on Con. § 380; Chitty on Con. 296.

BARROWS, J. June 3, 1879, the defendants subscribed the joint and several promissory note declared on for three hundred and eighty dollars, making it payable on demand to Charles Abbott, treasurer of the ministerial and school fund in the town of Upton or his successor in office with interest annually at seven per cent.

The payee having ceased to hold the office since the commencement of the action it is now rightly prosecuted in the name of his successor, Enoch Abbott. R. S., c. 82, § 13. See also, R. S., c. 12, § 41, which makes the municipal officers, town clerk and treasurer a corporation and trustees of the ministerial and school fund for the town where no other trustees are lawfully appointed for that purpose.

Under the general issue and brief statement the defendants undertake to retract their admission on the face of the note, and to deny the right of Charles Abbott to act as treasurer of the trustees because they say there was no legal warrant, notice or record of the town meeting in March, 1879, and on legal proof of the notice for the first meeting of the trustees, at which he was elected treasurer. The point is not open to the defendants. They have admitted the plaintiff's capacity by their pleadings as well as in the note they gave; and it is too late now to dispute it. *Page* v. *McGlinch*, 63 Maine, 472, 475; *Brown* v. *Nourse*, 55 Maine, 230; *Clark* v. *Pishon*, 31 Maine, 503. But the defendants set up an alleged want or failure of consideration; and as this also is in contradiction of the admission, which they made in the note, of value received, they attempt to prove it by the production of a deed made to two of them for whom the other two signed the note in question as sureties, the note being given for the price of the land described in the deed. The deed is a quitclaim deed, duly executed by Charles Abbott in his capacity as "treasurer of the ministerial and school fund for the town of Upton," and it purports to convey "by order of the trustees of said fund" . . . "all the right, title and interest of the said trustees of said ministerial and school fund, in and to" a parcel of "the ministerial and school fund land in Upton," duly described by metes and bounds, and "containing three hundred and eighty

acres, more or less." The deed appears to have been duly acknowledged and recorded. It was produced by one of the defendants, who testifies that the note was given for the title to the land therein described, and upon a bargain that the grantees were "to run their own risk of the title that any body else had, except the legal trustees," by which we understand that the defendants bargained for such title to the parcel as legal trustees of the ministerial and school fund in Upton, could give, and neither expected nor asked any covenants respecting it.

There is no suggestion that the grantees did not have possession under their deed, or that anybody has raised a question about their title, until they themselves have done it in making this defence.

The defence is a meagre and lame one in any view that can be taken of it. The giving of a quitclaim deed by the payee of a note to the promisor, seems both on principle and authority to be, in the absence of fraud, a sufficient consideration for the note, whatever the defects in the title. The precise act stipulated for, which according to the calculations of the parties, may or may not result for the benefit of the grantee, and the transfer of a possible interest to him from the grantor, has been done by the latter, as agreed upon. Both parties recognize the possibility of flaws in the title, and make their contract in view of the fact that, while the validity of the title may be questionable, the grantee gets and the grantor parts with whatever the latter has power to convey.

Hence in *Clark* v. *Sigourney*, 17 Conn. 510, it was held that a deed of release without covenants was a sufficient consideration for a note of three hundred dollars, though it afterwards appeared that the grantor had no title; and this case and its reasonings are cited approvingly with additional authorities by APPLETON, C. J., in *Stewart* v. *Crosby*, 50 Maine, 138. In *Bean* v. *Flint*, 30 Maine, 226, this court said that, "ordinarily when a person gives his note for a quitclaim deed, he cannot, on account of a defect in the title, avoid the payment of it." See also, *Randall* v. *Farnham*, 36 Maine, 86, 88. But were all this otherwise, the testimony introduced by the defendants does not go far enough

to sustain their defence, or to throw a cloud upon the title they acquired by the deed. On the contrary it all goes to show that Abbott and others were the acting officers of the town, and the acting trustees of the ministerial and school fund.

In *Trustees of the ministerial and school fund in Dutton* v. *Kendrick*, 12 Maine, 381, it was held not to be necessary in an action brought by them in that capacity, to show their legal organization as a corporation when there was evidence that they had so acted; and that the defendant was precluded from calling it in question, by pleading the general issue with a brief statement, as here.

We think that under the provisions of R. S., c. 12, § § 41, 42, and 43, a deed made and received in good faith, and duly executed by the acting treasurer of one of these peculiar corporations, in pursuance of an order of the acting trustees to that effect, where the intent to pass the estate is manifest on the face of the deed, will give a good title to the property therein described, although the records may fail to show all that is necessary to make them officers *de jure* as well as *de facto*. To such cases the familiar doctrine that the acts and doings *colore officii* of officers *de facto*, so far as the rights of the public, and others having an interest therein are concerned, are as valid as if they were officers *de jure*, ought to apply. See for illustration of cases, where the doctrine is held applicable. *Woodside* v. *Wagg*, 71 Maine, 207; *Greene* v. *Walker*, 63 Maine, 312, 313; *Brown* v. *Lunt*, 37 Maine, 423; *Nason* v. *Dillingham*, 15 Mass. 171; *Bucknam* v. *Ruggles*, *id.* 180.

It would seem to follow that in any controversy in which the defendants may be involved, touching the validity of their title to this land, they could not suffer by reason of want of proof of a legal town meeting in Upton, in March, 1879, or of proper notice to all the trustees of the ministerial and school fund of the meeting for the purpose of organization, or of the giving of a bond by the treasurer of said fund.

The deed was held void in *Warren* v. *Stetson*, 30 Maine, 231, because it was executed by the treasurer of the *town*, as such, and not as treasurer of the trustees "by order of the trustees."

Again, the extracts from the records introduced by the defendants, are not equivalent to proof that any deficiencies there apparent, are not supplied in other parts of the record. The burden was on the defendants to show that the officers were not officers *de jure*, if such proof could have availed them; and they fail to sustain it.

Defendants' counsel argues that, the conveyance being only of the right, title and interest of the trustees, and the fee being by law vested in the inhabitants of the town, it did not pass by the conveyance, and that the extract from the records of the trustees which he has put in evidence, while it shows a vote "to deed to the purchasers of said land on or before Tuesday next, or as soon as may be after that date," is insufficient to authorize the treasurer to make the deed for want of any designation of the parcel, price and the names of the purchasers. The record of the vote is not a model for imitation, but the defendants have not made it appear that there are no records which explain and apply the vote which is general in its terms; and it is clear that they would be entitled upon proper application to have the records amended, if deficient, so as to show the actual transaction. It is the sworn duty of the clerk to keep a full record of the doings of the trustees, and he may be compelled to perform it by appropriate process, if he neglects, on request, to supply actual defects.

Perhaps the most formidable objection to the deed is the introduction into the terms of the grant of the phrase, "the right, title and interest of the said trustees of said ministerial and school fund, in and to" the parcel of land intended to be conveyed, the description of which follows: It was doubtless used to import in the conveyance what the defendant who testifies in the case says was part of the bargain, that the purchasers were "to run their own risk against any title which any body else had except the legal trustees." But to determine whether the grantees in the deed got whatever interest in the land there was vested, and remaining in the inhabitants of the town, which was really what they bargained for, we must inquire whether the language of the deed, read in the light of the surrounding circumstances, will bear such a construction as to include that

interest. It must be remembered that the deed derives all its force from the provisions of the statute. At common law no conveyance which these officers could make would transfer the title, which was not in them, but was vested by the legislature in the inhabitants of the town for a fixed purpose defined by the law. By R. S., c. 12, § 43, however, power is given to them to "sell and convey all such ministerial and school lands belonging to and lying in their town, and the treasurer's deed thereof duly executed by order of the trustees, shall pass the estate."

And by R. S., c. 73, § 14, "a deed of release and quitclaim of the usual form, will convey the estate which the grantor has, and *can convey* by a deed of any other form." With reference to lands situated as these are, the word "and" in this statute may well be construed as if it were "or." The deed is to be effective upon the lands described therein, if the grantor "can convey" them.

No one can believe that these parties supposed that the trustees, changing as often as they do, (being liable to change every year) had any right, title or interest as individuals in these lands. The whole instrument shows that the intention of the parties was that the trustees should convey the estate which the statutes empowered them to convey in the parcel of land described in the deed, provided only that the purchaser was to take his own risk of all outstanding titles, except that which they could convey at the time the deed was made.

Where a deed derives all its validity from a special statute provision, enabling the grantor to convey, we must consider in its construction, not the language of the deed only, but that of the statute also. *Warner* v. *Mower*, 11 Vt. 385.

The case is not one of the execution of a deed at common law by the agent of the owner, nor one of the construction of a deed, made by an authorized agent, to convey lands of which his principal is the owner, as it might be affected by our statute respecting conveyances made by agents.

The validity and effect of this deed do not depend entirely upon the same rules that apply to those last mentioned.

The inquiry is, what is the force and effect of this conveyance, read in the light of the circumstances, and of the statute provisions under and by virtue of which alone it could have any effect to transfer the fee vested in the town. We think it conveyed to the grantees just the title for which they bargained. The defence fails at all points.

Judgment for plaintiff in the capacity set forth in the writ.

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

GEORGE I. RICHE *vs.* BAR HARBOR WATER COMPANY.

Hancock. Opinion April 6, 1883.

Eminent domain. Public use. Notice. Constitutional law. Trespass.

To constitute a public use authorizing the exercise of the right of eminent domain, it is not required that the entire community, or even a considerable portion of it should directly participate in the benefits to be derived from the property taken.

A notice dated April 4th, but first published in a newspaper, April 7th, takes effect from the date of its publication.

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The charter of a water company authorized it to take land for its use and provided that it "shall cause surveys to be made for the purpose of locating their dams, reservoirs and pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk; . . . and notice of such location shall be given to all persons affected thereby, by publication in some public newspaper." The company gave notice in a newspaper that, "for the purpose of erecting thereon a reservoir or reservoirs, and such other works as they deem necessary," they had "caused a survey of a certain lot of land to be made, and the plan thereof to be filed in the office of the town clerk. . . This land is situated upon the hill known as Cunningham's Hill (at Bar Harbor), and was formerly owned or supposed to be by A. P. Cunningham or others. For further particulars, interested parties are referred to the plan in the office of town clerk."

Held, that the notice was a sufficient compliance with the charter.

The clause in the constitution prohibiting the taking of private property for public uses without compensation, does not prohibit the legislature from

authorizing an exclusive occupation of private property, temporarily as an incipient proceeding to the acquisition of a title to, or an easement in the land taken.

The mode and manner in which the owner of land taken for public use is to be compensated for the land so taken, are to be determined by the legislature.

When it is not required that compensation be made before entering upon the land taken, and it is provided that the owner of the land may cause his damages to be ascertained in the same manner as land taken for highways, such owner cannot maintain trespass for such taking, within the time limited for an assessment of damages, and without any application for such assessment.

ON REPORT.

Trespass for entering plaintiff's premises between May 1, 1881, and the date of the writ, and erecting a reservoir and laying down water pipes.

The writ was dated September 9, 1881. The plea was general issue, and brief statement justifying the acts complained of under their charter, which read as follows:

"An act to incorporate the Bar Harbor Water Company. Be it enacted by the senate and house of representatives in legislature, assembled as follows:

"Section 1. David Rodick, Stephen Higgins, Fountain Rodick, Samuel N. Higgins, Charles Higgins, Albert F. Higgins, John A. Serenus Rodick, H. Rodick, Alfred E. Conners and Edwin G. Desisle, with their associates and successors, are hereby made a corporation by the name of the Bar Harbor Water Company, for the purpose of conveying to and supplying the village and vicinity of Bar Harbor, in the town of Eden, Hancock county, with pure and wholesome water, and said corporation, for said purposes may hold real and personal estate, necessary and convenient therefor, not exceeding in amount fifty thousand dollars.

"Section 2. Said corporation is hereby authorized, for the purposes aforesaid, to take, detain and use the water of Eagle Lake, Duck Brook, or either of them, in said town of Eden, and is also authorized to erect, maintain dams and reservoirs and lay and maintain pipes and aqueducts, necessary for the proper accumulating, conducting, discharging, distributing and disposing of water and forming proper reservoirs thereof; and said

corporation may take and hold any lands necessary therefor, and may excavate through any lands where necessary for the purpose of this incorporation.

"Section 3. Said corporation shall be held liable to pay all damages that shall be sustained by any persons by the taking of any land or other property, or by flowage, or by excavating through any land, for the purpose of laying down pipes and aqueducts, building dams and reservoirs, and also damages for any other injuries resulting from said acts; and if any person sustaining damage, as aforesaid, and said corporation shall not mutually agree upon the sum to be paid therefor, such person may cause his damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are by law prescribed in the case of damages by the laying out of highways.

"Section 4. Said corporation is hereby authorized to lay down, in and through the streets and ways in said town of Eden, all such pipes, aqueducts and fixtures as may be necessary for the purposes of their incorporation, under such reasonable restrictions as the selectmen of said Eden may impose. And said corporation shall be responsible for all damages to persons and property occasioned by the use of such streets and ways, and shall further be liable to pay to said town of Eden, all sums recovered against said town for damages from obstructions caused by said corporation, and for all expenses, including reasonable counsel fees, incurred in defeating such suits, with interest on the same.

"Section 5. Said corporation shall have power to cross any private or public sewer, or to change the direction thereof, where necessary for the purposes of their incorporation, but in such manner as not to obstruct or impair the use thereof; and said corporation shall be liable for any injury caused thereby.

"Section 6. Said corporation shall cause surveys to be made for the purpose of locating their dams, reservoirs and pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk of said Eden, and notice of such location shall be given to all persons affected thereby, by publication in some public newspaper, in said county; and no

entry shall be made upon any lands, except to make surveys, until the expiration of ten days from the said filing and publication.

"Section 7. Any person who shall wilfully injure any of the property of said corporation, or who shall knowingly corrupt the waters of said Eagle Lake and Duck Brook, or any of their tributaries, in any manner whatever, or render them impure, whether the same be frozen or not, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not less than one year, and shall be liable to said corporation for three times the actual damage, to be recovered in any proper action.

"Section 8. The capital stock of said corporation shall be five thousand dollars, which may be increased to fifty thousand dollars by a vote of said corporation; and said stock shall be divided in shares of fifty dollars each.

"Section 9. The town of Eden is hereby authorized to subscribe to the stock of said corporation to an extent not exceeding two thousand dollars, by a two-thirds vote, at any legal meeting called for that purpose, but no more than one meeting shall be called for that purpose in any one year.

"Section 10. The first meeting of said corporation may be called by a written notice thereof, signed by any two corporators herein named, served upon each corporator by giving him the same in hand or leaving the same at his last, usual place of abode, seven days before the time of meeting.

"Section 11. This act shall take effect when approved.

"Approved February 10, 1874."

Notice of location, dated April 4, 1881, was published in Ellsworth American, April 7, and April 14, 1881, as follows:

"State of Maine, Hancock county, Eden, April 4, 1881.

"Notice is hereby given that the Bar Harbor Water Company, (for the purpose of erecting thereon a reservoir or reservoirs, and such other works as they may deem necessary), caused a survey of a certain lot of land to be made, and the plan thereof to be filed in the office of the town clerk of Eden, as by law required.

"This land is situated upon the hill known as Cunningham's Hill, (at Bar Harbor) and was formerly owned, or supposed to be

owned, by A. P. Cunningham or others. For further particulars interested parties are referred to the plan in the office of the town clerk in Eden. Bar Harbor Water Company."

Other material facts stated in the opinion.

Hale and Emery, for the plaintiff.

The company had authority under their charter to take lands for dams, for reservoirs, for pipes, and for aqueducts — these four, and no more. In order to secure the right they must "cause surveys to be made for the purpose of locating their dams," &c. and make plans and give notice. This was clearly to give notice to the land owner. The survey was to be specific and for a single object, whether dam, reservoir, pipe or aqueduct. It was not to be general, and the company to build dams, reservoirs, pipes and aqueducts *ad libitum*, within the lines. The plan was to be accurate, specific and not general, so that the owner might know just how much and what land was taken, and for what purpose. He might not object to a pipe but might object to a reservoir.

The notice must be equally specific. It must be a "notice of such location." It must disclose the place where, and especially the particular purpose. *Spofford* v. *B. & B. R. R. Co.* 66 Maine, 26.

The statute does not say, "notice that a survey had been made," "notice of plan," but "notice of such location." The notice was to be a sort of a return, a publication of all the facts.

The notice given does not state what nor whose land was taken, nor for what purpose. It says: "for the purpose of erecting thereon a reservoir or reservoirs, and such other works as they deem necessary." It is not confined to the purposes for which they were authorized to take land, nor for such works as were really necessary, but all the works that the company might deem necessary. This is a very cavalier way of disposing of private rights. *Glover* v. *Boston*, 14 Gray, 282; *Wilson* v. *Lynn*, 119 Mass. 174; *W. P. Co.* v. *Allen*, 120 Mass. 352; Lewiston Case, 30 Maine, 19; *P. S. & P. R. R. Co.* v. *Co. Com.* 65 Maine, 292; *Hazen* v. *B. & M. R. R. Co.* 2 Gray, 574; *Pinkerton* v. *B. & A. R. R. Co.* 109 Mass. 527; *Kohlhepp* v.

W. Roxbury, 120 Mass. 596; *Lund* v. *New Bedford*, 121 Mass. 286; *Drury* v. *R. R. Co.* 127 Mass, 571.

Counsel further ably argued other questions presented by the case, citing: Pierce on Railroads, 254, 163; *Jeffries* v. *Swampscott*, 105 Mass. 535.

To the point that authority was not well given by the charter to take land, counsel cited: *Perry* v. *Wilson*, 7 Mass. 395; *Thacher* v. *Bridge Co.* 18 Pick. 501; *Lowell R. R.* v. *Salem*, 2 Gray, 35; *Haverhill Bridge* v. *Co. Com'rs*, 103 Mass. 120; *Conn. River R. R. Co.* v. *Co. Com'rs*, 127 Mass. 50; *Cushman* v. *Smith*, 34 Maine, 247; *Lee* v. *Pembroke*, 57 Maine, 488; *Sanborn* v. *Belden*, 51 Cal. 266; *Vilhac* v. *Stockton & Ione R. R. Co.* 53 Cal. 208; *Bohlman* v. *Green Bay*, 30 Wis. 105; *Hooker* v. *New Haven & North Hampton Co.* 14 Conn. 146; *Ash* v. *Cummings*, 50 N. H. 591; Cooley's Const. Lim. 562.

A. P. Wiswell, for the defendants, cited: *Stewart* v. *Polk Co.* 1 Am. R. (27 Iowa) 238; Cooley's Const. Lim. 182, 532, 560; Field on Corp. § § 441, 479; *Haverhill Bridge Co.* v. *Co. Com'rs*, 103 Mass. 120; *Railroad Co.* v. *Turner*, 31 Ark. 494 (25 Am. R. 564); *Cushman* v. *Smith*, 34 Maine, 247; *Nichols* v. *R. R. Co.* 43 Maine, 356; *Davis* v. *Russell*, 47 Maine, 443; *Perkins* v. *R. R. Co.* 72 Maine, 95.

APPLETON, C. J. There is nothing better settled than the power of the legislature to exercise the right of eminent domain, for purposes of public utility. This may be done through the agency of private corporations, although for private profit when the public is thereby to be benefitted. It is upon this principle that private corporations have been authorized to take private property, for the purpose of making public highways, railroads, canals, erecting wharves and basins, establishing ferries, &c. The use being public, the determination of the legislature that the necessity, which requires private property to be taken, exists, is conclusive. To constitute a public use, it is not necessary that the entire commnnity, or even a considerable portion of it should directly participate in the benefits to be derived from the purpose for which the property is taken. Accordingly an act incorporat-

ing a company to take springs, lands and rights, for the purpose of supplying a village with pure water, subject to the payment of damages as provided by law, in the case of highways, was held constitutional. So, from considerations affecting the health and comfort of a dense population, private property may be taken for a park or to prevent a nuisance dangerous to the health of the community, and the nuisance be abated. *Talbot* v. *Hudson*, 16 Gray, 417; *Lumbard* v. *Stearns*, 4 Cush. 60; *Holt* v. *Somerville*, 127 Mass. 408; *Bancroft* v. *Cambridge*, 126 Mass. 438.

The property of the plaintiff was taken for public uses. The taking was required by public exigencies. It was taken under and by virtue of an act of the legislature. It remains to be seen whether the defendants have made out a justification under their charter.

1. The notice given was sufficient. It was duly published in the Ellsworth American, under the dates of April 7 and 14, 1881. The plan of the land taken of the plaintiff, shows a survey of the lot in controversy to have been made on the twenty-fifth of the preceding March. The notice recites that the defendant had "caused a survey of a certain lot of land to be made, and the plan thereof to be filed in the office of the town clerk of Eden, as by law required." It goes on to add, that, "the land is situated upon the hill known as Cunningham's Hill, (at Bar Harbor) and was formerly owned, or supposed to be owned, by A. P. Cunningham or others. For further particulars, interested parties are referred to the plan in the office of the town clerk in Eden. Bar Harbor Water Company."

It is true this notice is dated April 4. Its publication was on April 7. It was effective as a notice only from that date. But on that date the plan referred to was in the office of the town clerk. Any one interested might then have seen it, and before that date there was no notice. The reference to a plan on file would seem to be sufficient, especially as the plan when filed is particularly designated. *Stone* v. *Cambridge*, 6 Cush. 271. In

Wilson v. *Lynn*, 119 Mass. 174, GRAY, C. J., remarks: "If the plan had been referred to it would have been sufficient."

The objection is taken that while the notice states that the survey was made "for the purpose of erecting thereon a reservoir or reservoirs," it is added, "and such other works as they may deem necessary." The purpose is a legitimate one. The other works deemed necessary are those necessary to carry into effect the general object of the corporation. The meaning is obvious. The necessity is what is required for the effectiveness of the reservoir. It matters not to the land owner, whether his land is taken for dams, reservoirs or pipes, nor when a lot is taken, is it requisite that the notice should set forth what specific portion of it is to be used for one purpose and what for another. The corporation will determine on what part of the land taken and necessary, the dams, reservoirs or pipes shall be located as will best subserve the objects they have in view.

2. The description of the land taken is sufficient. It describes the lot as on Cunningham Hill, in the village of Bar Harbor, in the town of Eden, and states that it was formerly owned by Anson P. Cunningham or others. It gives monuments at the corners and the length of line, and the courses by compass. Accompanying this is a plan. A deed adopting this description and placed on record, would be notice to the public. It is not necessary to consider whether or not the description of other lands taken is sufficient. This litigation regards only the rights of this plaintiff.

3. The survey and plan being made for the company, and placed by their agent on file, in the town clerk's office, for public inspection by all parties interested, the certificate of the town clerk thereon, and his testimony of that fact must be deemed sufficient evidence of the due filing of such plan and survey.

4. The defendants entered upon the premises in controversy, under and by virtue of their charter. They made the necessary survey. They gave the required notices. The survey was made, the notice given and the entry and subsequent occupation were under the powers conferred by their charter. It was held in *Cushman* v. *Smith*, 34 Maine, 247, that the "clause in the consti-

tution which prohibits the taking of private property for public use, was not designed to operate, and it does not operate to prohibit the legislature from authorizing an exclusive occupation of private property, temporarily, as an incipient proceeding to the acquisition of a title to it, or to an easement in it." This is precisely what and all that has been done.

But it is urged that compensation should precede the taking, and that no adequate provision is made for compensation.

The constitution, while prohibiting the taking for private property for public uses, does not require that the payment of such compensation should precede its taking. *Cushman* v. *Smith*, 34 Maine, 247; *Nichols* v. *Som. & Ken. R. R. Co.* 43 Maine, 356; *Davis* v. *Russell*, 47 Maine, 443; *Cairo & Fulton R. R. Co.* v. *Turner*, 25 Am. Rep. 564; 31 Ark. 494.

The mode and manner by which the individual, whose property is taken for public use, shall obtain compensation, is to be determined by the legislature. It cannot be determined in any other way. "The legislative power is left entirely free from embarrassment," observes SHEPLEY, C. J., in *Cushman* v. *Smith*, before cited, "in the selection and arrangement of the measures to be adopted to take private property, and appropriate it to public use, and to cause a just compensation therefor."

The provision for compensation is found in section three of the defendants' charter. It is precisely the one afforded where land is for highways and railroads. It is the one uniformly adopted when private property is required by some public exigency. If deemed sufficient in those cases, it must be deemed equally so in others. *Cushman* v. *Smith*. "If," observes ENGLISH, C. J., in *Cairo & Fulton R. R. Co.* v. *Turner*, 25 Am. Rep. 564, "it be objected that the corporation might not pay the judgment rendered or the award of damages, and it and its securities might be insolvent, and thereby compensation might be defeated; it may be answered that the land owner is not divested of his title, and the right to the easement does not vest in the corporation until the damages awarded are paid; and besides the owner's paramount claim upon the land, chancery, on his timely application, would, as we have seen, restrain the

corporation, by injunction, from the use of the property, until it renders compensation."

5. The alleged trespasses complained of were committed on the first of May, 1881. This suit was commenced on the ninth of September, following. That the plaintiff had knowledge of the defendants' proceedings is evidenced by the institution of this suit. He has made no attempt to obtain compensation in the mode provided by statute. He can yet do it. He cannot maintain trespass within the time in which application may be made for determining the damages for the land taken, and before making such application. *Nichols* v. *Som. & Ken. R. R. Co.* 43 Maine, 356; *Davis* v. *Russell*, 47 Maine, 443. The action is not maintainable.

Plaintiff nonsuit.

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

ROSCOE M. JORDAN

vs.

JAMES P. JORDAN, and CHARLES GAY and others, trustees.

Androscoggin. Opinion April 6, 1883.

Trustee process. Contingent claims. Payment.

Where the defendant agreed with the alleged trustees to sell their goods for a certain specified commission upon the goods sold and paid for, the trustees cannot be charged for the commissions on goods sold where the price has not been paid over to the trustees.

The alleged trustees on a December afternoon directed their book-keeper to send the defendant a check for an amount due him. The check was thereupon made. At eight o'clock in the evening the writ was served upon the trustees. They notified the book-keeper the next morning and were informed by him that he had mailed the check by the mail which closed at fifteen minutes past seven that morning, having no knowledge of the trustee process. The check was duly presented and paid. *Held*, that the trustees were not chargeable for the amount thus paid.

ON REPORT.

The report consists of the award of the referee and the evidence therein referred to:

[Award.]

"The case was submitted to me, as referee, upon the disclosure of the alleged trustees and the letter of Henry Little, P. M. dated April 6, 1882, (which are hereby made part of this report), to determine the liability both of the principal defendant and of the trustees; and I report that the trustees be charged in the sum of $80.84, less the costs legally taxable for the trustees, to be taxed by the court.

"I also report and award conditionally that the trustees be charged in the further sum of $54.82 on account of the payment of December 19; — and also in the additional sum of $300, for commissions on goods sold by the principal defendant before the services of the writ, on which the collections were not made by the trustees till after the dates of the services of the writ.

"This conditional award of $54.82 — and $300, is made in each instance subject to the opinion of the law court upon the legal questions involved; — and neither of said sums is to be allowed against the trustees, unless upon the foregoing evidence the law court shall decide as matter of law that the trustees are legally chargeable therefor. By agreement of the parties these questions are reserved for the determination of the law court.

"By agreement of parties, also, judgment on this award is to be rendered for the plaintiff, without costs, in the same amount as that for which the trustees shall be charged by the decision of the law court, less such costs as the trustees shall be legally entitled to, at the date of the judgment.

"But no execution shall issue on said judgment within one week from the time when it shall be finally rendered, and if the amount thereof is paid within that week the action shall be entered 'Neither Party.'"

It appeared by the disclosure that the books at the time of the service of December 19, were kept by the book-keeper at his

house, and the writ was served on the trustee that evening at his residence.

Other material facts are stated in the opinion.

Strout and Holmes, for the plaintiff, contended that the trustees were chargeable for the amount of the check sent to the defendant on the twentieth of December, 1881. The check was prepared by the book-keeper in the evening, at his house, where he kept the books, and it was the duty of the trustees to have made the service of the writ known to him that evening. It was only a ten minutes' walk. *Williams* v. *Marston*, 3 Pick. 65; *Spooner* v. *Rowland*, 4 Allen, 485; *Williams* v. *Kenney*, 98 Mass. 142; *Lyon* v. *Russell*, 72 Maine, 519; *Dennie* v. *Hart*, 2 Pick. 204.

The contingency which must attach to a debt in order to discharge the trustee "is not a contingency which may often exist before a statement of an account or other business transaction, whether anything may be found due from the trustee to a principal, who has an absolute right to call upon the trustee to render the account and make the settlement, but is a contingency which may prevent the principal from having any claim whatever, or right to call the trustee to account or settle with him." *Cutter* v. *Perkins*, 47 Maine, 557; *Dwinel* v. *Stone*, 30 Maine, 384.

There was no more "contingency" of the kind intended by the statute, in the case at bar, than in *Cutter* v. *Perkins*, *supra*. Certain proceedings had to be had to determine the amount due, and to fix the time when the commissions would be payable. Nor is this doctrine confined to the case of a legal representative summoned as trustee of an heir, or legatee, for the same principle holds, and there was the same contingency, without that element in *Wheeler* v. *Bowen*, 20 Pick. 563. Nor was it more contingent than the payment for mats sold and to be paid for only when the vendee should have sold again, which was held in *Stone* v. *Hodges*, 14 Pick. 81. Nor than, the question whether anything would be left from stock assigned to the cashier of a bank, to pay debts. *N. E. Mar. Ins. Co. v. Chandler*, 16 Mass. 274. Nor than the choses in action of a wife not yet reduced to possession by the husband, but attached as his property. *Holbrook* v. *Waters*, 19 Pick. 354. The contingency is "an uncertainty

whether anything will ever come into the hands of the trustee, or whether he will ever be indebted." Here it was established that the trustee was indebted at least when the third service was made, beyond all question, and the only remaining question was for how much. *Thorndike* v. *De Wolf*, 6 Pick. 120; *Davis* v. *Davis*, 49 Maine, 282; *Williams* v. *Androscoggin R. R. Co.* 36 Maine, 201; *Wilson* v. *Wood*, 34 Maine, 123; *Libby* v. *Brainard*, 63 Maine, 65; *Faulkner* v. *Waters*, 11 Pick. 473.

Drummond and Drummond, for the trustees, cited: *Williams* v. *A. & K. R. R. Co.* 36 Maine, 201; *Davis* v. *Davis*, 49 Maine, 282; *Bryant* v. *Erskine*, 50 Maine, 296; *Libby* v. *Brainard*, 63 Maine, 65; *Bowker* v. *Hill*, 60 Maine, 172; *Larrabee* v. *Walker*, 71 Maine, 441; *Spooner* v. *Rowland*, 4 Allen, 485; *Williams* v. *Kenney*, 98 Mass. 142; *Lyon* v. *Russell*, 72 Maine, 519; *Williams* v. *Marston*, 3 Pick. 65.

APPLETON, C. J. The defendant was employed by the trustees in effecting sales of their goods. He was to have commissions as he should sell and as the goods should be paid for. He was entitled to pay only after the payment of his principals. If they were never paid they lost their goods and the defendant lost his commissions. The trustees in no event lost their goods and in addition commissions on the sales of goods, for which no payment was ever made. The defendants' claim for compensation accrued only upon and after their payment. Whether the goods he sold would ever be paid for was a matter of contingency. The defendants' right to commissions depended on that contingency. "The contingency referred to in the statute," observes TENNEY, C. J., in *Cutter* v. *Perkins*, 47 Maine, 569, . . . "is a contingency which may prevent the principal from having any claim whatever, or right to call the trustee to account or settle with him." Such is the contingency here.

The defendant may never have a claim enforceable against the trustee. This is not a debt due in the present and payable in the future, for there may never be a debt. The trustees cannot be charged for the sum of $300 referred to in the case.

On December 19, 1881, there was due the defendant from the trustee the sum of $54.82 for commissions on sales when payments

therefor had been made. The trustee on that day advised his clerk of such fact and directed him to make and transmit a check for that amount to the defendant. The clerk made the check that day and enclosed it in a letter, which was placed in the post office before the mail closed the next morning, which was 7.15 A. M.; the train left at 7.23 A. M.

On December 19, 1881 this writ was served on the trustee at 8 o'clock in the evening by reading the same to him. The clerk was not notified of the service of the writ until after he had deposited the check in the post office and the mail had left. The check was duly presented and paid.

The question to be determined is whether the trustee is chargeable for the amount of this check. We think he is not. The clerk did his duty. The trustee is in no fault. He had a right to suppose his clerk would do as he was directed, as in fact he did. He was not legally bound after 8 o'clock in the evening or before 7 o'clock in the morning in the month of December to go to his clerk's who lived a half mile or more from him to countermand his order and stop the transmission of his funds. He is guilty of no negligence. The trustee should be discharged for this amount. *Lyon* v *Russell, and trustee*, 72 Maine, 519; *Spooner* v. *Rowland*, 4 Allen, 485; *Williams* v. *Kenney*, 98 Mass. 142.

The trustee is chargeable only for $80.84, about which there is no dispute.

Trustee charged for $80.84 less his legal costs, and judgment for the plaintiff according to the terms of the report.

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

GEORGE L. SNOW *vs.* LEANDER WEEKS.

Knox. Opinion April 7, 1883.

Juror. Taxes. Warrant to arrest for taxes.

A judge may in his discretion exclude from the panel a juror who is not legally disqualified to sit; exceptions do not lie to the act. He may put a legal juror off, but cannot allow an illegal juror to go on.

The plaintiff having been arrested for his taxes by a sheriff, under a warrant issued against him by the defendant, a city collector and treasurer, sued the defendant for the arrest, and the defendant justified himself by his warrant. By the tax-act interest upon taxes was collectible after a date fixed therefor by a vote of the city. *Held:* That an assertion in the warrant, that January 1, 1878, was the date fixed by the city, is *prima facie* evidence of the fact.

In such a suit the warrant is sustained by the ordinary presumption of correctness which attaches to the proceedings of officers in the performance of a public trust; it *prima facie* proves itself.

ON exceptions and motion for new trial by defendant.

Action of trespass against the treasurer and collector of taxes of the city of Rockland for the year 1877. The verdict was for plaintiff for $493.75.

The opinion states the material facts.

J. O. Robinson and *A. P. Gould*, for the plaintiff, contended that the defendant's justification failed because there was no evidence of any vote of the city of Rockland fixing a time when or within which the taxes for 1877 were payable. R. S., 1871, c. 6, § § 93, 153; stat. 1876, c. 92.

Two things are required by the statute of 1876; (1) that by an independent vote, the city or town shall first fix a time within which taxes shall be paid; (2) that the vote imposing interest after a certain time to be fixed in the same vote shall be passed if at all "at a meeting when money is appropriated or raised."

The statute clearly contemplates two independent votes. The city cannot impose interest until it has first fixed a time within which the tax shall be paid.

No vote of the city council, whatever, was put into the case and the authority for issuing any warrant at all against the plaintiff by the defendant, therefore, fails. No vote authorizing interest was introduced, the warrant was void for that reason.

D. N. Mortland, for the defendant, cited: 2 Greenl. Evidence, 629; 1 Greenl. Evidence, 79; *Call* v. *Pike*, 68 Maine, 217; *Nowell* v. *Tripp*, 61 Maine, 426; *Bethel* v. *Mason*, 50 Maine, 501; *Judkins* v. *Reed*, 48 Maine, 386; *Caldwell* v. *Hawkins*, 40 Maine, 526; R. S., c. 6, § § 147 – 153; *Chegaray* v. *Jenkins*, 5 N. Y. 376; *Abbott* v. *Yost*, 2 Deino, 86; *Savacool* v. *Boughton*, 5 Wend. 170; *Bailey* v. *Mayor*, 3 Hill, 531; *Pritchard* v. *Keefer*, 53 Ill. 117.

PETERS, J. At plaintiff's request, the presiding judge excluded from the panel several jurors from the city of Rockland, upon the assumption that the city might have some interest, or the jurors some bias, in the result of the suit. It is denied by the defendant that such bias or interest existed. But it matters not whether it existed or not. It was a matter for the exercise of the discretion of the judge. To his ruling upon such a question exceptions do not lie. He may put off a juror when there is no real and substantial cause for it. That cannot legally injure an objecting party as long as an unexceptionable jury is finally obtained. It is quite a different question where a judge puts a juror upon the panel who cannot sit. He may put a legal juror off. He cannot allow an illegal juror to go on. *Ware* v. *Ware*, 8 Maine 29; *Shea* v. *Lawrence*, 1 *Allen*, 167.

Upon another point, however, the exceptions must be sustained. The action is for an arrest and imprisonment. A *prima facie* case was made out for the plaintiff by proving that he was arrested at the defendant's request. The defense set up at the trial was, that the plaintiff was arrested and held by an officer, by virtue of a warrant issued against him by the defendant as the treasurer and collector of the city of Rockland, for a balance of taxes due from him. The warrant required the sheriff to collect interest upon the taxes from January 1, 1878. By the tax-act, interest was legally collectible upon taxes after such date as

the city by its vote should fix for their payment. The warrant clearly enough asserts that the date fixed by a vote of the city was January 1, 1878. No evidence, however, *aliunde* the warrant, was introduced to prove that such vote was passed, and the judge ruled that, for the want of such proof, the justification pleaded by the defendant was not made out. This ruling was wrong.

The warrant *prima facie* proves itself. It is sustained by the ordinary presumption of correctness which attaches to the proceedings of officers. The justification was *prima facie* made out, when the warrant was presented and the officer's action under it proved. The burden was then cast upon the plaintiff to show that the warrant was erroneously issued. The facts upon which the warrant pretends to be founded were as accessible to the plaintiff as to the defendant. Their existence or non-existence could easily be shown by either party. Public policy requires the plaintiff to disprove the official statement, if he is not satisfied of its correctness. After the warrant is produced in justification of the arrest of the plaintiff, he can be in no better condition than if the action were instituted against the defendant for issuing an irregular and unauthorized warrant, and in such case the illegality of the warrant must necessarily be proved. It would hardly be pretended that a clerk of our courts would be liable to a person against whom he issues an execution, without proof that the execution was falsely or fraudulently issued. Very much the same legal policy requires that the collector's mandate shall be to him a *prima facie* protection.

The law seeks to uphold official acts. In all reasonable cases, it presumes that officers have acted legally. It affords ample aid and encouragement to an official who is honestly endeavoring to execute a public trust. We think there are excellent reasons for the doctrine.

The authorities in support of this declaration of the law are quite uniform and abundant. A few only need be cited. 2 Whar. Ev. § § 1318, 1319, and cases in notes. 2 Best Ev. (Wood's ed.) § 365, and the numerous cases and learned review in note. *Bruce* v. *Holden*, 21 Pick. 187; *Lothrop* v. *Ide*, 13 Gray, 93.

"A public officer is entitled to reasonable intendments in his favor, the same as are applied to proceedings in court. *Stevens* v. *Kent*, 26 Vt. 503. "There is always a presumption that public officers have not proceeded wholly without authority." *Thornton* v. *Campton*, 18 N. H. 26. Where a public officer has done an act which is illegal, if certain preliminary conditions have not been complied with, the presumption in many cases will be in favor of compliance. *Jackson* v. *Cole*, 4 Cow. 587; *Jackson* v. *Belknap*, 12 Johns. 96; *Wood* v. *Morehouse*, 45 N. Y. 368.

An examination of the cases cited will show the tendency of the authorities upon questions analogous to the case before us. They lead us to the conclusion, that, without opposing evidence the defendant was justified by the warrant issued by him.

Exceptions sustained.

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

ARTHUR C. FROST *vs.* HENRY I. HOLLAND.

Cumberland. Opinion April 10, 1883.

Evidence. U. S. commissioner's record. Probable cause.

A paper certified by a commissioner of the United States circuit court, in this state, with his seal and signature, as a true copy of the original record in a proceeding within his jurisdiction, is properly authenticated, and admissible in evidence without oath.

In an action for malicious prosecution, proof that the plaintiff was discharged by the examining magistrate for want of probable cause to believe him guilty, makes a *prima facie* case for the plaintiff, upon the question of the want of probable cause.

ON EXCEPTIONS and motion.

Case for damages for an alleged malicious prosecution, before a United States commissioner, December 24, 1880. The writ

was dated August 1, 1881. The verdict was for plaintiff, for $432.50.

The opinion states the material facts.

Locke and Locke, for the plaintiff, cited: *Olmstead* v. *Partridge*, 16 Gray, 383; *Sayles* v. *Briggs*, 4 Met. 421; *Stone* v. *Crocker*, 24 Pick. 87; *Humphries* v. *Parker*, 52 Maine, 505; *Page* v. *Cushing*, 38 Maine, 526; *Merriam* v. *Mitchell*, 13 Maine, 439; Bigelow on Torts, (Student's Ed.) 82, 78; 1 Hill'd Torts, 446; 2 Starkie Ev. 915, 913, 914, 917; 3 Mason, 102; *Pullen* v. *Glidden*, 66 Maine, 202; *Speck* v. *Judson*, 63 Maine, 207; Butler's Nisi Prius, 14; 2 Greenl. Ev. § 456; *Tompson* v. *Mussey*, 3 Greenl. 305.

Clarence Hale, for the defendant.

There is no want of probable cause shown. Probable cause has been clearly defined in *Bacon* v. *Towne*, 4 Cush. 217, and in many other cases. Perhaps the best definition, quoted most widely by legal writers on the subject, is found in *Lacy* v. *Mitchell*, 23 Ind. 6.

If defendant honestly believed that plaintiff did pass it, and the circumstances were sufficiently strong to give him a reasonable ground of such suspicion and belief, then that makes such a case of probable cause as will be a perfect defence. *James* v. *Phelps*, 11 Ad. & El. 483; *Hall* v. *Suydam*, 6 Barb. 83; *Swain* v. *Stafford*, 4 Ired. 392; *Humphries* v. *Parker*, 52 Maine, 502; *McGurn* v. *Brackett*, 33 Maine, 331; Bigelow's Leading Cases in Tort, p. 198; The Central Law Journal, vol. 14, pp. 63, 86; *Farnham* v. *Feeley*, 56 N. Y. 451; Al. Law Jour. vol. 22, p. 114; *Cloon* v. *Gerry*, 13 Gray, 201; *Kidder* v. *Parkhurst*, 3 Allen, 393; Bigelow on Torts (Student's Series), 77, 78, and cases cited; *Stewart* v. *Sonnebon*, 8 Otto, 187; *Farnham* v. *Feely*, 56 N. Y. 451; *Besson* v. *Southard*, 10 N. Y. 236.

This whole question of probable cause has been ably and exhaustively discussed in the Central Law Journal, vol. 14, pp. 62 and 82, in articles written by John D. Lawson. These articles are full of citations and are a digest of principal decisions on the subject.

The rule which makes the certified copy of the record of a justice of the peace admissible, does not apply to the records of a United States commissioner.

1st. Because justices of the peace are held to be courts or judges of record. "They are required, by statute to keep a record of all their judicial proceedings, both in civil and criminal cases." The existence of such record is recognized and its production required, in various cases; "and many of the cases tried before them are not mere preliminary examinations leading to other proceedings, but judgments in their strict sense." *Thayer* v. *Commonwealth*, 12 Met. 9.

2nd. In every case in which certified copies of United States, and state officials have been admitted, it has been upon the ground that there was a prescribed duty and obligation to keep such records. *U. S.* v. *Percheman*, 7 Pet. 52.

Thus the register of letters, received at the post office, is an official record authorized by law to be kept, and is, therefore, admissible in evidence. *Gurney* v. *Howe*, 9 Gray, 404. And in *Evaston* v. *Gunn*, 19 Alb. Law J. 317, the admission of a record kept by a person employed by the United States signal service at Chicago was objected to upon the trial of an action; because there was no law authorizing such records to be used; and because it was not competent testimony. But the court held the said records admissible on the ground, that "they are of a public character, kept for public purposes, and so immediately before the eyes of the community, that inaccuracies, if they should exist, could hardly escape exposure." *Dyer* v. *Snow*, 47 Maine, 254.

SYMONDS, J. This is an action upon the case brought to recover damages for an alleged malicious prosecution of the plaintiff by the defendant, before a commissioner of the circuit court of the United States, upon the charge of passing a counterfeit trade dollar. The first exception is to the admission of a certified copy of the original record, "unsupported by the testimony of the commissioner." This copy, including the criminal complaint against the plaintiff, the warrant, return of arrest, recognizance, proceedings, and his final discharge for

want of probable cause to believe him guilty, is certified under the hand and seal of the commissioner as a true copy of the original record. This official certificate of the commissioner that in point of fact such a record exists is without contradiction in the case, and the same fact is assumed in the manner in which the exception itself is stated. The exception is to the admission of the copy without the oath of the commissioner; the claim being that the original record proved by his oath was required and the copy was not admissible.

In *Sawyer* v. *Garcelon*, 63 Maine, 25, it is said, "in most, if not all, of the courts in this country, copies of the record properly authenticated are received as sufficient in all cases; a practice said to be established either by immemorial usage or early statutes to that effect."

"The rule may be considered as settled, that every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy." 1 Greenl. Ev. § 484.

Substantially the same rule is stated in Whart. Ev. § 108, and reference is made to "the growing tendency, even at common law, to permit the records to be represented by exemplifications, or by other authenticated copies."

In reference to the judgments of inferior courts, it is said in 1 Greenl. Ev. § 513, that "where the course is to record them, which will be presumed until the contrary is shown, the record, or a copy properly authenticated, is the only competent evidence." *State* v. *Bartlett*, 47 Maine, 402, gives the same rule.

The method of procedure by commissioners of the circuit court in arresting, imprisoning and bailing offenders against the laws of the United States, is required to be in conformity with "the usual mode of process against offenders" in the state where they are found. U. S. Rev. Stat. § 1014. In this state, committing magistrates are required to keep a record of their proceedings. R. S., c. 83 § 24; c. 133 § § 13, 17; *Thayer* v. *Commonwealth*, 12 Met. 9. We think it was the public duty of the commissioner to keep a record of such proceedings as issuing warrants upon criminal complaints, imprisoning persons arrested or admitting

them to bail, or discharging them upon hearing. The seal of office of such a commissioner is recognized by the statute. U. S. Rev. Stat. § 1778. "In proving a record by a copy under seal, the courts recognize, without proof, the seal of state, and the seals of the superior courts of justice, and of all courts established by public statutes; and by parity of reason it would seem that no extraneous proof ought to be required of the seal of any department of state, or public office established by law, and required or known to have a seal." 1 Greenl. Ev. § 503; Whart. Ev. § § 319, 321, 695.

The papers which were received in evidence, certified by the commissioner with his official seal and signature as true copies of the original record, in a proceeding within his jurisdiction, were properly authenticated, and admissible without oath.

In an action for malicious prosecution, the want of probable cause will not be inferred from the mere failure of the prosecution, nor from a mere acquittal upon trial, but the weight of authority seems to be in accordance with the ruling, that proof that the plaintiff was discharged by the examining magistrate, for want of probable cause to believe him guilty, makes a *prima facie* case for the plaintiff in this respect, so that the defendant is called upon to offer proof to the contrary. 2 Greenl. Ev. § 455; 1 Am. Lead. Cases, 268; Cooley on Torts, 184.

The motion for a new trial on the ground that the verdict is manifestly against the evidence, or so excessive as to indicate an improper motive or misapprehension on the part of the jury cannot prevail. The plaintiff was prosecuted for a serious offence, for which heavy penalties are provided, when in fact no crime had been committed. The jury were not in fault in finding that the damages, necessarily resulting from this public accusation, were more than nominal or trifling, and it was for them to decide whether, under the rules of law relating to this class of actions, the evidence afforded the defendant any legal excuse for prosecuting the plaintiff for uttering a counterfeit coin, when the fact was that the coin was genuine.

Motion and exceptions overruled.

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

WILLARD C. LOW *vs.* INHABITANTS OF WINDHAM.

Cumberland. Opinion April 10, 1883.

Pleading. Ways. Notice.

Special pleading in defense is not required to raise the question of the sufficiency or insufficiency of the notice of the injury given by the plaintiff to the town in an action for damages received from a defect in a way.

A person injured by a defect in a way gave the following notice: "North Windham, November 28, 1879. To the selectmen of Windham: This is to notify you that I shall claim damage for injuries which I received in going through the bridge at Great Falls, Windham, on November 15. Willard Low." *Held:* That if the notice could be upheld in other respects it fails for want of a specification of the nature of the plaintiff's injuries.

ON EXCEPTIONS from the superior court.

Action to recover damages from a defect in a highway in the defendant town November 15, 1879.

The following is the only written notice given by the plaintiff to the defendants of the defect and accident, and his claim for damages therefor: 75 113 94 235

"North Windham, November 28, 1879.

"To the selectmen of Windham.

"This is to notify you that I shall claim damage for injuries which I received in going through the bridge at Great Falls, Windham, on November 15. Willard Low."

The presiding justice ruled *pro forma* that the notice was sufficient.

The writ was dated November 3, 1880.

The verdict was for plaintiff for $935.

M. P. Frank, for the plaintiff.

This notice furnished the defendants with all the essentials, and was therefore all that the law requires.

The principle was fully established in the case of *Blackington* v. *Rockland*, 66 Maine, 332, and the reasoning of the court in that case is so concise and clear that no better language could be found in which to express the plaintiff's argument in this case than the language used by the court on page 334 of that case.

It was not necessary for the plaintiff to set forth his claim for damages in dollars and cents; *Sawyer* v. *Naples*, 66 Maine, 455. And aside from this the notice is quite as full and explicit as the notice proved in *Blackington* v. *Rockland*, *supra*.

This notice not only fulfils the spirit and purpose of the statute, but its literal requirements in that: It is in writing. It sets forth distinctly his claim for damages. It specifies the nature of his injuries, namely personal injuries, bodily injuries, injuries which he received,— not injuries to his horse, his wagon, or to any of his property but to his person, and complies in this respect with the requirements of the law as construed in *Blackington* v. *Rockland*. The nature of the defect, namely, a weak bridge, a bridge of insufficient strength. It was not a covered bridge, and the words going through the bridge are used in the sense of breaking through. Words are to be interpreted in the light of the surrounding circumstances. Chitty on Contracts, c. 1, § 2–4, tenth Am. ed. p. 76. *Eaton* v. *Smith*, 20 Pick. 150.

It gives the location of the defect, the bridge at Great Falls, Windham. This bridge was publicly known as the "Great Falls bridge."

The defendants set up no such defence by their pleadings as a want of written notice, or the insufficiency of the notice given.

The written notice having been given, if defendants would take advantage of any defect in the notice they should have set it up in their pleadings.

The law relative to taking advantage of the statute of limitation as a defence furnishes a parallel. The statute declares that no action shall be brought, etc. unless within six years, etc. But although the action is brought after the time limited, and when the proofs are exhibited it appears that the statute of limitations would be a bar, still if such defence is not set up by the pleadings,

it will be deemed to have been waived. Spaulding's Practice, p. 526, § 31. *Longfellow* v. *Longfellow*, 54 Maine, 240.

So in this case, whatever may be the law as to the power of a town or city officer to waive a written notice, the pleading is an act of the town, of the defendants themselves, not of their officers, and surely they had a right to waive it if they saw fit, it being a statute requirement made for their benefit only.

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

SYMONDS, J. The statutes, 1874, c. 215, 1876, c. 97 and 1877, c. 206, which require the plaintiff in an action like this to have given notice to the town of the fact that he had received an injury upon the highway, within a certain time thereafter and with certain particulars in regard to it, have been considered by the court in the following cases: *Jackman* v. *Garland*, 64 Maine, 133; *Blackington* v. *Rockland*, 66 Maine, 332; *Sawyer* v. *Naples*, 66 Maine, 453; *Perkins* v. *Oxford*, 66 Maine, 547; *Veazie* v. *Rockland*, 68 Maine, 511; *Bradbury* v. *Benton*, 69 Maine, 194; *Hubbard* v. *Fayette*, 70 Maine, 121; *Wagner* v. *Camden*, 73 Maine, 485; *Rogers* v. *Shirley*, 74 Maine, 144.

In all of these cases, it seems to have been assumed to be an essential part of the plaintiff's case, in such an action, to prove that the notice required by the statutes was given. The language of the opinions would in many respects be irrelevant, if proof of the notice were not regarded as one of the conditions of the right of recovery. Notice to the municipal officers according to the statute is expressly stated in *Hubbard* v. *Fayette* to be a fact which the plaintiff must prove in order to entitle him to recover, and the precise question is decided by entering the nonsuit on the ground that the notice was insufficient, in accordance with the ruling at *nisi prius* and with the stipulations of the parties in the report. *Wagner* v. *Camden* proceeds upon the same ground. There is no intimation that special pleading is required in defense in order to raise that issue. If proof of the notice is wanting, the plaintiff's case fails. Notice must have been given, and that fact must be averred and proved by the plaintiff, to sustain the action. This is the clear conclusion from the authorities, and the only ground upon which they can be explained.

If the notice given in this case could be upheld in all other respects, it fails for want of a specification of the nature of the plaintiff's injuries. All that is said in *Blackington* v. *Rockland* against a strict construction of notices of this class is true and important. It was right to hold there that notice of an injury to the plaintiff's horse was notice of the respect in which the plaintiff was injured. It was a notice of damages to property, specifying the property. But it is impossible to hold that the words, "I shall claim damage for injuries which I received," contain a specification of the nature of the plaintiff's injuries. They might possibly be construed to refer to bodily injuries, as distinguished from damage to property, but we cannot regard the statutory requirement of a notice, "specifying the nature of his injuries," as fulfilled by a notice to the town that the plaintiff has been injured in his person. That would be a construction opposed to the ordinary force of the words, "to the common meaning of the language." R. S., c. 1, § 4, I. The law has not been so understood or administered since its enactment. There are many intimations in the cases cited against the sufficiency of such a notice.

In *Hubbard* v. *Fayette*, the first notice given is passed over by the court as "fatally defective in several respects;" and yet the only material point in which it differs from the second notice more fully considered by the court, is that it makes claim for damages "for injuries which my wife received," without further specification. It must have been this failure to specify the nature of the wife's injuries to which the court referred when it treated the first notice as more clearly defective than the second.

It is true that full and exact details of the personal injury are not required, and that the plaintiff is not precluded from recovering for injuries which are not known, and, therefore, cannot be specified at the date of the notice, but which manifest themselves later. The object of the notice in this respect is not to limit the plaintiff's right of recovery, but to give information to the town, by a general statement such as it is practicable for the plaintiff to make at the time, of the nature of the injuries for which he claims to recover damages. This is as important a requirement of the statute as it is that the plaintiff should not omit to set

forth his claim for damages. *Wagner* v. *Camden, supra.* When the main advantage which the town derives from the notice, namely, an early opportunity to investigate the case, is considered, the specification of the nature of the injuries may not be so important as that of the nature and location of the defect, but it is as positive a requirement of the statute and cannot be ignored. This provision by which an early notice to the town of the character and extent of the plaintiff's claim is required, is one of a series of enactments by which the legislature has limited or modified the right of action in this class of cases. It is for the court to allow it its legitimate effect. *Bartlett* v. *Cabot*, 54 Vt. 242.

A ruling at the trial against the sufficiency of this notice would have withdrawn the case from the jury. The *pro forma* ruling was, therefore, given that the notice was sufficient.

Exceptions sustained.

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

PEOPLE'S LOAN AND BUILDING ASSOCIATION OF RICHMOND,

vs.

BENJAMIN WHITMORE.

Sagadahoc. Opinion April 30, 1883.

Forcible entry and detainer. Landlord and tenant. Duress. Evidence.

In a process of forcible entry and detainer regularly commenced, proof that the respondent two years prior to the date of the process took a lease of the premises in question from the complainants, under which lease he had possession and paid rent, and that he continued in possession after the term had expired, and that, rent having accrued and remaining unpaid, he received from them the notice required by statute to terminate his tenancy more than thirty days before the commencement of the process, together with proof identifying the premises and parties, will make a *prima facie* case for the plaintiffs.

Where a tenant claims the right to contest his landlord's title on the ground that he was induced to take the lease by fraud and duress, proof of the

tenant's title to the property in controversy, is not admissible upon that question, when there is no testimony that anything was said or done by the landlord, or any one acting in his behalf, which would constitute fraud or duress in the negotiation for the lease.

ON REPORT.

The opinion states the case and material facts.

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

W. Gilbert, for the defendant, in an able argument contended that the lease was procured by fraud and duress, because the tenant was in possession when the officer went there in haying time with a writ of possession running against the defendant's son, and in favor of the plaintiffs, and put the plaintiffs' agent in possession, and thus induced the defendant to take a lease. In view of this transaction the actual relations of the several parties to the estate is of vital importance in the evidence bearing upon the question of fraud or duress. For if the plaintiffs had a title, though imperfect, and the defendant a mere usurper, holding possession against the apparent right of plaintiffs, the jury would justly view the evidence of artifice and coercion in a much less unfavorable light than they would in the absence of such circumstances.

But if the defendant had a good title, while the plaintiffs without title employed artifice and coercion to enforce him to a surrender of his estate, and estop himself to assert his title ever after, a competent jury would require very little evidence of compulsion to enable themselves to protect the lord of the domain against the encroachments of the usurper.

This was precisely the exigency at the trial. The deeds excluded show that the defendant had a good title. . . . It is respectfully and solemnly submitted, therefore, that all of these deeds should have been admitted for their very important and essential bearing on the question of duress or unlawful coercion.

Upon the question of the application of the rule that the tenant shall not be permitted to dispute his landlord's title, counsel cited: *Boston* v. *Binney*, 11 Pick. 1; *Heath* v. *Williams*. 25

Maine, 209; *Ryder* v. *Mansell*, 66 Maine, 167; *Lamson* v. *Clarkson*, 113 Mass. 348.

BARROWS, J. This is a process of forcible entry and detainer, commenced by the complainants July 28, 1881, against the respondent, who became their tenant of the premises under a lease, dated July 10, 1879, at which time the complainants were put in possession by an officer having a writ of possession in their favor, against William G. Whitmore, the son of the respondent. The respondent paid one year's rent, according to the lease, or, until July, 1880, but not afterwards, and although the lease had expired he never surrendered the premises to the complainants, and thereupon had due notice to quit June 25, 1881, more than thirty days before the commencement of this process.

The defendant having executed this lease under seal, and held possession of the premises, and paid rent agreeably to its provisions, is justly estopped from disputing his landlord's title, and setting up one of his own, until he has surrendered the possession which he has held under a solemn admission that he was *not* the owner, and that the lessor *was*, unless he can show that he was induced to execute the lease by some wrongful practice on the part of the lessors, such as amounts to fraud or duress, or, unless the title he offers to show, comes within some exception to the general rule, as was the case in *Ryder* v. *Mansell*, 66 Maine, 170. But when the parties came before the jury, and the plaintiffs had made out a *prima facie* case by proof of the facts above recited, and the identity of the premises, it appears by the report that a protracted examination failed to elicit from the defendant, or his witnesses, anything upon which to base the charge of fraud, or duress practiced by the plaintiffs, or any person acting in their behalf. The defence upon these points broke down entirely, and the defendant, as well he might, consented to a default with leave to report the case to this court for the determination of the questions, whether the plaintiffs had made out a *prima facie* case, and whether the evidence of title in himself, which he offered, was rightly excluded, or whether it ought to have been received

as coming within some exception to the general rule, like *Ryder* v. *Mansell*, or for any other good reason.

A careful examination of the testimony shows that no devices were practised, nor representations made by any agent of the plaintiffs, either as to the goodness of their title, or in any other respect. The defendant acted on his own knowledge and judgment, so that there was no room for any pretence of fraud. As to knowledge of the title the parties either stood on equal grounds, or the defendant had the advantage.

What will, and what will not, constitute duress so as to avoid a contract on that account, has been sufficiently discussed by the court in this state, in *Crowell* v. *Gleason*, 10 Maine, 325; *Fellows* v. *Fayette*, 39 Maine, 559; *Harmon* v. *Harmon*, 61 Maine, 227, and *Seymour* v. *Prescott*, 69 Maine, 376, to make reiteration in the present case impertinent, as it is obvious that there was no element of duress in anything said or done by, or in behalf, of the plaintiffs, in the taking of this lease — nothing in the circumstances, or the situation, to "shake a mind of ordinary firmness." There was no harsh language, no imprisonment, actual or threatened, no threat of anything, unless the assertion that the defendant would have to leave the premises without any fixing of the time when he would be required to do so, should be so construed. The business was deliberately transacted, and defendant says: "After I had thought of it a long spell, I was afraid he *could* turn me out," and so the lease was executed. Upon the defendant's own version of the transaction there was no evidence of fraud or duress. The single remaining question for the court now is, whether the title in himself, which the defendant offered to show, was competent evidence upon any branch of the case in defence of the action.

Defendant's counsel argues that it was competent on the questions of fraud and duress, because, he says, "if defendant had a good title, while plaintiffs without title employed artifice and coercion to force him to a surrender of his estate, and estop himself to assert his title ever after, a competent jury would require very little evidence of compulsion to enable themselves to protect the lord of the domain against the encroachments of a

usurper." In briefer terms, the jury are to be asked to find fraud and duress upon little or no evidence, if it is made to appear that the defendant is right upon the question of title. This convenient style of reasoning would effectually dispose of the estoppel in all cases. The jury are to infer fraud or duress from proof that the defendant had the better title, and no real occasion to take a lease and create an estoppel.

No legitimate inference of fraud or duress which should avoid the effect of the lease, can be drawn from such proof. Since the parties to contracts and suits are witnesses, the means cannot be wanting of giving direct proof of fraud or duress if any has been practised. When no such proof is offered, the want of it is not supplied by showing that the opposite party may have had a motive to do that which it does not appear that he in fact did. Moreover, counsel seems to misapprehend the nature and effect of the estoppel which the law creates. If the lessee really has a title which he could make good against the lessor, the law is not so unreasonable as to "force him to a surrender of his estate, and estop himself to assert his title ever after." It only requires him to do what he solemnly agreed under his hand and seal to do, *i. e.* to surrender the possession to his lessor at the end of his term, or such later period as the parties may fix, and to assume the burden himself, in any controversy that may arise about the title, instead of availing himself of the advantages of possession. To admit the evidence of the defendant's title under the pretext that it is competent upon the question of fraud or duress, would be in effect to relieve the defendant from the duty which the law imposes upon him of performing his own solemn agreement.

It remains only to inquire whether the character of the title which the defendant offered to show, was such as to make the case an exception to the ordinary rule. The plaintiffs offered no evidence as to title. But the mortgage of William G. Whitmore, the respondent's son, to them, was referred to in the lease which the respondent took, and necessarily came in for the purpose of explanation and identification. It thus incidentally appears that whatever title the son had at the date of the mortgage (and by reason of his warranty to them, any which he

might subsequently acquire would inure to their benefit), was in the plaintiffs. Looking now at the evidence of title in the respondent which was excluded, it is obvious that he could not present against his landlord the title he acquired by the deed of the premises to himself in 1839, for it is only a title acquired subsequently to the lease that could be admitted. The only other conveyance to himself offered, was the deed from the same son, William G. Whitmore, whose title the plaintiffs held under a previous conveyance with full covenants of warranty, and against whom they had a writ of possession, which being put into the case with the consent of both parties, may fairly be presumed to have been issued upon a valid judgment.

The radical difference between such a title as this, and that which the respondent was allowed to set up in *Ryder* v. *Mansell*, 66 Maine, 167 (in connection with records, which showed in that case that the landlord's title had expired after the giving of the lease), is apparent at a glance. *Here*, there is no attempt to show that the landlord's title had expired, or been in any manner vacated or transferred after the giving of the lease, but the effort, apparently, is to set up an adverse title, which arose before the lease and before the mortgages to the plaintiffs.

It is not a case of the determination of the landlord's title, or of the acquisition of it, by himself, that the respondent proposes to establish. Nor is it the case of a tenant in possession and not entering under the landlord, for the record shows the plaintiffs receiving possession from an officer of the law, and the tenant receiving it from them the same day. It is not the case of a tenant in possession attorning to a stranger. It bears no resemblance to any of the cases to which the rule of estoppel has been held not to apply.

The history of the case, as it may well be inferred from the order of events and the admissions of the respondent on cross-examination, develops a subtle attempt to defraud the plaintiffs by setting up, in the absence of their warrantor, the respondent's son, a title under the mortgages given to N. M. Whitmore, in 1871 and 1873, although the respondent was apparently cognizant throughout of the course of proceedings, and testifies explicitly

that he had received a deed from his son of his son's interest, before the plaintiffs obtained their writ of possession against the son. In any event it was no such subsequently acquired interest as the respondent could be permitted to assert in this suit when he has never surrendered the possession to his landlords as required by his lease.

Judgment for plaintiffs.

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

STATE OF MAINE *vs.* WILLIAM J. ROACH.

Cumberland. Opinion May 1, 1883.

Intoxicating liquor. Cider. Stat. 1880, c. 247.

When cider is kept for sale as a beverage in quantities, less than five gallons, it is intoxicating liquor under the law, as amended by stat. 1880, c. 247, and the place where it is so kept for sale is a nuisance under the law, though when sold it is not used upon the premises.

ON EXCEPTIONS from superior court.

This was an indictment charging the respondent with keeping and maintaining a nuisance under the liquor law.

At the trial the presiding justice was requested to give the following instruction:

"Every man is presumed, in the absence of proof to the contrary, to obey and not violate the law; and to constitute the offence charged in the indictment by reason of the sale of cider, it must be established by evidence that shall convince the jury beyond a reasonable doubt, that the cider sold was sold to be drunk on the premises where sold."

The request was refused and the respondent, the verdict being against him, alleged exceptions.

Ardon W. Coombs, county attorney, for the state.

H. D. Hadlock, for the respondent, contended, that the words "beverage" and "tipple" were synonomous, and cited the definitions of these words in Worcester's, Webster's and Richardson's dictionaries; and hence, that the cider acts of 1880, and of 1881, added nothing to the force of the statute in addition to what it contained in 1877, when the case of *State* v. *McNamara*, 69 Maine, 133, held that cider was only sold for tippling purposes when sold to be drunk on the premises.

The seller may not intend to sell as a beverage, but he can only control his own premises. He may prevent the purchaser from using it as a beverage on the premises. It is lawful to sell for certain purposes. The presumption must be that the sale was intended by the seller for a lawful purpose, especially when the case shows that so long as the seller could control the purchaser there was no unlawful use made of the cider. The legislature could not have intended to hold the seller responsible for the use made of the cider, after the purchaser had left the premises, and beyond the control of the seller.

DANFORTH, J. The respondent is charged with keeping a liquor nuisance under R. S., c. 17, § 1, as amended by c. 247, of the acts of 1880, by which, "all places used for the illegal sale, or keeping of intoxicating liquors, and all places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner, not provided for by law, are common nuisances." The proof relied upon to sustain the charge, is the sale of cider in less quantities than five gallons, not drunk upon the premises. Hence, under the first request for instructions, the only question arising is, whether under the law, cider thus sold, is intoxicating liquor, or prohibited as such.

By R. S., c. 27, § 22, as amended by c. 215, § 1, of the acts of 1877, cider was made intoxicating liquor "when kept or deposited with intent to sell the same for tippling purposes." This was the law, when the case of *State* v. *McNamara*, 69 Maine, 133, was decided. In that case it was held that to bring cider within the prohibition, applicable to intoxicating liquors, it must be kept for sale for "tippling purposes," and that these two words explained in the light obtained by their use in other statutes,

relating to the same subject matter, had acquired a legal, technical meaning, and to bring cider within that meaning, the sale must be for drinking upon the premises where sold; otherwise it was not considered intoxicating, or prohibited within the meaning of the law. This decision was made in 1879. In 1880, by c. 247, the same § 22 was again amended by the insertion of the words, "as a beverage," so that cider under the law, as it now is, is considered intoxicating when "kept to be sold for tippling purposes, or as a beverage." Under this law the present indictment was found.

It is evident that by this amendment the legislature intended to effect a change in the law; and that change must be to prohibit the keeping of cider for sale, when it was not prohibited before. It may be, and undoubtedly is, true, that the common meaning of "tippling purposes," and "beverage," as applied to the use of intoxicating liquors, is substantially the same. But as held in *State* v. *McNamara*, the former phrase had, by its use in legislative enactments, acquired a legal meaning, which the court felt bound to give it, in the construction of the statute that the intent of the legislature might be accomplished, while the latter has acquired no such meaning, and it is clear that the common one alone will give effect to the legislative intent.

It necessarily follows, that cider, under the present statute, must be considered an intoxicating liquor, and prohibited as such, when sold in less quantities than five gallons, to be used "as a beverage," whether so used upon the premises when sold, or elsewhere.

As the remaining exceptions are abandoned, it is unnecessary to consider them.

Exceptions overruled.
Judgment for the state.

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

INHABITANTS OF CAMDEN *vs.* INHABITANTS OF BELGRADE.

Knox. Opinion May 3, 1883.

Rules of court. Specifications of defence. Practice. Evidence. Pauper. Marriage.

Whether rule ninth of the Rules of Court adopted at the July term, 1855, ceased to be operative on the repeal of the statute requiring specifications of defence or not, it is competent for the presiding judge to order the filing of such specifications as a condition of taking off a default. When such specifications are filed, the court will not set aside a verdict as against law and evidence because the report of the evidence fails to show proof or admission of matters which it was essential for the plaintiff to establish, but which were alleged in the writ and not denied in the specifications.

Proof of the due solemnization of a marriage ceremony between two persons will not suffice, in a civil action, to exclude the ordinary circumstantial evidence of the existence of a previous marriage of one of those persons to a third person who is still living.

ON EXCEPTIONS and motion to set aside the verdict.

Assumpsit for pauper supplies furnished one William O. Kaherl *alias* Orrin S. Carle and family.

The writ was dated August 2, 1878.

The verdict was for the plaintiffs and the defendants moved to set the verdict aside as being against law and evidence and also alleged exceptions to certain rulings of the presiding justice.

The material facts are stated in the opinion.

A. P. Gould, for the plaintiffs, contended that the presumption of marriage will not arise from the cohabitation of a man with a woman if, during her life and without any proof of a divorce, he marries another woman, and cited: *Jones* v. *Jones*, 45 Md. 144; 20 Alb. Law J. 288.

The reasoning, upon which this principle rests, is, that the presumption of a marriage arising from cohabitation and repute is met and overcome by the stronger presumption, that a man will not incur the guilt of felony, and the danger which attends it, by marrying another woman during the life of one to whom he had

previously been lawfully married. This theory is supported by many authorities. 1 Bish. Mar. & Divorce, § § 444, 446; *Taylor* v. *Taylor*, 2 Lee, 274, (2 Eng. Ecc. 124;) *Poultney* v. *Fairhaven*, Brayton, (Vt.) 185: *Senser* v. *Bower*, 1 Penrose & Watts (Pa.), 450; *Clayton* v. *Wardell*, 5 Barb. 214; *Myatt* v. *Myatt*, 44 Ill. 473; *Breakey* v. *Breakey*, 2 Up. Ca. Q. B. 349; *King* v. *Inhabitants of Twyning*, 2 Barn. & Ald. 386; *Jones* v. *Jones*, 48 Md. 391.

We find an analogy in the rule that the presumption of the genuineness of the signature of a grantor in a deed after the lapse of thirty years is repelled by proof that he had granted the same lands to another person. Gresley Eq. Ev. 124, and authorities cited. Gilbert Ev. 102; *Willson* v. *Betts*, 4 Denio, 201.

The case of *Clayton* v. *Wardell*, 4 Comstock, 230, is not in conflict with the principle contended for, but there are some adverse remarks in the opinion of one of the judges. The case turned upon the insufficiency of the evidence of cohabitation and repute, to prove the prior marriage, and in this, alone, the majority concurred.

D. N. Mortland and *J. H. Potter*, for the defendants, cited: *Taylor* v. *Robinson*, 29 Maine, 323; *Bowdoinham* v. *Phipsburg*, 63 Maine, 497; *Hutchins* v. *Kimmell*, 31 Mich. 126; *Case* v. *Case*, 17 Cal. 598; 1 Bishop Mar. & Divorce, 434, 439; *Ferrie* v. *Public Adm'r*, 4 Bradf. 28; *Christy* v. *Clarke*, 45 Barb. 529; *Tummalty* v. *Tummalty*, 3 Bradf. (N. Y.) 369; *Newburyport* v. *Boothbay*, 9 Mass. 414; *Banister* v. *Henderson*, Quincy, 119; *Means* v. *Welles*, 12 Met. 361; *Barnum* v. *Barnum*, 42 Md. 251; *Fenton* v. *Reed*, 4 Johns. 52; *Clayton* v. *Wardell*, 5 Barb, 214; *Jewell* v. *Jewell*, 1 How. 219; *Archer* v. *Haithcock*, 6 Jones (N. C.) L. 421; *Donnelly* v. *Donnelly*, 8 B. Mon. (Ky.) 113; *Clayton* v. *Wardell*, 4 N. Y. 230; *Caujolle* v. *Ferrie*, 23 N. Y. 90; *State* v. *Libby*, 44 Maine, 469.

BARROWS, J. The verdict is for the plaintiffs for the amount claimed in the writ for supplies furnished William O. Kaherl, *alias* Orrin S. Carle and his alleged wife, Mary O. *alias* Orraville M. and their children. The defendants present the case upon a

motion to set aside the verdict as against law and evidence and upon exceptions to the refusal of the presiding judge to admit certain evidence by them offered, the character and bearing of which will be hereafter considered.

They claim the motion should be sustained for want of proof that the plaintiffs sent the defendants the requisite statute notice that these paupers had fallen into distress and were receiving pauper supplies from the plaintiff town.

Ordinarily if the report of all the evidence failed to show either proof of such notice or an admission at the trial that it had been given, it would be good cause for sustaining the motion. But in the present case any defect of proof in that respect is supplied by other portions of the report which show that at a previous term the defendants had been defaulted, the default to be taken off upon condition among other things that they should file with the clerk on or before a day certain a specification of their defence; and that the specifications filed under that order make no denial of the notice which is duly averred in the writ. The condition was not a mere idle ceremony. Its force and effect must have been well understood by the counsel on both sides. It was one which the presiding judge might well impose, with or without the aid of rule nine, as a condition of taking off the default, and its effect if properly regarded, could not be otherwise than salutary for both parties. Looking at the specifications filed under this order, and giving them their due effect, we find that the only points really open to the defendants were the furnishing of the supplies by the plaintiffs as alleged — the validity of the marriage of W. O. and M. O. Kaherl — the legitimacy of their children and consequently the settlement of the alleged wife and children in the defendant town.

It was not necessary under these specifications that plaintiffs should prove the statute notice to the defendants, nor the necessity of the supplies, nor that they were applied for or received in the manner required by chap. 119, laws of 1873, nor that Kaherl or Carle had his legal settlement in Belgrade. The office of a specification of defense differs from that of a brief statement in this, that the former is in part designed to limit the matters that

are controvertible under the general issue — the latter to enable the defendant to introduce what he could not properly prove under that plea alone. Looking at the positions which it was open to the parties to take under the specifications here filed, we find no reason to order a new trial unless the exceptions to the exclusion of testimony offered by the defendants ought to be sustained. These we will now consider.

The plaintiffs proved the regular performance of the marriage ceremony between Kaherl and the woman who is alleged in the writ to be his wife, March 19, 1873. All that was necessary to make a legal and valid marriage, if the parties were capable of contracting one, was made to appear. It had been followed by half a dozen years cohabitation and the birth of children. To impeach it the defendants proposed to establish the fact of a previous marriage of Kaherl with Esther Craig, (who was living March 19, 1873, the date of the marriage with Mrs. Ott,) by evidence of cohabitation for a considerable number of years, reputation, birth of children and contemporaneous admissions and claims of both the parties to the alleged marriage contract. They did not offer to prove a legal marriage by direct testimony and the presumptive evidence above referred to was rejected by the presiding judge.

Defendants contend that it ought to have been received and if found full and complete enough to satisfy the jury that Kaherl had a legal wife alive at the time the marriage was solemnized between him and Mrs. Ott then that marriage was invalid, and the jury should have been instructed that she and her children by Kaherl did not acquire thereby a settlement in the defendant town. This result would unquestionably follow if there was evidence upon which it would be competent for the jury to find that there was a valid marriage between Kaherl and Esther Craig. *Harrison* v. *Lincoln*, 48 Maine, 205; *Howland* v. *Burlington*, 53 Maine, 54; *Pittston* v. *Wiscasset*, 4 Maine, 293. The inquiry is as to the admissibility of presumptive evidence to establish the first marriage as against direct proof of the due solemnization of the second, while Esther Craig, the reputed first wife, was living.

The question is not free from difficulty and there are *dicta* and decisions of respectable courts which go far to sustain the ruling at *nisi prius* by which the evidence was excluded. But the general rule has long been understood to be as laid down by LORD KENYON, in *Leader* v. *Barry*, 1 Esp. 353; that in every *civil* case except an action for *crim. con.* general reputation, the acknowledgment of the parties and reception by their friends, &c. as man and wife, was sufficient proof of the marriage, although in an action for criminal conversation for reasons well assigned by LORD MANSFIELD, in *Birt* v. *Barlow*, 1 Doug. 170, (referring to *Morris* v. *Miller*, 4 Burr. 3057) there must be proof of an actual marriage, and the same strictness is required in an indictment for bigamy. See also *Read* v. *Passer*, 1 Esp. 213, 214; *Hervey* v. *Hervey*, 2 W. Black, 877; *Miller* v. *White*, 80 Ill. 580; and numerous other cases, where it is said that no other exceptions should be allowed. That proof by circumstances, reputation, conduct of the parties and the like has long been held competent in settlement cases, see *Rex* v. *Stockland*, Burr. Set. Cases, 508; 1 W. Black, 367; *Newburyport* v. *Boothbay*, 9 Mass. 414.

The court in this state have explicitly recognized the general rule in *Pratt* v. *Pierce*, 36 Maine, 454, and *Taylor* v. *Robinson*, 29 Maine, 328, where the court add, "we find no authority for a distinction in cases, where the party to the marriage is a party to the suit, and wishes to prove the marriage, and where the attempt to establish the marriage is by one who is a stranger thereto;" citing *Fenton* v. *Reed*, 4 Johns. 52, and the text books of Starkie and Greenleaf. The nature of the testimony, and the grounds of its admissibility are dealt with somewhat *in extenso* in Greenleaf's Evidence, vol. 2, pp. 443, *et seq.* § § 461, &c. 2d edition.

The general doctrine unquestionably is, that circumstantial evidence is always competent, and in most cases sufficient proof of marriage in civil cases.

How did this exception (for an exception it is conceded to be, in the cases which most strongly support it) grow up, and upon what reason is it based?

Apparently, part of the confusion in the decisions and *dicta* has come from the use of the terms, "marriage in fact," "actual marriage" and "legal marriage," to denote a marriage proved by direct evidence in contradistinction to a marriage proved by circumstantial or presumptive evidence. It should be borne in mind that it is an actual legal marriage, which is the thing to be proved, whether the evidence offered is circumstantial or direct. As to what constitutes a legal and valid marriage, see R. S., c. 59, § 17. Another source of confusion is the failure to regard the distinction between civil and criminal cases as to the amount of evidence required to overcome the presumption of innocence.

In the latter class it must be such as shall exclude all reasonable doubt of guilt, while in the former, where it comes collaterally in question, it suffices if there is a preponderance of evidence, which satisfies the jury of the fact. This court recognizes that distinction in *Ellis* v. *Buzzell*, 60 Maine, 209. And, with us, even in criminal prosecutions, while common reputation, and the like, are not competent to prove the marriage, other circumstantial evidence, such as cohabitation, birth of children, and contemporaneous recognition of the fact, by the parties to the marriage contract is admissible. *State* v. *Libby*, 44 Maine, 478–480. Still another element which has served to introduce clashing *dicta* into the discussions in the different courts, is the fact that the question most frequently has arisen in cases involving succession, legitimacy of children, and dower where the judges, all alike animated by the desire to decide according to the legal rights of the parties, have chanced to be very differently impressed by the probative force of the ever varying character and combination of the circumstances, adduced in the different cases to establish a marriage by presumptive proof.

But shall we lay it down as matter of law that there can never be, in a civil case, where it comes collaterally in question, an amount of circumstantial evidence, sufficient to establish a legal marriage against the presumption of innocence?

That is precisely what a decision which rejects all circumstantial evidence in a case like this, where it comes in collision with

direct proof of the due solemnization of a subsequent marriage, amounts to.

The question is one of too much practical importance to pass without a strict examination of the decided cases, and a careful consideration of the consequences of the decision. It is easy to conceive of cases where we might find ourselves compelled to do an irremediable wrong, if circumstantial evidence of a prior marriage can never be allowed to come in to overcome, if it can, direct proof of a subsequent marriage. Suppose a young couple, of decent character and repute, to have been married many years ago in a town where the records of marriages have since been burnt, or by a minister or magistrate who has failed, as they not infrequently do, to make due return to the records of its solemnization, and that the witnesses to the marriage are dead; but the parties have lived and cohabited as husband and wife in the immediate vicinity, and among their kindred and friends, and had children born to them, and have been recognized by their neighbors and by each other as lawfully married. Now, suppose the husband after a series of years becomes depraved and reckless, leaves his family, goes to another section of the state, and there is direct proof that there, under an assumed name, he goes through the form of marriage with a woman in low life, with whom he afterwards cohabits and by whom he has children. Suppose the question arose in a suit touching dower, or inheritance. Is it a conclusion of law that direct proof of the second marriage must of itself deprive his real wife of dower, and his legitimate children of the right of inheritance, and stigmatize her as a concubine and them as bastards, because circumstantial evidence of the first marriage, cannot, however strong, be received to combat the presumption of innocence, and the validity of the second marriage? To us it seems to be a question, not of the competency, but of the strength and sufficiency of evidence in every case, and that the testimony should be received and passed upon by the jury, subject to the power of the court to set aside any unwarrantable conclusion which they may draw.

How is it practicable for the court, without hearing it, to ascertain the probative force of all the circumstantial evidence,

which it is possible to adduce in a given case, and to say in advance that it cannot produce even a higher degree of satisfaction, and certainty than would the direct testimony of a witness, whose reputation may be doubtful, or his memory treacherous and indistinct, or who may have some secret motive to testify falsely? Again, suppose it is the party whose right it is to move first in the trial of the cause which relies on the circumstantial evidence, is it to be objected to and excluded, on proof to the presiding judge, that his opponent has direct evidence of another marriage, the effect of which would be to show one of the parties to this, guilty of a crime, if this is to be regarded as established? Or, after the direct evidence of the other marriage has been adduced, is the judge to be called upon to rule out the circumstantial, however satisfactory, as not fit to be weighed against the presumption of innocence? This court has not been wont to regard the evidence of circumstances thus lightly. We have seen it was admissible to affect, possibly to control that presumption even in criminal cases. *State* v. *Libby*, *supra*.

In a settlement case where the validity of a second marriage was in issue, the presumption of innocence was not held to outweigh the presumption of continuance of life in the absence of evidence. *Rex* v. *Harborne*, 2 Ad. & E. 540. And see remark of KENT, J., in *Harrison* v. *Lincoln*, 48 Maine, top of p. 209. But the decisions relied on to support the ruling must not be overlooked.

The most direct is *Poultney* v. *Fairhaven*, Brayton, Vt. 185. The case was an appeal from an order of justices for removal of paupers from the plaintiff to the defendant town. The male pauper, called by plaintiffs, testified that he was lawfully married to the female pauper. Defendants then offered to prove by the female, that prior to that marriage she was lawfully married to another man who is still alive, but her testimony was excluded, as was also evidence of the former marriage by cohabitation and reputation; and plaintiffs had a verdict. Upon a motion for new trial there was a *per curiam* opinion, the *whole* of which is as follows: "Asenath being *prima facie* the wife of John Slyter, it was necessary a previous legal marriage should be proved to

show she was not his legal wife; cohabitation with Austin, though sufficient to charge him, was not proper evidence to disprove her the wife of Slyter." "Motion dismissed." If the case is correctly reported, it evidently had very little consideration. No reason is given for making an additional exception to the general doctrine. Not so with *Jones* v. *Jones*, 45 Md. 144, and S. C. on a second trial, 48 Md. 391, upon which the ruling at *nisi prius* seems to have been based. The case was carefully examined and in the second opinion the authorities, *pro* and *con*, were deliberately reviewed.

The whole basis upon which the exception to the general rule rests is developed. If it be found either that the doctrine of the Maryland decision ought not to be sustained to its full extent, or that the case before us is not within it, on account of some essential difference between the facts presented, or between the criminal law of this state and that, we may be saved the necessity of a further detailed review of the authorities on either side. In the outset, it is to be observed that at neither of the trials in *Jones* v. *Jones*, does it appear that any evidence, either circumstantial or direct, of the fact of the marriages in controversy was excluded. The questions arose in the first instance upon the withholding of certain requested instructions as to the sufficiency of the evidence, and in the second, upon the giving of those instructions so that the second decision is simply a reiteration of the first, with a more elaborate review of the authorities. The Maryland court had their whole case before them, and it was in brief as follows: It was a succession case, to determine whether the claimant, H. J. was the legitimate son of the decedent, A. D. J. and whether there was a widow, and if so, who. The parties involved were colored, and some of them at least formerly slaves. On the part of H. J. it was claimed that, although he was the fruit of a meretricious connection, still his father subsequently married his mother, who was a slave, and the ordinary circumstantial evidence was offered to prove it. On the other hand it was claimed that at the date of that alleged marriage, A. D. J. was the lawful husband of A. S. who died in 1844, after which he married a third woman, F. M. who

claimed to be his widow. The court very properly held that, where the commencement of the cohabitation was meretricious, the mere continuance of it without any evidence to show a change in the relations and status of the parties would not prove a marriage, but if there was such evidence of a change in their conduct and repute, though not amounting to direct proof of marriage it would be competent; and, applying it to the case in hand, if there was proof that after the illegitimate birth of H. J. there was cohabitation of his father and mother, the latter assuming the name of the former, and they treated each other as man and wife, and him as their child, and were treated and reputed to be man and wife by their friends and acquaintances, these are facts to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection. . . But the court proceeded to hold that if it be found as a fact that A. D. J. was married to A. S. or F. M. during the lifetime of the claimant's mother, there being no evidence of any divorce, all mere presumption of previous marriage with her, founded simply on habit and repute, is at once overthrown, and it then becomes incumbent upon the claimant to establish the alleged marriage of his mother to A. D. J. as an actual fact by more direct proof. And it is plain, from the reasoning of the court and the authorities cited, that this conclusion rests on the strength of the presumption that A. D. J. was not guilty of bigamy. This is simply affirmed in a more elaborate opinion in 48 Md. 391. It is apparent from some expressions in the cases that the cohabitation of A. D. J. with the mother of the claimant, was not regarded as a crime, or as anything but an offence against decency and the moral law.

Hereupon we remark, that it would seem that if the legal marriage of A. D. J. with A. S. February 14, 1819, was established the strongest direct proof of his subsequent marriage to the claimant's mother, could not have availed the claimant; and that, if by including in the same category, the subsequent marriage with F. M. it is intended to assert that no circumstantial evidence, however strong, of a previous marriage can amount to a preponderance of proof against the presumption of innocence,

we do not assent to the doctrine. With us, fornication and lewd and lascivious cohabitation are offences against the criminal law, as well as bigamy. We do not see why we should infer that two persons have been guilty of the former offences, rather than that one of them has been guilty of the latter. Nothing but the adoption of the doctrine that proof of a marriage ceremony, regularly solemnized, raises a presumption not merely *prima facie*, but *juris et de jure*, against the validity of a prior marriage of one of the parties, whenever it happens that such prior marriage can be proved by circumstantial evidence only, will justify the exclusion of the circumstantial evidence.

This must be so on account of the practical difficulty in conducting a trial where such an issue is involved, to which we have before alluded.

True, the evidence may or may not, when presented, be found sufficient to prevail against the counter evidence and the presumption of innocence.

But like circumstantial evidence in other cases we cannot say, without hearing it, that it will not be strong enough not only to preponderate against that presumption, but to exclude every reasonable doubt.

We do not find in the cautious action and utterances of the Maryland court, an authority against its admissibility.

In nearly all the cases cited the courts are dealing with the weight and effect of the testimony, and not with its competency.

In *Archer* v. *Haithcock*, 6 Jones, Law, N. C. Rep. 421, the admissibility and sufficiency of the circumstantial, against the direct evidence is affirmed, and the court refuse to recognize any exceptions to the general rule, except in prosecutions for bigamy and actions for criminal conversation.

In this country the conditions are far less favorable to the making of direct proof of a marriage, when a contest arises in which it is called in question than they are in England. See the forcible remarks of CAMPBELL, C. J., as to the difficulty of making other than circumstantial proof with us. Herein is a sufficient reason why the English decisions upon this point should

not be regarded as applicable to the different state of things which is found here.

The Upper Canada decisions naturally follow the English.

Looking now at the proof offered in the present case, we find that the defendants took one step toward making proof by the record of the marriage of Kaherl with Esther Craig. Their intentions of marriage were duly recorded in the town where Kaherl lived, September 13, 1854. The defendants proved also that the books containing the records of intentions and marriages, between 1852 and 1857, in Augusta, where Esther Craig resided, and where the marriage is supposed to have taken place, were long since burnt up or lost, and that David Wilber, the magistrate, by whom they claimed the marriage was solemnized, is dead. The lack of record proof is thus accounted for. They could not call upon Kaherl to criminate himself. We think it cannot be said as matter of law that the fact that he had, under an assumed name, contracted a second marriage, while Esther Craig was living, raises such a conclusive presumption that he was not previously legally married as to exclude the ordinary circumstantial evidence to show that he *was*, in a suit where the validity of the two marriages comes in question.

Whether circumstantial evidence will suffice to establish in a civil case of this description, the validity of a prior marriage as against a later one, where there is direct proof of the performance of the ceremony must depend always upon its character and force, in each case where it is presented. We cannot say, until it has been heard, that it will not outweigh the counter evidence, and any presumption of innocence there may be to overcome.

Exceptions sustained.

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

ALBERT A. KEENE and another, *vs.* ALBERT G. SAGE.

Knox. Opinion May 5, 1883.

Action. Money had and received. Demand.

The defendant as agent for S and M to pay their employees, deducted from the wages of the men the amount due from them severally to the plaintiffs on store account and then retained in his own hands the sums thus deducted, alleging that the plaintiffs were indebted to him to that amount, when in fact they owed him nothing. *Held*, that the plaintiffs were entitled to recover the sums thus retained by the defendant in an action for money had and received, and that it was not necessary to show a demand before bringing the action.

ON EXCEPTIONS.

Assumpsit on account annexed and for money had and received. Writ dated March 7, 1878. The defendant was the superintendent for St. John and Mark who carried on the granite cutting business on Clark's Island, employing many men. The plaintiffs were the store keepers there.

Other material facts are stated in the opinion.

D. N. Mortland, for the plaintiffs, cited: *Harmon* v. *Harmon*, 61 Maine, 222; *Hall* v. *Marston*, 17 Mass. 575; *Williams* v. *Williams*, 23 Maine, 17; *Look* v. *Industry*, 51 Maine, 375; *Dill* v. *Wareham*, 7 Met. 438; *Robinson* v. *Williams*, 8 Met. 454; *Alden* v. *Pearson*, 3 Gray, 342; *Lewis* v. *Sawger*, 44 Maine, 337.

A. P. Gould and J. E. Moore, for the defendant, cited: *Lewis* v. *Sawyer*, 44 Maine, 332; *Whitton* v. *Whitton*, 38 N. H. 139.

VIRGIN, J. There is no motion against the verdict. The evidence is not fully reported. A part only of the charge is presented. The case finds that the judge correctly stated the facts

and the positions of the parties. Nothing is questioned save the correctness of certain rulings.

In the light of the rulings and the finding of the jury, the case is a simple one. The defendant was the agent of a co-partnership to disburse the money of the firm to laborers in their employment. The custom of the business required the defendant to reserve out of the funds due to the laborers and to pay to the plaintiffs, so much as the laborers owed them. The defendant, from the firm's funds in his hands, reserved from the amount due the laborers the sum of $120 as belonging to the plaintiffs; but, instead of paying it to the plaintiffs, or returning it to the firm, appropriated it to his own use, upon the ground that the plaintiffs owed him that sum, when in fact they were not owing him anything. The book-keeping process was this: The defendant, as agent of the firm, in possession of its books and funds, credited to laborers $120 for labor performed. He then charged to laborers $120 as money at their instance paid to the plaintiffs. This made the firm's books indicate an indebtedness to the plaintiffs instead of to the laborers. The defendant then charged the amount as paid to the plaintiffs and credited the sum to himself. His excuse is that the plaintiffs owed him $120 when it is proved that they owed him nothing. The case, nakedly stated, is this: A receives money of B to pay to C, and C requests A to pay it to D. A keeps the money, alleging that D owes him that amount, when in fact D owes him nothing.

It is clear enough that the money equitably belongs to the plaintiffs. It must be kept in mind that St. John and Mark owed the plaintiffs money that was to go to them through the defendant's hands. The plaintiffs sold goods to the laborers in the employment of that firm, rendering accounts of sales to the defendant, who, in the books of his principals, charged the laborers and credited the plaintiffs with the amount thereof. The plaintiffs' counsel contends that the view upon which the rulings were based was too favorable to the defendant, and takes the position that the defendant was the agent of all the parties and that he became liable to the plaintiffs as soon as any money was credited to them which was in his hands. The plaintiffs contend that the money

was virtually received for them by the defendant from the laborers, and not from St. John and Mark. However that may be, we are well satisfied that the defendant has no cause for complaint. The ground is taken that he had his principals' money and not the plaintiffs'. His principals make no claim to it. They claim that they paid it to the defendant on the plaintiffs' account. When the amount was reserved from the dues of the laborers, it was an appropriation for the plaintiffs. The sum appropriated is traced into the defendant's hands. He retained it, not upon the ground that it was the money of St. John and Mark, but upon the ground that it was the money of the plaintiffs in their hands; money due primarily to the plaintiffs, and secondarily to himself. The finding of the jury, under the instructions given makes this interpretation of the facts inevitable.

The case, clearly enough, falls within the doctrine maintained in *Hall* v. *Marston*, 17 Mass. 575, which has been affirmed and supported in many other cases. An action for "money had and received" is a most liberal action, and may be as comprehensive as a bill in equity. It was held in the case cited that the action may be supported without any privity between the parties, other than created by law, and that the law may create both the privity and the promise. The broad ground is there taken that whenever one man has in his hands money which he ought to pay over to another, he is liable to the action, although he has never seen or heard of the party who has the right to it. This doctrine applies to all cases when no rule of policy or strict law intervenes to prevent. *Freeman* v. *Otis*, 9 Mass. 272; *Hills* v. *Bearse*, 9 Allen, 403; *Lewis* v. *Sawyer*, 44 Maine, 332.

Was a demand necessary to entitle the plaintiffs to the action? We think not. The money was due to somebody. The defendant could not conscientiously retain it. The firm of St. John and Mark are not entitled to it, unless to pay it to the plaintiffs. The defendant obtained it from his principals for the plaintiffs, or under, at least, an implied undertaking to account with the plaintiffs therefor, and then wrongfully appropriated the same to his own use; thus committing an act of fraud. The case of *Hall* v. *Marston*, *supra*, was exceedingly like this case; and in

principle not differing from it; and in that case no demand was proved or deemed necessary. This is not a case where there was an uncertainty as to where the money belonged, or whether the plaintiffs would receive it if tendered to them. The defense has been a defiance of the plaintiffs' right. *Calais* v. *Whidden*, 64 Maine, 249.

Exceptions overruled.

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

DEBORAH W. LINCOLN *vs.* INHABITANTS OF STOCKTON.

Waldo. Opinion May 7, 1883.

Towns. Municipal indebtedness. Selectmen.

Where the selectmen borrow money on a town order to pay an outstanding debt of the town, without authority from the town, and the evidence fails to establish what is in fact and law a payment of the original debt, there is no liability on the part of the town to pay the order representing the new loan when there has been no corporate action in relation thereto.

Assumpsit declaring on a town order for one thousand dollars, dated July 19, 1876.

The writ was dated July 19, 1881, and the plea was the general issue.

At the trial it was agreed by the parties that the presiding judge should submit a single question to the jury, which with their answer thereto, should make a part of the case and the whole case should then be submitted to the law court.

The jury rendered the following verdict:

"The jury find that the money obtained of the plaintiff and for which the order declared on was given was used by C. C. Roberts to pay the order previously given to Mrs. Griffin."

The defendants moved to set this verdict aside as against evidence, the weight of evidence and against law. The case was

then reported with stipulations as follows: "If this motion is sustained by the law court a new trial is to be granted. If the motion is not sustained, then the law court is to examine the whole case, including all the evidence legally admissible, together with the special finding of the jury, and render such judgment as the legal rights of the parties require."

The opinion states the material facts.

William H. Fogler, for the plaintiff.

The plaintiff claims to recover of the town, under the law as laid down in the recent cases of *Billings* v. *Monmouth*, 72 Maine, 174; *Belfast Nat. Bank* v. *Stockton*, *Id.* 522.

In the case at bar, the original debt was a judgment of this court. That this was a legal debt, a legitimate liability, there can be no question. The then selectmen hired money of Mrs. Griffin to meet that liability, in part, and delivered the amount in payment, *pro tanto*, of that judgment. Fourteen days after the money was hired of Mrs. Griffin, the town voted to leave the matter of raising money by loan, or otherwise, with the selectmen.

This vote was an authority to the selectmen to hire money for that purpose. I submit that it would be a ratification of money previously hired.

In July, 1876, the selectmen for that year hired money of this plaintiff for the purpose of paying Mrs. Griffin the money loaned by her in 1874, and by the hand of Mr. Roberts, chairman of the board, paid the money to Mrs. Griffin and took up the order held by her.

"The vital question" is whether a legal debt of the town has been extinguished by the money loaned by the plaintiff.

While it is true, as stated by this court in *Belfast National Bank* v. *Stockton*, that to operate as an extinguishment of the debt of a town, payment must be made by "a person exercising some authority," it is nowhere laid down that in order to extinguish the debt, payment must be made by the treasurer of the town.

"It is the payment of the lawful debts of the town by its own agents with the plaintiff's money which constitutes the cause of

action," is the language of the court in *Billings* v. *Monmouth*.

Selectmen are agents to manage the prudential affairs of their town. *Augusta* v. *Leadbetter*, 16 Maine, 47.

"The selectmen, treasurer, and every other person charged with the expenditure of the money of any town, shall . . make detailed written or printed reports of all their financial transactions, for and in behalf of the town," &c. R. S., c. 3, § 31.

In *Belfast Nat. Bank* v. *Stockton*, the court say: "If a person having no authority assumes to pay a municipal debt, the payment is a nullity at the will of the town. Its relations to its creditors cannot be affected by a stranger against its will."

The case at bar is not such a case. Selectmen are not strangers intermeddling with the affairs of the town. They are the general financial agents of their towns. The statute recognizes them as charged with the expenditure of money of their towns. It is their duty to see that the liabilities of their towns are promptly and honorably met. It is a common practice for selectmen to pay out money in behalf of their towns.

It is probable that every member of this honorable court, when at the bar, time and again, received pay for professional services rendered to towns from the hands of selectmen.

If a suit were being tried upon the order held by Mrs. Griffin against the town, would, or would not, a perfect defence be made out by the facts proved in this case, a payment to her of the full amount due, by the chairman of the board of selectmen of the town, with the knowledge and co-operation of the full board, with no recognition for six years thereafter on the part of the town, by any report or vote, by payment, or offer of payment, of interest or principal?

The Griffin order was presented to the town as a voucher for money paid by the selectmen, as early, at least, as 1878, for it was presented to the auditors chosen by the town in March, of that year, as a voucher for money disbursed by the selectmen.

The Lincoln order, now in suit, was also reported, and presented to the auditors. The town has merely refused to accept the auditors' report. It has taken no action in dissent of the payment of the Griffin order.

No recognition of the Griffin debt as an existing liability of the town since its payment by this plaintiff's money is attempted to be shown. The town denies its liability to this plaintiff whose money paid the Griffin debt; it has not denied that the Griffin debt is extinguished at the expense of this plaintiff.

"By non-action, after knowledge of the facts, there may be recognition by the principal of the agent's acts as his own." *Belfast Nat. Bank* v. *Stockton*, *ante*.

If in their reports to the town during the three years last past, of the financial standing of this town, the selectmen of Stockton have included, as a liability of the town, a debt of one thousand dollars and interest, due to Mrs. Griffin, the fact could have been easily shown.

"The corporation owes either the old debt or the new." *Belfast Bank* v. *Stockton*.

A. P. Gould, for the defendants, cited: *Dickinson* v. *Conway*, 12 Allen, 487; *Belfast Nat. Bank* v. *Stockton*, 72 Maine, 522; *Agawam Nat. Bank* v. *South Hadley*, 128 Mass. 503; *Kelley* v. *Lindsey*, 7 Gray, 287; *Railroad Nat. Bank* v. *Lowell*, 109 Mass. 214; *Parsons* v. *Monmouth*, 70 Maine, 264 and cases there cited; *Herzo* v. *San Francisco*, 33 Cal. 134; *Mayor* v. *Ray*, 19 Wall. 468; *Argenti* v. *San Francisco*, 16 Cal. 255; *McCracken* v. *San Francisco*, 16 Cal. 591; *Pimental* v. *San Francisco*, 21 Cal. 351; *French* v. *Auburn*, 62 Maine, 452; *Loker* v. *Brookline*, 13 Pick. 343; *Jones* v. *Lancaster*, 4 Pick. 149; *Haskell* v. *Knox*, 3 Maine, 445; *Morrell* v. *Dixfield*, 30 Maine, 157; *Moor* v. *Cornville*, 13 Maine, 293; *Ingalls* v. *Auburn*, 51 Maine, 352; *Field* v. *Towle*, 34 Maine, 405; Dillon Mun. Corp. 378, note; *Salsbury* v. *Philadelphia*, 44 Pa. St. 303; *Baltimore* v. *Poultney*, 25 Md. 18; *Seibrecht* v. *New Orleans*, 12 La. An. 496; 1 Daniel Neg. Inst. § 420; 2 Do. § 1530; *Sanborn* v. *Deerfield*, 2 N. H. 251; *Rich* v. *Errol*, 51 N. H. 350.

SYMONDS, J. In recent cases in this state it has been held, that when selectmen have acted without special authority in procuring loans of money for municipal purposes, if the lender would

recover in an action of assumpsit against the town the amount of the loans, he must prove not only that the money was received by the selectmen in their official capacity but also that it was applied by them to the use for which it was obtained, to meet and discharge existing municipal liabilities, *Billings* v. *Monmouth*, 72 Maine, 174; that towns themselves by the statutes organizing them are strictly limited in the exercise of the powers of borrowing and appropriating money, *Hooper* v. *Emery*, 14 Maine, 375; *Parsons* v. *Monmouth*, 70 Maine, 264; *Minot* v. *West Roxbury*, 112 Mass. 1; that selectmen do not possess by virtue of their office a general authority to hire money upon the credit of the town, *Bessey* v. *Unity*, 65 Maine, 347; that some action of the town, the body corporate, within the scope of its corporate powers, is required to confer prior authority to borrow money in its name; and if a liability is alleged on the ground that the plaintiff's loan was one the municipality had a legal right to procure and that, though its officers did not act with authority at the time, it has subsequently availed itself of the money loaned by accepting its application to the payment of municipal debts, it is for the plaintiff to prove the facts which support the allegation.

It was in the light of the principles already established by the cases which have been cited that the decision in *Bank* v. *Stockton*, 72 Maine, 522, was rendered, and the opinion in that case directed attention to the fact that "the extinguishment of legal claims against the town" by the use of the plaintiff's money — which had been referred to in *Billings* v. *Monmouth*, *supra*, as the very basis of his claim, "the vital question" — necessarily implied, in a case where the authority of the municipal officers alone was insufficient, the subsequent assent of the town. "Without corporate act or assent, or the agency of a person exercising some authority, there can be no such thing in a legal sense as the payment of a debt of a town." Where, then, the authority of the agent is wanting or is insufficient, a ratification by the principal, the town, must be proved. Otherwise, the application of the new loan to the old debt can at most effect an

assignment of it; it cannot discharge or extinguish it, and while that remains unpaid no new liability on the part of the town can take its place.

But, as to the evidence required to prove this ratification, it was held in *Bank* v. *Stockton*, that formal corporate action was not always necessary to show the assent of the town, without which in such a case there could be no completed payment of a municipal debt; that corporate inaction, failure to act after receiving official notice "that such a loan had been made, that their treasurer, or one of their selectmen, had employed it in paying a municipal debt, outstanding and overdue, and that the creditor had accepted the payment and given a formal release of his claim," might be sufficient evidence of such assent; that simply to refrain from formal municipal action would not enable the town "knowingly to retain the benefit of payments so made by its agents, with moneys hired in its name without authority, and thereby give effect, so far as to release itself from the old debt, to the acts of its officers assuming more than their legal powers, and at the same time withdraw itself from liability for moneys so hired and used."

This is only another statement of the familiar rule of the law of agency, that ratification may result from failure to disavow the unauthorized act of an agent. That it has a proper application to corporations, municipal and private, is generally recognized in the authorities. In regard to the former, it is stated by Dillon, (3 ed.) § 463, *et seq.* in the following terms: "A municipal corporation may ratify the unauthorized acts and contracts of its agents and officers, *which are within the corporate powers*, but not otherwise. Ratification may frequently be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition." As to private corporations the same rule is stated by Morawetz, § § 74-84. "If the members of a corporation having notice of an unauthorized act, performed on their behalf by their regular agents, remain silent and take no steps to disaffirm the act, they may generally be charged with the consequences of the act on account of their acquiescence or ratification." Section 79. "In many

cases mere acquiescence or a failure to repudiate the act has been held sufficient." Section 74.

The authorities cited by the text writers are so numerous and uniform upon this subject, and the principle has been so recently declared in this state, that further discussion of it is not required. The following are a few of the cases in which it seems to be directly or indirectly recognized. 2 Kent's Com.* 291; *Peterson* v. *Mayor*, 17 N. Y. 453; *Hoyt* v. *Thompson*, 19 N. Y. 207, 218; *Fisher* v. *Sch. Dist.* 4 Cush. 494; *Keyser* v. *Sch. Dist.* 35 N. H. 477, 481; *Topsham* v. *Rogers*, 42 Vt. 189, 193; *Howe* v. *Keeler*, 27 Conn. 538; *Marsh* v. *Fulton Co.* 10 Wall. 676; *DeGrave* v. *Monmouth*, 4 C. & P. 111; *Hayden* v. *Madison*, 7 Greenl. 79; *Abbot* v. *Sch. Dist.* 7 Greenl. 118; *Jordan* v. *Sch. Dist.* 38 Maine, 164; *Argenti* v. *San Francisco*, 16 Cal. 256; *People* v. *Swift*, 31 Cal. 26.

The limitations upon the rule just stated, that formal municipal action is not always required as evidence of ratification by the town of an unauthorized act or contract, need not be considered in the present case; as, for instance, that the act or omission relied upon to show the ratification must be by the town itself or by some agent whose authority goes to that extent; that ratification, however proved, cannot make good an act for which prior authority could not legally have been given, one without the scope of the corporate powers or in excess of such powers in violation of law, or where, in certain instances, the officers in doing it violate or disregard the terms of a statute or a charter under which they are acting. There is nothing in this case to require a consideration of the limits of the application of the rule. There is no doubt the town is liable to the plaintiff for the amount of her loan, if it has either authorized or ratified its procurement.

It is not claimed that the selectmen, who hired the money of the plaintiff and with it paid — using that word, as it is convenient to do, to express the act, whether effective or not — the debt of the town to Mrs. Griffin, was authorized by vote of the town to hire money and use it to meet that municipal liability. The $1000, was borrowed of the plaintiff, July 19, 1876. At the

March meeting in that year the town had given the selectmen no authority to hire money to pay debts, but on the contrary had voted to raise $3000, for that purpose by taxation.

Only one question remains; if the agent was without authority, did the town assent or ratify. Assuming, in accordance with the verdict of the jury, that the act of the selectmen was sufficient (if it had been authorized) to constitute a payment, was there a subsequent municipal assent to supply the defect of authority? We think not.

The burden of proof is upon the plaintiff and the evidence does not sustain it. The special verdict of the jury apparently was not intended to go further in its effect than has just been indicated, namely, to find the fact of payment, whether authorized, or not. If it was intended as a special finding that there was either prior authority or subsequent ratification of the act of payment, it would be against the weight of evidence, and in that event the agreement of counsel brings the case before the law court substantially upon report.

We find nothing in the evidence, which under the rule stated in *Bank* v. *Stockton*, can be regarded as a ratification on the part of the town, of the act of the selectmen in hiring money of the plaintiff and using it to take up the Griffin order. The money was never in the hands of the treasurer of the town, nor was the transaction entered upon his books. Neither the fact that money had been hired of the plaintiff and an order given to her, nor the payment of the Griffin order, appears to have been reported to the town by the selectmen or treasurer. The latter order was retained in the possession of the selectman who had the principal charge of this transaction, and he still controls it, having refused to deliver or to exhibit it to his successors in office. It was presented by him to the auditors, appointed in 1878 to examine the accounts of the town for the years 1876 and 1877, and their report which the town refused to accept in March and again in September, 1879, so far as appears, was the first notice the town received of this loan from the plaintiff. The town has not controlled the Griffin order since, and there has been no admission on its part that the payment of it with money borrowed without

authority was valid. The town has never authorized or ratified the pretended payment of it. It is still evidence of a debt due from the town, outstanding, not on the files of the present officers or under their control, never having been surrendered or cancelled by authority or consent of the town. In the way in which the affairs of the town of Stockton have been mismanaged, there seems to be more reason than there would otherwise be for its standing upon the letter of its rights. Who may be at present the lawful holder of the Griffin order, or what his rights may be, cannot be decided in this action. The acts of the selectmen in adjusting accounts among themselves at the close of the year, whatever they may have been, do not tend to show a ratification by the town, when proof that these proceedings were reported to the town is wanting. The same is true of other matters relied upon as proof of municipal assent, such as the retention of the Griffin order by Roberts, among the papers of the town while he continued in office as selectman, and the payment of interest on the plaintiff's order. The evidence fails to establish what is in fact and law a payment of the original debt to Mrs Griffin, and a substitution of the debt to the plaintiff in its stead, by which the defendants are bound against their will.

Judgment for defendants.

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

HENRY WINDLE *vs.* W. B. JORDAN.

Androscoggin. Opinion May 15, 1883.

Livery-stable keeper. Contract. Vicious horse. Burden of proof. Practice.

A livery-stable keeper who lets a horse for hire for a trip, impliedly promises that the horse is a kind and suitable one for the purpose for which he is let, and not vicious, nor in the habit of kicking.

In assumpsit to recover damages for an injury received by a kick from a horse, hired of the keeper of a livery stable, while being driven with ordinary care, the defense was, that the defendant warned the plaintiff, at the time of letting the horse, that the horse was liable to kick if struck on the rump or flank, and the plaintiff agreed to take that risk, and that the injury was caused by the plaintiff's act in thus striking the horse. *Held*, that the burden of proof, after proof of the facts declared upon in the writ, shifted and rested upon the defendant, to satisfy the jury of the truth of the matters, upon which he relied, to avoid liability for his broken contract.

On EXCEPTIONS and motion to set aside the verdict.

Assumpsit to recover damages for an injury received from the kick of a horse which the plaintiff had hired from the defendant and was driving. The writ was dated March 26, 1880, and contained the following declaration:

[Declaration.]

"In a plea of the case, for that the said defendant, at said Lisbon, on the second day of September, in the year of our Lord, one thousand eight hundred and seventy-nine, in consideration that the plaintiff at the special instance and request of the defendant, had hired of him one horse and wagon for the purpose of riding from Lisbon, aforesaid, to Lewiston, in said county, and in return from said Lewiston to said Lisbon, for the price and hire of a reasonable sum of money, to wit: two dollars, and for other good and valuable considerations, then and there promised the plaintiff that the said horse was sound, kind, safe, and serviceable, and free from the vice of kicking, and that the same would perform well when harnessed in said wagon, and was suitable to perform said purpose and service.

"And the plaintiff in fact saith, that he, confiding in said promise of the said defendant, did, on the second day of September, aforesaid, set forward on said purpose and service with said wagon, drawn by said horse of the defendant, hired for the purpose aforesaid, as aforesaid.

"Yet the said defendant did not regard his promise, aforesaid, but then and there craftily and subtly deceived the plaintiff in this, that the said horse was then and there unkind, unsafe, unsound, and unsuitable for said purpose and service, and that

said horse was not free from the vice of kicking, but on the contrary said horse was then and there in the habit of viciously and violently kicking, all of which the said defendant then and there well knew.

"And the plaintiff avers that, in the performance of said service, the said horse was driven and managed by the plaintiff with due care.

"Yet, by reason of the said unkindness, unsoundness, and unsuitableness of the said horse for said purpose and service, the said horse then and there became restive, violent, furious, and uncontrolable, and then and there, while in said service, to wit: at said Lewiston, the said horse viciously and violently kicked the plaintiff upon his left knee and broke the knee-cap thereof, and then and there kicked the plaintiff upon his right leg and upon his thumb and finger, all without the fault of the plaintiff, and the plaintiff was thereby then and there greatly and permanently injured in his left knee, right leg, and thumb and finger, and by reason of his said wounds and injuries, then and there received, as aforesaid, the plaintiff then and there, for a long time afterwards, suffered great pain and anxiety, and became sick, sore, lame, disordered, and incapable of transacting his ordinary and necessary labor, affairs, and business; and so continued for a long space of time, to wit: ever since.

"And the plaintiff avers that his said injuries are incurable, that by reason of said wounds, injuries, and bruises so received, as aforesaid, he was obliged to expend, and did expend large sums of money, to wit: three hundred dollars, in endeavoring to be cured of said wounds and injuries, occasioned as aforesaid, and for board, nursing, medicine, and attendance.

The plea was the general issue. The verdict was for the plaintiff for the sum of nine hundred and thirty-four dollars.

The opinion states other material facts.

Hutchinson and Savage, for the plaintiff, cited: *Darby* v. *Hayford*, 56 Maine, 249; *Gardner* v. *Gooch*, 48 Maine, 494; *Harpswell* v. *Phipsburg*, 29 Maine, 315; *Purrington* v. *Pierce*, 38 Maine, 449; *Stone* v. *Redman*, 38 Maine, 580; *Rogers* v. *K. & P. R. R. Co*, 38 Maine, 230; *McIntosh* v. *Bartlett*, 67

Maine, 130; *Bachellor* v. *Pinkham*, 68 Maine, 253; *Tarbox* v. *Eastern Steamboat Co.* 50 Maine, 345; *Woodcock* v. *Calais*, 68 Maine, 244; *Brackett* v. *Hayden*, 15 Maine, 347; *Sawyer* v. *Vaughan*, 25 Maine, 337; *Towsey* v. *Shook*, 3 Blackf. 267 (25 Am. Dec. 109).

Frye, Cotton and White, for the defendant.

The plaintiff elected to frame his declaration upon an express contract. He might have declared in tort, and thus relied upon implied legal duties and obligations of the defendant, growing out of the contract of hire. The defendant pleaded the general issue, denying the promise. The case discloses an actual contest as to what contract was in fact made. The plaintiff and his witnesses claiming one thing, the defendant and his witnesses another. The plaintiff did not attempt to sustain his case upon the general obligations of a bailor.

Had this been an action sounding in tort for an alleged negligence on the part of the defendant in failing to disclose claimed faults in the horse, and founded on a legal duty on his part to make such disclosure, proof of the letting and failure to inform the plaintiff, would have perhaps cast on the defendant a burden such as the court in this case put upon him.

But plaintiff's action being on a contract, rulings applicable to the case of a contract ought to have been given. See Wharton Ev. § 357; *Tarbox* v. *Steamboat Co.* 50 Maine, 339; *State* v. *Flye*, 26 Maine, 312; *Powers* v. *Russell*, 13 Pick. 76; *Ross* v. *Gould*, 5 Greenl. 210.

It should be remembered that the defendant did not admit the contract as declared on, and attempted to be sustained by the plaintiff and his witnesses, and then attempt to avoid its force by another and distinct proposition. The issue between the parties was first as to what the contract actually was. The plaintiff alleging an unconditional contract, the defendant denying it.

The counsel further contended that the instructions upon the question of the due care of the plaintiff were not all that the defendant was entitled to have given, and cited: *Benson* v.

Titcomb, 72 Maine, 31; *Lane* v. *Crombie*, 12 Pick. 177; *I. & St. L. R. R. Co.* v. *Evans*, 6 Cent. Law J. 197; *Heinemann* v. *Heard*, 62 N. Y. Ct. App. 448; Shear. & Redf. Neg. § 43, and note.

BARROWS, J. The fallacy upon which the defendant's complaints of the instructions given to the jury are based, consists in the assumption that it was a special and express contract that the horse was kind and free from vice, that the plaintiff declared upon, instead of the promise implied by law and growing out of the relation of the parties as bailor and bailee of the animal for hire. It is true that the plaintiff and his witness to the contract of hiring, testify that both the defendant and his hostler recommended and warranted the horse, except in the matter of laziness, but that testimony was not essential to the plaintiff's case.

When it was proved and admitted that the defendant was a livery-stable keeper, and that he let the horse for hire to the plaintiff for the trip, the law settles the contract upon the breach of which the plaintiff counts; and if the defendant claims to be relieved by reason of any special negotiation between the parties, through which the plaintiff assumed any risk which the law would not otherwise impose on him, or if he gave the plaintiff any particular information with regard to the habits of the horse, which called for special and extraordinary care on the part of the plaintiff in driving, as to such matters the burden of proof rested on the defendant, and the jury were rightly so instructed.

It was not incumbent on the plaintiff to prove that no such exceptional element entered into his contract. The burden rested upon the party which affirmed that it did. There was no controversy between the parties as to what the contract was, except what the defendant introduced by undertaking to satisfy the jury that there was superadded to it, something out of the ordinary course, which affected the mutual obligations, duties, and liabilities of the parties to each other.

The substance of the defence was not that the horse was a kind horse, suitable to let, and not liable to kick when driven with

ordinary care, as he should have been to fulfill the contract on the part of the defendant in the particular as to which the plaintiff alleged a breach, but that when the horse was let he told the plaintiff, "if he took her he must not strike her on the rump, for she is liable to kick — on the rump, or on the flank — and if he took her he must take her on his own risk; he said he would run the risk," and that after the horse was brought back there were marks of the whip on and under her flank, upon the strength of which he claimed that her kicking was caused by the plaintiff's neglect of his injunction. To make this defence avail as an excuse for the breach of his contract in letting a vicious horse, defendant must establish a fact which was outside of the contract declared on, to wit: that the plaintiff was informed of the vice of the horse and agreed to take the risk, or that after receiving such information he so conducted as to cause the accident himself. But all depended upon proof of matters which were outside of the issue tendered by the plaintiff: for it could not be said that it would be a want of ordinary care to strike a horse with the whip on the rump or flank, unless the person in charge had been informed that if so struck he was likely to become unmanageable and kick. A vital element in the proof here was, the giving of the warning, which the defendant asserted and plaintiff denied. It was no part of plaintiff's duty to prove the negative. The defendant held the affirmative, and the burden was on him. If defendant would exonerate himself from compensating the plaintiff for a damage suffered by reason of what was, upon his own showing, a breach of the contract that he enters into every time he lets a horse for hire, it was incumbent upon him to satisfy the jury of the facts that would have that effect. Here was a new and distinct question raised by the defendant. *Tarbox* v. *Eastern Steamboat Co.* 50 Maine, 339, 345; *Brackett* v. *Hayden*, 15 Maine, 347.

But the defendant further complains that the presiding judge omitted to instruct the jury "that the burden of proof was upon the plaintiff to show affirmatively that his acts in no way contributed to the alleged injury," and also, "to show affirmatively that in driving said horse at the time of the alleged injury, he

was in the exercise of ordinary care." If the presiding judge had given the first of these instructions upon the case here presented, the plaintiff might have had ground of exception; for unless he had been warned that a blow upon the flank with the whip was likely to cause the horse to kick, an act of his might have contributed to produce the injury while it would not preclude his recovery.

But the jury had, among others, the following instructions: "If the plaintiff was injured through his own fault in striking the horse or using him in a manner which he ought not, so that he himself was careless, and that carelessness contributed to produce the injury which he received, he cannot recover; such is the law; and your verdict should be for the defendant."

"If the defendant disclosed to the plaintiff the fault of the horse, that he was liable to kick when struck, or struck in a certain manner, so that the plaintiff had knowledge of the viciousness of the horse, and then took the risk to use him, and then struck him in the manner which he was admonished it would not be safe to do, and the horse was thereby caused to kick, and the plaintiff thereby received his injury, he cannot recover."

"If you find that he was not made to kick by any such treatment, by any blow inflicted, or by any other fault on the part of the plaintiff, but kicked through viciousness, a viciousness known to the defendant, and because he was liable to kick when not struck, when there was no provoking cause, and the plaintiff was without fault, why then, that ground of defence fails."

"If you are satisfied that the defendant did not disclose the fact that the horse was accustomed to kick, under any circumstances, to the plaintiff, then I understand his learned counsel to concede that if the plaintiff, while using the horse with ordinary care and prudence, was injured by a kick from him on account of the vicious character, the vicious habits, so to speak, of the horse, that he can recover."

We think that these and other instructions given so far covered the case that if the defendant desired a more distinct instruction as to the burden of proof upon the question of due care, he should have requested it; and that, in the absence of any such

request, exceptions ought not to be sustained for the omission. *Harpswell* v. *Phipsburg*, 29 Maine, 315; *Stone* v. *Redman*, 38 Maine, 580.

The motion cannot be sustained. The vicious character of the horse and its unfitness to be let from a livery stable, was abundantly established by the testimony adduced by defendant, as well as by plaintiff. Upon the question of avoidance of liability by warning given, it is worthy of remark that the defendant and his principal witness, the hostler, do not agree as to the character and extent of the warning; and the plaintiff and his witness emphatically deny that there was any whatever. The defendant must abide by the finding of the jury.

Motion and exceptions overruled.

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

LUCIUS C. CHASE and others *vs.* SPRINGVALE MILLS COMPANY.

York. Opinion May 21, 1883.

Evidence. Deceased witness. Sick witness. Depositions. Practice.

When the deposition of a witness has once been legally taken and used at a trial in court, and the witness is dead, the deposition is admissible in evidence, in a subsequent proceeding between the same parties, and involving the same issue.

Whether the issue in the two cases is the same, or not, is in the first instance a question for the presiding justice to decide. And his decision is conclusive, when the exceptions do not afford any basis for a determination that an error in this respect was committed by such justice.

It is not beyond the limits of good practice, or a violation of any settled rule of evidence, to admit in evidence the deposition of a witness, who, by reason of sickness is unable to attend court, which was taken upon the same issue, between the same parties, and both parties had fully exercised the right to examine the witness, when no surprise or sudden change in the aspect of the case, to render the right of further examination valuable, is alleged, if

the court in view of all the circumstances determines that the ends of justice would be better served by receiving the deposition than by interrupting the trial.

ON EXCEPTIONS and motion to set aside the verdict.

An action of the case for disturbing the free and natural flow of the water in Mousam river, whereby the plaintiffs were unable to run on full speed and time their woolen mills in Sanford.

The writ was dated August 30, 1875. The plea was general issue. The verdict was for the plaintiffs in the sum of ten hundred and seventy-five dollars.

The exceptions state that at the trial the plaintiffs offered in evidence the deposition of Jonathan Tibbetts, 2nd, deceased. The defendant objected to the same, assigning, among other reasons, that it was taken in another cause, a chancery cause, and not for the claims set up in this action. The court admitted the deposition, excluding, on objection, one interrogatory. The plaintiffs also offered the deposition of Joel Moulton, deceased, and the defendant made the same objections as to the deposition of Tibbetts. The court admitted the deposition, excluding, on objection, certain interrogatories.

The plaintiffs offered the deposition of James O. Clark, and introduced the testimony of Daniel Clark, relative to him, as follows:

"I am brother of James O. Clark. I last saw my brother last Monday. (This Thursday, P. M.—Reporter.) It was just before sunset. He was at Wells beach; he was sick with typhoid fever. He had been so sick for the last week the doctor did not allow him to have any company, any more than his attendants. Monday, when I was there, he was delirious, out of his head. That was the first day he had been that way. I had a postal yesterday that was written Tuesday, saying he was about the same."

The defendant objected for the reasons assigned against the other depositions, and because the deponent was not a deceased person. The court admitted the deposition excluding, on objections, certain interrogatories. The defendant called Samuel

Webber, who testified that he resided in Manchester, New Hampshire; occupation, civil engineer. . . .

"I drove all around the country, up and around Mousam pond; noted the water shed on either side. Afterwards, in company with persons familiar with the country, I sketched the outline as nearly as possible of the line of water-shed, that fed in above Emery's mills. On that I made an estimate and calculation."

The defendant offered to prove by this witness, his calculations as such engineer as to the amount of the natural supply of water to that stream during the months of July and August, 1875, and the same was excluded on the plaintiffs' objections.

William J. Copeland, for the plaintiffs, cited: *Jones* v. *Roberts*, 65 Maine, 273; *Jackson* v. *Jones*, 38 Maine, 185; *Holbrook* v. *Knight*, 67 Maine, 244; *Webster* v. *Calden*, 55 Maine, 165; *Allen* v. *Lawrence*, 64 Maine, 175; 1 Greenl. Ev. § 63; 1 Whart. Ev. § 79.

R. P. Tapley, for the defendant, contended, that the depositions were inadmissible as depositions, and that being taken between the same parties in another cause does not render them admissible. The introduction of evidence by way of depositions, is regulated entirely by statute. R. S., c. 107; 2 Pick. 65; 4 Allen, 268; *Scott* v. *Perkins*, 28 Maine, 22.

That the testimony of a deceased witness, given in a former trial of the same case, may be proved on a second trial, is well settled. Beyond this, the authorities are not uniform. In this state it must be confined to the same case. 14 Maine, 201; 53 Maine, 258; 53 Maine, 149; see *Melvin* v. *Whiting*, 7 Pick. 79; 1 Whart. Ev. § 177; 1 Greenl. Ev. § 164; *Com.* v. *Richards*, 18 Pick. 434; *Warren* v. *Nichols*, 6 Met. 261; *Woods* v. *Keyes*, 14 Allen, 236; *Yale* v. *Comstock*, 112 Mass. 267; *Costigan* v. *Lunt*, 127 Mass. 354; *Orr* v. *Hadley*, 36 N. H. 575; *Hatch* v. *Brown*, 63 Maine, 419.

The deposition of James O. Clark was that of a living witness within the jurisdiction of the court.

The general rule admitting the use of the testimony of a witness at a former trial of the same cause, is limited to the death of the

witness. By some courts the rule has been extended to cases of permanent insanity and residence beyond the jurisdiction of the court, and in one case where the witness by reason of old age and ill health had entirely lost his memory.

But one case can, I think, be found in this country where the testimony of a witness then living was admitted on account of ill health and inability to attend court. That case gave no consideration to the question, and has been severely criticised in the notes upon the subject in Phillips' Ev. C. and H. notes by Edwards; see 2 Best Ev. § 496; Starkie Ev. (Sharswood Ed.) 61, 409; 1 Taylor Ev. § 472; 1 Whart. Ev. 177; 1 Greenl. Ev. 163.

The old case of *Lutterell* v. *Reynell*, 1 Mod. Rep. 284, is the basis upon which the matter of sickness got into the elementary works, and that case never passed any court *in banc* in review.

In the case of *Harrison* v. *Blades*, 3 Campbell, 457, the subject came up and Lord ELLENBOROUGH said: "I cannot dispense with the attendance of a witness who is still alive and within the jurisdiction of the court, so as to admit evidence of his handwriting in the same manner as if he were actually dead. No case has yet gone so far. . . . If such relaxation of the rules of evidence were permitted there would be very sudden indispositions and recoveries. . . . The party who would avail himself of his testimony must move to put off the trial." See *LeBaron* v. *Crombie*, 14 Mass. 234; *State* v. *Staples*, 47 N. H. 113; *Powell* v. *Waters*, 17 Johns. 176; *Weeks* v. *Lowerre*, 8 Barb. 530; *Wilbur* v. *Selden*, 6 Cow. 162; *Crary* v. *Sprague*, 12 Wend. 41; 2 Searg. & Rawle (Pa.), 84; 17 Searg. & Rawle (Pa.), 409; *Bergen* v. *People*, 17 Ill. 426; *Hobson* v. *Doe*, 2 Blackf. 308; 10 Grattan (Va.), 722; 33 Ala. 380; 1 Nott & McCord (S. C.),* 409.

In the last case the instances enumerated are: (1.) Where witness is dead. (2.) Insane. (3.) Beyond the sea. (4.) When kept away by the adverse party. *Howard* v. *Patrick*, 38 Mich. 795; *Kellogg* v. *Secord*, 42 Mich. 318; *Sullivan* v. *State*, 6 Tex. App. 319; *Collins* v. *Com.* 12 Bush. (Ky.) 271.

SYMONDS, J. When the deposition of a witness has once been legally taken and used at a trial in court, and the witness is dead, there is no doubt of the admissibility of the deposition in evidence in a subsequent proceeding, between the same parties and involving the same issue. In such case, it is not received by force of the statute regulating the taking of depositions, nor because it is a deposition; but by a rule of the common law, upon general principles of evidence, and because it is the testimony of a deceased witness, given upon the present issue between the parties, under all legal conditions and requirements as to the right of examination and cross-examination. 1 Greenl. Ev. § § 168, 553; *Railroad Co.* v. *Howard*, 13 How. 334; *Emery* v. *Fowler*, 39 Maine, 326; *Bank* v. *Hewett*, 52 Maine, 531.

Whether the issue in the two cases is the same, or not, is in the first instance a question for the presiding judge to decide, and a ruling or finding by him on that point can be reversed by the law court only when the case discloses an error therein; just as the question, "whether the witness who is called as an expert has the requisite qualifications and knowledge to enable him to testify, is a preliminary question for the court. The decision of this question is conclusive, unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law." *Perkins* v. *Stickney*, 132 Mass. 217.

The exceptions in this case afford no basis for a decision that an error in this respect was committed by the court at the trial. It is not shown that the issue in the suit in chancery, in which the depositions were taken, was different from that in this action, and an error in the determination of a preliminary question by the court is not to be presumed, when none is found in the case.

Exception is next taken to the admission, under circumstances stated in the report, of a similar deposition of a witness whose attendance was prevented by sickness; the ruling having been given on Thursday, and the fact being proved that on Monday of that week, the witness, being then at some distance but within the jurisdiction, had a typhoid fever and was delirious, and for

the last week only his attendants had been allowed by his physicians to be with him.

The facts are very similar to those of an old case, *Lutterell* v. *Reynell*, 1 Mod. Rep. 284, where a witness on his way to court "fell so sick that he was not able to travel any farther, and his depositions in chancery, in a suit there between these parties about this matter, were admitted to be read."

Referring to the case just cited, it is said in 1 Whart. Ev. § 179: "The same liberty would apply to depositions taken in a prior case between the same parties." The rule is stated in substantially the same way in 1 Greenl. Ev. § 163; and in 2 Starkie, 262, *et seq.* with reference to cases bearing directly or indirectly upon the question. Authorities directly in point are not numerous.

In *Miller* v. *Russell*, 7 Mart. N. S. 266, during the temporary sickness of a witness, the court of Louisiana allowed his testimony at a former trial, notes of which had been carefully kept, to be given in evidence, remarking that "to have examined him again, laboring under disease, would have afforded no better evidence, perhaps not so clear, as that which had been obtained from him on the former trial."

In Judge COWEN'S note (441) to Phillip's Ev. which reviews the authorities on this subject, the decision in *Miller* v. *Russell*, is referred to as one "which does not go beyond the reason of receiving a deposition *de bene esse*, and as easily vindicable on principle;" while another decision in the same volume, *Noble* v. *Martin*, p. 82, extending the rule to the case of a deputy sheriff, absent on official duty, is disapproved; and the note concludes, "Those authorities which come nearest to the liberal principle, on which secondary evidence is generally received, are less anomalous and, therefore, more scientific than the narrower decisions."

It is true the authorities differ upon the degree of mental or physical disability which will justify the admission of such evidence, and, to some extent, upon the question whether it

should be received at all, except upon proof of the permanent and hopeless incapacity of the witness to testify. We have no doubt the general practice of the courts would be to delay a trial, during the temporary illness of a witness, rather than to receive any kind of secondary evidence of his former testimony, in which there might be a new element of error, or which might not be justly and fully adapted to the present exigency of the case on either side. There was a case in this state in 1846, not reported, *State* v. *Canney*, 9 Law Rep. 408, in which oral evidence (aided by minutes) of what a deceased witness testified at a former trial of a capital case was received, while the same was rejected as to a witness who had become insane, it not appearing that the insanity was confirmed and hopeless.

It is doubtless true that objections to secondary evidence of this kind have peculiar force in criminal trials. 2 Phill. Ev. 521, N. 437; 2 Starkie Ev. 487, 488; 1 Whart. Ev. § 179; *Rex* v. *Savage*, 5 C. & P. 143; *State* v. *Staples*, 47 N. H. 113.

Undoubtedly in this case the discretion of the court would have been exercised to postpone the trial, rather than to receive the secondary evidence, had it been offered in any less certain and satisfactory form than that in which it was presented; but when it was all in a deposition taken upon the same issue and between the same parties, where both had fully exercised the right to examine the witness, and where no surprise, or sudden change in the aspect of the case, to render the right of further cross-examination valuable to the defendants, was alleged, if the court in view of all the circumstances determined that the ends of justice would be better served in the particular case by receiving the deposition than by interrupting the trial, we are not prepared to say, after a careful examination of the authorities cited in the able brief for the defendants, and by the authors to whom we have referred, that such a decision was beyond the limits of good practice, or a violation of any settled rule of evidence. We think, in this respect, the case does not show that an error in law was committed at the trial. The law does not wholly exclude the physical inability of the witness to attend, as a reason for admitting such evidence, and there should be apparent error or

injustice in the ruling of the presiding judge in the particular case, before his decision should be reversed.

The quantity of water naturally flowing in a stream during the months of July and August, 1875, was not a fact to be proved by the calculations of an engineer, whose only means of information were that he visited the region once during that period, drove around the country in company with persons familiar with it, and sketched an outline of the water-shed as nearly as possible. Many of the facts which must have affected the supply of water during those months, according to the statement of the engineer, could have been known to him, if at all, only from information received, and it does not appear that any hypothetical questions to him were excluded.

It is the opinion of the court that a new trial cannot be granted upon the motion.

Motion and exceptions overruled.

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

LEMIRA C. PENNELL *vs.* GEORGE H. CUMMINGS and others.

Cumberland. Opinion May 19, 1883.

Negligence. Physician's certificate of insanity. Commitments to insane asylum. Evidence.

In an action against physicians for falsely certifying, through malice or negligence, to the insanity of a person, who is thereby committed to the insane asylum, and the pleadings raise the issue as to the sanity of such person at the time when the certificate alleges her to be insane, the burden of proof is on the plaintiff in respect to the averment and claim that she was then sane.

In such an action the falsehood, and not the insufficiency of the certificate, is the ground of action against the certifying physicians. Without statutory provisions to that effect there cannot be a civil action for damages against a physician, based upon the insufficiency of the methods which he pursued in reaching and certifying a correct conclusion.

In such an action it is open to the defendants to prove precisely what were the circumstances under which they acted, what inquiry, investigation and examination they made and what the information was on which they proceeded. If such testimony did not go to the extent of a justification in case their certificate should be found to be false on the question of insanity, it was proper evidence to be considered in awarding damages.

If physicians who have certified to the insanity of a person, have not made the inquiry and examination which the statute requires, or if their evidence and certificate in any respect of form or substance is not sufficient to justify a commitment, the municipal officers should not commit, and if they do it is their fault and not that of the physicians, provided they have stated facts and opinions truly and have acted with due professional skill and care.

ON EXCEPTIONS.

Action of the case against defendants for making the following certificate which the plaintiff alleges was false through the malice or negligence, or both, of the defendants.

"Portland, January 19, 1881.

"This is to certify that we have examined Mrs. Lemira C. Pennell as to her mental condition and pronounce her insane and needing the care and restraints of an insane asylum.

George H. Cummings, M. D.
E. W. Brooks, M. D.

I concur in the above. H. N. Small, M. D.
T. A. Foster, M. D."

The verdict was for the defendants and the plaintiff alleged exceptions which, with the material facts relating thereto, are sufficiently stated in the opinion.

John J. Perry, for the plaintiff, in an able and elaborate argument, contended that it was the duty of the defendants to have based their certificate upon "due inquiry and personal examination" made on the day of the date of their certificate, and that they should have approached such examination and inquiry free from prejudice or preconceived opinions of the mental condition of the plaintiff, giving her the full benefit of the legal presumption of sanity. *Heald* v. *Thing*, 45 Maine, 392.

That the "due inquiry" is to be made at the time of the "personal examination," not prior, and all testimony as to

previous interviews with the plaintiff, or information as to her mental condition, or opinions as to her sanity could not be admissible. 2 Whart. Ev. § 1254, and cases cited. *Townsend* v. *Pepperell*, 99 Mass. 40.

That the certificate should itself show that the physicians performed the duty required of them by the statute, that their opinion was based upon "due inquiry and personal examination." *Sargent* v. *Roberts*, 52 Maine, 590; *Bailey* v. *Carville*, 62 Maine, 524; *Proctor* v. *Lothrop*, 68 Maine, 256; *Gee* v. *Patterson*, 63 Maine, 49; *Look* v. *Dean*, 108 Mass. 116.

Counsel further cited Taylor Med. Jur. pp. 504–506, and contended that the somewhat advanced views of the plaintiff upon hygiene, though entertained by some of the most learned and scientific men of the age, was all that was proved against her; and that the inference was quite clear, that because she thought she could give the defendants good advice upon sanitary matters and about ventilation, sewerage and kindred subjects, they were of the opinion that she must be insane.

Drummond and Drummond, for the defendants.

SYMONDS, J. The defendants are practising physicians in Portland. The action is against them for making a certificate of the insanity of the plaintiff, which the declaration alleges to have been false, in one count through malice, in the other through negligence.

The exceptions, reciting the material averments of the declaration so far as they relate to the questions of law reserved, after setting forth the acts of the defendants and the injuries which resulted to the plaintiff therefrom, conclude the allegations with the statement, "that at the time the certificate was made, she was not insane, and that said certificate was false. The defendants plead the general issue." It is in this way that the exceptions state the issue raised by the pleadings and the ground on which the plaintiff relied at the trial, namely, that the certificate was false in respect to the alleged insanity of the plaintiff.

There is no report of testimony, but the exceptions make the following general statement in regard to the character of the evidence introduced: "The plaintiff introduced evidence tending to show that she was sane on said nineteenth day of January, 1881, (the date of the certificate,) and had been sane ever since, and had taken care of herself ever since;" showing that it was directed on the part of the plaintiff to the support of the issue which had just been stated, to sustain the averment of the sanity of the plaintiff at the time when the certificate was given, on proof of which the plaintiff relied under the pleadings.

Upon the issue so raised, and in view of what the exceptions disclose as to the course of the trial, it was correct to rule that the plaintiff, to recover, must sustain the burden of proof in this respect, must establish the averment and the claim that she was sane when the defendants certified to her insanity. The presumption of sanity was in the plaintiff's favor at the outset, but when evidence had been offered for and against it, the question was no longer to be decided by the presumption alone, but by the weight of evidence, the presumption included, and until in the judgment of the jury this was on the plaintiff's side, the falsehood of the certificate in the respect to which the issue related, and which the exceptions show was the basis of the plaintiff's claim, did not appear.

The act of committing the plaintiff to the insane hospital was not the act of the defendants, but of the municipal officers, a tribunal organized for that purpose and from the decision of which an appeal is provided. This is an action, too, not for false imprisonment, but for making a false certificate of the plaintiff's insanity. Only the defendants' own acts are alleged against them, not a combination with others to accomplish an unlawful purpose. It was for the municipal officers, not for the defendants, to see that the provisions of law were observed in making the commitment. The act of 1876, c. 117, provides that "in all cases of preliminary proceedings for the commitment of any person to the hospital, the evidence and certificate of at least two respectable physicians, based upon due inquiry and

personal examination of the person to whom insanity is imputed, shall be required to establish the fact of insanity and a certified copy of the physicians' certificate shall accompany the person to be committed." This act prescribes a condition, as to the single fact of insanity, without the fulfilment of which there cannot be a legal commitment to the hospital, *Naples* v. *Raymond*, 72 Maine, 217; but it is a condition imposed upon the legal action of the committing board, not one which creates a new standard of liability for the physicians who act under it. If the physicians have not made the inquiry and examination which the statute requires, or if their evidence and certificate in any respect, of form or substance, is not sufficient to justify a commitment, the municipal officers should not commit, and if they do it is their fault, not that of the physicians, provided they have stated facts and opinions truly and have acted with due professional skill and care. A physician may rightfully testify or certify to facts within his knowledge, or to conclusions which he has formed, tending to induce a belief in a person's insanity, which at the same time are manifestly insufficient alone, under the statute, to warrant his confinement as an insane person. The illegality of a commitment upon such evidence or certificate, would not consist in giving or in receiving them, but in the action of the board ordering the commitment upon them, without the other preliminaries which the statute prescribes. The falsehood, not the insufficiency of the certificate, is the ground of action against the certifying physician. That issue was submitted directly to the jury by the instructions which were given.

The English statute, 9 G. 4, c. 41, § 30, provides that "any physician, surgeon or apothecary who shall sign or give any such certificate, without having visited and personally examined the individual to whom it relates, shall be deemed to be guilty of a misdemeanor." *Rex* v. *Jones*, 2 B. & Ad. 611. The offence defined in this section might perhaps be complete, even if there were no intent to deceive and only the truth was certified. But our statutes contain no such provision, and in the absence of a statutory requirement in that respect, we think there cannot be a civil action for damages against a physician, based upon the insuf-

ficiency of the methods which he pursued in reaching and certifying a correct conclusion. The falsehood of the certificate in the respect to which the issue relates must be proved, else the defendants are not liable. That is the cause of action set forth in the declaration.

Each defendant is liable only for his own act, for the correctness of the certificate in the terms in which he gave it. The defendants, Cummings and Brooks, examined the plaintiff, as they certified. The defendants, Foster and Small, concurred in the opinion of the examining physicians. It will be observed that we are not now considering what measure of liability would attach to either of the defendants, if their certificate was erroneous. Instructions upon that point were given to the jury at the trial, to which the plaintiff does not except. Apart from any statutory requirement, the law would undoubtedly hold the defendants in such a case to the usual professional liability for due care and skill, and when the serious consequences that may flow from reliance upon such a certificate by the municipal officers, the imprisonment of a sane person in an insane asylum, perhaps for a long time, the standard of care required, and of professional learning and ability to deal with such a subject, would certainly be an exacting one. But we refer now only to the ruling that the burden of proof was upon the plaintiff to sustain the issue raised by the pleadings, to prove her own sanity at the date of the certificate. If two of the defendants having examined the plaintiff, expressed the opinion that she was insane and the other two concurred in that opinion, and that opinion was according to the fact, it is not a ground of liability against either defendant that he did not do more than he certified, that he did not, besides this, pursue all the methods required by the statute as the basis for legal action on the part of the municipal officers. The truth of the certificate upon the points in issue is a defence to the action.

The exceptions to the admission of evidence against the objection of the plaintiff, relate principally to testimony tending to show what inquiry the defendants had made and what information they had received before they gave the certificate.

The exceptions are to the admissibility of the evidence, not to any ruling as to its effect. If the only question had been the truth or falsity of the certificate, the sanity or insanity of the plaintiff, it would not have been admissible. It had no tendency to aid in determining that issue. But if the jury found the certificate erroneous or false, the further question was then presented whether the facts of the case, the investigation which they pursued and the information on which they relied, were such as to relieve the defendants from legal liability for making a certificate or expressing an opinion which was not according to the fact. The plaintiff claimed that the certificate was not only false, but false through malice or negligence. Its falsehood in a respect (that of alleging the plaintiff's insanity) which gave the municipal officers authority, under the statute, to commit her to the hospital and led to their doing it, and this falsehood resulting from an unlawful motive on the part of the defendants, or from an absence of that professional vigilance and ability which they were bound to exercise in such a case, were the grounds on which their liability was predicated by the plaintiff. To meet that issue, it was open to the defendants to prove precisely what were the circumstances under which they acted, what inquiry they made and what the information was on which they proceeded. If such testimony did not go to the extent of a justification, it was proper to be considered in awarding damages. What facts were within the defendants' knowledge at the date of the certificate, as, for instance, the fact of her previous confinement at the hospital with the circumstances attending her discharge, what information had been communicated to them, and from what sources, evidence upon these points, with proper instructions as to its effect, simply brought to the attention of the jury the circumstances under which the defendants acted, and, if the certificate was erroneous, enabled them to judge whether the defendants were guilty of malice or of professional negligence in making it, and also whether damages should be assessed as for a wilful wrong, gross negligence, or for an unintentional failure to exercise the high degree of care and skill required in doing such an act.

There was no ruling receiving oral evidence of the contents of a letter. The question did not call for that, and when it came in in the answer, there was no motion to strike it out as incompetent.

We think there was no error in the rulings at the trial nor in the verdict of the jury.

Exceptions and motion overruled.

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

ROCKLAND WATER COMPANY *vs.* DAVIS TILLSON.

Knox. Opinion May 22, 1883.

Aqueduct. Easement. Quarry. Negligence.

In the case of an aqueduct, as in that of a way, the owner of the easement may peaceably pursue his right against any obstructions which the land-owner throws in the way of its enjoyment.

If blasting in a quarry undermine an aqueduct its owner may adopt new means of supporting it in its place and if a broader base for the new support than the width of the original location of the aqueduct had been rendered necessary by the blasting it is not trespass on the owner of the soil to use his land for that purpose.

An aqueduct has the right of support in the land and if blasting under it within the limits of its location by the land-owner deprives it of its former support, the right still remains and its enjoyment may be reclaimed with the incidents which necessarily went along with it. The same is true of a change of the course of the aqueduct rendered necessary by the act of the owner of the servient estate.

In an action by the owner of an aqueduct against the owner of the land, or one acting under his license, for damages resulting from quarrying beneath the aqueduct, the verdict must give complete satisfaction for the whole injury. If the jury by their verdict allow only the cost of a structure less than permanent, they are to add a fund, the interest of which would be sufficient to keep the structure in permanent repair. But the defendant in such a case is not to be subjected to an indefinite liability for all future acts of the quarry owners doing damage to an aqueduct legally located and properly built.

It is not the negligence of the workers in the quarry which would render them liable in such a case, but the effect of their acts, negligent or not, to disturb the plaintiffs in the enjoyment of a dominant right.

The defendant is not liable in such a case for injuries occasioned by the acts of his grantees, though holding the quarry under his warranty deed.

ON EXCEPTIONS AND MOTION.

Action to recover damages for injury to plaintiffs' aqueduct by removing its support in operating a lime quarry which it crossed. The writ was dated September 23, 1875. This was the second time the case had been tried. After the first trial it was carried to the law court on exceptions by both parties and is reported in 69 Maine, 255.

The case shows that the defendant worked the quarry from 1869, to April 24, 1871, when he sold to the Cobb Lime Company, and that company operated there between the date of the purchase and the date of the writ, causing a further damage to the aqueduct.

At the trial the verdict was for the plaintiffs for $226.31, and the plaintiffs moved to set aside this verdict, and for a new trial, and also alleged numerous exceptions to the rulings and instructions of the presiding judge.

The material facts upon the questions discussed in the opinion are sufficiently stated by the court.

A. P. Gould and J. E. Moore, for the plaintiffs, claimed that as their charter gave them the right to take lands for their aqueduct for the sole purpose of furnishing the citizens of Rockland and others with pure water, they were responsible to the public and the right of election, and duty devolved upon them to decide whether the aqueduct should be removed from the quarry.

This right of election is recognized by the court in this case, 69 Maine, 255.

If the plaintiffs in good faith determine that it is their duty to change the location, the defendant cannot interfere with the exercise of that power; and if they make the change prudently and do not increase the value of the aqueduct thereby, but simply make it as good and as secure as it was before, they are entitled to recover of him the cost. The plaintiffs insisted upon this claim at the trial and objected to all evidence introduced for the purpose of showing the cost of constructing a bridge.

The plaintiffs are to be made whole for the injuries to their works occasioned by the acts of the defendant. The court thus instructed the jury but later on gave the following instruction: "You have a right to decide, if you see fit that the remedy should have been by a structure less than a permanent structure; one requiring even oversight and repairs from time to time; in which case, however, you would assess besides the value of the structure a sum of money to be added, enough to keep a structure in repair for as long a time as the corporation might need it." And counsel ask "with such a structure would these plaintiffs be as well off as they were before the defendant interfered with their property? Would they be as well off, even as they could reasonably be made by building a proper support and protection for the pipe where it is? . . . We say first that the defendant had no right to impose this perpetual peril and burden upon the plaintiffs, when by building a permanent structure, they could be relieved from it."

"The constant peril to the water works by having their pipe supported across a chasm like that created by the defendant, by less than a permanent structure, one that required watching and frequent repairs, cannot be measured by the mere cost of such watching and repairs. . . . The aqueduct was, when the defendant disturbed it, where it would be perpetually secure. The jury were first to guess how long the corporation would need it, then they were to guess how much less than a permanent structure it was safe or would be likely to put up; and again they were to guess how much oversight and repairs a structure 'less than permanent' would require and cost."

But counsel claimed that the chief infirmity with the instruction was that it would not make the plaintiffs whole; and that in close connection with this comes in the further instruction, "The plaintiffs contend that the blasts of the quarry would jar the bridge, this Siamese structure of this vein or chasm. . . . At this point comes in, however, another consideration which you should think of. While considering that there may be a liability to shock, it must also be taken into consideration that any person, who so used the quarry as to injure the pipe legally and

properly resting through and over the quarry, would be liable to such injury, and they would be liable whether done negligently or not."

Counsel claimed that this was virtually an instruction that the plaintiffs were not entitled to a sufficient sum to build a bridge of such a character that it would afford protection from injury from the jar produced by blasting in the quarry, even if the blasting was conducted without negligence or in a prudent manner.

From November 11, 1869, to April 14, 1871, the plaintiffs were under the necessity of making frequent temporary repairs; and they were subject to loss and inconvenience by reason of the freezing of the pipe and the loss of the water by leakage. The plaintiffs claimed damages for these temporary repairs and incidental losses in their writ; and counsel contended that though amply maintained by proof they were not allowed, that the only instruction relating to them was as follows: "The plaintiff cannot recover for temporary repairs and then wait and recover for other temporary repairs." And this, counsel claimed, cut off the recovery of every cent of these expenses.

Plaintiffs' easement having been acquired only by laying their pipe across Ulmer's field and afterwards paying him the damage agreed, extended only over the land upon which the pipe laid. They have no right to the soil on either side of it; and they have no right to change the location. *Onthank* v. *Lake Shore R. R. Co.* 71 N. Y. 194; *Jennison* v. *Walker*, 11 Gray, 423; *Chandler* v. *Jamaica Pond Aq. Co.* 125 Mass. 544; Washburn's Easements (2d ed.), 225; *Jaqui* v. *Johnson*, 27 N. J. Eq. 526; *Idem*, 526.

Counsel further argued: "We say first, that as defendant was opening this quarry at his own risk his co-tenants could not be responsible for his torts; second, that if he was doing it as a tenant in common his trespass does not give the injured party the right to take the property of his co-tenants to repair the damage; third, that if the property of Tillson and his co-tenants could be taken to repair the injuries done by him, the property of his innocent grantees who hold the quarry under a conveyance of the lime rock from him, and authority to take it all out with a cov-

enant of warranty against the incumbrance of the plaintiffs' easement cannot be taken to repair the damage without compensation."

Counsel further contended that the defendant was responsible for the injury done to the aqueduct by his grantees. He only owned the lime rock. He only sold the lime rock. Sold it to be quarried. He covenanted with his grantees that there was no incumbrance. His grant authorized the Cobb Lime Company to take out and remove all the lime rock in that quarry. "I authorize you to take out all the lime rock and I guarantee that if you destroy the easement of the Water Company by doing it I will pay all the damage."

It cannot be questioned that if the Cobb Lime Company were sued by these plaintiffs for injuries caused by removing the lime rock, judgment against them would alone be a sufficient ground of action against this defendant upon his covenant to them. That would be circuity of action. *Brown* v. *Manter*, 21 N. H. 528; *Bates* v. *Norcross*, 17 Pick. 14; *Haynes* v. *Stevens*, 11 N. H. 28; *Thompson* v. *Banks*, 43 N. H. 540; *Comstock* v. *Johnson*, 46 N. Y. 615; *Voorhees* v. *Burchard*, 55 N. Y. 98; Wood on Nuisances, § § 77, 828; *Irvine* v. *Wood*, 51 N. Y. 224; Wash. Easements, (2 ed.) 665; Sedg. Damages, 162; Ang. Wat. Courses, 439.

Counsel further elaborately argued the motion to set aside the verdict.

Rice and Hall, for the defendant, cited: S. C. 69 Maine, 255; *Pen. R. R. Co.* v. *White*, 41 Maine, 512; *Farnum* v. *Platt*, 8 Pick. 338; *Liford's case*, 11 Rep. 46; Wash. Easements, 564; *Prescott* v. *White*, 21 Pick. 341; *Prescott* v. *Williams*, 5 Met. 429; *Dygert* v. *Schenck*, 23 Wend. 446; *Waggoner* v. *Jermaine*, 3 Denio, 306.

SYMONDS, J. In 1869 and 1870, the defendant, in working a lime quarry, disturbed the plaintiffs' aqueduct, and this action is to recover damages therefor. The plaintiffs had acquired under their charter the right to maintain the aqueduct through the field where the excavations were made. The owner of the land

authorized the defendant to open the quarry. The questions, therefore, which the case presents, arise between the owner of an easement on the one hand and on the other the owner of the fee, or one acting by his authority, who in changing and developing the property for lawful business purposes does damage, temporary or permanent, to the structure which the easement protects.

"The existence of a servitude upon an estate does not affect the general rights of property in the same. All these remain, subject only to the enjoyment of the existing easement. . . The proprietor of the soil retains his exclusive right in all the mines, quarries, springs of water, timber and earth, for every purpose not incompatible with the public right of way." Wash. Easements, 227, 228.

"The soil and freehold remain in the owner, although encumbered with a way. Every use to which the land may be applied, and all the profits which may be derived from it consistently with the continuance of the easement, the owner can lawfully claim." *Perley* v. *Chandler*, 6 Mass. 454.

"If any other person has an easement in an estate, the owner has still all the beneficial use, which he can have consistently with the other's enjoyment of that easement." *Atkins* v. *Bordman*, 2 Met. 467.

"Nothing is better settled than that a highway leaves the title of the owner unaffected as to everything except the right of the public to make and repair and use it as a way, and for some other public purposes." *Codman* v. *Evans*, 5 Allen, 308.

The defendant had the right to work the quarry in any way which did not deprive the plaintiffs of the use, nor disturb them in the enjoyment of the easement; but any obstruction of the easement or encroachment upon it, any disturbance of the soil or other support or protection by means of which the easement was enjoyed, which resulted in damage or which would furnish evidence in favor of the land-owner against the existence of the plaintiffs' right, would support an action by the owner of the easement to recover damages for the invasion of his right and for the injury done. *Hastings* v. *Livermore*, 7 Gray, 194. Nor

is it a defense to such an action to show that the defendant, when he injured the plaintiffs' right of property, was pursuing a lawful business and proceeding with care. The rule is correctly stated in *McKeon* v. *See*, 4 Rob. (N. Y.) 449. "The case presents the naked question whether the lawful character of the results of an occupation, trade or mechanical art, or the care with which it is carried on, can prevent any right of action by those whose enjoyment of life or property is destroyed by the mode or means of conducting such occupation, trade or mechanical art. The right of jarring a neighbor's house by the motion of a steam engine upon one's own premises cannot depend at all upon the utility or lawfulness of the purpose for which such motion is employed, or its final results. The intermediate injury before such results are obtained, wrought upon another's property or enjoyment of life, make such employment unlawful." The useful and lawful character of the business of working the quarry did not justify the defendant in disregarding the plaintiffs' right nor in disturbing them in its enjoyment. The question of the power of a court of equity in any case to relieve a valuable mine of the burden of such an easement, changing the direction of the aqueduct on terms without impairing its use, does not arise. The rule stated is the one which governs this action at law.

It is also true, in regard to an aqueduct as in regard to a way, that the owner of the easement may peaceably pursue his right against any obstructions which the land owner throws in the way of its enjoyment. If the blasting in the quarry undermines the aqueduct, he may adopt new means of supporting it in its place; and if a broader base for the new support than the width of the original location of the aqueduct has been rendered necessary by the blasting, it is not a trespass upon the owner of the soil to use his land for that purpose. The aqueduct has the right of support in the land, and if the blasting under it within the limits of the location by the land-owner deprives it of its former support, the right still remains and its enjoyment may be reclaimed with the incidents which necessarily go along with it.

In the present instance the company, having power by charter to take land for the purpose of laying and maintaining its aque-

duct, after completing its works through the *locus* agreed with the proprietor upon the amount of the damage and paid it, taking his receipt in full therefor. It was held in this case, 69 Maine, 255, that the plaintiffs thereby acquired a permanent easement under their charter. But no width of location was defined. The right acquired was to maintain the pipe in the ground in the position in which it had been placed. When the earth which then supported and protected the pipe was removed by the owner of the fee, it was an act which affected the means of support and protection first adopted, not the right. A superior right is not lost by a trespass or tort; and if not, the right of support must include the right, in any case where it is practicable to do it, to substitute what is necessary for the purpose in place of a natural support or protection wrongfully removed by the owner of the soil. There may be cases of the total destruction of the means by which an easement is enjoyed or its permanent obstruction, in which it is impracticable to exercise the right to repair or rebuild or the right is not worth exercising, and the law will give only the value of the easement, not the expense of restoration, in damages, but in those cases the trespass alone has no effect to extinguish the right.

The same is true of a change of the course of the aqueduct, rendered necessary by the act of the owner of the servient estate. If the excavation is one which cannot be suitably bridged, or over which it is impracticable to support the pipe, the owner of the easement may lay the pipe round the excavation upon land of the same owner, in a place where it is reasonable and practicable to do so, and may maintain it there while the obstruction continues, without committing a trespass; just as "if a private way is unlawfully obstructed by the owner of the adjoining land, a person entitled to use the way may justify passing over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage." *Kent* v. *Judkins*, 53 Maine, 160. We can see no difference in principle in this respect between an aqueduct and a private way. A dif-

ferent class of circumstances might be required to show the reasonableness and necessity of building a structure, like an aqueduct, round such an obstruction, from those which would warrant a traveller in leaving a road which had been rendered impassable, but we have no doubt that, as to the former, there might be cases in which the legality of such an act would be sustained. The same "fundamental principle of the common law, that a man shall not be heard to complain of an injury which is the direct and necessary result of his own illegal act," applies in both instances. In the present case, however, there has been no deviation of the course of the aqueduct, and the jury have found that none was necessary.

The defendant on June, 15, 1869, purchased of Ulmer, from whom the plaintiffs acquired their easement in 1852, one-fourth of the lime rock in the quarry, and acted for Ulmer as well as for himself in opening it. Under the circumstances stated, this right of new support or of change of course for the aqueduct pertained to the easement not only against the defendant who was the immediate trespasser, but also against Ulmer by whose authority and in whose behalf as well as in the behalf of the defendant the blasting was done. The right of support, under the original and under the changed conditions, was a part of the easement, and the easement was a right superior to any other estate (under Ulmer) in the land or mine, and remained an incumbrance upon them both in the hands of the grantees of Ulmer, holding by direct or mesne conveyances from him after the easement was granted.

The excavations by the defendant were from 1869 to April 24, 1871. The case was tried in March, 1882. During all this time the pipe has been carried over the excavation, where it still remains. The plaintiffs allege in their declaration that by the defendant's acts "they will be compelled, in order to make the same safe to remove their aqueduct and lay the same around said premises;" and their claim in argument is, that having a public duty to perform, to supply the city with water, they have a right to determine for themselves whether it is necessary to change the location of the aqueduct, or

not; that the quarry continued to be widened under the pipe by the defendant's grantees until about the date of the writ, so that till then there was no opportunity for them to decide what permanent and final arrangement it was necessary to make, the bridge over the quarry being regarded as a temporary structure only; and that now having decided that it is necessary in their judgment to go round the cut, they have a right to recover of the defendant the expense of making such a change, whatever the jury may think of the feasibility of suitably bridging the cut at less cost.

This claim seems to us to be without foundation. It was for the jury to determine what damage was caused by the defendant's acts, and that includes the inquiry what is necessary to be done, and at what expense, to restore the plaintiffs to the enjoyment of their right. It has already been decided in this case that "the jury are to judge whether any, and if so, what repairs should be made, and from this the actual injury to the property, and assess the damages accordingly." 69 Maine, 270. The plaintiffs could not justify going round the cut at all, without the payment of land damage, except by satisfying the jury of a necessity for so doing, created by the defendant, such at least as to render that the most judicious course to pursue. An election on their part to make the change does not affect their legal relation to the defendant. They may have the right under their charter, by making compensation for lands taken for the new location, to go round the cut, or to remove the aqueduct altogether from the Ulmer field, if they deem it necessary to do so, and the performance of their public duty may require the exercise of their judgment in that respect, but their judgment is not made the measure of the rights or liabilities of the defendant. It was for the jury to say what method of restoration was judicious and practicable, and what was the expense of it.

The charge left this question to the jury, to decide what mode of repairing was most judicious, and was therefore to be considered in assessing the damages; whether it should be by going around or across the cut; if the latter, whether it should be by a permanent structure, practically speaking, or by "a structure

less than a permanent structure, one requiring even oversight and repairs from time to time, in which case, however, you would assess besides the value of the structure a sum of money to be added, enough to keep a structure in repair for as long a time as the corporation might need it. . . . You may decide that they may go across with a permanent structure, or if it were more convenient and better, more judicious, that it should be even less than permanent, by putting money enough in the hands of plaintiffs to make it equivalent to permanent, that is, so that the interest would keep it in repair, keep it in restoration, because there are many cases where it is an impossibility to have a permanent structure."

We think these instructions justify themselves against the criticism of the learned counsel for the plaintiffs. The jury could not have failed to understand that, if they allowed in their verdict only the cost of a structure less than permanent, they were to add a fund the interest of which was sufficient to keep the structure in permanent repair. If there were anything doubtful in the phrase "for as long a time as the corporation might need it," it is sufficiently explained by the later sentences already quoted and by those which directly follow: "But whether in one or the other mode, it must be, the law says, a fair, reasonable, practicable, and the most judicious thing, to do. However done, it must be enough to make the plaintiffs whole, to pay for the entire injury, and if not to replace the plaintiffs in the exact conditions they were in, to grant an equivalent. The law does not expect that perfection can be always or often attained but requires that substantial and reasonable reparation and as perfect as may be, acting judiciously, wisely, and well, shall be the rule for your verdict."

The plaintiffs have no ground of exception to that part of the charge which directed attention to the fact that if hereafter the blasting in the quarry should jar and injure the aqueduct, properly constructed across the cut, the liability therefor, would rest upon those by whose act the injury was done. "While considering that there might be a liability to shock, it must also be taken into consideration that any person who so used the quarry as to injure

the pipe, legally and properly resting through and over the quarry, would be liable for such injury, whether done negligently or not." Clearly this is true. In determining the character of the structure required, the jury might consider its exposure to shocks from blasting in the quarry. This was in the plaintiffs' favor. But the defendant was not to be subjected to an indefinite liability for all future wrongful acts of the quarry owners, doing damage to an aqueduct, legally located and properly built. Subsequent operators in the quarry would have no more right to injure or disturb such an aqueduct than the defendant had to blast under the pipe where it was originally laid, and the extent of the injury done, would be the measure of liability in the one case as in the other. As we have already seen, it is not the negligence of the workers in the quarry which renders them liable in such a case, but the effect of their acts, negligent or not, to disturb the plaintiffs in the enjoyment of a dominant right.

Exception is taken to the instruction that "all the damages that can ever be recovered are to be recovered in this one suit; that is, the plaintiffs cannot recover for temporary repairs, and then wait and recover for other temporary repairs. They must recover in this suit all they can ever recover." It is claimed by the plaintiffs that the defendant, until April 24, 1871, when he sold to the Lime Company, was constantly widening the cut, that permanent repairs could not properly be made till the whole width of lime rock in the vein was removed, and there was no danger of further widening, and that the expense of temporary repairs to April 24, 1871, as well as the cost of a permanent structure across the vein, should be included in the assessment of damages.

It is to be observed that the liability of the defendant for damages is not to be measured by what the plaintiffs have done, or have omitted to do in the way of repairing the injury. The cost of the repairs which the plaintiffs have made, "is not to control, and may not even throw any light upon the question of damages. The plaintiffs may repair in their own way, and thus make the property very much more, or less valuable than it was before." 69 Maine, 269.

In repeated rulings at the trial the jury were directed to allow the plaintiffs full compensation for the injury which they had sustained. They "are to receive damages enough to make them whole; they shall have what was taken away restored, or its practical and reasonable equivalent." The jury are told they may regard themselves as a committee of view, thrown upon the spot on the date when the excavations by the defendant ceased, to examine the territory, to satisfy themselves of the comparative expense of the different modes of repair, and the effect of each upon the conflicting rights of property in the land, and, taking all into consideration, "to decide what was, upon the whole, the judicious thing to be done to repair and restore that property, to make the plaintiffs whole from the injury put upon them up to that date, and from any consequences that may follow from that injury."

The remark to which exception is taken, that "the plaintiffs cannot recover for temporary repairs, and then wait and recover for other temporary repairs," was intended, as the context shows, rather as an enlargement than as an abridgement of the plaintiffs' claim. It was to impress upon the jury that the plaintiffs' right of recovery in this action was not limited to the temporary repairs which had then been made; that no other right of action remained for future temporary or permanent repairs, and that full compensation for the whole injury must be given by this verdict. Moreover, the remark is strictly true in itself. It is by no means a ruling that the expense of the temporary repairs is not to be considered in determining the damages, but on the contrary a statement that the plaintiffs must not be limited in their recovery here, to costs already accrued, because after such a verdict they could not wait, and in another action recover the amount of future expenditures for a similar purpose. Therefore, the verdict must give complete satisfaction for the whole injury.

It is next contended by the plaintiffs that the court erred in ruling that the defendant was not liable for the acts of his grantees in removing rock from the quarry after April 24, 1871; that by giving them a deed of warranty, free from incumbrances, of an undivided fourth of the lime rock, he authorized them to remove

it, and, covenanting against the existence of the easement, is liable to the plaintiffs for all that his grantees, the Lime Company, did while proceeding according to their deed. But we think the rule of damages given to the jury at the trial was substantially in accordance with the former opinion of the court in this case. It was held in *Waggoner* v. *Jermaine*, 3 Denio, 306, that one who erects a nuisance upon his own land, a dam which obstructs a water course without right, and then conveys and surrenders the possession of the premises to another, with covenants of warranty for quiet enjoyment, remains liable in an action on the case for the damages occasioned by the continuance of the nuisance, subsequent to the conveyance. But the court has already decided that in this case the wrongful act of the defendant was not a continuing one, that he has erected no continuing nuisance for the maintenance of which, successive actions may be brought, that the injury complained of was in the nature of waste, and that the damages, present and continuing, must be recovered in one action.

If every grantor were liable, directly, to the parties injured for torts committed by the grantee in obstructing easements upon the granted premises, which were subsequently found to exist by legal right, although a warranty against incumbrances had been given, his covenant with one, the grantee, would expose him to actions by as many persons as there were different incumbrances, or in the case of a private way, by as many persons as had the right to use it, and to as many actions as the number of torts the grantee saw fit to commit after the existence of the easement was known; and this multiplicity of actions by the persons whose rights the grantee had invaded, would not relieve the grantor from liability to an action by the grantee, in which the measure of damages would be "a just compensation to the plaintiff for the real injury resulting from the incumbrance." *Wetherbee* v. *Bennett*, 2 Allen, 428.

The liability of the defendant in this respect, is upon his covenant and to the grantees or those in privity of estate with them. It is for them to determine whether to bring suit upon it or not. They may waive their rights under it, if they will. The

rule of damages might be very different in such an action, if brought, from that which controls this case.

The covenant was not given to the plaintiffs, nor is this an action upon it. The court has already excluded the theory of a continuing nuisance, the maintenance of which, by the grantee, under a covenant from the defendant for quiet enjoyment, renders the defendant liable to successive actions upon the case, and held that here the trespass did not continue beyond the act. The defendant has done no act of trespass since the deed to the Lime Company, and his grantees are not his agents.

We have examined the exceptions to the rulings, admitting or excluding evidence against the objection of the plaintiffs, and find no error to the prejudice of their legal rights. The motion for a new trial cannot prevail. There is evidence in the case, the credibility of which it was for the jury to determine, which is sufficient, if believed, to justify the result which they reached.

Motion and exceptions overruled.
Judgment on the verdict.

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

FRANK S. TUCKER *vs.* WILLIAM H. JERRIS.

Cumberland. Opinion May 23, 1883.

Torts. Adoption of same. Exemplary damages.

To hold one responsible for a tort not committed by himself, nor by his orders, his adoption of, and assent to the same must be clear and explicit and made with a full knowledge of the tort, or at least of the injured party's claim that there has been one.

Where there is no evidence sufficient to connect the defendant with a tort if there has been one, it is erroneous and misleading to tell the jury that they have the power to award exemplary damages.

ON EXCEPTIONS and motion from superior court.

An action of the case to recover damages for an alleged false arrest. The writ was dated August 19, 1881. The plea was the general issue. The verdict was for the plaintiff in the sum of one hundred and twenty-five dollars.

At the trial the presiding judge in his charge, after giving the general rule of damages, continued:

"The plaintiff claims in addition to this to recover punitive damages. . . . They are damages awarded in cases where the evidence discloses an utter and wanton disregard of the rights of another party. They also rest in the sound discretion of the jury. They are not obliged to award exemplary damages and such damages should only be awarded where the testimony discloses an utter and wanton disregard of the rights of the plaintiff. If you come to the question of damages, you can award in this case such exemplary damages as seems to you proper and just, under the circumstances of the case, if at all."

The opinion states the other material facts.

A. F. Moulton, for the plaintiff.

It cannot be claimed for Jerris that he did not know all the facts upon which Chase based his belief. It is no excuse that he was wilfully and wantonly ignorant. 14 Central Law J. 64; *Merriam* v. *Mitchell*, 13 Maine, 456; *Bailey* v. *Carville*, 62 Maine, 525; *Morton* v. *Young*, 55 Maine, 29.

The rule is well settled that punitive damages may be allowed for wilful injuries to the person. *Wadsworth* v. *Treat*, 43 Maine, 163; 2 Greenl. Ev. § 253; 1 Kent's Com. *630; Sedgwick, Dam. *39.

In this case, however, although punitive damages might and should have been allowed, the amount of the verdict is not sufficient to be called punitive.

Tucker actually lost about twenty-five dollars, in loss of time expenses for counsel fees, &c. He was entitled to recover for his bodily and mental sufferings, five days in jail, and for the disgrace and ignominy of such an arrest and the injury to his reputation. Field on Dam. 538; 2 Greenl. Ev. § 267. For all this, the verdict rendered could not have been more than suffi-

cient, hence no punitive damages could have been allowed, and the defendant could not have been aggrieved.

T. H. Haskell, for the defendant, cited: *Coombs* v. *Scott*, 12 Allen, 497; *Forsyth* v. *Day*, 41 Maine, 395.

BARROWS, J. The facts bearing upon the maintenance of the action established by the testimony in this case may be briefly stated as follows: The plaintiff was arrested upon a writ sued out in the name of the defendant as plaintiff by one Chase, who subscribed the requisite oath to cause the plaintiff's arrest, as agent for this defendant. The suit was for the price of a hack which once belonged to defendant and was left at the shop of Chase, who was a carriage-maker. Chase called on defendant to know what he would take for it, and defendant named the price for which he would sell it to him. Shortly after, Chase, without other permission from defendant to sell, sold the hack with some harnesses that belonged to himself, to the plaintiff, receiving of him $25 in part payment. Chase told defendant that he had sold the hack to a responsible party, and paid him a small part of the cash received. But defendant never ratified the sale to plaintiff as made on his behalf, and before the commencement of the suit in which plaintiff was arrested, he told Chase that he should look to *him* for the pay for the hack. Chase went to an attorney to commence an action in his own name against the plaintiff but gave the attorney such a version of the transaction that he advised that it should be commenced in the name of this defendant, Jerris, the original owner, which was accordingly done. There is no evidence that the defendant ever employed an attorney or authorized Chase to employ one on his account, but the contrary. The defendant, and Chase, and the attorney, (all who knew anything about it) thus testify in the most distinct and positive terms. Chase's statement on cross-examination that he styled himself in the affidavit agent for Jerris and that it was true, taken in connection with what he instantly adds — that he went to see counsel with the intention of suing the man "*on his own responsibility*," and the explanation which follows, fairly interpreted, simply means that he acted as Jerris's agent on that occasion, and, under advice of counsel, considered he had a right so to do.

There is no evidence that defendant ever did anything touching the prosecution of that action or knew that it had been commenced in his name until after the arrest; but plaintiff is obliged to rely upon a ratification by the defendant of Chase's acts as his agent in this wise: — Some question arose about the correctness and sufficiency of the bond tendered by the plaintiff to procure his release from arrest, whereupon the attorney who commenced the action, went to the office of this defendant who was the nominal plaintiff in that suit to get his approval of the sureties. There seems to have been no conversation except about the sufficiency of the sureties; and the attorney testifies that he has no recollection that then or at any other time the defendant disclaimed any responsibility, or the authority of the attorney to appear in the action. On the other hand it would seem that from the high character and standing of the attorney, the defendant took it for granted that all was right and did not regard the matter as of interest to himself. But the only evidence which connects the defendant with the transaction is this *quasi* recognition of the propriety of proceeding in his name after the arrest had been made. The evidence is conflicting as to the reason which Chase had to believe that the plaintiff who has no family ties, was going to reside beyond the limits of the State. But it is worthy of note that the plaintiff himself admits that he told Chase that he had an offer to go to the Provinces; and while the verdict could not be set aside on this point, it is manifest that the plaintiff's case was not a strong one on that branch of it.

But if the jury believed the plaintiff's testimony in all respects, and that Chase committed a wrong in causing his arrest, there was still a lack of proof to charge the defendant Jerris with that wrong, or for Chase's acts in the premises on the ground either of authority or ratification.

Of original authority even to commence a suit in the name or for the benefit of Jerris there was no evidence whatever — of ratification, none but the failure to direct its discontinuance as soon as it came to his knowledge that it had been commenced in his name when Chase's attorney presented the bond for his approval. The

question is whether that omission imposes upon the defendant a liability for Chase's tort, if he committed one.

To bind one to the performance of a contract which another without authority has assumed to make for him, the ratification must be made with a full knowledge of all material facts.

"Ignorance or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent." *Coombs* v. *Scott*, 12 Allen, 493. And this is so even though the ignorance or misapprehension arises from the negligence and omission of the defendant to make any inquiry relative to the subject-matter. *Ibid.* To hold one responsible for a tort not committed by his orders, his adoption of and assent to the same must at all events be clear and explicit, and founded on a clear knowledge of the tort which has been committed. *Adams* v. *Freeman*, 9 Johns. 117; *West* v. *Shockley*, 4 Harring. 287; *Kreger* v. *Osborn*, 7 Blackf.74; *Abbot* v. *Kimall*, 19 Vt. 551.

And this rule is not affected by the fact that the defendant has received the money coming by means of the tort from his servant. *Hyde* v. *Cooper*, 26 Vt. 552. The suit in this case was commenced in the defendant's name according to all the testimony by Chase for his own benefit, and under the mistaken idea that he had a right to use defendant's name in the process, and there is nothing from which it can be inferred that the defendant had any knowledge that Chase had committed any wrong in making the affidavit to procure the arrest, even if we regard the verdict of the jury as conclusive that he actually did. There is no evidence that at the time of the alleged ratification defendant knew even that plaintiff claimed that any wrong had been done. To hold the defendant responsible for such wrong, if there was one, upon the evidence here presented, the jury must have been governed by some unaccountable bias or prejudice. They probably accepted the assertions of counsel in lieu of testimony, and their verdict is clearly against law and evidence and without evidence to support it. It cannot stand. The instruction excepted to was liable to be understood by the jury as placing the burden of

proof upon the defendant to show that Chase had reason to believe that the plaintiff was about to leave the state, &c.; whereas it was incumbent upon the plaintiff who alleges it to prove that the affidavit was made either in bad faith or without sufficient grounds and so was not warranted by existing facts.

Since the testimony did not justify a verdict against the defendant in any event the suggestion that the jury was at liberty to give exemplary damages also was erroneous and misleading.

Motion and exceptions sustained.
New trial granted.

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

JOHN ATKINSON *vs.* INHABITANTS OF MINOT.

Androscoggin. Opinion May 23, 1883.

Payment. Promissory notes. Checks.

The creditor of a town received from the treasurer a check in part payment of the debt and a negotiable note signed "T. B. Swan, treasurer of the town of Minot," for the balance. *Held*, that the note, having been taken by the creditor under a misapprehension caused by the treasurer, was not evidence of a payment *pro tanto* of the demand for which it was given and that the town was liable on the original demand to the extent of such note.

Where the money is in fact paid over to the creditor on such a debt, and re-borrowed by the treasurer on the credit of the town, and a note signed as above given therefor, the creditor cannot recover the amount of such note of the town without showing that the money was in fact appropriated to the legitimate uses of the town.

A debtor, who appropriates the funds out of which a check given by himself or his agent in payment of a debt is to be paid, and thereby causes the check to be dishonered, cannot afterwards claim that there has been a payment by means of it.

ON REPORT.

The writ was dated March 12, 1881. The case and material facts are stated in the opinion.

George C. and Charles E. Wing, for the plaintiff, cited: *Perkins* v. *Cady*, 111 Mass. 318; 1 Greenl. Ev. § 200; *Appleton* v. *Parker*, 15 Gray, 173; *Melledge* v. *Boston Iron Co.* 5 Cush. 158; *Fowler* v. *Ludwig*, 34 Maine, 455.

J. M. Libby, for the defendants, cited: *Parsons* v. *Monmouth*, 70 Maine, 262; *Bessey* v. *Unity*, 65 Maine, 342; 3 Wills, 553; 2 Dall. (Pa.) 100; 13 Serg. & R. (Pa.) 318; Washburn, C. C. 191; 2 Greenl. Ev. 467; *Garland* v. *Spencer*, 46 Maine, 528; *Tisdale* v. *Buckmore*, 33 Maine, 461.

BARROWS, J. The plaintiff declares for money had and received to his use and money by him lent and accommodated to the defendants and interest thereon, and his writ contains also special counts upon two town orders given him July 16, 1877, for $1242.50 and $120.22, respectively, by the selectmen of the town in payment for town bonds about the validity of which there is no question.

The defendants claim that the town orders have been paid, and the burden of proof is upon them to prove payment. The orders which plaintiff produces and puts in evidence were in the possession of the town authorities, and had both been marked "paid" and "bought for sinking-fund" by the treasurer of the town. The amount once due upon them seems now to be represented in the plaintiff's hands by two notes signed "Thomas B. Swan, treasurer of the town of Minot," each for the sum of $500 payable in one year from date with interest annually at five per cent, and dated respectively November 15, and December 21, 1880, and a check dated December 21, 1880, upon the Casco National Bank in favor of the plaintiff or his order for five hundred twenty eight dollars and fifty-seven one hundredths. This action was commenced March 12, 1881.

If these documents were received by the plaintiff under such circumstances that they constitute in and of themselves a payment of the town orders declared on, or if those orders have been paid in any manner, the defence is established.

The facts attending the alleged payment appear to be as follows: the town orders in suit were presented to the town

treasurer on the day of their date and interest had been paid upon them annually. In 1880 plaintiff called on the town treasurer, Swan, for the interest, and was informed that the town had not the money but he would give him a town note on interest for the interest due, and pay it in a few months.

The note made by the treasurer was accepted by the plaintiff, and the treasurer thus ascertained that the plaintiff would receive notes given by him as town notes without scrutinizing his authority to bind the town too closely. Some time after this, the treasurer at another interview, informed the plaintiff that the town had the money in hand and wanted to pay him what they owed him, and that he would come over and pay him before long. Shortly after, he came to plaintiff's house, a number of miles from the village, and during a conversation plaintiff told him he was sorry the town was going to pay him, that they had had his money a good while, and he knew no immediate use he could make of it. Thereupon the treasurer spoke of some Oxford bonds his brother had to dispose of, and said he would see his brother and bring up the bonds and sell them to him. Upon talk about the price plaintiff told him he thought he would like to have them. The treasurer told him he would do nothing about paying him that day, and fixed a day for plaintiff to come to the village when he would be at home and would have the bonds to sell him. The day fixed seems to have been November 15, 1880. The plaintiff went to the office of the treasurer and learned that the bonds previously spoken of could not be had; and the transactions between him and the treasurer on that day must be ascertained in order to determine the rights of the parties in this suit. The treasurer, upon whose deposition, in connection with alleged corroboratory admissions of plaintiff, the defendants rely to prove payment, swears that he paid him, on the note given for interest and the other demands which he held against the town including these orders, the sum of $1529.75, $500 in money and the balance in a check on Casco National Bank, where it appears that the town had kept a deposit for some years, and then had one in the name of the treasurer of sufficient amount to cover the $1028.57 for which the check was given — that before paying him

he asked plaintiff "if he would take a check for part of it. He said that he would, but would *like to let the whole amount remain with the town of Minot*," that he does not remember whether the odd cents were paid in cash or went into the check. The treasurer's memory grows more precise as to the conversation which he says took place between him and the plaintiff after the payment, a conversation which he says resulted in his giving the plaintiff the $500 note dated November 15, and signed "Thomas B. Swan, treasurer of Minot," which he says was his own "private note," while he says nothing to indicate that he had any idea that the plaintiff so understood it. On the contrary from what he says and omits to say it is apparent that he knew that the plaintiff understood that so much of the original loan was to "*remain with the town of Minot.*" Yet if the money was in fact paid over, the plaintiff could not recover the $500, although it was re-borrowed by the treasurer upon the credit of the town, without showing that the money was in fact appropriated to the legitimate uses of the town, because the treasurer without special authority had no power to pledge the town's credit. *Bessey* v. *Unity*, 65 Maine, 342; *Parsons* v. *Monmouth*, 70 Maine, 262; *Billings* v. *Monmouth*, 72 Maine, 174.

But touching the alleged payment of $500 in cash, the plaintiff testifies positively and distinctly that it never was made. His version of the transactions at the treasurer's office November 15, is, that, after reckoning up the amount of the note and orders, the treasurer "said he wanted to pay me all except $500; he wanted to give me a town note for $500 and pay me the rest," that he assented — that, "after he made out this note he passed me a check on the Casco Bank of Portland; he said the town had money deposited there;" that plaintiff told him he "was not acquainted with checks, never handled any hardly," and that the treasurer thereupon informed him that he could get his money at any bank any time he wanted it, and, upon his further inquiry, that the check "was just as good to keep as money;" whereupon he took the note and check. Looking at what had previously passed between the plaintiff and the treasurer, we think this the more probable statement. Of the two witnesses the plaintiff

appears to be the more credible. The treasurer is testifying to relieve those nearly connected with him from liability on his bond, and his interest may fairly be said to be as great as that of the plaintiff; and he is in the attitude of doing that which he certainly well knew amounted to a fraud upon the plaintiff. Without attributing intentional misrepresentation to those of the defendants' witnesses who understood from the plaintiff that the $500 was paid in money, it is obvious that their recollection is not sufficiently distinct and concurrent as to what he actually said, and their liability to misunderstand under the circumstances was so great that their testimony does not seriously shake our belief in that which comes from the plaintiff under oath; and in any event it cannot be said that there is a preponderance of evidence in favor of the cash payment of $500. If the plaintiff only said that he took a check for part of the amount of the orders, these witnesses would naturally get the idea that the remainder was paid in cash, and from that to a firm belief on their part that the plaintiff *said* so, the road is short and easy. Upon the whole we incline to the belief that what the plaintiff did receive in exchange for his order and note on November 15, was the $500 note of that date and a check for the balance. Received as the note undoubtedly was by the plaintiff not in payment but as evidence of the town's continued indebtment to him to that amount — as to so much of the claim the case falls within the principles and presumptions referred to in *Melledge* v. *Boston Iron Co.* 5 Cush. 158; *Perkins* v. *Cady*, 111 Mass. 318; *Appleton* v. *Parker*, 15 Gray, 173; *Fowler* v. *Ludwig*, 34 Maine, 455; *Paine* v. *Dwinel*, 53 Maine, 52; *Strang* v. *Hirst*, 61 Maine, 15. The plaintiff had no intention to receive the worthless personal note of the town treasurer for $500 as payment of any portion of his demand against the town, and under the circumstances it did not operate as payment. As to this $500 the defendants' plea of payment is not sustained — whatever presumption of payment that arises from taking the treasurer's "private note" being effectually rebutted.

The remaining facts are not in dispute. A little more than a month later, the treasurer finding that the plaintiff had not drawn the money on the Casco Bank check went to him with a story that another man to whom the town owed $500 was calling for his money, and so succeeded in inducing him to exchange the check for another "private note," (which the plaintiff supposed was evidence of the town's indebtedness to him) and a treasurer's check upon the Casco Bank for $528.57. The treasurer absconded the last of January, and the town by its municipal officers forthwith took possession of the funds remaining in the Casco Bank to an amount exceeding the $528.57, and when the plaintiff presented the check on February 16, payment was refused and it was protested for non-payment. Hereupon we think that the act of the municipal officers, who are the general prudential agents of the town for the transaction of its business and control of its funds, in withdrawing the money which might otherwise have gone to pay the check for $528.57, must be regarded as defeating the payment which was attempted to be made thereby, and that the town holds the money thus withdrawn, to the amount of the check, as money had and received to the use of the plaintiff. There is no pretence that there was any express agreement to take the check absolutely as payment, and under the circumstances in which both the checks were taken, and in the absence of such agreement, the general doctrine applies as stated in Greenl's. Ev. vol. 2, § 520, p. 493, 2 ed. thus: "the check is regarded only as the means whereby the creditor may obtain payment; or as payment *provisionally* until it has been presented and refused; if it is dishonored it is no payment of the debt for which it was drawn." See also *Olcott* v. *Rathbone*, 5 Wend. 490; *Everett* v. *Collins*, 2 Campb. 515; *Puckford* v. *Maxwell*, 6 D. & E. 152, and other cases cited by Greenl. *ubi supra*.

The plaintiff is entitled to recover on this score then the further sum of $528.57 with interest from February 16, 1881, when the check was presented and payment refused. It operated as a provisional payment *pro tanto* until that time.

But we think that the plaintiff although he was induced by the fraud of the defendants' treasurer to take a note and lend money

to the amount of $500 on December 21, which he supposed he was lending to the town and for which he supposed the town was liable when it was not, must be regarded as having realized so much of the check first given, and that that matter stands upon the same footing as if that amount had then been received upon the check and loaned to Swan. It was not by reason of any act of the defendants or for which they are responsible that this $500 was not actually paid in money, as for aught that appears it would have been if the check had been presented on that day. This $500 then must fall within the scope of the cases first herein cited touching money procured by town officers who are not authorized to effect a loan. The plaintiff must be held to show that it was appropriated for legitimate expenses of the town and this he does not attempt. He must bear the loss as he must have borne that of the other $500 on November 15, had it then been paid to him in money and thereafter lent on the same day to the officer in whom he unwisely placed so much confidence. The $500 note of November 15, and the check of December 21, are on the files as evidence and are impounded for the benefit of whom it may concern. The $500 note of December 21, belongs to the plaintiff, but he can maintain no action on it against the town without proof that the money was actually appropriated to pay a debt of the town.

Judgment for plaintiff for $1028.57 with interest on $500 from November 15, 1880, and on $528.57 from February 16, 1881, to the date of the rendition of judgment.

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

OLIVER GRANT

vs.

ELIOT AND KITTERY MUTUAL FIRE INSURANCE COMPANY.

York. Opinion May 23, 1883.

Will. Fire insurance. Alienation. Assignment.

A testator, who resided and died in New Hampshire, by the first and second items of his will gave large legacies to his children and grandchildren; by the third he gave a like legacy to his wife, and also "the use and income of all my real and personal estate after the before mentioned legacies, and my just debts are paid for, and during the term of her natural life, with all the power to alter, repair, let and relet said real estate, which I, myself, have. I also give her full power to sell and convey, by deed or otherwise, any or all of my said real estate, by the approval in writing of a majority of my said children living at the time of such sale. I also give her full liberty and power to give, bequeath and devise any or all of my said estate during her lifetime, or by will at her death to such of my children or grandchildren as she may choose." By the fourth item he ordered all the foregoing legacies to be paid within a certain time after his decease, and "lastly, as to all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated, I give, bequeath and devise unto my said beloved wife, Ruth Roberts, her heirs and assigns forever," and his wife was made executrix. *Held:*

1. That Ruth Roberts took a fee in all his real estate remaining after the payment of debts and legacies, and had unlimited and unquestioned power to convey the same.

2. That her deed of real estate in this state conveyed a good title, though the will was not proved in this state until after such conveyance, and though she described herself as heir at law in the deed, as she must be deemed to have acted in the capacity which would make it effective.

The true construction of a provision in the charter of a fire insurance company, that in case the property "be alienated by sale, or otherwise, the policy shall thereupon be void," but may be ratified and confirmed to him on application to the directors within thirty days, is, that an alienation makes the policy not void but voidable at the election of the company.

If the company choose to waive their right to avoid it, and agree that it shall be good in the hands of the assignee, it becomes in substance a new and binding contract with him on the basis of the old one for the remainder of

the term. And the assignee accepting it from a mutual company becomes a member thereof, and is liable for the assessments on the premium note, and may maintain an action on the policy in case of loss.

When an assignment of an insurance policy has once received the assent of the directors, fairly procured, they cannot withdraw it against the will of the assignee.

The existence of equitable incumbrances upon the property does not affect the insurance.

ON REPORT.

Assumpsit on a policy of fire insurance, covering two thousand dollars, on certain farm buildings of the plaintiff, which were destroyed by fire.

The writ was dated March 8, 1880.

The opinion states the facts. The following is section six of the charter of the defendant company, which receives a construction in the opinion:

"Section 6. Whenever said company shall make insurance on any building, such building, the land under the same, and appurtenances thereof, shall be holden as security for such deposit money and assessments, as the person thus insured shall be liable to pay, and the policy of insurance shall, from the time it issues, create a lien on said buildings and land therefor, which shall continue, notwithstanding any transfer of the property; when any property insured by said company, shall be alienated by sale or otherwise, the policy shall thereupon be void, and shall be surrendered to the secretary of said company to be cancelled, and upon such surrender, the insured shall be entitled to receive his deposit note, upon payment of his proportion of all losses and expenses that have occurred prior to such surrender. But any grantee having the policy assigned to him, may have the same ratified and confirmed to him, for his own proper use and benefit, upon application to the directors within thirty days next after such alienation, on giving proper security to the satisfaction of the directors for such proportion of the deposit or premium note as shall remain unpaid, and by such ratification and confirmation, the party obtaining the same shall be entitled to all the rights and privileges, and subject to all the liabilities to which the original party insured was entitled and subject in this act."

William J. Copeland, for the plaintiff, cited: *Fogg* v. *Middlesex M. F. Ins. Co.* 10 Cush. 346; *Phillips* v. *Merrimack M. F. Ins. Co.* 10 Cush. 350; *Fuller* v. *Boston M. F. Ins. Co.* 4 Met. 208; *Barrett* v. *Union M. F. Ins. Co.* 7 Cush. 181; *Wilson* v. *Hill*, 3 Met. 66; May on Insurance, 464; *Cummings* v. *Cheshire County M. F. Ins. Co.* 55 N. H. 457; *Stimpson* v. *Monmouth M. F. Ins. Co.* 47 Maine, 379; *Barnes* v. *Company*, 45 *N. H.* 21; *Ill. M. F. Ins. Co.* v. *Fox*, 53 Ill. 151; *Hale* v. *Union Ins. Co.* 32 N. H. 295; *Behler* v. *German Mut. Ins. Co.* 68 Ind. 347; Angell on Insurance, 142, 143; *Bragdon* v. *Appleton Mut. F. Ins. Co.* 42 Maine, 262; *Durar* v. *Hudson County Ins. Co.* 4 Zab. (N. J.) 171; See 1 Hill (N. Y.) 71; *Cumings* v. *Hildreth*, 117 Mass. 309; Stat. 1874, c. 235; R. S., c. 49, § § 23, 21, 19; *Brown* v. *Williams*, 28 Maine, 254; *Newhall* v. *Union Mut. F. Ins. Co.* 52 Maine, 182; *Appeal*, 36 Penn. St. 120; *Sheafe* v. *Cushing*, 17 N. H. 509; *Van Nostrand* v. *Moore*, 52 N. Y. 12; May on Insurance, § 385; *Cumberland Valley Mut. F. Ins. Co.* v. *Mitchell*, 48 Penn. St. 374; *Emery* v. *Piscataqua F. & M. Ins. Co.* 52 Maine, 322; *Bellatty* v. *Thomaston Ins. Co.* 61 Maine, 414; *Bartlett* v. *Union Mut. F. Ins. Co.* 46 Maine, 500; *Lewis* v. *Monmouth Ins. Co.* 52 Maine, 492; *Walker* v. *Metropolitan Ins. Co.* 56 Maine, 371; *Bailey* v. *Hope Ins. Co.* 56 Maine, 474; *Patterson* v. *Triumph Ins. Co.* 64 Maine, 500.

R. P. Tapley, for the defendants.

The assignments of Ruth Roberts and Mark A. Libby were invalid, being of a void policy, and the consent thereto, by the directors, did not revive it. They were not authorized so to do. *Eastman* v. *Carrol Co. M. F. Ins. Co.* 45 Maine, 307; *Merrill* v. *Farmers' & Mechanics' M. F. Ins. Co.* 48 Maine, 285.

Prior to the loss, the plaintiff was notified that the action of the directors was had under a mistake of fact, and he was asked to return the policy.

The right to transfer under the will was limited to the consent of the heirs, and there is no evidence of that. *Stevens* v. *Winship*, 1 Pick. 318, 327. Touching the construction of the

will, see *Ide* v. *Ide*, 5 Mass. 500; *Larned* v. *Bridge*, 17 Pick. 339; *Harris* v. *Knapp*, 21 Pick. 412; *Gleason* v. *Fayerweather*, 4 Gray, 348; *Ramsdell* v. *Ramsdell*, 21 Maine, 288.

The will was inoperative here, as a conveyance of real estate, until approved here.

BARROWS, J. The defendants issued a policy of insurance, dated February 23, 1874, for the term of six years, to Hiram R. Roberts, of Rollinsford, New Hampshire, who was then the owner of the premises insured, which were situated in Berwick, in this county. Roberts died in 1876. He left a will which was duly probated in New Hampshire, and since the commencement of this suit has been admitted to probate in this county also. In that will he made his wife, Ruth Roberts, sole executrix, and by the first and second items gave large legacies to his children, and grandchildren; by the third, like legacies to his wife, and also "the use and income of all my real and personal estate, after the before mentioned legacies and my just debts are paid for, and during the term of her natural life, with all the power to alter, repair, let and relet said real estate which I myself have. I also give her full power to sell and convey by deed or otherwise, any or all of my said real estate, by the approval in writing of a majority of my said children living at the time of such sale. I do also give her full liberty and power to give, bequeath and devise any or all of my said estate during her lifetime or by will at her death, to such of my children or grandchildren as she may choose."

By the fourth item, he ordered all the foregoing legacies to be paid within a certain time after his decease, and "Lastly;—As to all the rest, residue and remainder of my estate, real, personal, and mixed, wherever found and however situated," it was "given, bequeathed and devised" to his "beloved wife, Ruth Roberts, her heirs and assigns forever."

April 20, 1877, the same Ruth Roberts conveyed all her right, title and interest in the premises to Mark A. Libby, describing herself in the deed as heir at law, and widow of H. R. Roberts, deceased, and on the same day by a written assignment, subscribed Ruth Roberts, "heir at law of H. R. Roberts, deceased," she

made over to said Libby the policy issued to Hiram R. Roberts, and the directors of the defendant company endorsed their consent to the assignment.

March 27, 1878, Mark A. Libby, receiving three hundred dollars in cash, gave a bond for a deed of the premises to Charles F. Higgins, conditioned upon the payment of eighteen hundred dollars by Higgins on the fifteenth of April, *prox.* And on the first of April, by Higgins' consent, and in his presence, Libby conveyed to the plaintiff, Higgins surrendering his bond and paying him two hundred dollars, and the plaintiff paying the balance, sixteen hundred dollars, and giving Higgins his own bond for a deed of the same, conditioned on the payment of sixteen hundred dollars upon long time. On the same day Libby assigned the policy to the plaintiff, and on the tenth day of April the directors of the defendant company endorsed thereon their consent to the assignment; but on the twenty-ninth of April, 1878, instructed their secretary to request the plaintiff to return the policy as they had assented to the assignment under the mistaken supposition that he was the owner of the property. The secretary did so. To which the plaintiff replied that he had a warranty deed of it, and there the matter rested. The buildings were burned in March, 1879, and due proof of the loss was made. The defendants deny their liability because they say they are a mutual insurance company, capable of contracting only in the manner prescribed by their charter—that no action is maintainable upon this policy by the plaintiff, unless the interest of Hiram R. Roberts in it has been regularly transferred to him, and the consent of the directors obtained before the policy became void—that there has been no such transfer, because the policy became void by alienation of the property upon the death of Hiram R. Roberts, without assignment of the policy and consent of the directors obtained within thirty days, according to the express provisions of section six of the charter, and that no consent of the directors could afterwards revive it.

In the ingenious argument of defendants' counsel much stress was laid upon the proposition that, unless Ruth Roberts took a good title to the property under the will of the party originally

insured, the plaintiff who claims under her deed has no title at all — that if she did take such a title it was an alienation which totally avoided the policy — that after the expiration of thirty days from such alienation, no subsequent assent of the directors to the transfer could make a valid contract of insurance with the plaintiff. Touching these matters we think that although Hiram R. Roberts seems to have been inclined at first to limit his wife's power to dispose of his real estate in the manner indicated in the third item of his will, his final disposition in the last item in favor of her, "her heirs and assigns forever" of "all the rest, residue and remainder of his property, real, personal and mixed," must be regarded as controlling what had gone before, and as giving her absolute power to convey, not only a life-estate, but the fee at her pleasure. We think the plaintiff's title through her deed is well derived, and that it is not defeated by the fact that at the time of her conveyance to Libby the will had not been admitted to probate in this state. If, according to the records, the heirs of Hiram R. Roberts were the apparent owners at the date of that deed, his widow, the devisee, was not the less the real owner, although the means of establishing her title were then wanting.

These have since been supplied, and there was no conveyance by the heirs in the interim so that the deficiency in the probate records then existing, creates no embarrassment in the record title, and the will when approved made the title of the devisee and her assigns good from the death of the testator.

Was this succession of the devisee to the party originally insured an alienation which *ipso facto*, avoided the policy in thirty days after the death of the testator in the absence of any assent of the directors obtained within that time?

It was well held in *Burbank* v. *Rockingham Ins. Co.* 24 N. H. 550, that a descent to the heirs of an intestate insured, is not within the clause against alienation, the same being an involuntary transfer by operation of law. But the court there, *arguendo*, made a distinction between heirs and devisees. Yet the same reasons which in the judgment of the courts suffice to relieve the heirs from a forfeiture under the alienation clause, will generally

apply in the case of devisees. And if it were necessary to decide the question here, we should strongly incline to hold that the death of a testator holding a valid policy of insurance for an unexpired term, would not constitute such an alienation as would avoid the policy, and prevent his executor from maintaining an action for the benefit of the devisee in case of loss within the term.

The death of the testator, through which alone the devisee acquires any title would seem to be, properly speaking, no more an alienation in his case than the death of an intestate. In both the title devolves by operation of law upon those who become, by means of his death his representatives in the title; and the general doctrine of the law seems to be as stated in 2 Am. Leading Cases, 841, thus; "When a building which has been insured by the owner, is destroyed by fire after his death, the right of action for the loss vests in his personal representative in trust, for the heirs, devisees, creditors and other persons claiming under him." *Wyman* v. *Prosser*, 36 Barb. 368; *Wyman* v. *Wyman*, 26 N. Y. 253. See also in this connection *Farmers' M. F. Ins. Co.* v. *Graybill*, 74 Penn. St. 17.

But we deem it unnecessary to decide upon this point, for we think that an alienation, though not followed by an assignment of the policy and assent of the directors procured within thirty days, will not preclude the directors from subsequently assenting so as to make a valid and binding contract with an assignee who is the owner of the premises. In other words, that the true significance and effect of the provision in section six of the act of incorporation, touching the effect of an alienation by the insured, is to make the policy not *void*, but *voidable*, at the pleasure of the insurance company, and that an assent of the directors to the transfer of the policy obtained in good faith at any time, during the term named in the policy, will make it good in the hands of the assignee, owning the property, for the remainder of the term. Instances in which the words, void and voidable are used indifferently, both by law writers and law makers, are sufficiently numerous to make this construction feasible whenever the context seems to require it. It is obviously so here.

If the policy absolutely and literally became *void* by means of an alienation, it could no more be revived by an assent of directors, within thirty days than after the lapse of a longer period. That which is null is incapable of restoration; but that which is only liable to become so may receive new life; and if we read, voidable instead of void the binding force of the contract is only suspended at the option of the company in whose favor the provision is made, and it is competent for them to waive the provision in their favor at such time as they please, and to enter into what is in substance, after all, a new contract with the assignee of the policy on the basis of the old one. When they do this the plainest principles of law, good faith, and fair dealing forbid them to recede. The cases of *Eastman* v. *Carroll Co. M. F. Ins. Co.* 45 Maine, 307, and *Merrill* v. *Farmers' & Mechanics' M. F. Ins. Co.* 48 Maine, 285, cited for defendants, exhibit an essential difference from the case at bar. In them the party to whom the policy originally issued made misrepresentations as to the title, and was not the owner of the premises insured, and the assent to the assignment was given in ignorance of this essential fact. In the case at bar the policy issued to the owner, and was assigned by his executrix and devisee, when she conveyed the property, and this assignment was assented to by the directors of the company.

There is nothing to indicate that they acted in ignorance of any fact which it was important for them to know. Whether Ruth Roberts was heir at law of Hiram R. Roberts was of no consequence so long as she was his legal representative and the owner of the premises. She had power to convey the premises and to assign the policy, and the erroneous description of herself as heir at law, does not affect the validity of her act. It was not the design of the provision in § 6, to restrict the power of the insurance company to make insurance in any manner known to the law. Its true constructiom is simply to give them the privilege, if they see fit to exercise it, to regard and treat the policy as void upon an alienation of the property whenever they do not choose to contract with the purchaser for the remainder of the term. The policy is voidable at their election; but when that election has been made—when they have sub-

stantially entered into a new engagement with the purchaser of the property, (the consideration of which is their own release from a liability to lose or refund the proportional part of the premium for the unexpired portion of the term) the provision in the charter was not designed and must not be construed to enable them to avoid the liability to the assignees which they have fairly assumed. See *Pierce* v. *Ins. Co.* 50 N. H. 297, 301; *Barnes* v. *Union M. F. Ins. Co.* 45 N. H., 21; *Hale* v. *Ins. Co.* 32 N. H. 295; *Cumings* v. *Cheshire Co. M. F. Ins. Co.* 55 N. H. 457.

The defendants were paid for insuring a given sum to Hiram R. Roberts for a fixed term, and their contract was to pay to his assigns. By consenting to the assignment made by his executrix and devisee to her grantee, Libby, they agreed that Libby might be substituted, and that the policy should represent to him just what it had to the party originally insured. The same thing was done when Libby conveyed the property and assigned the policy to the plaintiff, and we find nothing in the case reported, to invalidate the transaction in any of its parts. The plaintiff became a member of the company; (*Stimpson* v. *Monmouth M. F. Ins. Co.* 47 Maine, 379,) and liable for all assessments upon the premium note which defendants held, if he did not give a new one. *Cumings* v. *Hildreth*, 117 Mass. 309. No element of a valid and binding contract between the plaintiff and the defendants seems to be wanting.

The contract once fairly entered into, the defendants could not withdraw from it without the consent of the insured, as they appear to have wished to do, upon the mistaken idea that the plaintiff was not the owner of the premises.

His title was good and the bond to Higgins did not affect it or the contract of insurance. *Brown* v. *Williams*, 28 Maine, 254; *Newhall* v. *Union M. F. Ins. Co.* 52 Maine, 182.

In accordance with the stipulations upon which the case was reported,

Action to stand for trial.

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

INHABITANTS OF MINOT *vs.* INHABITANTS OF BOWDOIN.

Androscoggin. Opinion May 24, 1883.

Paupers. Marriage. Collusion of municipal officers. Settlement. Practice.

When the settlement of the father of an illegitimate child is in one town and that of the mother in another town, and after the birth of the child their marriage was procured through the agency and collusion of the officers of the latter town for the purpose of changing the settlement of the mother, the settlement is not thereby affected, notwithstanding the first town received such mother and child. It can recover for necessary supplies furnished such mother after her removal, the pauper being in distress and needing relief and notice being duly given the town in which is her legal settlement.

It is correct to instruct the jury in an action for pauper supplies that if a municipal officer makes use of the fact of the father of a bastard child being under arrest by way of advice, argument, or persuasion, to induce the marriage for the purpose of changing the settlement of the pauper in such sense that but for such act of the officer the marriage would not have taken place, then the marriage was procured by the agency of the municipal officers to change the settlement.

An affidavit upon which is based a motion to set aside a verdict because of interest in a juror must negative all knowledge of such interest on the part of both counsel and party.

Houlton v. *Ludlow*, 73 Maine, 583, affirmed.

ON EXCEPTIONS AND MOTION.

Assumpsit for pauper supplies furnished the wife and child of Frank W. Hawkes.

The jury rendered a verdict for the plaintiffs for twenty-four dollars, and they found specially that six dollars of the verdict was for support of the child.

The opinion states the material facts.

George C. and Charles E. Wing, for the plaintiffs, cited: *McLellan* v. *Crofton*, 6 Maine, 307; *Jameson* v. *Androscoggin R. R. Co.* 52 Maine, 412; *Merrill* v. *Crossman*, 68 Maine, 412; *Winslow* v. *Kimball*, 25 Maine, 493.

Gilbert and Atwood, for the defendants.

The statute provides that overseers are to relieve persons destitute and *found* in their towns and having no settlement therein, and that they shall recover the expenses incurred of the town chargeable. R. S., c. 24, § 24.

The town cannot go into a neighboring town and voluntarily take a pauper and bring her within its limits and then provide pauper supplies and make a third town in which is the settlement liable for the same. The pauper cannot be said to be "found" in the town when she was actually found in a neighboring town.

Then again, great injustice might result from the adoption of such a rule. Suppose a family of fourteen paupers in distress in York, whose actual settlement was in Kittery, should be removed by the overseers of Madawaska to that town and then they do, as these plaintiffs did after their removal, investigate the case and find that they did not own the paupers but that Kittery did, and suppose in the meantime the paupers have taken the small pox or other sickness, and expenses running into the thousands of dollars are incurred. Must Kittery pay the bill and remove the paupers from the distant town at large expense? Can one town thus trifle with the rights of another town and subject it to burdens which, but for the mistaken action of the town in error, it would never have incurred?

Counsel further contended in an able argument that the instructions and rulings of the court as to what would constitute the procurement of a marriage by the agency of the municipal officers to change the settlement, were inappropriate to the case at bar, and did great injustice to the defendant town in that by means of them but one side was submitted to the jury.

APPLETON, C. J. This is a suit to recover for supplies furnished Eunice Hawkes and her infant child. While Eunice was residing in Webster, she became pregnant, and after the birth of her child she married Frank W. Hawkes, the father, whose settlement was then in the plaintiff town, while that of the mother was in the defendant town. While Eunice was residing in Webster and receiving supplies there as a pauper, the overseers of the poor of Minot, being advised of the marriage, removed the pauper and her child to their town. Subsequently and after

such removal, the paupers continuing and being in distress supplies were furnished them by the plaintiffs, due notice thereof given the defendants, and this suit was brought to recover compensation for the supplies thus furnished.

The question involved was whether the marriage of Eunice Hawkes was procured to change her settlement by the agency and collusion of the officers of Bowdoin, where her settlement was before such marriage. The jury by their verdict found that it was so procured.

The case comes before us on motions for a new trial and exceptions to the rulings of the presiding justice.

I. It is urged that the verdict should be set aside as against the weight of the evidence. We think otherwise. There was unquestionably evidence tending to establish the fact of a collusive marriage through the agency of the officers of Bowdoin for the purpose of changing the settlement of the pauper. The force and effect of the testimony was to be weighed and determined by the jury. Their conclusion is in accordance with the weight of the testimony rather than adverse thereto. No reason on this account exists for disturbing it.

II. The defendants insist that the verdict be set aside because a juror, who sat on the trial of this cause, had a brother who was then a resident and tax-payer in the plaintiff town.

The defendants had by virtue of R. S., c. 82, § 72, a right to examine any juror on oath to ascertain whether he was related to either party, had given or formed any opinion or was sensible of any bias, prejudice or particular interest in the cause.

This they neglected to do. They should have made the necessary inquiries to ascertain whether the jurors could impartially try the cause, before the trial commenced and delay their investigation till after the rendition of the verdict. The party thus remiss is not entitled to a new trial as matter of right, though it may be ordered as a matter of discretion. *McLellan* v. *Crofton*, 6 Greenl. 307; *Woodward* v. *Dean*, 113 Mass. 297; *Tilton* v. *Kimball*, 52 Maine, 500.

Further, a party seeking a new trial by reason of interest in a juror should negative such knowledge on his part as well as

that of his counsel. *Jameson* v. *Androscoggin R. R. Co.* 52 Maine, 412; *Russell* v. *Quinn*, 114 Mass. 103; *Smith* v. *Earle*, 118 Mass. 531. Here the affidavit fails to negative knowledge on the part of counsel for the defendants. And the officers of the town might have been aware of the fact for aught that is very clearly disclosed in the affidavit of counsel.

It is not necessary to consider, whether, if the question were properly before us, a verdict should be set aside because one of the jurors was a cousin or brother to one of the inhabitants of a litigant town.

III. The presiding justice was requested to give this instruction: that, "if the jury believe from the evidence and under the instructions of the court, that the paupers, or either of them, had their lawful settlement in Bowdoin from the beginning and so remained, and that either or both of them was or were removed by the town of Minot, while she or they were or was in distress and in need of relief and so continued at and after such removal, and the town of Minot continually held them and provided for them, even then the plaintiffs cannot recover."

This request was general in its language. It was properly refused. The purport of the request is that if the officers of a town should remove a pauper in distress and being relieved in a town other than his settlement, the town so removing could not have a right of action for supplies duly furnished such pauper after his removal, against the town where the settlement of the pauper in fact was.

That the town so removing, the pauper having no settlement therein, could not sustain an action for expenses paid the town from which the pauper was removed, against the town in which the pauper had his settlement, is very clear. One town cannot make another liable by voluntarily assuming the payment of pauper supplies for which it was not liable, though such other town might have been and was bound to pay the town furnishing such supplies. One town cannot pay for supplies furnished a pauper by a town not liable for the support of such pauper and maintain an action for the same against the town which is liable. The jury were so instructed and properly.

IV. The paupers removed and being in distress and in need of relief after their removal, the overseers of the town of Minot were bound to furnish such relief as the exigency of their needs might require. It matters not how the paupers happened to be there; whether by mistake of fact or of law on the part of the overseers of the poor by whom their removal was effected. They might be illegally brought in a town contrary to the provisions of R. S., c. 24, § 38. But howsoever in the town and in distress, they are in the town, found in the town, and the law does not stop to inquire as to the mode or manner of their coming or by whom brought. It commands relief.

The paupers being in distress and relieved, the town relieving such distress has by the express terms of the statute, after following its requirements, to recover of the town in which the pauper relieved has his settlement, compensation for the supplies thus furnished. No question can be raised as to how or why the pauper happened to be in the town by which he is relieved. The conditions required for the maintenance of the action exist and plaintiffs must recover.

V. The presiding judge after alluding to the situation of Hawkes, who was arrested under the bastardy process, and to that of the mother of the illegitimate child, and of the motives and influences operating upon them and inducing marriage, added that so far as these were effective upon the minds of the parties without action by the defendant town, it would not be chargeable with the results arising from those causes. "But," he added, "if a municipal officer of the town made use of the facts of the situation, either by way of advice, argument, persuasion or inducement, made use of any means to induce the marriage for the purpose of changing the settlement, in such a sense that but for such act of the municipal officer, the marriage would not have taken place, if such a state of facts is shown, then the marriage was procured by agency of the municipal officer to change the settlement."

This instruction is in accordance with the statute, which provides that when a marriage is procured by the agency or the collusion of the town for the purpose of effecting a change in the settlement of a pauper, "the settlement is not affected by such marriage." It determines what is required to invalidate such marriage so far as relates to the settlement of a pauper, and by necessary and obvious implication negatives the idea that the mere honest giving of good advice would in any way affect such settlement.

VI. The child of Eunice Hawkes was born before her marriage and was illegitimate. But by R. S., c. 24, § 3, it is provided that "illegitimate children have the settlement of their mother at the time of their birth, but when the parents of such children born after March 24, 1864, intermarry, they are deemed legitimate and have the settlement of the father. The infant child therefore has the settlement of the father, which is in the plaintiff town. The amount of supplies for the infant was found by the jury to be six dollars, for which the defendants are not liable. *Houlton* v. *Ludlow*, 73 Maine, 583. This sum remitted, the verdict must stand.

Motions and exceptions overruled in case the plaintiffs will remit six dollars and interest thereon from the date of the verdict; otherwise exceptions are sustained and new trial granted.

Judgment accordingly.

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

BARROWS and SYMONDS, JJ., concurred in overruling the motion and exceptions, unconditionally.

LYMAN TYLER *vs.* JOSEPH S. FICKETT.

Penobscot. Opinion May 24, 1883.

Real estate. Building. Betterments.

Buildings erected on the land of another by one occupying under a contract to purchase become the property of the owner of the soil if the purchase be not completed, and are not betterments.

ON MOTION.

This is a real action to recover a lot of land and appurtenances in Bangor.

The case has before been at the law court and is reported in 73 Maine, 410.

It now comes upon the following motion, filed by the defendant, at the April term, 1882, and referred by the justice presiding to the law court together with the report, pleadings, deeds and exceptions in the former hearing:

[Motion.]

"And now said defendant comes and gives this honorable court to be informed, that at the trial of said case, the defendant in addition to the plea of the general issue, also filed his claim for betterments in due form of law, and the plaintiff also filed his claim to have the value of the soil without improvements, as provided in the twenty-fourth section of chapter 104 of the Revised Statutes, as will more fully appear by reference to the papers in said case.

"And thereupon the case was referred to referees to 'find the facts upon legal testimony and report the same on legal principles for the decision of the full court on law,' who proceeded to hear the parties, and having made their award in favor of demandant for the demanded premises, further found and awarded

according to section 34 of said chapter, by their said award, that the value of the buildings on said demanded premises was $175.00; that the value of the land without the improvements was $58.00, and that the value of the land with the improvements, other than the buildings, was $58.00, and that the use of the premises for six years prior to suit was $48.00, as will more fully appear by reference to their award which was duly returned to court and placed on file, and that thereupon the case was reported to the full court, 'to render such judgment on the facts reported as aforesaid and legally found, as the legal rights of the parties required, including the matter of title, boundaries, limitations and betterments,' and the full court having considered the case, and overruled certain exceptions not pertaining to or involving the question of betterments, ordered 'judgment for plaintiff accordingly' and nothing further. And thereupon the clerk misunderstanding the effect of the order thus entered on the docket, by mistake, under the general order of the court for judgments, entered 'judgment for plaintiff for title and possession of the demanded premises and damages for the sum of $48.00 and legal costs,' all of which was error and wrong, and further issued an execution on such erroneous judgment, which is still outstanding.

"Wherefore your petitioner, the defendant aforesaid, comes and says that accidentally the court failed to pass upon and decide said question of betterments, neither allowing nor disallowing the same as they should have done according to the reference and award of the referees and the submission to the full court, and that by issuing of the execution by the clerk he accidentally made another mistake of issuing the execution for damages $48.00, when there was no such judgment rendered on which such execution could be legally issued, and that, therefore, the same is unwarranted and void.

"Wherefore the defendant prays that said errors and mistakes may be corrected, by the court ordering the said execution thus improperly issued to be surrendered up and destroyed, and the action to stand to await the further order of the full court; and that the full court would order the action to be brought forward

to the present docket of the June term, 1882, for the purpose, and that thereupon such further judgment may be entered as may be conformable to the rights of the parties according to the terms of the award of the referees and the report of the court, at *nisi*, to the full court in *banc;* and that such further proceedings may be had as to justice and law may appertain, to the end that the tenant's claim for betterments, as reported by the referees, in their said award, may be duly allowed and ordered by the court."

Other material facts are stated in the opinion.

H. L. Mitchell, for the plaintiff.

A. W. Paine, for the defendant.

APPLETON, C. J. The question presented for determination is whether the defendant is entitled upon the facts found by the referees to betterments.

The lots owned by these parties originally belonged to Willard Thompson, who on October 16, 1852, conveyed to Thomas R. Thompson the lot of the plaintiff, and on October 29, 1852, to Erastus Gowen the lot of the defendant.

It appears that as early as 1853, Gowen entered on the lot conveyed to T. R. Thompson (now plaintiff's) under a verbal contract for its purchase at the price of $75.00, towards which he paid $31.00. While so occupying he erected the buildings in question, but subsequently he declined to complete his contract.

This occupancy by Gowen was not adverse to the title of the owner. It was in subserviency thereto. It was under a contract to purchase, which was in part performed. Gowen had no claim to betterments. *Treat* v. *Strickland*, 23 Maine, 234; *Moore* v. *Moore*, 61 Maine, 417. The buildings erected became affixed to and a part of the realty.

On March 14, 1874, Thomas R. Thompson conveyed his lot to one George. As there were no betterments as between him and Gowen, this conveyance gave George the lot and buildings. George in his deed conveyed the land excepting the buildings. But it is of no importance in the decision of this case whether

the buildings belong to George or the plaintiff. The defendant has no title to them.

On March 12, 1873, Gowen conveyed his lot to the tenant "with buildings thereon." The defendant entered and is in possession and claims betterments for the buildings. They are not on the lot conveyed to him as found by the referees. But suppose he entered into possession of the land holding it adversely from the date of his deed, he cannot claim compensation for what Gowen did. Gowen had no claim for betterments and having none, could convey none. The defendant has made no improvements. *Kennebec Purchase* v. *Kavanagh*, 1 Greenl. 348. He cannot claim any benefit of those made by his grantor who made them when he was in occupancy of the premises by permission of the owner and under a contract to purchase.

Motion overruled. Judgment for plaintiff.

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

MARTHA BLACKMAN

vs.

PROPRIETORS OF GARDINER AND PITTSTON BRIDGE.

Kennebec. Opinion May 29, 1883.

Damages. Personal injuries.

In an action for damages for personal injuries, the law will not allow the plaintiff to recover for his own loss of time and loss of capacity to labor, and, in addition thereto, recover what he has to pay another to supply that loss of labor.

In such an action, the presiding judge instructed the jury, upon the question of damages, that the plaintiff (a married woman) would be entitled to recover for loss of time and incapacity to labor, and added, after calling attention to the testimony in relation to expenses for medical attendance and an additional domestic, that the plaintiff, "was entitled to recover what she had to pay, in the exercise of prudence and care, for nursing *and assistance*." *Held*, That the words "and assistance" were calculated to convey to the jury the idea that the plaintiff was entitled to recover not only what she

had been obliged to pay for doctor's bills and nursing, but in addition thereto, for assistance about the house, etc. and for that reason the instruction was erroneous.

ON EXCEPTIONS and motion.

An action on the case against the defendants, a toll-bridge corporation, for personal injuries alleged to have been sustained by the plaintiff, a married woman, in crossing the defendants' bridge, December 30, 1878, from a defect caused by ice upon which she fell and fractured a bone of the arm and dislocated the wrist. The writ was dated September 17, 1880.

The opinion states the material facts.

Vose and Farrington, for the plaintiff.

Orville D. Baker, for the defendants, cited upon the question considered in the opinion: Shearman and Redf. Negligence, § 606; *Oliver* v. *No. Pac. Trans. Co.* 3 Oregon, 84; *Bridge Ass'n* v. *Loomis*, 20 Ill. 235; Dicey on Parties, 391; *McCarthy* v. *Guild*, 12 Met. 291; Stat. 1876, c. 112; *Abbott* v. *Abbott*, 67 Maine, 308; *Hobbs* v. *Hobbs*, 70 Maine, 382; *Filer* v. *N. Y. Cen. R. R. Co.* 49 N. Y. 47 (10 Am. R. 327.)

WALTON, J. While the plaintiff was crossing Gardiner toll bridge, she slipped and fell, and injured her wrist and arm; and for this injury she has recovered against the bridge company a verdict for $1291.63. The defendants claim that this amount is excessive, and ask for a new trial. They also except to the charge of the presiding judge upon the question of damages.

The verdict seems to be large for such an injury; but we are not prepared to say that it is so clearly excessive as to require us to set it aside, if we could feel sure that it was not based on an erroneous understanding of the law. But we do not feel sure of this. It seems to us that there is an error in the charge of the presiding judge which might, and probably did, improperly increase the amount of the verdict. The jury was instructed that there were certain elements of damage which could be computed with some degree of accuracy; and among these elements the presiding judge mentioned the plaintiff's loss of

time and incapacity to labor. This was undoubtedly correct. He then referred to the plaintiff's testimony, and called the attention of the jury to the fact that she had testified that she paid her physician twelve dollars; and, being unable to perform her usual labor, she had for about six months, hired another domestic in addition to the one that she had employed prior to that time, paying her wages at the rate of eight dollars a week. He then instructed the jury that the plaintiff was "entitled to recover what she had to pay, in the exercise of prudence and care, for nursing *and assistance*." Now, the case shows that in addition to her own family, the plaintiff kept several boarders, and that this additional domestic was her own sister (Miss Clark), and that, in addition to doing what was necessary to make the plaintiff comfortable, she took her place in the family, and, as Miss Clark herself testified, "did the general housework, looked after her family, and assisted about taking care of it, as she (the plaintiff) did when she was round."

Now the law would not allow the plaintiff to recover for her own loss of time, and loss of capacity to labor, and, in addition thereto, recover what she had to pay a domestic to supply that loss of labor. That would be double compensation. It would be paying twice for the same thing. As well might a plaintiff recover, first, for the value of a horse killed through a defect in the highway, and then for the money paid to buy another.

The plaintiff was undoubtedly entitled to recover for her bodily and mental sufferings, for necessary medical attendance and nursing, and for her loss of time, or loss of capacity to labor. But when the jury was instructed that she was entitled to recover what she had paid for "nursing *and assistance*," the last two words were probably used by the presiding judge inadvertently, and without perceiving, at the moment, the force and effect which, under the circumstances, and in view of the plaintiff's evidence, to which their attention had just been called, they would be likely to have with the jury. They were calculated to convey to the jury the idea that the plaintiff was entitled to recover not only what she had been obliged to pay for doctor's bills and nursing, but in addition thereto, what she

had paid for assistance about the house, and in taking care of her family and boarders — labor which she herself would have been able to supply if she had not been injured; and, as there is nothing in any previous or subsequent portion of the charge to limit or restrain their meaning, it is impossible to say that the jury did not so understand them, and act accordingly. For this reason we think the exceptions must be sustained and a new trial granted.

Exceptions sustained.
New trial granted.

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

AMOS FISK and another *vs.* MARY ANNAH WILLIAMS.

Knox. Opinion May 29, 1883.

Bond for a deed. Action. Premature suit. Tender. Performance.

The obligees in a bond for the conveyance of real estate upon the payment of a certain sum of money, and all taxes thereafter legally assessed on the property, demanded of the obligor a deed of general warranty to one of the obligees and the assignee of the other obligee. The assignment was not read to the obligor, (though it was contended that she had knowledge of it) nor was any information given her as to the assessment and payment of the taxes since the date of the bond. The payments required by the bond had been made, but the taxes for the last two years were not fully paid. Three days after making the demand, suit was commenced on the bond. The possession and occupation by the obligees and assignee were never interfered with, and forty-nine days after the demand, the obligor executed and tendered a deed. *Held;*

1. That three days was not a reasonable time to give the obligor in which to investigate and determine the fact of the assignment and the legality of the assessment of the taxes and their payment.

2. That the action was prematurely commenced.

3. That the tender of the deed was a good performance by the obligor of the condition of the bond.

ON EXCEPTIONS and motion.

Debt on a bond for the conveyance of real estate. Writ dated June 4, 1877. The verdict was for the plaintiffs in the sum of $1883.44, and the following special findings were returned by the jury.

"*Question.* Did the plaintiffs inform the defendant of the assignment from Fisk to Charles M. Hayden and exhibit it to her when they demanded the deed by Mr. White in April or on the first day of June, 1877?

"*Answer.* Yes. (Signed) Warren K. Sampson, Foreman."

"*Question.* Had the defendant knowledge of said assignment from Fisk to Charles M. Hayden before the demand of the deed June 1, 1877.

"*Answer.* Yes. (Signed) Warren K. Sampson, Foreman."

Other material facts stated in the opinion.

C. E. Littlefield, for the plaintiffs.

The first special finding was immaterial and could not have affected the result. It is not necessary to inquire whether or not it was against the weight of evidence. *Warren* v. *Williams*, 52 Maine, 343.

The motion to set aside the verdict cannot be sustained. *Beal* v. *Cunningham*, 42 Maine, 362; *Elliott* v. *Grant*, 59 Maine, 418; *Enfield* v. *Buswell*, 62 Maine, 128; *Handley* v. *Call*, 27 Maine, 35; *Stephenson* v. *Thayer*, 63 Maine, 146.

Exceptions do not lie to the refusal to order a nonsuit, or to instruct the jury to return a verdict for defendant, after the case is closed. *Stephenson* v. *Piscataqua F. & M. Ins. Co.* 54 Maine, 55; *Boody* v. *Goddard*, 57 Maine, 602; *Carleton* v. *Lewis*, 67 Maine, 76.

At the trial the exceptions state that the defendant contended for six other propositions: (1.) That the plaintiffs should have informed the defendant as to taxes assessed. (2.) That she was not bound to execute a deed with general covenants of warranty. (3.) That the bond only required her to execute a deed to the persons named in the bond. (4.) That a reasonable time had not elapsed after the demand, before the action was commenced. (5.) That a reasonable time was a question of

fact for the jury. (6.) That the taxes assessed were valid in law, and the exceptions state that these several propositions were overruled. But overruling what counsel contend for, is no ground of exceptions. He should have preferred requests for instructions. *State* v. *Straw*, 33 Maine, 556; *Stowell* v. *Goodenow*, 31 Maine, 538; *Rogers* v. *K. & P. R. R. Co.* 38 Maine, 227; *Purrington* v. *Pierce*, 38 Maine, 447; *Stone* v. *Redman*, 38 Maine, 578; *Willey* v. *Belfast*, 61 Maine, 569.

What is a reasonable time is a question of law. *Attwood* v. *Clark*, 2 Maine, 249; *Kingsley* v. *Wallis*, 14 Maine, 57; *Howe* v. *Huntington*, 15 Maine, 350; *Hill* v. *Hobart*, 16 Maine, 164.

The case shows that the defendant had ample time within which to comply with the demand, or to make performance of her bond. The parties and the premises were located within five miles of the defendant. She was then living with her husband, from whom she could have learned all the facts. She says she knew a deed was demanded in March, sixty days before the action was brought, and during all that time she testifies she did absolutely nothing towards investigating. The demand in March was good and making another June 1, was no waiver of the first. *Hill* v. *Hobart, supra; Hunt* v. *Hotchkiss*, 64 Maine, 242; Story, Agency, § § 140, 140 a.

Counsel further elaborately and ably argued the questions arising as to the form of the deed to which the plaintiffs were entitled and the questions pertaining to the assessment of taxes and kindred subjects, citing: *Dinsmore* v. *Savage*, 68 Maine, 191; *Lathrop* v. *Grosvenor*, 10 Gray, 52; R. S., c. 3, § 8; c. 6, § 114; *Limerick* v. *Petitioners*, 18 Maine, 183; *Milliken* v. *Bailey*, 61 Maine, 316; *Porter* v. *Haskell*, 11 Maine, 177; *Russell* v. *Copeland*, 30 Maine, 333; *Foye* v. *Southard*, 64 Maine, 389; 1 Greenl. Ev. § 601; *Adams* v. *McFarlane*, 65 Maine, 152; *Allum* v. *Perry*, 68 Maine, 234; *Congregation, &c.* v. *Halladay*, 50 N. Y. 664; *Blewett* v. *Baker*, 58 N. Y. 611; *Gregg* v. *VonPhul*, 1 Wall. 274.

A. P. Gould, for the defendant, cited: *Hill* v. *Hobart*, 16 Maine, 164; *Winslow* v. *Copeland*, 15 Maine, 276; *Simpson*

v. *Pease*, 53 Maine, 497; 1 Chitty's Pl. (8 Ed.) 322; *Hobbs* v. *Clements*, 32 Maine, 67; R. S., c. 6, § 28; *Brown* v. *Veazie*, 25 Maine, 359; *Nowell* v. *Tripp*, 61 Maine, 426; R. S., c. 6, § 114; *Carville* v. *Additon*, 62 Maine, 459; Dillon, Mun. Corp. § 751, note and cases cited; *Oberich* v. *Gilman*, 31 Wis. 495; *Wright* v. *Boston*, 9 Cush. 233; *Tobey* v. *Wareham*, 2 Allen, 594; *Lincoln* v. *Worcester*, 8 Cush. 57; *Williams* v. *Hilton*, 35 Maine, 547; *Stetson* v. *Day*, 51 Maine, 434; Sugden on Vendors, 261; *Fairbanks* v. *Dow*, 6 N. H. 266; *Hudson* v. *Swift*, 20 Johns. 24; *Gazley* v. *Price*, 16 Johns. 267; *Tinney* v. *Ashley*, 15 Pick. 546; *Russell* v. *Copeland*, 30 Maine, 332; Benj. Sales, § 683; *Cocker* v. *Franklin Co.* 3 Sum. 530; *Howe* v. *Huntington*, 15 Maine, 354;

LIBBEY, J. This action is upon a bond given by the defendant to the plaintiffs in the penal sum of two thousand dollars, dated October 1, 1872. The condition of the bond recites an agreement for the sale of a certain lot of land described therein, by the defendant to the plaintiffs, for the sum of two thousand dollars, and an agreement by the plaintiffs, their executors and administrators, to pay to the defendant, her executors, administrators or assigns, the said sum of two thousand dollars, as follows: Eight hundred dollars cash on delivery of the bond, three hundred dollars in one year, three hundred dollars in two years, three hundred dollars in three years, three hundred dollars in four years, with interest at the rate of seven and three-tenths per cent. "and all taxes legally assessed thereon after the (then) present year. Now, therefore, if the said Mary Annah Williams shall deliver unto the said Amos Fisk and Sarah P. Dow, a good and sufficient deed of warranty of said premises, the said Fisk and Sarah P. Dow making demand for the same and fulfilling all the conditions herein stipulated, then this obligation to be void."

On the second day of June, 1873, said Fisk assigned his interest in the bond to Charles M. Hayden, by an assignment upon the back of the bond. One of the objections to the maintenance, of the action raised and insisted upon at the trial,

was that the action was prematurely brought; that a reasonable time had not elapsed after the demand, if a legal demand had been made, to enable the defendant to investigate the facts and inform herself of her rights and duties and to prepare and tender such a deed as she was required to execute. There was evidence introduced by the plaintiffs, tending to show that a demand was made upon or shortly prior to the eleventh day of April, 1877, and also upon the first day of June of the same year. The action was brought on the fourth day of June. Upon this point, the presiding judge instructed the jury as follows: "Another objection raised, is that the action was prematurely brought. It is claimed that there was no such demand as the law would require, prior to the first day of June, 1877, and that the defendant had not a reasonable time within which to investigate and ascertain her legal rights, and determine whether she was legally required to execute the deed or not. The facts being undisputed in the evidence, it is my duty to rule as matter of law upon this question; and I instruct you that the action was not prematurely brought; and if, under the rules I shall give you in this case, there was a proper and legal demand made, either in April when White went to get the deed executed, or on the first day of June when Mr. Hayden and Mr. Littlefield went for that purpose, and the action was brought on the fourth day of June following, it was not prematurely brought, but may be maintained."

What is a reasonable time within which a party is required to perform a certain act, must be determined in every case, from the facts disclosed and all the surrounding circumstances. If the facts and circumstances are in controversy between the parties, the question is generally one for the jury under appropriate instructions by the court; but if the facts are not in controversy, or the evidence relied upon by the person whose duty it is to do the act, if true, would not authorize the jury to find in his favor, then it is the duty of the court to determine the question as matter of law.

A report of all the evidence in the case, is made a part of the exceptions, and from a careful examination of the testimony, we

think the judge was in error in assuming that all the facts and circumstances which should be found and considered in determining this question, were undisputed by the parties; and if the facts and circumstances which the evidence introduced and relied upon by the defendant, if true, fairly tends to prove, taken in connection with the undisputed facts and circumstances, show that a reasonable time had not elapsed when the action was commenced, the ruling of the judge must be held to be erroneous.

The ruling of the presiding judge upon this point, was based upon the hypothesis that the jury might find that the only sufficient demand made by the plaintiffs, was that made on the first day of June. The action was commenced three days after. The uncontroverted facts to be considered in determining the reasonable time of performance by the defendant as disclosed by the evidence, are as follows: The condition of the bond recites an agreement by the plaintiffs to pay all taxes legally assessed upon the premises after the year in which it was given, (1872,) and imposes upon the defendant the duty of performance on her part on demand by the plaintiffs, Fisk and Dow, and the performance by them, of their agreement to pay the taxes as well as the consideration to be paid for the lands. The plaintiffs went into possession of the premises immediately after the bond was given, and remained in possesion, having the use and income thereof, to the time of demand and for some time thereafter. They had made material changes in the house upon the premises, affecting its value; Fisk had assigned his interest in the bond to Hayden; the premises had been taxed every year after the giving of the bond; the taxes for 1877, and eight dollars and eighty-seven cents of the tax of 1876 were unpaid. The demand made upon the defendant was that she should execute the deed to Dow and Hayden, and not to Fisk and Dow, prepared and presented to her by the attorney of the plaintiffs, which contained covenants of general warranty, and among them, one that the premises were free of all incumbrances. It required her to covenant against a lien upon the premises, created by the legal assessment of a tax thereon, prior to that time. The plaintiffs gave her no information whatever in regard to the assessment or

payment of the taxes. The assignment of the bond had not been recorded and it was not read to her. Whether she knew of the assignment before that time or not, was a fact in controversy. She claimed and testified positively that she did not know it until some time after; that at the time the demand was made, she was not informed of the assignment. She also testified that at the time the demand was made, after some conversation in regard to the matter, she said to the parties making the demand, that she did not know what to do, and requested them to go to Mr. Gould, who was her attorney; she also testified that the deed was not read to her. She was a woman but little acquainted with business affairs. She was entitled to a reasonable time in which to investigate the facts connected with the claim of Hayden to a deed, and whether the plaintiffs had fully performed their agreements specified in the condition of the bond. Fisk was not present, admitting Hayden's right to the deed. She was entitled to a reasonable time in which to ascertain whether Fisk had made a genuine assignment to Hayden, and if so, whether she was legally required to execute the deed on demand by Dow and Hayden, and could safely do so as against a claim by Fisk. If she could be required to covenant against an incumbrance created by the legal assessment of a tax upon the premises, before doing so she had a right to a reasonable time in which to ascertain whether taxes had been legally assessed, and if so, whether they had been paid. To inform herself upon these questions so that she might safely act and execute a deed in conformity to the condition of her bond, it would be necessary and proper that she should consult good legal counsel. Taking into consideration the fact that the plaintiffs were in the undisturbed possession of the premises, and had no occasion for immediate action on the part of the defendant, and that she did not deny their right to a deed, we think it clear that three days was not a reasonable time for performance of the condition of her bond by the defendant, and that this action was prematurely brought.

But it is claimed by the counsel for the plaintiffs that the defendant is not aggrieved by the instruction under consideration,

so far as it relates to the demand on the first of June, because, he says, there was a previous demand in April. We think this position untenable. The evidence does not disclose a sufficient demand upon the defendant in April. It comes from the witness White and the defendant. Upon this point White testified that at the request of William Hayden, the father of Charles M. Hayden, he went to the defendant and informed her that he had drawn a deed running from her to Hayden and Dow, and had come to witness her signature and take the acknowledgment of it; that she declined, saying she was not ready to sign it. It does not appear from his testimony that he informed her what authority he had for requesting her to sign the deed, nor for whom he was acting. He did not inform her of the assignment of the bond by Fisk to Hayden, made no explanation to her why she was required to execute the deed to Hayden, and it does not appear that he had the bond with him on that occasion. He gave her no information whatever in regard to the assessment of taxes or their payment. Neither Dow, Fisk nor Hayden was present. The defendant testified that Mr. White called on her for a deed; that he said he had called with a deed of the house at South Thomaston for her to sign; that she did not see the deed; that he merely said he came up for her to sign a deed of the property; that he did not say to whom, and she did not know to whom. We think that this evidence does not prove a sufficient demand.

The case shows that the defendant on the twentieth of July, 1877, tendered to Dow and Hayden, the plaintiffs in interest, a good and sufficient deed of warranty of the premises as required by the condition of her bond. It is not inappropriate for us to remark upon the legal effect of that tender. Neither the time of payment of the purchase money, nor the tender of the deed was of the essence of the contract. The last payment of the purchase money, due on the first day of October, 1876, amounting to three hundred and eighty-four dollars and twenty-five cents, was not in fact paid till the eighth day of March, 1877. Still the plaintiffs' rights were not forfeited by the delay. The plaintiffs remained in possession of the premises till after the twentieth of July, taking the rents and profits under the contract

of purchase. They had made material changes in the house, affecting its value. The defendant had not in any way interfered with their possession or denied their right to a deed. Their interests had in no manner been impaired, by the delay. The only suggestion of loss to the plaintiffs is, the costs of their writ, prematurely commenced. We think the tender of a deed at that time was a good performance by the defendant of the condition of the bond in suit.

Exceptions sustained.

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

SEWALL L. HEYWOOD *vs.* DAVIS TILLSON.

Knox. Opinion May 29, 1883.

Trover. Action. Motive. Employer and employee. Landlord and tenant.

Trover is not maintainable by the owner of a house against one, though owner of the land, who refuses to employ any tenant who may occupy the same.

An employer has a right to refuse to employ or to retain in his service any person renting certain specified premises, and the owner of such premises has no cause of action against him for the exercise of such right, though such refusal was through malice or ill will to such owner.

ON REPORT.

An action to recover damages for interfering with the plaintiff's tenement house and refusing to employ any laborer who rented the same. Writ dated February 24, 1879. Plea, general issue.

A. P. Gould, for the plaintiff.

The facts are much stronger than is necessary to make out a case. It was a wrong done to plaintiff's property, for which he has a remedy.

It was held in *Aldridge* v. *Stuyvesant*, 1 Hall's R. (N. Y.) 210, "that an action on the case lies in favor of a landlord,

against any person who so wrongfully and maliciously disturbs his tenants, that they abandon his premises, and the landlord loses his rent."

In *Carew* v. *Rutherford*, 106 Mass. 1, the court say, "one of the aims of the common law has always been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others; and it has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege which he has. Many illustrations of this doctrine are given in Bac. Ab. Action on the Case, F. . . . But as new methods of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges; and existing forms of remedy must be used."

In *Marsh* v. *Billings*, 7 Cush. 322, the plaintiff by contract with the proprietor of the Revere House had the exclusive right to carry passengers to that hotel from a certain depot, and placed upon his carriage and servants stationed there, "Revere House." The defendant was a hackman, and to get passengers adopted that badge. The court held him responsible in damages in an action on the case.

The defendant claims that he had a right to employ whom he pleased, and to get tenants into his houses if he could; but he forgets the maxim, "*sic utere tuo ut alienum non laedas.*" He had no right to entice away the plaintiff's tenant, even for the honest purpose of filling one of his own tenements, nor had he a right to use his power to dismiss his employees unless they would cut down the rent they had agreed to pay the plaintiff, or quit the tenement, for the purpose of rendering it of no value to the plaintiff.

It is actionable to entice away one's servant, so that his services are lost to the employer, even for the purpose of obtaining those services on the part of the enticer. There are many authorities to this effect. 2 Hill. Torts (2nd ed.), 585, and authorities. An action lies for seducing a journeyman to leave his employer. *Hart* v. *Aldridge*, Cowper, 54. So too, for enticing away a dramatic artist from a theatre where he is

employed. *Lumley* v. *Gye*, 20 Eng. L. & Eq. 168; see *Walker* v. *Cronin*, 107 Mass. 555.

It was not necessary, in order that the plaintiff may recover damages for the loss of his tenant, that the lease should be for a definite period. *Gunter* v. *Astor*, 4 J. B. Moore, 12 (16 E. C. L. 357); *Walker* v. *Cronin*, *supra*; *Benton* v. *Pratt*, 2 Wend. 385.

The defendant is liable, not only for the injury sustained by the plaintiff in the loss of the particular tenant who was induced to leave, but he is also liable for the loss of rent occasioned by the conduct of the defendant, which was calculated to deter others from hiring the house. *Greenland* v. *Chaplin*, 5 Exch. 243.

D. N. Mortland, for the defendant, cited: *Bowen* v. *Matheson*, 14 Allen, 499; *Com.* v. *Hunt*, 4 Met. 111; *Boston Glass M'f'y* v. *Binney*, 4 Pick. 425; *Greenleaf* v. *Francis*, 18 Pick. 118; *Chase* v. *Silverstone*, 62 Maine, 175; *Frazier* v. *Brown*, 12 Ohio, 294; *Chatfield* v. *Wilson*, 28 Vt. 49; *Wheatley* v. *Baugh*, 25 Penn. 528; *Fernald* v. *Chase*, 37 Maine, 287; *Fifield* v. *M. C. R. R. Co.* 62 Maine, 77; *Bowlin* v. *Nye*, 10 Cush. 416; *Tucker* v. *Tarbell*, 11 Allen, 131.

APPLETON, C. J. This is an action on the case. The plaintiff in his writ alleges that on December 19, 1875 he was seized of a dwelling house on Hurricane Island of great value, yielding an annual rent of one hundred dollars which he should be receiving, were it not for the wrongful act of the defendant, and ought to receive from one Charles H. Sanborn and other tenants; that he leased the dwelling house and premises to said Sanborn for the term of one year, which sum said Sanborn was willing to pay; that the defendant was the occupant and owner of said Hurricane Island, and engaged in quarrying, cutting and working granite, and shipping the same to market; that there was no opportunity to lease any building, except to those in the defendant's employ; yet the defendant knowing this and to deprive the plaintiff of the rents and profits arising therefrom, did on December 29, 1875, order and direct the said Sanborn to pay him only twenty

dollars a year, instead of ninety-six dollars, and threatened to discharge said Sanborn if he did not comply with his order; by means, whereof, the plaintiff received but one dollar and sixty-seven cents per month, instead of eight dollars; that afterwards on August 1, 1876, said Tillson ordered and directed said Sanborn to leave said dwelling house and refused to allow him to remain therein, and threatened to discharge him from his employment, unless he should leave said dwelling house; and that the said Tillson threatened to discharge any and all persons from his employment, and expel them from the island, who should occupy said premises and become tenants of the plaintiff,—by means of which orders, threats and directions, the said Sanborn was induced to and did leave the premises, and refused to pay for the use of the same, and to occupy the same,—whereby the plaintiff has been unable to rent, lease or sell said dwelling house, and has lost all benefit from the same.

The second count is in trover for the conversion of the plaintiff's dwelling house.

The evidence in support of the plaintiff's claim, comes entirely from him, and witnesses called by him.

The defendant is the owner of Hurricane Island, has extensive quarries there, doing a large business, having important contracts with the government, and six hundred men in his employ.

The plaintiff went into the defendant's employ as a stone cutter in 1873, and purchased the house referred to in the declaration, in the fall of 1874, for two hundred and fifty dollars, and was discharged in October, 1875. He testified that he "made no attempt to injure General Tillson, previous to his (my) discharge;" that he "had been taking notes in regard to the management of the job," and was, "going to keep the notes in case the job was ever investigated;" that he "furnished information to the newspapers in regard to the management of the government works;" wrote articles in the Boston Herald and The Rockland Opinion; that when the latter paper was indicted for a libel growing out of the articles, he was here two weeks in procuring witnesses for the publisher; that he said he considered the defendant a damned

scoundrel, that he so testified, on the trial of the indictment, and that he "so considers him now."

The house was built on defendant's land, by verbal permission of his clerk.

Such is the relation of the parties.

The plaintiff claims to recover in trover, but he testifies that General Tillson told him, "that he would not interfere with making a disposition of the property," "that he has never directly assumed to him (me) any control over that house," "that he wanted me to dispose of my property there and go off the island; he said he should not interfere with my disposing of it," "that any man that rented my house should not work for him." Here is no conversion of the property. The plaintiff might live there. He might sell or lease his estate. He had full control of his property, leaving the defendant at liberty in fixing the terms and conditions on which he would employ those laboring for him. Whatever they might do, here is no conversion of the house of the plaintiff.

The first ground of complaint in the second count in the declaration is, that he "had leased the said dwelling house and premises to the said Charles H. Sanborn for the term of one year from the said day hereinbefore specified (December 29, 1875), for the sum of eight dollars per month, which sum the said Charles H. Sanborn was then and there ready and willing to pay." "Yet the said defendant, well knowing the premises, . . did on the said December 29, A. D. 1875, order and direct the said Charles H. Sanborn to pay the plaintiff only twenty dollars a year, instead of the ninety-six dollars per year, and threatened to discharge said Sanborn from his employment if he did not comply with such order; by means whereof the said Sanborn was prevented from payment to the plaintiff any more than one dollar and sixty-seven cents, instead of eight dollars per month."

The plaintiff's evidence disproves every material allegation as there set forth, and the above is the most tangible ground of complaint to be found in the whole declaration.

The house was not leased for the year. It was personal property. The plaintiff was not seized of it. Sanborn testifies

that the plaintiff rented the house to him "for eight dollars a month, so long as he (I) saw fit to occupy it," that he went into the house in October, 1875, and left in August, 1876, and that the amount he "paid Heywood was in the neighborhood of eighty dollars." The plaintiff nowhere alleges that he did not receive the rent as stipulated from Sanborn. The only evidence of ordering out is, what is testified to by Sanborn; that "he said he did not wish to injure me (Sanborn), but the man that lived in Heywood's house could not work for him." But this constitutes no ordering. It was what he had a right to say. It did not interfere with letting to others.

As the house was rented to Sanborn by the month, as "*long as he saw fit to occupy it*," the contract was terminable at the option of Sanborn. He could terminate it when and for what reason he saw fit. The plaintiff could not complain of its termination, no matter how unreasonable it might be. He had no contract with Sanborn that he should remain. He might remain or not. In *Hutchins* v. *Hutchins*, 7 Hill, 104, the defendants, after a will was made, devising certain real estate to A, conspired to induce the testator to revoke it, and effected their object by means of false and fraudulent representations: *Held*, that A, could not maintain an action, as the revocation of the will merely deprived him of an expected gratuity, without interfering with any of his *rights*. So, here, no rights were interfered with. There was no obligation on the tenant to remain. None on the landlord to permit him to remain. All there is, the tenant did not renew his contract. Why he did not is no concern of the landlord. The tenancy was at will. The exercise of that will was the exercise of a perfect right. The motive which induced that exercise, can be no ground of complaint, whether it was the chance of bettering his condition, to gratify a whim of his own or the ill will of another. The landlord cannot complain that a tenant declines to renew his lease. If Sanborn violated any contract, he is liable to the plaintiff in damages.

Besides, an employer has a vital interest in the welfare of his men. He has a right to see that they are not plundered. It was a perfectly proper motive for the defendant to interpose to

prevent an extortionate rent, as that of one hundred dollars a year for a shanty costing but two hundred and fifty dollars. His own interest and his interest in the success of his employees, without the imputation of anything sinister on his part, afford good and sufficient reasons for his intervention.

The question raised is, whether the defendant is liable in damages to a landlord for a tenant's leaving, or for one or many declining to become or not becoming tenants in consequence of his threats that he would employ no one who should become such landlord's tenants, or being his tenants should continue to remain such.

The defendant was doing a large business, having five or six hundred men in his employ. It was of the utmost importance to his success that his employees should be of good habits, friendly to his enterprise and interested in his prosperity. As between the employer and the employee, each may fix the terms and conditions on which the one will employ and the other be employed. "It is well settled," observes SHAW, C. J., in *Com.* v. *Hunt*, 4 Met. 133, "every free man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, work or refuse to work, with any company or individual at his own option, except so far as he is bound by contract." The employer has equal and reciprocal rights to fix the terms and conditions upon which alone he will contract for employment. He is restricted to no color or race. The conditions upon which he insists may be silly or absurd. If acceded to, they are binding on the employee. Whether wise or not, if legal, it is no concern of others. In *Carew* v. *Rutherford*, 106 Mass. 14, CHAPMAN, C. J., uses this language: "Every man has a right to determine what branch of business he will pursue, and to make his contracts with whom he pleases and on what terms he can. . . He may refuse to deal with any men or class of men. And it is no crime for any number of persons, without an unlawful object in view to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions." The employer has the same right of imposing conditions and limitations as those he may employ.

The workmen may agree that they will not work for an employer, "who should after notice, employ a journeyman, who habitually used it" (liquor), *Com.* v. *Hunt.* A laborer would not be liable to a journeyman who lost employment by reason of such agreement, and the refusal of the employer any longer to hire him. So the master may equally impose as a condition, that his servants shall not board at a house where liquors are kept for sale, and the seller cannot maintain an action against him for the loss of profits on liquors he might have sold his boarders had they remained with him. He may impose as a condition of employment, that certain associates and associations shall be avoided. Good habits are not all that is desirable. An interest in the success of an enterprise is required. The master may impose as a condition of employment, that he shall not associate with one who is inimical to him — who is seeking to injure him — who is acting as a spy upon his proceedings, and who is libelling him in the newspapers.

So, the employer, as he may by contract stipulate with his men where they shall not board, may equally determine where and of whom they may rent the houses they may occupy, and where they may not. The house may be in an unhealthy part of the city, or a disreputable neighborhood. But whatever the reason, good, bad or indifferent, no one has a right to complain.

The owner has no cause of complaint when one says he will not occupy his house, nor when another says he will refrain from doing an act if it be occupied. The defendant was under no obligation—owed no duty to the plaintiff that he should permit his men to occupy his house any more than to a boarding house keeper, that he should permit his men to board with him. The idea of a boarding house keeper suing a man because he declines or refuses to employ his boarders, or the owner of a house, because he will not employ his tenants, is utterly at variance with the right of individuals to make their own contracts. A landlord has no right of action against an employer of men, because he refuses to employ his tenants or boarders. Nor are his rights enlarged because the reason of such refusal is, that they are his tenants or boarders.

Neither is the employer liable if having the tenants or boarders of a landlord in his employ, he discharges them from his service because they choose to remain such tenants or boarders, having the right by his contract with them to terminate their services. If he has not that right he may be liable to those so discharged. If he has, no one else has any right to complain, because an employer having a right to discharge a servant, does discharge him. The contract is between the master and servant, and the master is not obliged to retain his servant in his employ in such case, and no one else can bring a suit against him because he does not.

The defendant has broken no contract. He has made none with the plaintiff. If the plaintiff has none with any one no contract is broken. If there be one, and the tenant has broken it, preferring to continue in the defendant's service, the tenant is liable for such breach. He is the one by whom the contract is broken. He is the principal in its breach. The defendant has done nothing.

It must be remembered that the interference complained of, is not with the general rights of the plaintiff. The threat is not general. It is only as to his employees. The plaintiff may rent to all the rest of humanity. The defendant owes no duty to the plaintiff. He has done him no wrong by declining to employ his tenants, unless he was under some legal obligation to employ them, and was guilty of some wrong in not employing them. This very action is brought upon the assumption that the defendant was in some way under an obligation to employ the plaintiff's tenants; that he was guilty of a dereliction of duty, of a violation of the plaintiff's right, in not employing his tenants, or in threatening not to employ such as should become or were his tenants.

If the defendant had advised a tenant to leave, because the house was in a disorderly neighborhood or too distant from the place of labor, and he had left, it will not be pretended that an action could have been maintained. If he advises and urges him to leave, but fails, however malicious his motive, his malice affords no ground of action. If he procures him to leave with-

out notice he is not responsible. There is no cause of action against him. But if the act, not actionable in itself, is accompanied by a bad motive — affords a ground of action — then it follows, that if an act be in itself lawful, if a bad motive becomes the basis of a suit, that is a man is sued for his motives, irrespective of his conduct.

The defendant had an absolute right to employ or not to employ, a tenant of the plaintiff, and no action would be maintained against him if he chose not to do it.

Threatening not to employ such tenant affords no ground of action on the part of the landlord. A threat to commit an injury is "not an actionable private wrong." Cooley on Torts, 29. It is only the promise of doing something which in the future may be injurious. It may never be carried into effect. It cannot be foreknown that it will be.

The belief on the part of the defendant that the plaintiff had injured and would injure him existing, that from ill will thus arising, he said he would neither employ nor retain in his employ a tenant of the plaintiff, affords no ground of action. Having a right to make that a rule of action, he is not liable for so doing, still less for merely threatening.

The act legal, he cannot be sued for mere ill will or personal animosity, especially when he has cause. "The exercise by one man of a legal right cannot be a legal wrong to another." Cooley on Torts, 685. In *Stevenson* v. *Newnham*, 76 E. C. L. 281, it was held that an act which did not amount to a legal injury could not be actionable because done with a bad intent. The insertion of the word maliciously when the act complained of is not unlawful *per se*, will not make a count good which would be bad without it. *Cotterell* v. *Jones*, 73 E. C. L. 713. Evidence that an act legal in its character was done wantonly and with intent to injure was held inadmissible in *Benjamin* v. *Wheeler*, 8 Gray, 409. In *Randall* v. *Hazelton*, 12 Allen, 415, COLT, J., says "damages can never be recovered where they result from a lawful act of the defendant." The law will not inquire into the motives of the party exercising such right however unfriendly or selfish. "It is generally held that no action will lie against one for acts done

upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantage or cause a loss to him, without violating any legal right; that is," remarks WELLS, J., in *Walker* v. *Cronan*, 107 Mass. 564, "the motive in such case is immaterial. *Frazier* v. *Brown*, 12 Ohio St. 294; *Chatfield* v. *Wilson*, 28 Vt. 49; *Mahan* v. *Brown*, 13 Wend. 261; *Delhi* v. *Youmans*, 50 Barb. 316." A similar decision was made in *Wheatley* v. *Baugh*, 25 Penn. St. 528. If a wrongful act would suffice, one would think that fraudulent representations by which one was prevented from securing his debt by an attachment would suffice, but it was held otherwise in *Bradley* v. *Fuller*, 118 Mass. 239. "Malicious motives make a bad act worse; but," observes BLACK, J., in *Jenkins* v. *Fowler*, 24 Penn. 308, "they cannot make that wrong, which in its own essence, is lawful, . . . any transaction which would be lawful and proper if the parties are friends, cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law, by doing no *act* which violates it, we must leave his motives to Him who searches the heart." In *Fowler* v. *Jenkins*, 28 Penn. 176, the preceding case is cited with approval, WOODWARD, J., remarking that, "even a malicious exercise of this right would give the plaintiff no cause of action." In *Glendon* v. *Uhler*, 75 Penn. 467, the same doctrine was reaffirmed. In *Phelps* v. *Nowlen*, 72 N. Y. 45, MILLER, J., says "that the maxim *sic utere tuo ut non alienum laedas*, applies only to cases when the act complained of violates some right, and an act legal in itself, violating no right, cannot be made actionable upon the ground of the motive which induced it." "But motives," say the court in *Pickard* v. *Collins*, 23 Barb. 444, "in doing an act which violates no legal right of another, cannot make that act a ground of action." In *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505, it was decided that an act lawful and right in itself, is not actionable on acount of its being performed from an improper or bad motive. "Motive alone," remarks BENNET, J., "is not enough to render the defendants liable for doing those acts which they had a right to do." This doctrine was re-

affirmed in *Chatfield* v. *Wilson*, 28 Vt. 49. There is nothing conflicting with these decisions to be found in *Harwood* v. *Jones*, 32 Vt. 724. In *Hunt* v. *Simonds*, 19 Missouri, 583, it is held that an action does not lie for conspiring to do a lawful act, however malicious the motive, for the very obvious reason that the act was lawful. These views are fully sustained in the text books. Cooley on Torts, 688; *Smith* v. *Bowler*, 2 Disney, (Ohio,) 153; *Kiff* v. *Youmans*, 86 N. Y. 324.

In most of the cases where reference is had to the motive as malicious, it will be found that the act done was wrongful, as in *Bowen* v. *Hall*, 20 Am. Law Reg. 578, where a contract was broken. The breaking the contract was an unlawful act and the inducing it was held to make the person liable — as in the case of enticing a servant from his master, but if there be no contract, one is not liable for inducing a person to leave, though the master wished to further employ him. *Boston Glass Manufactory* v. *Binney*, 4 Pick. 425. In other cases, malice is shown to enhance damages. But if the act be legal, one is not liable for doing it. If doing it from a bad motive, he be made liable, then his liability arises from his motive and not from his act. A different rule would encourage litigation. "Malice," observes MILLER, J., in *Phelps* v. *Nowlen*, might be easily inferred 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." This same act under the same circumstances would be a wrong, if done with intent to injure by one man, and if done by another without such intent, would be regarded as fitting and proper. A tort implies a wrongful act done. But mutual ill will between parties antagonistic to each, affords no basis for mutual suits for such ill will. "So in reference to the term damage, the law is," remarks COLT, J., in *Randall* v. *Hazelton*, 12 Allen, 415, "that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*." But a refusal to hire or to continue to retain one in his employ because he boards with one inimical to the employer, does not give a right of action

for such refusal, unless there is some rule of law restricting the employer in the terms and conditions of his employment.

To entitle a plaintiff to recover, there must be a wrong done. "No one is a wrong doer but he who does what the law does not allow."[1] He who does what the law allows, cannot be a wrong doer whatever his motive. "So no one is guilty of a fraud, because he exerts his rights."[2] The motive which may induce such exertion is immaterial.

So far as relates to the case of Sanborn, who was a tenant by the month, the stipulated rent was fully paid, and the tenant left as he had a right to do. He left because defendant would not employ one of the plaintiff's tenants. The defendant had a right to impose that condition. The tenant had a right to his preference.

As to the rest of the world, except the defendant's employees, there was full liberty of sale or rent. As to these, there was liberty, if they chose to risk the chance of employment. The defendant threatened. He might cease to threat. He might never carry his threats in execution. He might never intend to. There is no proof that a single one of his employees was influenced by his threats — wanted to hire plaintiff's house, or would have hired it; or hiring it, would have remained; or remaining, how long any tenant would have remained.

There is no proof of any wrong done — of any legal damage — or of any facts for or on account of which any damages could be assessed — unless threatening to do what a man has a perfect right to do, will constitute a sufficient foundation for an action. If any wrong was done, it was by the tenant in leaving; and if he has broken any contract, or violated any rights of the plaintiff, he alone is responsible for his misfeasance.

Plaintiff nonsuit.

[1] Nemo damnum facit nisi quid id fecit quod facere jus non habet.—Dig. xii, 6, 53.
[2] Nullus videtur dolo facere qui suo jure utitur.

BARROWS, J. I concur in ordering judgment for the defendant here because I think an employer has an absolute right to intervene for the protection of those who are in his service from extortion, and also for the preservation of his own business interests from detriment, by preventing those who are in his employ from associating or dealing with those whom he regards as hostile to himself.

As to what his own interest or that of his employees requires in these respects, his judgment is conclusive, and his legal right to refuse to employ those who will not conform to his wishes and injunctions cannot be questioned. Except by his own contract he can be under no legal obligation to give employment to any man, and to the making of that contract he may attach any condition not in contravention of law or public policy that he pleases. No one has any legal cause of complaint against him if he exercises the right so to do.

I am of the opinion also that this is in a class of cases where public policy forbids inquiry into the motives of the employer. The spirit of unfriendliness, so often generated by sharp competition in business, and the abundant occasions for difference between employer and employee would be likely to overwhelm with litigation any man or corporation engaged in extensive operations, if every proprietor of a tenement in the vicinity could call him to account before a jury for making it a condition with his workmen that they shall regard his wishes in selecting their place of abode, inasmuch as the same principle would extend to all others who desire to reap a profit by dealing with the workmen. It is true that in this particular case there was abundant reason, both in the exorbitant rent demanded of the workmen for the tenement, and in the hostile attitude which the owner of it assumed to the employer, to justify the prohibition. But such proofs might not always be readily attainable.

The point is that those who desire to deal with another's employees have no such vested right in the wages he is to pay them as to authorize them to dictate what terms he shall or shall not make with them, or to complain if he deems it for his interest, or that of his workmen, to make non-intercourse

with themselves a condition of employment. The multiplicity of groundless and malicious suits of this description which would be likely to arise if their maintenance was made to depend on the motive of the prohibition is, of itself, a sufficient reason why no inquiry should be made about it; as in the case of public officers acting within the scope of their duty (*Benjamin* v. *Wheeler*, 8 Gray, 409); or of those who are merely enforcing a legal claim (*South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505); or of insurers refusing to contract with those whom they distrust; (*Hunt* v. *Simonds*, 19 Missouri, 583.)

WALTON and SYMONDS, JJ., concurred.

PETERS, J. My judgment is that the law does not permit the plaintiff to recover. The facts alleged by the plaintiff are clearly enough proved. It cannot reasonably be denied, the defendant himself does not deny, that the plaintiff's tenant was induced by the threats of the defendant to quit the plaintiff's tenement. In a moral sense the motive may not have been a justifiable one. Still, the action is not maintainable.

The case comes to this: Can the plaintiff recover against the defendant for inducing, by such means of persuasion and influence as were used by him, a third person, to break a contract or engagement of tenancy with the plaintiff? I cannot see that such a position is warranted by the authorities. It seems to me to be an advance upon the present state of the law upon the subject. The question is not whether a person would be exonerated from liability for causing another to break a contract, if such person has used illegal means to accomplish his purpose. But what is the law of a case where the means used were legal means, or would be so regarded if there was no revengeful motive connected with them.

The defendant had a legal right to employ or not employ a laborer who happened to be a tenant of the plaintiff. By an act or by threat of an act which he had a legal right to perform, he induces the laborer to quit the tenancy. He advises and persuades the laborer to break or not to continue a contract. That is not an offense against the law. If a man can advise, can he not use

any lawful means to make his advice effectual? Morality may notice the motive. In such a case as the present the law cannot.

There are, however, exceptions to these general propositions or rules. At a very early period of the common law an action was given to a person against one who knowingly enticed a servant, minor or apprentice from his master. And that principle has been, by at least a preponderance of authority, gradually and fittingly extended until it now sustains an action whenever the person enticed away is under a contract or duty to perform personal services of any kind to the plaintiff. It is no longer necessary that the employer and the employed should stand in the strict relation of master and servant. The person employed may be a skilled mechanic, an expert even, or a professional performer. Still it must be personal services that are to be rendered. Further than this the cases do not extend the principle.

An exhaustive discussion of the doctrine is contained in the ruling case of *Lumley* v. *Gye*, 2 El. & Bl. 216; 75 E. C. L. and that case is learnedly reviewed in Big. Cas. Torts, 306. The same question lately appeared again in the English Court of Appeal, Exch. Div. in the case of *Bowen* v. *Hall*, and that case is also reviewed, and much learning added to it, in a note by an editor, in 20 Am. L. Reg, N. S. 578. These authorities cover all the ground of discussion, and very little could be profitably added. And in those cases the question was not whether the principle should go beyond instances where the contract was for the rendering of personal services, but whether it should go so far as that under all circumstances. And even upon the question of such limited application of the principle the cases are not fully agreed.

The plaintiff cannot recover unless the principle is to be still further extended. There are strong reasons for making it actionable for one person to persuade wrongfully another to break a contract for personal services. There are also reasons for extending an application of the doctrine, but, I apprehend more to be said against extension. There certainly would be difficulties and dangers in advancing the doctrine beyond its present stage. There may be found among the cases judicial expressions favoring the

right of action as one of general application, but certainly no well considered cases have gone to such an extent. WELLS, J., in *Walker* v. *Cronin*, 107 Mass. 555, 567, says that the doctrine "applies to all contracts of employment, if not to contracts of every description," but that was a case of employment. So in *Lumley* v. *Gye*, *supra*, some of the arguments of the judges would logically defend the doctrine as applicable to all contracts, but in that case, too, a contract of employment only was involved. The plaintiff cites us to the old common law authorities that it was actionable in a person "to menace of life and member the *tenants* of another," &c. An examination of the note in Big. Cas. Torts, at p. 326, before cited, will, I think, clearly explain, that the rule applied to such tenants as occupied the condition of servants, persons employed by the landowners, tenants who "paid yearly rents and *services*." Threats of life and member would be most illegal means.

Any man may advise another to break a contract, if it be not a contract for *personal services*. He may use any lawful influences or means to make his advice prevail. In such a case, the law deems it not wise or practicable to enquire into the motive that instigates the advice. His conduct may be morally and not legally wrong. Strictly, in the present case, the defendant has done an act not in itself unlawful by lawful means. The law neither forbids the act nor the means. Standing within the pale of the law, he must have its immunity for the reason stated.

While it may not be denied that the plaintiff's argument has its force, I do not see that the decisions of the courts are a support for it, nor do I bring myself to the belief that the doctrine contended for would be, in view of all cases likely to arise under it, safe and salutary enough to require or excuse its adoption.

VIRGIN, J., concurred.

INHABITANTS OF VASSALBORO' *vs.* GEORGE NOWELL and others.

Kennebec. Opinion May 29, 1883.

Taxes. Collector. Illegal assessments.

When a collector of taxes accepts a warrant, with the bills of assessment which are in part illegal, and collects a portion of the taxes, he is under legal obligation to collect of the remainder so much as are legally assessed. WALTON, BARROWS and DANFORTH, JJ., dissenting.

Orneville v. *Pearson*, 61 Maine, 552, and *Harpswell* v. *Orr*, 69 Maine, 333, considered.

ON EXCEPTIONS.

Action on the bond of a collector of taxes.

The case was submitted to a referee, and his report states the question and material facts.

The exceptions were to the ruling of the court, accepting the report and ordering judgment for the defendants (except as to N. C. Wyman).

(Report of referee.)

"Pursuant to the foregoing rule I, the referee therein named, having notified, met, and fully heard the parties, and maturely considered their several allegations and the evidence produced, find and report thereon accordingly, that the writing obligatory declared on, is the deed of the defendants, George Nowell, Jonathan Nowell and William Abbott, and that it was executed also by William F. Tabor, who is dead, and by George H. Pope, against whom the plaintiffs have discontinued on account of his bankruptcy or insolvency, and by one J. O. Wyman, not named as defendant in this suit; and that it was not executed by the defendant, N. C. Wyman, who is in any event entitled to judgment in his favor for his costs of court, to be taxed by the court; and I further report that said writing obligatory has

been lost, and that it was a bond, duly executed by the persons above named, as having become parties to it, and was dated August 17, 1875, and was in the usual form for the penal sum of twenty thousand dollars, and that it was conditioned for the faithful discharge by the said George Nowell of his duty as collector of taxes for said town of Vassalboro', for the year 1875, to which office the said George was legally chosen, and that he accepted the same, and filed this bond, in pursuance thereof executed by himself as principal, and the said Jonathan Nowell and William Abbott, with others, as aforesaid, as sureties, and that said George Nowell was legally qualified as collector for said year, and received from assessors, duly chosen and qualified, a warrant in due form of law for the collection of taxes amounting in all to the sum of $19,648.30, for collecting which he was to have one per cent. He entered upon the collection, and as far as appears he paid over what was due from him for taxes collected. The taxes were assessed upon real estate, personal property and polls — about four-fifths of the whole amount upon the real estate — the balance upon personal estate and polls in legal proportions respectively.

"There was no proper description of the real estate taxed, so that it could be identified and a valid sale made to enforce the collection. The bulk of it simply appeared in the assessment lists, with the name of the party to whom it was taxed as "buildings and (so many) acres of land," or "(so many) acres of land," without other description. But very few pieces of real estate had any other description, or anything by which their location and boundaries could be ascertained. Besides large sums remaining uncollected of the taxes upon real estate, thus defectively assessed, there remains uncollected out of the taxes, for that year, the sum of $600, assessed upon personal property and polls of various individuals.

"But I hold (subject, however, to revision by the court, to whose decision the law is referred for settlement) that the failure of the assessors, so to describe the great bulk of the real estate, as to enable the collector to enforce payment of the tax, by making a valid sale of the land, so far relieved him from the duty

of completing the collection of the taxes, that no action can be maintained on the bond against him and his sureties for his failure, to collect either the portion of the taxes on real estate, remaining uncollected, or the sum of $600, above mentioned, remaining uncollected of the taxes assessed upon personal estate and polls.

"At the request of defendants I further report that it appeared that the amount of taxes assessed in Vassalboro' in 1875, above mentioned — $19,648.30, consisted of $4,528.35, state tax; $1,658.55, county tax; $12,501.00, raised by the town for proper objects, and $960.40, for overlay which the defendants contended was excessive and vitiated the assessments. I based no conclusion, favorable to the defendants, upon the fact, deeming it a mistake of the assessors, which under R. S., c. 6, § 114, would not avoid the assessment.

"But if on the facts, hereinbefore stated, there is a legal reason why no action should be maintained against the defendants for the said George Nowell's neglect to collect the sums remaining uncollected on the commitment to him for the year 1875, then judgment is to be rendered in favor of all the defendants, and for their costs of reference taxed at one dollar and thirty-two cents and costs of court to be taxed by the court.

"But if, notwithstanding these facts, the defendants are liable for the failure of the said collector to collect personal property and poll taxes legally assessed, then judgment should be rendered for the plaintiffs for six hundred dollars, and interest thereon, from the date of the writ to the time when judgment is made up as debt or damage, and for costs of reference taxed at six dollars and fourteen cents, and costs of court to be taxed by the court, against the said defendants, George Nowell, Jonathan Nowell and William Abbott.

William G. Barrows, referee."

Herbert M. Heath, for the plaintiffs.

Joseph Baker, for the defendants.

The defendants cannot be liable under such an assessment, because the fault or negligence of the plaintiffs themselves, has

deprived the collector of the facilities for fulfilling the conditions of his bond.

By a vote of the town at the March meeting they agreed to pay the collector one per cent for collecting the taxes of that year. The collector accepted this proposition and entered upon the duties of his office, upon the strength of their promise to pay him that sum for collecting all the taxes. This, we hold, was a contract between the town and the collector. Now it is hardly any more work or expense to collect a real and personal estate tax of each tax payer, than to collect the personal estate tax alone. But the town, by their negligence, deprives the collector of all the percentage of the real estate tax, which is four-fifths, at least, and then seek to compel the defendant to collect the personal tax. This is a palpable violation of their contract with the collector and releases him.

The case of *Harpswell* v. *Orr*, 69 Maine, 333, is conclusive on this point. That was not a case of real estate tax alone, but it involved taxes upon both personal and real. The court make no suggestion of confining the decision to real estate taxes alone, and both the language and the reasons given cover each.

So in *Orneville* v. *Pearson*, 61 Maine, 552; excepting "animals" in the warrant of commitment, would take away one mode of collecting taxes on personal estate, but not on real estate; and yet the court there held that the bond was not liable for uncollected taxes. No one ever dreamed of seizing animals to pay a real estate tax, and yet because of that exemption in the warrant and not in the law, the court say it is no breach of the bond not to complete the collection of the taxes. The fact is you cannot divide. The bond is a unit, and if the town, by its own acts, prevent the performance of the whole or any part, the other party has a right to refuse to perform.

There is another illegality here which affects the whole assessment. The overlayings were $26.01, in excess of the five per cent overlay allowed by law. We claim this violates the whole tax. *Elwell* v. *Shaw*, 1 Maine, 339; *Huse* v. *Merriam*, 2 Maine, 375; *Mosher* v. *Robie*, 11 Maine, 135.

PETERS, J. A town collector failed to collect a portion of the taxes committed to him. Among the uncollected were taxes upon persons and personal property, amounting to six hundred dollars, which were properly assessed, and also a large amount of taxes upon real estate, assessed under defective and illegal descriptions. The collector complains that, by this insufficient assessment of such real estate, he was deprived of one mode or arm of power by which the collection of that portion of the taxes could be enforced. Does this fact, after the collector has received a portion of both the legal and the illegal taxes, excuse him from a further collection of the legal taxes remaining unpaid? We know of no rule or policy of the law which justifies such a proposition.

We are not prepared to say, for it is not now necessary for us to decide such a question, that a collector would be obliged to accept a warrant to enforce the collection of taxes, a portion of which were defectively assessed, and not legally collectible. But we think that, when he does accept a warrant with the bills of assessment, and collects a portion of the taxes, he is under legal obligation to collect of the remainder so much as are legally assessed. If the rule is to be otherwise, it might just as well be decided that collectors may collect taxes or not, as they please; for we well know that scarcely a city or town in this state, if even one, has ever placed in the hands of its collectors perfect assessments upon all of its real estate. Certainly, a sound public policy will not allow a collector to proceed so far as to gather all the taxes which may be obtained readily and easily, and receive his commission upon them, and refuse to collect the rest of the taxes legally assessed.

We cannot see that the present case is a stronger one for the defendants, because "the great bulk of the real estate in town," was defectively described in the assessment. Logically, the rule would be the same, whether the number of parcels be few or many. The argument for the defendants proceeds upon the ground that the contract between the town and its collector is an entirety, the implication being that the collector is to have a percentage upon all the taxes to be assessed, and that the town

breaks its side of the contract by furnishing imperfect assessments. If this be so, we cannot perceive why the contract is not broken by the town, if the assessment by mistake includes a poll tax upon a deceased person, or upon a person removed from town, or if the assessors abate a portion of the taxes assessed. Who could say, in such case, where the stopping point shall be, beyond which the tax gatherer may not retreat in order to shelter himself from liability? The term, "great bulk," does not describe a measure definite enough to go by. The rule would not be precise or practical. Parties would have nothing but uncertainty to depend upon.

The position of the defense as to the nature of the contract between the parties cannot be sustained. The real relation is that of principal and agent. The agent need not enter upon the work assigned to him, if there be any reasonable objection to it. But entering upon the execution of his duties, he has no right to leave those duties half performed. The collector in the present case could have seen the difficulties in his way, just as well in the beginning as in the end. He is excusable for non-collection, only so far as the town failed to furnish him full and sufficient means with which to enforce collection. That failure here applies not to the whole list of uncollected assessments, but only to a distinct and separable part of them. The burden complained of by the collector is pretended rather than real.

The collector cannot dictate as to what persons or what property shall be assessed. He takes his chances as to that. His compensation is regulated accordingly. If property is omitted from assessment, it is no concern of his. And, surely, if real estate is defectively assessed, it can make no stronger case for him than if not taxed at all. Property illegally taxed may well be regarded as in the condition of property omitted from taxation. So, assessors may make new assessments sometimes: may abate assessments under some circumstances; may correct errors in both warrants and assessments in some cases; and none of these steps taken by the assessors will exonerate a collector from the performance of the duties undertaken by him.

The town is certainly in a dilemma, if this collector can throw up his commission. If he is not under a legal obligation to collect the taxes that are legally and well assessed, then no other collector can be placed under such obligation. Nor do we see that the town officers could commit these bills of assessment, in the present condition of things, to a new collector. There is no cause for declaring the office vacant. There is no vacancy to fill. R. S., c. 6, § 121.

The defendants rely upon several cases as approving the doctrine which they contend for. We think the cases fail to support such doctrine. In *Orneville* v. *Pearson*, 61 Maine, 552, it was held that a collector was not obliged to complete the service required under a defective and illegal warrant. The presumption is that the warrant was not sufficient for the enforcement of any of the taxes in that case remaining unpaid. In *Harpswell* v. *Orr*, 69 Maine, 333, a collector was exonerated from completing his services under a valid warrant, where there was no description, in the valuation and assessment, of the real estate taxed. "The omission," it is there said, "deprived the collector of one mode of collecting the tax." It does not appear in that case that any of the unpaid taxes were legally assessed. The doctrine established by those cases is, that a town cannot hold a collector responsible for failing to do what it has neglected to give him the power to do. Nothing more or different from this was in the mind of the court in rendering those decisions. They should be regarded as authorities for nothing beyond it. A collector cannot be obliged to act under an illegal warrant, nor has he all the means furnished by law to collect a tax upon real estate when such estate is not properly and sufficiently described. But so far as taxes are concerned which he has full and legal power to collect, if he enters upon a discharge of his official duties, he should complete those duties at least to the extent of the power conferred.

Exceptions sustained.

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

DISSENTING OPINION BY

BARROWS, J. I cannot bring myself to concur with the majority of the court in this case, and I think I ought to state my reasons. It may be that seeing and hearing the details of the evidence as I did as referee, I am more impressed with the injustice of the result than my associates could be by a bald statement of the essential facts which I made at the request of the parties in order to present the question to the court.

It seems to me that the opinion of the majority holds the collector and his sureties to the performance of a contract which they never made. One cannot believe that they ever intended to become bound for the collection of a few hundred dollars assessed upon polls and dribblets of personal property scattered all over town, for the trifling percentage which might be a fair compensation for the collection of many thousands, which would call for no greater expenditure of time, travel and trouble, on the part of the collector. From the very nature of the business to be done, in order to hold the collector to any duty beyond the faithful turning in to the treasury of all voluntary payments that are made to him, a condition is implied that the collector shall be armed with a warrant backed by an assessment that will enable him by due diligence to enforce payment of the bulk of the taxes committed to him in the various ways that the statutes provide. Failure in these particulars was the ground of the decisions in *Orneville* v. *Pearson*, 61 Maine, 552 and *Harpswell* v. *Orr*, 69 Maine, 333.

To me, it looks like trifling with the decision in *Harpswell* v. *Orr*, to suggest that both court and counsel may have been so heedless as to overlook in that case the universal fact that such an assessment includes taxes upon polls and personal property, as well as upon real estate, or to shut our eyes to the fact that the failure to collect all such taxes, if it had been regarded by the court as material, must needs have changed the result there reached. There was no element affecting the liability of the principal and sureties in that case that does not exist here even in greater measure, yet the manifest scope of that decision was to relieve the collector from the obligation to collect poll-taxes

and the like when the bulk of the assessment fails. If the court intend now to overrule that decision, let it be done distinctly so that it may not be left as a stumbling-block in the way of the profession and the court hereafter.

But I still think that all the town can claim is that the collector undertook upon the implied condition above mentioned to collect from a certain number of people scattered over a territory of definite extent an amount of taxes which was approximately known to be, say, $20,000 for one per cent of that amount.

To me it seems an unreasonable construction of his contract to hold that though that condition is unfulfilled and he is deprived by the remissness of the assessors of the most important means of enforcing payment of the great bulk of these taxes he is still bound to go over the same territory, spend the same time and visit the same number of persons, to pick up in poll taxes and other trifling sums a remnant that is of small importance to the town for a compensation that is ridiculously inadequate, upon pain of subjecting himself and his sureties to the payment of their aggregate amount with interest.

On the other hand it would be equally unreasonable for the collector to claim what the opinion says he "logically" might, if he is relieved under the circumstances here presented — that the failure to give him the necessary power over every parcel of real estate assessed or the trifling diminution of the grand total by abatements and the like would furnish him the same excuse. Not so; the law recognizes the ordinary course of business and the imperfection of all human proceedings. "Substantial performance" of duty is what it requires and it will not regard trivial defects. It asks what may be reasonably and justly expected by and of the parties respectively, and *that* is the rule which it applies to measure their duties to each other. It will not regard the *trifles* which contracting parties may seize upon as pretexts to avoid their obligations — but will take a practical view of the nature of the business to which the contract relates and see what reason and justice demand of each of them. But the opinion claims that the law can furnish no rule for just discrimination, or, in fact, that it can recognize no difference except that which exists

between absolute perfection and total failure. Yet at almost every term of the court we negative this idea in practice and leave it to the jury to determine (as in suits to recover pay for skilled labor for example) whether there has been a "substantial performance" of a contract, and what it is reasonable and just for the parties to require and expect of each other in various contingencies.

What is tolerable "logic" is not always good law, and may sometimes lead to very unjust results. But the opinion further maintains that "public policy" requires us to punish the collector and his sureties for the negligence of the assessors. It seems to me that the *true* "public policy" requires rather that *all* the town officers shall be held to perform their duties with *reasonable* care and correctness than that such an extraordinary burden should be imposed upon the collector and his sureties by the neglect or want of skill of those whose duty it was to furnish him with a legal warrant to collect a reasonably accurate and legal assessment, such as he had a right to expect when he undertook the collection. The whole substance and effect of the contract of the collector and his sureties here is changed, and they may well say we have entered into no such engagement. There is a radical difference between undertaking the collection of $20,000 in taxes for $200 and the collection of $600 spread over the same territory for $6.

The opinion asserts in effect that the collector ought not to accept the office without examining the assessments. Practically the collector must accept or decline when called upon to take his oath of office, according to the provisions of R. S., c. 3, § § 10 and 15, long before the assessment is made, and his bond is commonly made and delivered before he has an opportunity to make such examination. I think he has a right to presume that there will be a substantial performance of their duties on the part of the other town officers, and where that is found wanting the town cannot hold him or his sureties responsible for the collection of a small fraction of the tax if he declines to proceed farther.

WALTON and DANFORTH, JJ., concurred.

INHABITANTS OF MT. DESERT *vs.* INHABITANTS OF TREMONT.

Hancock. Opinion May 31, 1883.

Statute of limitation. Arbitration and award. Reference. Practice.

By the act of the legislature, setting off a portion of Mt. Desert and incorporating the same as the town of Tremont, the latter was holden to pay to the former a certain proportion of its liabilities, among which was a judgment recovered against it; in an action to recover the defendants' proportion of the same; *Held*, That the statute of limitations did not begin to run until payment of the judgment by the plaintiffs.

On a submission of "all demands between the parties" thereto, the award is no bar to a claim not in fact submitted or considered by the arbitrators.

ON REPORT.

This is the second time this case has been to the law court. See S. C. 72 Maine, 348.

Assumpsit to recover fifty-six hundredths of twelve hundred dollars, being the amount of a judgment paid by the plaintiff town to Daniel Kimball, June 1, 1876. The writ was dated September 7, 1877. The plea was the general issue, with brief statement setting up the statute of limitations; also that all demands between the parties were submitted to referees, prior to the commencement of this suit, and the referees had heard the parties and made their report to the Supreme Judicial Court, and that such report had been accepted and judgment rendered thereon.

The defendant town was formerly a part of the plaintiff town and was separated therefrom and incorporated in the name of the town of Mansel, by c. 92, special stat. 1848, and by a subsequent statute, the name was changed from Mansel to Tremont.

The following is the act of incorporation:

"Be it enacted by the senate and house of representatives in legislature assembled, as follows:

"Section 1. All that part of the town of Mt. Desert, in the county of Hancock, lying south of a line commencing at Andrew Fernald's north line on Somes' Sound; thence across the mountain to the head of Deming's Pond; thence continuing the same course to Great Pond; and thence across said pond to the southeast corner of lot number one hundred and fourteen, on a plan of said town by John S. Dodge; thence westerly on the south line of said lot number one hundred and fourteen, to Seal Cove Pond, and continuing the same course to the middle of said pond; thence northerly up the middle of Upper Seal Cove Pond to the head thereof, and continuing the same course to the south line of lot marked 'Reuben Noble,' on said plan; thence westerly on the south line of said last named lot to the sea shore, together with Moose Island, Gott's Island and Langley's Island, with the inhabitants thereon, is hereby set off from said town of Mt. Desert and incorporated into a separate town of Mansel, and vested with all the powers, privileges and immunities, and subject to all the duties and liabilities of other incorporated towns, agreeably to the constitution and laws of this state, and is classed in the same representative district as its inhabitants now are.

"Section 2. Said town of Mansel shall be holden to pay the said town of Mt. Desert such proportion of the debts and liabilities of the said town of Mt. Desert, beyond their resources now existing, and which may hereafter arise in consequence of any and all suits at law, now pending against or in favor of said town of Mt. Desert; and also assume the support of such proportion of all persons, supported as permanent or occasional paupers by said town of Mt. Desert, as the last valuation of that portion set off, hereby bears to the whole valuation of the town of Mt. Desert.

"Section 3. The inhabitants of the town of Mansel shall be held to pay all taxes which have been assessed upon them by the town of Mt. Desert and which remain unpaid at the time of the passage of this act; and also their just proportion of such state and county taxes as are already, or may be hereafter assessed and apportioned on the inhabitants of the town of Mt.

Desert, until the legislature shall lay a tax upon the town of Mansel.

"Section 4. The inhabitants of the town of Mansel shall be entitled to receive from said town of Mt. Desert their proportion of school money raised in said town of Mt. Desert, which has been or may be apportioned to the several school districts and parts of districts falling within the limits of the town of Mansel, as hereby incorporated.

"Section 5. It shall be the duty of the selectmen of the town of Mt. Desert, to make returns to the secretary of state, by the first day of February next, of the proportion of the state valuation of said town, which is set off by this act, and incorporated into the town of Mansel.

"Section 6. Any justice of the peace within said county of Hancock, may issue his warrant to any legal voter residing in said town of Mansel, directing him to notify the inhabitants thereof to meet at a time and place specified in said warrant, for the choice of town officers and to transact such business as other towns are authorized to do at their annual town meetings.

"Section 7. This act shall take effect and be in force, from and after its approval by the governor."

At the trial the plaintiff introduced the records and evidence in the case of *Daniel Kimball vs. Inhabitants of Mt. Desert*, by which it appeared that the cause of action in that suit was a levy upon the property of Daniel Kimball, April 22, 1848, to satisfy a judgment or warrant of distress from the court of county commissioners against the inhabitants of Mt. Desert. The defendants introduced in evidence, the agreement in writing signed by committees for and in behalf of their respective towns, December 30, 1851, by which all demands between the towns were submitted to the determination of John M. Hale, John West and Theodore C. Woodman in the manner stated in the opinion, also the record of the judgment rendered on their report.

Hale and Emery, for the plaintiffs, cited: *Wood* v. *Leland*, 1 Met. 387; *Thayer* v. *Daniels*, 110 Mass. 345; *Perkins* v. *Littlefield*, 5 Allen, 370; *Reeves* v. *Pulliam*, 7 Baxter (Tenn.), 119;

Lytle v. *Mehaffy*, 8 Watts (Pa.), 267; *Godfrey* v. *Rice*, 59 Maine, 308; *Kendall* v. *Bates*, 35 Maine, 359; *Bixby* v. *Whitney*, 5 Maine, 192; *King* v. *Savory*, 8 Cush. 309; *Hopson*, v. *Doolittle*, 13 Conn. 236; *Hastings* v. *Dickinson*, 7 Mass. 153; *Cuyler* v. *Cuyler*, 2 Johns. 186.

A. P. Wiswell, for the defendants.

This action is based upon an implied promise for contribution which the law presumes one, jointly liable to pay a debt, makes to the other, jointly liable, upon his payment of the debt. But the law never implies a promise when there is a liability created by express contract or by statute. *Expressum facit cessare tacitum*. Metcalf, Contr. 6. Here there was an express liability imposed by the statute. The liabilities of the old town remained the same, were not changed by the separation of a portion of its territory. *Windham* v. *Portland*, 4 Mass. 384; *Hampshire Co.* v. *Franklin Co.* 16 Mass, 86; *North Yarmouth* v. *Skillings*, 45 Maine, 142.

There can be, then, no implied promise or liability on the part of Tremont to pay any portion of the liabilities of Mt. Desert. But in this case, the act contained a provision by which Tremont was not made liable to creditors jointly with Mt. Desert or in any other manner, but was made liable to pay to Mt. Desert a certain proportion of the debts. It is claimed that this created an immediate liability on the defendant town to pay Mt. Desert its proportion of all the debts; that by a proper construction of the act of separation on account of the liabilities and resources of Mt. Desert should have been taken at that time and if there was an excess of debts then, Tremont was required to pay its proportion then. That Mt. Desert could then have maintained an action for such proportion. *Smith* v. *Pond*, 11 Gray, 234; *Turner* v. *Durgin*, 119 Mass. 507,

Consequently this action, commenced nearly thirty years after the right of action accrued, is barred by the statute of limitation.

Counsel further argued that the submission of all demands between the parties embraced the claim now in suit; and also that the burden was upon the plaintiff in this case, to show that

the liabilities of Mt. Desert at the time of the separation, were in excess of the resources, in order to entitle them to maintain any action against Tremont. *New Bedford* v. *Hingham*, 117 Mass. 445.

VIRGIN, J. If the two members of a mercantile partnership, one of whom being a dormant partner, should divide their partnership effects and dissolve, and he in whose name the business had been done should thereafter continue business, at the old place, on his own account and the dormant member should remove his goods into a new store and there do business on his private account, and the written agreement of their dissolution should stipulate that the latter should repay to his former associate a certain proportion of all debts and liabilities of the firm which the latter should pay, the cause of action under the written stipulation would arise whenever payment should be made upon one of the debts and not when the written agreement was executed; and the statute of limitations would begin to run between the parties at the same time. *Perkins v. Littlefield*, 5 Allen, 370. And if a creditor of the firm should keep his claim alive by reducing it to a judgment and the judgment should be renewed years after the original cause of action was barred, still the statute of limitations would not begin to run between the old partners under their express agreement, until some payment be made by the payee. This is the familiar rule between co-sureties, joint contractors and principal and surety. See authorities in plaintiffs' brief. And we think the same principle is applicable to the case at bar; section two of the act of separation should receive the same construction as the supposed stipulation in the agreement for dissolution. By the previous section, the defendants were to receive more than one-half of the valuation of Mt. Desert, and the legislature deemed it equitable that the new town should bear a corresponding proportion of the burdens of the old. One of the liabilities ripened into a judgment against Mt. Desert in 1850 and was kept alive until 1876, when the plaintiffs satisfied it, the payment having been made within six years next before the date of this

writ. We fail to perceive upon what principle of law the action can be considered barred by the statute.

2. It is apparent from an inspection of the original award and the bill of particulars annexed thereto, that the claim involved in this action was not submitted to the referees; and hence, although the submission in terms embraced "all demands between the parties," this claim not having been considered by them, their award is no bar to this action. *Bailey* v. *Whitney*, 5 Maine, 192; *King* v. *Savoy*, 8 Cush. 309.

3. The certificate of the selectmen of Mt. Desert, dated December 20, 1852, cannot be considered as embracing the claim in suit; for it only professes to speak in relation to "bills for the year 1852." And if it might by its terms have covered this claim had it existed, it did not then exist.

4. By the terms of spec. st. 1848, c. 98, § 2, the defendants were holden to pay the plaintiffs "such proportion of the debts and liabilities of Mt. Desert, beyond their then existing resources, . . . as the last valuation of the portion set off bore to the whole valuation of Mt. Desert," which is admitted to be in proportion of 56 to 100. We cannot think that the resources of Mt. Desert were not deducted out by the referees (one of whom was Mr. Woodman) when the judgment of October 5, 1852, was recovered. That was when a general settlement took place between the parties and it was only four years after the separation.

Judgment for plaintiffs for $672 and interest from June 1, 1876.

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

WILLIAM K. HILTON and another *vs.* JENNIE E. MORSE.

Androscoggin. Opinion June 2, 1883.

Deed. Husband and wife. Fraudulent conveyance.

A deed of gift from a husband to his wife is a valid conveyance as against subsequent creditors of the husband, when it does not appear, as one step in a fraudulent design, that it was made with the active and deliberate purpose to put the property beyond the reach of debts which he then intended to contract and not to pay.

ON REPORT.

Writ of entry dated November 6, 1878, to recover possession of a farm in Lewiston.

The plea was *Nul disseizin*, with a brief statement that the defendant is owner in fee of the premises described in the plaintiffs' writ and declaration.

The opinion states the material facts.

Frye, Cotton and White, for the plaintiffs.

The property attached was paid for out of the earnings of Alfred E. Morse, defendant's husband, through a series of exchanges, with the exception of four hundred dollars. The evidence establishes the fact that the four hundred dollars was a voluntary contribution in 1871 on the part of Mrs. Morse towards the erection of a building which was afterward exchanged for the present contested estate; and at the time neither party intended it to form the basis of a legal indebtedness. The balance put into the house and lot out of which this real estate came, was made up of the large personal earnings of Alfred E. Morse, receipts from boarders, towards which defendant contributed labor alone, while the rent, grocery bills and all other expenses were met by Alfred E. Morse.

That such a state of facts furnishes no claim for indebtedness from Alfred E. Morse to his wife, see, *Merrill* v. *Smith*, 37

Maine, 394; *Bradbury* v. *Adams*, 37 Maine, 199; *Sampson* v. *Alexander*, 66 Maine, 182; *Paulk* v. *Cook*, 39 Conn. 566.

The plaintiffs do not controvert the proposition that under the decisions upon the statutes of this state a voluntary conveyance made by a husband to a wife cannot be impeached by subsequent creditors, merely because such conveyance was fraudulent as to existing creditors. But where there was an actual intent to defraud subsequent creditors, the conveyance would then be void as to them; see, Bump, Fraudulent Conveyances, (ed. 1872) 327; *Whittington* v. *Jennings*, 6 Simons (9 Eng. Ch.), 493; *Pratt* v. *Curtis*, 6 Bank. Reg. 142; *Richardson* v. *Smallwood*, Jacob's Ch. Rep. 552; *Brown* v. *M'Donald*, 1 Hill, Ch. (S. C.) * 297; *Savage* v *Murphy*, 34 N. Y. 508; *Laughton* v. *Harden*, 68 Maine, 208; *Paulk* v. *Cook*, 39 Conn. 566; *Madden* v. *Day*, 1 Bailey, (S. C.) 337; *M'Elwee* v. *Sutton*, 2 Bailey, (S. C.) 128; *Beach* v. *White*, Walker's Ch. (Mich.) 495; *Holmes* v. *Penny*, 3 Kay & Johnson, 90; *Mills* v. *Morris*, Hoffman's Ch. 419; *Churchill* v. *Mills*, 7 Coldw. (Tenn.) 364; *Hitchcock* v. *Kiely*, 41 Conn. 611; *Hall* v. *Sands*, 52 Maine, 358; *French* v. *Holmes*, 67 Maine, 196; *Rollins* v. *Mooers*, 25 Maine, 192; *Hartshorn* v. *Eames*, 31 Maine, 96; *Wheelden* v. *Wilson*, 44 Maine, 11.

Hutchinson and Savage, for the defendant, cited: *Foster* v. *Hall*, 12 Pick. 89; *Green* v. *Tanner*, 8 Met. 411; *Hinckley* v. *Phelps*, 2 Allen, 77; *Bancroft* v. *Curtis*, 108 Mass. 47; *Snow* v. *Paine*, 114 Mass. 520; R. S., c. 61, § 1; *French* v. *Holmes*, 67 Maine, 195; *Davis* v. *Herrick*, 37 Maine, 399.

SYMONDS, J. Writ of entry, in which the only issue is one of title to the farm demanded; the plaintiffs having levied an execution upon the farm as the property of the defendant's husband and claiming to hold it against a prior deed from him (indirectly) to her, dated May 24, 1877, and alleged to be in fraud of creditors and void.

The act of 1847, c. 27, § 2, which provided that the property of the husband "conveyed by him to the wife, directly or indirectly, without adequate consideration and so that the creditors of the husband might thereby be defrauded, shall be held for the payment of the prior contracted debts of the husband," was held

in *Davis* v. *Herrick*, 37 Maine, 399, to be "equivalent to an enactment that it shall be held only for prior contracted debts. A construction which would subject it to the payment of other debts must destroy the effect of the words prior contracted. When an act declares under what circumstances property shall be held for the payment of the debts of former owners who have conveyed it, that of necessity excludes all other circumstances. The intention of the framers of the statute appears to have been, to allow a husband to pay for property conveyed to his wife, with his own money or property, and to allow his wife to hold it, unless the creditors then existing of the husband should thereby be defrauded. If such conveyances be made to defraud existing creditors, whose debts have been since paid, the property would not under the provisions of the statute, while it would by the common law, be subject to be taken for the payment of debts subsequently contracted."

The present statutes — R. S., c. 61, § 1 — declare that when property has been conveyed by the husband to the wife "without a valuable consideration paid therefor, it may be taken as the property of the husband to pay his debts contracted before such purchase."

In *French* v. *Holmes*, 67 Maine, 195, it was held, that the rule which had been stated in *Davis* v. *Herrick*, as to the validity of such conveyances against subsequent creditors of the husband, was not changed by the revision; that the true construction of the statutes now in force in this respect is the same as that of the act of 1847, and it is still only for the husband's debts contracted before the deed to the wife, that such property is liable to be taken thereafter. "The gift from the husband to the wife is valid unless fraudulent as to existing creditors;" and then void only as to them, is also implied. Other sentences in that opinion, from which the argument for the plaintiffs draws a different conclusion, to the effect that "the wife's position as a donee from her husband differs in no respect from that of any other donee of his," have reference only to her relation to existing creditors. It was not intended by them to reverse the rule declared in *Davis* v. *Herrick* — which had just been cited with approval — and to hold that a

gift to the wife, in fraud of present creditors, was void also as to later creditors; which would be true of other donees and of the wife also except for the statute. *Clark* v. *French*, 23 Maine, 221; *Marston* v. *Marston*, 54 Maine, 476.

The debt due to the plaintiffs from the defendant's husband was contracted after he had conveyed the farm to her. If, then, the rule already cited applies, and under the statute a gift from the husband to the wife is valid except so far as it is a fraud upon existing creditors, the levy cannot prevail against the defendant's deed, assuming it to be wholly without valuable consideration. The voluntary conveyance to the wife would be good against the after-contracted debt of the husband.

Still, it is claimed by the plaintiffs that there are features which distinguish this case from those which have been cited; that the attention of the court, when it was said in *Davis* v. *Herrick* that under the statute a gift to the wife in fraud of present creditors, they being afterwards fully paid, was good as to later creditors, was directed only to the fact that a change in the law in this respect was introduced by the statute, not to the extent of that change; that that opinion only goes so far as to hold that the principle of the common law by which, the fraudulent character of the conveyance in respect to present creditors being proved, it was void against subsequent creditors, can no longer have general application in cases to which the statute applies; or, in other words, that the mere fact that there are subsequent creditors does not of itself let them in to their common law right of resisting a deed which was void when made as to creditors whose claims had then accrued.

It is urged that in *Davis* v. *Herrick* the court was not considering a case in which actual fraud upon future creditors was directly intended by the conveyance; where there was a deliberate and active purpose to put the property beyond the reach of debts which the grantor then intended to contract and not to pay, to obtain new credits before the conveyance should be known and thereby defraud the new creditors; the voluntary conveyance to the wife being but one step in the execution of this fraudulent design, the grantor being then insolvent and paying the earlier

debts only by contracting others of a later date and of an equal or greater amount, for the purpose of giving validity to his deed by merely changing the date of his indebtedness. Neither the statute nor the decisions under it, it is claimed, prevent the general rule of law from obtaining in this state, by which under such circumstances the subsequent creditors are to be subrogated to the rights of the creditors whose debts their means have been used to pay.

The able argument for the plaintiffs sustains this position by abundant authorities. We find nothing in our cases which is intended to be inconsistent with it. It is undoubtedly correct. The statute does not preclude the operation of the general principles of law and equity in such a case. The facts being established, insolvency of the grantor at the date of a voluntary conveyance to the wife, the direct intent to deceive future creditors thereby and defraud them, new credits obtained in pursuance of this design, the deed and the substitution of new debts for old being but means of accomplishing the fraudulent purpose, the fraud is not to be effective to deprive the substituted debt of any part of the security in this respect which belonged to the original debt.

The evidence in the present case is reported for the decision of law and fact. The question remains, what result follows from the application of these principles to the facts before the court. We do not think it is, to decide the case in the plaintiffs' favor. Elements are wanting, which are necessary in order to withdraw it from the effect of the rule declared in *Davis* v. *Herrick*.

What other motives there were to induce the conveyance to the wife should be considered, before deciding that the intent was to defraud future creditors. Towards the original purchase by the husband, in 1871, of the Park street house, the wife had advanced four hundred dollars, of her own money acquired before marriage, which was about as much as the husband then had to invest. That house and lot cost twenty-two hundred dollars. The husband worked in the mill, and the wife kept boarders, to complete the payments. This property, so acquired, was exchanged for the farm in October, 1873, the deeds in both instances being taken in the husband's name. The husband con-

tinued to work in the mill till May, 1876, the wife having charge of the farm, keeping boarders, and doing various kinds of out-door work besides the housework. The wife was discontented, thought they could do better in the city, and before he left the mill, the husband had promised to give her a deed of the farm, if she would remain there. He went into business as a member of a firm in August, 1876, and the giving of the deed was delayed till May, 1877.

No account of stock had been taken by the firm prior to this deed. The defendant's husband did the general work of a clerk, putting up goods, had no charge of the books and very little to do with the financial part of the management. He had been in the business only about nine months when the deed was given. His partner had been in it longer, was apparently more of a business man than he, and was constantly representing the affairs of the firm as prosperous. That the husband had knowledge of facts which showed the firm to be in failing circumstances, or approaching insolvency, at the date of the deed, we think is not proved.

The case shows that the debts due from the firm at the date of the deed to the defendant were paid before the judgment on which the execution issued to be levied by the plaintiffs, but it does not show that they were paid wholly by incurring new debts, nor that there was anything out of the ordinary course of business in the manner of their payment. The firm failed in November, 1877, but what it owed then does not appear, nor the amount of the debts contracted after May 24, 1877.

There are some admissions in the testimony of the defendant and her husband, which are urged in argument against her, but in several instances they are rather in her favor, in that they indicate a disposition to acknowledge facts, without considering their effect; and not the purpose, hardly even the ability, to devise and carry out the intentional fraud upon subsequent creditors which is alleged.

If the issue here were between the defendant and creditors of her husband, whose debts accrued before the deed to her, a different question would be presented; but the statute, the effect

of which has already been considered, does not permit those who have only the standing of subsequent creditors to defeat the deed upon the ground that at its date it was a fraud upon the existing creditors of the grantor. The evidence reported would not sustain a finding of fact that the conveyance was intended as a fraud upon later creditors in the sense already indicated, part of a scheme of fraud, the object of which was, by incurring new debts to pay prior debts, to put the farm beyond their reach.

For the purposes of this case, we think the plaintiffs stand in the position of subsequent creditors, with only the rights which belong to them in that capacity, and that if the deed to the wife were regarded as wholly without valuable consideration there is not such evidence of actual fraud intended upon them, as under the statute will defeat the deed in their interest.

Nor does the evidence show that there was no valuable consideration for the deed to the wife. The four hundred dollars which she put into the Park street house was not intended as a gift to her husband.

Judgment for the defendant.

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

ELLEN A. REED, administratrix, in equity, *vs.* FRANKLIN REED.

Sagadahoc. Opinion June 2, 1883.

Equity. Equitable mortgage. Evidence. Jurisdiction. Land in another State. Stat. 1874, c. 175. Inadequate consideration.

Since the enactment of stat. 1874, c. 175, this court has complete power over equitable mortgages.

When a conveyance by deed absolute in form is alleged to have been made as a security rather than as a sale, this court has jurisdiction if the parties reside in this state, although the premises conveyed are situated in another state.

In equity, the character of the conveyance is determined by the intention of the parties to it.

A conveyance made by a deed absolute on its face, may in equity be shown by a written instrument not under seal, or by oral evidence alone, to have been intended as a security for a contemporaneous loan or pre-existing debt.

The evidence admissible for such a purpose, is not confined to a mere inspection of the papers alone, but all the material facts and circumstances of the transactions, whatever form the written instruments have been made to assume, may be shown.

In deciding whether a conveyance absolute in form was in fact given as a security, gross inadequacy of the sum advanced compared with a fair value of the premises conveyed is a pregnant fact to be considered.

The character of the conveyance becomes fixed at its inception; and if it be a mortgage, the right of redemption cannot be restricted by any contemporaneous agreement of the mortgagor.

To constitute a mortgage for the payment of money, a subsisting debt must be shown, although no independent personal security therefor is essential.

Bill in equity.

Heard on bill, answer and proof.

The plaintiff is the widow and administratrix of Samuel D. Reed.

The opinion states the material facts.

The following is the written agreement of the defendant referred to in the opinion:

"Whereas, Samuel D. Reed, of Bath, in the county of Sagadahoc and state of Maine, has by his deed dated the eighth day of May, A. D. 1873, conveyed to me certain land situate and lying in the county of Marathon, in the state of Wisconsin, containing in all about twenty-four hundred and eighty acres, in consideration of a certain sum of money paid by me to him on the delivery of said deed, and inasmuch as neither said Samuel D. nor myself are fully acquainted with the real value of said lands, and know not that they are worth a sum beyond what I have already paid him therefor; and I do not desire to speculate at his expense, nor to deprive him of any advantage that may accrue from the rise in value in said lands; therefore in consideration of these circumstances, I do for a valuable consideration to me paid by said Samuel D. promise and agree to and with said Samuel D. that if at any time during his life-time I shall sell and dispose of said land or any part thereof at a sufficient price to leave a balance after deducting all payments, costs, charges, expenses and interest, and all sums of money that may be due me from him, that I will pay said balance to

him if he shall demand it. This promise and agreement does not extend to the heirs, executors or administrators of said Samuel D. but the same is confined to him personally during his lifetime, and it is understood that at his decease no rights or claims of any nature incident to or growing out of this agreement shall survive.

(Signed) Franklin Reed."

"Witness, F. W. Weeks.
Bath, May 8, 1873."

Adams and Coombs, for the plaintiff, cited: Story, Conflict of Laws, 454–457; 2 Story, Eq. Jur. 48, 49, 185; 2 Kent's Com. (4th ed.) 463 and notes; *Laughton* v. *Harden*, 68 Maine, 208; *Graves* v. *Blondell*, 70 Maine, 190; *Egery* v. *Johnson*, 70 Maine, 258; *Eveleth* v. *Wilson*, 15 Maine, 109; *Peterson* v. *Grover*, 20 Maine, 363; *White* v. *Chadbourne*, 41 Maine, 149.

C. W. Larrabee, for the defendant.

The plaintiff in her bill says that the conveyance of May 8th, 1873, from her intestate to defendant, was made to secure defendant for money loaned; that the sum loaned was less than the consideration named in said deed; and that the sum thus loaned has been repaid, either by said intestate during his lifetime or since his death, from proceeds of property in defendant's hands that belonged to said estate.

This is negatived by the evidence in writing, both by the deed and the writing signed by defendant and by defendant's answer. There is no direct evidence in the case to contradict the defendant's answer. The declaration of the husband, made to the wife when she released her right of dower, without the knowledge of defendant and of which the defendant was not informed, cannot be received to change an absolute into a conditional deed.

This leaves the allegation of plaintiff as to the point whether or not the deed was defeasible, as stated in her complaint, upon herself, naked in contrast with defendant's positive answer that

he purchased the land in good faith, and paid for it what at the time he believed to be a fair price, viz: two thousand dollars. The answer of defendant was responsive to the allegations in the bill upon this point, and must prevail. 2 Story's Eq. Jurisprudence, 1528; *Flagg* v. *Mann*, 2 Sumner, 206.

The book entries are not such records of deceased as to entitle them to weight. They are the casual jotting upon an unused book. The book itself is the best evidence to show that it is not evidence. To make such a book evidence, it must appear that the entries were made by deceased in the regular course of business. *Lord* v. *Moore*, 37 Maine, 220; 1 Wharton, 684; *Bonnell* v. *Mawha*, 37 N. J. 198.

In this case there was no loan in contemplation, and no stipulation for repayment; and the vendee had no remedy against the vendor. He took no voucher for the money paid, only a deed. Such a relation must exist, either by express or implied agreement, in order to establish a mortgage. *Conway's executors* v. *Alexander*, 7 Cranch, 237.

A stipulation that if the grantor can within a limited time dispose of the land to better advantage, he may do so, paying to the grantee the "consideration money" mentioned in the deed, does not make the instrument a mortgage. 1 Jones Mortgages, 271; *Stratton* v. *Sabin*, 9 Ohio, 28.

If the defendant took the deed from Samuel D. for an agreed consideration, and for the reasons set forth in his answer, voluntarily and without any consideration therefor, gave him the writing set forth in plaintiff's bill, it did not change the tenure or title. It was simply a personal and conditional promise dependent on the conditions therein specified.

There is no intrinsic evidence from the writing itself, in conflict with defendant's answer. It recites that defendant had then already paid all that the land might bring on resale, and the promise that if he should sell during the lifetime of the grantor, for a price sufficient to leave a balance after deducting all payments, costs, charges and interest, and all sums of money that may be due, etc. that he will pay him said balance if demanded, etc. This of itself would not create a defeasance in

the title. And unless it was done in fraud of the other creditors of said Samuel D. the plaintiff in her said capacity, has no claim in law or equity therefor against this defendant.

Counsel further argued the question of alleged fraud in the conveyance from plaintiff's intestate to the defendant, contending that no fraud entered into the transaction, that the defendant paid all that either of the parties at the time thought the land was worth.

VIRGIN, J. Bill in equity, brought in behalf of the creditors of an intestate's estate which has been duly decreed insolvent, and heard on bill, answer and proof.

The bill alleges that the absolute deed of May 8, 1873, whereby the intestate conveyed to his nephew, the defendant, twenty-four hundred and eighty acres of land situated in Wisconsin, was given in fraud of his creditors, or else to secure a contemporaneous loan of money, and invokes the equity power of the court to so decree.

Prior to 1874, the equity jurisdiction of this court in regard to mortgages, was limited to "suits for the redemption of estates mortgaged." R. S., c. 77, § 5. This provision was invariably construed to apply to those conveyances only which are legal, as distinguished from equitable mortgages — where the condition is a part of the deed itself, or there is a separate instrument of defeasance under seal, executed by the grantee to the grantor, as a part of the absolute conveyance. R. S., c. 90, § 1; *French* v. *Sturdivant*, 8 Maine, 246; *Shaw* v. *Gray*, 23 Maine, 174; *Richardson* v. *Woodbury*, 43 Maine, 206, 210. But since the enactment of St. 1874, c. 175, conferring full jurisdiction in equity, the court has had complete power over equitable mortgages. *Thomaston Bank* v. *Stimpson*, 21 Maine, 195.

The administratrix of an estate duly decreed insolvent, being the representative of all who have an interest in its distribution, is the proper party to bring the suit in behalf of its creditors. *McLean* v. *Weeks*, 65 Maine, 411, 418; *Pulsifer* v. *Waterman*, 73 Maine, 233, 241. And inasmuch as equity proceeds, and its decree is *in personam* and not *in rem*, and the deed is the

subject matter of the suit, the fact that the *situs* of the land described in the deed is in another state, is no objection to the maintenance of the bill as the parties are residents here. *Arglasse* v. *Muschamp*, 1 Vern. 77; *Massie* v. *Watts*, 6 Cranch, 148, 160; *Brown* v. *Desmond*, 100 Mass. 267.

While at law, to constitute a mortgage, the deed itself must contain the condition, or, in case of an absolute deed, there must be a separate instrument of defeasance, of as high a nature as the deed, given by the grantee to the grantor, as a part of the transaction, it is the uniform doctrine of the English court of chancery, as well as of the federal courts and of the highest courts of well-nigh all of the states having full equity jurisdiction, that where a conveyance is made by a deed absolute in form, the transaction may, in equity, be shown by a written instrument not under seal, or by oral evidence alone, to have been intended as a security for a preexisting debt, or for a contemporaneous loan. 4 Kent, (12th ed.) 142 *et seq.;* 3 Lead. Cas. in Eq. (3d Am. ed.) White and Tudor's notes to *Thornbrough* v. *Baker*, 605 *et seq.;* Hare and Wallace's notes, S. C. 624 *et seq.;* 1 Jones Mort. c. 8.

This principle was recognized by this court long before the legislature conferred upon it sufficient jurisdiction to so declare it. *Woodman* v. *Woodman*, 3 Maine, 350; *Fales* v. *Reynolds*, 14 Maine, 89; *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Whitney* v. *Batchelder*, 32 Maine, 313, 315; *Howe* v. *Russell*, 36 Maine, 115; *Richardson* v. *Woodbury*, 43 Maine, 206. The *dictum* of a majority of the court in the last mentioned case, holding that when a deed absolute in terms, is given to secure a debt due to the grantee, a resulting trust arises by implication of law, is not supported by any reliable authority or well grounded reason and it has never been followed.

The mere contemporaneous oral agreement or understanding alone of the parties to a deed, is not admissible to vary the express terms of the instrument which in equity as well as in law, is the exponent of their meaning, unless some overruling equity, in addition to such understanding is shown, from which it can be implied that a defeasance was contemplated. *Sutphen*

v. *Cushman*, 35 Ill. 186. It is therefore, a question of fact, whether, on looking through the forms in which the parties have seen fit to put the result of their negotiations, the real transaction was in fact a security or sale. Hence all the facts and circumstances of the transaction, whatever form the written instruments have been made to assume, are admissible, each case depending upon its own. The evidence, therefore, is not confined to a mere inspection of the written papers alone; but "extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised under the shelter of any written papers, however precise they may appear to be." *Russell* v. *Southard*, 12 How. 139, 147, and cases cited on the latter page. If a deed and memorandum back, of themselves import a sale on condition instead of a mortgage, they are not conclusive, the question being whether their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed. *Russell* v. *Southard*, *supra*.

Upon similar principles, parol testimony is admissible to show a resulting trust. It is the universally acknowledged doctrine that if one purchase an estate in the name of another, a trust results to him who advances the money when the payment is a part of the original transaction. *Buck* v. *Pike*, 11 Maine, 9, 23; *Dudley* v. *Bachelder*, 53 Maine, 403; *Burleigh* v. *White*, 64 Maine, 23. And oral testimony is admissible to show the facts, although there is no clause in the deed indicating that the conveyance was in trust. And when, in such case, the great equity of the consideration paid by the real purchaser is made to clearly appear, it controls the effect and operation of the deed.

In examining a transaction of the kind now before us, the embarrassed circumstances of the grantor are material. And the inadequacy of the sum advanced, compared with a fair cash value of the premises conveyed, is of great moment. For property holders are not obliged to sell their property for a sum

much less than its fair value, since they can readily realize its real value in the open market. And it is much more reasonable that they should give security on it, than sell it for much less than what they can thus realize. *Rich* v. *Doane*, *supra*. "When no fraud is practised," said Mr. Justice CURTIS, in *Russell* v. *Southard*, *supra*, 148, "and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold." See also the cases cited by him.

So the general current of authorities holds that courts incline against conditional sales as they do against forfeitures; and when upon all the circumstances, the mind is uncertain whether a security or a sale was intended, the courts guided by prudential reasons, will treat it as the former, 1 Jones Mort. § 279, and cases cited in note 8; *Conway* v. *Alexandor*, 7 Cranch, 218. "Courts of equity" said POLAND, C. J., in *Rich* v. *Doane*, 35 Vt. 125, 128, "have followed the rule of regarding the mortgagor as the weaker party, dealing at a disadvantage and needing protection, so that such cases have been watched with jealousy; and if enough is proved to render it fairly doubtful whether the conveyance was a mere security for a debt, or an absolute conveyance with right of repurchase, the premises have been held redeemable." Under such circumstances, such a decision "is more likely to subserve the ends of abstract justice and avert injurious consequences." 1 Jones Mort. § 279, and cases in note 2. Speaking of the resort of parties to a formal conditional sale, as a device to defeat the equity of redemption, COLE, J., said "the possibility of such resort, together with other considerations, has driven courts of equity to adopt as a rule, that when it is doubtful whether the transaction is a conditional sale or a mortgage, it will be held to be the latter." *Trucks* v. *Lindsey*, 18 Iowa, 504. See also *Russell* v. *Southard*, *supra*, 151 - 2.

The general rule is that to constitute a mortgage for the payment of money, there must be a subsisting debt therefor,

showing the relation of debtor and creditor. This continuing liability may be express or implied. *Holmes* v. *Grant*, 8 Paige, 243, 259. Hence there need be no bond, note or any other independent personal security therefor. *Smith* v. *People's Bank*, 24 Maine, 185, 195; *Mitchell* v. *Burnham*, 44 Maine, 286; *Brookings* v. *White*, 49 Maine, 483; *Varney* v. *Hawes*, 68 Maine, 442. Anything tending to show that there was a subsisting debt, or advance by way of a loan, goes to prove the transaction to be a mortgage. *Murphy* v. *Calley*, 1 Allen, 107. "If," said WELLS, J., "there is a large margin between the debt, or sum advanced, and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor." *Campbell* v. *Dearborn*, 109 Mass. 144.

There is another rule which is inflexible, viz. that the character of the transaction, as ascertained by a consideration of all of the material facts attending it, is fixed at its inception; and if it be determined to be a mortgage, the mortgagor cannot be precluded by any contemporaneous agreement from redeeming. *Hale* v. *Jewell*, 7 Maine, 435, 436; *Chase* v. *McLellan*, 49 Maine, 375. "The principle is well settled," said SAVAGE, C. J., in *Clark* v. *Henry*, 2 Cow. 324, "that chancery will not suffer any agreement in a mortgage to prevail, which shall change it into an absolute conveyance upon any condition or event whatever."

"The doctrine of 'once a mortgage always a mortgage,'" said Chan. KENT, "was established by Lord NOTTINGHAM, as early as 1681, in *Bonham* v. *Newcomb*, 2 Vent. 364. . . . The object of the rule is to prevent oppression; and contracts made with the mortgagor, to lessen, embarrass or restrain the right of redemption, are regarded with jealousy, and generally set aside as dangerous agreements founded in unconscientious advantages assumed over the necessities of the mortgagor." 4 Kent, 159. In *Bonham* v. *Newcomb*, *supra*, where an absolute conveyance was given with a defeasance upon payment of one thousand pounds during the life of the grantor, and the grantor covenanted that, it should not be redeemed after his death — the chancellor held that the estate was redeemable by the heir, notwithstanding the agreement.

Moreover, it is well settled that the admission of oral evidence in cases of this character is not in contravention of the statute of frauds. *Walker* v. *Walker*, 2 Atk. 98; *Campbell* v. *Dearborn*, 109 Mass. 130; *Carr* v. *Carr*, 52 N. Y. 251; *Wyman* v. *Babcock*, 2 Curtis, 386, 399.

The application of these rules to the facts in this case must determine its decision.

An examination of the evidence leaves no doubt that the plaintiff's intestate was financially embarrassed and needed money when he executed the deed of the Wisconsin lands; and that one of his motives in making the conveyance, was to delay his creditors — some of whom had reduced their claims to judgments — to the end that he might obtain a compromise. And there is some evidence that the defendant had, at least, strong suspicions of his uncle's object. But as our minds hesitate somewhat in coming to the conclusion that he really co-operated in this fraudulent design, we pass it and come to the question whether the conveyance was in fact made for the purpose of securing a loan; and of this, we entertain no doubt.

If the intestate's estate were solvent, and the suit were brought by the plaintiff solely as the personal representative of the deceased grantor, then, inasmuch as his own conduct in the premises, even admitting the transaction to have been a mortgage in equity, could not stand the equitable test which is sought to be applied to the defendant, the bill would be dismissed at once. *Hassam* v. *Barrett*, 115 Mass. 256. But, since, as before seen, the suit is brought in behalf and for the benefit of the creditors whom the intestate intended to defraud, it may be maintained, notwithstanding the fraudulent purpose of the debtor.

The grantor was involved. Several judgments were outstanding against him besides various simple contract debts. He wanted money in his brick business among other things. He conveyed, by deed absolute in form, his Winnegance property, with an understanding it should be reconveyed "on payment of

what the defendant paid on it." If he made a legal mortgage of his property, his equity of redemption would be attached by his creditors. He applied to the defendant for money and obtained, at the time of the conveyance — as the defendant testifies — $400; and some time thereafter — the defendant does not know when or whether all at one time — $1600. For this money he gave an unconditional deed of warranty of twenty-four hundred and eighty acres of timber lands in Wisconsin. If the defendant's answer speaks the truth in this connection, he paid only eighty cents per acre. By copy of deeds put into the case, it appears that, after his uncle's death, to wit: in October, 1876, he sold one hundred and sixty acres of the lands, at $6 per acre, and in May, following, eighty acres at $5 per acre.

In his additional answer, filed by direction on exceptions to the original, the defendant alleges that he sold some of the land, the quantity of which he does not recollect, for $650, and estimates the quantity by the rates brought by the other sales less commissions, although he alleges that he kept an account with the land, a copy of which he appends to his answer, as a true exhibit of the facts. Subsequently, in his account sent to the plaintiff, he credits $650 to the brick dealings. In his deposition, he testifies that the two items of $650 are but one in fact, and should be credited to a third transaction distinct and separate from the others and having no connection therewith, the Winnegance property. And yet on cross-examination he is obliged to admit that, at the time he received the $650, he had had no business transaction with his uncle other than that of the Wisconsin lands. These inexplicable, inconsistent statements are such a departure from a straight forward relation of the real facts, that we cannot give much weight to his answer or testimony.

Notwithstanding he was to reconvey the Winnegance property (of which he received an absolute conveyance in January, 1874,) on payment of the amount which he paid on it at various dates; and by the terms of the written contemporaneous memorandum, given in the Wisconsin land transaction, he agreed to pay any balance (arising from a sale of the lands) "after deducting all payments, costs, charges, expenses and interest, and all sums of

money that may be due" him from his uncle "if he shall demand it;" still he testifies that he never kept any account with him and hence could not show their dealings. And the only excuse he gives, is that he had the deeds and thought that sufficient.

The mere reading of the peculiar terms of the written memorandum, given by the defendant to his grantor, (which he alleges in his answer "was not in fulfilment of any prior understanding between them but originated solely from his own regard for his uncle and was written and delivered after he had received the deed,") excites the gravest suspicion of inequitable advantage, although it takes pains to disavow in terms any "desire to speculate at his expense or to deprive him of any advantage." It undertakes, with great minuteness and greater plausibility, to give a detailed statement of the facts, but does not omit to cover up the real consideration under the general assertion of "a certain sum of money paid," &c. It contains no promise on the part of the defendant, to sell at any time, but craftily stipulates what shall be done with a possible balance, "if at any time, during" his uncle's "lifetime" the defendant "shall sell," &c.; and then limits his promise to his uncle "personally during his lifetime," and recites that "it is understood that at his (uncle's) decease, no rights or claims of any nature incident to or growing out of this agreement shall survive." The remarks of Mr. Justice CURTIS, in the opinion from which we have more than once quoted, are as applicable to this case as to the one before him. "In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed so much anxiety is manifested on this point, as to make it apparent that the draftsman had a somewhat difficult task to perform. But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan or security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that in doubtful cases, the court leans to the conclusion that the reality was a mortgage and not a sale."

The attempt of the memorandum to confine all remedies to the grantor personally must fail, since, as heretofore seen, the inflexible rule of law and equity does not tolerate it.

The fact that the intestate must have submitted to the terms of the memorandum is not fatal to the maintenance of the bill. Persons under the double pressure in which the grantor found himself will yield to much that is inequitable and oppressive, and equity weighs an assent thus obtained as not equal to the dust in the scale.

On a careful consideration of the facts in this case — the gross inadequacy of the price alleged to have been paid as compared with its real value, the payment of $650, together with the various circumstances above mentioned, we cannot resist the conclusion that the relation of the parties to the deed was that of borrower and lender, that the sum paid by the defendant to the intestate was a loan although there may have been no collateral personal security given for it, and that the transaction was in fact intended as a mortgage, and that the plaintiff as representative of the creditors, for whom she brings this suit, is entitled to redeem the premises not sold, before the commencement of this suit, to *bona fide* purchasers.

The case must go to a master to state the account between the estate and the defendant, and the case continued until the coming in of his report. Decree accordingly.

Bill sustained with costs.
Case to go to a master.

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

HOSEA B. PHILLIPS *vs.* ROBERT GERRY.

Hancock. Opinion June 5, 1883.

Evidence. Auditor. Practice.

In a real action to foreclose a mortgage given to secure a note of one thousand dollars, the defence relied upon a receipt from the plaintiff in these words: "This day received of Robert Gerry his note of one thousand dollars on three months with eight per cent interest; when he pays, I am to give up a note for one thousand dollars I hold a mortgage for on land at Ellsworth," with evidence that that note had been paid, the defendant claiming that the receipt referred to this mortgage note; it was held admissible for the plaintiff to present in evidence two other notes of one thousand dollars each, which he had held and endorsed for the benefit of the defendant, and which were secured by another mortgage, the plaintiff claiming that the receipt referred to a renewal of one of these notes, which he held at the date of the receipt.

It is not error to recommit a report to an auditor after it has once been accepted and used at a trial, when the verdict has been set aside and a new trial granted. And where the auditor's second report reaffirms the first, it is competent for the court to allow both to be read in evidence at the new trial.

ON EXCEPTIONS.

This was a real action to foreclose a mortgage.

The material facts are stated in the opinion.

George P. Dutton, for the plaintiff.

Hale and Emery, for the defendant.

The issue was whether the receipt applied to the mortgage note or a duplicate note. The duplicate note was admissible, but the note we object to was another which was not in controversy. It only served to confuse the jury and inflame the amount of Gerry's indebtedness. Much more was this the case when the whole string of notes was let in. All these notes were apparently new, and additional claims against the defendant, giving the jury the impression that the defendant was certainly owing the plaintiff a large amount.

The court cannot go behind the bill of exceptions, and there is nothing there to show that the evidence was material or relevant.

Counsel further contended that it was error to recommit the auditor's report, after it had once been accepted and used at a trial. But if that could be done, and a new report is made and accepted and used in evidence, certainly the first report could not be thus used. The first report is no longer in court. It had been recommitted and another report made.

SYMONDS, J. Real action to foreclose a mortgage. The case itself is not reported, but from the exceptions we understand that, the plaintiff having first offered in evidence the mortgage and the accompanying note for one thousand dollars, dated May 21, 1874, the defendant then introduced the following receipt, signed by the plaintiff, and dated April 29, 1878. "This day received of Robert Gerry his note for one thousand dollars, on three months with eight per cent interest. When he pays, I am to give up a note for one thousand dollars, I hold a mortgage for on land at Ellsworth;" claiming that this receipt referred to the mortgage note which the plaintiff had introduced, and that the note had been paid.

Thereupon it appeared that the plaintiff had held, and had indorsed for the defendant's benefit two other notes of the defendant for one thousand dollars each, and each dated August 27, 1877, secured by another mortgage; and the question arose to what note does this receipt refer. Upon that issue, the court received in evidence both the notes of August 27, 1877 — or rather the original of one of them, and a duplicate which had been given to take the place of the lost original of the other — together with several notes which had been given in renewal of them; the plaintiff claiming that one of these renewals, dated April 29, 1878 (and not the mortgage note which he had introduced) was the note mentioned in the receipt.

The statement of the ruling explains and justifies it. It was neither more nor less than allowing the jury, called upon to distinguish between two things, to see both of them. Whether the receipt intended the note secured by the mortgage declared on, or one of the two notes of August 27, 1877, renewed, must

have been the material inquiry. We see no reason for excluding from the attention of the jury the facts relating to either branch of the investigation. The whole transaction of April 29, 1878, and not a part of it only, was the proper subject of examination in determining to what the receipt of that date referred.

The recommitment of the report to the auditor, at the October term, 1881, was not erroneous. The statute confers general authority in that respect, without limitation as to the term or the previous history of the case. R. S., c. 82, § 63; Pub. Laws, 1881, c. 36. Notwithstanding the report had once been accepted and had been used at one trial, when the verdict was set aside and a new trial granted, it was in the discretion of the presiding judge to order a recommitment of the report to the auditor for a more extended statement of his findings upon matters of fact. The decision of the law court might render such a course advisable or necessary. The auditor's second report reaffirmed the first, rendering it competent for the court to allow both to be read in evidence to the jury.

Exceptions overruled.

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

HARRIET W. FOSTER *vs.* SAMUEL R. PRENTISS.

JOAB W. PALMER *vs.* same.

Penobscot. Opinion June 5, 1883.

Mortgage. Fixtures. Waiver.

A mortgagor claimed to own certain machinery and tools in a mill, or that had been in the mill and were removed by him, as not being embraced in the mortgage of the land "with the steam-mill, fixtures, machinery, buildings," and at the request of the mortgagee, after he had taken possession, repaid to the mortgagee the amount paid by him as taxes on such machinery and tools. *Held*, That such repayment to the mortgagee, who had knowledge of the facts and situation of the property, constituted a valuable consideration

for his assenting to the mortgagor's claim to title, and the payment and retention of the money by the mortgagee constituted a waiver of his claim to such property under the terms of the mortgage, or as fixtures to the realty.

ON REPORT.

These were actions of trover to recover the value of certain machinery and tools; the plaintiff in the first suit received her title to the property named in her writ from the plaintiff in the second suit and it consisted of the machinery in the planing mill. The writs were dated July 12, 1880. The plea in each case was general issue. The cases were tried together.

The opinion states the material facts.

Wilson and Woodward, for the plaintiffs, cited: *Pickard* v. *Sears*, 6 Ad. and El. 469; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 483; *Lapham* v. *Norton*, 71 Maine, 88.

Charles P. Stetson, for the defendant, contended that the bank never intended to and never did waive or release any rights which it had and that a director, trustee or treasurer cannot by virtue of his office release parties from liability to the corporation under contract. *Dedham Savings Inst.* v. *Slack*, 6 Cush. 408; *E. C. Co.* v. *M. Ins. Co.* 6 Gray, 220; *Fairfield Savings Bank* v. *Chase*, 72 Maine, 227.

SYMONDS, J. Trover for machinery, tools and other articles, claimed by the plaintiffs as their personal property, by the defendant as parts of real estate purchased by him.

The land, "with the steam-mill fixtures, machinery, buildings," was conveyed to the Bangor Savings Bank by the firm of Palmer and Johnson, October 8, 1869, by a deed of warranty intended only as a mortgage. That firm on April 1, 1873, transferred its business to the new firm of Palmer, Johnson and Company which continued in the occupation of the premises from that time till the bank took possession under its deed in November, 1877. The plaintiffs represent whatever title either of these firms had in the property in dispute. The defendant represents the bank, whose title he acquired by a deed dated November 1, 1879. In his testimony he does not claim to stand in any better position than that. "The bank sold me just what their mortgage covered."

The deed of confirmation dated Junuary 28, 1880, from the bank to him declares it to have been the intention of the parties to the deed of November 1, 1879, "to convey all the said bank's right, title and interest in and to all the machinery, fixtures and all other parts and things to said mill belonging . . . intending hereby to place the said Prentiss in the place of said bank with reference to all said property, with the same rights of enjoyment and action which the bank then had, such being the intention of the parties at the time of making said deed." No question, therefore, arises as to any superior rights a purchaser from the bank for valuable consideration, without notice of the plaintiffs' claim to hold a part of the property as personalty, might have. The rights of the bank as mortgagee, whatever they were, were transferred to the defendant. The interests of the mortgagors and the firm which succeeded them in the business are in the plaintiffs. The case is to be decided as if the original parties were before the court.

In November, 1877, soon after the bank took possession, the plaintiff, Palmer, removed from the steam-mill to his house certain parts of the machinery and tools, claiming them as his own. This removal was known to the officers of the bank either before, or very soon after it took place. It was also known to the bank that Palmer claimed the machinery in the planing mill, which was left upon the mortgaged premises, as his, and with one of the trustees at least, he stipulated that he should lose no rights by allowing it to remain where it was.

The treasurer of the bank, subsequently in conversation with Palmer, claimed that if the planing mill machinery and the property which had been removed from the steam saw mill to Palmer's house were not included in the mortgage to the bank, but were Palmer's property, he ought to repay to the bank the amount which it had expended to discharge the taxes upon them for the years 1876 and 1877. To this claim Palmer assented and in pursuance thereof on December 17, 1877, paid to the bank the sum of one hundred and eighteen dollars, taking the following receipt signed in the name of the bank by its treasurer: "Received of Palmer, Johnson & Co. one hundred and eighteen

dollars, for taxes in Brewer for the years 1876 and 1877, on property removed by them from the saw mill known as the Palmer mill and the machinery in the planing mill."

The treasurer testifies: "After the payment of this one hundred and eighteen dollars, I told the trustees what I had received and the books showed it; I can't say they all knew it but the books were submitted to their examination, most every day more or less of them were in and looked over the books. I think I spoke to the president in regard to the receipt of this money; I think I told him that I had succeeded in collecting so much money on account of taxes paid on the Brewer property, from Palmer and Johnson."

About two years later the bank conveyed the real estate to the defendant, and the question is whether that deed gave him title to the property on which the taxes had been so paid by Palmer. We think not.

The effect of the deed has already been considered. It was simply to put the defendant in the position of the bank. But the bank had already waived its claim upon the property mentioned in the receipt. It had received and retained a valuable consideration for assenting to Palmer's claim of title to it as personal property. This was the only reason for Palmer's making the payment and the only ground on which the treasurer received it. The money was not demanded nor paid on account of the mortgage debt, nor as an assessment due from the mortgagors in possession, but solely upon the ground that, if the property was Palmer's, he ought to pay the taxes upon it. Assent to his title, waiver or release of the claim of the bank, were in substance the inducements held out to Palmer to make the payment. He had already removed the steam-mill machinery to his house, claiming it as his, and this fact was known to the bank. The receipt is in terms for taxes upon property so removed and upon the machinery in the planing mill, manifestly recognizing the facts of the situation, precisely what it was on which it belonged to Palmer to pay the taxes, that these two lots of property stood alike in this respect and differently from the mortgaged property, Palmer's claim of title extending to both.

The demand by the treasurer was in effect that Palmer should reimburse to the bank the amount which it had paid for taxes upon his machinery. It could not have been the understanding of either party that the bank should receive the taxes from Palmer, as assessed upon his property, and then hold the property as its own.

It is not necessary to consider the prior authority of the treasurer or other officer of the bank to act for it in these respects, because the case shows sufficient evidence that these acts of its agents were ratified by the corporation. The conclusion from the testimony cannot be avoided that this transaction was known to the trustees at the time. Palmer's claim of title, his assertion of it by removing part of the property from the mill to his house, and by effecting an arrangement with some of the corporate officers, by which he could leave the rest at the mill without losing any rights, his payment of the one hundred and eighteen dollars, and the treasurer's receipt of it, as an amount due for taxes upon property which Palmer owned, these facts being known, the acceptance and retention of the money became corporate acts, acts of the bank. It still holds the one hundred and eighteen dollars, while its grantee (having only its rights) claims the property as part of the realty. To allow this claim would be to disregard the agreement clearly implied in the acts of the parties. The deed did not convey to the defendant property which the bank had already received a valuable consideration for allowing Palmer to consider his.

There are other parts of the evidence which strengthen this conclusion that the bank released its claim upon the property mentioned in the receipt, such as that during the two years while the bank was in possession, before the deed to the defendant, it made no effort to recover the property which Palmer had carried away, and also that during the same time it allowed him to let the planing mill machinery to one Goodwin for a while, and receive the rent therefor.

Of the articles mentioned in the schedules annexed to the writs, it is only to these two classes, the planing mill machinery, and the property removed from the steam saw mill, that the

defendant claims title. Some parts of the machinery of the old mill which the mortgage did not cover, and a few other articles which are not claimed as part of the realty, are alleged to have been converted by the defendant. These, so far as they shall be proved, will be included in the assessment of damages; together with the planing mill machinery, and the steam-mill property, which the defendant took from Palmer's house, after it had been removed there. In both actions the entry will be,

Defendant defaulted. Assessment of damages at nisi prius.

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

PETERS, J., did not sit.

CITY OF AUGUSTA *vs.* OLIVER MOULTON.

Kennebec. Opinion June 5, 1883.*

Right to flow lands. Prescription. Highways.

In order to acquire by prescription a right to flow lands without the payment of damages therefor the land must have been flowed for some portion of each year for twenty consecutive years, doing damage to it to some appreciable extent.

The location and building of a public road, over and upon land over which an individual has the right to flow, by prescription, does not take away the right to flow, nor entitle the municipality upon which rests the duty to build and maintain the road, to damages done by the water flowing over or against it, to the extent thus previously acquired by prescription.

ON EXCEPTIONS and motion to set aside the verdict.

An action on the case to recover damages for injury to a road caused by the defendant's dams overflowing the same from September 25, 1866, to the date of the writ, September 25, 1876. The plea was general issue and brief statement setting up a right to flow, acquired by prescription, and the statute of limitations.

* Announced May 31, 1882.

The material facts appear in the opinion.

W. S. Choate, city solicitor, and *Herbert M. Heath*, city solicitor, for the plaintiff, cited: *Jordan* v. *Woodward*, 40 Maine, 317; *Tinkham* v. *Arnold*, 3 Maine, 120; *Hathorn* v. *Stinson*, 10 Maine, 238; S. C. 12 Maine, 183; *Seidensparger* v. *Spear*, 17 Maine, 123; *Gleason* v. *Tuttle*, 46 Maine, 288; *Underwood* v. *No. Wayne S. Co.* 41 Maine, 291; *Com* v. *Fisher*, 6 Met. 437; *Ellis* v. *Welch*, 6 Mass. 251; *Perry* v. *Worcester*, 6 Gray, 546; 6 Mass. 458; *Hancock* v. *Wentworth*, 5 Met. 451.

Joseph Baker, for the defendant, cited; *Underwood* v. *No. Wayne Scythe Co.* 41 Maine, 291; *Wood* v. *Kelley*, 30 Maine, 47; *Williams* v. *Nelson*, 23 Pick. 141.

SYMONDS, J. This is an action to recover for damages to a road in Augusta caused by water flowing back upon it from the defendant's dam.

In order to acquire by prescription a right to flow lands without the payment of damages therefor, the court ruled, "the land must have been flowed by the dam twenty years consecutively; that is, at some portion of the year for twenty years, doing damage to it to some appreciable extent." In support of the exception to this ruling the plaintiffs argue that, as the dam was built (in 1804) to obtain a head of water for a mill, and as the statutes then gave, and continued to give, to mill owners the right to flow the land of others, paying damages therefor, the flowage was by license of law, the land owner could not have prevented it, an original grant cannot be presumed from lapse of time, and prescriptive rights cannot be acquired in the manner which the ruling implies.

This was so held in *Tinkham* v. *Arnold*, 3 Maine, 120, which the plaintiffs cite. In *Hathorn* v. *Stinson*, 10 Maine, 224, 239, the court queries, but does not decide, whether the flowing of lands for the support of mills for long periods may not under some circumstances afford presumptive evidence, if not of grant, at least of license, so as to bar the claim for damages; but when the same case was again before the court, 12 Maine, 183, it was

held that such license cannot be presumed unless some injury to the land was caused by the flowing. In *Seidensparger* v. *Spear*, 17 Maine, 123, 128, the decision in *Tinkham* v. *Arnold*, seems to have been followed, the court holding that there was no presumptive evidence of a grant "when by law such grant was not necessary and when the conduct of all concerned was explainable on legal ground without such presumption." But about this time, in Massachusetts, the opinion in *Williams* v. *Nelson*, 23 Pick. 141, was delivered, opposed to that in *Tinkham* v. *Arnold*, and holding that the exercise by a mill owner of the right to maintain a dam and flow the lands of others for twenty years without damages paid or claimed was evidence of the right to flow without paying damages and would bar the claim for them.

In *Nelson* v. *Butterfield*, 21 Maine, 220, 227, all these cases were elaborately reviewed, and in some degree reconciled by adopting precisely the rule which was given to the jury at this trial. It has been repeatedly affirmed. *Wood* v. *Kelley*, 30 Maine, 47; *Underwood* v. *North Wayne Scythe Co.* 41 Maine, 291; *Mansur* v. *Blake*, 62 Maine, 38.

The main question presented at the trial was whether the defendant had a prescriptive right, to flow the land, acquired before the road was located. If so, the ruling was, the right continued as before, notwithstanding the location and building of the road; and the defendant was not liable for the damages done by the water flowing over or against it. To this exception is taken. But is it not clear that the ruling is correct? Suppose the premises from which the plaintiffs argue are conceded;— that the right to flow was only a private easement which might lawfully be impaired in the building of the road, and not like a natural stream, the course of which is not to be unnecessarily obstructed or changed; that the public acquired by the location the right to build a solid road without bridge or culvert, and thereby limit the right to flow; that the only remedy for the mill owner for such diminution or loss of space for flowage is by claiming compensation for property taken for public purposes;— suppose these premises are conceded, what prevents him from exercising the right, if any, that remains outside of the location, or subjects

him to any new conditions in the manner of using the right to flow between the mill and the road? He may still let the water flow where it has a right to flow till the road stops it, and it is not his duty to see that the road is so constructed as to stop the water without damage to itself. The location gave the public no rights outside of its limits. If there was a prescriptive right to flow the land for the use of the mill before the road was located, and a solid road was built, the right remained to flow against the side of the road next the mill, to the same height and under the same limitations as before; a right against which the public must guard in constructing the road. The case is not one where the two easements, that of the public and that of the mill owner, are inconsistent and cannot co-exist. It is entirely practicable to build the road, so as to withstand the force of the water. The location did not take away the right to flow. The case shows no attempt to do that.

The verdict having been in favor of the defendant upon the ground that he had acquired when the road was built the prescriptive right to flow without the payment of damages, there is no occasion to consider the question whether prior occupancy alone, although still accompanied with a liability to pay yearly damages for the flowing, would not under the statute, give the mill owner the superior right against such a location. The rulings at the trial in this respect were at least as favorable to the plaintiffs as they should have been. Under the directions to the jury contained in the charge, it is apparently impossible for the plaintiffs to have been prejudiced by the partial exclusion of evidence in regard to the Back Run dam. If damage to the road by water flowing back upon it was proved, and that without legal right, the jury were told to find for the plaintiffs, if the main dam either "caused the flowing of the water, or with the back dam contributed to it." The whole case shows that it was physically impossible, and must have been manifestly so to the jury, for the water to be forced back upon the road, without the main dam contributing to that result. Certainly argument was not required to show that the back dam alone could not do it. It is the argument of the plaintiffs that the main and

back dams, with the small, intervening island, should be regarded as one dam, two parts artificial and one natural, holding back the same stream. If so, the water would not flow to a higher level on one part of the dam than another, each part aids in detaining it, and substantially the same question is presented, as the charge presents, to the jury.

If it be said that an exception to the truth of the statements just made arises from the fact that the raising of the Back Run dam since the location of the road would diminish the space for the outflow of the water and might therefore, if proved, have tended to show a higher flow than that authorized by the right which had been acquired when the location was made, and so have charged the defendant with liability for exceeding the limits of his right, the answer is, that this is a point not taken at the trial. There is nothing in the case to direct the attention of the presiding judge to the effect of a change in the Back Run dam to cause a higher flow on the main dam. The admission of evidence was not claimed on that ground. Under the declaration, too, it was discretionary with the court to confine the plaintiffs to testimony relating to one dam, and they having elected the principal dam cannot object to the exclusion of evidence relating to the other.

We think the verdict is not against evidence in finding a prescriptive right to flow acquired before the location of the road, in such sense as to justify the court in setting it aside.

The mill was built in 1804. The road was located in 1833. When the evidence is reviewed in the light of the probabilities, and with the aid of facts of common knowledge, if it does not clearly sustain the finding of the jury that the meadows were so flowed during those twenty-nine years as to cause appreciable damage, it at least precludes any action of the court on the ground that such finding was manifestly wrong.

Motion and exceptions overruled.

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

STATE *vs.* FLAVIUS O. BEAL.

Penobscot. Opinion June 5, 1883.

Innkeeper. Trout. Stats. 1878, c. 75, § 16; 1879, c. 123, § 4; 1879, c. 104.

An innkeeper having trout, not alive, in his possession on the twenty-seventh day of January, and the tenth and twelfth days of February, 1882, had the same cooked and served to his guests in his hotel at regular meals, the bills of fare for such meals showing such fact; *Held*, That those acts constituted a sale of trout in violation of stat. 1878, c. 75, § 16, as amended by stat. 1879, c. 123, § 4. *Held further;* That by stat. 1879, c. 104, the penalties of stat. 1878, c. 75, § 16, either in its original or in its amended form, were not remitted as to Great Tunk pond.

APPLETON, C. J., dissenting.

ON REPORT.

Indictment of the keeper of a hotel for having trout, not alive, in his possession, between the first day of October and first day of May, with intent to sell the same in violation of stat. 1879, c. 123, § 4, amendatory of stat. of 1878, c. 75, § 16.

The opinion states the facts.

Benjamin H. Mace, county attorney, for the state.

Wilson and Woodward, for the defendant.

Statutes 1878, c. 75, and 1879, c. 123, are penal statutes. *Com.* v. *Hall*, 128 Mass. 410.

They are, if possible, to be so construed as to leave the citizen free from penalties and from danger, without appealing to the discretion of any one. *Butler* v. *Ricker*, 6 Maine, 268.

And all parts of the statute being upon the same subject, are to be examined together, to ascertain the intent and any meaning which is found to be incompatible with any plain provision, must be rejected. *Merrill* v. *Crossman*, 68 Maine, 414.

As section thirteen, as amended, does not apply to Great Tunk pond, there is no annual close time for such fish in that pond. And

counsel contended, in an able argument, that sections sixteen and seventeen, so far as they applied to fish, caught in Great Tunk pond, were incompatible with the plain provision of the law and must be rejected.

SYMONDS, J. In January, 1882, the defendant, a hotel-keeper in Bangor, having received from a friend some trout which were caught during that month in Great Tunk pond, in Hancock county, had them cooked and served to the guests of the hotel at the regular table, as part of the common bills of fare. It is not denied and there can be no doubt, that these facts include possession of the trout by the landlord with intent to sell them, offering them for sale, and a sale completed. *Groves* v. *Kilgore*, 72 Maine, 489.

Either of these three acts, to sell trout, to expose them for sale, or to have them in possession with intent to sell them, between the first day of October and the first day of the following May, is a direct violation of pub. laws, 1879, c. 123, § 4; an amendment of the act of 1878, c. 75, § 16.

By chapter 104 of the laws of 1879, the penalties of certain other sections (§ § 13, 15) of the original act of 1878, do not apply to the taking of trout in Great Tunk pond. The penalties specially remitted in reference to this pond, relate to taking fish in close time; but all the prohibitions contained in the original act, against certain modes of taking them, (§ 14,) and against the sale of them, (§ 16,) remain in full force upon these, as upon other waters of the state. There is no trace of a legislative intention to exempt Great Tunk pond from the operation of section sixteen, either in its original or in its amended form.

The argument is, however, that inasmuch as this section sixteen (1879, c. 123, § 4) forbids transporting from place to place, as well as selling, offering for sale and possession with intent to sell, if applied to this pond, it deprives the remission of the other penalties by the act of 1879, c. 104, of all value, because the right of fishing is of no account if one cannot sell or transport the fish.

If there were no answer to this objection, the question would still remain whether, allowing it its full force, any other effect

could be attributed to it, than to exhibit a defect in the legislation on this subject, a failure to make the special act broad enough to confer a privilege which, under the general law, was a valuable one.

But we think that if fish were caught at this pond during the period which was the close time for other waters of the state, and still were caught in a manner which was lawful at that place under the special act, taking them home to dispose of them in any legal way, would not be an act forbidden by section sixteen. The taking, the possession, the purpose, would all be lawful; the act of carrying, if in common phrase, or in a legal sense it could properly be described as a transportation from place to place, would manifestly be wanting in that element of illegality against which it is clear, when all the provisions of the act are examined together, the penalties of that section were directed. But we do not meet directly in the present case the difficulty, whatever it may be, which arises upon the construction of that part of the section. It is all a part of the general law of the state. The waters where these trout were caught have never been exempted from the operation of it. The act of the defendant was a violation of its provisions.

Judgment for the state.

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

DISSENTING OPINION BY

APPLETON, C. J. By the act of 1878, c. 75, § 13, a close time is established in the waters of this state, within which land-locked salmon, trout and togue, are not to be taken.

By section fifteen of the same chapter, a penalty is imposed for taking, catching, killing, or fishing for in any manner, land-locked salmon, trout or togue.

By section sixteen, the sale, exposure for sale, or having in possession, with intent to sell or transport from place to place, in this state, any land-locked salmon, trout or togue, during close time are prohibited under a penalty.

The defendant is indicted for having trout and togue within close time for sale.

But the case finds that the trout and togue were caught in Great Tunk pond, in Hancock county.

By c. 104, of the acts of 1879, it is provided "that the provisions and penalties contained in sections thirteen and fifteen of chapter seventy-five of the public laws of 1878, shall not apply to the taking of togue or trout in Great Tunk pond in townships, numbers seven and ten, in Hancock county."

There is then no close time for taking in Great Tunk pond. There is no penalty for taking, catching, killing, or fishing for trout or togue, there at any time. The fish caught there were lawfully taken. The fisherman might give them away, for that is not prohibited. He might eat them. His family might partake of the result of his skill. It will hardly be contended that if he and the rest of the family, could eat, that if he happen to have a boarder, whether for a longer or shorter period, that the penalty would attach for the fish eaten by the boarder, and not to the portion partaken of by the rest of the family.

As the fish may be given away, the donee and his family have the same right of cooking and eating which belongs to the donor.

The sixteenth section can only apply to the sale of fish caught in violation of law — to fish, illegally, in the possession of the seller. It cannot reasonably be held applicable to the sale of fish, specially authorized by statute to be taken. It applies to fish taken contrary to the prohibitions of the statute. The different parts of a statute are to be construed together. It is absurd to suppose that the legislature intended to punish criminally one for giving away or selling fish it specially authorized him to take and eat. *Com.* v. *Hall*, 128 Mass. 411. Thus making it an offence or not, accordingly as the fish is eaten by the fisherman or one purchasing of him.

But this is not all. By section sixteen, not merely is the sale, &c. of any land-locked salmon prohibited, but a penalty is imposed on its transportation, "from place to place within this state." The prohibition against transportation is equally imperative as that against selling.

The fish then, though authorized to be taken, and, as the counsel for the government admit, to be eaten, cannot be transported to the dwelling of the fisherman without incurring the same penalty as that prescribed for selling. The result then, as claimed by the state is, that the fish must be cooked on the bank of the pond or thrown back into it.

The section sixteen, under consideration, imposes a penalty for selling and transporting certain fish in close time. The next year license was granted to take fish in the Tunk pond during the whole year. This was by necessary implication a repeal, as to fish taken in Tunk pond, of the penalty imposed for having fish in his possession by c. 75, § 16, of the acts of 1878. The close time was abolished as to that locality. It is but a poor compliment to the intelligence of the legislature to suppose it meant to grant license to take fish which men could neither sell nor carry away without committing a violation of law, yet such is the inevitable result of the claim set up by the government. It would be but a paltry boon to the public to authorize the taking of fish, which the fisherman could neither sell, give away or even transport from the pond where caught without incurring a penalty.

LOIS D. HODGDON and another *vs.* MOSES D. GOLDER.

Androscoggin. Opinion June 13, 1883.

Promissory notes. Defence. Failure of title.

A partial failure of title constitutes no defence to a suit on a note given for real estate.

REPORT on agreed statement.

Assumpsit on a promissory note of nine hundred dollars given May 11, 1876, by the defendant to the plaintiffs.

The opinion states the material facts.

Ludden and Drew, for the plaintiffs, cited: *Morrison* v. *Jewell*, 34 Maine, 146; *Thompson* v. *Mansfield*, 43 Maine, 490.

L. H. Hutchinson and A. R. Savage, for the defendant.

There was a total failure of the consideration. *Rice* v. *Goddard*, 14 Pick. 295, and cases there cited; *Jenness* v. *Parker*, 24 Maine, 289.

Defendant took no title by the widow's joining in the deed. A widow cannot alien or assign unassigned dower. 1 Washburn on Real Property, (3d. ed.) 286, 232, 237; *Johnson* v. *Shields*, 32 Maine, 424.

Her joining in the deed can only operate, at the most, as an estoppel and not by way of grant of title. *Lothrop* v. *Foster*, 51 Maine, 367.

The principal estate having failed, the subordinate estate, if any, fails also.

There was a total failure, of a specified, distinct aliquot part of the consideration; to wit, the share of Nellie M. Hodgdon; and the defendant has no remedy upon the covenants of Nellie M. Hodgdon, she was a minor and her deed has been avoided.

APPLETON, C. J. On February 25, 1874, Alexander B. Hodgdon died leaving a widow and three children, one of whom, Nellie M. Hodgdon, was a minor. In the following April an administrator was duly appointed and qualified.

In May, 1876, the widow and son acting as agents for the two daughters as well as for themselves, sold the real estate of the decedent to the defendant for thirty five hundred dollars, giving a warranty deed signed by them and the other children of the deceased. The note in suit was given as part of the consideration of the purchase.

At time of the above mentioned conveyance, the estate of the decedent had not been settled in the probate office. Subsequently thereto, the real estate conveyed to the defendant, was sold by the administrator *de bonis non* of the estate of Alexander B. Hodgdon to S. A. Cummings and Jacob A. Field, to the latter of whom the defendant had conveyed the estate by him purchased, as before stated.

The interest of Nellie M. Hodgdon, was sold by her guardian to S. A. Cummings by license from the probate court.

The warranty deed of the heirs and widow of Alexander B. Hodgdon conveyed to the defendant a seizin of the premises granted. He entered into possession of and occupied the same until he conveyed them away. He had both seizin and possession. Though subsequently, this title was defeated by the deed of the administrator *de bonis non* on the estate of Hodgdon and that of the guardian of the daughter, there was not such an entire failure of consideration as would constitute a defense. *Wentworth* v. *Goodwin*, 21 Maine, 150; *Morrison* v. *Jewell*, 34 Maine, 146; *Thompson* v. *Mansfield*, 43 Maine, 490; *Wentworth* v. *Dows*, 117 Mass. 14.

The remedy when anything valuable passes by the title, but not the entire estate conveyed, is by an action of covenant broken. To constitute a valid defense to a note given for the conveyance of real estate there must be a total and entire failure of title. *Jenness* v. *Parker*, 24 Maine, 289.

Defendant defaulted. Damages to be assessed at nisi prius.

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

JACOB GRAVES, in error, *vs.* AUGUSTUS F. SMART.

Kennebec. Opinion, June 21, 1883.

Error. Sheriff. Deputy. Coroner. Service.

Where the sheriff is also a coroner and the writ is directed to a coroner, the service is illegal if made by him as sheriff, when his deputy is a party to the action.

Where there has been no legal service and no appearance by the defendant, and the defendant is an inhabitant of another state, the court has no jurisdiction and a judgment by default is erroneous and will be reversed.

ON REPORT.

The opinion states the case and material facts.

Clay and Clay, for the plaintiff, in error, cited: *Dane* v. *Gilmore*, 51 Maine, 544; *Gage* v. *Graffam*, 11 Mass. 181; Spaulding's Practice, 70; *Bank* v. *Cook*, 4 Pick. 405; R. S., c. 102, § 8; *Starbird* v. *Eaton*, 42 Maine, 569.

S. and L. Titcomb, for the defendant, in error.

When a defendant is absent and has no actual notice of the writ, it is in the discretion of the presiding judge to enter up judgment on default or continue for judgment. The exercise of this discretion cannot be reversed on error. *Lovell* v. *Kelley*, 48 Maine, 263.

Stat. 1872, c. 14, as amended by stat. 1879, c. 82, authorizing any writ or precept in which the deputy of a sheriff is a party to be served by any other deputy of the same sheriff, must be construed by necessary implication as giving the sheriff the same power conferred upon his deputy for whose official acts he is liable. If a deputy in his official capacity commits an illegal act, the sheriff is liable therefor. Can the sheriff be held responsible for the acts of the deputy and still have no power to perform the same acts himself?

APPLETON, C. J. This is a writ of error to reverse a judgment of the superior court of Kennebec county.

The writ in the original action was directed to a coroner, the plaintiff therein being a deputy sheriff. It was served by the sheriff of the county, by an attachment of real estate, the plaintiff in error, being an inhabitant of Massachusetts, but no personal service was made on him. Notice by publication was ordered and given, but there was no appearance and judgment was rendered on default.

One deputy cannot serve on another except by statutory authorization. *Brown* v. *Gordon*, 1 Greenl. 165; *Douglass* v. *Gardner*, 63 Maine, 462.

A service by one unauthorized to serve, is void. *Hart* v. *Huckins*, 6 Mass. 400.

While by stat. 1879, c. 82, it is provided that "any writ or precept in which the deputy of a sheriff is a party, may be

served by another deputy of the same sheriff," no authority is given to the sheriff to serve any precept upon his deputies.

The writ was properly directed to a coroner. The direction to the sheriff was stricken out. The service was made by the sheriff. It matters not that the sheriff was at the same time a coroner. He did not act as such, as appears by his return. It follows that there has been no legal service. It was not in accordance with the mandate of the writ, nor by one authorized to serve.

There being no legal service and no appearance, such want of legal service is error. The court had no jurisdiction. *The Wilton Man. Co.* v. *Woodman*, 32 Maine, 185; *Gay* v. *Richardson*, 18 Pick. 417. There being no sufficient service upon the plaintiff in error to authorize the rendition of judgment against him, it must be reversed, for want of jurisdiction. *Smith* v. *Paige*, 4 Allen, 94. The jurisdiction of the court is not admitted by suffering a default, the defendant not being within its jurisdiction. *Jewell* v. *Brown*, 33 Maine, 251. Without complete jurisdiction, no valid judgment can be rendered. *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 457.

In *Lovell* v. *Kelley*, 48 Maine, 263, the plaintiff in error was an inhabitant of the state, and service was made by leaving a summons at his last and usual place of abode. Not so, in the case at bar.

Judgment reversed.

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

INHABITANTS OF DRESDEN *vs.* DANIEL GOUD.

Lincoln. Opinion June 21, 1883.

Taxes. Assessors. Oath. Assessors de facto. R. S., c. 6, 75. Stats. 1874, c. 232; 1879, c. 158.

Where no assessors are elected, the selectmen must, each of them, be sworn as assessors before they can legally assess a tax. They can not make an assessment as officers *de facto*, which will sustain an action for taxes under stat. 1874, c. 232, as amended by stat. 1879, c. 158.

ON REPORT.

The opinion states the case and material facts.

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

Joseph Baker, for the defendant.

DANFORTH, J.. This is an action under the statute of 1874, c. 232, as amended in 1879, c. 158, to recover a tax assessed upon the defendant for the year 1881. One of the numerous objections to the maintenance of the action, is the allegation that the assessors for that year were not sworn as such. To this, two answers are made; one of fact and one of law. It is claimed that the proof shows that they were sworn, and if not, they were officers *de facto*, and as such, their acts were binding upon the defendant.

1. It appears from the records of the town, that no assessors were chosen for the year 1881. Hence by virtue of R. S., c. 6, § 75, the selectmen became the assessors, and the same section further provides that "each of them shall be sworn as an assessor." The only evidence we have of any oath having been administered to the persons elected selectmen, is a certificate taken from the records of the following purport: "1881, March. Then Charles W. Bickford and Edwin F. Houdlett and Bradbury Blin, chosen selectmen for the ensuing year, severally made

oath to faithfully and impartially perform the duties of their offices; before me. Attest, John H. Mayers, town clerk."

This may be sufficient evidence that the persons named were sworn as selectmen. The certificate alludes to them as selectmen, but not as acting or proposing to act in any other capacity. The fact that the word "offices" is in the plural number, affords no aid, for that is equally applicable to the different offices of the several individuals, as to any other office which either might hold, or if to any other office it may as well have been overseers of the poor, or constable, or any other office to which they might have been chosen. The statute requires that "each of them shall be sworn as an assessor." The fact that this office devolves upon them by virtue of their election as selectmen, does not make the two, one office, but each retains its distinct character and each requires its distinct and proper oath. Yet in this certificate, the word assessor is not used, nor is there any language which we can understand as referring to that office. Hence there is an entire failure of evidence to show that each or either of these men was sworn as an assessor.

2. Assuming that these men, acting as they did as assessors, by color of an election which if legal, would have made them such, still the principles applicable to officers *de facto*, would not apply here. The question here presented involves necessarily the competency of the persons to do the act, or make the assessment. The statute requires as a condition precedent to the maintenance of the action, that the tax should be "legally assessed," and the proper oath is a condition precedent to the authority of the assessors to assess. No oath, no competency; no competency, there can be no legal assessment.

Besides, the defendant is not a third person, nor is there any third person to avail himself of the act, or attack the assessment collaterally. The act operates directly upon the defendant. It is his property and his alone that is at stake, and the contest is not a collateral one, but a direct impeachment of the legality of the assessment. True the assessors are not a party to the action, but the town which stands in their place and which they represented, is such party and has no more rights simply because the statute provided that the action should be in its name.

The decisions in this and other states have gone farther than necessary to sustain these principles. It is now too well settled to be doubted, that in sales of property for taxes, to save a forfeiture it is required that the purchaser shall show not only the legal election and qualification of the assessors, but the legal qualification of all officers who have any duty to do in relation to the sale; and this is so even though the purchaser is an innocent third person. There are cases in some of the states which hold that the collector who makes the sale, if he comes within the definition of an officer *de facto*, may make a valid sale though not qualified by taking the prescribed oath. But even these cases, so far as they have been brought to our attention, go no farther than to hold that the officers making the sale may make a valid one if officers *de facto*, leaving the principle still applicable that the assessment must be made by officers *de jure*. In *Tucker* v. *Aiken*, 7 N. H. 113, the court say, "the general principle undoubtedly is, that the acts of an officer *de facto* are valid, so far as the public or the rights of third persons are concerned; and that the title of such an officer cannot be inquired into in any proceeding to which he is not a party. But proceedings founded upon the assessment and collection of taxes have been supposed to form an exception to this rule; or rather, a different rule has been supposed to be applicable to such proceedings. The principle is expressly laid down, that in order to maintain a title to land sold for taxes, or to justify a distress, every substantial regulation of the law must be shown to have been complied with, and it seems to have been understood that this principle included and required proof of the due election and qualification of all officers concerned in the assessment and collection of the tax." Such seems to have been the law as uniformly held by the courts in New Hampshire.

In *Payson* v. *Hall*, 30 Maine, 319, on pages 325–6, SHEPLEY, C. J., says, "that when constables or sheriffs perform acts by virtue of judicial precepts, it is usually sufficient to show that they were officers *de facto*, without producing proof that they were legally qualified to do so. A person injured by such acts, has a remedy by action against the officer, and his rights

are secured by a final resort to the official bond. But one injured by the misconduct of a collector of taxes, cannot be protected by a resort to his official bond for redress, that having been made for the security of the town alone. He must be permitted to avoid the acts of one assuming without lawful authority to be a collector, or be in many cases without a remedy. . . . The tax payer is entitled to have his interests protected in the sale of his property, by the obligations imposed by the official oath." This case was affirmed in *Gould* v. *Monroe*, 61 Maine, 547, and recognized as sound in *Oldtown* v. *Blake*, 74 Maine, 286, though in that case, it was held that a collector not having taken the oath, may be so far an officer *de facto* as to enable him to make a demand for the tax valid for the purpose of affecting the costs, when the refusal to pay was put upon other grounds.

If the collector must be an officer *de jure* to enable him to make a valid sale of property for the payment of a tax, much more must the assessors be such to enable them to make a legal tax for which an action can be maintained under the statute. *First Parish* v. *Fiske*, 8 Cush. 267.

Plaintiffs nonsuit.

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

ALBERT MOORE, Judge of Probate,

vs.

SULLIVAN LOTHROP and others.

Somerset. Opinion June 21, 1883.

Pleading. Declaration. Time. Amendment.

In an action of debt on a bond to a judge of probate the declaration is defective if it does not allege the precise day on which the defendants became bound. Such a declaration is amendable.

ON EXCEPTIONS.

Debt on an administrator's bond to the judge of probate. The writ was dated February 15, 1882. The defendants' demurrer to the declaration was overruled, *pro forma*, and they alleged exceptions.

(Declaration.)

. . . "To answer unto Albert Moore, who is Judge of Probate, within and for said county of Somerset, in whose name and by whose express authority this action is brought, by and for the benefit of William Folsom, of Skowhegan, in said county of Somerset, in his capacity of administrator of the goods and estate, not already administered, which were of Thomas J. Adams, late of said St. Albans, deceased, in a plea of debt, for that the said defts. at said Skowhegan, on the — day of March, A. D. 1876, by their writing obligatory, of that date, sealed with their seals, and here in court to be produced, bound and acknowledged themselves indebted to one Edward Rowe, Judge of the Probate of wills, and granting administrations within and for the county of Somerset, in the full and just sum of three thousand dollars, to be paid to the said Rowe, or his successor in said office on demand, and the plaintiff avers that the said Albert Moore, is the successor of the said Edward Rowe, in said office of Judge of Probate of wills and of granting administrations within and for the county of Somerset. Yet the said defendants although often requested, the same have not paid but refuse, to the damage of the said plaintiff, (as he says) the sum of three thousand dollars, which shall then and there be made to appear with other due damages."

E. N. Merrill, for the plaintiff.

D. D. Stewart, for the defendants.

BARROWS, J. That the defendants bound themselves to the Probate Judge as alleged in the declaration, was a traversable fact, and the declaration is defective in not alleging the precise day on which they did it. *Platt* v. *Jones*, 59 Maine, 232, 241, and authorities cited; *Gilmore* v. *Mathews*, 67 Maine, 520;

Gray v. *Sidelinger*, 72 Maine, 114; Serjeant Williams says in note (3) to *Mellor* v. *Walker*, Williams' Saunders, vol. 2, p. 5*b*. that "if the day in the declaration be material as in an action upon a bond, bill of exchange, promissory note, and the like, the plaintiff, in his replication, cannot vary from the day without a departure. See as to parol contracts, *Little* v. *Blunt*, 16 Pick. 365. But notwithstanding this, the pleader need never be at a loss in declaring upon a probate bond whether it bears date of a specific day or not.

The obligors bind themselves on the day when the bond is accepted and approved by the Probate Judge, and the day on which his court was held at which the bond was presented and approved may always be ascertained by the record.

It will always be safe to allege that the obligors bound themselves on that day, if the descriptive allegations as to the date mentioned in the bond are carefully made conformable to the fact.

The *pro forma* ruling (probably made without seeing the papers) was erroneous, and the exceptions and demurrer must be sustained; but the plaintiff may have leave to amend upon payment of costs according to the statute.

Exceptions sustained.

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

JAMES WRIGHT *vs.* COLUMBIA HUNTRESS.

Somerset. Opinion June 21, 1883.

Insolvency. Discharge.

Since the passage of acts amendatory of the insolvent law, (stat. 1878, c. 74) the certificate of discharge should allege a compliance with the original act, and "of all acts amendatory thereof," in order to establish a valid discharge.

ASSUMPSIT on a promissory note of two hundred dollars. The writ was dated August 12, 1881. The defendant at the September

term, 1882, filed a plea in bar, setting up a discharge in insolvency. To this the plaintiff demurred, and the demurrer being overruled, he alleged exceptions.

The following is the certificate of discharge, set out in the defendant's plea.

"State of Maine.

"Somerset, ss. Court of insolvency. In the case of *Columbia Huntress*, of Harmony, in said county of Somerset, insolvent debtor.

"Whereas, *Columbia Huntress*, of Harmony, in said county of Somerset, has duly assigned his estate for the benefit of his creditors, according to the provisions of an act of said state of Maine, entitled "an act in relation to the insolvent laws of Maine," approved on the twenty-first day of February, A. D. 1878, and appears to have conformed to all the requirements of the law in that behalf;

"It is therefore ordered by the court that said *Columbia Huntress* be, and he hereby is, forever discharged from all debts and claims, which by said act are made provable against the estate of said debtor, and which existed on the fourth day of October, A. D. 1881, on which day the petition for proceedings was filed in said case; excepting such debts, if any, as are by said act excepted from the operation of a discharge in insolvency.

[Seal.] "Given under my hand and the seal of said court, at Skowhegan, in said county of Somerset, this fifth day of September, A. D. 1882.

"Albert Moore, judge of said court of insolvency, for said county of Somerset."

James Wright, for the plaintiff.

E. N. Merrill, for the defendant.

APPLETON, C. J. This is an action of assumpsit on a promissory note, to which the defendant pleads in bar a discharge under the provisions of the insolvent law of this state.

The petition of the defendant was filed in the court of insolvency on the fourth day of October, 1881, and the certificate of discharge bears the date of September 5, 1882.

The plea is in accordance with c. 74, § 45, of the acts of 1878. It sets forth the certificate of discharge.

The question presented is, whether the certificate, which by that section is made conclusive, shows a valid discharge, and we think it does not.

The certificate shows only a compliance with the provisions of an act of the state of Maine, entitled, "An act in relation to the insolvent laws of Maine," approved on the twenty-first day of February, 1878. It contains no reference to subsequent amendments.

Now by c. 154, § 18, of the acts of 1879, § 40, c. 74, of the acts of 1878, is amended by adding at the close of section forty, these words: "If it shall appear to the court that the insolvent has in all things conformed to his duty under this act, *and all acts amendatory thereof*, and that he is entitled under the provisions thereof to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof under the seal of the court." The same provision is re-enacted in c. 199, § 18, of the acts of 1880.

The insolvent debtor must show a compliance, not merely with the provisions of the original act, but with all subsequent and amendatory acts. This has not been done. The certificate does not allege that the insolvent has complied with the provisions of the acts amendatory of the original act of 1878, c. 74, and affords no sufficient answer to the plaintiff's suit.

Exceptions sustained.
Plea bad.

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

CHARLES R. MILLIKEN *vs.* CULLEN C. CHAPMAN.

Cumberland. Opinion June 26, 1883.

Promissory notes. Sales. Caveat emptor.

Where one sells negotiable business paper in good faith without endorsing it, making no misrepresentations respecting it, and at a rate of discount indicating that the purchaser has a compensation for his risk, there is no implied warranty on the part of the seller as to the past, present or future solvency of the makers or indorsers.

In cases of sale or barter of commercial paper as of other personal property the rule of *caveat emptor* applies.

In an action to recover the purchase money for which a negotiable promissory note of the Dennison Paper Manufacturing Company was sold, the defendant requested the following instructions: "that if at the time of the sale plaintiff had knowledge of a fact obtained in conversation with A. C. Dennison materially impairing the financial credit of the Dennison Paper Manufacturing Company and which he knew or had reason to know was unknown to defendant, it was his duty to communicate such knowledge to defendant when he sold said notes to him, and if he did not do so, such concealment would be a fraud upon defendant and authorize him to rescind the trade." *Held*, that the instruction was properly refused.

Baxter v. *Duren*, 29 Maine, 434, partially affirmed, and *Hussey* v. *Sibley*, 66 Maine, 192, considered.

ON EXCEPTIONS, and report on motion to set aside the verdict.

Assumpsit to recover the amount of the following due bill: "June 27, 1879. Due C. R. Milliken, $3,625, Thirty-six hundred and twenty-five dollars. C. C. Chapman."

Writ was dated August 7, 1880.

(Declaration.)

"In a plea of the case for that whereas at said Portland, said Milliken on the twenty-seventh day of June in the year of our Lord eighteen hundred and seventy-nine sold and delivered defendant sundry notes of the Dennison Paper Manufacturing Company, said Chapman in consideration thereof then and there promised plaintiff to pay him thirty-six hundred and twenty-five dollars on demand, payment of which was then and there demanded. Yet the said defendant, though requested, has not paid the same, but neglects so to do."

At the trial the presiding justice instructed the jury upon one branch of the case as follows:

"Then I think it is claimed here in this case that there were some concealments, some keeping back of something that should have been known; that there was information obtained but a short time before this, perhaps on the very day, by conversation with Mr. Dennison, which should have been revealed to the defendant.

"Now a mere concealment in a case like that, keeping back, where there is no fiduciary relation existing between the parties, is not a matter of fraud; that is, where each party stands upon the same plane, each party acting for himself, and each party relying upon his own judgment with regard to the matter, although there may be some facts known to one party that are not known to the other, he is under no obligation to reveal them. But when information is asked and some part of the truth may be told then he is bound to tell the whole truth; for the concealment of a part truth when a part is told would in fact be a misrepresentation; so if there is any such fact in existence which was kept back, material for the other party to know, then any statements or conduct on his part tending to deceive the other party or to keep that fact or information away from him, would in fact be fraudulent; he has no right to do anything to throw the other party off the track, so to speak, to draw his attention away from this important fact or to prevent him from making further inquiry or such inquiry as he might otherwise have made.

"Therefore if there is any concealment of a material fact and here is a question raised between counsel as to whether that is a material fact or not and it is for you to decide; I say if there was a material fact there, which he kept back under the circumstances which I have stated to you, that he was telling a part of the truth in answer to a request for information, or if he was guilty of any acts or words which tended to keep the other party from making proper investigation, to prevent him from ascertaining that fact, to lead him away from it and he succeded in that matter, why so far it would be a fraud."

Other material facts are fully stated in the opinion.

William L. Putnam, for the plaintiff, cited: *Hanson* v. *Edgerly*, 29 N. H. 343; *Hammatt* v. *Emerson*, 27 Maine, 308; *Atwood* v. *Chapman*, 68 Maine, 38; *Prentiss* v. *Russ*, 16 Maine, 30; *Bank* v. *Cooper*, 36 Maine, 197; 2 Kent's Com. 490; 482*; Story's Eq. Jur. § § 207 *et seq*, 146, 149; *Cross* v. *Peters*, 1 Maine, 393; *Davies* v. *London & P. M. Ins. Co.* 8 L. R. ch. Div. 469; *Ward* v. *Hobbs*, 4 App. Cas. 26; *McCobb* v. *Richardson*, 24 Maine, 82; Story's Eq. § 150; *Biggs* v. *Barry*, 2 Curtis, 259; *Lupin* v. *Marie*, 2 Paige, 169; *Smith* v. *Hughes*, 6 (L. R.) Q. B. 597; *Kennedy* v. *Panama Mail Co.* 5 (L. R.) Q. B. 587; *Littauer* v. *Goldman*, 72 N. Y. 506; *Camidge* v. *Allenby*, 6 B. & C. 373; *Bicknall* v. *Waterman*, 5 R. I. 43; *Beckwith* v. *Farnum*, 5 R. I. 231; *Frontier Bank* v. *Morse*, 22 Maine, 97; *Whitbeck* v. *Van Ness*, 11 Johns. 409; *Day* v. *Kinney*, 131 Mass. 37; Byles on Bills, *154; *Evans* v. *Whyle*, 5 Bing. 485; Daniel's Neg. Inst. (2 ed.) § § 737, 739.

S. C. Strout and C. F. Libby, for the defendant.

This case was submitted to the jury upon the question of fraud in the sale of the notes *only*, and the matters embraced in the first three requests for instruction were not submitted to the jury, and have not been passed upon by them. These requests were pertinent to the issue, and should have been granted. The first request is based upon a *mutual mistake*, without any bad faith. The Dennison notes were sold defendant, as current paper of a running concern, reputed solvent. This is implied from the transaction as narrated by both sides, and follows from the price. In such cases, there is no contract binding upon the parties, but it is voidable, and defendant, it is admitted, did all that was necessary to rescind. *Norton* v. *Marden*, 15 Maine, 45; *McCobb* v. *Richardson*, 24 Maine, 85; *Warner* v. *Daniels*, 1 Wood. & M. 90, 107, 110; *Smith* v. *Babcock*, 2 Wood. & M. 246, 260; *Mason* v. *Crosby*, 1 Wood. & M. 342; *Doggett* v. *Emerson*, 3 Story, 700; *Daniel* v. *Mitchell*, 1 Story, 172; *Wheelden* v. *Lowell*, 50 Maine, 505; *Hammatt* v. *Emerson*, 27 Maine, 308.

The doctrine of *caveat emptor*, as applied to sales of notes, must be construed somewhat differently from its application to sales of chattels. In the sale of chattels, the purchaser can see, by inspection, the quality of the article, and so can intelligently buy on his own judgment. But in the sale of a note, inspection will only show the form of the paper. The essential thing, the ability of the maker to pay the paper, is to be learned elsewhere.

In *Baxter* v. *Duren*, 29 Maine, 434, it was held that the seller did not even warrant the genuineness of the signature, but this case has been substantially overruled in *Hussey* v. *Sibley*, 66 Maine, 196; and absolutely overruled in *Merriam* v. *Walcott*, 3 Allen, 258; *Bank* v. *Morton*, 4 Gray, 156.

Now, we may say, the seller represents the paper as genuine, and, unless sold as failed paper, he also represents it, as at the time, current paper, with mercantile credit and reputed solvency. Suppose the sale was of a horse in a pasture, at a distance, and both seller and buyer had seen the horse, well and right within a few days, and the trade was made upon the knowledge of each, without representation, when in fact, the horse died the day before, both parties ignorant of the fact — would the buyer be bound? Or if the horse had under these circumstances broken a leg, rendering him valueless, would the contract be enforceable? See *Benedict* v. *Field*, 16 N. Y. 595. *Harris* v. *Hanover National Bank*, U. S. circuit court, southern district of New York, not yet reported.

The second and third requests are based upon the failure of the Dennison Company, antecedent to the sale of the notes. Was the company a failed corporation at the time of the sale? We say, upon the evidence, that it was. A check of the company, drawn upon the Casco Bank, where it kept its deposits and had done its business for many years, was protested for non-payment at that bank on June 25, two days before the transaction between plaintiff and defendant, and was never paid, except by compromise at 25 per cent in the final settlement of the corporation.

We submit that a failure, in the legal and commercial sense, takes place when a debtor, being insolvent, recognizes that fact, and ceases to make any effort to meet maturing obligations; and

whenever this state of facts can be proved, as it is in this case, a failure is established. If it was failed paper, as we say it was, when sold defendant, then the consideration for defendant's memorandum failed, and he might rescind. He purchased living, current, unfailed paper, and received dead and failed paper. He paid, or agreed to pay, for what was never delivered to him, and both good morals and law declare him not bound to perform a promise, the consideration for which has thus failed. It is well settled law, that payment of a debt in bills, which are nothing but notes of a failed bank, both parties being ignorant of the fact, does not operate as payment. 2 Greenl. Ev. § 522; *Frontier Bank* v. *Morse*, 22 Maine, 88; *Owenson* v. *Morse*, 7 Term, 64; *Young* v. *Adams*, 6 Mass. 182; *Merriam* v. *Walcott*, 3 Allen, 258; *Hazard* v. *Irwin*, 18 Pick, 105.

The fourth request we regard as clearly good law, and should have been given, while the instruction actually given, we submit, does not accurately present the law upon this point. The instructions given are based on the doctrine of *caveat emptor*, as applied to sale of chattels, where inspection affords the means of judgment as to quality and value. *Biags* v. *Ins. Co.* 1 Wash. C. C. 506; *Elton* v. *Larkins*, 5 C. and P. 385; *Murgatroyd* v. *Crawford*, 3 Dallas, 491; *Stetson* v. *Ins. Co.* 4 Mass. 330; *Curry* v. *Ins. Co.* 10 Pick. 535; *Bridges* v. *Hunter*, 1 M. and S. 15; *Hoyt* v. *Gilman*, 8 Mass. 336; *McLanahan* v. *Ins. Co.* 1 Pet. 170; 1 Parson's Mar. Ins. 467; Kerr on Fraud and Mistake, 100, 109, 98; *Prentiss* v. *Russ*, 16 Maine, 30; *Brown* v. *Montgomery*, 20 N. Y. 287; *Mitchell* v. *Worden*, 20 253; *Pegueno* v. *Taylor*, 38 Barb. 375; 2 Parsons on Bills, 207; Barb. Story, Promissory Notes, § 389, n. 2; *Weddigen* v. *Boston Glass Co.* 100 Mass. 422; *Kidney* v. *Stoddard*, 7 Met. 252; *Hill* v. *Gray*, 1 Stark. 434; *Brown* v. *Montgomery*, 20 N. Y. 287; 2 Kent's Com. 482, 645; *Laidlow* v. *Organ*, 2 Wheat. 178; 1 Parsons on Contracts, 583, 578; *Gardiner* v. *Gray*, 4 Camp. 143, a leading case.

The principle contained in the fourth request is entirely within the reason and principle in the foregoing authorities, and should have been given to the jury, instead of the opposite instruction in fact given. *Merriam* v. *Lapsley*, 12 Fed. Rep. 458.

BARROWS, J. Assumpsit to recover the amount of a due bill, given by the defendant to the plaintiff, June 27, 1879, for $3625. The consideration of the due bill was the sale by plaintiff to defendant, who was a broker, dealing in commercial paper, of three promissory notes amounting to $3700, made on that day by the Dennison Paper Manufacturing Company, payable in one, two and three months to their own order, and by them endorsed to plaintiff in payment for pulp sold and delivered to them by a pulp manufacturing company, of which plaintiff had charge.

Defendant pleaded the general issue, with a brief statement that the sale of the notes referred to in the plaintiff's declaration as the consideration of defendant's promise, was effected by the fraudulent misrepresentations of the plaintiff, and has been rescinded by defendant. The cause having been tried upon this issue, and the verdict being against him, the defendant brings the case here upon a motion to set aside the verdict, and upon exceptions to the presiding judge's refusal to give certain requested instructions, and to adverse instructions given, touching the matters to which the requests relate.

The requests relate with a single exception to matters not put in issue by the pleadings. Apparently, the defendant being doubtful whether he had made out a defense on the ground of fraudulent misrepresentation by the plaintiff, desired to place his claim to rescind on the ground of mutual mistake, and the first three requests are based upon the hypothesis (inconsistent with the fraud alleged) that the jury would find that the plaintiff, as well as the defendant was ignorant of certain existing facts which the defendant claimed, gave him the right to rescind when they came to his knowledge. The plaintiff's right to recover, had the general issue alone been pleaded, was, upon the evidence adduced, unquestionable. The defendant's due bill was given for a valid, and to some extent, valuable consideration, there being, at the worst, *not a want*, but a *partial failure* of consideration. Strictly speaking, in order to enable the defendant to prevail upon the ground that he had a right to rescind because of the existence of material facts, of which both parties to the contract were ignorant, that matter should have been pleaded by an additional brief

statement, and the judge's refusal of the requested instructions might be justified for want of it.

But as counsel have, without objection on either side, fully argued the case on the question of the correctness of the requests and instructions, we think it best to regard the case as rightly before us, on these points.

What are the essential facts in proof here, to which the first three requested instructions were to be applied? in addition to those already adverted to — substantially, these: The plaintiff was selling the product of the pulp mill, freely to the makers of the notes up to the very day of this transaction — two car loads being then on the way to them, the price of which, however, did not enter into the notes sold to defendant. They had been large customers of the plaintiff from the time he took charge of the pulp mill, as they had been of its previous managers. They had carried on the paper manufacturing business for more than thirty years under the same management, and there was a large amount of real and personal estate, estimated by their treasurer at $500,000, apparently unincumbered standing in their names. The course of business between them and the plaintiff, was partial payment in cash, as the pulp was received, and from time to time batches of notes on different times designed to cover the balance of the account. Some of these notes had been sold by plaintiff to defendant six or eight months previous to this sale, at a considerable discount and conversation had passed between them, indicating clearly that defendant knew that plaintiff was disposed to sacrifice a portion of his profits in the pulp making business, in order to be free from risk.

At a later date, failing to agree with defendant about the discount to be made upon the sale, the plaintiff had had the notes which he took, discounted at the banks with his own endorsement. But shortly before the sale of these notes, the defendant's clerk had suggested to the plaintiff that his employer was ready again to trade for the paper. Both plaintiff and defendant were subscribers to Russell's commercial agency, upon the books of which it had appeared for months, that the Dennison Paper Manufacturing Company, was more or less pressed for money, and

slack in its payments; but in connection with this, there were details and information upon the whole favorable to their credit and probable solvency. Under these circumstances the plaintiff, who had been engaged for some days in making preparations for the opening of a mountain house, largely resorted to by pleasure travel, which he was carrying on, fell in with the treasurer of the Paper Manufacturing Company, on board the cars on his way to Portland, called on him to step into his office on his way up town, and give him notes as before for about the balance of his account, asked him how they were getting along, and was informed that they were doing as well as usual, except that their selling agent in New York who had just been at the mill, had demurred about accepting for $5000, which they had asked him to accept to carry them through the month, but had finally consented on receiving the assurance of the superintendent at the mill, that they could make it good the next month. The company had frequently before had similar accommodation from their selling agent. On their arrival in Portland the treasurer gave the plaintiff a batch of notes, and the plaintiff took them to the defendant's office, and after a brief negotiation, sold three of them to the defendant, without mentioning the fact that had been communicated to him that the makers' selling agent had hesitated about accepting for them as above mentioned, and only consented to do so on the assurance of the superintendent that it would be made good the following month. The sale of the notes to the defendant was made at a discount of twelve per cent, while the going rates for prime commercial paper was from three and one-half to four and one-half per cent.

In point of fact the selling agent determined, on that very day, not to give the accommodation acceptance he had previously promised, so notified the superintendent, sent a mortgage for $100,000, which he had had for a number of months on the mill property to be recorded, and, thereupon, the same afternoon, after the sale of the notes to the defendant, the treasurer gave up the attempt to meet their paper then maturing, and one of their notes for $1500 or more, went to protest, and ultimately they paid their creditors only twenty-five per cent. The defendant hearing

of the failure the next morning, refused to pay the due bill, offered to return the notes, and, it is admitted, did all that was necessary to rescind the bargain, if he had the right to rescind it. It further appeared that two days previous to this, a check upon a Portland bank, where the Dennison Paper Manufacturing Company had been in the habit of keeping a deposit, dated June 12, 1879, for less than a hundred dollars which had been sent to one of their distant creditors, and had been passing from hand to hand till June 25, was protested for non-payment, but it did not appear that any notice of the fact could have reached the makers of the check on the 27th.

Whether there was any actual misrepresentation on the part of the plaintiff, in order to procure the sale, was a question upon which the evidence was directly conflicting — the testimony coming from witnesses, so far as we can judge, of equal credit and good standing, and apparently supported on either side by corroborating circumstances of which we doubt not counsel made all practicable use in their arguments to the jury. The verdict must be regarded as settling this point against the defendant, on whom rested the burden of proof, provided the jury were rightly instructed. Upon the foregoing proof, the defendant requested certain instructions, the essential parts of which are as follows:

1. "That if in the sale of the notes both parties acted under a mutual mistake, as to one or more facts material to the transaction, and defendant was injured thereby, the contract was voidable and defendant might rescind it."

2. "That if at the time of the sale of said notes the makers were insolvent, and had, in fact, failed, and the paper was worth but a small per centage of its face, both plaintiff and defendant being ignorant of the fact, the contract of sale would be voidable and defendant might rescind it."

3. "That if the jury find that on June 25, two days prior to the sale of the notes, a check of the makers had gone to protest at the Canal bank, in this city, and still remained unpaid at the time of said sale, this is sufficient evidence of the failure of the makers at that time, to warrant the jury finding that the notes were the notes of a failed corporation at the time they were purchased."

These instructions were not given, but the case was put to the jury for determination upon the issue of fraud in the procurement of the sale by the plaintiff, which was the main ground of defence. Manifestly the instructions, if given, would have tended to weaken the defendant's position before the jury upon the question of fraud, for they are predicated upon the hypothesis that the jury would find that the plaintiff, as well as the defendant, was ignorant of the real fact, with regard to the solvency of the makers of the notes, which would be equivalent, under the circumstances, to absolving him from the charge of fraud, and would negative all motive on his part for its commission.

But what we have undertaken to determine is, whether upon the evidence here adduced they present the correct rule for the determination of the rights of the parties — in fine, whether mutual ignorance or mistake as to the actual solvency and pecuniary ability of the makers of notes so sold at the time of the sale, would give the purchaser the right to rescind, which is here claimed.

It is plain that if the doctrine contended for by the defendant, as to the effect of mutual ignorance of material facts of the parties to a sale of negotiable paper, be carried to its logical results, the actual pecuniary condition of the promisors at the time of the sale must be open to inquiry, for that is the one fact above all others "material to the transaction," in the sense in which defendant's counsel use the phrase. But unless the doctrine can be maintained even to this extent, the first requested instruction was rightly refused, for, without specification of the nature of the facts that might be regarded as giving the defendant the right to rescind, it would be liable to mislead the jury. Even conceding it to be a correct statement of an abstract principle, it would not be an appropriate instruction in such a case from the manifest tendency it would have to mislead the jury when they came to apply it in the consideration of the case. But nobody claims that the seller of negotiable paper, who does not endorse it, but without fraud sells it for what it will bring in the market, guaranties that the makers are actually solvent, though some cases go so far as to hold that he does guaranty that up to the

time of the sale, there shall have been on their part no open act of failure or bankruptcy, or other matter notoriously affecting their credit. It is well known that in the great majority of cases, especially in cases of the failure of those who have been long in business, the decay is gradual, the struggle against adverse fate and insolvency protracted, and that of all their commercial paper which is afloat when they finally break, hardly a piece can be found that was given when they were in fact solvent, but all, or nearly all, was issued in the prolonged effort to maintain their credit until some favorable turn should set them right.

It would seem to be an anomaly to hold that although he who procures a note to be discounted with his endorsement, is chargeable with the debt only upon due presentment, demand, and notice, still one who sells it outright in good faith, for what it will bring without his endorsement, can be held, practically almost as a guarantor without demand or notice, on the ground that he impliedly warrants that the makers are solvent at the time of the sale, when there is such a predominance of chances, that it will turn out they were not so, if the paper is not met at maturity, and that the adjustment of their affairs will develop the fact.

The cases which have a bearing, more or less direct upon the questions here raised, are so numerous that to attempt a review of them, individually, would protract this opinion to an unreasonable and unnecessary length.

The ultimate object of inquiry is, what does the seller of commercial paper, who disposes of it in good faith in the market, without becoming a party to it, and not in payment of a debt payable in money, then, or previously contracted, impliedly warrant — on the failure of which the purchaser is entitled to rescind the trade?

There is a class of cases like *Baxter* v. *Duren*, 29 Maine, 434, 441, and authorities there cited, which hold that the only implied warranty is, that the seller owns or is lawfully entitled to dispose of the paper — that "the law, respecting the sale of goods, is applicable," and *caveat emptor* the rule. Whether this statement of the principle would now be held to exclude a warranty of the genuineness of the signatures is not a question arising in this case.

It may be that we should now say that the promise of the apparent parties, was the essence of the thing sold, and that a mutual mistake as to its existence would be a mistake as to the identity of the subject of the sale, and good ground of rescission. We have no occasion to consider that question here; but the defendant's counsel are in error in supposing that *Baxter* v. *Duren*, was overruled in *Hussey* v. *Sibley*, 66 Maine, 192 - 196. That was a case of attempted payment upon an existing debt by a town order, which was void for want of authority in the makers, and though in adverting to *Baxter* v. *Duren*, some authorities holding doctrines adverse to the extension of the principle to cases involving the genuineness of the signatures are cited, and some remarks made which may be construed as approving them, still the decision in *Hussey* v. *Sibley*, is carefully placed, (see p. 196) "upon the ground that the order *having been delivered in payment af an existing debt*, and proving invalid, fails to operate as a payment." Thus the court still maintains the distinction asserted in *Baxter* v. *Duren*, between negotiable paper transferred without endorsement in payment of a debt due or then contracted, and transactions where the paper is sold or bartered as other goods and effects are.

We have no occasion then to give further attention in this connection to the numerous class of cases in which the note was simply transferred in payment of a debt. They afford no rule for cases of sale. The creditor, who is entitled to cash payment, gets no consideration and very properly therefore, is not required on the reception of what is rather a means of payment than actual satisfaction, to assume any risk. If the means fail the end is not reached, and the courts rightly hold that there is no payment. Not so with a sale, in which the price is affected by the risk, and the purchaser gets perhaps, as in the present instance, three times the market rate for prime commercial paper, by way of discount in consideration of the hazard greater or less which he assumes. The condition of the promisor as to solvency and pecuniary ability affects, not the essence, but the quality of his promise which is the subject of the sale; and to all such cases we are content to apply the rule thus enunciated

by the Rhode Island court in *Bicknall* v. *Waterman*, 5 R. I. 43: "The well known common law principle applicable alike to sales and exchanges of personal things, is that fraud or warranty is necessary to render the vendor or exchanger liable in any form for a defect in the quality of the thing sold or exchanged. Applying this principle to the sale or exchange of the note of a third person transferred by endorsement without recourse or by delivery merely, the vendee or person taking it in exchange, takes the risk." And in *Beckwith* v. *Farnum*, *Id.* 230, the same court say: "The barter or exchange of a promissory note endorsed without recourse for cotton or any other species of merchandise, carries with it no implied warranty of the past or future solvency of the maker of the note. The rule *caveat emptor* applies in the absence of fraudulent representation or concealment."

For obvious reasons these doctrines have no application to cases of the transfer of bank notes or bankers' demand notes used as currency from one party to another, whether in payment or exchange. It is of the essence of such paper that the makers should be in good credit. It is no longer currency when they fail, and the case is analogous to the sale of an animal which, unknown to the contracting parties is dead, or destroyed to all intents and purposes by the breaking of a leg, before the contract is complete. But there is an essential difference between paper designed to pass as money, and ordinary commercial paper which is the subject of trade and speculation between brokers and their customers.

The case of *Frontier Bank* v. *Morse*, 22 Maine, 88, was a case of simple exchange of currency supposd to be equally valuable for the convenience of the parties. No element of risk or compensation for risk assumed, entered into the transaction. It affords no rule for the regulation of brokers' purchases of business paper. There the risk of insolvency is an important element in fixing the price, as we see in the transaction under consideration. It is precisely because the broker knows that he assumes this risk, that he demands it may be three times the going rate of discount and compensation for the use of money, and the seller accedes to the demand because he is

willing to sacrifice a portion of his profits in order to realize at once and with certainty, the remainder. That these parties so understood it, appears from the account given by themselves and the defendant's clerk, of the significant conversation which occurred at the time of the first dealings between them in this paper. The defendant's version of it is that plaintiff told him "that he came in to see if he could sell some paper that he might take in the course of his business — that he had a good commission and he thought he should like to sell the paper and make, I think the expression he used was, "a sure thing of it." It is idle to argue in the face of such a communication between the parties, that the seller who submitted to an exaction of thrice the going rate upon prime paper in order "to make a sure thing of it," impliedly warranted anything about the solvency of the makers of the paper he was selling. He warranted nothing but good faith and the right to sell; and the requests asserting a right to rescind on the ground of mutual mistake, were rightly refused. Not even equity would interpose in such a case. *McCobb* v. *Richardson*, 24 Maine, 82. What we mean to hold is that he who in good faith sells negotiable paper for what he can get without endorsing it, or making any false representations respecting the solvency of the makers, warrants nothing as to their condition in that respect, past, present or to come. The court that ignores as too shadowy, the distinction between paying a debt in failed paper and selling the same in good faith for what the buyer is willing to give, will inevitably find itself involved in ascertaining the still more shadowy difference it makes to the purchaser of paper that has a month to run, whether the maker fails on the day of the purchase, or the day before, or the day after — or as in *Harris* v. *Hanover Nat. Bank*, U. S. Circuit Court, Southern District of New York, (not yet published) which we have seen but cannot concur in, will find itself perplexed to determine whether there is a material mistake of fact in a sale of paper in New York at eleven o'clock because it turns out that (unknown to the parties) an attachment was put on the property of the maker in New Orleans at half past ten New York time. We think it might promote litigation,

but would seriously embarrass other business transactions, if the validity and certainty of the latter were made to depend on distinctions so subtle.

We prefer to rely upon the earlier wisdom of the cases we have cited, and *Whitbeck* v. *Van Ness*, 11 Johns, 409; *Evans* v. *Whyle*, 5 Bing. 485; Byles on Bills, *154; Daniells on Negotiable Instruments, 2d Ed. § § 737 *and seq.*

It remains only to determine whether the fourth requested instruction was properly refused and whether the instructions given upon the point therein referred to were correct. The request was that the jury should be instructed "that if at the time of the sale, plaintiff had knowledge of a fact obtained in conversation with A. C. Dennison, materially impairing the financial credit of the Dennison Paper Manufacturing Company, and which he knew or had reason to know was unknown to defendant, it was his duty to communicate such knowledge to defendant when he sold said notes to him, and if he did not do so, such concealment would be a fraud upon defendant and authorize him to rescind the trade." This relates to the fact before mentioned that the selling agent of the company had hesitated about giving them the $5000 accommodation acceptance and had only agreed to do it upon the assurance of the superintendent that it would be made good from the product of the mill the following month. It might be questionable whether this information was not better adapted to lull, than arouse the suspicions which one who was cognizant of the matters long before spread upon the records of the Commercial Agency might entertain. The ultimate consent of the selling agent might well be supposed to indicate continued confidence on the part of those best acquainted with the actual standing of the company. But if it be conceded that this was a fact "materially impairing the financial credit" of the company, still the request was fatally defective, and if given it would have furnished the plaintiff good ground of exception. It is not predicated upon the idea that the fact was designedly withheld by the plaintiff, and it deals with an omission which might be merely accidental, occasioned by the haste of the transaction, or the want of perception on the

part of the plaintiff of the importance of the information in the same manner as if it were designed and fraudulent, and declares that the simple failure to mention every fact within the plaintiff's knowledge which he knew or ought to have known, would be regarded as materially impairing the credit of the company, would be a fraud authorizing a rescission if the plaintiff *had reason to know* that it was unknown to the defendant — thus making the jury, acting in the light of subsequent events, the judges of what the plaintiff ought to have regarded as facts detrimental to credit and probably unknown to defendant, and not requiring them to find that he purposely withheld the information in order that defendant might be deceived. Under such a rule it would be impossible for a dealer to know whether he had sold an article or only made a contract voidable at the option of the other party, if he became dissatisfied with his bargain. The seller's good faith and honest intention count for nothing if he carelessly omits to tell everything he knows that might be said in disparagement of the article he has to dispose of, whether it occurs to him at the time or not, in case there is reason to suppose the purchaser does not know it. There is no such impracticable rule of law. On the other hand, it is *caveat emptor* where there is neither fraud nor warranty; and the intention to conceal — the fraudulent purpose, — the idea present in the mind of the seller that the purchaser has not equal means of information in respect to the fact — must be found in order to give the vendee a right to rescind on such a score.

This is the doctrine approved in *Prentiss* v. *Russ*, 16 Maine, 30, cited for defendant. In *Baglehole* v. *Walters*, 3 Camp. 154, all the elements which are called for in *Prentiss* v. *Russ*, to make a case of fraudulent concealment, were present. The owner of the vessel had had her on the ways and discovered that the bottom was rotten. He could not but know that this was a material fact, but he replaced her in the water where the purchaser could not have the same opportunity for inspection, and it was upon this state of things that it was held that though he sold "with all faults," his concealment of the knowledge he

himself had obtained, must be regarded as fraudulent. Here was an act done to prevent the purchaser from getting the knowledge which the seller had and withheld.

Doubtless in a case like this, if the seller of commercial paper knows that the maker has failed or is about to fail and purposely conceals his knowledge from the vendee to whom the same sources of information are not accessible, it would be held to be a fraud. But it must be borne in mind that the fraudulent concealment which will affect a sale of goods or of commercial paper like this in which both parties stand in the main upon an equal footing and "at arms' length" as the phrase is — neither having anything but casual and fortuitous advantages, is not to be tested by the same rules that apply to those standing in exceptional relations to each other, requiring the *strictissima fides*, which is expected as between trustee and *cestui que trust*, counsellor and client, and those sustaining other confidential relations, or those contracting with reference to marine insurance, suretyship and the like. Cases of these descriptions are governed by their own rules which have no application to ordinary business transactions between parties standing on equal footing, to whom the common law says, *caveat emptor*. There was nothing in the case before us that would justify the giving of the requested instruction.

The subject of fraudulent concealment has been much discussed; and a reference to a few well considered cases (omitting those that for one cause or another fall within exceptional classes) and to the best text writers will suffice to show that the instructions given upon this point were sufficiently favorable to the defendant. *Cross* v. *Peters*, 1 Maine, 376; *Hammatt* v. *Emerson*, 27 Maine, 308, 326, 327; *Hanson* v. *Edgerly*, 29 N. H. 343; *Ward* v. *Hobbs*, Ct. of Appeals, 3 Q. B. Div. 150; *Burgess* v. *Chapin*, 5 R. I. 225; *Dambmann* v. *Schulting*, 75 N. Y. 55; *Peoples Bank* v. *Bogart*, 81 N. Y. 107-109; Story's Eq. Jur. § § 207, *et seq.*

Motion and exceptions overruled.

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

GEORGE LEWIS

vs.

MARTHA E. SMALL, Administratrix on the estate of ELISHA SMALL, deceased.

Sagadahoc. Opinion June 27, 1883.

Promissory notes. Mortgage. Interest.

When a mortgage has been assigned and the assignee enters into possession, he cannot claim that interest should be added to the mortgage debt, and that sum constitute a new principal upon which interest is to be cast.

ON EXCEPTIONS.

Assumpsit. The plea was general issue. The verdict being for the defendant, the plaintiff alleged exceptions to certain instructions as stated in the opinion.

W. Gilbert, for the plaintiff.

C. W. Larrabee and F. Adams, for the defendant.

APPLETON, C. J. The defendant's intestate, as assignee of a mortgage, took possession of the mortgaged premises, receiving the rents and profits and retaining possession to the time of his death.

This suit is brought to recover an alleged excess of rents and profits received by defendant's intestate above the amount due on the mortgage.

The mortgage debt bore interest from the beginning and payment was overdue, and no interest had been demanded or paid except by rents and profits. There was evidence tending to prove that the net rents and profits exceeded the amount of the mortgage debt, and evidence to prove they did not.

The presiding justice instructed the jury "that Mr. Small (defendant's intestate) would be entitled to six per cent interest

on the mortgage debt at that time up to the time he took possession. . . . Whatever you find that sum to be then, Mr. Small would be entitled to interest for that number of years and months added to the amount of the mortgage debt."

He further instructed the jury that they should "commence and compute the interest on the whole before Small took possession, using that as a principal from that time and compute the interest up to the time when the annual interest of the first year's occupation should be considered as a payment and so on through."

The instructions given were erroneous. The assignee of the mortgage was only entitled to the note and interest thereon to the time of its redemption. He had no right to cast interest to the time he took possession and make that a new principal upon which to cast interest. He had no right to compound interest.

It is true, it was held in *Jackson* v. *Campbell*, 5 Wend. 572, that when a previous mortgage is paid and an assignment is obtained with the concurrence of the mortgagor, the assignee is entitled to interest upon the sum paid, as well upon the interest as the principal. But this principle, if sound, does not apply to the case at bar. Here, there appears no concurrence of the mortgagor.

Exceptions sustained.

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

SOPHIA B. STEVENSON *vs.* EDMUND A. FULLER.

Waldo. Opinion June 30, 1883.

Contract. Breach. Damages. Levy.

F agreed in writing under seal that E should give to S, or her heirs, a good and sufficient bond for a quitclaim deed of the place on which S lived, after the expiration of three days from that date, or at any time when called for after said three days, and therein specified what should be the conditions of the bond. No bond was ever delivered to S, though a demand therefor was made upon E and F, each of them. *Held*, That the failure to deliver the bond,

constituted a breach of contract for which F was liable, the measure of damages being the value of the land, subject to the incumbrances to be removed — the value of the equity of redemption of the land.

A levy is fatally defective where the appraisers describe certain premises, and set off all except a portion which is only described by giving two of its boundary lines, the officer making the appraisement a part of his return.

ON REPORT.

Debt on a contract under seal, the writ bearing date October 4, 1881. The plea was general issue, with brief statement setting up performance, and if there had been a failure that the plaintiff had suffered no damage.

The opinion states the material facts upon which it rests.

Thompson and Dunton, for the plaintiff, cited: *Hill* v. *Hobart*, 16 Maine, 164; *Warren* v. *Wheeler*, 21 Maine, 484; *Russell* v. *Copeland*, 30 Maine, 332.

William H. Fogler, for the defendant.

The deed from the plaintiff to Robert Elliot, although absolute in form, was, in fact, given as security for money loaned, and other indebtedness.

The transaction, independent of the obligation given by the defendant to the plaintiff, constituted an equitable mortgage in which the plaintiff was the mortgagor, and Robert Elliot was the mortgagee.

The right of the plaintiff to redeem the premises conveyed, by payment of the debt or debts, to secure which the conveyance was made, existed, independently of the obligation given by the defendant, and this right to redeem the plaintiff still possesses. *Stinchfield* v. *Milliken*, 71 Maine, 567; *Peugh* v. *Davis*, 96 U. S. 332; *Campbell* v. *Dearborn*, 109 Mass. 130; Jones on Mortgages, § 282, *et seq.*

If Elliot had given the plaintiff such a bond as the defendant's obligation describes, the transaction would have constituted a mortgage merely. The plaintiff's right to redeem and Elliot's obligation to release his title upon payment of the amount due, would have existed the same as now. The plaintiff's right would have been no stronger, Elliot's obligation no more binding.

Admitting that there has been a breach of the defendant's obligation, the plaintiff has thereby suffered no damage. She has the same interest in the premises conveyed by her, the same right to redeem, and to compel the mortgagee to account, and the same power to compel a release on payment of her debt, as she would have had, if Elliot had executed and delivered to her, within the three days, the bond described in defendant's obligation. She is therefore entitled to merely nominal damages. *Hadley* v. *Baxendale*, 26 Eng. L. and Eq. 398; *Miller* v. *Mariner's church*, 7 Maine, 51; *Grindle* v. *Eastern Express*, 67 Maine, 317; *Thoms* v. *Dingley*, 70 Maine, 100; *Derry* v. *Flitner*, 118 Mass. 131; *Pollard* v. *Porter*, 3 Gray, 312.

Nominal damages are adequate, because: (1,) The plaintiff has a perfect remedy against the representatives of Robert Elliot, and it is her duty to first avail herself of such means of protecting herself from loss. See cases last cited. (2,) As neither the administrator nor devisee of Robert Elliot are parties to this suit, a recovery by the plaintiff will be no estoppel to the maintenance of a bill in equity to redeem against the representatives of Robert Elliot. Bigelow on Estoppel, pp. 46 *et seq.* and 75. (3,) Mrs. Elliot, as devisee of Robert Elliot, has executed a bond corresponding in all particulars to the stipulations of defendant's obligation, and, the plaintiff being out of the state, has tendered it to her attorneys. This offer is a proper element to be considered in estimating the damages.

APPLETON, C. J. On April 20, 1875, the plaintiff gave a warranty deed of the Sawyer place to Robert Elliot, as security for a yoke of oxen, and one hundred dollars to be delivered to her husband, but no bond was given back.

On the same day this defendant gave this plaintiff a guaranty in the following terms:

"I, Edmund A. Fuller, of Freedom, hereby agree to guarantee, in the sum of two thousand dollars, to be paid to Mrs. Sophia B. Stevenson, or her heirs, that Robert Elliot or his heirs shall give to said Sophia B. Stevenson, or her heirs, a good and sufficient bond for a quitclaim deed to the Sawyer place, on which she now lives, after the expiration of three days from this date, or at any

time when called for after three days; said bond shall specify the time of redeeming the said property, and the conditions shall be the payment of all sums to the said R. Elliot, and Elliot and Fuller.

"Also that D. D. Stevenson shall have a yoke of cattle to work on his place. Also one hundred dollars.

Edmund A. Fuller, (L. S.)"

"Montville, April 20, 1875.

"Witness, Samuel N. Stevenson."

The oxen and the money were delivered in pursuance of the defendant's contract, but no bond was ever offered by the defendant, or executed by Elliot, though a demand was made on each.

The suit is upon the defendant's contract. It was his duty to deliver the required bond. It was never done. His contract has not been performed. He is liable for its breach. *Prentiss* v. *Garland*, 65 Maine, 156.

There being a breach of the defendant's contract, the plaintiff is entitled to damage. If the contract had been that Elliot should deliver stock, or a horse, or any specific article, the damage would be the value at the time and place specified of the article to be delivered. But it matters not what was to be delivered, whether a bond or stock. The true measure of damages is the value of the land, subject to the incumbrance to be removed. The bond, if given, would have been equivalent in value to the equity of redemption. For such value the plaintiff is entitled to recover.

It has been urged that the plaintiff might have obtained redress by proceedings in equity. Whether she could or could not, may be uncertain. She was under no obligation to risk the expense and uncertainties of litigation. This is a suit at common law. All the defendant had to do was to perform his contract. That done, he would not be liable in damages. It is urged in reduction of damages that the plaintiff, by possible litigation, might have relieved the defendant from the performance of his contract, or from damages arising from its non-performance. But she was under neither legal nor moral obligation to litigate with a third party, at her own expense, but for his benefit. This suit must

be decided upon the legal rights of the parties arising under it, and not upon the possible results of equitable proceedings, which the defendant could not require the plaintiff to bring, especially when he neglected or refused to procure and deliver the bond, which would have been conclusive evidence in such proceedings. *Cooper* v. *Page*, 24 Maine 72; *Prentiss* v. *Garland*, 65 Maine, 156.

It is in evidence that on November 11, 1873, one Benjamin Williams commenced a suit against this plaintiff for a debt on which her real estate was attached — that at the following April term her husband, Daniel D. Stevenson, was summoned as a party, and that the action proceeded to judgment — that on such judgment an execution issued, and that a portion of the Sawyer place was taken by levy on February 5, 1875, and appraised at $705.87. The judgment was against both defendants, and the levy was made on the premises, as "the estate in fee simple, of Sophia B. Stevenson and Daniel D. Stevenson," though the title was in the wife. The validity of the levy becomes of importance in the assessment of damages.

The appraisers describe certain premises which they examined, from which they except and reserve "a piece of land, and the buildings thereon, commencing at said road, at the easterly end of a forty foot barn, standing on that portion of the land hereby set off; thence northerly on a line with the easterly end of said barn ten rods; thence easterly on a line parallel with said road to land of said John McFarland." It will be perceived that but two sides of the portion excepted and reserved from the levy are given. The other sides, their length of line and their courses are left to the imagination. The officer makes the appraisement a part of his return, which it will be seen is fatally defective — no boundaries being given for the land excepted from the levy.

The plaintiff's estate was subject to taxation, and to the advances made at the date of the conveyance to Elliot. She remained in the occupancy of the premises up to May 1, 1881, when possession was taken of the same.

The farm, according to the evidence, was worth twelve hundred dollars, when the plaintiff left the premises October, 1880.

From this sum is to be deducted the amount of taxes paid by defendant and interest thereon, and the further sum of two hundred and sixty-five dollars and interest from the date of the defendant's contract, April 20, 1875, to October, 1880. Interest is to be calculated on the balance thus ascertained, to the date of the judgment, and execution to issue for the balance so found.

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

INHABITANTS OF WARREN, petitioners,

vs.

INHABITANTS OF THOMASTON.

Knox. Opinion July 5, 1883.

Boundary lines. Channel. Special stat. 1864, c. 307.

When the channel of a river is named as the boundary between two towns, the line is the thread of the channel.

By special stat. 1864, c. 307, the thread of the channel of Georges river forms a part of the boundary line between the towns of Warren and Thomaston.

ON REPORT.

This was a petition dated March 24, 1882, for the appointment of commissioners to determine the true line between the towns, the same being in controversy, under the provisions of R. S., c. 3, § 43. The commissioners reported that, "Being of the opinion that the line cannot be ascertained and determined until the question of law is settled," submitted it to the court for instruction; thereupon a report to the law court was agreed upon.

C. E. Littlefield, for the petitioners, cited: *Winslow* v. *Kimball*, 25 Maine, 493; *Ingalls* v. *Cole*, 47 Maine, 253; *Collins Granite Co.* v. *Devereaux*, 72 Maine, 424; *Holden* v. *Veazie*, 73 Maine, 315; *Perkins* v. *Oxford*, 66 Maine, 545; *Oxton* v. *Groves*, 68 Maine, 372; *Low* v. *Tibbetts*, 72 Maine, 94; *Cottle* v. *Young*, 59 Maine, 105; *Johnson* v. *Anderson*,

18 Maine, 77; *Pike* v. *Munroe*, 36 Maine, 312; *Robinson* v. *White*, 42 Maine, 217; *Newhall* v. *Ireson*, 8 Cush. 595; *Kingston* v. *Louw*, 12 Johns. 252; *Thomas* v. *Hatch*, 3 Sum. 170; *McCready* v. *Virginia*, 94 U. S. 391; *Browne* v. *Kennedy*, 9 Am. Dec. 503.

A. P. Gould, for the respondents.

The same rules of construction in the matter of boundaries apply in acts of incorporation of towns which prevail in the construction of deeds and grants. *Perkins* v. *Oxford*, 66 Maine, 545. "To," "from" and "by" are terms of exclusion in the construction of deeds in determining the boundaries of the land granted. *Bradley* v. *Rice*, 13 Maine, 198; *Robinson* v. *White*, 42 Maine, 209; see also 2 Wash. Real Prop. 679, 680.

In *Pike* v. *Monroe*, 36 Maine, 309, it is held, that a deed beginning at a certain monument and "running from thence down the river fifty rods, bounds the lot conveyed, on the river; and if the river is a fresh water stream, it conveys the land to the centre." "But if it is a navigable river, in which the tide ebbs and flows," it extends to low water mark, citing: *Hartsfield* v. *Westbrook*, 1 Haywood, (N. C.) 258; *Rogers* v. *Mabe*, 4 Dev. N. C. 180; *Buckley* v. *Blackwell*, 10 Ohio, 508; *Harramond* v. *Glaughon*, Taylor's R. 136; *Kingston* v. *Louw*, 12 Johns. 252. As applied to tide water streams these cases exclude the stream. See also *Handly's Lessee* v. *Anthony*, 5 Wheaton, 375.

By the above rules of construction the Thomaston line clearly stops when it gets to the channel of George's River and does not go to the centre. And it runs thence by the channel, which is by the eastern edge of it. No part of the channel is in Thomaston. Before the act of 1864, the whole of the river was in Warren. That act set off a portion of Warren to Thomaston, if it had any effect. No part of the river below low water mark has ever been set off from Warren.

The change of words in describing the new line in the act of 1864, aids in the construction of it.

"Beginning in the *center* of the channel of Oyster river. . . following down said river *in* the channel *to* the channel of Georges

river, thence down said channel," &c. Why this change of language when the line reached Georges river, if it was intended to establish the boundary in the center of the channel, as it had done in Oyster river? The change is too significant to be disregarded.

APPLETON, C. J. By c. 307, § 1, of the acts of 1864, entitled, "An act to change the town line between Thomaston and Warren," it is provided that "the town line between the towns of Thomaston and Warren shall be established as follows: Beginning in the centre of the channel of Oyster river, below Elder point, near the head of tide water, where the town lines now cross said river, and following down said river in the channel to the channel of Georges river; thence down said channel, till it intersects the town line where it crosses said Georges river."

The question to be determined, is the meaning of the words, "to the channel of Georges river; thence down said channel, till it intersects the town lines, where it crosses said Georges river." Is the boundary line between these towns the thread of the channel — its central line, or is it the exterior line of the channel where the Oyster river first comes in contact with it?

When the line runs "to the road thence by the road," the grant is to the centre of the road, even though the measurement of distances would extend only to the side of the road. *Oxton* v. *Groves*, 68 Maine, 371. A grant of land bounded on a highway, carries the fee in the highway to the centre, unless the terms of the conveyance unequivocally exclude such construction. *Low* v. *Tibbetts*, 72 Maine, 92. Nothing short of an express intention to exclude the soil of the highway will have such effect. *Salter* v. *Jonas*, 10 Vroom, 469; *Paul* v. *Carver*, 26 Penn. 223.

In case of fresh water streams, when such stream is the boundary, the deed passes the fee to its centre. The words to the stream, thence up or down the river, in a deed pass a title to the thread of the stream. *Rice* v. *Monroe*, 36 Maine, 309. The general rule is, that when the river is the boundary, the grantee takes *usque ad filum aquæ*, unless the river be expressly excluded from the grant by the terms of the deed. *Luce* v. *Carley*, 24 Wend. 451.

Indeed the authorities are uniformly to the effect that when a grant runs to a highway or river, and thence up or down the same, the title passes to the centre of each. *State* v. *Canterbury*, 28 N. H. 195; *Rix* v. *Johnson*, 5 N. H. 520.

The line, in the case under consideration, runs not by Georges river, but to and then down its channel. The channel is the deepest part of the river. It is the navigable part — the water road over which vessels pass and repass. It is the highway of commerce. Had the line run to the river and down the river, the boundary would have been the thread of the stream — the *filum aquae*. But, the thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water. The channel and the thread of the river are entirely different. The channel may be one side of the thread of the river or the other. The legislature exclude the idea of the thread of the river as the boundary and establish a totally different one — the channel of the river. A draw bridge is required by the necessities of navigation. Hence, not the river, but the channel is made the boundary, so that the burden resting upon these towns may thus be equalized.

The line as established does not run to a stake. It does not run to the river. It runs to the channel of the river — not "to the margin" of the channel — not "by the side of" the channel — not "by the line of" the channel, (these expressions, "by the margin," "by the side of," "by the line of," have been held in cases of a highway to pass title to the exterior line of the way, and not to its centre), but to the channel as a unit, as a totality. It runs to the highway of vessels. The channel, as a whole, is the dividing line, and each town is bounded by the centre line thereof. When a line runs "to a road and thence by the road," "the road," observes SHAW, C. J., in *Newhall* v. *Ireson*, 8 Cush. 595, "is a monument; the thread of the road, in legal contemplation, is that monument or abuttal. Land may, no doubt, be bounded *by the side* of a highway, but it must be done in clear and distinct terms to control the ordinary presumption." Whether the highway be by land or water, the same rule of construction must

apply. When the river is a boundary, the thread of the stream is the dividing line. When the channel, as here, is the boundary, the thread of the channel is constituted the boundary. The *Cold Spring Iron Works* v. *Tolland*, 4 Cush. 492.

The purpose of the legislature was to change the old and establish a new line between these towns. The Georges river is not made the boundary, because, if so, the thread of the stream would be the dividing line between them, and the thread might have the channel on one side or the other, and thus impose unequal burdens on the towns. Hence, after commencing in the centre of the channel of Oyster river, then following said river in the channel *to* the channel of Georges river, the line runs down said channel, till it intersects the town line, when it crosses said Georges river. It does not run to the bank — to monuments on the bank — to the side of the channel as a monument. The channel being a monument, the divisional line is the centre, precisely as if it had been a river *Boscawen* v. *Canterbury*, 25 N. H. 188; *Plymouth* v. *Holderness*, 28 N. H. 217. Whether the tide ebbs and flows is a matter having no bearing on the question, the legislature having uncontroled power over the boundaries of towns.

The result is, that the thread of the channel of Georges river is the dividing line between Warren and Thomaston.

BARROWS, DANFORTH and LIBBEY, JJ., concurred.

SYMONDS, J., concurred in the result.

VIRGIN, J., did not concur.

LEMUEL NICHOLS *vs.* ALFRED BAKER.

Penobscot. Opinion July 5, 1883.

Promissory notes. Fraud. Evidence.

Where a note is procured under the fraudulent pretense of selling merchandise, to be subsequently delivered, the person procuring the note not intending to deliver the property at all, but using the form of negotiation about it merely as an instrument of fraud, the note, as between the original parties, is void. It is also void in the hands of a third party who received it with a knowledge of its fraudulent procurement.

For the purpose of showing that such a note was fraudulent in its inception, that the design was not to deliver the property sold, it was held admissible in an action upon the note, to show that the party who procured it had substantially similar transactions about the same time with others, in which instances, the property was not delivered.

It was also held admissible to introduce the writings made in such other transactions to show by the comparison of handwriting, the identity of the individual engaged in the several transactions.

Dissenting opinion on the motion by APPLETON C. J., and BARROWS, J.

ON EXCEPTIONS, and motion to set aside the verdict.

Assumpsit on a promissory note of the defendant for one hundred and eighty dollars, dated June 7, 1879, payable in three months. The writ was dated September 9, 1879. The plea was the general issue. The verdict was for the defendant.

The facts sufficiently appear in the opinions.

Humphrey and Appleton, for the plaintiff.

The testimony of witness, Blagden, relating the circumstances of his giving a note to the same parties who procured the defendant's note, and that he hadn't received the pruning shears, was inadmissible because the jury could not limit its application.

Suppose these same men committed these two distinct crimes, we respectfully insist that it was not competent to prove the second for the purpose of proving or giving intensity to the first. In the language of MORTON, J., in a similar case, (*Jordan*

v. *Osgood*, 109 Mass. 461) "the effect of such proof may be to produce such a state of mind in the jury to whom it is addressed, that a less weight of testimony satisfies them than would otherwise be necessary to produce conviction."

The wrong done an innocent plaintiff by the admitting of such testimony, cannot be better illustrated than by this very case. Suppose a single individual is defrauded into giving his note, and this note, before maturity, goes regularly into the hands of an innocent purchaser. In a suit between such purchaser and the defrauded maker, a jury would without difficulty decide, as the law decides, that the defrauded maker must pay the innocent purchaser. But when the case is no longer a single case, but is duplicated and multiplied, the feelings of sympathy and indignation on the part of jurors may very likely overbear considerations of duty and law. See remarks of HOWE, J., in 13 Allen, 179.

But in this case Blagden was permitted to testify what two persons stated to him, with no proof whatever of identity except two signatures of different names, with no testimony whatever as to the identity or similarity of handwriting. We respectfully submit that this was an error. *Jordan* v. *Osgood*, 109 Mass. 457; *Thayer* v. *Thayer*, 101 Mass. 111; *Com.* v. *Elwell*, 1 Gray, 463; *Com.* v. *Blood*, 4 Gray, 31; *Blake* v. *Howard*, 11 Maine, 202; *Aldrich* v. *Warren*, 16 Maine, 465; *State* v. *Hastings*, 53 N. H. 452; Criminal Leading Cases, (False Pretences).

Counsel in an able argument further contended that the motion to set aside the verdict as being against law and the weight of evidence, should be sustained.

Wilson and Woodward and Jasper Hutchings, for the defendant, cited: *Rowley Bigelow*, 12 Pick. 307; *Wiggin* v. *Day*, 9 Gray, 97; *Cary* v. *Hotailing*, 1 Hill, 311; *Com.* v. *Stone*, 4 Met. 43; 1 Greenl. Ev. § 111; *State* v. *McAllister*, 24 Maine, 139; *Castle* v. *Bullard*, 23 How. 172; *State* v. *Potter*, 52 Vt. 33; *Mussey* v. *Mussey*, 68 Maine, 346; *Woodman* v. *Dana*, 52 Maine, 9; *Moody* v. *Rowell*, 17 Pick. 490; *Homer* v. *Wallis*, 11 Mass. 308.

SYMONDS, J. One of the grounds of defence to this action on a promissory note alleged to have been signed by the defendant was, that if the signature was genuine — which was denied — it was procured by fraud, under the pretence of selling him some pruning shears to be subsequently delivered, or appointing him agent for the sale of them; — the men who obtained the note intending not to deliver the shears at all, but using the form of negotiation about them merely as an instrument of fraud, as a means by the aid of which they could the more readily accomplish their purpose of deceiving the defendant and getting his note by falsehood, without consideration and without knowledge even on his part of the character of the paper he was signing.

The court correctly ruled that if the evidence sustained this claim in defence, the note as between the original parties would be void.

Upon this issue, then, the question of the intent of the men with whom the defendant dealt became material. The shears were never delivered, and no explanation was ever given. Was this accidental, due to subsequent causes which might remove the charge of fraud, or was it a part of the original plan — none having been sent because there was no intention to send them?

Upon this question alone, and for the purpose of showing that the note was fraudulent in its inception, that the design was not to deliver the shears, the defendant offered testimony to prove that within a few days of the same time, the men who procured the note of the defendant had a substantially similar transaction with a resident of a neighboring town, and that in his case, too, the shears failed to arrive. To the admission of this evidence, carefully limited at the time and in the charge to the force the judgment of the jury should attach to it in explanation of the non-delivery of the shears, to its effect to strengthen the probability that the failure to deliver them to the defendant was intentional, there being no explanation in either case and two such accidents not being so likely to occur as one, the exception of the plaintiff cannot be sustained. It is clear upon principle

that when the question to be tried is whether the failure in one instance to deliver goods which had been promised and for which a note had been given was intentional and fraudulent, or not, the fact that about the same time under similar circumstances, notes were procured by the same men in other instances upon the same promise to deliver goods, and none arrived and no explanation was given, is proper for the consideration of the jury in determining what design was present in the particular transaction upon which they are to pass. The ruling at the trial, in terms, only received the fact of non-delivery in two similar instances as tending to show that in each, the intention to deliver was wanting. We think this was correct and also that the ruling may be supported on broader grounds. It is generally true that contemporaneous frauds may be proved when they tend to show a fraudulent intent in the particular transaction under investigation. In the numerous cases in which this question has been considered, there may be slight differences in result, not entire uniformity in deciding in what cases one fraud may properly be said to make manifest the intention which pervades another transaction; but the rule of evidence certainly goes to this extent, as stated in *Jordan* v. *Osgood*, 109 Mass. 461, that another act of fraud is admissible to prove the fraud charged, when there is evidence that the two are parts of one scheme of fraud, committed in pursuance of a common purpose. This rule seems sufficient to justify the admission of the testimony to which exception is taken.

The procurers of the notes were two strangers, who hired teams at the plaintiff's livery stable in Bangor, were engaged for six or seven weeks in driving about the country, and then went away. Evidence tending to show that they were employed during this time, in obtaining notes from different persons upon the promise to deliver pruning shears for them, that their business with others and their methods of doing it were substantially the same as with the defendant, close similarity in the ways in which they operated in the several instances, in the

representations and means by which they induced persons to sign, the number of notes which they obtained while driving over a limited territory during comparatively a short period — the plaintiff himself having purchased six of them, — their going away without delivering the shears according to their promise, the appearance of the notes in the hands of persons claiming to collect them as innocent holders; — evidence tending to show these facts was admissible to prove a general plan to defraud, of which the jury might find the transaction with the defendant was a single instance. In the general features of the case, we think there was circumstantial evidence from which the jury were warranted in finding a common design in the two cases, the details of which were received before them; — and evidence tending to show that such common design was a fraudulent one, was pertinent, whether it related to one case or the other, or to both. The evidence went far enough in this direction to authorize the admission of testimony that there were other instances in which the goods were not delivered according to the contract, as tending to prove a fraudulent purpose in this.

In connection with the circumstances of the case, pointing more or less directly to the conclusion that the men who obtained the notes were the same in the two cases, papers written by them were received in evidence to enable the jury to judge of their identity by comparison of hands. To this exception was taken.

In 1 Greenl. Ev. § 512, referring to the use of answers in chancery in evidence in subsequent proceedings, it is said, "some proof of the identity of the party will be requisite. This may be by proof of his handwriting." At the trial of indictments for perjury in such answers, it was held in *Rex* v. *Morris*, 2 Burr. 1189, and in *Rex* v. *Benson*, 2 Camp. 508, that identity of the person might be shown by proof of handwriting. In an action against Henry Thomas Ryde, as the acceptor of a bill of exchange, it appeared that a person of that name had kept cash at the bank where the bill was payable, and had drawn checks which the cashier had paid. The cashier knew the person's handwriting by the checks and testified that

the acceptance was in the same handwriting; but he had not paid any check for some time and did not personally know him. There was no other proof of his identity with the defendant, and this was held *prima facie* sufficient. "It cannot be said there was not some evidence of identity. A man of the defendant's name had kept money at the branch bank; and this acceptance is proved to be his writing." *Roden* v. *Ryde*, 4 Ad. & El. N. S. 626. Where other writings, admitted to be genuine, are in the case "the comparison may be made by the jury with or without the aid of experts." 1 Greenl. Ev. § 578. The rule of practice in this state allows papers not otherwise pertinent, to be proved and offered in evidence for the single purpose of enabling the jury to judge by comparison of hands of the genuineness of signatures; that is, whether they were or were not written by the same hand. *Chandler* v. *LeBarron*, 45 Maine, 534. If they may judge of handwriting for the purpose of determining the genuineness of a disputed signature, they may just as well decide whether two hands are the same for the purpose of determining the identity of parties. The process is the same, and the thing to be decided is the same. Only the object of the inquiry differs. Proof of the genuineness of two signatures in the same hand is proof of the identity of the writer of the two. One reason now given for excluding the opinions of non-experts who are not acquainted with the handwriting, is that the jury are as competent as they to make the comparison. The papers written by these men at the two times, were proper evidence for the examination of the jury on the question of identity.

The jury might well find upon the evidence, that the note was procured from the defendant by fraud, and that it was void between the original parties.

It was also for them to decide under proper instructions, whether the plaintiff was a *bona fide* holder for valuable consideration before maturity and therefore entitled to recover the amount of the note, if genuine, notwithstanding the fraud; and also the other controverted question whether the facts of the case proved the note to be in law a forgery, void in the hands

even of an innocent holder. Our opinion is that, there having been no error in the rulings on these points, the verdict is not so clearly against the weight of evidence as to require the granting of a new trial.

Motion and exceptions overruled.

VIRGIN, PETERS and LIBBEY, JJ., concurred.

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

DISSENTING OPINION BY

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

"$180. Orrington, January 7, 1879.

Three months after date, I promise to pay H. T. Jepson & Co. or bearer, one hundred and eighty dollars at the Farmer's National Bank, Bangor, Maine, value received.

(Signed) Alfred Baker."

The plaintiff is a stable keeper in Bangor. He testified that he purchased the note in suit and others before their maturity, paying the full value therefor, and ignorant of any facts that would tend in the slightest degree to impeach their validity, that the persons of whom he purchased, — introduced themselves as having occasion to hire teams, — stating that they had been recommended by a friend of his to apply to him — that he fixed a price per day, that they hired his teams paying promptly for their use — that after paying seventy-five or a hundred dollars — they proposed purchasing horses and harnesses as cheaper than hiring and paying for the same in notes, (one of which is the one in suit), that he objected, but upon their assertion that they were good and would be met at maturity, he employed an attorney to examine the registry of deeds to see if the signers owned real estate and finding they did, he made a trade, by which he obtained the note in suit and others, for the property sold them, that he did not know their business, but supposed they were runners, and that he neither knew nor had suspicion of any fraud in the procuring of the notes, or for what they were given.

The note was given on time. The plaintiff purchased it shortly after it was given. He gave full consideration for the same. The fact of full consideration is the surest guaranty of good faith. He knew nothing of the circumstances under which the note was given. He had no suspicions of its fraudulent origin. He was under no legal nor moral obligation to enquire as to the origin of the note. The signer had announced to the public that it was for "value received." He knew the parties with whom he traded as customers and traded with them as such. All this is uncontradicted.

No principle of law should be more carefully guarded or more sacredly adhered to than that the *bona fide* holder of a note purchasing it for its value before maturity, should be protected against the sympathy a jury may have for the folly or their indignation against the fraud by which a note may have been dishonestly obtained. The *bona fide* purchaser is ignorant of the folly. He is no party to the fraud. The foolish and the deceived must bear the consequences of their folly and imbecility and not impose on those who relied on their assertions, the penalty which nature always attaches to negligence or want of caution.

The law as to the rights of a *bona fide* endorsee of a note before maturity and for value, is settled by a rare and unequalled uniformity of decisions in every State of the Union. "Possession of such an instrument payable to bearer, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; and nothing," observes CLIFFORD, J., in *Collins* v. *Gilbert*, 94 U. S. 753, "short of fraud, not even *gross negligence*, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence or to invalidate the title of the holder supported by that presumption." Such after a full examination of the authorities bearing upon the question has been held to be the law in this State. *Farrell* v. *Lovett*, 68 Maine, 326; *Kellogg* v. *Curtis*, 65 Maine, 59; *Swift* v. *Smith*, 102 U. S. 442. "The other rule laid down in some of the cases, that an endorsee for value cannot recover if he takes the note without due caution, or under circumstances which ought to excite the suspicions of a prudent

man," observes MORTON, J., in *Smith* v. *Livingston*, 111 Mass. 345, "is indefinite and uncertain." The rule established is in accordance with the general principles of commerce and best adapted to protect the free circulation of negotiable paper. *Re Great Western Tel. Co.* 5 Biss, 363; *Morehead* v. *Gilmore*, 77 Penn. 118.

The plaintiff is to be protected. He had no suspicion or knowledge of the fraud. He bought before maturity. He paid full value.

The defendant interposes three grounds of defence: The first is that it is a forgery.

It is only necessary to examine the signatures to see at a glance that the defendant's signature to the note is genuine. It is safe to say that no intelligent man can have an honest doubt on the subject.

The next ground is that "if the signature was his it was made by him with the intent to sign another and entirely different instrument, and that no negligence was to be imputed to him, he not knowing what he signed."

The defendant's signature is on two papers in the case. The first was a statement of his real estate and his stock. This he testifies he read carefully, — "was very careful about it," (the reading,) and knows he understood it. It was in these words:

"Orrington, June 7, 1879.

"This certifies that I, Alfred Baker, have examined the Sisson Improved Pruning Shears, and do consider them a practical implement, and have purchased of H. T. Jepson & Co. forty-five pieces at four dollars each, and *have given my written obligation in the amount of $180, which is negotiable and payable at the Farmer's National Bank*, of Bangor, Maine," &c.

(Signed) Alfred Baker."

In the agreement entered into between him and "the manufacturers of the Sisson pruning shears," which was delivered him, there is the recital of his having "given his written obligation in the sum of $180."

Both these papers he carefully read and understood. He swears he was very particular as to his reading them. After

reading them with care, he signed a paper reciting that he had given his "written obligation in the amount of $180, which is negotiable and payable at the Farmer's National Bank, Bangor, Maine," — and that he received an appointment of his agency, which he produced containing a statement of the same fact. After a careful perusal of these papers he knowingly and understandingly testifies to these facts. What is such an obligation but a note of hand? There is his written statement — that he had done this and his oath that he read the paper and understandingly signed it.

This paper he placed in the hands of the men with whom he was contracting. It gave assurance of his ability to pay. It was given to be used. It was used. Upon the credit of the facts therein stated, and in the belief of their truth, the plaintiff made his purchase. If ever the doctrine of estoppel is to be applied, it is in a case like the present. If one of two must suffer, it certainly should not be the plaintiff, whose only fault is in believing the defendant's statements to be true.

If it be said that the defendant did not understand the meaning of the word "obligation," the plaintiff should not suffer for such gross ignorance. He did know that he signed a paper obliging him to pay a sum of money — which was negotiable and payable at a bank.

No one can reasonably doubt that the defendant signed the note in question, and knew what he was signing. If he did not, the plaintiff should not suffer for such inconceivable negligence and stupidity. He should not seek to throw the burden upon one who without fault relied upon his written assertions. He would be barred by his assertions as to property. He is equally so as to ownership.

The defendant is estopped by his representations. He notified to the world that he had signed a negotiable contract. He stated the date and amount, when and where payable. He stated the means he had with which he could pay it. He promised to pay to whomsoever it should be endorsed.

If he had written a letter to the plaintiff containing the facts set forth in his certificate, and the plaintiff had in good faith, purchased the note, relying on them, he would be estopped to defend

against the same. He did more. He wrote a general letter to the whole community reciting what he had done, and that he had means with which to meet his note at maturity. The plaintiff in good faith, relying upon the truthfulness of his representations, purchased. The defendant may have been deceived in making those representations, and thus be a loser. The plaintiff who relied upon them should not be. Such is well settled law.

To create an estoppel *in pais* the representation relied upon, must have induced the party seeking to enforce an estoppel, to do what resulted to his detriment, and what he would not otherwise have done. *Allum* v. *Perry*, 68 Maine, 233. "In all cases where one party has been induced to take a particular course in the faith of statements made or expectations held out either expressly or by implication, by another, the latter will be debarred from pursuing any subsequent mode of action at variance with his former language and conduct, to the injury of the former." 2 Hare & Wallace, Leading Cases, 165.

There is no dispute as to the above facts. It is a clear case of negligence. In *Kellogg* v. *Curtis*, 65 Maine, 590, the judge, on facts similar to the case at bar, decided that the defendant was defrauded and guilty of negligence in signing the note in question. "What constitutes negligence in a case like this," observes PETERS, J., "when the facts are clear and unequivocal, is a question of law." "The principle is clearly and correctly enunciated in a late case in Missouri not yet reported, thus: 'When it appears that the party to be charged intended to bind himself by some obligation, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining the true character of such instrument before signing it, but neglected to avail himself of such means of information and relying on the representations of another as to the contents of the instrument, signed and delivered a negotiable promissory note, instead of the instrument he intended to sign, he cannot be heard to impeach its validity in the hands of a *bona fide* holder.'" To the same effect is the case of *Abbott* v. *Rose*, 62 Maine, 194. One who allowed his name to be signed to a promissory note, supposing

his signature was being attached to the acceptance of an agency, is liable to a *bona fide* indorsee. *Indiana Bank* v. *Weckerly*, 67 Ind. 345, and *Maxwell* v. *Morehart*, 66 Ind. 301. Here there is no allegation or pretence of the substitution of one paper for another as the defendant testifies he signed a paper making him liable, and if he failed to appreciate its effect, the loss should be his and not another's.

The last ground of defence is that when the note was given, the payees or their agents had no intention of delivering the articles contracted to be delivered — and therefore that the note was without consideration and fraudulent in its inception. That may be conceded but it furnishes no defence against a *bona fide* holder. Such is the universal rule.

To sustain this branch of the case the evidence of one Bragdon was received as to his subsequent dealing with two persons who were not identified as those dealing with the defendant. Their identity should have been first shown. This was not done. The statements and the conversation with them — *res inter alios* — were admitted and the jury were permitted without proof to infer identity. *Com.* v. *Jackson*, 132 Mass. 16. The conversations of Bragdon with these strangers was hearsay, inadmissible and offered to prejudice the jury. But this illegal testimony was admitted to affect the rights of a *bona fide* holder. It was admitted to prove identity — the question in dispute. Though evidence legally inadmissible, it had the same effect as if admissible. The jury were allowed to give the same effect to and to draw the same inferences from illegal testimony as from legal.

These strangers had not been witnesses — therefore the evidence was not admissible to contradict what they might have said on the stand. It is a bald case of hearsay.

The verdict was the result of sympathy for the defendant. But he has little claim to sympathy. He entered into a contract by which he expected great profits from his neighbors. He seeks to escape from his "obligation" by the denial under oath of his signature. He may have been the victim of knaves. But that is no reason why the plaintiff should become the victim of his folly or his falsehood. Men had better bear the consequences

of negligence than seek to escape them by perjury. Cheating is criminal but there are greater and graver crimes.

I think a new trial should be granted.

BARROWS, J., concurred.

LAVONEY HIGGINS by LEONARD HIGGINS, her next friend,

vs.

JOHN E. DOWNS.

Somerset. Opinion July 16, 1883.

Exceptions. Expert testimony. Practice.

When exception is taken to the exclusion of testimony which could only come from an expert, it must affirmatively appear that the testimony excluded was expert testimony, otherwise the exception will not be sustained.

ON EXCEPTIONS, which state as follows:

"This was an action of trespass brought by a pupil against her teacher for punishment inflicted upon her in school.

"Plaintiff claimed that it was excessive, and that in consequence thereof, her spine and brain were injured and became diseased, and she has suffered ever since from such spine and brain disease.

"Defendant claimed that such traits were hereditary in the family, and offered evidence that an elder sister of hers had previously suffered from a like disease.

"This evidence the presiding judge excluded. To which ruling excluding the same the said defendant respectfully excepts, and having reduced his exceptions to writing, prays that the same may be allowed."

Baker and Baker, for the plaintiff.

Walton and Walton, for the defendant.

APPLETON, C. J. The plaintiff brings this action to recover damages for bodily injuries inflicted by way of punishment and causing disease of the spine and brain.

The defence claimed was, that the disease was the result of heredity, and not caused by the blows inflicted. Whether so or not involved grave questions of medical science. What was the

nature of the plaintiff's disease and how caused, and what that of her sister and the likeness between them, if any there was, were questions as to which experts could alone be called properly to testify.

Whether the testimony offered was that of a witness whose knowledge and experience would qualify him to give an opinion, in matters where evidence of opinion is admissible, is to be determined by the court. The question is one of competency, and exceptions will not be sustained, unless it appears clearly that the exclusion was erroneous. It is not shown that the witness was an expert. If not, the rejection of the testimony was proper. To sustain the exceptions, it should affirmatively appear that there was error in the rulings. It does not so appear. *Hawks* v. *Charlemont*, 110 Mass, 110.

Exceptions overruled.

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

HORACE E. BUCK, executor, in equity,

vs.

A. W. PAINE and another, trustees.

Penobscot. Opinion July 31, 1883.

Will. Trust.

S. R. by his will devised to the respondents one-half part of his real and personal estate to hold in trust for the equal use and benefit of his grandchildren, T. S. R. and S. H. R. for the term of three years, at the end of which time the trust was to cease, and each one's share to go them respectively, and in this clause of the will authorizing the trustees, before the expiration of said three years to pay or deliver over to them such part of the estate in their hands as they may deem prudent and that their receipts therefor should be sufficient vouchers in probate. The trustees at the request of S. H. R. then wife of the complainant, advanced her eighteen hundred dollars to purchase the note and mortgage set forth in the bill, for her benefit, which they did, taking her receipt signed by her husband acting in her behalf for the same towards

her portion, and charging her with the sum as paid her and giving a memorandum that the note and mortgage was held by them for her benefit and was to be assigned to her at her request. *Held;*

1. That the sum of eighteen hundred dollars was an advance to her under the will and was her estate;

2. That being her property the purchase of the mortgage and note was with her funds;

3. That the respondents held the same in trust for her; and that she was entitled to an assignment of the same;

4. That on her death her executor was authorized to demand and entitled to receive an assignment of the same and that equity would compel such assignment.

BILL IN EQUITY.

Heard on bill, answer and proofs.

The opinion states the material facts.

Barker, Vose and Barker, for the plaintiff, cited: *Baker* v. *Vining*, 30 Maine, 121; *Dwinel* v. *Veazie*, 36 Maine, 509; *Buck* v. *Swazey*, 35 Maine, 42; *Kelley* v. *Jenness*, 50 Maine, 455; *Dudley* v. *Bachelder*, 53 Maine, 403; *Park* v. *Johnson*, 4 Allen, 266.

A. W. Paine, for the defendants, contended that the purchase of the mortgage was not, and could not intentionally have been at the wish of Mrs. Buck. That the request being made and receipt given by her husband when she was unable to express a wish or sign a receipt must be held to be unauthorized and void. That the trustees had no right legally to let the money go save only as she wanted it personally, and hence in requiring her consent and request in the paper of February 25, 1882, which they gave to Mrs. Buck's husband for her, they imposed a condition meaning something and measured only by the value of the the whole property at stake. It was in effect a condition to have her bring herself within the condition or position where she could lawfully, under the terms of the will, be made the recipient or the trustees authorized to make an advance.

There should have been a demand before the action was brought. *Lee* v. *Lanahan*, 59 Maine, 478; *Hosmer* v. *Clark*, 2 Greenl. 308; *Payne* v. *Gardiner*, 29 N. Y. 146.

As to the power and authority of the trustees, see, *Waltham Bank* v. *Wright*, 8 Allen, 121; *Jenney* v. *Wilcox*, 9 Allen, 245;

Bradford v. *Forbes*, 9 Allen, 365; *Wells* v. *Child*, 12 Allen, 333; *Bacon* v. *Pomeroy*, 104 Mass. 585; *M. Nat. Bank* v. *Weeks*, 53 Vt. 115.

APPLETON, C. J. This is a bill in equity to enforce the assignment of a mortgage held by the respondents in trust.

The complainant was the husband of Susan H. Rich and by her last will and testament was appointed executor of the same, and a legatee under its provisions. The bill is brought to enforce a trust in favor of his deceased wife.

By the will of Sylvanus Rich, the respondents were appointed trustees of a certain portion of his estate for the benefit of his grandchildren, Thomas S. and Susan Rich the wife of this complainant, for the term of three years.

The fourth item of the will is in these words: (4) "To Albert W. Paine and Thomas A. Rich, I do give the other half part of all the residue and remainder of my estate, real and personal, subject only to the payment of the other half of my said debts and personal charges. To have and to hold the same to them, the said Paine and Rich, and the survivor of them and their heirs and assigns forever in trust, for the equal use and benefit of my two grandchildren, Thomas S. and Susan H. Rich, children of my deceased son, Henry S. Rich, for the term of three years, at the end of which time the trust shall cease, and each one's share shall then go to said children respectively, together with all the net earnings and income thereof not already then paid or delivered to them respectively. My said trustees are to have the entire control and disposition of said half part of said remainder, see to its care and investment, with full power to sell and convey any part of it as they may think proper and best for the interest of all concerned. They may from time to time *pay or deliver over to said beneficiaries so much and such part of said estate thus in their hands as they may think prudent*, and their receipts therefor shall be sufficient *vouchers in probate*. . . . If either of said children shall die before the trust ceases, his or her legal heirs shall be substituted in place of the deceased in every respect."

Mrs. Buck died before the expiration of the three years specified in the above item. By her direction and with her approval the trustees were induced to and did advance eighteen hundred dollars to purchase the note and mortgage which the bill seeks to have assigned. When the note and mortgage was purchased, it was assigned to the respondents as executors of the estate of Sylvanus Rich and for Mrs. Buck on whose account the purchase was made.

The assignment of the mortgage was made on February 25, 1882. On the same day, his wife being too ill to sign a receipt, the complainant gave for her the following:

"$1800. Bangor, February 25, 1882.

Received of A. W. Paine and Thomas A. Rich, executors of the estate of the late Sylvanus Rich, eighteen hundred dollars, towards my portion of the estate of said Sylvanus Rich, deceased, under his last will and testament. Susan H. Buck, by Horace E. Buck."

At the same time and as part of the transaction, Mr. Paine acting as executor gave the following memorandum: "Bangor, February 25, 1882, mortgage made by John Buck to Joseph L. Buck and by him this day assigned to the executors of the estate of Sylvanus Rich, bearing date January 20, 1874, and recorded book 147, page 20, of Hancock registry, and the notes secured thereby are held by us for her benefit and to be assigned to her on her request, and all moneys received on same to be hers and paid over to her, the above named Susan H. R. Buck at once.

Albert W. Paine, for executors."

In the account of Mr. Paine as executor of the estate of Sylvanus Rich and trustee under his will with Susan H. Buck is found the following entry:

"1882, February 25, paid you as per receipt, $1800.00."

The bill alleges a request on the respondents to assign the mortgage and a refusal.

Here was an advance made by the trustees. It was made in pursuance of the authority given by the will. A voucher was duly given. It might be under the hand of the beneficiary under

the will or under that of any agent she might appoint. There is nothing which precludes or forbids a payment on her order any more than to herself. Being paid, the voucher given, the payment vested in her. The receipt though signed by the husband, if authorized, did not prevent its vesting. The mortgage was purchased with money advanced and charged to her account. No question was made or doubt raised as to the prudence of the advance. The respondents took the assignment in their name and admit it was in their name "for her benefit and to be assigned to her on her request and all moneys received on the same to be hers and paid over to her, the above named Susan H. R. Buck, at once." Here is obviously a trust. The mortgage was Mrs. Buck's. The money received from it was hers. Being hers she had full right of disposition of the mortgage and the plaintiff has a right as her executor that the trust be enforced for the benefit of her estate.

The respondents interpose various objections to the above result.

(1.) It is insisted that Mrs. Buck at the time of the transaction in question was mentally incompetent to transact any business. The evidence on this point is contradictory, but without going into a minute examination of the testimony of the witnesses it is sufficient to say that the evidence fails to satisfy us of such incompetency. Sanity is the legal presumption and it is not disproved.

(2.) It is urged that "it was to be assigned to her on her request" and that this was a condition precedent; that she has never requested such assignment, and therefore that the bill is not maintainable.

But the money with which the purchase was made has been charged to her and a sufficient receipt taken, the husband having authority to give it. The mortgage having been purchased with her funds, it was her property and though the assignment runs to the trustees, it is none the less in equity hers. Being hers, the executor of her estate is entitled to an assignment of the same. A demand by such executor was all that was required.

No one else, after her death was authorized to make the demand but her legal representative and he duly made it.

Bill sustained. Decree as prayed for, with costs.

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

RICHARD ALLEN and another, trustees,

vs.

HENRY W. BUCKNAM.

Washington. Opinion July 31, 1883.

Contract. Deed. Consideration. Payment of a lien.

The defendant purchased land of C. upon which the plaintiffs, as trustees, claimed a lien for the payment of the sum sued for. The defendant promised both the plaintiffs and C. to pay for the land in part, by paying the amount of the alleged lien, and in consideration of that promise obtained the conveyance. *Held*, That whether the condition which is supposed to create the lien is valid or otherwise, is immaterial, and that the action will lie for the amount.

ON REPORT.

Assumpsit on account annexed, which was as follows:

"Henry W. Bucknam,
To Richard Allen and Abram Merritt,
Trustees of the Methodist Episcopal Church of
Columbia Falls, Dr.

For amount due for the rent or use of the farm known as the Methodist Church place or farm occupied by Hiram Coffin for many years and formerly owned by Louisa J. Bucknam and situated in Columbia Falls. $50 for the year 1880 and $50 for the year 1881 as per your agreement and promise,	$100.00
Interest to date.	9.00
December 14, 1881.	$109.00"

The writ was dated December 14, 1881, and in it the defendant was summoned to answer unto "Richard Allen and Abram Merritt, trustees of the Methodist Episcopal church of Columbia Falls in said county." The plea was the general issue.

The defendant claimed title to the farm in question under a deed from Hiram Coffin, and Coffin's interest in the premises rested upon a devise in the will of Louisa J. Bucknam, probated November 8, 1853, which was in these words:

"*Fifth.* I give and bequeath to Hiram Coffin, his heirs, &c. the remainder of my homestead farm, all my right, title and interest in the same upon conditions, as follows, viz: That he pay annually the sum of fifty dollars to the Methodist E. church in Columbia village for the support of preaching the gospel, or if the said Hiram choose to pay the principal of which the above sum is the interest, all at one time, or in payments within, then my executors hereinafter named shall give a good and sufficient deed to the said Hiram Coffin, his heirs, &c. which shall be as good and binding as if given by me and the said principal if paid by said Hiram, shall be placed in the hands of trustees hereinafter named who shall put the same at interest as a fund forever, and the interest accruing from the same shall be expended for the support of preaching the gospel in the village of Columbia, as before requested. But if the said Hiram, or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the M. E. church, in Columbia village, to go into the hands of the trustees hereinafter named, and their successors who are to dispose of the same and put the proceeds at interest as a fund forever and the interest of said fund only shall be expended for the support of the gospel as before named."

After the evidence was out, the presiding justice said that he should instruct the jury that, if the farm was bought by defendant of Coffin, and he took Coffin's place with the consent of and agreement with the plaintiffs, he agreeing to take the land on the same conditions that Coffin had it and pay plaintiffs as before, that they would find a verdict for the plaintiffs.

Whereupon the defendant submitted to a default and the case was reported by agreement that if this ruling was incorrect, the default was to be taken off and the case stand for trial.

Other material facts stated in the opinion.

William Freeman, for the plaintiffs, cited: *Todd* v. *Tobey*, 29 Maine, 219; *Motley* v. *Manf. Ins. Co.* 29 Maine, 337; *Hinkley* v. *Fowler*, 15 Maine, 285; *Weeks* v. *Patten*, 18 Maine, 42; *Dearborn* v. *Parks*, 5 Maine, 81; *Rowe* v. *Whittier*, 21 Maine, 545; *Hilton* v. *Dinsmore*, 21 Maine, 410; *Huchinson* v. *Huchinson*, 46 Maine, 154; *Bassett* v. *Bassett*, 55 Maine, 127; *Long* v. *Woodman*, 65 Maine, 56; *Thomas* v. *Dickerson*, 2 Kernan, 365; *R. S. Lodge of Masons* v. *Buck*, 58 Maine, 426; 65 Maine, 406.

Charles A. Bucknam and Charles Peabody, for the defendant.

Unless the plaintiffs can show that they have dispossessed themselves of the premises and that the defendant is in possession of them by their permission, this action cannot be maintained. *Moshier* v. *Reding*, 12 Maine, 478; *Roxbury* v. *Huston*, 39 Maine, 312; *Page* v. *McGlinch*, 63 Maine, 472. For the ruling of the court assumes at least, a possessory right of plaintiffs in the premises.

Counsel in an able argument contended that the plaintiffs, if trustees, had no lien on the farm by virtue of the will of Louisa J. Bucknam, and that therefore, if the defendant made any promise to pay the plaintiffs anything it was without consideration. Many authorities were cited upon the question argued.

DANFORTH, J. After the evidence was out in this case, the presiding justice ruled, "that, if the farm was bought by the defendant of Coffin, and he took Coffin's place with the consent of and agreement with the plaintiffs, he agreeing to take the land upon the same conditions Coffin had it and pay the plaintiffs as before," the plaintiffs would be entitled to a verdict. The defendant thereupon submitted to a default which is to stand if the ruling is correct, otherwise to be taken off.

This ruling is predicated upon and must be tested by the facts thus hypothetically stated. The evidence reported is clearly

sufficient to establish them as facts, but if not, the default by consent precludes any inquiry into their verity.

The conditions under which Mr. Coffin held the land in question, are imposed by the will of Louisa J. Bucknam; who devised the land to said Coffin upon the condition, "that he pay annually the sum of fifty dollars to the Methodist E. church of Columbia village, for the support of the preaching the gospel, or if the said Hiram choose to pay the principal of which the above sum is the interest," then he is to have an unconditional deed.

It is claimed in defence, that this was a devise of the land upon a condition subsequent, and that the condition is void as tending to a perpetuity, as well as for other reasons. But if it were so, how it affects this case is not apparent. The condition had been recognized and acted upon by the devisee for a long series of years. He chose still to recognize it when he sold the property and required as he had a right to do, a promise of the payment of the money in accordance therewith from the purchaser. The defendant gave that promise, both to the grantor and to these plaintiffs. It was by means of it that the consent of the plaintiffs and the deed from Coffin were obtained. The promise is the consideration for the conveyance, and the conveyance a consideration for the promise. If the condition is good, the defendant obtained all he bargained for; if not good, he obtained certainly no less. There would not, then, be any failure in the consideration for the promise. That consideration the defendant still retains. He has not been interrupted in his enjoyment of it, nor is it claimed or suggested that he can be. It is, therefore, the simple case of a purchase of land upon a promise to pay a certain sum of money therefor, which the promisor has neglected to fullfil. In such case, that an action will lie to recover the amount, is too well settled to leave room for doubt.

Nor has the objection to the want of authority on the part of the plaintiffs any better foundation. There is enough in the case to show *prima facie* their appointment as trustees. They are the acting trustees; had been recognized as such by Coffin,

as also by the defendant, and are the persons to whom the promise was made.

Default to stand.

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

HENRY MARSH *vs.* FRANCIS E. PARKS and others.

Penobscot. Opinion July 31, 1883.

Costs. Several defendants, verdict in favor of one and against the others.

When there are several defendants in a personal action, who join in their pleadings, and the verdict is in favor of one and against the others, the successful party is allowed all his separate costs, and an aliquot part of the joint costs, unless the court is satisfied from special circumstances, a different proportion should be allowed.

ON EXCEPTIONS.

Trespass *quare clausum* against nine defendants, who joined in their pleadings. The verdict was in favor of Richard H. Libby, one of the defendants, and against the others.

The presiding justice ruled, generally, that all the witnesses called by the defendants in the trial, except those who were summoned and did not testify, might be taxed and allowed against the plaintiff, without limitation or restriction of any kind. And the plaintiff alleged exceptions.

D. D. Stewart, for the plaintiff.

S. S. Brown, for the defendants.

APPLETON, C. J. This was an action of trespass *quare clausum*, against several defendants, who all pleaded the general issue jointly, and filed a joint brief statement. The jury acquitted the defendant Libby, and found the other defendants guilty. The question presented for adjudication, relates to the taxation of the acquitted defendant's costs.

It is well settled that the successful defendant is entitled to his travel, attendance, and attorney fee, and to the fees of such witnesses as he may have summoned for his special defence, or in aid of the general defence.

Here, it is not alleged that he summoned or paid any, for any special defence of his own. He joined in pleading with his co-defendants. The defence was joint.

"The rule, according to which costs are given, when there are several defendants in a personal action, and the verdict is in favor of one or more of them, and against the others, is this — the successful defendant is allowed *all* his *separate* costs, and *prima facie*, an aliquot part of the joint costs, unless the master is satisfied that some smaller proportion should be allowed by reason of any other special circumstances." Marshall on Costs, 42. In *Griffith* v. *Kynaston*, 2 Tyrwh. 575, three defendants being sued in trespass for assault and false imprisonment, appeared by the same attorney, but severed in pleading. The same evidence was adduced for all, with the exception of one witness, who was called for one of them separately. That one being acquitted, the master allowed him forty dollars costs only. The court, however, held, that he was entitled to recover from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the master that he was not indemnified by the other defendants. The same was held in *Griffith* v. *Jones*, 2 C. M. & R. 333; *Gambrell* v. *Falmouth*, 31 E. C. L. 363; *Redway* v. *Webber*, 106 E. C. L. 252. The decisions in this country adopt a similar rule. *Mason* v. *Waite*, 1 Pick. 456; *West* v. *Brock*, 3 Pick. 303; *Fales* v. *Stone*, 9 Met. 317; *Crosby* v. *Lovejoy*, 6 N. H. 458.

Exceptions sustained.

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

DAVID B. RENDALL *vs.* SCHOOL DISTRICT NO. 2, in Monroe.

Waldo. Opinion July 31, 1883.

Trespass. Assumpsit. Estoppel. School district taxes.

Where one has recovered judgment in trespass, against a collector for the unlawful sale of his property seized to collect a school district tax, he cannot in assumpsit recover of the school district the amount of such tax.

REPORT on agreed statement.

Assumpsit for money had and received amounting to the sum of seventeen dollars and sixty-nine cents.

The opinion states the facts.

Joseph Williamson, for the plaintiff.

The judgment in the action of trespass against the collector cannot operate as an estoppel to this suit. It was final for its own purpose and object, and no further. Bigelow on Estoppel, 41.

It affirmed simply a right of possession as between the plaintiff and defendant in the judgment suit to be in the plaintiff, and was in the nature of damages for the wrongful disturbance of the plaintiff's property. A judgment in a former action is conclusive only when the same cause of action was adjudicated between the same parties, or the same point was put in issue on the record, and directly found by the verdict of the jury. *Howard* v. *Kimball*, 65 Maine, 308; *Gilbert* v. *Thompson*, 9 Cush. 348.

The tax having been paid by the seizure and sale of the plaintiff's property, and the amount having been paid for the use of the district, he is entitled to recover such amount with interest from the time of such payment. *Smith* v. *Readfield*, 27 Maine, 145; *Haines* v. *School Dist.* 41 Maine, 246; *Starbird* v. *School Dist.* 51 Maine, 101.

Philo Hersey, for the defendant, cited: 27 Maine, 145; 34 Maine, 75; 112 Mass. 75.

APPLETON, C. J. The plaintiff being assessed on his property in the sum of seventeen dollars and sixty-nine cents to defray the expenses of a school house in the defendant's school district, refused to pay the same. A warrant for its collection was duly issued to the collector of taxes, who seized the personal property of the plaintiff, and sold the same at auction for thirty-five dollars and twenty-nine cents.

But the collector seized and sold articles exempt from attachment more than was necessary to pay the tax and charges of sale, neglected to deliver the plaintiff an account of the same or to return the overplus, and thereby became a trespasser *ab initio*. The plaintiff sued him as such and recovered judgment for forty dollars and costs on which judgment execution has duly issued.

The plaintiff now brings assumpsit for so much of the proceeds of the sale as was paid the defendants for his taxes.

The plaintiff might sue in tort or by waiving the tort, in assumpsit, but the damages would depend on the form of action he might adopt. In the one case he would recover the value of the property sold, in the other the proceeds of its sale. He has elected the former remedy and has recovered damages for his property unlawfully taken and sold. The judgment thus recovered would seem to be a bar for another action for this injury, though there may be a different form of action. *White* v. *Philbrick*, 5 Greenl. 146. This suit is for less than half of the proceeds of sale. Having recovered judgment for the proceeds as a whole, he cannot waive a fraction of it and recover for a portion of it as the result of a sale. *Ware* v. *Percival*, 61 Maine, 391; *Dunbar* v. *Boston*, 112 Mass. 75.

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

DORCAS WILKINSON *vs.* JOHN DREW.

York. Opinion July 31, 1883.

Negligence. Punitive damages. Evidence.

In an action of the case for losses sustained by the negligence of the defendant punitive damages may be allowed when the act or omission was wilful and wanton, though it is not thus alleged in the declaration.

In an action of the case for losses sustained by negligently setting fire to the plaintiff's grove, which she rented for picnics and to pleasure parties, it was held admissible to show that the defendant said "he wished to God it had burned the whole of it."

In such an action it is not admissible to show that parties hiring the grove trespassed upon the defendant or that the grove was resorted to by persons of ill repute, and disorderly persons.

ON EXCEPTIONS.

Action of the case. The writ was dated August 21, 1882. The plea was the general issue and the following brief statement:

"And for brief matter of special defense, defendant says that the premises of the plaintiff were used in a manner and for a purpose that was unlawful, and constituted it a nuisance, which manner was of special injury and damage to him in his property, and in the comfort and convenience of its use and occupation, interrupting and interfering with his business, and largely impairing the value of his said property, both his mill and his dwelling house, and in various other ways by the collection of improper crowds, &c. otherwise damaged him and injured him."

At the trial the defendant's counsel asked several witnesses questions as to the conduct and character of persons visiting the grove and their trespassing upon the defendant's property, all of which were excluded. The verdict was for plaintiff in the sum of $170.83.

Other material facts are stated in the opinion.

Copeland and Edgerly, for the plaintiff, cited: *Pike* v. *Dilling*, 48 Maine, 542; *Day* v. *Woodworth*, 13 How. 363.

G. C. Yeaton, for the defendant.

All the authorities which permit punitive damages under any circumstances rigidly confine them to the class of cases in which "the injury is inflicted wilfully," or "from wanton or malicious motives, or a reckless disregard of the rights of others"; and the point to be emphasized here is that the action is case and not trespass, and that the writ contains no allegation of anything "wilfully or wantonly or recklessly" done by defendant.

It is a familiar principle of pleading that "whatever circumstances are necessary to constitute the cause of complaint. . . must be stated in the pleadings." So recently as *Gilmore* v. *Mathews*, 67 Maine, 517, 520, it is stated thus: "Every fact necessary to sustain the action should not only be stated, but set out distinctly and with certainty, leaving nothing to inference."

If the court can hold punitive damages recoverable in case for negligence at all, it would seem consonant with the traditional purpose of a declaration to require some allegation by which the defendant may be informed that he is charged with acting, or omitting to act, wilfully or wantonly, else the very gravamen of plaintiff's real claim remains concealed from him until the moment of trial, nay, until the particular witness who testifies to the facts relied upon to establish the wilfulness and wantonness, be called. 6 T. R. 128; 8 T. R. 192; Oliv. Prec. (3d ed.) Tit. Case II. p. 350; *Peoria Bridge Association* v. *Loomis*, 20 Ill. 236; *Wordsworth* v. *Treat*, 43 Maine, 163; *Pike* v. *Dilling*, 48 Maine, 539; *Prentiss* v. *Shaw*, 56 Maine, 427; *Goddard* v. *G. T. R. R.* 57 Maine, 202; *Hanson* v. *E. & N. A. R. R.* 62 Maine, 84; *Johnson* v. *Smith*, 64 Maine, 553.

The plaintiff was responsible for the bacchanalian orgies which were celebrated in her grove, thereby constituting it a nuisance, for the interruption of which illegal source of profit no damages can be recovered. *Sherman* v. *Fall River Iron Works Co.* 5 Allen, 213; *Lord* v. *Chadbourne*, 42 Maine, 429, 440; *Brightman* v. *Bristol*, 65 Maine, 426, 435; Wood's Law of Nuisances, 818, 819; *Fish* v. *Dodge*, 4 Denio, 311; *State* v. *Williams*, 1 Vroom, 102.

Evidence as to what parties brought with them to the grove was also competent to characterize the people, the occasion, the place. So also that "people of ill repute of both sexes" gathered there, and their "disorderly conduct," going and returning on excursion picnics, were competent. *Vide Commonwealth* v. *Kimball*, 7 Gray, 328; *Commonwealth* v. *Gannett*, 1 Allen, 7; *Commonwealth* v. *Dam*, 107 Mass. 210.

APPLETON, C. J. This is an action of the case in which the plaintiff seeks to recover damages of the defendant for his "improperly and carelessly" erecting in an improper place a brick kiln on his land near that of the plaintiff, kindling a fire in the same and so "negligently" watching and tending the same, that it greatly damaged the plaintiff's grove, burning the trees standing thereon, and rendered it undesirable and of little value for picnics, and excursions of pleasure, for which purposes it had been previously rented.

The defendant's counsel requested the court to instruct the jury that this was not a case for punitive damages, but the court declined to give such instructions.

The plaintiff claims to recover for losses occasioned by the negligence of the defendant. The contention is that this being an action for negligence, punitive damages cannot be awarded.

The law seems well settled that punitive damages may be given in case equally as in trespass. Whatever reasons exist for punitive damages in trespass are equally applicable in case. The objection is that this is merely negligence and not the wilful act of the defendant. But the omission of duty — negligence, may be as injurious and criminal in its consequences as the direct and wrongful application of force. The omission to act when action is obligatory is equally criminal with wrongful action when action is forbidden. Action and inaction alike imply volition. Care and want of care are evidentiary of mental conditions. In *Hopkins* v. *A. & St. Lawrence Railroad*, 36 N. H. 9, which was an action to recover damages for the negligence of the defendant, PERLEY, C. J., says, "It is objected that in this case exemplary damages cannot be recovered, because the foundation of the action is negligence, and not a wilful and malicious act of

the defendants. Such damages are awarded for the sake of the public example, or to punish some act or default, which has more or less the character of a crime. The right to recover them is not confined to one form of action. They may be recovered in case as well as trespass. *Goodspeed* v. *The Bank*, 22 Conn. 630; *Fleet* v. *Hollenkemp*, 13 B. Monroe, 219; *Day* v. *Woodworth*, 13 Howard, 363."

Assuming that punitive damages may be given in actions for negligence, it is conceded that those given were in strict accord with law.

The objection is taken that there can be no recovery for punitive damages because of the omission of certain adjectives intensifying the negligence by describing it as gross and of certain adverbs indicating wicked intent, as maliciously, wantonly, &c. In *Wilson* v. *Brett*, 11 M. & W. 113; ROLF, B., said that he could see no difference between *negligence* and *gross negligence*; that it was the same thing with the addition of a vituperative epithet. This observation has met with approval. In *Railroad Co.* v. *Lockwood*, 17 Wall. 357, the court say, referring to the distinction between slight and gross negligence: "In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence perhaps it is more strictly accurate to call it simply negligence." This is the tendency of modern authorities. The character of the negligence and how far it implies a disregard of the rights of others or a criminal neglect on the part of a defendant, is to be determined by the jury under proper instructions. The damages are to be determined by the act done or omitted to be done and the circumstances attending the act or the omission to act, and not upon whether certain vituperative adverbs are or are not inserted in the declaration. To authorize damages, it is sufficient if the plaintiff in his declaration allege negligence, but he must prove that it is of such a character as to authorize the jury to find that the act or omission of the defendant was willful and wanton.

The remark of the defendant that "he wished to God it had burnt the whole of it," meaning the grove, was clearly admissible as indicating a state of mind unfriendly to the plaintiff and as

showing not merely utter indifference to her rights, but a preference for the destruction of her property rather than its preservation.

If the lessees of the plaintiff were guilty of any trespass upon the property or rights of the defendant or any violation of the laws of the state, the defendant has the recognized legal remedies and the state its criminal processes, but the plaintiff is not shown in any way to be responsible therefor. The evidence, therefore was properly rejected.

Exceptions overruled.

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

PETERS, J., concurred in the result.

SERENA L. POWERS *vs.* THOMAS MITCHELL.

Cumberland. Opinion August 2, 1883.

Action, transfer from the docket of one county to that of another. Stat. 1872, c. 45. "Continued nisi." Practice.

The power of a justice of this court to transfer a civil action from the docket of one county to that of another county, is derived solely from the statute, and by stat. 1872, c. 45, that power, for sufficient cause, is conferred only "while holding a *nisi prius* term, for the trial of civil and criminal causes."

After the close of a term by final adjournment, whether an action be continued, or "continued *nisi*," an action cannot be transferred because not done by a judge then holding a *nisi prius* term.

When the court have not jurisdiction it cannot be conferred by consent or agreement of counsel.

When a suit has been pending for several years, the general issue been pleaded, three trials been had, and the cause transferred and entered on the docket of another county, a plea in abatement cannot be filed. A motion to dismiss, filed on the second day of the first term in the new county, because of an improper transfer and for want of jurisdiction, is seasonably filed.

ON EXCEPTIONS.

This is an action of the case to recover damages in the sum of ten thousand dollars for personal injury alleged to have been sustained by the plaintiff in consequence of the defendant's negligence in causing a collision of sleighs in which the parties were respectively riding in the public street in Augusta, December 29, 1879. The writ was dated on the ninth day of January, A. D. 1880, and entered in the March term, 1880, of this court in Kennebec county, where three trials have been had. At the March term, 1882, the plaintiff filed a motion for change of venue, and on the last day of the term, being the 29th day of March, an entry was made, "Motion for change of venue continued *nisi*." And on the 7th day of April, following, the clerk of the court in that county received the following order from the justice presiding at the March term:

"State of Maine. Kennebec, ss. Supreme Judicial Court. March Term, A. D. 1882.

"In the civil action pending in said Court, being No. 125 upon the docket thereof, wherein Serena L. Powers is plaintiff and Thomas Mitchell is defendant, on plaintiff's motion filed on the thirteenth day of the term, and for good and sufficient reasons shown to the Court, it is—

"Ordered, That said action be and the same hereby is transferred to the docket of said Supreme Judicial Court, in the county of Cumberland, in said State of Maine, for trial."

The action was thereupon entered upon the docket of Cumberland county, and on the second day of the first term (April term, 1882,) in that county, the defendant filed a motion to dismiss "from the docket of the court in said county of Cumberland" because it was improperly transferred and for want of jurisdiction. The exceptions were to the decree of the court in overruling this motion.

C. W. Goddard and *A. M. Spear*, for the plaintiff.

Defendant's exceptions are prematurely and improperly here and must be dismissed.

When a dilatory plea is overruled and exceptions taken, the court is to proceed and close the trial, and the action shall then be continued and marked law, &c. R. S., c 77, § 22.

Cases should not be entered at the law court on exceptions until they are in a condition to be finally disposed of if the exceptions are overruled. *State* v. *Inness*, 53 Maine, 541.

The motion to dismiss for want of jurisdiction is in the nature of a dilatory plea, overruling it did not end the suit, but kept it in court for future proceedings. In such case the exceptions should await the final disposition of the case. The court should have proceeded and closed the case, and then if plaintiff was aggrieved, it should have been marked law and continued. It is improperly entered on the law docket. *Day* v. *Chandler*, 65 Maine, 367.

Such exceptions must be filed at the time when the proceedings complained of are had, should remain in the court where the action is pending, until it is ready for final disposition, and come here, if at all, at the same time with other exceptions raised at the trial, if any, or when the case is in such a position that an adjudication upon them is necessary for a final determination of the rights of the parties. *Cameron* v. *Tyler*, 71 Maine, 28.

The docket of this case in this county shows that the action was regularly and legally transferred to this county. If the defect or error which defendant alleges is not apparent on the face of the record, it should have been taken advantage of by plea in abatement as insisted on by plaintiff's counsel at the time he filed his motion. 36 Maine, 388; Spaulding's Practice, page 160, § 6.

The presiding justice had ample authority both at common law and by express statute to order the transfer. Indeed it is made his *duty* to issue such order when good and sufficient reasons are shown. 1872, c. 45.

What does the docket, cleared of extraneous papers show?

First, That plaintiff duly filed her motion for change of venue on the thirteenth day of the March term, (March 28,) 1882.

Second, That at said term the motion was granted and for good and sufficient reasons shown to the court the transfer of the action was ordered as prayed for.

Third, That on the fourteenth day of the term (March 29), the motion for change of venue was "continued *nisi*."

Fourth, That on said fourteenth day the general order for the continuance was issued and the court finally adjourned.

Fifth, That the "order" was "received from Judge WALTON to enter (as of March term) 'motion allowed, action transferred to Cumberland county docket for trial as per order on file.'"

It will be observed that the docket sufficiently and unequivocally shows the two main facts, the filing of plaintiff's motion and the order of the presiding justice thereon, both at the March term, 1882. If those two entries stood alone, there could be no excuse for cavil. Are they invalidated by the presence of the other entries? Even if there were any conflict between them, the court would undoubtedly endeavor to give effect to the docket as a whole, and the final order of March term, 1882, which is beyond controversy the main entry, must control the interlocutory and subordinate ones. But there is no real conflict. What does the entry "continued *nisi*" mean? Beyond dispute it means "continued unless" some alternative lawful disposal shall be made of the matter under continuance prior to the term to which it will otherwise be continued.

What that alternative in any given case may be will depend on the facts in the case so far as they may appear. What the alternative in this case was, there can be no doubt, viz: — "motion continued" to the next October term of this court for this county "unless" before that time the case shall, during vacation, be transferred by the justice holding the present March term for said county, as of said term, on said motion, to the docket of this court for the county of Cumberland. No ingenuity can essentially alter the legal interpretation of that entry, "continued *nisi*."

Defendant contends that the law does not authorize the transfer at the time and in the manner made (1872, c. 45), the point being that the actual "order" was not received, and the entry in fact spread upon the docket until nine days after final adjournment of the March term. But the record shows that the entry "continued *nisi*" was actually made by the justice "while holding a *nisi prius* term of said court for the trial of civil and

criminal cases, upon plaintiff's motion" filed at said term after a third trial and disagreement of the jury; of this there is no question.

It is too late to question the authority of the court after adjournment to complete entries which the pressure of business during a *nisi prius* session has rendered it impossible to finish in term time. It has been the immemorial practice of the justices of this court not only in person, but by the clerks of the court under their direction and authority. Instances are innumerable and some of them relate to matters of the gravest importance, such as the signing of exceptions and certifying to evidence on motions for new trial, completing the records of sentences from the pencil minutes on the backs of indictments, &c.

Orville D. Baker, for the defendant, cited: *Hawkes* v. *Kennebec*, 7 Mass. 463; *Lincoln* v. *Prince*, 2 Mass. 544; *Cleveland* v. *Welsh*, 4 Mass. 591; *Newman* v. *Hammond*, 46 Ind. 119.

APPLETON, C. J. This action was pending on the docket of the Supreme Judicial Court for Kennebec county. On March 28, 1882, being the thirteenth day of the term, the plaintiff filed a motion for the transfer of the action to the docket of another county, in which he alleged good and sufficient reasons therefor. The parties were heard on the motion. On the next day this entry, under the action, was made, "motion continued *nisi*," and the court adjourned finally and the term was closed.

Nine days after the adjournment, and in vacation, an order was received from the justice before whom the motion for the transfer had been heard, that an entry be made under the action, that the same be transferred to the docket of the Supreme Judicial Court, for the county of Cumberland, for trial. Thereupon such entry was duly made at that date, as of the preceding March term.

The above facts appear of record in the papers filed, and the question presented for adjudication is, whether this suit has been transferred in accordance with the provisions of the statute of 1872, chapter 45, which confers upon a judge holding a *nisi prius* term, the power to order the transfer of an action from the

docket of the county in which it is pending to that of another county for trial.

The statute on the subject, to which reference has been had, is in these words: "That it shall be the duty of any judge of the Supreme Judicial Court for this state, *while holding any nisi prius term of said court for the trial of civil or criminal causes*, to order for good and sufficient reasons shown, on motion of either party, the transfer of any civil action, or criminal case now pending or hereafter to be brought in said court to the docket of said court in any other county in this state, for trial."

The action having been made originally returnable to the Supreme Judicial Court, at a term holden in Kennebec county, this court sitting in Cumberland county could have no jurisdiction over the same, except by virtue of a transfer in accordance with the above statute. The entry on the docket, ordering the transfer, is made, in fact, in vacation. But the power to order a transfer, is conferred only on a justice of this court, "while holding any *nisi prius* term of said court for the trial of civil or criminal causes." It is not given to a judge in vacation. It is not given to a judge "while" *not* holding a *nisi prius* term. Here the record shows that the order was made, and the entry on the docket likewise, in vacation. Consequently, the action has not been transferred in accordance with the requirements of the statute.

The power to transfer an action from the docket of one county to that of another, has but recently been conferred on the justices of this court. It can only be done by a justice *while* holding a *nisi prius* term. It is not given in vacation. Now, if a continuance *nisi* is a continuance, as the plaintiff's counsel claims it to be, then this action was continued. If continued, the order was in vacation. But the statute confers no such authority on a judge in vacation, but necessarily and clearly negatives it.

The commencement of a term is fixed by statute, and its termination by its final adjournment. All judgments, decrees, and orders must be entered in term time. The judge cannot order an entry to be made in vacation. If a cause is continued,

he can neither order nonsuit nor default. It matters not whether the order relates to a nonsuit, default or removal, his power over the case is alike terminated. "It is a rule well established," observes MILLER, J., in *Bronson* v. *Schulten*, 104 U. S. 410, "that after term time has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them." If the power to modify or correct a decree or order has ceased, much more must it follow that there is no power to enter a decree or make an order.

The acceptance of a report of road commissioners is a judicial act, which can only be done in term. In *Pillsbury* v. *Springfield*, 16 N. H. 565, the parties relied upon an order of the judge out of term, as authority for the clerk to enter up judgment. "But it has been sufficiently shown," concludes WOOD, J., in delivering his opinion, "that a judgment or decree of the court of common pleas, accepting a report of the road commissioners, is not of that nature. It is a strictly judicial act. A motion for the purpose is open to contestation, and the sureties have a right to be heard. It is, therefore, an act that can be done only by the court; and there is no court of common law with judicial power except in term." It was decided in *Ferges* v. *Wesler*, 35 Ind. 53, that "when a law authorizes or contemplates the doing of an act by the court, it is and must be understood, that the court in term time may and must do it, and the judge in vacation cannot, unless the power is *expressly* conferred upon him by law." In *Newman* v. *Hammond*, 46 Ind. 119, a receiver was appointed and his bond approved in vacation. "There is no law in the state authorizing the judge to appoint a receiver or the clerk to approve his bond in vacation, hence the appointment was void and the receiver has no legal right to maintain the suit."

The order of removal is a judicial act, and not having been made in term, is not within the statute by which alone authority is given.

Nor does the continuance *nisi* change the result. The action is none the less continued. "*Nisi prius*, the commission to justices of assize; so called from a judicial writ of *distringas*, whereby

the sheriff is commanded to distrain the empannelled jury to appear at Westminster before the justices at a certain day in the following term, to try some cause. *Nisi prius justic domini regis ad assissas capiend venerint*, viz. unless the justices come" *before* that day to such a place, &c. 2 Ins. 424; 4 Ins. 159; Jac. Dic. The continuance of a cause *nisi* is no part of the common law. With us, it is only applicable to cases pending on the law docket, and is authorized by stat. 1821, c. 54, § 8, which with various modifications has remained in force to the present time. But the authority to continue was by the express terms applied to cases, "continued *nisi* for advisement by the court, or for argument by consent of parties," and after the justices shall have determined the same, provision is made for entering judgment. But this gave no general authority to continue cases *nisi*. Indeed if that could be done, the right to except might at any time be foreclosed.

But supposing there is this authority to continue any and all cases *nisi*, what is the legal interpretation of the entry "continued *nisi*," as claimed by the learned counsel for the plaintiff? It is this: "motion continued to the next October term of this court, for this county, 'unless' before that term the case shall, *during vacation*, be transferred by the justice holding the present March term, for said county, as of said term, on said motion to the docket of this court, for the county of Cumberland." The transfer is to be made, by the very construction of the order as understood by the plaintiff's counsel *during* vacation. Now if anything is certain it is that a transfer made by a judge *during vacation*, is not and cannot be one made by a judge "while holding a *nisi prius term*," unless one is prepared to say that "during vacation," and "while holding a *nisi prius* term," mean one and the same thing. If not, then, the removal was unauthorized, and against the plain meaning of the statute.

In Howe's Practice, 399, reference is made to cases continued for advisement. The case referred to is, *Perry* v. *Wilson*, 7 Mass. 393, which was a question of law. But cases continued for advisement are not cases continued *nisi*. They are continuances. However, whether a case is continued or con-

tinued *nisi*, it is a continuance, and any judgment or decree, or order by a judge in vacation, is not a judicial act, done by him while holding a *nisi prius* term.

The question of abatement does not arise. The suit has been pending for years, the general issue has been pleaded and there have been three trials. It had long ceased to be an action to which a plea in abatement could be filed.

The motion was not a dilatory one. It was a motion negativing the entire jurisdiction of the court in the then condition of the record. The court has only such jurisdiction as is conferred either expressly or by necessary implication. Where the court have not jurisdiction it cannot be conferred by consent or the agreement of parties. *State* v. *Bonney*, 34 Maine, 223. A judgment rendered by a court not having jurisdiction is void. *Lovejoy* v. *Albee*, 33 Maine, 414. When it appears to the court, that they have no jurisdiction of the case before them, they will not proceed in the suit but will stay all further proceedings, though the objection is not taken by plea to the jurisdiction. *Lawrence* v. *Smith*, 5 Mass. 362. The objection to want of jurisdiction may be taken advantage of at any stage of the proceedings. *Eddy's case*, 6 Cush. 28; *Eaton* v. *Framingham*, 6 Cush. 245; *Riley* v. *Lowell*, 117 Mass. 76; *Custy* v. *Lowell*, 117 Mass. 78; *Bearce* v. *Bowker*, 115 Mass. 129.

If it was necessary to file the motion to dismiss within the time allowed for dilatory pleas by the rules of the court, the case shows that it was seasonably filed.

Exceptions sustained. Case remanded to the docket of the Supreme Judicial Court for Kennebec county.

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

ALBERT L. BURBANK

vs.

THE BETHEL STEAM MILL COMPANY.

Cumberland. Opinion August 2, 1883.

Nuisance. R. S., c. 17, §§ 12, 17, 19. Stationary steam engine. Charter. Bethel Steam Mill Company. Evidence.

In an action to recover damages for burning of property, caused by the use of a stationary steam engine which was erected and used without a license, *Held;*

1. That the remedy was at common law and not by R. S., c. 17, §§ 12, 17, 19.

2. That to maintain the action the plaintiff must prove that the engine from its location, improper construction or insufficient repair was in fact a nuisance to the plaintiff, or that the defendants were guilty of negligence by reason of which fire was communicated to the mill and from it to plaintiff's buildings.

3. That the court cannot declare as a matter of law that the engine if located in a proper place and properly constructed and used, was in its nature, calculated to do mischief to the property of any person.

4. That if the engine was in the use of a third person under a contract with the defendants, by which he had the exclusive control of it, and was to make the proper repairs, and it was not in fact a nuisance when delivered to such person, but became a nuisance by his neglect to keep it in proper repair, or if the injury was caused by his negligence the defendants would not be liable.

5. That it was not admissible to show that the mill caught fire the year before, it appearing that that fire was not communicated to the mill by the use of the engine in any way.

The charter of the Bethel Steam Mill Company, (special stat. 1863, c. 259)* does not exempt the corporation from the provisions of R. S., c. 17, for the protection of the public, nor give them any right to erect and maintain an engine at such a place, or to construct and use it in such a manner that it would be a nuisance to others in the enjoyment of their property.

ON EXCEPTIONS from the superior court.

This was an action to recover damages sustained by reason of the burning of the plaintiff's house and barn at Bethel, August 26, 1876, the fire being communicated from the steam mill of the defendants which was burnt on that day. The writ was dated September 29, 1879. The plea was the general issue.

The opinion states the essential facts.

W. L. Putnam, for the plaintiff.

This action went to the jury upon the single question of liability for maintaining a nuisance, the contract with Pierce having shut out all claims upon the counts for negligence. R. S., c. 17, § 8, provide, in most sweeping language, remedy for injury to property by nuisance; as did its corresponding provision in the previous revision of 1857. The *dictum* at the close of the opinion in *Lyons* v. *Woodward*, 49 Maine, 29, is supposed by defendants, to restrict the effect of this statute to the class of nuisances particularly described in the first section of that chapter. The inquiry there was directed to the nature of the alleged *injury*, and not to the *cause* of the injury; and the court looked to section 1 as explaining the nature of the *injuries* for which an action would lie. It seems to us clear, that this action lies by express provision of the statute. However this may be, our

* Sections 1 and 2, defining the powers of the corporation, are as follows:

Section 1. John Lynch, David Hammons, their associates, successors and assigns, are hereby created and constituted a body corporate and politic by the name of the Bethel Steam Mill Company, with all the powers and privileges and subject to the duties and liabilities contained in the laws of this state relating to manufacturing corporations.

Section 2. Said corporation is authorized to manufacture all kinds of lumber in the town of Bethel, county of Oxford, and for this purpose may construct, repair and maintain upon their own lands all suitable buildings, and may purchase and hold such personal and real estate as may be necessary for this object, not to exceed one hundred thousand dollars. They may also construct and maintain such piers and booms as may be necessary and convenient for the operations of said mill; but said company are to have no more right to prevent or delay the passage of logs and timber on said Androscoggin river being driven below, than they would be entitled to if this act was not passed.

pleadings are such, that we maintain our suit, either at common law or upon the statute. It is now well settled in this State, that while no private action arises for a public injury by a public nuisance, one does lie for a private and special injury by a public nuisance. *Franklin Wharf* v. *Portland*, 67 Maine, 59; *Brown* v. *Watson*, 47 Maine, 161; *Dudley* v. *Kennedy*, 63 Maine, 465.

By R. S., c. 17, § 19, the use of defendants' engine made it a common nuisance. Being such nuisance, it was operated at the peril of defendants. *Frye* v. *Moor*, 53 Maine, 583; *Jones* v. *Railway Co.* 3 Q. B. 733; *Salisbury* v. *Herchenroder*, 106 Mass. 458; *Ryland* v. *Fletcher*, 3 Law Report, H. L. 330.

In reference to the eighth request, it will be seen that the charter does not expressly authorize the company to manufacture by steam. If it did, yet the locality and methods of erecting engines and guarding against fire and explosion, would remain to be provided for; and there would be no presumption, that the legislature intended to supersede the wise and detailed provisions of the R. S., on these points. This precise principle of construction is settled in *Pratt* v. *Railroad Co.* 42 Maine, 586.

The statutory action of the selectmen with reference to stationary engines is *quasi* judicial, after notice to parties interested; and its place cannot be supplied by the arbitrary municipal action of the inhabitants, even if such action had been valid, which according to *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62, was not the fact.

In reference to the instructions of the court about the Pierce contract, we cite the following cases, and we think a perusal of them will obviate necessity of any argument or comment, and that they fully sustain the instructions. *Todd* v. *Flight*, 99 Eng. Com. Law Rep. 377; *Chicago* v. *Robbins*, 2 Black, 418; *Water Co.* v. *Ware*, 16 Wall. 566; Wheaton on Negligence, §§ 817–8; *Robbins* v. *Chicago*, 4 Wall. 657; *Eaton* v. *Railroad Co.* 59 Maine, 526; *Conners* v. *Hennesey*, 112 Mass. 96.

Inasmuch as Pierce did not erect the engine, and, for aught that appears, did not know that it was unlicensed, he might not be liable for the nuisance; and therefore no one might be liable, unless defendant. *Pillsbury* v *Moore*, 44 Maine, 156.

With reference to the question of negligence, it would seem entirely proper, as throwing a proper light upon the case, to inquire whether, within a reasonable time previous to the fire complained of in the suit, fire had caught from the same alleged defect, and whether that fact had been brought to the attention of the president of the company or to the engineer in charge, who was there when the fire took place. It is claimed that *Parker* v. *Portland Publishing Co.* 69 Maine, 173, applies. We think not. This evidence seems to us within the principle of *Grand Trunk Railway Co.* v. *Richardson*, 1 Otto, 454.

Strout and Holmes with *Enoch Foster*, for the defendants, cited: *Parker* v. *Portland Pub. Co.* 69 Maine, 173; *Brightman* v. *Bristol*, 65 Maine, 435; *Lyons* v. *Woodward*, 49 Maine, 29; 2 Greenl. Ev. § 472; 1 Add. Torts, 197; *Rockwood* v. *Wilson*, 11 Cush. 226; *Morrison* v. *Davis*, 20 Pa. St. 171; *Penn. R. R. Co.* v. *Kerr*, 62 Pa. St. 353; *Harrison* v. *Berkley*, 1 Strobh. S. C. 525; *Sharp* v. *Powell*, L. R. 7 C. P. 253; *Fletcher* v. *Rylands*, L. R. 1 Ex. 265; *Ryan* v. *N. Y. C. R. R.* 35 N. Y. 210; Wharton, Neg. § 148, *et seq.*; 1 Add. Torts, 6; Field, Damages, § 50; *M. & S. P. R. R. Co.* v. *Kellogg*, 4 Otto, 469; *Chapman* v. *A. & St. L. R. R. Co.* 37 Maine, 94.

Counsel contended further that not only was the stationary engine not a nuisance at common law, but that it could not be a common nuisance, inasmuch as its erection had been authorized by an act of the legislature. The act of incorporation was for the Bethel Steam Mill Co. and the character of the mill is indicated in the title of the act. In construing the act the court have a right to have recourse to the title. Bishop, Statutory Crimes, § 46; Dwarris on Statutes, § 102, note, and § 108.

The act of incorporation authorizes the company "to manufacture all kinds of lumber in the town of Bethel, county of Oxford, and for this purpose to construct, repair, and maintain upon their own land all suitable buildings."

This authority, by implication, embraces everything that was necessary to its enjoyment. Now, if this was to be a steam mill company for the purpose of manufacturing lumber, and the company had a right to construct and maintain all suitable buildings

for that purpose, it would necessarily involve the erection and use of a steam engine as a part of the structure, otherwise the building would not be a steam mill. The authorities are ample and conclusive that where the legislature confers an authority of this kind upon a company or a person, and a building is erected in accordance with and for the purpose mentioned in the act of incorporation, such building cannot be a common and public nuisance, and the legislature, in its sovereign power, having conferred such authority, it does not lie within the province of municipal officers to defeat the grant from the State by neglecting or refusing to grant a license for the purpose contemplated by the act; in a word, the act of the legislature supersedes and takes the place of all other authority of less grade and potency. Upon this point we cite: *Boulton* v. *Crowther*, 2 B. & C. 703; *Steam Navigation Co.* v. *Morrison*, 13 C. B. 581; *Beaver* v. *Mayor, etc.* 8 E. & B. 44; *Brand* v. *Hammersmith, R. R. Co. L. R.* 2 Q. B. 241, 242; *Cracknell* v. *Mayor, L. R.* 4 C. P. 634, 635.

Such is the settled law of England; and the current of American decisions sustains this doctrine fully. *Lawler* v. *Boom Co.* 56 Maine, 445; 6 Barber, 313, 318; 9 Barber, 350, 364; 18 Barber, 222, 247; 4 Cush. 72; Wood on Nuisance, §§ 746, 750; Wharton on Negligence, §§ 271, 869, 870; Addison on Torts, 882.

As an illustration of the binding force of an act of incorporation as against even general statute law, we cite the case of *Titcomb* v. *Union Marine & Fire Ins. Co.* 8 Mass. 325, where the court held an act incorporating an insurance company, and prescribing the particular manner in which the shares of members and stock were to be attached and sold on execution, to supersede the general provisions of statute upon the same subject passed prior thereto.

LIBBEY, J. In 1863, by private act, c. 259, the defendants were created a manufacturing corporation by the name of the "Bethel Steam Mill Company," with power to manufacture all kinds of lumber in the town of Bethel, and for that purpose

were authorized to construct, repair and maintain upon their land "all suitable buildings." They erected on their own land, in said town, a steam mill for the manufacture of lumber, with a stationary steam engine therein, without obtaining from the municipal officers of the town a license therefor.

In 1876 the mill was operated by one Pierce under a contract with the defendants, and in August of that year, the mill was burnt. A strong wind prevailed which carried the burning cinders upon the plaintiff's dwelling house and barn, and they were thereby burnt. The plaintiff brings this action to recover his damages sustained by that fire. The declaration contains three counts. The first two base the right of action upon the negligence of the defendants; the third founds it upon R. S., c. 17, § § 12, 17 and 19. As the case was tried and submitted to the jury by the presiding judge, the plaintiff's right to recover was based upon the third count.

The judge instructed the jury, in substance, as follows: If the defendants used their stationary steam engine, erected and maintained without a license, it was a common nuisance, and if the fire was communicated directly to the defendants' mill from the furnace, from the flues, or from the chimney, by reason of which the mill was burnt, and the burning of the plaintiff's buildings was a result naturally and reasonably to be expected from the burning of the defendants' mill, and the burning of the mill was the proximate cause of the burning of the plaintiff's buildings, the plaintiff was entitled to recover without proof that the steam engine was a nuisance, in fact, or of negligence on the part of the defendants. The great contention between the parties is whether the rule of law, thus given to the jury, is correct.

The first question that arises is, does the plaintiff's right of action rest upon the statute, or upon the common law? Sections 17 and 19, R. S., c. 17, had their origin in the act of 1846, c. 191; § 1 of that act, was the same as § 17, R. S., and prohibited the erection of a stationary steam engine without a license. Section three was as follows: "Any such engine hereafter erected without a license, made and recorded as aforesaid, shall

be deemed and taken to be a common nuisance without any other proof thereof than proof of its use." This is the same in meaning as § 17, c. 17, R. S. Section 4 was the same as § 20, c. 17, R. S., and gave the municipal officers, the same authority to abate such stationary steam engine, that health officers had to abate a nuisance to health by c. 14, R. S. The act imposed no penalty for its violation, and gave no action to any person for any injury therefrom.

Section 12, c. 17, R. S., had its origin in the act of 1821, c. 24, § 4. There was a slight change in its phraseology in the revision of 1857, but not to indicate an intention of the legislature to change its meaning. Before the revision of 1857, this statutory provision did not apply to the act of 1846. That act was merely a police regulation, declaring that a stationary steam engine, erected without a license should be deemed a common nuisance without other proof than proof of its use, and authorizing its summary abatement by the municipal officers of the town where it was erected. It gave no action to any person injured by it. His right of action, if any, was at common law.

In the revision of 1857, the act of 1846 was added to c. 146, R. S., of 1840, and became a part of chapter 17 of that revision. There is nothing in the revision indicating an intention of the legislature to change the construction of the two acts as they existed before the revision, and they should have the same construction after the revision as before. *Hughes* v. *Farrar*, 45 Maine, 72; *French* v. *Co. Com'rs*, 64 Maine, 580; *Lyon* v. *Woodward*, 49 Maine, 29. In the latter case this court put the same construction on c. 17, R. S., 1857, that we now put upon it, and after that decision was promulgated, the legislature re-enacted these provisions of R. S., 1857, in the revision of 1871, without change, thereby adopting the construction of the court.

From these considerations we are of opinion that the plaintiff's remedy, if he has any, is at common law and not by statute.

Can the action be maintained at common law without proof of negligence of the defendants, or that their steam engine was a nuisance, in fact? It is claimed by the counsel for the plaintiff, that it can be, on the ground that the defendants erected their

engine in violation of law, and having done so were insurers against all damage, which any one might sustain from its use; and in support of this proposition he cites and relies on *Ryland* v. *Fletcher*, 3 Law Rep. H. L. 330; *Jones* v. *Festiniog R. Co.* 3 L. R. (Q. B.) 733; *Salisbury* v. *Herchenroder*, 106 Mass. 458; *Frye* v. *Moor*, 53 Maine, 583.

We think these cases are all distinguishable from the case at bar. The authority of *Rylands* v. *Fletcher*, has been denied by many of the courts in this country, and by some accepted. This court has neither denied nor accepted it, and we have no occasion now to do so. Its authority, however, is not to be extended beyond the class of cases possessing all the elements upon which the judgment of the court was based. It is believed that the courts in this country — certainly in this state — have never held it applicable to fires, rightfully set upon one's own premises, which escape and extend on to the property of others. (*Simonton* v. *Loring*, 68 Maine, 164).

The case was before the House of Lords, on appeal from the exchequer chamber, (1 L. R. Exch. Cases, 265.) In the exchequer chamber the judgment of the court was delivered by BLACKBURN, J., who stated the legal proposition upon which the case was decided as follows: "We think that the true rule of law is, that the person, who for his own purposes, brings on his lands and collects, and keeps there *anything likely to do mischief* if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." The House of Lords affirmed this rule as the law of the case. The essential element in this legal rule is, that the thing must be one "*likely to do mischief.*" The court cannot declare, as matter of law, that the defendants' stationary steam engine, if located in a proper place, and properly constructed and used, was, in its nature, calculated to do mischief to the property of any person. *Brightman* v. *Bristol*, 65 Maine, 435; *Losee* v. *Buchanan*, 51 N. Y. 476.

In *Jones* v. *Festiniog R. Co.* the defendants were running their steam locomotive over their railroad without legal authority; and the court held them responsible for damage to the plaintiff's

property by fire, communicated by sparks or coals from the locomotive. The decision of the case was put upon the ground that the use of the locomotive steam engine on the defendants' road was *highly dangerous*, and the defendants used it at their peril. It affirms the rule in *Rylands* v. *Fletcher*.

In *Salisbury* v. *Herchenroder*, the defendants' hanging sign over the street was absolutely prohibited. It could not be legalized by license. It was unlawful as to every person passing along the street, or having property that might be damaged by it; and this unlawful element was present, acting with the wind in doing the damage to the plaintiff.

Frye v. *Moor*, does not sustain the rule claimed for the plaintiff. The law of the case is stated by TAPLEY, J., in the opinion of the court, as follows: "The defendants caused an *unnatural* accumulation of water in a reservoir above the mill of the plaintiff. If accumulated rightfully as to this plaintiff, they must at least exercise ordinary care in letting it again pass into its ordinary and accustomed channels over the plaintiff's property. If accumulated wrongfully, and without any right or authority, as against this plaintiff, if they let it into its ordinary and accustomed channels, they do so at their peril, and they must be held responsible for the consequences of their wrongful act." It is believed to be the settled law of this state, that, to render the defendant liable without negligence, his act must be shown to be wrongful as against the plaintiff.

If the defendants' steam engine is not in fact a nuisance and the defendant was not guilty of negligence, was its erection and use *wrongful* as against the plaintiff? What was the unlawful element that rendered it liable to abatement as a common nuisance? Clearly the want of a license. To-day without a license the statute declares it a nuisance. To-morrow with a license without change of location, structure, or use it is not a nuisance. It is not the use of a stationary steam engine that makes it a nuisance. Its use for any proper purpose is lawful. It is only when it is *unlicensed* that it is to be deemed a nuisance without any other proof than its use. What additional protection or security would a license have given to the plaintiff? How did

the want of it, in any way, affect the plaintiff's rights, or tend to cause his injury? The want of a license rendered it wrongful as against the public, as a violation of a police regulation; but it is not perceived how it did so as against the plaintiff.

But assuming that the defendants' engine *without a license*, was a nuisance for which the plaintiff could maintain an action for damage sustained from it, he must prove that his damage was caused by the particular element in its character or use which rendered it a nuisance. *Bowden* v. *Lewis*, 13 R. I. 189. Hence if a building is used as a slaughter house, and is a common nuisance by reason of its noxious exhalations or offensive smells, and it takes fire without negligence of the owner, and thereby the property of another is burnt, or destroyed, he cannot maintain an action against the owner of the slaughter house therefor, although he was using the building in violation of the statute; because his injury was in no way caused by the noxious exhalations or offensive smells. This is familiar law; and applying it to this case the instructions of the judge cannot be sustained. The want of a license in no way caused or contributed to the burning of the defendants' mill by which the plaintiff was damaged.

Again it is well settled law, fully recognized by the authorities cited for the plaintiff, that the wrong doer is responsible only for such damages as are the natural and ordinary consequences of his wrong unless it be shown that he knew or had reasonable cause to know that consequences not usually resulting from the act, are, by reason of some existing cause, likely to intervene so as to occasion damage to a third party. *Ryland* v. *Fletcher*, *supra*; *Sharp* v. *Powell*, 7 L. R. C. P. 253. How can it be said that the use of the defendants' engine, *without a license*, would naturally be calculated, in any greater degree, to communicate fire to the mill, than its use with a license? The want of a license could have nothing to do with the origin of the fire.

The law is regarded as well settled in this country by a line of decisions well considered that one doing a lawful act in a manner forbidden by law, is not absolutely liable for an injury caused to a third party by the act; nor is the violation of law in doing it conclusive evidence of negligence. *Baker* v. *Portland*, 58

Maine, 199; *Larrabee* v. *Sewall*, 66 Maine, 376; *Gilmore* v. *Ross*, 72 Maine, 194; *Kidder* v. *Dunstable*, 11 Gray, 342; *Spofford* v. *Harlow*, 3 Allen, 176; *McGrath* v. *N. Y. & H. R. R. Co.* 63 N. Y. 522; *Massoth* v. *D. & H. Canal Co.* 64 N. Y. 524; *Knupfle* v. *Knick. Ice Co.* 84 N. Y. 488; *Hoffman* v. *Union Ferry Co.* 68 N. Y. 385; *Lockwood* v. *Chicago & Nothern R. Co.* 54 Wis.

These cases involved the doing of a lawful act in an unlawful manner, and they fully sustain the rule as we have declared it. They are distinguishable from the class of cases relied on by the counsel for the plaintiff, which involved the doing of a *wrongful or unlawful act* which caused the injury.

For the reasons stated we are of opinion that, to maintain this action the plaintiff must prove that the defendants' stationary steam engine, from its location, improper construction or insufficient repair, was in fact a nuisance to him, or that the defendants were guilty of negligence, by reason of which fire was communicated to the defendants' mill and from that to his buildings.

Other questions were raised and fully discussed at the argument, and, as they may arise if the case is again tried, it is proper that we should decide them now.

It is claimed by the counsel for the defendants, that, by the contract between them and Pierce, he was to have the possession and control of the mill, and must make the repairs while in possession performing his contract; that he was in effect their lessee with the duty of making repairs on the premises during his lease, and therefore the defendants are not liable for an injury caused by the use of the mill. By the contract between the parties their relation appears to have been as claimed for the defendants.

If the stationary steam engine and mill were not in fact a nuisance when they were delivered by the defendants to Pierce to be used by him in the performance of his contract, and the plaintiff's injury was occasioned by the negligence of Pierce in not keeping them in proper repair, or in their use, the defendants are not liable. But if they were in fact a nuisance when delivered to Pierce, and by the contract were to be used by him substantially as they then were, and were so used, and the injury resulted from the use, the defendants are liable. *Lowell* v.

Spaulding, 4 Cush. 277; *Canton* v. *Eastern R. R. Co.* Mass. not yet reported; *Mellen* v. *Morrill*, 126 Mass. 545; *Ryan* v. *Wilson*, 87 N. Y. 471; *Swords* v. *Edgar*, 59 N. Y. 28.

The contention of the defendants that, by their charter they were authorized to erect and maintain a steam mill on their own land in Bethel, and that thereby they are not subject to the statutory provisions in regard to stationary steam engines, cannot aid them. A fair construction of their charter gives them the same rights to erect and use such a mill as an individual has, and in no way exempts them from the police regulations for the safety of the public. Nor does their charter authorize them to erect their mill at such a point, or construct and use it in such a manner that it will be a nuisance to others in the enjoyment of their property. *Commonwealth* v. *Kidder*, 107 Mass. 188; *Bellemont and Ohio Co.* v. *Fifth Baptist Church S. C. U. S.* not yet reported. See Albany L. J. June 23, 1883, p. 488.

The plaintiff was permitted to prove by Winchester and Town, on cross-examination, that the defendants' mill caught fire in 1875, the year before it was burnt. It did not appear by the statements of the witnesses that the fire in 1875 was communicated to the mill by the use of the engine in any way. The point where it was discovered would not authorize that inference. The evidence did not properly tend to show the capacity of the furnace flues, or chimney, to communicate fire to the mill by their use. It was not admissible on the authority of the cases that hold, that, where the issue is whether the fire was set by a railroad locomotive, the same locomotive under similar circumstances at other times had emitted sparks and coals and set fire. If it appeared that the fire was communicated to the mill in 1875, by the use of the engine, we think it would be admissible. But on the authority of *Parker* v. *Publishing Co.* 69 Maine, 173, the evidence was irrelevant, and calculated to mislead the jury, and should have been excluded.

Exceptions sustained.
New trial granted.

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

BARROWS, J., concurred in the result.

ELIJAH NORTON

vs.

CHARLES L. SOULE and another, and INHABITANTS OF SCHOOL DISTRICT NO. 2, in Eddington, Trustees.

Penobscot. Opinion August 17, 1883.

Trustee process. Wages of school teacher.

The wages of a school teacher employed for a definite time, until the expiration of which he is not by the contract entitled to receive any part of his pay, cannot be holden by trustee process until he has completed his term, or so long as there is a contingency as to his right to receive pay.

Except, perhaps, in the case of school districts maintaining graded schools, towns alone are responsible for the support of schools and liable for the payment of teachers.

ON EXCEPTIONS.

Assumpsit for necessaries. The writ was dated February 6, 1883.

The trustees disclosed by their attorney: That the agent of the district employed the defendant, Soule, to teach the winter term of school in that district at the rate of twenty-eight dollars a month of twenty-two days "with the implied understanding as is the custom in such employment," that Mr. Soule should "recover no part of his earnings until the term of school should have been fully completed." The term commenced December 19, 1882, and was not finished February 10, 1883, when the writ was served on the trustees.

The trustees were discharged and plaintiff alleged exceptions.

D. L. Savage, for the plaintiff, contended that after money has been apportioned to a school district for school purposes it

belongs to the district, citing *School District* v. *Deshon*, 51 Maine, 454.

M. Laughlin, for the trustees, cited: *Head* v. *Merrill*, 34 Maine, 586; *Miller* v. *Goddard*, 34 Maine, 102; *Otis* v. *Ford*, 54 Maine, 104; *Dore* v. *Billings*, 26 Maine, 56; *Rolfe* v. *Cooper*, 20 Maine, 154.

BARROWS, J. There are two insuperable objections to a judgment in this case charging the school district as the trustee of the principal defendant.

1. Soule was hired "for the winter term," which at the time of the service of the writ he had not completed; and he might neglect or refuse to complete it in a way that would deprive him of his right to compensation for the service which he had rendered. Here was a contingency which would prevent the school district, if otherwise liable, from being charged as trustee in this suit. R. S., chap. 86, § 55, clause 4; *Miller* v. *Goddard*, 34 Maine, 102; *Otis* v. *Ford*, 54 Maine, 104. Nor does it help the plaintiff that Soule subsequently kept the term out; for the question must be settled upon the facts, as they existed when the writ was served on the alleged trustee. *Williams* v. *A. & K. R. R. Co.* 36 Maine, 201.

2. The school district was not the party liable for the schoolmaster's wages, nor did it have any goods, effects or credits of his in its possession. School districts are corporations of limited powers and can create no debt against themselves without statute authority. *Estes* v. *School District 19, in Bethel & Milton*, 33 Maine, 170. It does not appear that the district had any authority to raise money for the teacher's wages, or to make itself in any way responsible therefor. See R. S., chap. 11, §§ 24, 25.

The only possible exception which subsequent enactments can be said to have created to the remark of SHEPLEY, J., in *Dore* v. *Billings*, 26 Maine, 59, that "towns alone are responsible for the support of schools, and they alone are liable for the payment of the teachers," is in the case of graded schools under chap. 11, § 25. Whether that is really an exception we need not stop

now to decide. In all other cases it is as true now as it was then that the agent of the district is exclusively the agent of the town for the employment of a teacher. The money which he receives to pay the teacher, is the money of the town upon whom the duty of raising and collecting the money and paying the teachers is by law imposed. *Rolfe* v. *Inh'b'ts of Cooper*, 20 Maine, 155; *School District No. 3, in Sanford*, v. *Brooks*, 23 Maine, 545; R. S., c. 11, § 43. Except to the limited extent allowed in certain cases by R. S., of 1871, c. 11, § 25, the school district has no power to do it.

The case of *School District No. 9, in Searsport*, v. *Deshon*, 51 Maine, 454, cited for plaintiff, was brought and maintained under the peculiar provisions of R. S., of 1857, c. 11, § 54, authorizing the recovery of unexpended funds in the hands of a delinquent school agent "by an action of the case in the name of the town, *or district*." It is not perceived that it can aid the plaintiff under the state of facts here disclosed as existing at the time of the service of this process on the trustee. The form of the disclosure is authorized by R. S., c. 86, § 28.

Exceptions overruled.

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

WARREN CRESSEY *vs.* JOSEPH PARKS.

Penobscot. Opinion August 25, 1883.

Collector's sale. Time. Days. Sunday.

When chattels distrained are to be sold in a specified time, the day of seizure is excluded, and the day of sale included in the reckoning. Thus goods seized on the eighth are to be sold on the twelfth, when they are to be sold in four days after seizure.

When a statute gives a definite number of days for doing an act, and says nothing about Sunday, the days are consecutive, and include Sunday. And when the day on which the act is to be done falls on Sunday, the act must be done on the next day.

ON EXCEPTIONS.

The opinion states the case and material facts.

By stipulations in the exceptions, if they were not sustained, the defendant was to be defaulted, and damages were to be assessed by the clerk.

D. F. Davis and *C. A. Bailey*, for the plaintiff, cited: R. S., c. 6, § 104; *Brackett* v. *Vining*, 49 Maine, 356; *Farnsworth Co.* v. *Rand*, 65 Maine, 19; *Bemis* v. *Leonard*, 118 Mass. 502; *Robinson* v. *Waddington*, 13 Queen's Bench, 753 (66 E. C. L.); *Ex parte Simpkin*, 2 Ellis and E. (Queen's Bench) 392 (105 E. C. L.); *Rawlins* v. *The Overseers of West Derby*, 2 C. B. 72; *Asmole* v. *Goodwin*, 2 Salk. 624; *Peacock* v. *Regina*, 4 C. B. (N. S.) 264 (93 E. C. L.); *Morris* v. *Barrett*, 7 C. B. (N. S.) 138 (97 E. C. L.); *Hughes* v. *Griffiths*, 13 C. B. (N. S.) 323 (106 E. C. L.); *Reg.* v. *Justices of Middlesex*, 7 Jurist, 396; *Rowberry* v. *Morgan*, 9 Exch. 730; *Ex parte Dodge*, 7 Cowen, 147; *In the matter of Goswiler's estate*, 3 Pa. 200; *King* v. *Dowdall*, 2 Sandf. 131; *Barnes* v. *Eddy*, 12 R. I. 25; *Wallace* v. *King*, 1 H. Black, 13; *Harper* v. *Taswell*, 6 C. & P. 166 (25 E. C. L. 336); *Ordway* v. *Ferrin*, 3 N. H. 69; *Creswell* v. *Green*, 14 East. 537; *Tuttle* v. *Gates*, 24 Maine, 398; *Bissell* v. *Bissell*, 11 Barb. 96; *Taylor* v. *Corbiere*, 8 How. Pr. 385; *Franklin* v. *Holden*, 7 R. I. 215; *Carville* v. *Additon*, 62 Maine, 459; *Sawyer* v. *Wilson*, 61 Maine, 532; *Gorham* v. *Hall*, 57 Maine, 58; *Orneville* v. *Pearson*, 61 Maine, 557; *Morgan* v. *Edwards*, 5 H. & N. 415; *Mayer* v. *Harding*, 2 L. R. Q. B. 410; *Windsor* v. *China*, 4 Greenl. 298; *Priest* v. *Tarleton*, 3 N. H. 93; *Castle* v. *Burditt*, 3 T. R. 623; *Souhegan Factory* v. *McConihe*, 7 N. H. 309; *Caldwell* v. *Eaton*, 5 Mass. 399; *Titcomb* v. *Ins. Co.* 8 Mass. 334; *Howe* v. *Starkweather*, 17 Mass. 243; *Pierce* v. *Benjamin*, 14 Pick. 356; *Alger* v. *Curry*, 40 Vt. 437.

Barker, Vose and Barker, and *A. L. Simpson*, for the defendant.

How soon can a collector of taxes sell distrained property? In reckoning time the day of seizure is excluded. The debtor is first to have four days within which to pay. That is his time, and until that is fully expired the property cannot be sold.

By the statutes of Massachusetts, c. 8, § 8, in force, and unchanged since 1791: "The collector shall keep the property four days, at least, at the expense of the owner, and shall, within seven days after the seizure, sell the same, &c. by posting notice forty-eight hours before sale."

When our statute of 1820 was enacted, the Massachusetts provision of keeping four days for the debtor's benefit was retained, in no way shearing the debtor's right to pay within the four full days. Its language is in Smith's laws of Maine, c. 96, § 26, "the distress so taken to keep, the space of four days, at the cost and charge of the owner thereof; and if the owner do not pay the sum or sums of money so assessed upon him, within the space of four days, then the said distress shall be openly sold, &c. notice of sale, &c. being given forty-eight hours next, before the sale and expiration of the four days aforesaid," &c.

In the revision of 1841, the exact words of "then," &c. are retained, but in 1857 and 1871, the "then" is omitted, but in each, the provision of "forty-eight hours notice before the expiration of said four days," are retained.

Now the day of seizure is never counted. The debtor is not to be charged with it as a part of his time, any more than the officer is to be charged with it in his time. The debtor is to have four days to pay in. Any payment before the last hour of the fourth day, or "the expiration of the four days aforesaid," is in season to prevent a sale, and any sale before the last minute of that fourth day, is an encroachment upon his time for payment, and would make the officer liable to trespass. Both cannot have this fourth day. Which shall have it? If the officer can sell on that day the debtor cannot pay. If the debtor can pay at any hour or minute of that day, the officer cannot sell. He can pay "within" that day, the statute says, if not paid "within," "then" "the officer may," &c. and not until "then." *King* v. *Whitcomb*, 1 Met. 331.

Now in this case the officer seized the eighth, and that day cannot be counted — the next day was Sunday and is counted — so he had the ninth, tenth, eleventh and twelfth, till midnight to pay in. He did not pay. The officer having advertised, as

required, "then" sold on the thirteenth at ten A. M. being the first day after "the expiration of said four days." He could not have sold on an earlier day, and ought not to sell at an earlier hour of that day.

In *Brackett* v. *Vining*, 49 Maine, 356, the property was seized October 27, and advertised for sale November 3, when, under our statute the sale could not have been made before November 1, and should have been made on that day. The court properly held, the officer could not keep the property seven days after the seizure, when he should have sold on the fifth, thus keeping it two days beyond the statute time for selling. The owner had till, and including October 31, to pay in, and the officer "then" should have sold, November 1. This, then, is no authority against us.

Farnsworth Co. v. *Rand*, 65 Maine, 19, settles the question again that the debtor shall have his four days, and then the officer must sell. In that case the seizure was March 5, and the sale should have been March 10, thus excluding the fifth, the day of seizure, giving the debtor the sixth, seventh, eighth and ninth, to pay in; the sale should have been on the tenth, and by keeping till the eleventh, the officer became a trespasser *ab initio*.

It will be seen, R. S., c. 6, § 94, that in the form of the collector's warrant, the statute of 1820, is followed by retaining the word, "then." The direction is as follows: "And the distress, so taken, to keep for the space of four days, at the cost and charge of the owner, and if he does not pay the sum so assessed within the said four days, then you are to sell at public vendue," &c. The collector should obey his warrant regardless of any statute which might be in conflict with it. Webster defines, then, when thus used, to mean, "soon afterwards, or immediately afterwards." The Bible so construes it: "First be reconciled to thy brother, then come and offer thy gifts. Matthew 5, 24.

Carville v. *Additon*, 62 Maine, 459, is not an authority against our position. WALTON, J., in the opinion, says: "The eighth objection, that the property was not kept four days, is not well founded in fact. The officer's return shows that it was kept four days, and there is no evidence in the case contradicting it."

The courts of Massachusetts, New Hampshire and Vermont hold that the "four days" mean four full days.

Barnard v. *Graves*, 13 Met. 85. In this the distraint was on the sixth. The day of taking was excluded, and the distress kept the seventh, eighth, ninth and tenth, and sold at one o'clock on the eleventh.

In *Ordway* v. *Ferrin*, 3 N. H. 69, and in *Souhegan Factory* v. *McConihe*, 7 N. H. 309, the distress was kept four full days. The rule of the court then was to count the day of seizure as one of the four days. Subsequently the legislature of that state changed the rule excluding the day of seizure, as will be seen in 36 N. H. 302, and 42 N. H. 555, in each of which cases the distress was kept four full days. Also in 36 Vt. 623, POLAND, C. J., at the close of the opinion discusses the reason of the rule.

Thus it will be seen that the rule we invoke is in harmony with the construction given in our sister states, and in harmony with § 94, c. 6, R. S., (the form of the warrant of commitment) and the fair interpretation of the words in § 104, c. 6, R. S., viz: "for the space of four days, and if he does not pay the sum so assessed within the said four days," &c.

Counsel contended in another brief, that while the statute was to be construed strictly, it should be construed reasonably and sensibly, citing: *Winslow* v. *Kimball*, 25 Maine, 493; *Whitney* v. *Whitney*, 14 Mass. 88; *Holbrook* v. *Holbrook*, 113 Mass. 74; *Gibson* v. *Jenny*, 15 Mass. 206; *Commonwealth* v. *Kimball*, 24 Pick. 270; *Stewart* v. *Raymond*, 4 Cush. 314; *Cleaveland* v. *Norton*, 6 Cush. 384.

Sunday intervening cannot be counted as one of the days. *Tuttle* v. *Gates*, 24 Maine, 398; *Thayer* v. *Felt*, 4 Pick. 354.

The remarks of PETERS, J., in *Seekins* v. *Goodale*, 61 Maine, on page 404, apply to this case.

APPLETON, C. J. This is an action of trespass against the defendant, a collector of taxes for the town of Glenburn, for seizing and carrying away six tons of the plaintiff's hay for the non-payment of his taxes and selling the same.

By R. S., c. 6, § 104, "If any person refuses to pay the the taxes assessed against him . . . the collector may

distrain him by his goods and chattels . .. and keep such distress for the space of four days at the expense of the owner, and if he does not pay his taxes within that time, the distress shall be openly sold at vendue by the officer for its payment."

The hay was seized for taxes on Saturday, January 8, and advertised for sale on Thursday, the thirteenth, and thence the sale adjourned to Friday, the fourteenth, when the property seized was sold.

In computing time, the day of the seizure is not to be reckoned. The rule is thus stated by Bishop in his work "On the Written Laws, 107." When a statute specifies a particular number of days, weeks, or years, the computation should be made by adding, for instance, to the ascertained number of the day in the month, the statutory number. Thus, an enactment passed on the fifth day of the month, to take effect in ten days, will go into operation on the fifteenth day of the month, because the sum of ten and five is fifteen. The rule of reason therefore, may be stated to be, "that of the two extreme days, the one shall be included and the other excluded in the reckoning."

The term specified by the statute for sale is four days after seizure. The collector keeping the property seized beyond the time in which it could be legally sold, is thereby a trespasser *ab initio*. *Brackett* v. *Vining*, 49 Maine, 356; *Farnsworth Co.* v. *Rand*, 65 Maine, 19.

The statutes in Massachusetts on this subject, are similar to those of this state. The time when the sale was to be made, became an early subject of discussion. In *Caldwell* v. *Eaton*, 5 Mass. 399, PARSONS, C. J., in considering the question says, "The notice must be given forty-eight hours before the expiration of the four days. It is, then, a necessary consequence that they must be sold at auction, after they have been kept four days and no longer." In *Titcomb* v. *Insurance Co.* 8 Mass. 334, SEWALL, J., says, "Shares taken on execution are to be exposed for sale in the same manner as by law prescribed when personal estate is taken on execution. The time for this purpose, allowed and determined by the general statute, is four days. Now when

four days had expired and no sale had taken place, a new notice was necessary to legalize a subsequent sale." In *Howe* v. *Starkworth*, 17 Mass. 241, PARKER, C. J., citing the last named case, says, "The sale under the execution would be bad by suffering more than four days to elapse between the seizure on execution and the sale." To the same effect is the decision in *Pierce* v. *Benjamin*, 14 Pick. 356. Such, too, is the recognized law in this state. "The day of seizure," remarks SHEPLEY, C. J., in *Tuttle* v. *Gates*, 24 Maine, 395, "is not to be reckoned as one of the four, and the sale cannot be legally made after the fourth day." The day of seizure not being reckoned, the sale must be on the fourth day. *Ordway* v. *Ferrin*, 3 N. H. 69. If the day of the seizure as well as that of the sale, were both excluded, the defendant would be allowed parts of both those days beyond the time required by law. *Bemis* v. *Leonard*, 118 Mass. 502.

The sale in the case at bar should have been on the twelfth. The defendant is not to have four whole days and parts of two others. The rule in England is that in case of goods distrained and sold within four days, the days must be calculated inclusively of the last, and exclusively of the day of taking. *Robinson* v. *Waddington*, 66 E. C. L. 753.

In the Massachusetts statute, the phrase "for the space of four days" occurs as in that of this state. But "the space of four days" embraces no more than four days. Such, too, has been the practical construction, as is clearly shown by the many decisions to which reference has been made.

The main ground of defence is that Sunday is not to be reckoned as a day. The statute provides that the distress is to be kept "for the space of four days at the expense of the owner," and if the tax be not paid within that time, the distress shall be sold at vendue by the officer for its payment. The expression, "the space of four days," excludes no day. It implies consecutive days. "Sunday," remarks BYLES, J., in *Peacock* v. *The Queen*, 93 E. C. L. 264, "at common law, is just like any other day." "Sunday," observes LORD ELLENBOROUGH, in *Creswell* v. *Green*, 14 East. 537, "is as much a day to occupy space of time as any other day." When the

statute prescribes the number of days within which an act is to be done, and nothing is said about Sunday, it is to be included. It was held in *Carville* v. *Additon*, 62 Maine, 459, that it was no objection to the legality of the collector's proceedings that one of the four days during which the distress was kept was Sunday. So in *The State* v. *Wheeler*, 64 Maine, 532, it was decided the draft for jurors was valid, although one of the four days before the drafting was Sunday.

Whenever the legislature intend Sunday shall be excluded from the days within which an act shall be done, it is done in express terms, as in c. 84, § 3. It is never left to implication. When goods are sold on execution, Sunday is excluded by statute from the four days during which the goods seized are to be kept. But Sunday is not excluded where the collector distrains for non-payment of taxes. R. S., c. 6, § 104. "Where an act of parliament gives a specified number of days for doing a particular act, and says nothing about Sunday," observes HILL, J., in *Ex parte Simpkin*, 2 E. and E. "the days are consecutive days, including Sunday."

In *Asmole* v *Goodwin*, 2 Salk. 624, it was held "as to business done out of court, as rules to plead within four days, etc. Sundays are reckoned the same as other days." The uniform current of authorities is in conformity with this decision up to the present time. Thus in *Ex parte Simpkin*, 2 Ellis and E. 392, it was decided that when an act of parliament gives a specified number of days for doing a particular act and says nothing about Sunday, the days are consecutive days including Sunday. So in this country. In *King* v. *Dowdall*, 2 Sandf. § 131, OAKLEY, C. J., uses this language: "We know of no rule or principle by which it (Sunday) is to be excluded from the computation when it is an intermediate day," and we have supposed the law on the subject to be settled.

The distress for taxes may be made on any day of the week, Sunday excepted. The law has not prohibited seizure on any week day. But the property seized cannot be sold on Sunday, not because Sunday is not a day, but because it is a day on which, by statute, the execution of civil process is prohibited.

R. S., c. 81, § 78. No sale can be made on the preceding Saturday, when the seizure was made on Wednesday, because that would be against the provision of the statute requiring the officer to keep the property distrained four days. When, then, is the sale in such case to be made? The statutes must be construed together. The seizure may be made on any secular day. The property seized must be kept four days by statute. Its sale is prohibited on Sunday. Being lawfully seized, it must be sold. As it cannot be legally sold within three days, it must be sold on Monday because all official or executive action is prohibited on Sunday. The true rule on this subject is laid down *In the matter of Goswiler's estate*, 3 Pa. 200, thus: "Whenever by a rule of court or an act of the legislature, a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken or the decision is made is excluded, and if one or more Sundays occur within the time, they are counted unless the last day falls on Sunday, in which case, the act may be done on the next day." To the same effect is the opinion of the supreme court of Rhode Island in *Barrows* v. *Eddy*, 12 R. I. 25. In *Hughes* v. *Griffith*, 106, E. C. L. 323, it was held in the computation of time, that when the last day falls on a Sunday and the act is to be done by the party, it may be done on the next practicable day.

The original notice being defective, no postponement can cure the original defect. "A valid sale cannot be made at an adjournment which would have been invalid if made on the day adjourned from." *Wilson* v. *Sawyer*, 61 Maine, 531.

Defendant defaulted. Damages to be assessed by the clerk.

WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred. PETERS, J., did not sit.

WILLIAM H. NASON, Assignee, *vs.* PORTER HOBBS.

York. Opinion September 13, 1883.

Insolvency. Exemptions. Fraudulent preferences.

The seizure of a horse on execution prior to the commencement of insolvency proceedings, is not affected by such proceedings.

The property of an insolvent which is exempt, depends upon what property he owned at the time of the commencement of insolvency proceedings. He could not claim as exempt a yoke of oxen which he sold the day before.

A sale of a yoke of oxen was made by an insolvent, who owned no other oxen, the day before the commencement of insolvency proceedings, with a view on the part of vendor and purchaser to give a preference to the latter; *Held*, That the sale was void.

ON REPORT.

Trover by the assignee of Francis Winn, insolvent debtor, to recover the value of a horse and yoke of oxen. The horse was seized on an execution in favor of the defendant, June 1, 1882, and sold by the officer on the execution at public sale to the defendant June 7, 1882. On the 6th of June, 1882, the defendant purchased the oxen of the insolvent, knowing him to be such, for the purpose entertained by both to give him a preference over other creditors. Insolvency proceedings were commenced June 7, 1882.

Other material facts stated in the opinion.

Copeland and Edgerly, for the plaintiff.

Asa Low, for the defendant.

VIRGIN J. The proceedings in insolvency were commenced on June 7, 1882, at which date, the property of the insolvent not exempt from attachment and seizure on execution, became vested in the plaintiff as his assignee, stat. 1878, c. 74, § 30. The seizure of the horse on execution having previously taken place was not affected by the insolvent proceedings, *Storer* v.

Haynes, 67 Maine, 420, 422. The construction of a similar provision in the U. S. bankrupt statute, by U. S. supreme court is to the same effect. *Wilson* v. *City Bank*, 17 Wall. 473.

What property of the insolvent was exempt? That depends upon what property he owned on June 7, 1882, when proceedings in insolvency were commenced. He could not claim as exempt, property which he did not own that day. He then owned one horse, which his father — residing on the insolvent's farm in the latter's absence from the State, and claiming to act for him — selected as exempt when the other horse was attached. He did not then own the oxen, for he had sold them the day before to the defendant; and he could not legally claim sold oxen as exempt, especially when he still had an exempt horse. R. S., c. 81, § 59, clause 7.

But the case finds that the sale of the oxen was made with a view upon the part of both vendor and purchaser to give a preference to the latter; and hence it was void; and the assignee is expressly authorized to recover their value from the purchaser. Stat. 1878, c. 74, § 48. The value being admitted to have been $175 at the time of commencement of proceedings in insolvency, and the defendant having refused to surrender the oxen on demand made August 30, 1882, the entry must be,

Judgment for plaintiff. Damages assessed at $175, and interest from August 30, 1882, to the date of the judgment.

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

J. M. DANIELS *vs.* MICHAEL MARR, and F. D. MERROW, trustee.

Androscoggin. Opinion September 13, 1883.

Trustee process. Property exempt from attachment.

A trustee disclosed that he had in his possession at the time of the service of the writ upon him a mare belonging to the principal defendant, of the value

of forty or fifty dollars, on which he had a claim of about thirty dollars. The disclosure did not state that the mare was exempt from attachment, nor was that fact suggested by the trustee or claimed by the defendant. *Held*, that the trustee was chargeable for twenty dollars.

On exceptions from the ruling of municipal court for the city of Lewiston discharging the trustee.

The opinion states the material facts.

A. R. Savage, for the plaintiff.

J. W. Mitchell, and *Tascus Atwood*, for the trustee.

The trustee cannot be charged under this statute because the mare which he had in his possession was exempted by law from attachment. R. S., c. 81, § 59.

If the plaintiff would seek to charge the trustee on the ground that the mare was of more than three hundred dollars value and therefore not exempted from attachment the burden is on him to establish that fact. And if he would have him charged on the ground that the defendant at the time owned other animals all of which would not be exempted he must also show that fact. The trustee is not required to furnish, in his disclosure, an inventory of the defendant's property which is not in his possession. He does all that is required of him when he discloses such property as he has in his possession at the time the process is served on him.

And even if the plaintiff should show that the defendant, at the time the process was served on the trustee, owned other animals, he cannot charge the trustee for the mare until he shows that the defendant has had an opportunity to elect which animals he will have exempted, and that he has either neglected to make his election or has elected to have others exempted.

Virgin, J. We are of the opinion that the exceptions must be sustained.

The disclosure admits the trustee to have had actual possession of the defendant's mare which was worth ten to twenty dollars more than the sum due on the mortgage. It does not state that she was in anywise exempt from attachment; nor has any suggestion of exemption been made by the trustee or claimed by the defendant. Had such a fact existed and been shown the trustee

could not be charged. *Staniels* v. *Raymond*, 4 Cush. 314, 317. The admission makes out a *prima facie* case of chargeability which has not been overcome.

This case is not altogether unlike an attachment by trustee process of money due from a trustee to a principal defendant for personal labor. If the trustee, after disclosing the indebtedness, would discharge himself, he must further disclose that the indebtedness accrued for personal labor performed during the month next preceding the service of the writ. *Lock* v. *Johnson*, 36 Maine, 464; *Haynes* v. *Hussey*, 72 Maine, 448. If the officer had attached the mare, the debtor could not have maintained trespass against the officer by simply proving the attachment, and omitting to show any facts tending to prove she was exempt. *Colson* v. *Wilson*, 58 Maine, 416.

The trustee having disposed of the mare after service of the writ and before the disclosure, no motion for a decree was necessary under the provisions of R. S., c. 86, § 50; *Stedman* v. *Vickery*, 42 Maine, 132, 136. He must therefore be charged for the difference between the value of the mare (which he cannot object to calling $50 since he has prevented the plaintiff from redeeming) and the sum due on the mortgage.

Exceptions sustained.
Trustee charged for $20.

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

GEORGE W. LORD, administrator of W. A. LORD,

75 399
h94 309

vs.

SEWELL I. CROWELL.

York. Opinion September 13, 1883.

Mortgage. Discharge. Amendment.

Where the endorsee of mortgage notes, comprising the entire mortgage debt, puts them into a judgment and execution against the mortgagor, and levies the same upon the mortgaged premises, the mortgage is thereby extinguished,

though the possession of the premises had been previously delivered by the mortgagor to the mortgagee, and was then held by the grantee of the mortgagee, who, however, never held any part of the mortgage debt.

In such a case the levying creditor may maintain a real action against the grantee of the mortgagee for the possession, and in that action the officer may amend his return of the levy in accordance with the fact.

ON REPORT.

Real action for the possession of certain land in Berwick.

The case shows that Andrew B. S. Morrison mortgaged the premises to W. A. Worster to secure three notes of five hundred dollars each. Mortgage and notes dated July 18, 1868.

Worster endorsed and delivered the three notes to W. A. Lord, plaintiff's intestate, and subsequently, April 2, 1873, Worster conveyed the premises to the defendant by deed of general warranty, he, Worster, having previously received possession of the same from Morrison, and been in possession a year or more, receiving the rents and profits.

The defendant paid Worster nine hundred dollars, which was the full value of the premises. He had no knowledge of the notes or that the title of Worster was any other than fee simple.

The plaintiff sued Morrison on the mortgage notes, April 17, 1880, recovered judgment, January 25, 1881, and levied the execution on the mortgaged premises, February 17, 1881.

The report stipulated that if this action could be maintained, the defendant was to be defaulted with leave to file, and be heard upon, a claim for betterments.

The opinion states other material facts.

Copeland and Edgerly, for the plaintiff, cited: *Sanger* v. *Bancroft*, 12 Gray, 365; *Moore* v. *Ware*, 38 Maine, 496; *Johnson* v. *Candage*, 31 Maine, 28; *Moore* v. *Bacon*, 123 Mass. 58; *Porter* v. *King*, 1 Maine, 297; *Crooker* v. *Frazier*, 52 Maine, 406; Jones on Mortgages, 1229; *Whitney* v. *Farrar*, 51 Maine, 418; *Tufts* v. *Maines*, 51 Maine, 393; *Hooker* v. *Olmstead*, 6 Pick. 481; *Holman* v. *Bailey*, 3 Met. 55; *Wilson* v. *King*, 40 Maine, 116; *Hill* v. *More*, 40 Maine, 515.

G. C. Yeaton, for the defendant.

Tenant claims that demandant cannot recover for two reasons, to wit: His levy under which he claims is so defective that whatever Morrison's title, when made, it could pass nothing. Morrison had at the time of the levy no title which any levy, however formally perfect, could take as against the grantee of the mortgagee in possession.

The levy is defective because it fails to show notice to the attorney of the non-resident debtor, or to set forth any facts to excuse the want of such notice. R. S., c. 76, § 1; *Wellington* v. *Fuller*, 38 Maine, 61. And because it was not made as R. S., c. 76, § 27, requires a levy upon an equity of redemption to be made. Such a right may be sold by a judgment creditor as provided by R. S., c. 76, § 29, or levied upon under § 27, as construed in *Soule* v. *Buck*, 55 Maine, 30, 32, in one of *two* forms only, viz: First, when "the return shows that the creditor elected to disregard the incumbrance" of the existence of which he *did know;* and second, a provision which this section supplied of a levy, where the existence of the mortgage was *unknown* to the creditor.

In this state a long series of decisions, some of the later of which only will be cited here, have fully established the following propositions:

As between mortgagor and mortgagee, the legal estate is in the latter.

Before breach of the condition in the mortgage the mortgagor cannot maintain a real action for possession of the mortgaged estate against the mortgagee, unless between them there is an agreement to that effect. R. S., c. 90, § 2.

After breach of the condition, the mortgagee is entitled to the possession as against the mortgagor, and this possession in him, or those claiming under him, cannot be disturbed by the mortgagor, or those claiming under him *at law* in any event, whether the mortgage debt remain unpaid or not.

Either before or after breach of the condition the mortgagee, or those who hold under him, may maintain an action *at law* for

possession of the mortgaged premises against the mortgagor or his assignee, unless there be an agreement to the contrary, or the mortgage debt be paid.

The remedy of a mortgagor against a mortgagee, or one who holds under him, in possession after breach of the condition, upon payment of the sum secured by the mortgage, is *in equity* alone. R. S., c. 90, § § 13, 14; *Smith* v. *Kelley*, 27 Maine, 237; *Huckings* v. *Straw*, 34 Maine, 166; *Wilson* v. *Ring*, 40 Maine, 116; *Hill* v. *More*, 40 Maine, 515; *Stewart* v. *Crosby* 50 Maine, 130; *Stinson* v. *Ross*, 51 Maine, 556; *Conner* v. *Whitmore*, 52 Maine, 185; *Stanley* v. *Kempton*, 59 Maine, 472; *Stewart* v. *Davis*, 63 Maine, 539; *Rowell* v. *Mitchell*, 68 Maine, 21; *Johnson* v. *Leonards*, 68 Maine, 237; *Linnell* v. *Lyford*, 72 Maine, 280, 285; *Linscott* v. *Weeks*, 72 Maine, 506; *Lovejoy* v. *Vose*, 73 Maine, 46. See also *Ruggles* v. *Barton*, 13 Gray, 506; *Welsh* v. *Phillips*, 54 Ala. 309; *Hinds* v. *Ballou*, 44 N. H. 619; *Townsend Savings Bank* v. *Todd*, 47 Conn. 190; *Hubbell, appellant*, v. *Moulson*, 53 N. Y. 225; *Campbell* v. *Birch*, 60 N. Y. 214; *Frische* v. *Kramer's lessee*, 16 Ohio, 125; *Hill* v. *Robertson*, 24 Miss. 368; 2 Wash. Real Prop. c. 16, § 4; 1 Jones on Mortgages, 808 *et seq.*; 1 Herman on Mortgages, § § 53 *et seq.*; Thomas on Mortgages, c. 8, p. 79; Tudor's Leading Cases, 3d ed. 15, note and citations; Williams Real Prop. 408 *et seq.*; *Pickett et al.* v. *Jones*, 63 Mo. 195; *White* v. *Bond*, 16 Mass. 400.

VIRGIN, J. When a debtor gives his promissory note to his creditor, he thereby gives his personal security for the payment of his debt, and subjects his person and property generally, to any of the remedies which the law provides for compelling its payment at and after maturity. And if, at the same time, the debtor secures the ultimate payment of his debt by a mortgage on his property, real or personal, he thereby gives to his creditor an additional security, to either of which he may resort. If he elects to rely on his mortgage on real estate, he may adopt any of the modes of foreclosure; in which case the law affords the debtor the right to pay his debt and save his property at any time during the statute period for redemption. If, however, he

chooses to resort to the ordinary process of attachment and levy, he may levy his execution on any unexempted real or personal property of his debtor; and by waiving his mortgage, he may in the absence of any intervening interests of third persons, make his extent or levy on the real or personal property covered by that. There is no restriction in the law of remedies upon the creditor. Each of the remedies is open to him and each is effectual. The debtor cannot limit the creditor to his remedy on the mortgage, any more than he can confine him to his personal action on the note. Both are parts of one system of law, and both must stand together. *Porter* v. *King*, 1 Maine, 297; *Crooker* v. *Frazier*, 52 Maine, 405; *Coggswell* v. *Warren*, 1 Curt. 223; *Libbey* v. *Cushman*, 29 Maine, 429; *Whitney* v. *Farrar*, 51 Maine, 418. And if the payee of the note legally transfers the note to a third person, the debtor has no reason to complain of a like result; for he in terms authorizes the transfer with the knowledge, presumably, that along with the transfer go all the incidents and legal rights without restriction, which pass with the transfer of such personal securities, and cast upon him no legal burden.

It is well settled that when the mortgagee has negotiated the note secured by the mortgage to a third person, without assigning the mortgage, he simply holds the mortgage in trust for the holder of the note. *Johnson* v. *Candage*, 31 Maine, 28; *Moore* v. *Ware*, 38 Maine, 496; *Morris* v. *Bacon*, 123 Mass. 58. Neither by assignment, nor otherwise, can he convey to another any other right than he himself had; for the mortgage itself, together with the non-production of the note secured, would be ample notice to the assignee of the nature and extent of his title. *Moore* v. *Ware*, *supra; Jordan* v. *Cheney*, 74 Maine, 359.

But a mortgage by its very terms becomes extinguished by payment of the mortgage debt, at or before the breach of the condition. *Holman* v. *Bailey*, 3 Met. 55. And, as a matter of course, if the land mortgaged be all appropriated on the mortgage debt, the mortgage would be extinguished, though the debt might not all be thereby paid. And since the provisions of R. S., c. 90, § 28, have been in force, the same result is wrought

by payment after condition broken. *Wilson* v. *E. & N. A. R. Co.* 67 Maine, 358, 361.

Our opinion, therefore, is that the mortgage was extinguished by the levy and consequent appropriation of all land mortgaged on the mortgage debt, assuming the levy was made in accordance with the provisions of the statute.

On examination of the officer's return, it does not appear "but that Morrison might have had an attorney, who, had he received due notice, would have chosen an appraiser;" and "the levy for this cause is defective." *Wellington* v. *Fuller*, 38 Maine, 61. But as between these parties the officer can amend his return, if the facts, as they really existed, will cure the defect. *Wellington* v. *Fuller*, *supra; Knight* v. *Taylor*, 67 Maine, 593.

This result operates harshly upon the defendant; but this plaintiff is in nowise at blame.

As the case is to stand on the docket for the defendant to be heard on a claim for betterments, the officer can amend his return, and then the entry will be,

Defendant defaulted.

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

HUMPHREY P. THOMPSON and another,

vs.

JAMES T. REED and Trustees.

Sagadahoc. Opinion September 13, 1883.

Statute of limitations. Promissory notes.

The statute of limitations is no bar to an action brought in this state on a promissory note made and payable in New York, although the parties continued to reside there until any action thereon was barred by the statute of that state, when it does not appear that the payer has not resided in this state six years since the note became due.

Nor is it material that the maker of the note had attachable property in this state for eleven months after the note was payable.

ON REPORT.

Assumpsit upon a promissory note given by the defendant to the plaintiffs, March 31, 1866, and on an account for money loaned at New York in the summer of 1866. The plea was the general issue and statute of limitations. At the trial the defendant consented to be defaulted in the sum of $1487.11 with leave to report the case to the full court, who were to determine from the evidence introduced and offered whether the action is barred. If barred the default is to be taken off and plaintiffs nonsuited, otherwise judgment on the default.

The material facts are stated in the opinion.

William L. Putnam and *Joseph M. Trott*, for the plaintiffs, cited: *Dwight* v. *Clark*, 7 Mass. 517; *Little* v. *Blunt*, 16 Pick. 359; *Crosby* v. *Wyatt*, 23 Maine, 164; *Crehore* v. *Mason*, 23 Maine, 416; *Brown* v. *Nourse*, 55 Maine, 230; *Hacker* v. *Everett*, 57, Maine, 548; *Alden* v. *Goddard*, 73 Maine, 346; *Putnam* v. *Dike*, 13 Gray, 535; *Bulger* v. *Roche*, 11 Pick. 36; *Thibodeau* v. *Levassuer*, 36 Maine, 362; *Johnson* v. *Railroad Co.* 54 N. Y. 416.

C. W. Larrabee, for the defendant.

It is recognized doctrine that the old English statute of limitation barred the remedy only and not the right, but modern statutes cut off the right as well as the remedy. *Dundee* v. *Dougall*, 1 Macq. H. L. Cas. 317; *DeBeauvoir* v. *Owen*, 5 Exch. 166; 19 L. J. Exch. 177.

In *Higgins* v. *Scott*, 2 Barn. & Ad. 413, the doctrine *per curiam*, is simply that the statute of limitation bars the remedy and not the debt. The *dictum* rests mainly on Lord ELDEN in *Spears* v *Hartly*, 3 Esp. 81, which, if examined, will be found to turn on the maintenance of a lien by possession. See also *Rothery* v. *Munnings*, 1 Barn. & Ad. 15, which makes no distinction between the extinction of remedy and of debt. True our court in *Brown* v. *Nourse*, 55 Maine, 230, recognized this

distinction. The point is dismissed as *res judicata*, citing *Brigham* v. *Bigelow*, 12 Met. 270. But in the latter case the principal question was whether the R. S., which went into operation after the cause of action accrued, should be applied.

All enactments of limitations by the legislature declare what shall be a bar—after a certain number of years have elapsed from the time the cause of action accrued no action shall be maintained. The rights of the parties are measured by the lapse of time passed. So when the parties find that by the laws of the state where both reside that the right of action has become barred, that there is no longer any remedy in the courts of that state and the debtor has been liberated by force and virtue of the law, it is not an easy matter to see the difference between giving the party plaintiff a remedy under the *lex fori* and rehabilitating his dead and comatose cause and giving it a new life. There has been as much judicial flirtation on this question as any in the books. *Wright* v. *Oakley*, 5 Met. 400; *LeRoy* v. *Crowninshield*, 2 Mason, 151; *Shelby* v. *Guy*, 11 Wheat. 361; *Varney* v. *Grows*, 37 Maine, 306; *Whitney* v. *Goddard*, 20 Pick. 304.

The plaintiff is not within the saving terms of R. S., c. 81, § 99, neither by its language nor by the intendment of the act.

VIRGIN, J. The statute of limitations is no bar to an action brought in this State on a promissory note made and payable in another State, although the parties continued to reside there until any action thereon was barred by the statute of that State.

It is the universally acknowledged rule of law that contracts are to be construed according to the law of the place where they are made and to be performed, but that they are to be enforced according to the *lex fori*. And it is now well settled by the great current of authority that as the statute of limitations operates merely upon the remedy, it is consequently local in its operation and the law of the place where the remedy is sought and not that of the *situs* of the contract, must control. *Leroy* v. *Crowninshield*, 2 Mason, 151; *Tribodeau* v. *Lavassuer*, 36 Maine, 362; *Townsend* v. *Jemison*, 9 How. 407; *Brown* v. *Nourse*, 55 Maine, 230. Some of the states have statutory

provisions allowing the interposition of the statute bar of another state where the defendant had resided for the requisite period. Thus Massachusetts, in 1880, enacted a statute providing in substance that no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory or country while he has resided therein. Pub. stat. c. 197, § 11. But the statutes of this state contain no provision of like character.

The provision of the statute under which the plaintiffs seek to maintain this action is: "If any person is out of the state when a cause of action accrues against him, the action may be commenced within the time limited therefor after he comes into the state," R. S., c. 81, § 99. There being no plea to the jurisdiction but a general appearance by the defendant, we assume no question of that kind would arise on the real facts although not disclosed by the case as reported. The case does find that both the plaintiffs and defendant resided in New York when and where the note was made and by its terms to be paid, and the account accrued, and continued to reside there until 1875; and that the defendant has resided there ever since the dealings between the parties recited by both note and account. Under these circumstances notwithstanding an action on the note and account would be barred in New York, this action is not barred here. *Bulger* v. *Roche*, 11 Pick. 36; *Putnam* v. *Dike*, 13 Gray, 535.

Nor does the fact that the defendant had property in this state for eleven months next after the note was given aid the defendant. (1,) Because it does not appear that the plaintiffs knew the fact or could be charged with knowledge through due diligence. *Crosby* v. *Wyatt*, 23 Maine, 156, 164; *Little* v. *Blunt*, 16 Pick. 359; and (2,) because it is immaterial even if such fact were known to the plaintiffs.

R. S., c. 81, § 99, as originally enacted, provided that if any person who, at the time a cause of action accrued against him, was without the limits of the state and "did not leave property or estate therein that could by the common and ordinary process of law be attached," &c. the action may be commenced within the time limited therefor after his return. Stat. 1821, c. 62, § 9.

Much trouble arose in satisfying juries of the fact that the creditor knew the debtor had attachable property here, or that his property was held in so public a manner as to amount to constructive knowledge, and to raise the presumption that if the creditor had used ordinary diligence the debtor's property might have been attached. *Little* v. *Blunt*, 16 Pick. 359, 365. And the property clause was repealed and omitted from the revision of 1840. R. S., (1840,) c. 146, § 28; *Crehore* v. *Mason*, 23 Maine, 413.

That the property clause was intentionally omitted from the revision of 1840, is evident from a like change of the statute of Massachusetts. We derived our statutes in the early history of the state from the mother commonwealth. Our stat. of 1821 above cited, was a substantial rescript of the stat. 1786, c. 52, which continued in force until 1836, when the first revision of the Massachusett's statutes was made. The revision commissioners, after citing the section under examination, say: "If the creditor knows of the existence of such property, it is not to be supposed that he will neglect to take it, and prefer to rely on an action against the debtor if he shall happen to come into the state; and this provision in that case would be useless. If on the other hand, the debtor should leave property so situated, whether by design or accident, that it is not known to the creditor, it would be unjust that the latter should be barred of his action and lose his debt, by reason of a fact, which was not, and in the common course of business could not be known to him. It is accordingly proposed in this section to omit this qualification of the rule as to absent defendants." Com. Rep. Part III. 275. And the legislature followed the recommendation of the commissioners, Massachusetts R. S., (1836) c. 120, § 9, which was only four years before our first revision.

Defendant defaulted.

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

DANIEL F. WHITTIER

vs.

JOHN A. WATERMAN, administrator, and others.

Cumberland. Opinion September 15, 1883.

Will. Life estate.

A testatrix, by her will which was duly probated and allowed, disposed of the residue of her estate as follows:

"*Sixth.* All the balance of my property, real and personal, I give to my son, Daniel F. Whittier, (not including my household property, which I have otherwise disposed of,) five thousand dollars to be at his own disposal at once, the balance to be under his control. Should he die leaving a wife and no children, his widow shall have two thousand dollars of this amount over the five thousand dollars. Should he die leaving issue, said issue shall receive all over and above said five thousand dollars, and should he die leaving no widow or issue, all of said property, over and above said five thousand dollars, shall be equally divided among my grandchildren. The legacies herein given my son Daniel are subject to certain gifts which I have specified to him in writing. Should it be thought expedient to sell any real estate I may leave, my son Daniel may give deeds and apply the proceeds as provided by the provisions of this will." *Held;*

1. That the legacy was an absolute gift of five thousand dollars.
2. That Daniel F. Whittier was legatee for life of the residue, and as such, was entitled to the possession, control and income of it.
3. That the limitations over were not repugnant or void.

Bill in equity against the administrator with the will annexed, of Mary W. Whittier, and others, to obtain a construction of the sixth clause of the will, which is recited in the head-note.

The following questions were propounded by the bill:

First. Does Daniel F. Whittier have the right to the possession and absolute control of the balance of the estate under the sixth section; and if so, when?

Second. Are not the limitations over repugnant and void?

Third. What is Daniel F. Whittier's interest in and title to the property bequeathed by said sixth section, over and above the five thousand dollars already paid him?

Fourth. Should not the administrator pay over the same to the said Daniel, directly upon his individual receipt, or are his rights those of a trustee?

George B. Emery, for the plaintiff, cited: 1 Redf. Wills, 420; *Delany* v. *VanAlden*, 84 N. Y. 16; *Bell* v. *Smith*, 6 Pet. 80; *Jones* v. *Bacon*, 68 Maine, 34; *Stuart* v. *Walker*, 72 Maine, 145; *Martin* v. *Martin*, L. R. 2 Eq. 404; *Copeland* v. *Barron*, 72 Maine, 206; *Sampson* v. *Randall*, 72 Maine, 109; 2 Redf. Wills, 442, 715, 716, 689, 699, 713; 3 Jarman, Wills, 47, 48; 3 Greenl. Cruise, *181; *Doughty* v. *Brown*, 4 Yeates (Pa.), 179; *Jackson* v. *Robins*, 16 Johns. 537; *Shaw* v. *Hussey*, 41 Maine, 495; *Brook* v. *Brook*, 3 Smale & G. 280; *Wisden* v. *Wisden*, 2 Smale & G. 396; 32 Beavan, 421; 4 Kent's Com. *270; *Jackson* v. *Bull*, 10 Johns. 19; *Campbell* v. *Brownrigg*, 1 Phillips' Ch. 301; *Wait* v. *Belding*, 24 Pick. 129; 11 Jarman, Wills, 1250, notes; *McDonald* v. *Walgrove*, 1 Sanf. Ch. (N. Y.) 274; *Smith* v. *Bell*, Mart. & Y. (Tenn.) 612; *Watkins* v. *Williams*, 3 Mac. & G. *622.

Lewis Pierce, for the defendants, cited: *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Stuart* v. *Walker*, 72 Maine, 146; *Copeland* v. *Barron*, 72 Maine, 206.

Symonds, J. The sixth clause of the will of Mary W. Whittier, plainly makes a distinction between the five thousand dollars given to Daniel F. Whittier "to be at his own disposal at once" and "the balance", which is "to be under his control."

What is the distinction intended? The legacy is an absolute gift of the five thousand dollars. What is the legatee's interest in the residue?

An examination of the whole clause shows, we think, that the testatrix intended to give the primary legatee, not the title to the remaining real and personal estate mentioned, but only the control and income of it during his life. This is implied in the fact already noticed that in the same sentence which gives him this residue, a sum is set apart, the five thousand dollars, of which he is to have the full power of immediate disposition.

What is called the balance is given to him to be under his control, not to be at his disposal, and as distinguished from the absolute gift.

The later provisions manifest the same intention. Should the legatee die leaving a widow and no children, she "shall have two thousand dollars of this amount over the five thousand dollars." If issue are living at his death, they "shall receive all over and above said five thousand dollars; and should he die leaving no widow or issue, all of said property over and above said five thousand dollars, shall be equally divided among my grandchildren."

These provisions, for the residue above the five thousand dollars to go at the death of the primary legatee, in one event in part to his widow, in another event wholly to his children, or, they failing, to all the grandchildren of the testatrix, are strongly against the construction that the will intended to give full title to the first taker.

The power given to the legatee to convey real estate, "should it be thought expedient," and apply the proceeds according to the will, seems to assume, so far as it relates to this residue, that the will does not give him the fee. He is to convey in pursuance of the power, not in his own right; and the proceeds are not his property, but are to be used as the will directs.

Nor is this a case in which a life estate, which might otherwise arise by implication from the terms of a will, is enlarged to a fee by an added power or right to dispose of the property unconditionally. As to the residue in question, no such power or right is given by this will.

It follows (to answer the questions proposed by the bill) that under the sixth clause Daniel F. Whittier is a legatee for life of the residue of the estate described therein as "the balance to be under his control;" that as such legatee he has the right to the possession, control and income of it, (*Sampson* v. *Randall*, 72 Maine, 109), but that the estate is only for life and the limitations over are not repugnant or void.

Decree accordingly.

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

CYRUS STILSON, administrator, in equity,

vs.

EBEN LEEMAN and others.

Somerset. Opinion September 17, 1883.

Costs in equity proceedings.

In suits in equity the whole subject of costs rests in the sound discretion of the court.

The mere fact that two or more defendants plead severally does not entitle them to tax several costs, especially when they have one and the same solicitor; each case depends on its own facts.

Where a bill sought to charge certain real estate (the record title to which was in the defendant, M. L.) with a judgment against her husband (the defendant E. L.) in favor of the plaintiff's intestate, on the ground that it was purchased with the money of the husband and conveyed to the wife without consideration through a conspiracy between the husband and wife and their respective fathers (the defendants J. L. and B. L.); and that at all events, $200 or $300 of the husband's pension money had been expended in repairing the buildings; and one solicitor appeared for all the defendants at the suggestion of the defendant, E. L; *Held*, That each defendant may tax for an answer, but that only one bill for costs accruing after filing of the answers should be taxed.

A party is not entitled to costs before a judge at chambers on an interlocutory matter in which he did not prevail.

No costs are allowed to be taxed for filing interrogatories unless they are filed in the clerk's office.

Costs for depositions are not taxable when the depositions are not admissible.

Costs for travel and attendance are taxed as in actions at law.

ON EXCEPTIONS.

This was a proceeding in equity in which the defendants prevailed and taxed their several bills of costs as shown below. These bills were allowed by the clerk against the objections of the plaintiff who appealed to the court. The presiding justice confirmed the taxation by the clerk and to this ruling the plaintiff alleged exceptions.

(Costs of Eben Leeman.)

Drawing answer and filing,	5 00
August 19, trav. to Norridgewock .99 and hearing before Judge Danforth, $2 00,	2 99
4 terms trav. Supreme Judicial Court, at .66 = 2.64,	2 64
40 days attendance Supreme Judicial Court, at .33,	13 20
Law court trav. 2.64, att. 3.30,	5 94
Att'y fee fact, 2.50, att'y fee law, 2.50,	5 00
Drawing interrogatories, (2 set)	2 00
Deposition, Benj. Lane,	8 60
Deposition, Hollis H. Churchill,	2 20
Filing two papers,	10
Notice of order,	50
Taxation,	25

(Costs of Martha S. Leeman.)

Drawing answer and filing,	5 00
4 terms travel 2.64, 40 days att. 13.20,	15 84
Att'y fee fact, 2.50, att'y fee law, 2.50,	5 00
Trav. and att. law court,	5 94
Drawing interrogatories, (2 set)	2 00
Deposition, Eben Leeman,	4 30
Deposition, John Leeman,	4 30
Taxation,	25

(Costs of John Leeman.)

Drawing and filing answer,	5 00
Trav. 4 terms, at .66 = 2.64,	2 64
Attendance, 4 terms, 40 days, at .33 =	13 20
Law court trav. 2.64, att. 3.30,	5 94
Att'y fee law, 2.50; att'y fee fact, 2.50,	5 00
Taxation,	25

(Costs of Benjamin Lane.)

Drawing and filing answer,	5 00
Trav. 4 terms, at .66 =	2 64
Att. 40 days at .33	13 20
Law court trav. 2.64, att. 3.30,	5 94
Att. fee fact, 2.50, att. fee law, 2.50,	5 00
Taxation,	25
Clerk's fee for hearing in costs,	5 00

John H. Webster, for the plaintiff, cited: *Clark* v. *Reed*, 11 Pick. 446; *Pratt* v. *Baron*, 11 Pick. 495; *Platt* v. *Squire*, 5 Cush. 551; *Miller* v. *Lincoln*, 6 Gray, 556.

A. G. Emery, for the defendants.

As to the right of John Leeman and Benjamin Lane to costs, we cite *Linnell* v. *Lyford*, 72 Maine, 283, where the court say: "No one should be made a party against whom no decree, if brought to a hearing, could be had. The only result of making her a party would be to entitle her to a bill of costs." No decree could be operative against either Lane or Leeman, hence if they were made parties they should each have costs.

We cite for the consideration of the court, *O'Connell* v. *Bryant*, 126 Mass. 232: "Two persons sued together in tort who sever in their answers although they appear by the same attorney are to be treated as separate parties and each of them, if he prevails, is entitled to separate costs." Also *George* v. *Reed*, 104 Mass. 366. "In an action of tort, changed on plaintiff's motion to a suit in equity upon the terms that he shall pay the defendant's taxable costs, each defendant is entitled to separate costs if they have answered severally, and it is immaterial that the action was brought originally in contract."

In this court in a recent case in Somerset county, (not yet reported,) *Susan Fletcher, Adm'x*, v. *Somerset Railroad et als.* the order is "bill dismissed with one bill of costs to respondents." Thus by implication admitting that the respondents would have been entitled to several costs had not the order limited it to one.

VIRGIN, J. In actions at law, costs and the recovery thereof, are regulated by express statutory provisions — the prevailing party being entitled thereto, when not otherwise specially provided, although he does not prevail to the full extent of his claim. R. S., c. 82, § 104, and cases in margin.

There is no statute regulating the recovery of costs in suits in equity. The whole subject rests by general practice in the sound discretion of the court. The court is authorized, at its

sound discretion, to award costs to either or neither party, as equity shall require on consideration of all the facts and circumstances of the case, and the condition and conduct of the parties. The very facts and circumstances which entitle a party to prevail, generally entitle him to costs also. But this rule is not universal; for a plaintiff may rightfully be entitled to, and obtain a decree affording him the relief sought, and yet not be entitled to costs; for the reason that the defendant was nowise in the wrong.

A prevailing party so much more frequently recovers costs than otherwise, that it has many times been said that the successful party is *prima facie* entitled to costs, and will recover unless the other party shall "show circumstances in a sufficient degree to displace the *prima facie* claim for costs." *Stone* v. *Locke*, 48 Maine, 426, and cases there cited; 2 Dan. Ch. Pr. (5th ed.) c. xxxi, § 1, p. * 1376 *et seq.*

In actions of tort against a plurality of defendants, they are allowed to plead severally, and if they, or a part of them prevail, each of the prevailing parties is entitled to costs. But in equity, the mere fact that several prevailing defendants filed separate answers, does not entitle them to several costs, especially when they all have the same solicitor. Here the sound discretion of the court is called in, the decision of each case depending upon its peculiar facts and circumstances, the diversity being too great to render it practicable to lay down any general rule which shall govern in such cases. 1 Dan. Ch. Pr. (5th ed) * 730 – 1.

The bill aimed to charge certain real estate, the record title to which was in the defendant, Martha Leeman, with a judgment due from her husband, Eben Leeman, (another defendant) to the plaintiff's intestate, on the ground that it was purchased with the money of Eben and conveyed to Martha, without consideration, through a conspiracy between her husband and herself, and their respective fathers, the remaining defendants; and that at all events, some two or three hundred dollars of Eben's pension money had been expended in repairing the buildings.

Each one of the defendants filed a separate answer, and appeared by one and the same solicitor, who admits in his deposition that he received his instructions from Eben, the

judgment debtor. It also appears that no other defendant took any interest in taking the depositions. Under these circumstances each defendant may tax for an answer; but only one bill for costs subsequently accruing, to be taxed. Nothing should be taxed for the defendants for the hearing at Norridgewock, they not having prevailed. 2 Dan. Ch. Pr. (5th ed.) *1379. Nothing for drawing interrogatories, as none were drawn and filed, which are those contemplated by the fee bill. Nothing for the depositions of the defendants; for they were not admissible in evidence. The remaining items of the bill of costs as taxed by the clerk for Eben Leeman, to be allowed. Now that all bills in equity are to be heard in the first instance, with one exception, by a single justice at a *nisi prius* term of court, or at chambers, the travel and attendance should be taxed as in actions at law, when the case is heard or made up at a regular term of court.

Exceptions sustained. No costs to either party after the appeal.

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

WARREN W. SPRINGER, in equity,

vs.

JAMES M. AUSTIN and wife.

Kennebec. Opinion September 17, 1883.

Practice. Equity. Stat. 1881, c. 68.

By the provisions of stat. 1881, c. 68, all hearings in equity, with one exception, must he had in the first instance by a single justice of the court, (§ 1), upon whom is conferred full power to hear and decide all motions and and causes and to make and enter the necessary orders and decrees, (§ 9). The only exception is found in § 13, which authorizes the justice hearing tbe cause to report it, with the parties' consent to the law court, if he is of the

opinion that any question of law is involved of sufficient importance or doubt to justify it.

BILL IN EQUITY.

The opinion states the case.

W. T. Haines, for the plaintiff.

J. H. Potter and T. J. Moody, for the defendants.

VIRGIN, J. This is a bill in equity brought by a judgment creditor against his debtor and debtor's wife, seeking to enforce the collection of his judgment by the sale of a certain farm conveyed by one, Wyman, to the wife, but alleged to have been paid for in part by the debtor.

The case is not before this court in accordance with the provisions of the statute "regulating the practice in equity proceedings." Stat. 1881, c. 68. By the provisions of that statute, "all hearings in equity," with one exception, must be had, "in the first instance" "by a single justice of the court," (§ 1,) upon whom is conferred full power to hear and decide all motions and causes, and to make and enter the necessary orders and decrees, § 9. The only exception to this requirement is found in § 13, which authorizes the justice on hearing a cause to "report it, with the parties' consent, to the next law court held within the district in which the cause is pending, if he is of the opinion that any question of law is involved of sufficient importance or doubt to justify the same." All causes not thus reported are to be not only heard but decided (subject to appeal and exceptions) by a single justice and thus save the delay and expense, the two great mischiefs at which the legislature aimed in enacting this statute.

In the case at bar, certain issues were framed and tried by a jury, pursuant to the provisions of § 20. And instead of the justice completing the hearing and deciding the cause and one of the parties taking the case up on appeal or on exceptions or on both, the findings of the jury and all the testimony are reported by agreement of the parties, with a stipulation that

"the law court shall render such judgment thereon as the case requires."

But passing over this irregularity and the fact that the bill contains no prayer whatever, an examination of the case upon its merits satisfies us that the bill cannot be maintained. The burden is on the plaintiff to prove that the debtor paid some portion of the purchase money of the farm in Sidney conveyed by Wyman to the debtor's wife. The jury found that the wife paid for the farm in Belgrade. And the testimony is uncontradicted that she paid Hersom for building the house upon it; that she sold the farm to Hersom for $600, $350 of which were paid toward the farm purchased by her of Wyman and conveyed to her. The debtor and wife both testify that she paid every dollar of the consideration for the latter farm and that he paid nothing.

The mere fact that the title of the farm in Belgrade was in the debtor, is not inconsistent with the testimony relating to her payment therefor, inasmuch as the bond was made to him years before. Considering the long and serious illness of the debtor and the undisputed industry of the debtor's wife, we think the testimony clearly negatives the allegation that the debtor had any equitable interest in the farm in Sidney.

Bill dismissed with single costs.

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

WATSON V. LEONARD *vs.* FELICIA E. MOTLEY and others.

Kennebec. Opinion October 6, 1883.

R. S., c. 75, § 11. Levy. Practice. Dower. Petition for partition.

To enforce the lien given by R. S., c. 75, § 11, it is necessary that the heir should have notice, either actual or constructive, of the suit of the administrator, in which his share of the estate is attached, so that the court may have jurisdiction and render a valid judgment. Where it is apparent on the

face of the record that no notice was given, the levy of an execution on the heir's share will not defeat a levy regularly made by his creditors.

A widow's right of dower, unassigned, is no bar to partition among tenants in common. But such widow is not a proper party to a petition for partition among them; and if wrongly joined as a respondent she must be discharged with costs.

ON REPORT.

Petition for partition of the farm in Albion, which was owned by Ezra Pray at the time of his decease.

The material facts are stated in the opinion.

G. T. Stevens, for the petitioner, cited: *Blaisdell* v. *Pray*, 68 Maine, 271; *Ward* v. *Gardiner*, 112 Mass. 42; *Pierce* v. *Strickland*, 26 Maine, 293; *Pond* v. *Makepeace*, 2 Met. 114; *Downs* v. *Fuller*, 2 Met. 135; *Deering* v. *Lord*, 45 Maine, 293; *Parks* v. *Crockett*, 61 Maine, 492; *Cunningham* v. *Buck*, 43 Maine, 456; *Annis* v. *Gilmore*, 47 Maine, 152; *McNally* v. *Kerswell*, 37 Maine, 552; *Holyoke* v. *Gilmore*, 45 Maine, 566.

W. A. Lancaster, for the respondents, cited: *Ward* v. *Gardiner*, 112 Mass. 42; *Motley* v. *Blake*, 12 Mass. 280; R. S., c. 75, § 11.

BARROWS, J. The undivided fifth part of the premises of which the petitioner asks to have his share set off in severalty, and which descended from Ezra Pray to his son Ezra A. was attached and levied upon by the plaintiff and other creditors of said Ezra A.—the petitioner becoming entitled to four hundred thirteen seven hundred twentieths, and the other creditors to the remainder thereof. No irregularity is suggested in the proceedings, and the petitioner is entitled to the partition prayed for unless the respondents make good their plea that the title is not in the petitioner but in themselves, which they undertake to do by virtue of a later attachment and levy made upon the share of Ezra A. Pray by the administrator of Ezra Pray, in satisfaction of a debt due from said Ezra A. to his father, from whom the estate descended. This, though later in date, they claim takes precedence of the levy under which the plaintiff's title accrues, because of the lien given by R. S., c. 75, § 11. But that lien in order

to defeat the attachments of the heirs' creditors must be enforced by legal proceedings within two years after administration granted upon the ancestor's estate.

Respondents' counsel argues that here is a literal compliance with the calls of the statute, because he shows a suit brought by the administrator, and an attachment within the required time and a levy within thirty days after judgment. But, unfortunately for the respondents, it is apparent upon inspection that the record in the suit *Henry E. Pray, administrator*, v. *Ezra A. Pray*, is the record of a judgment absolutely void for want of notice to the defendant, either actual or constructive, and thus in fact rendered by a court that had no jurisdiction in the premises. It is true as this court said in *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 462, that "the weight of authority seems to be, with respect to domestic judgments of courts of general and common law jurisdiction, that the recital of notice will be conclusive when the judgment is attacked collaterally, and that such judgment will be regarded as absolutely void only when the want of notice is apparent upon inspection." But here there is no recital of notice and it is apparent on inspection that none was given. Herein the record differs fatally from that in *Leonard* v. *Pray*, under which the petitioner claims. It is true that the report here presented speaks of an "order of notice and proof of notice in the suit of *Pray, adm'r*, v. *Pray*," as presented by the respondents; but, as to the proof of notice, it compares well with the celebrated chapter entitled "The snakes of Ireland," in the history of that country, the sum total of which chapter is — "There are no snakes in Ireland." As a muniment of title, the record in *Pray, adm'r*, v. *Pray*, is an absolute failure, and the statute giving a lien never contemplated the levy of an execution issued upon a judgment which the court had no jurisdiction to render, as sufficient to enforce the lien.

Nor is the existence of a right of dower, which has never been assigned to Eveline Pray, the widow of Ezra Pray, an obstacle to partition. *Blaisdell* v. *Pray*, 68 Maine, 269, 271; *Ward* v. *Gardner*, 112 Mass. 42.

But Eveline Pray, though she has a right of dower in the estate, is not a tenant in common with the petitioner and the other owners; and she is wrongly made a party in this process. *Ward* v. *Gardner, supra.* She has no estate in the premises until her dower has been assigned or otherwise set out to her. If she neglects to have this done until the estate has been divided she must take her dower in the several pieces. But the plea specially filed in her behalf is a valid one, and not being a tenant in common she is entitled in this process to judgment in her favor for costs as improperly brought into court.

Judgment for partition as prayed for. Judgment for Eveline Pray for her costs.

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

HENRY L. WYMAN *vs.* EUGENE OLIVER.

Sagadahoc. Opinion November 27, 1883.

Fishing privilege. Dower. Reversion.

The commissioners to set off a widow's dower assigned to her with other parcels, "the fishing privilege from Hiram Morse's wharf to the north line of the land owned by the deceased in his own right." The remainder of the estate, excluding the reversion of the widow's dower, was subsequently distributed among the heirs. *Held,*

1. That by the assignment of dower, the whole of the fishing privilege, between the points named, whether any part of it was, or ever had been, in use as a privilege or otherwise, was severed from the upland.

2. That the distribution among the heirs, prevented the release of dower from restoring the fishing privilege to its former condition of an incident to the upland, and rendered it necessary in the distribution of the reversion, to treat it as distinct property.

ON REPORT, on motion to set aside the verdict.

Trespass upon a certain fishing privilege in Phipsburg. The writ was dated December 17, 1881. The plea was the general

issue, and a brief statement, claiming that the acts done, were authorized by a third person, who was owner of the land. The verdict was for the plaintiff with nominal damages, and this verdict the defendant moved to set aside.

The opinion states the material facts.

W. Gilbert, for the plaintiff.

C. W. Larrabee, for the defendant, in an able argument contended as indicated in the opinion, citing: *Edwards* v. *Currier*, 43 Maine, 474; *Eaton* v. *Jacobs*, 49 Maine, 559; *Goddard* v. *Cutts*, 11 Maine, 440; *Wells* v. *Waterhouse*, 22 Maine, 131.

DANFORTH, J. This case has been tried before a jury resulting in a verdict for the plaintiff, and comes up upon a motion to set that verdict aside. The only question is as to the title of the premises. The charge in the writ is in substance an invasion of the plaintiff's fishery, by erecting a weir upon it. The place described is upon the western shore of the Kennebec river, in the town of Phipsburg, where the tide ebbs and flows, and below high water mark. The plaintiff is the owner of a fishery, some farther up the river, and claims to own the fishing privilege along the shore, down to, and including the place where the defendant, as he concedes, erected the fixtures complained of. No question is raised as to any public right of fishing, but only whether the defendant has by his weir invaded the private and exclusive rights of the plaintiff. The defendant concedes that he built the weir as charged, but claims that he did so as the lessee of William H. Higgins, the alleged owner, and thus the question of title is presented. If Higgins is the owner, or if the plaintiff has no title, the verdict must be set aside. If the plaintiff has a title it must stand.

Both parties claim under Mark L. Hill, who formerly owned the upland on the western bank of the Kennebec river, extending three hundred to four hundred rods up and down the river, and opposite to the fishery in question. It is conceded that as riparian owner, under the ordinance of 1641, his title extended to low water mark, subject to the rights of the public, not now

in question, and of course included the premises in dispute. In 1842 or 1843 Mr. Hill died intestate, and left this property to his heirs. He also left a widow, whose dower was set out to her by order of the probate court in 1844. In assigning her dower, the commissioners with other parcels of the estate, assigned to her, "the fishing privilege from Hiram Morse's wharf to the north line of the land owned by the deceased in his own right." This description included all the fishing privilege in front of the land of the deceased, and for the widow's natural life, and so far as an assignment could do so, severed the fishing privilege from the upland, for it is to be noticed, that no part of the land set out, bordered upon the river, except two small lots, and they were in express terms limited to high water mark.

We cannot concur with the counsel that this description referred only to such privileges as were then or had been in use. It does not use the plural number, but refers to one privilege and one only, and that a continued one from the southerly to the northerly line of the farm. If it were not in use, it would nevertheless be a privilege, a right to take fish and use the means necessary for that purpose, and would pass in a conveyance under that name, equally as if in use. This privilege though not then in use, now occupied by the defendant, was included within the limits specified, and must be considered as having passed to the widow by the assignment.

In 1844, but subsequent to the assignment of the dower, the remaining portion of the Hill estate, except the reversion of the dower, was distributed among the heirs. This, too, was done by a warrant from the judge of probate. In this distribution, in the assignment of the lots bordering upon the river, with one exception, not material to this case, "the fishing privilege was reserved to the dower." Thus keeping up the severance between the flats and the upland, and while the latter was divided the former was left undivided. Under this division it does not appear that the heirs, or any of them claimed any part of the fishing privilege, or that the commissioners intended to, or did assign it, but the contrary is evident.

In 1847 the widow having conveyed or released her dower to the heirs, another division was made, and this too, by order of the judge of probate. As the fishing privilege had been severed from the upland, in this distribution, it became proper and necessary even, to treat it as a distinct piece of property, and not as incidental to the upland, and it was so treated in the assignment. The release of the dower by the widow did, undoubtedly, as claimed by counsel, relieve the estate of that incumbrance, but it did not restore the fishing privilege to its former position, as incidental to the upland. If so, the effect would have been to destroy the equality of that division. The only way to prevent this, was that of treating it as distinct property, which was done by the commissioners. In pursuance of this plan the commissioners, as a part of the share of Helen H. Morse, assigned to her "all the fishing privilege east of the dower, and belonging to the same." It is true all the fishing privilege did not lie directly east of the dower, but it was in that direction, and there was, as we have seen, no fishing privilege whatever, "belonging" to the dower as incidental to it, but only by virtue of the assignment, and that was all that belonged to the estate. Thus Mrs. Morse obtained a title to all the fishing privilege, including that in question. This is the fair construction of the language of the commissioners, and must have been their meaning for no other assignment of any portion of the privilege was made.

Mrs. Morse appears to have retained the title, thus obtained, until her death, after which in a distribution of her property among her heirs, the commissioners assigned to Jacob G. Morse, as a part of his share, "all the fishing privileges and flats belonging to said dower lot." This is substantially the same language used in the assignment to Mrs. Morse, and the connection shows that the dower lot is the same as that there referred to.

By deed dated September 8, 1865, Jacob G. Morse conveyed to Christopher Cushing "the fishing privilege east of the dower, set off to me in the division of the estate of my late mother."

November 6, 1868, Andrew C. Hewey, as administrator on the estate of said Cushing, conveyed to John Tucker the "lot or

parcel of land and flats opposite of Lee's Island, used as a fishing privilege, known as the Morse privilege, with all the rights and privileges connected therewith, which the said Christopher Cushing bought of Jacob G. Morse, by his deed, dated September 8, 1865."

October 5, 1871, Tucker conveyed to the plaintiff the fishing privilege, "known as the Morse privilege, with all the rights connected therewith, which the said Christopher Cushing bought of Jacob G. Morse, by his deed dated September 8, 1865."

Thus it appears that the fishing privilege in front of the farm of Mark L. Hill, by the assignment of dower, the several distributions among the heirs, and all the conveyances has been treated as one privilege, extending from his north to his south line, and by the description and references in these several different conveyances, the title is so clearly traced from the original owner to the plaintiff, as to leave no doubt as to the validity of his claim, or any room for that of the defendant, or his lessor.

An examination of the grounds upon which the defendant places the alleged title, under which he claims, does not change the result.

The lessor certainly has no claims by virtue of his riparian ownership. The first and continued severance of the fishing privilege from the upland, would preclude this. But his failure to sustain his title on this ground is equally, or more clear, when it is examined more specifically. This claim, if it has any foundation, must rest upon a deed from Almira H. Goss, an heir to Mark L. Hill, and to whom was assigned lot eleven upon the plan, next northerly of the dower lot. The evidence shows that the fishery claimed by the defendant, and where the erections complained of are, is situated just above the northerly line of the dower, extended to the river. It is, therefore, opposite to lot eleven, and belongs to that lot, if any. But when that lot was assigned the fishing privilege was "reserved to the dower." It did not, therefore, pass to Mrs. Goss. There is nothing in the case which tends to show that Mrs. Goss, or any of her successors, subsequently acquired any title to the fishery, and of

course could convey none. Nor does it appear that any one claimed title by virtue of riparian ownership, or pretended to convey any. Higgins himself, the defendant's lessor, testifies: "I had no claim then any farther than the edge of the marsh; I had no claim below that, till I got a deed of it." The only deed in the case, which in terms purports to convey to him or his predecessors, anything below highwater mark, is the quit claim deed of Samuel H. Morrison, dated March 13, 1880. Morrison, who had previously conveyed the upland, does not appear to have had, or claimed, any other title than that coming from Goss, which as we have seen was of the upland only. Hence, neither source of the defendant's alleged title can avail him, while that of the plaintiff is good.

Motion overruled.
Judgment on the verdict.

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

AFTON H. CLARKE *vs.* JONATHAN F. HILTON.

Somerset. Opinion November 27, 1883.

Practice. Real actions. Dower. Pleadings. Betterments.

Where the respondent to a writ of entry pleads the general issue without making a seasonable disclaimer, and it turns out that the demandant has the better title, the respondent cannot defend on the ground that he has had no notice to quit before the commencement of the action and has not ousted the demandant. The only question is which of the parties has the better title? Nor is it a defence that the defendant has a right to dower in the demanded premises when the dower has never been assigned or otherwise set out to him. But a demandant proving title only to an undivided portion of the premises can have judgment only for such portion, or in the language of R. S., of 1841, c. 145, § 12, for "his own particular share."

To entitle a respondent in such suit to set up a claim for betterments his possession must have been adverse.

Where a husband managed and controlled an estate conveyed to his wife in 1855, living upon it with her and their children until her death in 1860 and

afterwards remained in possession, his children continuing to be members of his family during a portion of their minority, and not giving him any notice to quit after they became of age, his possession, in the absence of any distinct denial of the right and title of his wife's heirs should be regarded as permissive and in the nature of a trust for the benefit of his wife and the family, and not adverse nor of a character to enable him to set up a claim for betterments in a suit brought by one of the heirs within six years after the youngest child becomes of age, although it appears that he has appropriated all the proceeds of the place to his own use and paid all the taxes and never paid nor promised to pay rent to any one, and that he has a right to dower in the premises which has never been assigned or set out to him.

ON REPORT.

Real action to obtain possession of certain real estate situated in St. Albans. The writ was dated December 2, 1881. The plea was general issue and the following brief statement:

"And for brief statement of further defense the said defendant says the premises were owned in fee by his former wife, Ann H. Hilton, at the time of her death on September 30, A. D. 1860 (subject to an incumbrance of mortgage hereinafter mentioned), that her estate was solvent, that she died intestate and that he, being her husband up to the time of her death, was entitled to have the use for life of one-third of her real estate to be recovered and assigned in the manner and with the rights of dower, that he has held the premises in actual possession from the time of her death to the present time; that his dower in the premises has never been set out to him, or in any way assigned to him by her heirs, (of whom the plaintiff is one), or assigned by the judge of probate or by judgment of court; that he has never at any time received from plaintiff, nor from any one notice to quit the premises or to surrender them.

"The defendant further claims the benefit of the laws in relation to betterments, and claims compensation for buildings and improvements on the premises, and alleges and offers to prove that he has had the premises in actual possession for more than twenty years prior to the commencement of this action, to wit: from the death of his said former wife, Ann H. Hilton on September 30, A. D. 1860. And he prays that the jury may find that fact, and that they shall also find and state in their verdict what was the value of the premises, when the tenant, said J. F. Hilton,

first entered on the same, to wit: on September 30, A. D. 1860, and that they shall also find and state in their verdict the value of the premises at the time of the trial above their value when said tenant first entered thereon.

"And further for brief statement of matters pertinent to the question of betterments, particularly as to the value of the premises when the tenant first entered thereon, viz: on September 30, A. D. 1860. The defendant alleges:

"1. That the premises were then encumbered by his right of dower, in relation to which the facts are as above stated in his brief statement of further defense.

"2. That the premises were conveyed by said Nancy Hilton to said Ann H. Hilton by warrantee deed dated December 22, 1855, duly recorded September 15, 1856, at ten o'clock, A. M. Somerset registry of deeds, vol. 83, page 481. That at the time of the death of his said former wife, on September 30, A. D. 1860, the premises were encumbered with a valid mortgage given simultaneously with said deed, Nancy Hilton to Ann H. Hilton, by the said J. F. Hilton and said Ann H. Hilton, his former wife and mother of the demandant, to Nancy Hilton, his mother, dated December 22, 1855, duly recorded in Somerset registry of deeds, vol. 83, page 50, September 15, 1856, at ten o'clock, A. M.; the condition of which was that the said J. F. Hilton and Ann Hilton, their heirs, executors or administrators, should well and truly maintain said Nancy Hilton, suitably clothe and provide for her both in sickness and in health, pay all doctor's bills and other charges necessary to her comfort and convenience during her natural life; that said Nancy Hilton lived to May 21, A. D. 1874, on the premises in the family of said J. F. Hilton when she died; that she was supported at his expense as provided in said mortgage, and that he did at all times up to the time of her death, faithfully fulfil the conditions of said mortgage, at great expense to him, from the time of the death of his said former wife on September 30, A. D. 1860, to the death of said Nancy Hilton, on May 21, 1874, to wit: at the expense of $1000 for the space of thirteen years, seven months and twenty-one days."

A. R. Savage, and *Folsom and Merrill*, for the plaintiff, cited: R. S., c. 104, § 9; R. S., (1857) c. 61, § 5; stat. 1841, c. 117; stat. 1857, c. 34; 1 Washburn, Real Prop. 285 (3 ed.); 4 Kent's Com. 58, 61, 63; *Johnson* v. *Shields*, 32 Maine, 424; *Sheafe* v. *O'Neil*, 9 Mass. 13; *Evans* v. *Webb*, 1 Yeates, 424 (1 Am. Dec. 308); *Bolster* v. *Cushman*, 34 Maine, 428; Taylor's Landlord & Tenant, § 472; *Jackson* v. *Burton*, 1 Wend. 341; Schouler Dom. Rel. (2 ed.) 442; *Treat* v. *Strickland*, 23 Maine, 234; *Kelley* v. *Kelly*, 23 Maine, 192; *Comings* v. *Stuart*, 22 Maine, 110; *Varney* v. *Stevens*, 22 Maine, 331; *Knox* v. *Hook*, 12 Mass. 329; *Maddocks* v. *Jellison*, 11 Maine, 482; *Runy* v. *Edmonds*, 15 Mass. 291; *Mason* v. *Richards*, 15 Pick. 141; *Larcom* v. *Cheever*, 16 Pick. 260; *Plimpton* v. *Plimpton*, 12 Cush. 458.

Josiah Crosby, for the defendant, after stating the origin of the betterment law in this state, citing, stat. 1821, c. 47, § § 1, 5; R. S., (1841,) c. 145, § § 23, 35, 42; *Pratt* v. *Churchill*, 42 Maine, 477; stats. 1848, c. 87; 1852, c. 240, § 1; 1854, c. 90, § 1, contended that to entitle one to betterments the possession must be exclusive but not necessarily adverse to the fullest extent of that term. But in case of a claim by a tenant to the fee founded on a forty years possession, the possession must undoubtedly be adverse to the fullest extent, but not so in the case of betterments founded on six years or twenty years possession. R. S., c. 104, § § 20, 25, 32 and 38, relative to betterments, and § 45, relative to forty years possession, &c. clearly recognize the distinction. See Sedgwick and Waite, on Trial of Title to Land, c. 28, § 731, *et seq.*

Another argument which seems to me decisive upon the point that the possession need not be such that if continued twenty years would give the fee, is derived from the very statute by virtue of which we claim betterments to be calculated on the possession of twenty years instead of six years. For if twenty years disseizin will give the fee, why provide by statute for the inferior right of betterments on a twenty years possession "open, notorious and exclusive," unless upon the theory that there might be a twenty years possession which would give betterments but

would not give the fee? It is absurd to provide betterments to a man who has acquired the fee.

Counsel cited and commented on the different statutes relating to betterments, and on *Treat* v. *Strickland*, 23 Maine, 284; *Maddocks* v. *Jellerson*, 11 Maine, 482; *Austin* v. *Stevens*, 24 Maine, 520; *Pratt* v. *Churchill*, 42 Maine, 570. The counsel further elaborately argued other grounds of defense raised by his pleadings, citing: *Potts* v. *Cullum*, 68 Ill. 217; *Wilie* v. *Brooks*, 45 Miss. 542; *Wood* v. *Wood*, 83 N. Y. 575: *Minier* v. *Minier*, 4 Lans. (N. Y.) 421; *Young* v. *Tarbell*, 37 Maine, 514; *Jones* v. *Brewer*, 1 Pick. 314; 2 Scribner, 72, 32, 54, 33; R. S., c. 67, § 14; Buller N. P. 117; *Jones* v. *Brewer*, 1 Pick. 317; *Bright* v. *Boyd*, 1 Story, 478; *Cook* v. *Toumbs*, 36 Miss. 685; *Bonham* v. *Badgley*, 2 Gilm. (Ill.) 622; *Den* v. *Dodd*, 1 Halst. (N. J.) 367; *Bolster* v. *Cushman*, 34 Maine, 428; *Barbour* v. *Barbour*, 46 Maine, 9,

Counsel concluded: "In the judgment of the legislature, and I will add of mankind, the longer the lapse of time the more sacred are the relations that cluster about the family household, the HOME, the thatched cottage it may be, or a palace, but which John Howard Paine, could designate with no more enduring term than "Home, sweet home." I respectfully submit to the court that justice, humanity, a due regard to the family relations and the instincts of nature demand that the defendant be let in to his defense.

BARROWS, J. The questions presented by the report are: 1. Is the plaintiff entitled to prevail; and if so to what extent? 2. Is the defendant entitled to betterments; and if so, under what rule, and within what limits as to time?

The plaintiff shows title to the demanded premises in herself, and her brother, as heirs at law of their mother, the defendant's wife, who died in 1860, leaving the defendant and their children in possession, subject to a mortgage to Nancy Hilton, the defendant's mother, who conveyed the premises to his wife in 1855, receiving at the same time a mortgage conditioned for her maintenance during life. This mortgage was executed by the

defendant and his wife, and its conditions were fully performed, Nancy Hilton remaining a member of defendant's family, till her death in 1874. Defendant's marriage took place in 1850. The plaintiff was born in 1851 and her brother in 1857. The plaintiff lived on the premises, in the family of her father, the defendant, until 1866, and her brother did the same until 1874. Before the conveyance to his wife (Nancy Hilton, then the owner, making one of his family), the defendant lived upon, controlled, and managed the demanded premises. From and after said conveyance up to the present time, he has continued to do the same, and during all his occupancy, before and since the conveyance, he has paid all the taxes and has appropriated all the proceeds to his own use, and has never promised to pay rent to any one. Since the death of his wife, dower has never been assigned, or in any manner set out to him; and prior to the commencement of this action he had no notice to quit.

Hereupon the defendant says this action cannot be maintained. First, for want of this notice; second, by reason of his right of dower in the premises. But he pleaded the general issue, and did not disclaim any right, title or interest in the premises, as he should have done, according to R. S., c. 104, § 6, if he would now insist that he was not holding the plaintiff out of possession at the time of the commencement of the action.

Under the plea of the general issue and in the absence of such disclaimer, the question of notice is not open to him. The only inquiry in such case is under R. S., c. 104, § 6, which of the parties has the better title? Now here, the defendant, in his brief statement, without seasonably disclaiming title in himself, asserts the title of his former wife at the time of her death, intestate and solvent, and alleges the facts respecting the title, substantially, as above stated, including the fact that plaintiff is one of the heirs. He thereby settles the question, as to title, against himself. He is not one of the heirs of his wife. *Lord* v. *Bourne*, 63 Maine, 368. Husband and wife, though they may be entitled under our statutes to certain interests in the estates of each other, are not, properly speaking, heirs of each other. The rights which the statutes give them, respectively, they do

not take as heirs, and until dower has been lawfully assigned, neither of them by virtue of those rights can defeat the right of possession which the descent of the property confers upon the heirs, or the conveyance by the former owner gives to his grantee. *Sheafe* v. *O'Neil*, York Co. 9 Mass. 13; *Hildreth* v. *Thompson*, 16 Mass. 191, 193. Except where, as in New Jersey and some other states, the rule has been changed by statute, the weight both of English and American authority is, that though one entitled to dower be in possession, the heir or devisee may recover against her, without assigning dower. 4 Kent's Com. 61. 62, 4th ed. and cases cited; 1 Washburn R. E. 1st ed. 253; Park on Dower, 334; *Evans* v. *Webb*, 1 Yeates, 424; S. C. 1, Am. Dec. 308, 2 Scribner on Dower, 30. Before dower is assigned the right thereto is a mere chose in action — nothing which can be regarded as an estate; it confers no title to or seizin of any part of the land subject to it. *Johnson* v. *Shields*, 32 Maine, 424, 426; *Bolster* v. *Cushman*, 34 Maine, 428.

The cases cited by the defendant rest upon the statute provisions of their several states, and we have none that are equivalent.

Section four of c. 103, R. S., cannot be regarded as affecting the question. There was a similar provision in the statutes of 1821, c. XL, § 5, which has come down, substantially unchanged, through the various revisions. But it gives only a right of action, not a property in the land itself, nor a right to enter upon and hold it as against the heir. It aims rather at securing a prompt assignment, and the interest of the party entitled to dower meanwhile, than at the creation of a mongrel sort of tenancy in common, between such party and the heirs, the one holding subject to the disabilities of a life tenant, and the others entitled to the privileges and powers attending the ownership of the fee.

There is nothing in the objections to the maintenance of the action that can avail the defendant. But upon familiar principles the demandant must recover upon the strength of her own title, and not upon the weakness of the defendant's. She shows title to an undivided half of the demanded premises, the other half having descended to her brother. Judgment in her favor can go only under R. S., c. 104, § 10, for that undivided portion to

which she shows title in herself. Section nine of the same chapter, while allowing tenants in common to join or sever in an action of this sort, does not mean that one suing alone, can recover the whole or any more than his own proportion of the estate, even against one who shows no title.

Is the defendant entitled to betterments? The defence he offers is peculiar. He pleads the general issue, which imports that he is now in possession, holding adversely to the plaintiff, but his brief statement admits in effect the title of herself and her brother, and claims only that he has a right to the use, for life, of one-third of the premises, "to be recovered and assigned in the manner and with the rights of dower." In defense of the suit he relies upon this right and the want of notice to quit, neither of which, as we have seen, can avail him; but the character of the claim indicates that of the possession which he has had. But for the plea of the general issue, and the want of a disclaimer, it might have been difficult so far as anything appears here, for the plaintiff to make out a disseizin. The defendant seems to have held in submission to the acknowledged title of his children, and claiming only for himself a life interest in one third, at all events until the youngest became of age. Until a husband thus left by his wife and the mother of their children, in possession of a homestead incumbered by a mortgage, which he has executed with her, has done something more distinctly in denial of the right of her heirs, than the mere remaining in possession, receiving the profits of the place and performing the condition of the mortgage — the heirs participating as members of his family during such part of their minority as they saw fit and after becoming of age giving him no notice to quit — we think his possession is not to be regarded as adverse though "he has appropriated all the proceeds to his own use" and "has never paid or promised to pay rent to any one" and "has paid the taxes." This is simply a continuation of the occupation which he had during the lifetime of his wife, and that was unquestionably permissive and in the nature of a trust for the joint benefit of themselves and their children.

It is only by reason of the construction which the statute gives to his plea of the general issue unaccompanied by a seasonable disclaimer, that he can now be regarded as a disseizor.

His counsel makes an elaborate argument in support of the proposition that it is not necessary that one's possession should be adverse in order to entitle him to the privileges of the statutes, commonly called the "betterment acts." But we are of the opinion that it is an essential element in such possession, and that without it the case is neither within the letter or spirit of the betterment acts, or within the hardship which they were designed to relieve. Upon what pretext can one, who for his own convenience makes improvements upon the land of another, whose title he acknowledges while he is temporarily in possession, claim pay for them when the owner comes to assert the title which he admits?

The betterment acts, based both upon twenty and six years' possession, presuppose that the party is in possession claiming title to the land, and such party is entitled to the benefit, in proper cases, not only of improvements made by himself, but by "those under whom *he claims*." R. S., c. 104, § § 20 and 25. The somewhat verbose description of the character of the possession referred to, given in the statute of 1821, c. 47, § 5, besides requiring that "the possession, occupancy and improvement . . . by the tenant or those under whom he claims shall have been open, notorious, and exclusive," further describes it as sufficient when "comporting with the ordinary management of similar estates in the possession and occupancy of *those having title thereto, and satisfactorily indicative of such exercise of ownership*, as is usual in the improvement of a farm *by its owner*."

The obvious import of these expressions is to apply the statute provisions to those who are in possession claiming title as owners, and exercising the rights of owners under such claim; so that if the question were new, it would be settled in conformity with the uniform current of decisions, which have been confirmed by repeated revisions of the statutes without substantial change. *Comings* v. *Stuart*, 22 Maine, 110; *Varney* v. *Stevens*, *id.* 334;

Kelley v. *Kelley*, 23 Maine, 192; *Treat* v. *Strickland*, *id.* 234; *Maddocks* v. *Jellison*, 11 Maine, 482; *Prop's Kennebec Purchase* v. *Kavanagh*, 1 Maine, 348; *Runey* v. *Edwards*, 15 Mass. 291; *Knox* v. *Hook* (Hancock Co.), 12 Mass. 329, 331, 332; *Mason* v. *Richards*, 15 Pick. 141; *Larcom* v. *Cheever*, 16 Pick. 260, 263. The same rule as to the character of the possession was held to apply to the statutes giving betterments after twenty years possession, in *Pratt* v. *Churchill*, 42 Maine, 471. Defendant's counsel argues against the construction, because, he says, twenty years adverse possession would give practically an absolute title to the land, and the party would have no occasion to claim betterments. He overlooks the cases where, by reason of disabilities of the plaintiffs (minority and absence beyond sea, for example) twenty years adverse possession would be no answer to the demandant's claim — to say nothing of cases where by reason of the peculiar character of past grants and conveyances, one who has been in possession more than twenty years, supposing himself to have a good title in fee, may find his estate terminated and be evicted.

We do not see how under existing statutes, and in view of the decisions above cited, a husband and father in possession of lands belonging to his wife and her heirs, whose title he has never disputed, except technically by the plea of the general issue, modified as it is here by the brief statements, can by making improvements thereon, entitle himself to raise the question of betterments. It would certainly be too harsh an inference to regard his possession as adverse before the youngest child became of age, and since then six years have not elapsed.

The death of the wife was subsequent to the passage of chapter 34, laws of 1857, and we see no reason to doubt that the husband would have a right to dower in such real estate as she might leave at her death, although her title to it accrued previous to the passage of that act. It is not limited by its terms to estates subsequently acquired, and no vested rights would be disturbed by giving its provisions full effect. But, as we have

heretofore seen, the defendant's right to dower which has never been assigned, constitutes no defence in this action.

Judgment for plaintiff for an undivided half of the demanded premises.

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

ARNOLD HARRIS *vs.* SAMUEL A. HOWES and another.

Waldo. Opinion December 1, 1883.

Landlord and tenant. Ways, land damages for widening. Money had and received.

The defendants were owners of land in Belfast. Plaintiff was their lessee of a portion thereof under a lease for a term of years. In widening a street, the city took a portion of the land including a part of that leased to plaintiff. The entire damages for the taking were accorded to and collected by defendants, no claim being made that a portion of the damages belonged to the lessee. *Held*, That the plaintiff may recover of the defendants, his share of the damages, (after deducting his *pro rata* share of the expenses incurred by the defendants in prosecuting the claim for damages) in an action for money had and received.

ON REPORT.

The writ was assumpsit for money had and received, and was dated April 4, 1881. The plea was the general issue.

The opinion states the material facts.

Joseph Williamson, for the plaintiff, cited: 3 Hurlstone & Collman, 460 (Exch.); *Sweetser* v. *McKenney*, 65 Maine, 225; *Holley* v. *Young*, 66 Maine, 520; Taylor's Landlord & Tenant, §§ 262, 445, 22, 385; *Vernon* v. *Smith*, 5 B. & A. 1; *Wilson* v. *Prescott*, 62 Maine, 115; *Ellis* v. *Welch*, 6 Mass. 246; *Parks* v. *Boston*, 15 Pick. 198; *Patterson* v. *Boston*, 20 Pick. 165; R. S., c. 18, § 5; *Gillespie* v. *Thomas*, 15 Wend. 464; *Brown* v. *Co. Com.* 12 Met. 209.

Philo Hersey, for the defendants.

The defence claims that the action cannot be maintained by law, and further that no equitable claim exists in favor of the plaintiff against the defendants.

The plaintiff had a method prescribed by law by which he could obtain damages of the city of Belfast, if any he suffered, and having a method so prescribed by law, he could not recover them in any other way or allow them to be recovered through any other person or in the name of other persons. Neither could damages be allowed to any other persons for him, for any interests he had in land taken, or in consequence of land taken. R. S., c. 18, § 20, is as follows: "A written return of their proceedings in all cases containing the bounds and admeasurements of the way, and the damages allowed to each person for land taken is to be made and filed with the clerk." The plaintiff has claimed that the language here used, viz: "to each person for land taken" does not include him for he does not own the land, and therefore he could not recover from the city by the prescribed method. In answer we say that among the rules to be observed for the construction of statutes the tenth is as follows: "The words 'land or lands' and the words 'real estate,' include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein." Most surely this is liberal enough to include the plaintiff's right under a lease, which is a virtual deed for the period it covers. If this were insufficient, section 7 of the charter of the city of Belfast, would seem to be ample in its provision. It reads as follows: "The city council shall have exclusive authority and power to lay out any new streets or public way or widen or otherwise alter or discontinue any public way in said city and to estimate the damages any individual may sustain thereby." The plaintiff's method of recovering damages is clearly prescribed and his right under that method well founded in law. Having failed to make use of the proper method or in fact any method while there was yet opportunity, can he now, at the bar of this court, recover damages from those who did him no damage, or recover any portion of the damages allowed other persons who neither claimed nor

received damages for injury to plaintiff and who never received any for or in consequence of injury done him. Most assuredly this would be a new and novel feature in law, if equity or justice are its foundation. See Taylor's Landlord and Tenant, (3rd ed.) § 6; Constitution of Maine, Art. 1, § 21; *Parks* v. *Boston*, 15 Pick. 198; 6 Mass. 246.

PETERS, J. The plaintiff claims to maintain an action for money had and received upon these facts: Damages were awarded to the defendants for land taken for widening a street in the city of Belfast. The plaintiff at the time had a lease of a portion of the land. In the proceedings no notice was taken of the lease, nor was any claim set up by the lessee, and the damages were estimated and awarded as if there had been no lease upon the premises. This seems to be shown by the facts and admitted by the arguments.

The plaintiff contends that in equity and good conscience he is entitled to recover from the defendants, to whom the whole damages were paid, such a proportion thereof as should legally have been awarded to his interest in the land as lessee.

There can be no doubt that, under the rule maintained in the earlier Massachusetts cases, and adopted into the practice in such proceedings in this state, there should have been separate awards to the lessors and lessee for their respective interests in the premises; the sum of the awards not to exceed the entire value of the land taken. The lessee's "land" was condemned, in the sense of the word as used in the statute, and the lessee was "aggrieved" thereby. *Ellis* v. *Welch*, 6 Mass. 246; *Parks* v. *Boston*, 15 Pick. 198; *Patterson* v. *Boston*, 20 Pick. 165.

By the fault or mistake of both of the present parties, one award only was made. The plaintiff mistook in not claiming, and the defendants in not disclaiming, the right to recover the lessee's damages. We do not see why a bill in equity would not lie to rectify the mistake, nor why the present action cannot be sustained for such purpose. Certainly, the defendants have money in their hands which equitably and fairly belongs to the plaintiff. There can really be no more difficulty for this court to determine the relative sums belonging to the parties, than

for county commissioners to work out the result. The duty of the commissioners would have been first to ascertain the entire damages and then apportion them. Nor is it unusual in such proceedings in many of the states, for an award to be made in gross, and the division to be made afterwards according to ownerships. *Wilson* v. *Railroad*, 67 Maine, at p. 363. The present Massachusetts statutes furnish a mode of proceeding similar to that. Mass. Gen. St. c. 4; *Boston* v. *Robbins*, 126 Mass. 384. Proceedings have been sustained where only the *quantum* of damages was found and awarded to "owners unknown." *Com.* v. *Great Barrington*, 6 Mass. 492; *In matter of Eleventh Avenue*, 81 N. Y. 436. See 2 Mass. 489; and *Brown* v. *Co. Com.* 12 Met. 209.

Of course, the plaintiff should not recover an amount exceeding his relative share of the whole amount awarded, less a *pro rata* proportion of the costs and expenses which the defendants were subjected to in obtaining the award. Had there been a contest before the commissioners as to title, and the whole title been awarded to the defendants, perhaps the plaintiff should not recover anything. But the plaintiff's title was in nowise contested. The damages seem to have been awarded to the title as an entirety, without regarding the minor ownership. There was no decision that the plaintiff was not entitled to damages. The plaintiff and defendants could have joined in one complaint for the prosecution of their claims. The law finds some privity of contract from this relationship or alliance of parties. This case belongs to the class of cases in which, under LORD MANSFIELD'S rule, adopted in this state, not adopted in all the states, the law forcibly implies the privity, if need be, because equitable. *Keene* v. *Sage*, 75 Maine, 138, and cases cited; 2 Whar. Con. 722.

The defendants contend that the lease terminated on May 1, 1878. The cases cited show the contrary. The lease gave the plaintiff an option to continue the lease for five years after that date. That the plaintiff accepted a continuance and made his acceptance effectual, is proved by his paying and the defendants accepting the rent regularly since that time. The case of *Howes*

v. *Belfast*, 72 Maine, 46, shows that the final hearing in damages for the land taken was in August, 1878. At that time there was no contingency about the continuance of the lease. Its continuance was then fixed. *Holley* v. *Young*, 66 Maine, 520.

Defendants defaulted. Damages to be assessed at nisi prius.

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

JOSEPH L. BUCK and another, *vs.* GEORGE W. KIMBALL.

Same *vs.* AUGUSTUS R. DEVEREUX.

Hancock. Opinion December 4, 1883.

Lien claim. Sale on writ. Shipping. Estoppel. Sheriff and deputy.

An officer cannot make a valid sale, according to the provisions of R. S., c. 81, § § 29-38, of a vessel attached to secure a statutory lien against it, on a writ which does not run against the owners directly.

A proceeding to enforce a lien on a vessel, being *in rem* as well as *in personam*, is not affected by the passage of a statute providing a new mode of selling upon a writ, property so attached; the statute containing no provision making it applicable to pending actions.

Where an officer without the consent of the owners sold a vessel attached on a writ, brought to enforce a lien claim, the owners are not estopped from contesting the validity of the sale because of the fact that they chose one of the appraisers at the time of such sale.

If an officer make an unauthorized sale on a writ of property legally attached he becomes a trespasser *ab initio*. And the purchaser at such a sale becomes a trespasser if he takes the property away after notice from the owners, that the validity of the sale was denied and would be contested.

A sheriff is answerable for the official acts of his deputy, although the deputy's term of office has expired.

ON REPORT.

The first named action is against the purchaser at an auction sale by a deputy sheriff, on a writ brought to enforce a statutory lien, of the schooner, called the "Lady of the Ocean" which the

deputy had attached and sold according to the provisions of R. S., c. 81, § § 29-38. The second action is against the sheriff whose deputy made the sale.

Both writs were dated September 27, 1881. The report gives the declaration and plea in the first action only. The declaration contains a count in trespass and one in trover for the schooner formerly called the "Lady of the Ocean" now called the "Thayer Kimball." The plea was general issue, with brief statement, as follows:

"And for brief statement said defendant says that said plaintiffs had no property in said schooner called the 'Lady of the Ocean' and her furniture and appurtenances on the first day of June, 1880, and that they were not on said first day of June entitled to the possession of said vessel her furniture and appurtenances, that said defendant and one, Knott C. Rankin, were on said first day of June, the lawful owners of said vessel, and in possession of her, that said vessel her furniture and appurtenances was sold to said defendant and said Rankin, at public auction on the seventeenth day of May, 1880, and that on said seventeenth of May, said defendant for himself and said Rankin took possession of said schooner and has continued in possession of said vessel and still continues in possession of said vessel; that said vessel her furniture and appurtenances was sold after due appraisement made by appraisers selected by said plaintiffs and other parties in interest for the purpose of said sale, that said plaintiffs were present at said sale and did not deny the authority of the auctioneer to sell said vessel; that said George W. Kimball, Jr. and said Knott C. Rankin are now owners of said vessel and have been owners and in possession of said vessel since the seventeenth day of May, 1880." . . .

The report shows that the vessel was attached on the twenty-fourth day of September, 1878, on a writ dated the seventeenth day of that month, to enforce a statutory lien on the vessel, in favor of William L. Hayford, by James W. Patterson, a deputy of the defendant, Devereux, and the vessel remained in the custody of Mr. Patterson until sold by him on the writ, May 17, 1880, as stated in the opinion.

Other material facts are stated in the opinion.

Hale and Emery, for the plaintiffs, cited: *Pierce* v. *Strickland*, 26 Maine, 277; *Hinckley* v. *Gilmore*, 49 Maine, 59; *Tomlinson* v. *Jessup*, 15 Wall. 454; *Hayford* v. *Cunningham*, 72 Maine, 128; *Hurd* v. *Cushing*, 7 Pick. 169; *Hale* v. *Skinner*, 117 Mass. 474; *Wallis* v. *Truesdell*, 6 Pick. 455; *Ross* v. *Philbrick*, 39 Maine, 29; *Pratt* v. *Bunker*, 45 Maine, 569; Waterman, Trespass, 502, 503.

H. D. Hadlock, for the defendant.

The attachment of the vessel by the officer was the taking her into custody by the court to await the result of the suit, and the court, under the attachment, had the legal possession of the vessel. *Phebe*, 1 Ware, 368.

That the writ upon which the vessel was attached had all the essential requisites, is apparent from the opinion of the court in the case upon which the attachment was made, as the court in that case pronounced upon the merits involved and thereby affirmed the sufficiency of the process, for without a sufficient process no judgment could have been pronounced upon the merits. *Hayford* v. *Cunningham*, 72 Maine, 128.

The sale of the property, *pendente lite*, was by virtue of the statute which conferred upon the attaching officer the power to have the property appraised and sold. Chapter 243, laws of 1880; § 10, of c. 91, R. S.

The proceeding under § 7, of c. 91, of the R. S., was in the nature of a proceeding *in rem*, and the court had the custody of the property, which it was to hold until the suit on which the attachment had been made was finally determined.

In *Hinkley* v. *Gilmore*, 49 Maine, this court said: "There is no doubt that in admiralty a sale of a thing may be made *pendente lite*, but it must be by special order of court." See *U. S.* v. *Schr. Lion*, 1 Sprague, 399; *The Globe*, 2 Blach. C. C. 427.

In this case the court could not enter an order for the sale of the vessel, because the owners appeared and objected; and

therefore the provisions of the statute in relation to a sale by order of court could not be enforced.

The officer, when applied to by Mr. Hayford to proceed in accordance with the provisions of law, and to sell said vessel in manner and form observed in this case would have been derelict in his duty had he refused to comply.

The law assumes that it would be better for both parties to have the property changed into money rather than to allow it to perish or to waste, or be kept at great expense, till the suit in which it is attached should come to an end. *Pollard* v. *Baker*, 101 Mass. 261.

In the *United States* v. *Arredondo*, 6 Pet. 729, 730, it was laid down as a universal principle that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are valid and binding as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. *Voorhees* v. *Bank U. S.* 10 Pet. 449; *The Trenton*, 4 Fed. Rep. 657; 2 Droit, Maritime, 53; *Stringer* v. *Marine Ins. Co.* L. R. 4 C. B. 676; *The Trenton*, 4 Fed. Rep. 657.

The general principle of law, as respects third persons is, that where one having title stands by and knowingly permits another to purchase and expend money on property, under the erroneous impression that he is acquiring a good title, and the one who stands by does not make his title known, he shall not afterwards be allowed to set it up against the purchaser. *Erwin* v. *Lowery*, 7 How. 178.

Testing the sale by this principle, how does it stand? The purchaser saw by the notice of sale that the vessel had been taken on attachment, appraised, and would be sold at public auction, and he attended the auction and there he saw these plaintiffs present at the sale, nor did they make any objection to the sale; but by their presence sanctioned it, and therefore they cannot impeach it, even if formal steps had not been strictly complied with.

If the debtor acts in selecting the appraisers and these facts are known to the purchaser when he buys and pays for the property, the debtor is estopped from avoiding the sale, by showing that the officer had not taken the necessary steps to authorize him to sell. *Erwin* v. *Lowery*, 7 How. 178; *Chapman* v. *Pingree*, 67 Maine, 198.

SYMONDS, J. It was decided in *Hinkley* v. *Gilmore*, 49 Maine, 59, that the statutes — R. S., c. 81, § § 29-38 — which authorize the sale of certain kinds of personal property on mesne process do not apply to logs attached upon a writ in which the owner of the logs is not a defendant, to secure a statutory lien for services rendered to a contractor in cutting and hauling them; that those provisions of the statutes were not intended to authorize the sale upon the writ of property "confessedly not the debtor's and which could not be levied on until after notice to the claimant and a judgment of the court that it was subject to the lien claimed;" and, therefore, that a sale under those sections and in accordance with them affords no defence to the officer in an action brought against him by the owner of the logs to recover their value.

The reasoning of the court in that case is equally clear against the right to sell upon the writ vessels attached, to secure statutory liens upon them, on process not against the owners directly.

While this is not denied, it is urged that the act of 1880, c. 243, has changed the law in this respect. How far that amendment may have the effect to extend the application of these sections of the statute, in the case of vessels, cannot here be determined, because it was passed while the action to enforce the lien upon the vessel, the sale of which upon the writ in that case is the subject of this controversy, was pending. It did not in terms apply to pending cases and the general rule holds that "actions pending at the time of the passage or repeal of an act shall not be affected thereby." R. S., c. 1, § 3. The action to enforce the lien was a proceeding *in rem*, as well as *in personam*, and a statute which provided a new mode of selling upon the writ

property so attached would clearly affect such a pending action, if its application in such case was allowed.

For the decision of this case, the law remains as declared in *Hinkley* v. *Gilmore*, *supra*.

At the April term, 1880, while the action to enforce the lien was pending, a petition was presented to the court for an order to sell the vessel under the act of 1880, c. 243, which was refused because the owners objected. Thereupon request in writing was made by the attaching creditor to the officer to proceed with the sale according to the provisions of R. S., c. 81, § § 29-38; this written request setting forth that those who appeared as owners refused their consent to the sale under the act of 1880. This was neither more nor less than an application to the officer to proceed under the provisions which authorized (in certain cases) a sale without consent. In the notices given by the officer to the owners of the time and place of appraisal, the same fact of refusal of consent by the owners is recited as a reason for the method of procedure adopted. The public notice of the sale at auction sets forth the attachment and appraisal, with no suggestion of the consent of the owners. The bill of sale which the defendant, Kimball, received from the officer declares that the owners appeared in court in answer to the petition for an order of sale and refused their consent thereto; and that thereupon application was made to the officer to proceed as provided "when consent to a sale by order of court has been denied;" and traces the authority of the officer to sell not to any consent of the parties but to the attachment and the proceedings thereon.

Under such circumstances we see nothing in the fact that the owners chose one of the appraisers to estop them from contesting the validity of the sale. Manifestly it could not have been intended or understood as a waiver of their rights, an assent to the proceeding or an admission that it gave good title.

On the contrary, the whole proceeding upon its face was one to enforce a lien upon the vessel against the will of the owners. The officer did not assume to do anything, nor could the purchaser have understood that he was receiving anything, by

virtue of their consent. The papers recited their dissent and the sale proceeded as it did upon that ground.

Both actions are maintainable.

The defendant, Kimball, not having acquired title by the purchase at auction, was a trespasser in taking the vessel away after notice, as he says, "that the validity of the sale was denied and would be contested."

The officer by an unauthorized sale of property legally attached became a trespasser *ab initio*. It was an official act of the deputy — the unwarranted sale of property lawfully in his custody under the attachment — for which the sheriff is answerable although the deputy's term of office had expired.

In both actions the entry will be,

Judgment for the plaintiff. Assessment of damages by jury at nisi prius.

WALTON, VIRGIN and PETERS, JJ., concurred.

APPLETON, C. J., and DANFORTH, J., concurred in the result.

SOPHIA LASHUS *vs.* GEORGE H. MATTHEWS.

Kennebec. Opinion December 6, 1883.

Officer. Attachment. New trial.

The question, whether or not an officer serving in good faith and in a proper manner a writ from a court of competent jurisdiction is a trespasser in making an attachment, does not depend upon the result of the suit in which the attachment is made, nor is it affected by it.

The validity of the claim sued is not in issue in a suit against the officer for making the attachment, nor can it be thus collaterally tried.

L. sued an officer in trespass for attaching her property in a suit against her husband. After verdict against her, she filed a motion for new trial on the ground that since the verdict, judgment had been rendered in favor of her husband in the action in which the attachment was made. *Held*, That the motion could not prevail, and judgment was ordered on the verdict.

ON MOTION to set aside the verdict and for a new trial.

Trespass. The writ was dated January 5, 1882.

The plea was general issue and brief statement.

The verdict was for the defendant.

The questions presented to the law court and the material facts are stated in the opinion.

F. A. Waldron, for the plaintiff.

The validity of the note sued in the action against the plaintiff's husband, in which the defendant attached the plaintiff's property, was a material issue in this case. That note was dated September 29, 1871. The transfer of the property attached to the plaintiff from her husband was in March, 1876. Hence it was claimed by the defendant at the trial that he represented a creditor of the husband whose claim was existing at the time of the transfer to the wife. That the transfer was void as to such creditor. The charge of the presiding judge was strong on that point. But since the verdict, the rescript from the law court has been received, to the effect that that note was not a valid claim. That the plaintiff in that suit was not a creditor of Lashus at the time of the transfer to his wife. *Rollins* v. *Lashus*, 74 Maine, 218.

If that fact could have been presented to the jury, the verdict would unquestionably have been the other way.

Counsel further ably argued the motion to set aside the verdict as against evidence and the weight of evidence.

W. T. Haines, for the defendant.

BARROWS, J. The plaintiff, Sophia, wife of Levi Lashus, brought this action of trespass against the defendant, a deputy sheriff in the county of Kennebec, basing her claim to recover on the ground that he had attached and carried away a small stock of goods and the furniture in a certain saloon as the property of her husband, Levi Lashus, when in fact the same belonged to her. The case was tried at the October term, 1882, and the defendant, among other matters, put in evidence a writ in a suit then still pending in the superior court, in favor of *Mark Rollins* v. *Levi Lashus*, being the same on which he had

attached the property in controversy, and the note on which said Rollins' suit was founded, given in 1871 by Levi to said Rollins' predecessor in the office of county treasurer. The plaintiff produced a bill of sale from her husband of the stock and fixtures which were in the shop in March, 1876, purporting to be "in consideration that my wife, Sophia Lashus, has this day become responsible for certain of my debts by signing notes with me and securing payment of the same by mortgage of real estate."

He also transferred to her on the same day all the debts due to him, by a written assignment purporting to be "for a valuable consideration," with a stipulation appended "that this paper shall be sufficient evidence that said Sophia Lashus is the lawful owner of said demands;" and the testimony of the plaintiff and her husband, who was her main witness, is that after that time, the business, though conducted by him, belonged to her. Hence her claim to the property attached by the defendant at the saloon occupied by the husband in 1881. The husband testifies that he has had no part of the income of the store, "only what I needed to eat and wear, or if I wanted to go anywhere. I had no regular pay out of the proceeds at all. I had what I needed out of the business of the store. My wife and I have lived out of that store for the past six years." [This seems to be about what the owner of such a business would be likely to get if he was fortunate.] She says, "I clothe him and feed him and give him spending money whenever he wants it. He has staid in the same store and carried on the saloon business. He did not pay me rent for the store; it was mine; he brought the money to me when there was any; I took care of the profits." [Nor does this differ greatly in essentials from the ordinary course of business in well regulated families of that rank in life.] "I did not make any weekly allowance to him for his services."

She says further that the amount of her husband's debts at the time of his failure and her purchase, was nine or ten hundred dollars — that part of them were settled at a discount; but she did not know what discount; nor did she know the value of the

goods she received from him, nor the amount of the accounts he assigned to her. Her bill of sale on its face appears to have been designed for security for signing notes with her husband and mortgaging her real estate to secure their payment. If anything had ever been paid on the notes besides the proceeds of the business, it would seem that it might have been easily proved by the testimony of third parties.

Looking at all that was in evidence, and all that was conspicuously lacking on her part, if the jury came to the conclusion that this property and business really belonged to the husband, who supported himself and his wife out of it, and had what money he wanted to spend himself—and that it did *not* belong to the wife, who knew and did so little that was material in relation to it, we are by no means sure that they erred.

They are not wont to err on that side in such cases.

The motion to set aside the verdict as against law and evidence, cannot be sustained. We think it more than probable that the verdict upon the issue presented was correct. That issue was, as stated by the presiding judge to the jury in a charge of which the plaintiff makes no complaint, whether the plaintiff was the *bona fide* owner of the goods, or whether the conveyance and title which she set up were fraudulent and void as against her husband's creditors by reason of the fraud, the burden being on the defendant representing such creditors to make proof of the same. The verdict must be deemed conclusive as to the fraud; and from the nature of the evidence, it would be fraud of the kind which would invalidate the plaintiff's title as against subsequent as well as prior creditors, there being a continued secret trust for the benefit of the debtor and with the apparent design to defraud all creditors, future as well as existing.

But since the trial, and while the case was pending on the motion to set aside the verdict which is disposed of as above, comes the plaintiff with another motion to set aside the verdict for newly discovered evidence, the substance of which is that judgment has been rendered in favor of Levi Lashus in the suit brought by

the county treasurer against him, in which the property here in controversy was attached as the property of Levi. The motion cannot prevail.

The question whether or not an officer serving in good faith and in a proper manner a writ from a court of competent jurisdiction is a trespasser in making an attachment, does not depend upon the result of the suit in which the attachment is made, nor is it affected by it in a case like this. The officer represents not the attaching creditor alone, but the law, which authorizes him to "attach and hold as security [goods and chattels] to satisfy the judgment for damages and costs which the plaintiff *may* recover." R. S., c. 81, § 22.

The validity of the claim sued is not in issue in a suit against the officer for making the attachment, nor can it be thus collaterally tried. The plaintiff here must recover, if at all, upon the facts she alleges and proves to have existed at the time when her action was commenced and tried. The foundation of her claim is that the property was hers and so not liable to attachment for any debt which the defendant in the attachment suit might be found to owe. The process in the officer's hands afforded him a conclusive justification for all regular and lawful proceedings against the defendant therein named, and all who can assert only his rights. Nor does the dissolution of the attachment after the suit against the officer is commenced, make the officer who has simply obeyed his precept and done his duty under it, liable in such suit. If he attaches property which is not liable to attachment for the debts of the defendant named in the writ, he is responsible to the owner. That was the claim here made, but the jury have settled the vital facts against the claimant. It follows inevitably from the evidence and the finding of the jury, that the property attached by this defendant was subject to be attached and held for such judgment as the county treasurer *might* recover against Levi Lashus; and the failure of the county treasurer's suit does not make the officer a trespasser *ab initio*.

The officer in defending a suit of this sort, is neither expected nor required to come prepared to try out the issue between the

parties to the suit in which he has made the attachment. They would be bound by no finding which the jury might make in his case, and if the right of the plaintiff in the attachment suit to recover were an issuable fact in a suit of this description, and the failure of the officer to establish it would make him liable to a plaintiff occupying the position that this plaintiff does, it might turn out when the attachment suit came on for trial between the parties to it, that the plaintiff there would prevail, and the officer be called upon to respond to him for failing to seize the attached property upon execution. The law does not expose its officer to any such dilemma, nor does it permit any such incongruous mixture of issues between other parties in the trial of a cause. By virtue of the law which empowers him to attach the goods and chattels of the defendant in the writ placed in his hand for service, he acquires a special property in the goods attached and the right to contest all claims thereto asserted by any third parties unembarrassed by any question as to the maintenance of the suit in which the attachment is made.

As the court remarked in *Braley* v. *French*, 28 Vt. 546: "In the attachment of personal estate the officer acquires a special property and the right to its custody and possession. For any injury to it the right of action is in the officer, as, in any termination of the case, he is accountable for the property either to the creditor or debtor. . . . His right over the property is independent of the creditor or debtor as, in a given event, he is responsible for it to the debtor, and in another event, to the creditor; and that right exists so long as that special property continues in him."

"It is not admissible for the defendant in order to dissolve an attachment on motion to show that the debt was not due; or that the amount claimed by the plaintiff was unconscionable or unreasonable. This would be to try in a summary and collateral way the main issue in the cause. Nor can he move to discharge the attachment on the ground that the property attached did not belong to him." Drake on Attachment, 3 ed. § 417.

But were all this otherwise — were it possible to maintain that an officer who has not refused to restore goods which he has been

regularly holding under an attachment to the custody from which they were taken when the suit has terminated in favor of the defendant, could be set down as a trespasser *ab initio* at the instance of a fraudulent vendee of such defendant the moment the defendant prevailed in the suit — still there would be ample reason in this case to disallow this motion. It does not appear that at the trial any question was made by the plaintiff as to the debtor's liability to the county treasurer in the suit in which the property was attached. To allow the fraudulent vendee to lie in wait with such a motion, and when his own claim has been declared fraudulent and void to avail himself of the debtor's success in the other suit in a way and to an extent which the debtor could not have done, would be a strange perversion of the course of legal proceedings. This plaintiff, it appears has at best only the right which her husband had in the property attached. He could not prevail against an officer proceeding regularly under his precept while the attachment suit was pending; for his only right is to have the property returned when the attachment is dissolved by a judgment in his favor. If a failure to do this would make the attaching officer a trespasser *ab initio*, it is not even suggested that such a failure has occured here.

Motions overruled. Judgment on the verdict.

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

ISRAEL R. BRAY *vs.* PEMBROKE S. MARSH.

Franklin. Opinion December 14, 1883.

Promissory notes. Guaranty. Waiver of demand and notice.

M sold and delivered to B, before it was due, the promissory note of H, payable to K, (but which had never been endorsed by K), and at the time of the delivery M endorsed it "holden without demand or notice." H was solvent at the time of the maturity of the note and for about three years thereafter when he became utterly insolvent. In the meantime M made one or more

requests of B to collect the note of the maker. In a suit afterwards brought by B against M to recover the amount of the note, *Held;*

1. That M was a guarantor.
2. That by the terms of his endorsement he waived a demand and notice.
3. That he was liable to B for the amount of the note.

ON REPORT.

Assumpsit for the amount of the following note:

"$122.50. Canton, Maine, January 10, 1877. Six months from date for value received I promise to pay to the order of Frank E. Kidder, one hundred twenty-two and fifty one-hundreths dollars and interest. Otis Hayford."

On the back is written the following:

"Holden without demand or notice. P. S. Marsh."

The writ was dated August 27, 1880.

The case was withdrawn from the jury and reported to the law court with power to draw inferences as a jury might and render judgment according to the legal rights of the parties.

The opinion states the material facts.

S. Clifford Belcher, for the plaintiff, cited: *Malbon* v. *Southard*, 36 Maine, 147; *Colburn* v. *Averill*, 30 Maine, 310; *Irish* v. *Cutter*, 31 Maine, 536; *Cobb* v. *Little*, 2 Maine, 261; *Brown* v. *Curtiss*, 2 N. Y. (2 Comst.) 225.

H. L. Whitcomb, for the defendant.

The sale and delivery of the note with the written endorsement made the defendant a guarantor, no more nor less.

It is true the defendant endorsed it "holden without demand or notice." He waived nothing then because the law does not entitle him to a demand or notice, had he not waived it, as appears by the whole current of decisions. The defendant waived notice and demand. The law says he is not entitled to either, so he waived nothing.

The plaintiff was bound to use due diligence in collecting the note, and notify the defendant within a reasonable time after its maturity of its dishonor. *Parkman* v. *Brewster*, 15 Gray, 271; *Marsh* v. *Day*, 18 Pick. 321.

Sixty days was an unreasonable delay after maturity before calling on the maker to pay.

The case does not show to whom the defendant undertook to guarantee the note. *Bichard* v. *Bartlett*, 14 Mass. 279, seems to be exactly in point.

DANFORTH, J. From the report in this case it appears that the defendant assuming to be the owner of a negotiable promissory note payable to Frank E. Kidder, but not indorsed by the payee, sold and delivered it to the plaintiff with the indorsement upon the back: "Holden without demand or notice," which was signed by him as a part of the contract of sale, and upon this contract the action is brought. This sale and indorsement was after the original delivery of the note and before it became payable. The maker of the note was in good credit at its maturity and remained so for about three years thereafter when he became utterly insolvent. In the meantime the defendant made of the plaintiff one or more requests that he would collect the note of the maker, which he neglected to do, though he made a demand upon the maker for the payment as he says within sixty days after maturity, as the letter of the maker shows in less than thirty days.

The defence is put upon two grounds. First, that the case does not show to whom the defendant undertook to guarantee the note; and second, the negligence of the plaintiff in not collecting of the maker when he might have done so.

To sustain the first objection the case of *Bichard* v. *Bartlett*, 14 Mass. 279, is relied upon. It is true in this case as in that it does not appear how or for what purpose the defendant obtained the note. But in *Bichard* v. *Bartlett*, the court say "the statement of facts does not show with whom the contract was made, and upon that omission the decision was founded and statement was discharged that the defect might be remedied if the evidence could be produced. In this case the evidence has been produced and shows beyond a doubt that the defendant was either the actual owner of the note, or is estopped to deny his ownership and that his contract was with the plaintiff and

for a consideration moving from him. Thus upon this point *Bichard* v. *Bartlett*, is an authority for sustaining the action.

The second objection founded upon the alleged negligence of the plaintiff must depend upon the terms of the contract, which so far as is important to this point, is in writing and from the meaning of the parties as gathered from that writing we are to ascertain the force of the contract.

In this case it is claimed that the contract is that of guaranty, that a guarantor is not entitled to a demand and notice, and for that reason the written words are without meaning or effect. Were this so, the plaintiff must recover, for the only complaint is that of delay. If the law imposes no duty upon the person receiving the guaranty to demand payment of the maker of the note or give notice of default, then a delay or omission even to do so, cannot be a negligence of which the guarantor can complain. No case has been cited and as we believe none can be, in which it has been held that in order to make a guaranty of an existing debt absolute it is necessary to take any steps other than to make the demand and give seasonable notice. This is sufficient to enable the guarantor to protect himself, which is all that is required. It is no part of the plaintiff's duty to commence an action upon the note, certainly not unless he is indemnified for his costs. Besides in this case he could not have sustained an action in his own name, nor does it appear that he had any right to use that of the payee.

It is undoubtedly true, that, as the defendant was not a party to the note and put his name upon it subsequent to its inception, he was not an indorser but rather a guarantor. *Irish* v. *Cutter*, 31 Maine, 536. Whatever may have been the early authorities, it must now be considered as well settled that a simple contract of guaranty without conditions or restrictions, requires a demand and notice. Story on Prom. Notes, § 468; 3 Kent's Com. 124 (12 ed.); *Bickford* v. *Gibbs*, 8 Cush. 156; *Wildes* v. *Savage*, 1 Story's R. 22. By these and other authorities it appears that if the demand and notice are seasonable nothing further is necessary to lay the foundation of an action against the guarantor.

As a guaranty is a contract it is competent for the parties to impose such restraints and liabilities as they see fit. They may waive any conditions imposed by law, or may impose others. They may make them absolute or conditional.

Had the defendant been an indorser, the words used are so common, and have so frequently received a judicial construction, that no question could be raised as to their meaning or effect. The contract of guaranty, though not the same in respect to demand and notice, is similar to that of indorsement. The only difference is, that it is less restricted, inasmuch as in the former it is seasonable if in time to protect the guarantor against the insolvency of his principal. It would seem to be self-evident that a waiver in one case should have the same effect as in the other, and that the words used here are equally apt to effect that waiver, and render the liability absolute as in the case of an indorsement. It was so held in *Bickford* v. *Gibbs*, *supra*. In *Cobb* v. *Little*, 2 Maine, 261, it was decided that language much less direct made the liability absolute, and an original undertaking. In *Bean* v. *Arnold*, 16 Maine, 251, the word "holden" attached to the name was held sufficient to render the guaranty unconditional. To the same effect are *Blanchard* v. *Wood*, 26 Maine, 358, and *Irish* v. *Cutter supra*.

Defendant defaulted.

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

STATE OF MAINE *vs.* NATHANIEL BROWN.

Sagadahoc. Opinion December 18, 1883.

Criminal practice. Exceptions.

Exceptions to the ruling of the court at *nisi prius* in overruling a motion of the respondent to be discharged from custody, after the jury had disagreed and been discharged of the case, must lie in the court of the county until final action there.

ON EXCEPTIONS.

Search and seizure. The cause was tried at the August term, 1883, before a jury duly empanelled, who reported that they could not agree and were discharged, without a verdict and without the consent of the defendant, but with no objection on his part. After the jury were discharged of the case the defendant asked to be discharged from custody. This motion was overruled by the court and the defendant was delivered into the custody of the sheriff. To this ruling the defendant alleged exceptions, and, on motion of the county attorney, these exceptions were certified to the Chief Justice as frivolous and intended for delay.

F. J. Buker, county attorney, for the state.

W. Gilbert, for the defendant.

PETERS, C. J. We think these exceptions are not properly before us, and must be dismissed from this jurisdiction. Exceptions should not be sent to the law court until the case is fully disposed of in the trial court. If we entertain a hearing upon the respondent's motion before a determination of the cause at *nisi prius*, unnecessary delay may be occasioned. If the case be sent to us once in this way, there is no reason why it could not come up in the same way over and again upon motions possible to be made. In such event there might be a total failure of justice. It is not this case alone that we have in view but the principle of the thing. The exceptions must lie in the court for the county until final action there. This view is in accord with all the authorities. There are many analogous cases. *Lamphear* v. *Lamprey*, 4 Mass. 107; *Daggett* v. *Chase*, 29 Maine 356; *Abbott* v. *Knowlton*, 31 Maine, 77. The question presented is preliminary or collateral and not final. It is fully covered by the case of *Cameron* v. *Tyler*, 71 Maine, 27.

Exceptions dismissed from this court.

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

JOSIAH M. STAPLES and another, in equity,

vs.

THOMAS H. SPRAGUE and others.

Sagadahoc. Opinion December 27, 1883.

Partnership. Authority to dispose of partnership property.

Five persons mutually agreed to cut and pack for sale a quantity of ice, and, after deducting all expenditures, including their own labor, from the proceeds of sales, to divide the residue among them in equal shares. *Held*, that this agreement created a partnership between the contracting parties. Each partner was agent for all.

In the absence of fraud the majority of a firm can make a valid sale of ice, belonging to the firm, without the consent of the minority.

BILL in equity, heard on bill, answers and proof.

The opinion states the case.

W. Gilbert, for the plaintiffs.

C. W. Larrabee, for the defendants.

WALTON, J. This is a suit in equity, in which Josiah M. Staples and Marshall B. Graves, are the plaintiffs, and Thomas H. Sprague, James E. Lilly, and Alvah J. Hildreth, are the defendants. And, by a supplementary bill, Jeremiah Millay, Seth T. Woodward, and S. Thomas Woodward, are also made defendants.

The prayer of the bill is for an account, and that the defendants may stand charged with, and be required to pay over to the plaintiffs, two-fifths of the net proceeds or value of one thousand seven hundred and twenty-five and one-half tons of ice.

The bill states and the evidence proves that in December, 1879, the two plaintiffs, and the three first named defendants, agreed to cut and pack for sale a quantity of ice, and that, after deducting all expenditures, the residue of the money derived from the sale, if any, should be divided among them in equal shares.

And the case shows that March 3, 1880, one of the defendants (Sprague) sold the ice for one dollar and twenty-five cents a ton.

The bill charges that this sale was for less than the market value of the ice, and that Sprague, in making the sale, acted without authority. And the plaintiffs claim that the defendants (the last three named being the alleged purchasers of the ice) shall be charged, not only with the price for which the ice was actually sold by Sprague, but further, for the highest price for which it might have been sold during that season.

We have read the evidence with care, and the impression which it makes upon our minds is that Sprague, in selling the ice, acted in perfect good faith; that he hesitated, negotiated, consulted such of his associates as he could reach, made every possible effort to get a better offer, and finally accepted the offer of one dollar and twenty-five cents a ton, because he thought it would be better for his associates as well as himself to do so, rather than to reject the offer and take the chances of getting a better one. The evidence shows that the price of ice immediately went up, but the evidence fails to show that on the day of the sale of this ice, the market price was much, if any, above what was obtained for it.

And there is no evidence of fraud or collusion on the part of the purchasers. True, they bought to sell again, and undoubtedly bought as cheaply as they could, and with the hope, and probably with the expectation, that ice would be higher, and that they would be able to sell at a profit. But the evidence fails to show any fraudulent practices on their part, or any collusion with Sprague or the other defendants, to defraud or injure the plaintiffs.

Having come to the conclusion that the sale was made without fraud or collusion, our next inquiry is whether Sprague had authority to make it. We think he had. The agreement to cut and store the ice created a partnership between the contracting parties. And it is familiar law that each partner is the agent of all. Story's Agency, § 39. Or, as Chancellor KENT states the law, in the absence of fraud, each one has the complete *jus disponendi* of the whole partnership interests, and is considered

to be the authorized agent of the firm. 3 Kent, 50, 10th edition. And in case of an actual disagreement, he adds that the weight of authority is in favor of the power of a majority of the firm, acting in good faith, to bind the minority. And such ought to be the law; for when there is a community of interest, certainly it is the will of the majority, and not the will of the minority, that ought to control. If there is a fraudulent combination on the part of the majority to injure or oppress the minority, the law is otherwise. But in the absence of fraud, certainly it is the majority, and not the minority, that ought to control. In this case, the sale by Sprague was with the knowledge and consent of Lilly and Hildreth; and they three constituted a majority of the firm. If the two plaintiffs had been present, and had actually dissented, we think it was a case where the will of the majority should control, and that Sprague, Lilly and Hildreth, being a majority of the firm, could have made a valid sale of the ice, without the consent of the plaintiffs. We think the sale was valid, and being made in good faith, it is the opinion of the court that the alleged purchasers are in no way liable to the plaintiffs, and that they, (Millay and the two Woodwards) must be discharged with several costs; and that the other defendants (Sprague, Lilly, and Hildreth) are to be charged with the amount for which the ice was actually sold by Sprague, and no more. With respect to the three last named defendants (Sprague, Lilly, and Hildreth) the bill must be sustained for the purpose of settling up the affairs of the firm; and for that purpose the case must go to a master.

Original bill against Sprague, Lilly, and Hildreth, sustained; the case to go to a master to take an account.

Supplementary bill against Millay, and the two Woodwards, dismissed, with costs for each.

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

ELNATHAN SEARLES *vs.* CHARLES R. HARDY.

Franklin. Opinion December 27, 1883.

Practice. Want of service. Entry of actions. Motion to dismiss.

A writ in an action of assumpsit cannot properly be entered in court when no service has been made or attempted and no attachment of property, if the defendant is an inhabitant of the state. If such a writ has been entered in court and an order of notice has been improvidently made and complied with, the action will nevertheless be dismissed on the defendant's motion, if the motion is seasonably made.

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

Assumpsit on an account annexed.

The opinion states the material facts.

E. O. Greenleaf, for the plaintiff.

J. C. Holman, for the defendant.

WALTON, J. The writ in this case is dated September 8, 1882. It was returnable to the Supreme Judicial Court to be held at Farmington on the fourth Tuesday of the same month. The defendant is described in the writ as an inhabitant of the state, residing in the same town in which the court was to be held. No reason is apparent upon the face of the writ why it should not have been served upon the defendant in the ordinary mode, and none has been stated. It was not so served; and the action was entered in court without any service of the writ whatever. No property was attached upon it, and no service of it was made, or, so far as appears, attempted to be made, upon the defendant; but, instead, an order of notice was obtained from the court returnable to the next March term. This order having been complied with, the defendant appeared specially on the first day of the term, and moved that the action be dismissed

for the reason that the service was not legal and the action not properly before the court; and the question is whether the motion should not have been sustained. We think it should. An action such as this was can not properly be entered in court without any service of the writ whatever, or any attempt to serve it, if the defendant is an inhabitant of the state, and no property has been attached upon the writ. If property has been attached upon the writ, or the service is defective without the fault of the plaintiff or his attorney, the action may be entered and an order of notice obtained. R. S., c. 81, § 21. But when no property is attached, and no service of any kind attempted, the action cannot properly be entered and an order of notice obtained. And if such an order is improvidently made and complied with, the action will nevertheless be dismissed on the defendant's motion, if the motion is seasonably made. *Briggs* v. *Davis*, 34 Maine, 158. In this case, the motion was seasonably made, and it is the opinion of the court that it should have been sustained, and the action dismissed.

Exceptions sustained. Motion allowed, and the action dismissed.

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

WILLIAM CLEMENTS *vs.* WARD MASON.

Waldo. Opinion December 27, 1883.

Money had and received. Collector of taxes. Town treasurer.

Where the collector of taxes pays the town treasurer money for which the treasurer does not account either to the town or to his successor in office, and in consequence of such omissions the collector is compelled to pay to the town the same amount of money a second time, he may recover the same of the treasurer who thus neglected to account in an action for money had and received,

ON EXCEPTIONS.

Assumpsit for $300 which the plaintiff, as a collector of taxes, paid to the defendant, as town treasurer, October 20, 1875, for which the defendant gave no credit on the town books, and the plaintiff paid the money a second time to the town. The verdict was for the plaintiff and the defendant alleged exceptions.

The opinion states the material facts.

Wayland Knowlton, for the plaintiff, cited: 2 Greenl. Ev. § § 117, 119, 114; *Richardson* v. *Kimball*, 28 Maine, 463; *Norton* v. *Kidder*, 54 Maine, 189; *Thomaston* v. *Warren*, 28 Maine, 289; *State* v. *Barnes*, 29 Maine, 561; *Naples* v. *Raymond*, 72 Maine, 213.

Thompson and Dunton, for the defendant.

The treasurer of a town is the legal custodian of the funds of the town, and a payment of money by the collector to the treasurer from the proceeds of his collections, is a payment to the town.

The court say, in *Inhabitants of Richmond* v. *Brown & Tr.* 66 Maine, 373, which was an action of assumpsit for money had and received against the collector of taxes who was delinquent in paying over money collected, that the money thus in the hands of the collector was the money of the town, and that the action was maintainable. Judgment was rendered for the plaintiffs. See also, *Inhabitants of Trescott* v. *Moan et als.* 50 Maine, 347. It is not necessary to discuss the question whether, in case the plaintiff had paid the amount of his commitments to the defendant and $300 more, he could maintain an action to recover back the amount so overpaid, for such is not the case at bar. The exceptions show that at no time during the defendant's term of office, had the plaintiff completed his collections by a considerable amount, as there were *more* than $300 due the town from him when the defendant's term of office expired; therefore the alleged payment of $300 October 20, 1875, was not and could not have been, under any circumstances, an overpayment.

This money collected by the collector being the money of the town even while in his hands, was, when paid to the treasurer, in the legal custody and possession of the town, and should the treasurer convert the same to his own use or in any other manner

illegally divert the resources of the town, he would be accountable to the town and not to the collector.

If this plaintiff paid to the town or to defendant's successor in office, any money in excess of the amount of his commitments, the last money paid was the money of the plaintiff, and he must look for his money where he paid it. If the court should hold that the plaintiff can recover the $300 paid on the twentieth of October, 1875, he can, on the same principle of law, recover the entire amount by him paid to the defendant.

WALTON, J. The question is whether, if a town collector of taxes pays to the treasurer of the town money which the treasurer does not account for to the town nor to his successor in office, and in consequence of such omissions the collector is compelled to pay to the town the same amount of money a second time, and the money first paid to the treasurer is still retained by him, he having in no way accounted for it to the town or to his successor in office, it may be recovered of him by the collector in an action for money had and received.

We think it may. We regard it as settled law that when money has been delivered to the defendant for a particular purpose, to which he has refused or neglected to apply it, it may be recovered back in an action for money had and received. The law is so stated by Professor Greenleaf, and the authorities cited by him fully sustain the proposition. 2 Greenl. Ev. § 119. And see *Norton* v. *Kidder*, 54 Maine, 189.

We see no reason why this rule should not apply to a town treasurer who, having received money from a collector of taxes, neglects or refuses to give the collector credit for it, in consequence of which the collector is compelled to pay the money a second time. We think it should. We think it would be difficult to conceive of a case more proper for its application.

Such was the ruling of the court in this case, and we think the ruling was correct.

Exceptions overruled.
Judgment on the verdict.

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

INHABITANTS OF LEE *vs.* INHABITANTS OF WINN.

Penobscot. Opinion December 27, 1883.

Paupers. Pauper supplies.

If a town furnish one of its paupers a house in which to live and land on which to work, he being poor and needy and unable to furnish them himself, the house and land thus furnished may be regarded as pauper supplies within the meaning of the law and be sufficient to prevent the pauper from acquiring a settlement by residence so long as he continues to occupy them.

It is not important in such a case to inquire by what means the town obtained the control of the house or land.

ON EXCEPTIONS and motion to set aside the verdict.

An action to recover for supplies furnished to one Andrew J. Brown. Writ was dated September 23, 1881. The only question was one of settlement at the time the supplies were furnished, in the summer and September, 1881.

The former settlement of the pauper in Winn was admitted. In 1865, he moved into Lee on to a farm then bought by him, and he has ever since resided there until he fell into want in 1881. At the time of his purchase of the farm he mortgaged the same back for two notes of $75.00 each, one of which he paid and a part of the other. In 1868, he fell in want, and Winn furnished him with certain supplies, and at or about the same time the overseers purchased and took an assignment of the mortgage in the name of the town, bearing date July 19, 1869, and had the same recorded. Counsel for defendants requested the court to instruct as follows, viz:

1. That the purchase of the mortgage from Bagley by the town was not a furnishing of supplies such as under the statutes had the effect to prevent the pauper from gaining a settlement in Lee.

2. That the payment of taxes upon the mortgaged premises under the circumstances detailed by the witnesses was not such a furnishing of supplies as would affect his settlement.

4. The motive of the party in the purchase of the mortgage in the name of the town cannot affect the legal quality of the act of so doing, but the legal effect of the act must be adjudged from the act itself. If in itself the purchase and holding of the mortgage was not in law a furnishing of supplies, it cannot be made so by proof of any improper motive on the part of the person engaged in effecting it.

The presiding justice refused the first and second, and also the first clause of the fourth request, and did instruct that "if Brown, the pauper, being in distress, applied for relief, and the overseers of Winn in good faith purchased the mortgage, the better to aid the pauper in supporting himself, and thereby preventing a foreclosure of the same, the pauper knowing of such purchase, it would be aid indirectly furnished as long as that condition of things continued, he meanwhile remaining all the time in need of such aid."

The verdict was for the plaintiffs and the defendants alleged exceptions and moved to set the verdict aside as against the law and evidence and the weight of evidence.

J. Varney, for the plaintiffs, cited: *Linneus* v. *Sidney*, 70 Maine, 114; *Veazie* v. *Chester*, 53 Maine, 29.

A. W. Paine, for the defendants, contended, that the purchase of the mortgage by the defendant town and quietly filing it away to await the final departure of the pauper was not a furnishing of pauper supplies within the meaning of the statutes; that it was not a supply directly or indirectly received by the pauper from the town of Winn; R. S., c. 24, § § 1, 6; that it was not a supply applied for by the pauper or received by him with a full knowledge that it was a pauper supply. Stat. 1873, c. 119.

Pauper supplies can only be furnished when there is a want. This mortgage was purchased to secure the use of the house and land that no "want" might arise which would render necessary the furnishing of pauper supplies. The want must precede the act of furnishing supplies.

What the town did was a commendable act of foresight. An act to ward off poverty and want, not to relieve it. It was of the class of acts practiced in every town, like the furnishing of employment to the poor in order to ward off want and distress. Counsel cited: *Standish* v. *Windham*, 1 Fairf. 99; *Standish* v. *Gray*, 18 Maine, 92; *Canaan* v. *Bloomfield*, 3 Maine, 172; *Wiscasset* v. *Waldoboro'*, 3 Maine, 388; *Leeds* v. *Freeport*, 10 Maine, 356; *Milo* v. *Harmony*, 18 Maine, 415; *Corinna* v. *Hartland*, 70 Maine, 355; *Hampden* v. *Bangor*, 68 Maine, 368; *Oakham* v. *Sutton*, 13 Met. 192; *Veazie* v. *Chester*, 53 Maine, 31.

WALTON, J. We think the motion and exceptions must be overruled. No one can acquire a pauper settlement by having his home in a town for five successive years, if, during the time, he receives directly or indirectly, supplies as a pauper. And it is the opinion of the court that, if a town furnishes one of its paupers a house in which to live, and land on which to work, he being poor and needy and unable to furnish them himself, the house and land thus furnished may be regarded as pauper supplies within the meaning of the law, and be sufficient to prevent the pauper from acquiring a settlement by residence so long as he continues to occupy them. It is not important to inquire by what means the town has obtained the control of the house or land. It may be by lease, or by an absolute purchase, or by the purchase of a mortgagee's interest. It is enough that the use and possession of them are secured to the pauper by the town, he being poor and needy and unable to procure them himself. A house in which to live is as necessary as food or clothing; and if furnished by the town, because the pauper is in distress and in immediate need of such relief, the court entertains no doubt that it is as clearly a pauper supply as a coat or a barrel of flour would be. And the supply being continuous, and the reception of it continuous, the acquisition of a pauper settlement, while that condition of things continues, is impossible. Whether the pauper is destitute and in immediate need of such relief, and whether the relief is applied for or accepted by the pauper with

full knowledge that they are pauper supplies, are, of course, questions of fact for the jury.

In this case, we think the evidence was amply sufficient to justify the jury in finding that the pauper was in distress and in need of immediate relief; that one of his necessities was a house in which to live; that, although in one sense he owned a farm on which there was a suitable house, the farm was under mortgage, and the mortgagee was about to take possession; that in the exercise of a prudent foresight, and with a due regard for their own interests as well as the necessities of the pauper, the town in which the pauper then had a settlement, and by which he was then being supported, purchased the mortgage, and then permitted the pauper to occupy the mortgaged premises free from rent, and without collecting or attempting to collect of him any portion of the debt to secure which the mortgage was given; and that this was done with the full knowledge and acceptance of the pauper; and that this condition of things continued through the entire period of time during which it is claimed he acquired a settlement by a residence in the town of Lee. And the jury must have so found, as otherwise, under the instructions of the court, they could not have returned a verdict for the plaintiffs.

We think the instructions of the court were correct, and sufficiently full to enable the jury to decide the case understandingly; and that the defendants were not aggrieved by the withholding of any of their requested instructions; and we think the verdict of the jury is amply sustained by the evidence.

Motion and exceptions overruled.
Judgment on the verdict.

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

GEORGE W. DILLINGHAM *vs.* TOBIAS L. ROBERTS.

Hancock. Opinion December 27, 1883.

Deed. Boundaries. "Privilege."

Where the description in a deed of a parcel of land bounded the premises upon one side by the shore of the sea at high water mark, and then added these words, "including all the privilege of the shore to low water mark." *Held*, that the fee in the land between high and low water mark passed to the grantee.

ON REPORT.

Writ of entry to recover a parcel of land between high and low water mark in Bar Harbor. Both parties claimed under deeds from Tobias Roberts; the plaintiff under a deed dated August 14, 1875, and the defendant under a deed dated December 27, 1868. The following is the description in the defendant's deed.

"Commencing at a birch tree seventy feet south of the steamboat wharf; thence south fifty-one degrees west, to the northeast corner of the Martin house, one hundred and sixty feet; thence south nine degrees west, to a stake, forty feet; thence north eighty-eight degrees east, one hundred and twenty-seven feet at two birch trees; thence north, forty-four degrees east, seventy feet to a birch tree on the bank; thence following the shore to the point of beginning — including all the privilege of the shore to low water mark, containing one-half of an acre more or less."

Wilson and Woodward, for the plaintiff.

Did the defendant, by the deed to him, acquire title to, become tenant of the freehold of the flats in question? The description in said deed begins at a birch tree. Upon reference to the plan, which is a part of the case, it appears that the birch tree is in the line of high water. After running around the upland, the

description returns waterward "to a birch tree on the bank." Again referring to the plan, we find this second birch tree exactly in the line of high water. The description then goes on: "thence following the shore to the point of beginning." That this description plainly excludes the flats, is, in the light of the following authorities, too clear for argument. *Storer* v. *Freeman*, 6 Mass. 435, 437 and 438; *Niles* v. *Patch*, 13 Gray, 254, 257; *Lapish* v. *Bangor Bank*, 8 Maine, 85, 89 and 90; *Dunlap* v. *Stetson*, 4 Mason, 349, 366; *Nickerson* v. *Crawford*, 16 Maine, 245; *Montgomery* v. *Reed*, 69 Maine, 510, 514; *Bradford* v. *Cressey*, 45 Maine, 9, 13 and 14.

Following the description in said deed which we have heretofore alluded to, come the words, "including all the privilege of the shore to low water mark." Do these words give defendant title to the flats, constitute him tenant of the freehold thereof? We respectfully submit that they do not.

The term "privilege," is one not intended for, or appropriate to the conveyance of title to the soil, for transferring the freehold. It is, rather, a term commonly used in the creation and transfer of easements and other incorporeal rights. Thus, Washburn, in the very opening of his work on Easements and Servitudes, alludes to the definition of an easement adopted by BAYLEY, J., from Termes de la Lay, which he calls a book of great antiquity and accuracy, as "a privilege that one hath," &c. See *Duncan* v. *Sylvester*, 24 Maine, 482; *Commonwealth* v. *Alger*, 7 Cush. 52; *Lapish* v. *Bangor Bank*, 8 Maine, 85; *Dunlap* v. *Stetson*, 4 Mason, 349; *Bradford* v. *Cressey*, 45 Maine, 9; *Montgomery* v. *Reed*, 69 Maine, 510; *Gerrish* v. *Union Wharf*, 26 Maine, 384; *Deering* v. *Long Wharf*, 25 Maine, 51; *State* v. *Wilson*, 42 Maine, 9; *Duncan* v. *Sylvester*, 24 Maine, 482; *Weston* v. *Sampson*, 8 Cush. 347; *Hill* v. *Lord*, 48 Maine, 83; *Moor* v. *Griffin*, 22 Maine, 350; *Barker* v. *Bates*, 13 Cush. 255; *Duncan* v. *Sylvester*, 24 Maine, 482; *Ripley* v. *Knight*, 123 Mass. 515; *Jordan* v. *Woodward*, 40 Maine, 317.

Hale and Emery, for the defendant cited: *Brown* v. *Lakewood*, 15 Pick. 151; *Reed* v. *Reed*, 9 Mass. 372; *Andrews* v. *Boyd*, 5 Maine, 199; *Butterfield* v. *Haskins*, 33 Maine, 395; *Earl* v.

Rowe, 35 Maine, 414; *Paramour* v. *Yardly*, Plowden, 540; *Stone* v. *North*, 41 Maine, 265; *Gleason* v. *Fayerweather*, 4 Gray, 348.

WALTON, J. The question is whether, if one conveys a parcel of land bounded upon one side by the shore of the sea at high water mark, and then adds these words, "*including all the privilege of the shore to low water mark*," the fee in the land between high and low water mark passes to the grantee. We think it does.

In *Farrar* v. *Cooper*, 34 Maine, 394, the language of the deed was, "one undivided moiety forever of the *privileges* of a mill yard," and the court held that it carried the fee. Another description in the same deed was, the "north easterly half of a double saw mill, with the *privilege* of forever having and keeping a saw mill on the same plat of ground on which that half of the mill stands," and it was held that the fee passed. "For," said SHEPLEY, C. J., "a conveyance of the use of land forever is equivalent to a conveyance of the land." And this is undoubtedly true; for the greatest estate which one can have in land is its use forever; and if he conveys the entire use, or, in the language of the deed we are now considering, all his "privilege" in it, it is difficult to perceive how he can have any estate left.

The word "privilege," although not a very appropriate term to use in describing one's title to real estate, may be so used without doing very great violence to its legitimate meaning. An estate in fee simple is in one sense no more than the privilege of holding land by a certain tenure. Such a holding may be described as a "privilege" without doing violence to the term. And especially is this true of land over which the tide ebbs and flows; for while it is true that by virtue of the ordinance of 1641 – 7 one whose land is bounded by the sea may hold to low water mark, still, that portion of his land over which the tide ebbs and flows, is so incumbered by public rights, that he would be very likely to regard it, and to speak of it, as a mere privilege, and a very limited one at that. At any rate, we fail to see how one who has conveyed "all the privilege of the shore to low water mark," can have any right, title, interest, or estate

left in it. It is well settled, as stated in the case cited, that a conveyance of the entire use of land forever is equivalent to a conveyance of the land itself. Is not "all the privilege" as strong a term as "all the use?" We think so. We do not mean to say that it is as appropriate a term to use. But it does seem to us to be equally expressive and equally effective to convey all one's title to land over which the tide ebbs and flows. And it will be seen by reference to the agreed statement of facts that this conclusion is decisive of the case in favor of the defendant.

Judgment for the defendant.

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

TOBIE AND CLARK MANUFACTURING COMPANY

vs.

ALICE J. WALDRON.

Waldo. Opinion December 27, 1883.

Fraudulent conveyance. Torts.

If one has committed a tort for which the person injured is entitled to recover damages, the wrong-doer cannot defeat such recovery by conveying all his attachable property to his wife without consideration, he, in making the conveyance, and she, in accepting it, intending thereby to defeat such a recovery.

A cause of action arising *ex delicto* has the same protection as a cause of action arising *ex contractu*.

ON REPORT.

Writ of entry. The writ is dated July 11, 1881.

Both parties claim title through the defendant's husband. The defendant by virtue of a deed dated March 21, 1879, and the plaintiff by virtue of an attachment made March 31, 1879, and subsequent levy.

The material facts are sufficiently stated in the opinion.

J. W. Mitchell and *Tascus Atwood*, for the plaintiff, cited: *Hall* v. *Sands*, 52 Maine, 355, and cases there cited; 14 N. Y. Supreme Ct. Reports, 563; 26 N. J. Equity Reports, 89; 40 Iowa, 582; 18 Johnson, 425; *Merrill* v. *Crossman*, 68 Maine, 412; R. S., c. 76, § 13; c. 61, § 1; *French* v. *Holmes*, 67 Maine, 186; *Winslow* v. *Gilbreth*, 50 Maine, 90.

Thompson and Dunton, for the defendant.

During the pendency of an action of tort, sounding in damages, the plaintiff's right to recover does not constitute him a creditor. He becomes a creditor only upon the rendition of judgment in his favor for damages. *Craig* v. *Webber*, 36 Maine, 504; *Hall* v. *Sands*, 52 Maine, 355.

A married woman may hold property without paying for it an adequate consideration, by direct or indirect conveyance from her husband, against his creditors *subsequent* to such conveyance. *Davis* v. *Herrick*, 37 Maine, 397; *Johnson* v. *Stillings*, 35 Maine, 427.

When an act declares under what circumstances property shall be held for the payment of the debts of former owners, who have conveyed it, that of necessity, excludes all other circumstances. *Davis* v. *Herrick*, 37 Maine, 397.

Property conveyed to the wife, for which payment was made out of the husband's property, is not liable to be taken under the provisions of R. S., c. 61, § 1, upon an execution recovered against the husband upon several debts, some of which accrued before and some after the conveyance. *Holmes* v. *Farris*, 63 Maine, 318.

WALTON, J. The question is this: If one has committed a tort for which the person injured is entitled to recover damages in an action at law, can the wrong-doer defeat such recovery by conveying all his attachable property to his wife, without consideration, he, in making the conveyance, and she, in accepting it, intending thereby to defeat such a recovery? Certainly not. The statute, 13 Eliz. c. 5, often declared to be a part of the common law of this state, protects not only *creditors* against such fraudulent conveyances, but *all others* who have just and

legal causes of action. A cause of action arising *ex delicto* has the same protection as a cause of action arising *ex contractu*. The language of the statute is "creditors *and others*." And it is said in Twyne's Case (3 Coke, 82) that the statute extends not only to creditors, but to all others who have a cause of action. And our statute, which makes it penal to be a party to such a conveyance, speaks of "creditors *or others*." R. S., c. 126, § 3. Even a claim for alimony, and before a suit for a divorce has been commenced, is thus protected. *Livermore* v. *Boutelle*, 11 Gray, 217; *Bailey* v. *Bailey*, 61 Maine, 361.

It is undoubtedly true that a wife may hold property conveyed to her by her husband, as against his subsequent creditors, although the conveyance is without consideration, and therefore void as against his prior creditors. But that is not the question in this case. The question in this case is not whether a wife may hold property conveyed to her by her husband without consideration, as against his subsequent creditors, nor as against his prior creditors, nor as against one subsequently injured by the husband's tort, but whether she can hold it against one who had been *previously* injured by her husband's tort, when the conveyance is made, not only without consideration, but with the express intention on the part of both the husband and the wife thereby to defeat a recovery for such tort. Of course she can not. Such a result would be in the very teeth of the statute. And we apprehend that no case, English or American, can be found which will support such a result. Our statute in relation to married women does not. That relates only to voluntary conveyances from the husband to the wife; such as, being made without consideration, are constructively fraudulent; and not to such as are actually fraudulent, being made with an express intention to hinder and delay creditors or others. And it does not apply to torts at all. R. S., c. 60, § 1. With respect to them the law remains the same as it was before the statute was enacted. A mere voluntary conveyance from the husband to the wife — that is, one against which nothing can be said, except that it was made without consideration — may be valid as against one who is injured by a subsequent tort of the husband. We think it is.

But such a conveyance, which is not only voluntary, but is made for the express purpose of defeating one who has a just and legal claim against the husband, for a tort committed before the conveyance is made presents another and a very different question. And we can not doubt that the correct answer is that such a conveyance is not protected by the married woman's act; that, as against such injured person, it is void.

In this case, the parties have agreed that if the cause of action set forth in the writ in a former suit against the defendant's husband, and the judgment thereon, are such as entitle the plaintiff therein to contest the conveyance from the husband to his wife, (the husband being the defendant in the former suit, and the wife the defendant in this suit), upon the ground that the conveyance was made to hinder and delay creditors, or "others" having claims against the husband, judgment shall be rendered for the plaintiff. In other words, the defendant does not controvert the fact that the conveyance was fraudulent — fraudulent in fact as distinguished from fraudulent in law. But she contends that the plaintiff's cause of action, although existing at the time of the conveyance, still, being for a tort, did not constitute him a creditor, and that he can not contest the conveyance. The fallacy of this position consists in the assumption that none but creditors can contest such a conveyance. This assumption, as we have already shown, is not well founded. One having a cause of action arising out of a tort may contest a conveyance *actually* fraudulent to the same extent as one having a cause of action arising out of a contract. It is only a conveyance which, being without consideration, is constructively fraudulent, that the married woman's act protects. She can no more be the receptacle of a conveyance which, in addition to being without consideration, is also *actually* fraudulent, than any other person. To hold otherwise would open a door through which all tort-feasors as well as creditors could at once escape from the consequences of their wrong-doings. The legislature never intended such a result; nor is there anything in the married woman's act which will justify it.

The plaintiff's cause of action against the husband was for a tort. He was charged with a willful and malicious injury to a hydraulic ram which the plaintiff was bound to repair. The conveyance to the wife of all his attachable property was made ten days before the plaintiff's attachment, but long after his cause of action had accrued. We can not doubt that the plaintiff is entitled to contest the conveyance "upon the ground that it was made without consideration, and with intent to hinder and delay creditors, and others having claims against her husband;" for, as said by Mr. Justice THOMAS, in *Livermore* v. *Boutelle*, 11 Gray, 220, if the plaintiff was not, at the time of the fraudulent conveyance, strictly a creditor, he was one of the "others" whose just and lawful suits would be delayed, hindered, or defeated by such conveyance; and, as such, entitled to the same protection as a creditor.

Judgment for plaintiff.

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

JOHN G. FIELD *vs.* WILLIAM PLAISTED and another.

Washington. Opinion December 27, 1883.

New trial. Excessive damages. Stationary engine.

Where a verdict is not so clearly excessive as to create a belief that the jury was influenced by improper motives, or fell into some mistake in making their computation, the court has no right to set the verdict aside.

In an action of the case where the plaintiff claimed that he had for several years suffered great inconvenience and annoyance, and damage from sparks, soot and cinders from the defendants' steam engine. *Held*, that a verdict for one-hundred and seventy-five dollars was not so clearly excessive as to authorize the court to set it aside.

ON MOTION to set aside the verdict.

An action of the case to recover damages for the erection, maintenance and operation of a stationary steam engine in Princeton.

The writ was dated May 1, 1880.

The essential facts appear in the opinion.

J. and G. F. Granger, and Hanson, for the plaintiff.

Rounds and McKusick, for the defendants.

WALTON, J. The plaintiff claims that he has for several years suffered great inconvenience and annoyance, and damage from sparks, soot and cinders, from the defendants' steam engine; and for this injury he has obtained a verdict for $175 damages; and the defendants move to have the verdict set aside and a new trial granted on the ground that the damages are excessive. We do not think the motion can be allowed. This is one of a class of cases in which it is difficult to estimate the damages. The actual pecuniary loss may be very small, while the annoyance, inconvenience and discomforts may be very large; and the pecuniary value of the latter is a matter in relation to which men's minds are liable to differ. One jury might fix the damages at one sum, and another jury at a different sum, and yet both act honestly. If in such a case, the verdict is not so clearly excessive as to create a belief that the jury was influenced by improper motives, or fell into some mistake in making their computation, the court has no right to set the verdict aside and put the parties to the trouble and expense of another trial. We have carefully read the evidence in this case, and the impression made upon our minds is that the verdict is not so clearly excessive as to raise the presumption that the jury must have fallen into some error, or been influenced by some improper motive. If another trial should be had, we think it is by no means certain that the damages would be reduced.

Motion overruled.
Judgment on the verdict.

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

AUGUSTA ESTES *vs.* HOWARD ESTES.

Somerset. Opinion December 27, 1883.

Slander. Variance. Arson. Evidence. New trial.

In actions for verbal slander the words must be proved strictly as alleged.

In such an action the allegation in the writ was that the defendant said: "You burnt your buildings," and no witness testified that the word "your" was used by the defendant in any conversation relating to the burning. *Held*, that the allegation was not supported by the proof.

An accusation that the plaintiff burned a building which, though owned by the defendant, was occupied by the plaintiff as a dwelling house, will not support an allegation in an action of slander, that the defendant had accused the plaintiff of arson.

An allegation in an action of slander, that the defendant accused the plaintiff of setting a building on fire for the purpose of obtaining the insurance upon it, is not supported when there is no evidence that there was any insurance upon the building burned, or that the plaintiff had any insurable interest in the building, or that any insurance was ever received or claimed.

A plaintiff in an action of slander upon the allegation that the defendant had accused her of a want of chastity obtained a verdict for nominal damages, and thereupon moved to set the verdict aside as inadequate, and for a new trial. It appearing that the words were spoken in the presence of but four persons, the plaintiff and her husband, her husband's brother (who was the defendant) and the mother of her husband and the defendant, the motion was overruled.

ON EXCEPTIONS and motion to set aside the verdict.

An action of slander. The writ was dated February 28, 1879. The plea was general issue and the verdict was for the plaintiff, damages being assessed at one cent.

The essential facts are stated in the opinion.

D. D. Stewart, for the plaintiff.

The jury found the defendant guilty of an accusation against the plaintiff, most disgraceful and humiliating to a lady of good character, as this plaintiff was shown to be, and yet gave the plaintiff but one cent damage. The bare statement of the case

shows the great wrong done the plaintiff by such a verdict. It can be explained in but one way — it was the result of bias, prejudice or mistake. The mistake may have arisen, in part at least, from the instructions and language of the charge.

The words, if proved to the satisfaction of the jury, were actionable *per se*. In such case the law conclusively presumes malice, and, unless the occasion upon which they were spoken was privileged, and there is no pretence of such privilege here, the plaintiff was absolutely entitled to recover, and the jury should have been so instructed. *Jellison et ux* v. *Goodwin*, 43 Maine, 287; *Newbit* v. *Shatuck*, 35 Maine, 318; *True* v. *Plumly*, 36 Maine, 466; *Watson et ux* v. *Moore*, 2 Cush. 137; *Kenney* v. *McLaughlin*, 5 Gray, 3.

But the learned judge gave no such instruction. What he did say was continually qualified by the instruction that the defence was made out if there was no malice. When words are actionable *per se*, "evidence is not admissible to disprove malice in law." *Powers* v. *Cary*, 64 Maine, 16.

"The existence of malice is not a question for the jury in an ordinary case of slander (where the words are actionable *per se*.) The law implies such malice as is necessary to maintain the action." 2 New Mass. Digest, 3352, § 9, and cases cited; *Kenney* v. *McLaughlin et ux*, 5 Gray, 3-5.

That the defendant charged the plaintiff with burning the buildings is proved beyond doubt. Indeed he admits it. "I told her right to her head that I thought she burned the buildings." This, with the other evidence in the case, brings it within R. S., c. 119, § § 1, 4 and 6. It sustains the special count charging arson, and the general count charging the same offence. *Dunnell* v. *Fiske*, 11 Met. 552-3; *Clark* v. *Munsell*, 6 Met. 385-6; *Kenney* v. *McLaughlin*, 5 Gray, 4.

And the whole evidence together seems also to sustain the count charging her with burning the buildings to obtain the insurance on property burned, bringing the case within the offence described in R. S., c. 126, § 15. Whether the whole evidence, when fully considered, did or did not sustain this charge, or the charge of arson, was a question of fact to be submitted to the

jury and determined by them. *Buckley* v. *O'Neil*, 113 Mass. 193, 194.

S. S. Brown, for the defendant, cited: Sedgwick on Damages, 766; Hilliard on New Trials, 572; *Mauricet* v. *Brecknock*, 2 Dougl. 509; *Taunton M'f'g Co.* v. *Smith*, 9 Pick. 13; 2 Salk. 647; *Martin* v. *Hopkins*, 9 Johns. 36; *State* v. *Haynes*, 66 Maine, 307; 2 Bish. Cr. Law, § 8; 3 Inst. 66; 2 Russell on Crimes, 548; Starkie on Slander, 272-3; 8 Johns. 59; 2 Greenl. Ev. § 414; *Miller* v. *Miller*, 8 Johns. 74; *Whiting* v. *Smith*, 13 Pick. 364; *Maitland* v. *Goldney*, 2 East. 426.

WALTON J. This is an action of slander. The declaration contains four counts; one special count and three general counts.

The words set out in the special count are these: "*You are a damned whore and I can prove it; and you burnt your buildings.*"

The three general counts aver, *first*, that the defendant accused the plaintiff of having committed the crime of adultery; *second*, with having committed the crime of arson; and *third*, that she was guilty of setting buildings on fire for the purpose of obtaining the insurance upon them. And the plaintiff adds that under the general counts charging accusation of arson, or of burning buildings with the design of procuring insurance upon them, she will rely upon the specific charges alleged in the first special count; and that the general counts are relied upon to guard against any variance in the exact language, as alleged in the special count, and not for any other or distinct charge.

The case is before the law court on exceptions; and the exceptions state that "after the evidence was out, the court ruled that the action could not be maintained upon any of the counts relating to the charge of burning the buildings, and withdrew all that part of the case from the consideration of the jury;" and it is to this ruling that the exceptions relate.

A careful examination of the declaration and of the evidence offered in support of it, fails to satisfy us that this ruling was erroneous.

I. The evidence does not support the special count. It is there alleged that the defendant said "and you burnt *your* build-

ings." No witness testifies that the word "your" was used by the defendant in any conversation relating to the burning. And this is an important word, as it relates to and fixes the ownership of the buildings which it is claimed the defendant accused the plaintiff of burning. The plaintiff testified that the defendant said "you set *those* buildings on fire." And again, "he said that I burned *the* buildings." And again, "he said you burned *them* buildings." Such is the testimony of the plaintiff. And her husband, in testifying to the same conversation, invariably used the words "the buildings." He says that the defendant accused his wife of burning "*the* buildings." Here is a variance between the allegation and the proof. And it is an important one; for the defendant testified that he owned the buildings referred to at the time they were burned, and no one contradicts him; and whether he accused the plaintiff of burning her own or his buildings was important, for it materially qualified the character of the charge. And it is a familiar rule of law, too familiar to require the citation of authorities in support of it, that in actions for verbal slander, "the words must be proved strictly as alleged." It is clear, therefore, that, in this particular, the special count was not supported by the proof.

II. Did the evidence support the general count in which it was alleged that the defendant accused the plaintiff of arson. Clearly not. To constitute arson the building burned must be the dwelling-house of another, not the dwelling-house of the one setting the fire. Now, the proof in this case is that, while it is true, as already stated, that the defendant was the owner of the buildings burned, they were occupied by the plaintiff. The house burned, therefore, was her dwelling-house, not the dwelling-house of another. And an accusation that she had burned such a building, if such an accusation was in fact made, would not support an allegation that the defendant had accused her of arson. It is clear, therefore, that the evidence did not support this count.

III. Did the evidence support the count in which it was alleged that the defendant accused the plaintiff of setting the buildings

on fire for the purpose of obtaining the insurance upon them. Certainly not. There is no evidence that the buildings burned had any insurance upon them; or that the plaintiff or her husband had an insurable interest in them; or that any insurance was ever received or claimed by either of them. There is evidence tending to show that the defendant accused the plaintiff of obtaining some insurance on the hay in the barn at the time of the fire, to which she was not justly entitled; but not a scintilla of evidence that he accused her of setting the buildings on fire for the purpose of obtaining the insurance upon them. The charge made may have been as offensive to the plaintiff, and as injurious to her, as the one set out in the declaration. But the two charges are not alike; and proof of the one cannot be regarded as proof of the other.

We therefore repeat that, a careful examination of the plaintiff's declaration, and the evidence offered in support of it, fails to satisfy us that the ruling of the presiding judge that the action could not be maintained upon any of the counts relating to the burning of the buildings, was erroneous. We think it was correct.

Upon the other branch of the case — we refer to the allegations that the defendant accused the plaintiff with a want of chastity — the plaintiff recovered a verdict for nominal damages; and she asks for a new trial upon the ground that the damages are inadequate. So far as appears there were but four persons present at the time when it is claimed that the defendant made this charge,— the plaintiff and her husband, and the defendant and his mother; and the defendant's mother was also the mother of the plaintiff's husband; so that in a certain sense they were all members of one family. It appears that the two brothers were quarrelling about something; what, does not appear; that the defendant had the plaintiff's husband by the throat or collar; that the plaintiff, to make him let go, pricked his hand with a needle; that the defendant then, as she says, struck her, and called her a damned whore. The defendant denies that he struck her, and denies that he called her a whore. The mother testifies that the plaintiff called the defendant a nasty, lying little puppy;

and that the defendant called the plaintiff a nasty slut; but she says the defendant did not call the plaintiff a whore in her hearing. Under these circumstances, can it be wise to allow these parties to litigate this matter further? We think not. They have had their day in court. They have had their case once tried, and probably as fairly tried as it would be if another trial should be had. The plaintiff has recovered a verdict for nominal damages, thus vindicating her character for chastity, if she has not obtained as much money as she desired; and we find no error in the rulings of the presiding judge. We think they must abide by the result.

Motion and exceptions overruled.

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

SAMUEL MESERVE and another, in equity,

vs.

CHARLES E. WELD and another.

York. Opinion December 27, 1883.

Insolvency. Preference.

A manufacturer of lumber made a conveyance to a creditor by a bill of sale, which was recorded, of all his lumber, manufactured and unmanufactured, and all the machinery in his mill, and received from the vendee a writing which was not recorded, showing that the sale was intended only as security. It appeared that the conveyance was within four months of the time when the vendor was declared insolvent, that he was then insolvent, and the vendee had reasonable cause to believe him insolvent. *Held*, that the sale was not in the usual course of the vendor's business and was *prima facie* a preference in violation of the insolvent law.

BILL IN EQUITY.

Heard on bill, answer and proofs.

The defendants were the assignees in insolvency of Palmer, Brooks and Maddox, of Buxton.

The opinion states the material facts.

Herbert M. Sylvester, for the plaintiffs.

R. P. Tapley, for the defendants.

WALTON, J. This is a suit in equity to recover from the assignees of an insolvent firm the proceeds of property which the plaintiffs claim had been conveyed to them as security before the proceedings in insolvency were commenced. The assignees defend the suit upon the ground that the conveyance was within four months of the time when the insolvency proceedings were commenced, and that the conveyance was in fraud of the insolvency act.

We think the defense is sustained. That the conveyance was within four months of the time when the vendors were declared insolvent is not controverted. That the vendors were insolvent at the time of the conveyance, and that the plaintiffs had reasonable cause to believe them to be insolvent, will not admit of doubt. The conveyance was not in the usual course of the vendors' business. Their business was the manufacture of lumber of various kinds, and the conveyance included not only manufactured lumber, but lumber not manufactured, and all the machinery with which the vendors could continue their manufactures. If enforced, the conveyance would have put a stop to their business. And, although the bill of sale, which was recorded, was, in terms, absolute, the vendees gave to the vendors a separate writing, not recorded, showing that the sale was intended as security only. It is unnecessary to repeat that such a transaction could not be in the usual course of the vendors' business. Not being a sale in the usual course of the vendors' business, the insolvent law, (§ 48) declares that it shall be deemed, *prima facie*, as intended to secure to the purchasers a preference in violation of the insolvent act; and the evidence, instead of rebutting this presumption, confirms it. Our conclusion, upon the whole evidence,

is, therefore, that the plaintiffs are not entitled to the relief prayed for in their bill.

Bill dismissed with single costs for the defendants.

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

JOSEPH MOULTON *vs.* THOMAS N. EGERY.

Piscataquis. Opinion December 28, 1883.

State treasurer's deed. Description.

The description of property in a deed of the state treasurer was as follows: "The following described parcel of land so forfeited, situate in the county of Piscataquis, viz: 11607 acres, No. 8, Rg. 9, N. W. P. Elliotsville." *Held*, that the description was not sufficient to pass title to any particular parcel or interest in land.

ON REPORT.

Writ of entry. The plea was the general issue.

At the trial, plaintiff introduced the following deed of the state treasurer and offered what was admitted to be a transcript of the state treasurer's books, so far as they relate to taxes and the payment of taxes in township No. 8, Range 9, N. W. P. Elliotsville.

"To all persons to whom these presents may come.

"I, S. C. Hatch, treasurer of the state of Maine, send greeting.

"Whereas, in obedience to the provisions of c. 6, § 46, of the Revised Statutes, in relation to the collection of taxes in unincorporated places, the said treasurer caused to be published a notice containing a list of all tracts of land lying in unincorporated places which have been forfeited to the state for state taxes, or county taxes, which had been certified according to law to the treasurer of state, together with the amount of such

unpaid taxes, interest and cost on each parcel, and that the same would be sold at the treasury office in Augusta, on the sixth day of September, A. D. 1876, at eleven o'clock A. M. in the state paper, and a paper in the county where said lands are situate, (where any such were published,) three weeks successively before the day of sale, and within three months thereof; and whereas, said list contained the following described parcel of land so forfeited, situate in the county of Piscataquis, viz: 11607 acres, No. 8, Rg. 9, N. W. P. Elliotsville, upon which there was due and payable for taxes, interest and costs, the sum of forty-one forty-three one-hundredths dollars, including its proportion of the state tax for 1874, and the county tax for the same year, certified to the treasurer of state according to law.

"And whereas, on said sixth day of September, 1876, at eleven o'clock A. M. at the treasury office in Augusta, said treasurer did sell the interest of the state in said premises to Joseph Moulton at auction for the sum of forty-one and forty-three one-hundredths dollars, he being the highest bidder therefor, and his bid being a price not less than the full amount due thereon for such unpaid state and county taxes, interest and cost of advertising, as required by law.

"Now, know ye, that I, S. C. Hatch, in my said capacity in consideration of the premises and of the payment of the said sum of forty-one and forty-three one-hundredths dollars, the receipt whereof is hereby acknowledged, do hereby sell and convey to him, the said Joseph Moulton, his heirs and assigns forever, all the interest of the state by virtue of said forfeiture, in and to said premises so sold as aforesaid. To have and to hold the same, with all the privileges thereof to him the said Joseph Moulton, his heirs and assigns forever, subject to all taxes assessed thereon subsequent to the year eighteen hundred and seventy-four, provided, however, that any owner or part owner thereof shall have the right to redeem his proportion of the same at any time within one year, by paying or tendering to the purchaser, or treasurer of state, his proportional part of what the said Joseph Moulton paid for the same, with interest at the rate

of twenty per cent. per annum and the cost of conveyance, as provided in c. 6, § 48, of the Revised Statutes."

Signed, sealed, acknowledged and delivered.

Henry Farrington, for the plaintiff, contended that the description in the deed was sufficient because it was the only description the treasurer could make.

An assessment upon a whole township *in solido*, designating the number and range is good. *Adams* v. *Larrabee*, 46 Maine, 516. Each owner, whether in common or not, may pay for his interest in any tract of land and then is entitled to a certificate from the treasurer "discharging the tax upon the number of acres or interest upon which payment is made." R. S., c. 6, § 45. And if not paid the land is forfeited and may be sold.

Now when all the owners do not pay, what can the state treasurer do but sell and give a deed of the number of acres which has been forfeited? That is all the description he can give.

Counsel cited: *Hodgdon* v. *Wight*, 36 Maine, 326; 35 Maine, 405.

Wilson and Woodward, for the defendant, cited: *Griffin* v. *Creppin*, 60 Maine, 270; *Adams* v. *Larrabee*, 46 Maine, 516; *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Matthews* v. *Light*, 32 Maine, 305; *Smith* v. *Bodfish*, 27 Maine, 289.

BARROWS, J. The only description of the land which the plaintiff says was forfeited to the state and conveyed by the state treasurer to him in the deed under which he claims title, runs thus: "the following described parcel of land so forfeited, situate in the county of Piscataquis, viz: 11607 acres, No. 8, Rg. 9, N. W. P. Elliotsville." It is not sufficient to pass title to any particular parcel or interest in land, or to enable the plaintiff to maintain his action,— for the reasons given and upon the authorities cited in the following cases: *Griffin* v. *Creppin*, 60 Maine, 270; *Larrabee* v. *Hodgkins*, 58 Maine, 412. Nor is the plaintiff aided by the transcript from the state treasurer's books.

It cannot be ascertained from anything found in that transcript that the land thus imperfectly described in the treasurer's deed

is the same described in the plaintiff's writ and the same formerly owned by R. D. Hill and upon which he paid taxes.

The number of acres specified in the deed differs from that given in the transcript as the number upon which Hill paid taxes, and it is admitted that it is not the number which he actually owned.

It is admitted that the township, if it is sufficiently designated, contains more than 20,000 acres. It nowhere appears whether the 11,607 acres, the forfeiture of which is claimed, was held in common with other owners of the township or in severalty. Nothing is said in *Adams* v. *Larrabee*, 46 Maine, 516, which can be construed as sustaining such a conveyance as this.

In *Hodgdon* v. *Wight*, 36 Maine, 326, mainly relied on by the plaintiff, no question was raised by the respondents as to the sufficiency of the conveyance or the character or identity of the estate claimed to have been forfeited. The attention of the court was specially directed to a different class of questions.

Plaintiff nonsuit.

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

PAUL POOLER *vs.* WILLIAM F. REED.

Piscataquis. Opinion December 28, 1883.

R. S., c. 51, § 41. Trial justices. Bangor police court. City marshal.

Trial justices, and police courts having their jurisdiction, may try complaints for the offence described in R. S., c. 51 § 41, (evading payment of fare on railroads) and impose the forfeiture which is there prescribed "to be recovered on complaint." But they exceed their jurisdiction when they order a man charged with the offence to find bail, for his appearance at a future term of the Supreme Judicial Court, and to be committed for want of such bail. An officer cannot justify the execution of a mittimus which shows such excess of jurisdiction on its face.

A city marshal and chief of police being present and directing the execution of a mittimus by one of his subordinates, and making return thereof, as exe-

cuted by himself, cannot avoid the responsibility which he thereby assumes, but is liable to the party injured for his necessary loss of time, and the reasonable expenses of procuring his liberation on *habeas corpus*.

ON REPORT.

The writ was dated December 8, 1880, and was in plea of trespass, alleging that the defendant took and imprisoned the plaintiff June 19, 1880, and deprived him of his liberty and claimed damages in the sum of one thousand dollars.

The plea was the general issue.

The material facts are stated in the opinion.

H. L. Mitchell, for the plaintiff, cited: *Pooler* v. *Reed*, 73 Maine, 129; 2 Hilliard, Torts, 213, 425; *McMahan* v. *Green*, 34 Vt. 69; *Haynes* v. *Small*, 22 Maine, 16; *State* v. *Kenniston*, 67 Maine, 559; *Cowan* v. *Wheeler*, 31 Maine, 439; R. S., c. 51, § 41; *State* v. *Hall*, 49 Maine, 412; *Love* v. *Crosby*, 42 Maine, 327; *In re Hersom*, 39 Maine, 476; *State* v. *Hartwell*, 35 Maine, 129; *Piper* v. *Pearson*, 2 Gray, 120; *Fisher* v. *McGirr*, 1 Gray, 44; *Knowles* v. *Davis*, 2 Allen, 61; *Pratt* v. *Hill*, 16 Barb. 303; *Savacool* v. *Boughton*, 5 Wend. 172; *Wise* v. *Withers*, 3 Cranch. 337; *Gurney* v. *Tufts*, 37 Maine, 130; *Thurston* v. *Adams*, 41 Maine, 419.

Barker, Vose and Barker, for the defendant, contended that the admissions of the defendant, as shown by the two returns, are undoubtedly admissible, but not conclusive against him, for one reason if for no other, viz: He was not an officer *de jure*, and as between himself and the plaintiff, not an officer *de facto*. *Pooler* v. *Reed*, 73 Maine, 129.

Not being an officer *de jure* or *de facto*, so far as his acts to this plaintiff are concerned, his admissions are open to explanation or contradiction. The facts may be shown, as fully as if any other unauthorized citizen had signed the returns.

The allegation in the complaint charged a crime. C. 51, § 41, R. S., and was a reasonable law. *State* v. *Goold*, 53 Maine, 279. The police court had not final jurisdiction. The penalty was "not less than five nor more than twenty dollars." The power conferred upon the police court in section second of "an

act to establish a police court in Bangor," reads as follows: "Said judge shall, except where interested, exercise jurisdiction over all such matters and things, civil and criminal, within the county of Penobscot as justices of the peace may exercise under similar restrictions and limitations."

The extent of the jurisdiction of a justice of the peace to impose a fine is ten dollars. The limit, in the crime for which plaintiff was arrested, is "not less than five nor more than twenty dollars." It will not be claimed that where the limit exceeds the final jurisdiction of the court, it has not final jurisdiction at all.

Admitting all the plaintiff alleges and attempts to prove by the returns on the warrant and mittimus, and that the defendant is estopped to deny, then he was an officer armed with precepts in due form, issued by a court which had jurisdiction of the crime and the criminal, and a complete justification for every act alleged by the plaintiff to have been committed upon him by the defendant. *Sanford* v. *Nichols et al.* 13 Mass. 287; *Wilmarth* v. *Burt*, 7 Met. 257; *Gray* v. *Kimball*, 42 Maine, 299; *Robinson* v. *Barrows*, 48 Maine, 186; *Guptill* v. *Richardson*, 62 Maine, 257.

BARROWS, J. The defendant was city marshal and chief of police of the city of Bangor at the time of the acts for which this suit is brought.

In pursuance of what he says is the universal practice where a warrant is served by a policeman, he subscribed as "constable of Bangor" the returns made upon a warrant issued from the police court against the plaintiff upon a charge of evading payment of his fare upon a railroad running into the city, and upon a mittimus issued by said court for failure to comply with its order that he should recognize with sureties for his appearance before the Supreme Judicial Court to answer to said charge. The defendant, though otherwise legally entitled to constabulary powers had vacated that office by his acceptance of the office of justice of the peace after qualifying as constable and before the date of the arrest. He cannot, therefore, justify as constable any

interference with the liberty of the plaintiff. *Pooler* v. *Reed*, 73 Maine, 129.

The defendant now seeks to avoid liability upon the ground that the testimony tends to show that the arrest and commitment were both, in fact, made by one Wentworth, a policeman. We think he cannot thus evade the responsibility which he assumed when he made the returns. The remarks of WHITMAN, C. J., in *Haynes* v. *Small*, 22 Maine, 16, apply with increased force in cases where the personal liberty of the citizen has been invaded *colore officii*. See also *Cowan* v. *Wheeler*, 31 Maine, 439.

Moreover there is evidence sufficient to prove that the commitment to the jail was made in the presence and by the direction of the defendant as chief of police to his subordinate, the policeman, and though it was doubtless done under the order of the police court, it was without the formality of a written mittimus and return, which were not prepared until a day or two afterwards; and this act was deliberately adopted by the defendant when he subscribed the return. The whole business was loosely done, and under such circumstances as to make a technical justification by the defendant impossible. Yet if the only wrong done by the defendant to the plaintiff had been the performance of an act which a duly qualified officer having the proper precept in his hands might have justified, it would be difficult to see how the plaintiff suffered more than a nominal damage by reason of the defendant's doing a duty which properly belonged to another. But the mittimus, the execution of which was the chief cause of damage to the plaintiff, shows on its face that the court had no jurisdiction to issue it, and it would not protect the defendant, had he been a legally qualified constable.

The offence with which the plaintiff was charged was first defined in chapter 107, laws of 1854, and the penalty there imposed "upon conviction thereof, before any justice of the peace in any county where such offence may have been committed," was "a fine of not less than five nor more than twenty dollars for every such offence." The statute was much condensed in the revision of 1857, but neither the penalty nor the jurisdiction has been changed by that or the subsequent revisions under which the offender "forfeits not less than five nor more than twenty

dollars to be recovered *on complaint.*" The word "complaint" is used here in contradistinction from indictment, and of itself designates the courts which are to try and dispose of such charges. Compare R. S., of 1871, c. 131, § 13, with the corresponding provisions in R. S., of 1841, c. 167, § § 13 and 14. Neither the district nor the Supreme Judicial Court ever entertained criminal *complaints*, except when presented on appeal, or through the intervention of the grand jury, in the form of *indictments*.

The plaintiff says he was not guilty of the offence charged and he had a right to have his case determined then and there before the police court, and should not have been subjected to the additional burden of finding sureties for his future appearance in a strange place far distant from his home.

Such an order was almost sure to result, as it did, in his incarceration, from which he was, however, promptly relieved on *habeas corpus*.

Now a warrant issued by an inferior court, when it is apparent on its face that the court has no authority to act, or has exceeded its authority, will not protect the officer who executes it. *Gurney* v. *Tufts*, 37 Maine, 130, and cases there cited. *Thurston* v. *Adams*, 41 Maine, 422.

The defendant's justification fails at all points, and he must compensate the plaintiff for his loss of time and expenses in procuring his liberation.

But there is nothing to indicate that the defendant was acting vindictively or with a design to oppress, nor otherwise than as he supposed his duty required.

That two days were allowed to elapse before application was made for the plaintiff's discharge was rather the fault of the plaintiff than of the defendant.

The plaintiff should have compensation for one day's detention, and his expenses, and the lapse of time since the occurrence is to be regarded in estimating the damages.

Judgment for plaintiff for $37.50 damages.

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

HUTSON B. SAUNDERS *vs.* JOHN B. CURTIS.

Hancock. Opinion December 28, 1883.

Contract. Deed. Reasonable time.

Where a party in a written contract for sufficient consideration promises to pay another a certain sum of money, when he shall be able to convey by a good and sufficient deed premises of which he then had no title, no action can be maintained upon the promise until the other party has first obtained a title and tendered a good and sufficient deed thereof. This is a condition precedent and to avail it must be performed, when no time is named, within a reasonable time.

In such a case a reasonable time is such time as is necessary conveniently to do what the contract requires should be done, and a delay of one year not satisfactorily explained is an unreasonable time.

ON REPORT.

Assumpsit on the written promise of the defendant recited in the opinion. The writ was dated March 25, 1881, and the plea was general issue and a brief statement setting up the statute of frauds.

The opinion states the material facts.

Charles P. Mattocks, for the plaintiff.

The agreement is sufficient to take the case out of the statute of frauds. R. S., c. 111, § 1; *Levy* v. *Merrill*, 4 Maine, 180; *King* v. *Upton*, 4 Maine, 387; *Appleton* v. *Chase*, 19 Maine, 74; *Eveleth* v. *Scribner*, 12 Maine, 24; *Barstow* v. *Gray*, 3 Maine, 409.

The agreement of the plaintiff was to be performed within a reasonable time and therefore the instrument is not void because no time is named. *Atwood* v. *Cobb*, 16 Pick. 227.

The case nowhere discloses any desire or effort on the part of the defendant to rescind the agreement prior to the tender of the deed by the plaintiff, March 17, 1881.

If the defendant desired to rescind the contract he should have done so within a reasonable time.

What is a reasonable time is a question of law. In *Kingsbury* v. *Wallis*, 14 Maine, 57, the court held that in the absence of all testimony tending to show that so long a time was necessary, a delay of two and one-half months was beyond a reasonable time. Here the defendant did nothing for a year, and his remark, that the plaintiff had got him, at the time the deed was tendered, shows that he had not rescinded and that he considered himself still holden by the contract.

Bion Bradbury, for the defendant, cited: 2 Pars. Contracts, 561, 562; *Howe* v. *Huntington*, 15 Maine, 350; *Kingsley* v. *Wallace*, 14 Maine, 57; *Schlessinger* v. *Dickinson*, 5 Allen, 47.

DANFORTH, J. This is an action upon a written promise signed by the defendant of the following tenor, viz: "Ellsworth, February 25, 1880. I hereby agree to pay H. B. Saunders, thirty-five hundred dollars ($3500) when he shall be able to convey to us by good and sufficient deed the Joseph Gott lot, so called, situated on the western side of Long Island, in Bluehill Bay, and said to contain one hundred acres more or less."

As a consideration for this promise by the defendant the plaintiff offers the following writing signed by himself and which makes a part of the declaration in his writ, viz: "Ellsworth, February 25, 1880. I am to give Taylor, Curtis, Proctor and Morse, a deed of the Joseph Gott Island lot, so called, said to contain one hundred acres, more or less; conveying by said deed to them a good and sufficient title upon the payment to me by said Taylor *et als.* of the sum of thirty-five hundred dollars on delivery of said deed."

These two instruments are not only of the same date, but as the case shows were made at the same time and are but parts of one and the same transaction. Hence they must be construed together as constituting one contract.

The case shows what is entirely consistent with the written contract, construed as a whole, that at the time the several promises were made, the plaintiff had no title to the land and that

the parties understood that it was thereafter to be obtained by the plaintiff from the owner then supposed to be Mr. Gott. The purchase of this lot was the object sought by the defendant and the conveyance of a good title was the condition upon which he was to pay the stipulated price. Until this condition was performed, no obligation rested upon him to make any payment or do any other act. A tender on his part, before this, would be of no avail in obtaining the title, for the plaintiff could not be compelled in a court of equity or elsewhere to convey a title when he had none, and if the tender under the circumstances of this case could lay the foundation of an action to recover damages, that might be a very inadequate remedy and would certainly fail to give that which the contract contemplated, the land itself. Hence no duty was imposed upon the defendant until the plaintiff first performed the condition precedent. This was first to be performed by the plaintiff if he would give force and vitality to the contract and as no time in which it was to be performed was specified, by well settled legal principles it must be done within a reasonable time. 1 Parsons on Contracts, 450; *Howe* v. *Huntington*, 15 Maine, 350. That the plaintiff so understood his duty is evident from the prompt and immediate measures taken by him to procure a title from the supposed owner, upon whom he had, or supposed he had, some claim for a conveyance. But it appears that this supposed owner had conveyed to other parties on the same day and necessarily these measures failed. Of this failure the defendant was at once notified with a request to surrender and cancel the contract. That request was not complied with. But notwithstanding this it may be questionable whether the contract was not at an end. It certainly would have been if there had been no action on the part of the defendant.

But it is claimed that the defendant's refusal to rescind was a waiver of the failure of the plaintiff and he is now estopped to deny the continued existence of the contract.

It may be true that there was a waiver of the failure to obtain a title at that time, but assuming that the contract continued, there was no waiver of any of its terms. If it continued after

it was the same contract as before. The same conditional liability rested upon the defendant, the same obligation of diligence upon the plaintiff.

The failure in the first instance had resulted mainly, perhaps entirely, from the fact that the supposed owner had parted with his title. But when this fact was ascertained it was also learned into whose hands the title was conveyed. If, then, the plaintiff would continue the contract in force, it was his duty to make all reasonable exertions to procure the title from the new owner. Instead of that, from his own testimony, it appears that he made no effort to that end until February 9, 1881, nearly one year after the contract was made and after the alleged waiver of the first failure. It further appears that at that time the negotiation for the purchase began and ended in success on the same day.

This long delay which the plaintiff does not see fit to explain, we think unreasonable. In coming to this conclusion we do not in any degree rely upon the speculative value or want of it in the land. Such value is too uncertain and partakes too largely of the nature of gambling to have any countenance or recognition in the law. We rely upon the more definite and certain rule laid down in *Howe* v. *Huntington*, *supra*, that when a matter of contract is to be done within a reasonable time, it means, "so much time as is necessary conveniently to do what the contract requires should be done." This rule seems to be well sustained by the authorities cited, and is peculiarly applicable in this case, in which it seems to have been contemplated and understood by the parties that the contract was to be performed in the shortest convenient time. The non action of the defendant in regard to it, shows that he had for a long time considered it at an end and the law justifies that conclusion.

Judgment for defendant.

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

SAMUEL A. RENDELL

vs.

OTIS HARRIMAN and others.

Waldo. Opinion December 28, 1883.

Promissory notes. Principal and agent. Evidence.

In an action on a promissory note which recited "For value received we promise to pay S. A. Rendell or order," &c., and was signed by four individuals and following the signatures were the words "president and directors of Prospect and Stockton Cheese Company." *Held*, that there was nothing in the body of the note nor attached to the signatures to show that the promise was made for or in behalf of any person other than the signers; and that evidence to show that it was the promise of the cheese company and not of the individual signers was not admissible.

Sturdivant v. *Hull*, 59 Maine, 172, affirmed.

ON REPORT.

Assumpsit upon the following promissory note.

The plea was the general issue with brief statement that the instrument declared on was the note of the Prospect and Stockton Cheese Company.

(Note.)

"$246.50. Stockton, October 19, 1878.

"For value received, we promise to pay S. A. Rendell, or order, two hundred forty-six and fifty one-hundredths dollars, in one year from date, with interest.

Otis Harriman, R. M. Trevett, L. Mudgett, W. H. Ginn, } President. Directors of Prospect and Stockton Cheese Company."

The defendants offered to show by the proper record evidence, that a corporation called the Stockton and Prospect Cheese Company was duly established by law; that by its by-laws, accepted in 1875, the president and directors of said corporation were authorized to audit all accounts; that the said Harriman was its president, and the other defendants its directors, at the date of said note; that on the tenth of April, 1877, the president and directors, by a vote of said corporation were duly authorized to purchase the machinery and all other fixtures required for making cheese, and getting water into the factory, and that the plaintiff was then, and ever since has been a stockholder in said corporation.

They also offered to show by parol and record evidence, and production of the several instruments hereinafter set forth, that in pursuance of said last named vote, said officers purchased of the plaintiff, such machinery and fixtures, to the amount of six hundred thirty-four dollars and sixty-four cents; that thereafterwards in part payment therefor, the plaintiff received from R. S. Trevett, one of the defendants, and then and ever since, the treasurer of said corporation, four several sums of money as expressed in the following receipts, viz:

"$225. Stockton, June 8, 1877.

Received of R. M. Trevett, treasurer, two hundred twenty-five dollars on account of Prospect and Stockton Cheese Factory. S. A. Rendell."

"$56. Stockton, June 23, 1877.

Received of R. M. Trevett, treasurer, fifty-six dollars on account of the Prospect and Stockton Cheese Factory.

S. A. Rendell."

"$15. Stockton, July 17, 1877.

Received of R. M. Trevett fifteen dollars on account of Prospect and Stockton Cheese Factory.

S. A. Rendell."

"Stockton, October 17, 1877.

Received of R. M. Trevett, treasurer of Stockton and Prospect Cheese Company, thirty-eight dollars on account.

S. A. Rendell, by R. B. Ames."

That these payments left a balance due the plaintiff of three hundred two dollars and sixty-four cents. Interest was added to this sum, a balance due from the plaintiff on his stock subscription was deducted leaving a balance in his favor of two hundred and ninety dollars, for which, on the tenth day of November, 1877, by vote of the directors the following order was given:

"$290. Stockton, November 10, 1877.

To R. M. Trevett, treasurer of the Prospect and Stockton Cheese Company, or his successor in office, please pay to S. A. Rendell, or order, two hundred and ninety dollars, it being for fixtures for the cheese factory.

Directors of Prospect and Stockton Cheese Co. } Adelbert Crockett, J. M. Grant, Albert Harriman, Alex. Black."

(On face of order.)

"Presented and accepted,

"Nov. 10, 1877.

"R. M. Trevett, treasurer of P. & S. Cheese Co."

That on said order, two payments were made, for which the following receipts were given:

"Stockton, January 15, 1878.

Rec'd of R. M. Trevett, treasurer of Prospect and Stockton Cheese Company, forty-seven dollars on account.

S. A. Rendell, by R. B. Ames."

"$20. Stockton, March 7, 1878.

Received of Adelbert Crockett, twenty dollars to be credited to Prospect and Stockton Cheese Factory.

S. A. Rendell."

That on the nineteenth of October, 1878, at the request of the plaintiff who claimed that he wished a note, to raise money on, the directors exchanged said order for the note in suit.

That at the annual meetings of said corporation, in April, 1880, and April, 1881, the plaintiff was duly chosen and sworn as a director of said company; that in said meetings, the reports of the president upon the financial standing of the corporation were made and duly accepted; that said reports specified the liabilities of the company, one of the items of which was "S. A. Rendell, note for $246.48," being the note in suit, and that the plaintiff attended both said meetings. That on the fifth of April, 1881, the plaintiff received a payment upon said note for which he gave the following receipt:

"Stockton, April 5, 1881.

Received of R. M. Trevett, treasurer, fourteen and forty-eight one-hundredths dollars, ($14.48) on account of the Prospect and Stockton Cheese Factory Company, to be endorsed on the note holden by me against said company.

S. A. Rendell."

By the terms of the report, if the foregoing testimony, or any part thereof, was admissible, the action should stand for trial; otherwise to be defaulted for the amount of the note and interest.

George E. Johnson, for the plaintiff, cited: *Tucker M'f'g Co.* v. *Fairbanks*, 98 Mass. 101; *Stackpole* v. *Arnold*, 11 Mass. 27; Story on Agency, § 269; Story on Notes, § 65; *Sturdivant* v. *Hull*, 59 Maine, 172; *Mellen* v. *Moore*, 68 Maine, 390; *Hancock* v. *Fairfield*, 30 Maine, 299; *Shaw* v. *Shaw*, 50 Maine, 94; *City Bank* v. *Adams*, 45 Maine, 455; *Nobleboro'* v. *Clark*, 68 Maine, 91; 1 Greenl. Ev. § 275; 3 Wash. Real Prop. 250, 251; 1 Pars. Bills and Notes, 102.

Joseph Williamson, for the defendants.

The severity of the rule adopted in *Sturdivant* v. *Hull*, 59 Maine, 172, and older cases, upon which the decision in *Mellen* v. *Moore*, 68 Maine, 390, is exclusively based, has been since much relaxed by *Simpson* v. *Garland*, 72 Maine, 40, following the broader construction of § 15, c. 73, R. S., in *Nobleboro'* v. *Clark*, 68 Maine, 93. It now seems to be settled that evidence

of the authority of the agent, at least, can be received to show the intent of the parties to bind the principal. Therefore, the evidence produced by the defendants, upon this point, is admissible.

Where there is a doubt or ambiguity on the face of an instrument, as to whether the person means to bind himself, or only to give an evidence of debt against an institution or body of which he is a representative, parol evidence is admissible. Note to *Rathbon* v. *Budlong*, 1 Am. L. C. 614.

In *Sturdivant* v. *Hull*, the question of ambiguity was not raised, nor did the defendant offer to show any authority from his alleged principle to make the instrument declared on.

Both upon principle and authority, the note in suit has such a doubt or ambiguity upon the face, as to bring it within the foregoing rule. Upon authority, the recent case of *Metcalf* v. *Williams*, 104 U. S. 93, is directly in point. The defendant was sued personally upon a check drawn by him, as he contended, officially, as the vice-president of the Montpelier Female Humane Association. The name of the association did not appear in any place upon the check. The bank upon which it was drawn, was simply requested by two persons, signing themselves as officers, one as vice-president, and the other as secretary, to pay a certain sum. "Whether," says the opinion of the court, "they made this request as officers or as individuals is ambiguous, to say the least. It is evident that an inquiry into the circumstances of the case might render it certain which was intended." See also *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 326; *Brockway* v. *Allen*, 17 Wend. 40; *Kean* v. *Davis*, 20 N. J. Law, 683.

"An examination of this class of cases," says THOMPSON, C. J., in *Gill* v. *Brown*, 12 John. 388, "will show that they all turn upon the question, to whom was the credit intended to be given," or, as in *Mott* v. *Hicks*, 1 Cow. 535, "whether from anything that passed between the parties at the time, it was understood by them that the plaintiff was to rely upon the personal security of the defendant."

A note to Byles on Bills, 27, says that "when individuals subscribe their proper names to a promissory note, *prima facie*

they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents with the payee's knowledge."

DANFORTH, J. All the questions which have been or can be raised in this case growing out of the common law, as well the purpose and effect of R. S., c. 73, § 15, were raised and fully discussed and settled in *Sturdivant* v. *Hull*, 59 Maine, 172. A case so well considered and so fully sustained by the authorities as that would seem to be decisive of all the questions involved and would undoubtedly have been so considered, but for a hope raised by what is claimed "as a modification of the rule established by it, in *Simpson* v. *Garland*, 72 Maine, 40, following a more liberal construction of the statute in *Nobleboro'* v. *Clark*, 68 Maine, 93." But upon a review of *Sturdivant* v. *Hull*, we see no occasion to depart from its teachings, nor do we perceive any modification of its doctrine in any case which follows. On the other hand, *Mellen* v. *Moore*, 68 Maine, 390, "is exclusively based" upon it; it is referred to as authority in *Nobleboro'* v. *Clark*, and is followed in the still later case of *Ross* v. *Brown*, 74 Maine, 352; nor do we find anything inconsistent with it in *Simpson* v. *Garland*. In the latter case the note contained language purporting to show that the promise was that of the principal and which the court held did show it; while in *Sturdivant* v. *Hull*, no such language is used. True, in the case of *Ross* v. *Brown*, it is suggested that it does not appear that the maker of the note had any authority to bind the town; but from the opinion it clearly appears that the liability is fixed upon the agent by force of the terms of the contract and not by any extraneous evidence, or the want of it. In *Nobleboro'* v. *Clark*, the contract was set up as binding upon the principal and was so held because by its terms it appeared that such was the intention of the agent and such being the intention, it was necessary with or without the statute to show the authority of the agent before the contract could be regarded as that of the principal. The

action at bar is against the alleged agents and as suggested in *Sturdivant* v. *Hull*, whatever may be the effect of the statute in "extending a liability to the real party in interest and affording a remedy against him, it cannot be so construed as to discharge one who for a sufficient consideration, has expressly assumed a liability by means of a written contract, or to allow proof *aliunde* for that purpose." Nor do we find any case at common law to go so far. All the authorities, including those cited by the defendant in this case, concur in holding that the liability of the one party or the other must be ascertained from the terms of the written instrument and parol proof cannot be received to vary or control such terms.

That an agent may make himself responsible for his principal's debt is beyond doubt. That the defendants in this case have done so by the terms of the note in suit, uncontrolled by extraneous evidence is settled by the uniform decisions in this state, supported as shown in *Sturdivant* v. *Hull*, by the weight of reason, as well as of authority elsewhere.

The evidence then, offered, if admitted, would not avail the defendants unless it had the effect to discharge them from a contract into which they have entered.

It is true, that in the cases cited, such evidence was admitted and was perhaps admissible, under the well established rule of law, that when there is an ambiguity in the contract, when the language used is equally susceptible of two different constructions, evidence of the circumstances by which the parties were surrounded and under which the contract was made may be given, not for the purpose of proving the intention of the parties independent of the writing, but that the intention may be more intelligently ascertained from its terms. But to make this evidence admissible some ambiguity must first appear; there must be language used such as may without doing violence to its meaning, be explained consistently with the liability of either party, some language which as in *Simpson* v. *Garland* tends, in the words of the statute, to show that the contract was made by the agent "in the name of the principal, or in his own name for his principal."

In this case no such ambiguity exists, no such language is used. The promise is that of the defendants alone without anything to indicate that it was for or in behalf of another. True, the defendants affixed to their names their official title, with the name of the corporation in which they held office, but nothing whatever to qualify their promise or in the slightest degree to show it other than their own. The statute as well as the decisions, with few exceptions, as we have seen requires more than this to make the testimony admissible. *Bray* v. *Kettell*, 1 Allen, 80.

Defendants defaulted for the amount of the note and interest.

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

ALBERT H. LEIGHTON, administrator,

vs.

GEORGE BOWEN and another.

Penobscot. Opinion December 28, 1883.

Promissory notes. Evidence. Trustee.

As between the maker and the administrator of the payee of a promissory note, it is competent to show by parol evidence, that the note was made and delivered only as collateral security for the performance of the maker's duty as trustee of the payee, and that such duty was fully performed.

In such a case the right to maintain an action upon the collateral must stand or fall with the principal obligation. If that is fulfilled there remains no valid subsisting consideration to support an action upon the collateral.

When one party uses the name of another party, with his consent, to hold stock for speculative purposes, such other party is a mere passive trustee, with no duty to perform until funds come to his hands or a transfer of the stock is called for.

ON REPORT.

Assumpsit on the following promissory note.

"Bangor, January 5, 1881.

"For value received, two months after date, we promise to pay to the order of Ichabod Leighton one hundred dollars.

[Signed.] Bowen & Emery."

The plaintiff was the administrator on the estate of Ichabod Leighton.

At the trial the plaintiff put in the note and stopped.

The defendants then introduced evidence against the objection of plaintiff, of the facts recited in the opinion.

The action was then reported to the law court to determine whether the evidence introduced by the defendants was admissible, and if so to determine the effect of such evidence, and render judgment accordingly, by nonsuit or default.

Charles P. Stetson and *H. L. Mitchell*, for the plaintiff.

The testimony offered by defendants was not legally admissible, and cannot be considered in defence to the action, being in violation of the well known principle that parol evidence shall not be allowed to alter and vary the operation and effect of a written contract. *Brown* v. *Spofford*, 95 U. S. 474, p. 480; *Forsythe* v. *Kimball*, 91 U. S. 291–294; *Millett* v. *Marston*, 62 Maine, 477; *Shaw* v. *Shaw*, 50 Maine, 95.

Parol evidence is admissible to show fraud in the inception of the note, want of consideration, or that there was no delivery.

In this case there is no charge of fraud, there was a valid consideration for the note. Leighton paid his one hundred dollars. Bowen received the stock and has had it ever since.

The note was duly delivered.

The case differs from *Watkins* v. *Bowers*, 119 Mass. 383, relied upon by defendants. That note was given for a policy of insurance, and an agreement that defendant should have sixty days to determine whether he would or not be insured. He declined to take the policy of insurance.

And the evidence was competent upon the issue whether there was a contract between the parties, and a completed delivery of the policy and note under it.

Barker, Vose and Barker, for the defendants, cited: *Coddington* v. *Goddard*, 16 Gray, 446; *Fearing* v. *Clark*, 16 Gray, 74; *Faunce* v. *State Mut. Life Ins. Co.* 101 Mass. 279; *Watkins* v. *Bowers*, 119 Mass. 386; *Goddard* v. *Cutts*, 11 Maine, 442; *Sweet* v. *Stevens*, 7 R. I. 375; *Seymour* v. *Cowing*, 4 Abb. App. Dec. 200; *Pym* v. *Campbell*, 6 E. & Bl. 370; *Davis* v. *Jones*, 17 C. B. 625; *Bell* v. *Ingestre*, 12 Adol. & El. N. S. 317; *Wallis* v. *Littell*, 11 C. B. (N. S.) 369.

BARROWS, J. It is not always easy to draw the line which distinguishes between testimony which must be regarded as incompetent and irrelevant, because subversive of the wholesome rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a *valid* written instrument," and that which is competent and relevant as showing that the written unsealed instrument declared on is not valid and binding between the original parties to it, by reason of the want or failure of a consideration to support it, or because it was not delivered under such circumstances as to make the contract complete. Hence not a few cases in the books of suits upon promissory notes between the maker and promisee, or their personal representatives where it is difficult if not impossible to reconcile the decisions.

As the desire to do exact justice between the litigating parties upon the facts established by satisfactory proof, or the fear of encouraging perjurious attempts to get clear of liabilities distinctly assumed and verified by written evidence has predominated, the line of admissibility has varied and become questionable and indistinct even in the decisions of courts of the highest respectability.

It does not seem to be necessary here to attempt an extended citation and review of the authorities.

Where the suit is between the original parties, the inquiry is: Has the plaintiff established the existence of a completed contract entered into upon a valid and still subsisting consideration? If so, the writing must speak for itself, and contemporaneous parol agreements, inconsistent with it, are inadmissible to affect the liability thereby assumed. But in determining whether the

contract was complete and founded upon such consideration, the transaction out of which it grew is open to investigation, and the testimony of competent witnesses bearing upon either of those points, is relevant. This must include the acts and conversation of the parties at the time, so far only as they have a bearing upon the questions of the completion of, and the consideration for the alleged contract.

The testimony here offered in defence may be regarded as establishing the fact that the only transaction between Ichabod Leighton and the defendants, which could be supposed to furnish a consideration to support this note was as follows:

They were in an office with a third party who was engaged in placing the stock of a new mining company. This man had arranged to put a pool of sixty thousand shares into the New York market for speculative purposes, and proposed to Leighton to go into it. Leighton replied that he liked to speculate a little, but didn't want to be known in the matter. Upon which the broker proposed, and it was finally arranged between them, that if Bowen would allow Leighton to put it in his (Bowen's) name, Leighton would take five hundred shares, and pay the broker seventy-five dollars therefor, which was done, and the broker made the certificate for Leighton's shares, which were to go into the pool in Bowen's name.

Upon Leighton's inquiring what he had to show for his interest Bowen said he would give him anything he wanted, and proposed to give him this note "*as collateral*"—the arrangement being that Leighton was to have all which his five hundred shares should bring when sold, if it did not exceed one hundred dollars. If it brought more than one hundred dollars Bowen was to have half the excess. Leighton received the note agreeing that he would not use it in any way until the stock was sold. The broker had charge of the sale. The shares fell flat and the stock has never been sold. It does not appear that Ichabod Leighton ever called for money or stock. At the trial of this suit Bowen offered to surrender the certificate transferred by himself to Leighton, but Leighton's administrator objected to the tender as not seasonably

made. What must Ichabod Leigton have understood to be the consideration of this note? For his own accommodation he had put his stock in Bowen's name, but Bowen neither had, nor was it expected by either that he would have any control of it. Leighton himself had put it into the New York pool, and the broker had charge of the sale. The only delivery of the note was expressly made "as collateral" — to secure the performance of Bowen's duty as Leighton's trustee in the matter. Bowen was the mere conduit through whom the proceeds of such sale as the broker might make, were to come. No proceeds accruing, the consideration, if one could be said ever to have existed, failed entirely unless Bowen refused or neglected to obey Leighton's further directions as to the disposition of the stock. Leighton never gave any further directions. The stock which he bought remained subject to the call of himself or his administrator in Bowen's hands. Bowen was a mere passive trustee, allowing the use of his name to gratify Leighton's propensity to speculate a little without being known in it. After the failure of the speculation he would naturally enough be less inclined than before "to be known in it." It was no part of Bowen's duty to follow him with a tender of the certificate of the stock when he did not call for it. The note was delivered, known and understood by both, simply as a collateral for the fulfillment of the trust. It must stand or fall with the principal obligation, like all collaterals. When the principal obligation has been fulfilled, the right to maintain an action upon the collateral ceases.

We think that the plaintiff's objection that the tender of the certificate came too late is not tenable. Had it been made to appear that either the administrator, or Leighton himself, ever asked for or offered to receive the certificate, the case would have been entirely different. Until then Bowen was simply discharging his duty by remaining passive. It is shrewdly claimed that this testimony brings into the contract a condition not therein expressed which is contradictory to its terms. Not so. It goes to the present existence of a consideration which the plaintiff is bound to establish in order to maintain an action upon it, and to

the question of a delivery for a specific purpose only. No rights of an innocent holder for value are involved here.

Plaintiff nonsuit.

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

GRACE MANSFIELD and others, in equity,

vs.

WILLIAM H. MANSFIELD.

Waldo. Opinion December 28, 1883.

Will. Life-estate in real and personal property.

A devise of property personal and real, to the wife of the testator to hold the same so long as she shall remain his widow, followed by a devise over of the same property to a son and one of the daughters of the testator in unequal proportions upon the termination of the estate of the wife therein, gives to the widow an estate for life in such property determinable upon her marriage; and she can convey nothing more by her deed of the realty.

A life-estate in personal property the ordinary use of which is its destruction, is of course equivalent to an absolute gift when the same has been consumed, and the gift of such life-estate in goods and chattels which are liable to be worn out and deteriorated by use, amounts to the same thing if the life-estate lasts long enough.

Not so as to moneys, and bank or other stocks that may be expected to yield an income without waste of the principal. But the rule in this state is that the legatee for life of personal property is entitled to the possession, management and control of it after the settlement of the estate, the court having power to require security in proper cases for the preservation of the principal, when it is of such a character that the principal ought to be preserved.

BILL in equity. Heard on bill and demurrer.

The opinion states the facts.

Barker, Vose and Barker, for the plaintiffs.

Joseph Williamson, for the defendant.

BARROWS, J. William Mansfield, who died in 1874, left a will, executed in 1872, and since his death duly probated, whereby he devised to his beloved wife Grace, one of the complainants, all his "property and estate of any description and wherever situate, to hold the same so long as she shall remain [his] my widow." By the second item he devised to his son William H. the respondent here, two-thirds of the same property and estate "upon the termination of the estate of my wife therein, "upon condition that he pay to a daughter of the testator one hundred dollars, "when he comes into possession of said property." By the third item he gave to this daughter one hundred dollars, to be paid to her by the son, "out of the property devised to him in the second article." In the fourth item he devises to another daughter "one-third part of all my property and estate upon the termination of the estate of my wife therein;" and in the fifth and last item, he appointed his son executor. By the inventory, it appears that the testator left something less than seventeen hundred dollars in personal property, and real estate appraised at fifty-four hundred and thirty-three dollars.

The bill charges that the income of the estate under prudent management has been insufficient for the reasonable support of the widow — that the personal estate which was left after payment of debts and charges of administration has been consumed for her support — that she is unable to make sale of the real estate because the respondent claims that she has not a fee, but only a life estate therein. Whereupon she and the daughters claim that it was not the true intent of the testator that she should be thus left dependent upon charity, and therefore they call upon the court for such a construction of the will as shall give to the parties concerned a knowledge of their legal rights in the premises. The chief interest which the parties have in the question presented relates to the character of the estate which the wife took in the realty.

Touching the personalty it may be remarked that a gift even of the use for life of any articles that are necessarily consumed in the using, such as hay, grain, provisions and the like, is commonly tantamount to an absolute bequest of them, and is entirely equivalent, when the article has been consumed by the legatee — that the same is true (when the life estate continues long enough) of many other chattels which are liable to be worn out and cease to be valuable by lapse of time, such as household furniture, domestic animals, vehicles, agricultural implements. Not so as to moneys, bank and other stocks or other personalty which may be expected to yield an income without impairment or depreciation of the principal. But as to all personal estate thus bequeathed, the rule in this state is that the possession, management and control of it belongs after the payment of funeral expenses, debts and charges of administration, to the legatee for life. *Starr* v. *McEwan*, 69 Maine, 335 — the court having power in their discretion to require security for the preservation of the principal in proper cases. *Sampson* v. *Randall*, 72 Maine, 109. There is nothing in the present case which seems to call for the exercise of that power. As to the real estate, it may well be that the testator did not anticipate the results which were to follow from the provisions that he saw fit to make for his "beloved wife." But we can judge of his intentions only by what he did. He omitted those provisions which were held sufficient in *Hall* v. *Preble*, 68 Maine, 100, to enable the widow to convey a fee in land devised to her during life.

It is true that by R. S., c. 74, § 16, "a devise of land must be construed to convey all the estate of the devisor therein unless it appears by his will that he intended to convey a less estate." But the provisions above quoted abundantly suffice in accordance with repeated decisions of this court and well settled rules of construction, to show that this testator intended to give to his wife at best but an estate for life and to make a devise over in fee, upon the wife's death or marriage, to his son and one of the daughters in unequal proportions, the son's portion being

conditioned also for the payment of a legacy to the other daughter when he should come into possession of his own share. Whatever the necessities of the widow, or however great the hardship, we cannot construe the will otherwise than as giving her a life estate determinable upon her marriage; and she can convey nothing more to her grantees.

"If a man grant an estate to a woman *dum sola fuit*, *durante viduitate*, or *quamdiu se bene gesserit* . . . for any like incertaine time, which time, as Bracton saith, is *tempus indeterminatum*; in all these cases, if it be of lands or tenements, the lessee hath, in judgment of law, an estate for life determinable." Co. Litt. Lib. 1, c. 6, § 56; First Part Hargraves' Ed. p. 42. And Blackstone describes and illustrates in like manner a certain species of tenancy for life. Black. Comm. Vol. II, p. 121.

See also besides the cases above cited from 69 and 72 Maine, *Warren* v. *Webb*, 68 Maine, 133; *Fox* v. *Rumery*, *id.* 121, 126-128; *Stuart* v. *Walker*, 72 Maine, 145; *Green* v. *Hewitt*, 97 Ill. 113; *Cooper* v. *Pogue*, 92 Penn. 254: *Bradly* v. *Westcott*, 13 Vesey, Jr. 445; *Giles* v. *Little*, 104 U. S. 291; *Parsons* v. *Winslow*, 6 Mass. 169, 178; *Dumey Schoeffler*, 24 Mo. 170.

Decree in conformity herewith.
No costs for either party.

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

MARY A. YOUNG *vs.* FRANCIS A. PRITCHARD.

Penobscot. Opinion December 28, 1883.

Estoppel. Evidence. Judgments. Opinion of court.

In a writ of entry the tenant is not estopped from showing title in himself, prior to and at the date of an alleged trespass, which was the subject of an action of trespass *q. c.* brought by himself against the co-tenant and grantor of the demandant and his servant by a judgment in their favor, in such action, upon a verdict of not guilty, although they may have pleaded soil and freehold by brief statement, filed with the general issue, unless it be made to appear that there was a precise definition and description of the *locus* in the pleadings in the action of trespass, and also that the recovery was had upon the issue of soil and freehold, and not upon the negation of the trespass. Neither the report of a case, as presented upon a motion for new trial to the full court, nor the opinion of the court thereon, is admissible in evidence to show upon what issue the trespass action was determined. Nor is the demandant thus estopped by a judgment in favor of the tenant's servant in trespass *q. c.* rendered upon the report of a referee in an action brought by demandant's co-tenant and grantor, where such report merely finds the defendant in the trespass action not guilty, unless there is proof that the *locus* was precisely defined in the hearing before the referee, and that his report proceeded upon a finding that the title was in the tenant.

ON REPORT.

The case and material facts are stated in the opinion.

Davis and Bailey, for the plaintiff, contended that the judgment in the action of trespass brought by the defendant against the plaintiff's husband and grantor, the record of that case showing that the defendants there justified under a plea of soil and freehold, and the verdict upon which judgment was rendered being not guilty, was a bar to this action.

The effect of that judgment was to establish title in the plaintiff's grantor at the time of the commencement of the action of trespass, and that title the plaintiff now holds. The issue of

soil and freehold concludes the defendant here from disputing her title at that date. If, therefore, the defendant would impeach the plaintiff's title, it must be by matters arising subsequent to that time, because that judgment is conclusive upon the question of soil and freehold between the parties thereto and their privies. *Arnold* v. *Arnold*, 17 Pick. 4; *Outram* v. *Morewood*, 3 East. 346.

As to what was the matter in issue if the record does not show it, evidence *aliunde* may be produced. As remarks PARKER, C. J., in *King* v. *Chase*, 15 N. H. 9, "the declaration and pleadings may show specifically what this is (the matter in issue) or they may not. If they do not the party may adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special. . . . It may be shown by parol evidence, if necessary, upon what ground the verdict proceeded.

If the evidence in the former case were before the court, it would readily be seen that the title to the land in controversy was the matter in issue, and that the pivotal point of the decision was the location of the line between two contiguous properties. The reported case, *Pritchard* v. *Young*, 74 Maine, 419, is made a part of this case and definitely settles this point.

That becomes the main question in the determination of this case. See Bigelow on Estoppel (2d ed.), 91.

N. Wilson, for the defendant.

BARROWS, J. This is a writ of entry dated March 17, 1880, wherein the plaintiff demands against the defendant, possession of a parcel of land in Greenbush, "being a part of lot numbered 2, in mile square numbered 3, Range 3, according to survey of Tarbox; the same being a strip of land lying next south of a line running from East to West, dividing said Lot No. 2 into North and South halves respectively, the said strip herein demanded being so much of the South half thus determined as said Pritchard has enclosed, and now occupies to the exclusion of the demandant."

The defendant pleaded the general issue with a brief statement denying plaintiff's title and claiming that defendant has title in

fee simple by deed of warranty of same land conveyed by Isaac Young, plaintiff's husband, to Thomas L. Young, August 13, 1855, and of all which said T. L. Young "then occupied," and of all enclosed and occupied by himself at the date of plaintiff's writ, and further brief statements claiming title to the same by adverse possession in himself and his grantors since 1845, and asserting that he and his grantors since November of that year, have been in the continued and adverse possession and occupancy of "all that part of said lot northerly of the line indicated by the Bagley fence so called" — that he "claims to own it by deed and by possession; and that it is the same identical half part, more or less, measured out, surveyed and agreed upon in the original division of said lot between Isaac Young and Thomas L. Young."

When the case came up for trial at the January term, 1883, the plaintiff put in subject to the defendant's objections: 1. The record of a judgment rendered at the same January term, in an action of trespass *q. c.* brought by this defendant Pritchard, November 6, 1879, against Isaac Young, this plaintiff's husband and one Buxton, who justified as Young's servant, wherein Pritchard alleged that those defendants on May 1, 1878, and divers days and times between that day, and the date of his writ, broke and entered his close "situate on the Northerly side of the Bagley fence, so called, on said Lot No. 2, and took down and removed said fence 15 to 20 feet over and upon plaintiff's field," trod down the grass, &c.; to which said Young and Buxton pleaded not guilty, with a brief statement that "the acts complained of were committed, *if at all*, upon a narrow strip or gore of land lying immediately North of the Bagley fence on said Lot No. 2, mile square 3, Range 3, as set out in plaintiff's writ and South of a line extending from East to the West lines of said Lot No. 2, dividing the same into North and South halves, respectively," in which strip of land Isaac Young claimed soil and freehold for himself and this plaintiff, Mary A. Young, as tenants in common, and title therein in himself and said Mary as his co-tenant — Buxton justifying as his servant. Upon pleadings thus framed, the general issue was joined, and the verdict was

simply not guilty. Pritchard filed a motion for new trial which was overruled by the full court, and judgment entered up at the January term, 1883, (which was the trial term of this suit) for the defendants for their costs.

2. The plaintiff offered in evidence subject to defendant's objections, a quitclaim deed from her husband, the above named Isaac Young, to herself, dated November 13, 1879, conveying all the grantor's "right, title and interest in the South half of the same Lot No. 2," according to Tarbox's survey —" The north half having been conveyed by me to Thomas Young by deed of warranty, August 13, 1855." Upon this testimony the demandant rested. Thereupon the defendant offered to prove that at the date of this last named deed Isaac Young had no record title, and that the title and possession were in himself, as set forth in his brief statement, and that at the date of the alleged trespass in the action of trespass *q. c.* the record of which had been offered by plaintiff as above, neither Isaac Young nor the plaintiff had title to or occupancy of any part of the North half of said Lot No. 2, and especially none of the strip of land in controversy. He further offered the record of a judgment of this court, rendered at the October term, 1879, (just previous to the conveyance of the demanded land to the plaintiff by Isaac Young) in an action of trespass *q. c.* brought by said Isaac Young, July 19, 1878, against Nelson Pritchard, who justified as the servant of this defendant, wherein Young complains of a trespass by Pritchard on the ninth day of July, 1878, committed upon that part of the South half of the same Lot No 2, which lies Westerly of Card's ridge road, by "depositing certain rails, posts and rubbish thereon," &c.; to which Pritchard pleaded the general issue, with a brief statement denying Young's title to the *locus* and alleging the same to be in Francis A. Pritchard, (this defendant) under whom he justified all and singular the acts complained of as trespasses. The record further shows the rendition of final judgment upon the report of Noah Barker, (referee under a rule of court) that the defendant was not guilty and in favor of Pritchard for his costs. The defendant now offered to prove the identity of the *locus* with the land here in

controversy. Plaintiff objected to all the evidence offered by the defendant; and thereupon the case was transmitted to this court, apparently, for the determination of the questions raised as to the admissibility of the evidence offered by the parties, respectively, and also to see which party, if either, was estopped by the records and accompanying proof presented.

The plaintiff relies upon the estoppel which she claims accrues to her from the judgment in favor of Isaac Young, her grantor, in this action of trespass, brought by this defendant in which Young pleaded (with the general issue) soil and freehold in himself and her as his co-tenant; and upon the conveyance to her of Young's interest. She cites *Arnold* v. *Arnold*, 17 Pick. 9, and *Outram* v. *Morewood*, 3 East. 346.

The correctness of those decisions will not be questioned here. This court has gone quite as far in maintaining the conclusiveness of judgments in *Sturtevant* v. *Randall*, 53 Maine, 149, 151 – 154, and *Walker* v. *Chase*, *id.* 258, 260 – 262.

But the difficulty about the estoppels which are claimed by each of these parties against the other, is that neither of the records which they respectively produce, nor any competent evidence *aliunde*, establishes the fact that the jury found in *Pritchard* v. *Young*, that the soil and freehold were in Young and his co-tenant — nor that the referee found in *Young* v. *Pritchard*, that the title to the *locus* was in Pritchard. All that is established in either of those cases, is that the defendants were not guilty of the trespass alleged; but "the matter particularly put in issue," is not shown to have been found, either by the jury in the one case, or by the referee in the other. The plaintiff relies upon the opinion of the court in *Pritchard* v. *Young*, 74 Maine, 420, to show that it was settled in favor of his client. But neither the opinion of the court nor the case reported makes any part of the record. Freeman on Judgments, § 79, p. 55, and cases cited; *Coolidge* v. *Inglee*, 13 Mass. 51; nor do we see upon what principle it can be regarded as competent evidence of any fact in controversy between the parties.

We think that both the decision and the reasoning in *Arnold* v. *Arnold*, 17 Pick. 4, and the authorities there cited, are adverse

to giving such an effect to the judgment in *Pritchard* v. *Young*, as the plaintiff claims for it, upon what is substantially the naked record here presented. To raise an estoppel, it is not sufficient to show that the matter in controversy *may* have been determined in the former litigation between the parties or their privies. The party claiming an estoppel against his adversary must make it appear affirmatively by legal evidence that it *was* determined.

As Lord ELLENBOROUGH said in *Outram* v. *Morewood*, *supra*, "It is not the recovery but the matter alleged by the party, and *upon which the recovery proceeds*, which creates the estoppel." "In every action," say the court in *Arnold* v. *Arnold*, *supra*, "the verdict is conclusive as to the subject matter of the suit, and any matter particularly put in issue *and found by the jury*." But it is just as essential that it should appear that it was "found by the jury" (or other tribunal to which it was presented), and that it was "the ground upon which the recovery proceeded," as that it was "matter alleged by the party," or "particularly put in issue." A simple "not guilty" of the trespass alleged settles nothing as to the location of the line between the parties when it does not appear that there was any finding upon the issue of soil and freehold, or any precise definition and description of the *locus*.

In view of the cases already referred to, further discussion seems superfluous.

Case to stand for trial.

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

ANDREW M. HASKELL *v.* JAMES H. OAK.

Penobscot. Opinion December 28, 1883.

Corporation. Stockholders. Contract.

The stockholders of a corporation at a time when the corporate indebtedness was something over four thousand dollars and the assets less than two thousand dollars, subscribed an agreement promising to pay the treasurer "the sums placed against our names, respectively, for the purpose of liquidating the debt against said association," and all but one paid their subscriptions and the business of the corporation was continued for three years. *Held*, that an action of assumpsit could be maintained on the agreement against the delinquent subscriber in the name of the treasurer for the benefit of those who were creditors at the time of the subscription.

ON REPORT of agreed statement of facts.

The writ, dated March 2, 1882, was assumpsit upon the following agreement:

"Garland April 17, 1877.

"We, the subscribers, hereby agree to pay Andrew M. Haskell, treasurer of the Garland Dairying Association, on or before the first day of June, 1877, the sums placed against our names, respectively, for the purpose of liquidating the debt against said association; provided that any subscriber may have the privilege of discharging his subscription by giving to some creditor of said association an acceptable note for the amount of his subscription, or such part of it as has not been paid in cash, payable in one year from said first day of June, said note to draw interest at the rate of six per cent. per annum."

Subscribed in different amounts by fifty-two stockholders. The defendant's subscription was fifty dollars.

Other material facts are stated in the opinion.

Thomas H. B. Pierce, for the plaintiff, cited: 1 Pars. Contracts, (2 ed.) 357; R. S., c. 48, § 9; *Amherst Acad.* v. *Cowls*,

6 Pick. 427; *Hanson* v. *Stetson*, 5 Pick. 506; *Carr* v. *Bartlett*, 72 Maine, 120; *Fryeburg Academy* v. *Ripley*, 6 Maine, 443; 16 Am. Law Reg. 553, 554; *Wood* v. *Dummer*, 3 Mason, 308.

Davis and Bailey, for the defendant.

The defense to this suit is a want of consideration.

Defendant was a stockholder who had paid the full amount of his stock subscription. He, therefore, was not liable for the debts of the corporation or any part thereof. Laws of 1871, c. 205, § 5; *Poor* v. *Willoughby*, 64 Maine, 379.

There is no pretense that he had assumed any liability as an officer of the corporation.

What possible consideration is there for this subscription? It did not operate as a payment of the debt. The corporate property was not saved to the corporation thereby; for notwithstanding the subscription the property all went to the creditors. There is no pretense, at least, it nowhere appears in the statement of facts, that any delay even, was granted by any creditor on account of it; that the final gobbling up of all the property did not occur just as soon as it would have done if no subscription had been made. There is no intimation that any creditor was pressing his claim and gave any day on account thereof; or that any attachment, lien, right or privilege was surrendered as a consideration therefor. From all that appears, any creditor could have prosecuted any day notwithstanding the subscription to enforce his claim.

A more absolutely naked agreement it is difficult to conceive of.

"A gratuitous subscription to promote the objects for which a corporation is established cannot be enforced unless the promisee has, in reliance on the promise sued on, done something or incurred or assumed some liability or obligation. And it is not sufficient that others were led to subscribe by the subscription sought to be enforced." *Church* v. *Kendall*, 121 Mass. 528.

Thus the case would stand if the creditors were suing.

This whole doctrine of voluntary subscriptions has so recently been considered by this court in *Carr* v. *Bartlett*, 72 Maine, 120, it is unnecessary to allude to any other authorities, as that case and those therein cited cover every branch of this subject.

BARROWS, J. The defendant was a stockholder in the Garland Dairying Association, a corporation organized under the general law in 1874, which in April, 1877, had an outstanding indebtedness of something over $4000, and resources (including land and buildings at their estimated value) of something less than $2000.

Whereupon, fifty-two stockholders, of whom the defendant was one, subscribed the agreement upon which this suit is brought, promising to pay (the plaintiff) "Andrew M. Haskell, treasurer of the Garland Dairying Association, on or before the first day of June, 1877, the sums placed against our names, respectively, for the purpose of liquidating the debt against the Association."

The subscription amounted to $2250, the defendant placing against his name, at the time of signing, the figures $50. All the subscribers but the defendant paid as they agreed, and the association continued in business during the years 1877, 1878 and 1879. But in April, 1880, they gave up business and transferred all the remaining property, real and personal, to their creditors. It was insufficient to satisfy the amount due, and this suit is prosecuted in the treasurer's name for the benefit of those who were creditors of the corporation at the date of the subscription. The defense set up is that there was no consideration for the defendant's promise. And it is argued in his behalf on the ground, that, as his stock had all been paid for, he was not liable for any debts of the corporation, under the laws of 1871, c. 205, but was expressly relieved therefrom, by § 5, of that chapter. It is true, he was under no such liability. *Poor* v. *Willoughby*, 64 Maine, 379. But he had a right to agree with others to save his stock from immediate sacrifice and the business in which he was interested from impending failure. As their affairs stood, they could not go on except in defiance of law. Though their stockholders were relieved from individual liability, they were still

prohibited, by R. S., c. 48, § 9, clause 1, from contracting debts beyond a certain amount, proportioned to their capital, investments, and assets.

It does not follow from the naked fact that the defendant was under no personal liability for the corporation debts, that his subscription with his fellow-stockholders to pay the pressing debts of a corporation in which he held stock, and thus to make up their capital and assets to an amount which would enable them to continue the business, was without consideration.

Where the holding out of a *bona fide* opportunity and prospect of pecuniary gain to himself through legitimate business is the motive presented to the promisor, it cannot be said that there is a want of consideration for the promise. Where, as here, he has had that opportunity, which was all he bargained for, it is not in his mouth to say that there was no consideration for the promise because it turned out that in the prosecution of the business there was in fact no gain. The position in which the promise was made was this: The defendant owned stock in a corporation which owed an amount more than twice its capital and assets. The inference is irresistible that its creditors were pressing, and that when the corporation had voted to sell their factory for less than one-fourth of the amount of their debts, (the rest of their resources not amounting to another fourth,) the question presented to all interested, was, whether the experiment should be given up and the business cease? It was plain that it must do so unless a subscription of the stockholders upon which the creditors might rely for the ultimate payment of their claims could be made. It was made, and the business went on for three years more. Each stockholder's interest (the defendant's included) was made, temporarily at least, more valuable and the opportunity to continue a business which might prove profitable was secured. The delay sought has been given. It may fairly be inferred that there was an understanding with the creditors that it would be given if a subscription large enough to place the corporation upon a fair footing as to solvency could be obtained. All the subscriptions except that made by the defendant have been paid, and still a portion of the indebtment out-

standing when the stockholders subscribed to procure the delay remains unpaid. All the payments made by those who subscribed with him have inured to the benefit of the defendant's stock.

No element is wanting here which was found sufficient to charge the defendant upon her subscription in *Carr* v. *Bartlett*, 72 Maine, 120. It makes no difference whether the promise is made to enable a business enterprise to commence operations or to continue them. The consideration for the promise is substantially the same in both cases. The undertaking of the subscribers is not merely inchoate; the case finds that it has been fully performed by all concerned therein except the defendant.

Good faith to his fellow-stockholders who have paid for the benefit of his stock, and to the creditors who have forborne to urge their claims to enable the corporation to prosecute its enterprise for several years longer, forbids the defendant, at this stage, to recede. There was a sufficient consideration moving to him from each of these parties; and his promise was made to one, who, on the face of the subscription paper, appears to have been the trustee for them both. See as to the effect of mutual promises upon a subscription paper, *Allen* v. *Duffy*, (per COOLEY, C. J.) Mich. given in 9 Reporter, 646.

To say nothing of the advantage secured to himself as owner of an overloaded stock through the payments made by his fellow subscribers, there was, in the implied undertaking of the payee to devote the subscriptions which he accepted to the purpose declared, a sufficient consideration to support the promise. *Trustees of Fryeburg Parsonage Fund* v. *Ripley*, 6 Maine, 442, 445, 446; *Amherst Academy* v. *Cowls*, 6 Pick. 427; *Collier* v. *Baptist Education Society*, 8 B. Monroe, 68; *Troy Academy* v. *Nelson*, 24 Vt. 189, and other cases referred to by Judge BENNETT in his note upon *Church* v. *Kendall*, 16 Am. Law Register, 546.

In fine, in this purely business undertaking, none of the thinly woven technicalities, of which courts have now and then made a screen for the rash benevolence that has impelled some one in an unguarded moment to promise a gift for some public charity, can avail this defendant. The few (mostly old) cases in which

courts, while stigmatizing the defence as base, dishonorable and unjust, have suffered the purchaser of a cheap and fleeting reputation for public spirit and liberality to avoid his promise by cries of corban — no promisee — no privity with promisee, and the like, have no application here.

Judgment for plaintiff for $50 and interest from June 1, 1877.

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

HENRY H. GRANT, administrator,

vs.

NATHAN P. CARVER.

Waldo. Opinion December 28, 1883.

Shipping. Master. Ship's husband. Deceased part-owner.

The authority of the master of a vessel or of a ship's husband is not vacated by the death of one of the part-owners as to the share of such part-owner, and the master may rightfully continue to account with and pay over to the ship's husband the net earnings of the deceased part-owner's share with the rest of the earnings that come to his hands, and such payment will relieve him from liability to the estate of the deceased until he has notice from the representatives of the deceased that they have revoked the authority of the ship's husband to receive their part of the earnings.

ON REPORT.

Assumpsit by the surviving administrator on the estate of William McGilvery to recover the earnings of one-sixteenth of the ship *Susan Gilmore*, after the death of McGilvery, while the defendant was master, as follows:

"August 18, 1876,	$826.32.	
"February 1, 1877,	182.12.	
"July 1, 1877,	830.18.	
"February 5, 1881, Interest,	445.48.	
		$2284.10."

The writ was dated February 5, 1881. The plea was general issue.

The opinion states the material facts.

Joseph Williamson and William H. Fogler, for the plaintiff.

It was the duty of the master to collect the freight money and as a matter of fact he did collect it. Having collected, it was his duty to remit it to the respective owners, or to some person duly authorized. If he remits to any person other than the owner, such remittance does not relieve him from liability unless previous authority or subsequent ratification is shown. The master's authority to remit to Gilmore, Kingsbury and Company, was given him by McGilvery specially.

Gilmore, Kingsbury and Company, as agents of the ship, were not authorized to receive from the master the net earnings which belonged to the several owners. The master did not so understand, for he gives the express instructions of McGilvery as his authority for remitting to them; and on one occasion, at least, he transmitted direct to a part owner.

The authority given to the defendant by McGilvery to remit his share of the earnings to Gilmore, Kingsbury and Company, was a naked authority, and was, therefore, determined by McGilvery's death.

So far as the remittance of $830.18 is concerned, the authority to remit to Gilmore, Kingsbury and Company, had been specifically revoked by the plaintiff's letter of the third of May, 1877.

A power ceases with the life of the person giving, except in cases where the power is coupled with an interest, or is given for a valuable consideration or as security. The interest which can protect a power after the death of the person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. *Hunt* v. *Rousmanier*, 8 Wheat. 174.

If an agreement be entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some

benefit to the donee of the authority, such an authority is irrevocable. Chitty on Contracts, 226; Story on Agency, § 477.

Gilmore, Kingsbury and Company had no interest in the earnings of this sixteenth of the ship. When the freight was earned and collected by the master, who was the proper agent of each of the owners, it became a thing distinct from the ship, to his share of which each owner had the immediate right of possession. The authority of the master to remit to Gilmore, Kingsbury and Company, the authority of that firm to collect, was a naked power, revocable at pleasure, and ceasing with McGilvery's death.

The contract is inadmissible against the plaintiff. Neither he nor his intestate was a party to it. If admissible, it does not create an interest in plaintiff's share of the earnings of the ship in Gilmore, Kingsbury and Company.

The defendant claims that the plaintiff has ratified the payments to Gilmore, Kingsbury and Company, first, by his acquiescence, secondly, by his letter of June 14, 1878. The ratification of the act of an agent, in order to bind the principal, must be with a full knowledge of all material facts. *Owings* v. *Hull*, 9 Pet. 629; *Thorndike* v. *Godfrey*, 3 Greenl. 432; *Smith* v. *Kidd*, 68 N. Y. 130; *Combs* v. *Scott*, 12 Allen, 496.

If the principal has received no benefit from the agent's act, his ratification must be his deliberate and intentional act. Story's Agency, § 239.

If mere acquiescence is relied upon as an implied ratification, it must appear that the party setting up such ratification has been prejudiced thereby. *Forsyth* v. *Day*, 41 Maine, 394-5.

In the case at bar, there could have been no ratification by the plaintiff until he received the defendant's letter of June 6, 1877, for till then he had no knowledge that the first two remittances had been made to Gilmore, Kingsbury and Company. In August, 1877, at the first opportunity, the plaintiff told the defendant he should look to him for the money. Here was no ratification, no acquiescence, even, but a distinct disclaimer of the defendant's acts. The plaintiff, after that, made no claim upon Gilmore, Kingsbury and Company for the money, and did no act recognizing the defendant's act.

The plaintiff's letter of June 6, 1878, cannot be construed as a ratification. The letter was not written to the defendant; it was written by the plaintiff in his private capacity, the defendant having been previously notified that he would be held responsible for the money, could not have been misled, or suffered injury by reason of the letter.

That letter was written under a mistake of fact — a mistake occasioned by the fraudulent act of Gilmore, Kingsbury and Company. That firm had proved a claim against McGilvery's estate for $5,393.02. After the fraud was exposed in the case of *First National Bank of Salem* v. *Grant*, 71 Maine, 374, the claim was reduced to $2,624.23.

The defendant by wrongfully intrusting the plaintiff's funds to Gilmore, Kingsbury and Company, made them his agents, and cannot avail himself of a ratification secured by their fraud.

Eugene P. Carver and W. P. Thompson, for the defendant.

If a party purchase property of another with knowledge of a contract or of a trust relating thereto, he will take only the title and enjoy only those rights that his vendor enjoyed in relation to the same, even if the sale to him was absolute in its terms. *Scudder* v. *Calais Steamboat Co.* 1 Clifford, 370; *Taylor* v. *Stibbert*, 2 Vesey, Jr. 437.

A contract like the one here shown will be enforced between the original parties as regards the management of the vessel, even if a majority in interest of the owners of the vessel desire to break or dispute the same. *Darby* v. *Baines*, 9 Hare, 369; 12 Eng. L. & Eq. 238.

This contract was to those parties who had purchased with knowledge of its contents or had even notice of it, in the nature of an incumbrance on the vessel. *Scudder* v. *Calais Steamboat Co. supra.*

Wherefore those who had knowledge of the contract when they purchased would be bound by its terms. In the questions of actual and constructive notice and of registry, the same principles apply in the conveyance of vessels under the United States registry laws as in the case of real estate. Schouler's

Personal Property, vol. 1, p. 390; *Horton* v. *Davis*, 26 N. Y. 495. See *White's Bank* v. *Smith*, 7 Wall. (U. S.) 646; *Aldrich* v. *Ætna Co.* 8 Wall. 491.

Upon the other questions in the case, counsel cited: *Hunt* v. *Rousmanier's Adm'r*, 8 Wheaton, 174; *Merry* v. *Lynch*, 68 Maine, 94; Story on Agency, § § 35, 36, 253, 254, 255, 256; 3 Parsons, Ship. and Adm. 112, 109; *Gilman* v. *Healey*, 55 Maine, 120; *Shaw* v. *Berry*, 35 Maine, 279; *Bell* v. *Cunningham*, 3 Peters, 69; *Conrad* v. *Abbott*, 132 Mass. 330; *Thayer* v. *White*, 12 Met. 343; Elwell Evans, Agency, § § 94, 95; *Wright* v. *Boynton*, 37 N. H. 9; *Law* v. *Cross*, 1 Black, (U. S.) 533; *Brigham* v. *Peters*, 1 Gray, 147; *Foster* v. *Rockwell*, 104 Mass. 167; *Freeman* v. *Swett*, 11 Maine, 79; *Hazard* v. *Spears*, 2 Abb. App. Dec. 353; *Hastings* v. *Bangor House*, 18 Maine, 436; *Low* v. *Conn. R. R. Co.* 46 N. H. 284; *Monitor Ins. Co.* v. *Buffum*, 115 Mass. 343; *Hawley* v. *Northampton*, 8 Mass. 3; *Gifford* v. *Choate*, 100 Mass. 343; *Barrett* v. *Marsh*, 126 Mass. 213.

BARROWS, J. The plaintiff as surviving administrator of William McGilvery brings this action, upon an account annexed and for money had and received, against the defendant who was captain of the ship *Susan Gilmore*, during McGilvery's ownership in the vessel and for nearly sixteen months after his death, claiming to recover one-sixteenth of her earnings while the defendant remained captain, after McGilvery's decease in March, 1876. The defendant paid over all the earnings which came to his hands in this interval to Gilmore, Kingsbury and Company, who were the managing owners in the lifetime of McGilvery, and continued to be so until about the time of their failure in December, 1878, nearly a year and a half after the defendant left the ship. He denies his liability to pay any portion of it to McGilvery's estate in this action notwithstanding he had notice from the administrators, in May, 1877, before he left the ship in July, and before the payment of the last installment to Gilmore, Kingsbury and Company, that they claimed to hold him responsible for one-sixteenth of the ship's net earnings, and requiring

him to pay their sixteenth to certain parties named in their letter other than the ship's husband. To this written notice received by him in England, the defendant responded in a letter showing more temper than good taste, but in substance informing them that he had transmitted the earnings of the ship to Gilmore, Kingsbury and Company, — that this was in conformity with his last orders from McGilvery, — that they were the agents of the ship, "and it was known by all the owners when they took in her" — and that he was not the agent and should not be responsible for the earnings of McGilvery's part, but that Gilmore was good for it and would probably have accounted for it if McGilvery's share had not been in some way mortgaged or incumbered.

While it may well be that, in the absence of any binding agreement to the contrary, a co-part-owner of a vessel may revoke the authority of the ship's husband to receive his share of the net earnings and may require the captain to remit such share of all that may come into the captain's hands to himself or to such person or persons as he may appoint, we think the report in the present case exhibits sufficient reasons against the recovery by the plaintiff here, even of the sum paid over to Gilmore, Kingsbury and Company after the reception of the notice from the administrators in May, 1877. Obviously, as to all sums previously accounted for and paid over by the captain to the managing owners, there can be no valid claim.

The death of a co-part-owner does not, *ipso facto*, revoke the authority by him given to the master of a vessel in which he owns an interest, or to the ship's husband, as to his share. The manifold inconvenience and injustice that would be liable to result from holding the agency to be thus revoked in such cases would be sufficient reason for making them exceptions to the ordinary rule. The personal representatives of the decedent, simply take his place, his position and his rights touching the affairs of the ship. A ship's husband may be appointed either in writing or by parol, or his appointment may be inferred from the acquiescence of the part-owners in the performance by him of the duties

of the trust, and by their recognition of him as such in their mutual dealings; and in the recital of his powers and duties we find among others — "to make contracts for freight and collect the freight and all returns." Parsons on Ship. and Adm. Book I, c. IV, § 6.

In the absence of express orders to the contrary from the representatives of a deceased co-part-owner, it cannot be doubted that the master would be relieved from all personal liability for the earnings by him received when he had paid them over to the managing owner, even though one or more of the part-owners by whom the business was originally intrusted to himself and to such managing owner, might be dead at the time of such payment. The rightfulness of the payments by the defendant to Gilmore, Kingsbury and Company, who had been recognized as the managing owners by McGilvery himself, cannot be questioned up to the time of the reception of the order from the administrators to remit their share of the net earnings elsewhere. Touching the installment subsequently paid, the defendant claims that there was a power irrevocable vested in Gilmore, Kingsbury and Company, as managing owners, by virtue of a written contract subscribed by Butler and Atkinson, the builders, and the defendant and Gilmore, Kingsbury and Company when they became purchasers of their interests in the ship — to the effect that the defendant should go master of the ship at a certain rate of compensation, and Gilmore, Kingsbury and Company should be the ship's agents, receiving all remittances and paying all bills — to have therefor, a certain commission upon all receipts and disbursements of the ship's money, and interest and commissions at a higher rate for all their advances on the ship's account.

Doubtless, such a contract is valid and binding upon all who become parties to it, and cannot be rescinded by either party so long as it is faithfully observed by the other. *Darby* v. *Baines*, 12 Eng. L. & E. 238. But this agreement was not subscribed by McGilvery, and if it could be fairly inferred from the testimony that he bought his sixteenth of Gilmore, Kingsbury and Company, in subjection to it so that the doctrine of *Scudder* v.

Calais Steamboat Co. 1 Clifford, 370, and *Taylor* v. *Stibbert*, 2 Vesey, Jr. 437, could be regarded as applicable, we think enough appears in the case to justify the order which the administrators gave to the captain to remit their sixteenth of the net earnings to themselves or the parties named in their letter of May, 1877.

McGilvery's estate was insolvent and upon his administrators rested the duty of a vigilant collection of its assets for equal distribution among the creditors. The testimony shows that when their notice to the captain was sent, in May 1877, dividends on the share of the vessel owned by the estate to the amount of more than $1000 had been, for months, in the hands of the managing owners and so far as appears, they had neither paid them over to the administrators nor informed them of their reception, though there is nothing to indicate that they had any lien upon them which should prevent their going into the general assets of the deceased insolvent.

Whatever the agreement by which a ship's husband has been appointed, if he fails in the prompt performance of his duties, it can no longer be regarded as binding on the opposite party.

If the agreement that Gilmore, Kingsbury and Company should be the managing owners, were all that the defendant had to rely upon, we think he would be holden for the remittance made to Gilmore, Kingsbury and Company, in defiance of the notice of May, 1877.

But we think the plaintiff is estopped from asserting this claim by the following facts: When the defendant returned to this country in August, 1877, Gilmore, Kingsbury and Co. were for aught that appears, in good credit and condition financially, and the defendant interested himself to bring about an adjustment between them and the administrators of the question that had been raised as to the dividends he had paid over to them. Gilmore, Kingsbury and Company had proved a claim of about five thousand four hundred dollars against the estate of McGilvery in insolvency, and the settlement of the estate had proceeded so far that it was apparent that the dividends thereupon to which they would be entitled, would be likely to

equal or exceed the sum received by them from the earnings of the *Susan Gilmore*. In this condition of things, it seems to have been agreed by Mr. Buck, the plaintiff's co-administrator with Mr. Gilmore and the defendant, that the sums received by the firm from the defendant as earnings of McGilvery's share of the *Susan Gilmore*, should be offset against the dividends due and to become due to the firm from the estate — and thereupon all claim on the part of the estate against the defendant on this score was surceased until more than two years after the failure of Gilmore, Kingsbury and Company, when it was renewed and this suit brought. The administrators have never paid, except by this arrangement, the dividends from the estate to the firm, and neither the firm nor its assignees in insolvency seem to have asserted any claim for them. Thus the defendant's act in paying the earnings to Gilmore, Kingsbury and Company was substantially ratified, and the estate had the benefit of it.

If this adjustment had been the work of Buck alone, it would have bound the estate; (*Gilman* v *Healy*, 55 Maine, 120; *Shaw* v. *Berry*, 35 Maine, 279;) but as late as June, 1878, we find the plaintiff also expressing his assent to the arrangement in a letter to the firm, and proposing to turn in the same manner to offset expected dividends, a claim for between six and seven hundred dollars which the estate had against them for the earnings of another vessel. The familiar principles which regulate and enforce equitable estoppels, forbid the plaintiff to retract the assurance given by Buck to the defendant "that it would be all right," inasmuch as they allowed him to suppose the matter thus adjusted until the defendant had lost his opportunity to enforce reimbursement from Gilmore, Kingsbury and Company. All that the ingenious counsel for the plaintiff have to suggest as a reason for regarding the ratification of the defendant's acts as incomplete, is that after Gilmore, Kingsbury and Company had failed, it turned out that the estate was holden on an accommodation note given by McGilvery for the benefit of the firm, and that the claim of the firm against the estate in insolvency was reduced to about one-half of its original amount. Hereupon they argue that the ratification was

not made with a knowledge of all the facts, and hence not binding. The position is not sound; the administrators did know all the facts respecting the action of the captain which was to be ratified — even to the minutest details — and these are the acts and facts which it is necessary the principal should know in order to make a valid ratification. *Thorndike* v. *Godfrey*, 3 Maine, 429. Aside from this, as matter of fact, the existence of the claims by the establishment of which the debt due from the estate to Gilmore, Kingsbury and Company was reduced, must have been known to the administrators prior to the plaintiff's letter of June 14, 1878. On both grounds — ratification and estoppel — the defendant is entitled to prevail.

Judgment for defendant.

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

INHABITANTS OF LEEDS, appellants from decision of the COUNTY COMMISSIONERS.

Androscoggin. Opinion January 1, 1884.

Ways. County commissioners. Committee.

A road was laid out by the county commissioners in the towns of Greene and Leeds; Leeds appealed to a committee and the committee affirmed the proceedings of the commissioners. *Held*, that Leeds cannot object to the acceptance of the report of the committee becuse they gave no notice of their hearing of parties to Greene; nor because an order of notice does not appear upon the docket, although contained in the commission; nor because one of the original petitioners for the road was made one of the committee, the person having been agreed upon by the parties with full knowledge of the fact, and no objection having been raised thereto, until at the argument before the law court.

ON EXCEPTIONS.

An appeal by the town of Leeds from the decision of the county commissioners of Androscoggin county in laying out a road, through the towns of Greene and Leeds.

The committee was appointed by the court, by consent; its report affirmed the proceedings of the county commissioners. The exceptions were to the ruling of the court in accepting the report of the committee.

George C. and *Charles E. Wing*, for the appellants.

The statute provides that the committee shall give such notice as the court shall order. The docket entries show an absence of any order of notice by the court. If the clerk undertakes to act in the place of the court he should give legal notice, and at least each town through which the road passes should be notified. The road located was in the towns of Leeds and Greene. The clerk in this instance issued the warrant to the committee and ordered the notice to be given that is specified in the warrant. If it be competent for him to omit one party, he can of course in the absence of any legal restriction omit two, and if two, then he can with safety and propriety exercise his own wishes and taste as to whom shall have notice and what parties shall be left to obtain notice of hearings involving their property rights in the best way available to them. We submit that the court made no order concerning the notice; that the act of the clerk is not the act of the court, and that if erroneous it should not be adopted by the court.

We call the attention of the court to the fact as shown by the original petition, that Daniel Lara, one of the committee, was also one of the original petitioners.

A. R. Savage, for the original petitioners.

PETERS, C. J. A road was was laid out by county commissioners in the towns of Greene and Leeds. Greene was content with the proceeding, but Leeds appealed from it. Under the appeal, a committee was appointed who reported that the proceedings of the commissioners be affirmed. Leeds excepts to the order of the court accepting the report.

It is objected that the committee gave no notice to the town of Greene. None was necessary to the inhabitants of that town. They stood in the condition of a defaulted defendant, made no appeal, and had no after interest in the litigation. They were, presumably, satisfied with the road as established by the commissioners. It does not belong to the town of Leeds to speak in behalf of the town of Greene.

It is further objected, that the notice served by the committee upon the town of Leeds was illegal, because not expressly dictated and ordered by court. The objection is not sound. No order of notice appears on the court docket, but the customary notice from the committee was required by the commission to the committee, and the return shows that the notice was given. There is always some presumption of regularity pertaining to the execution of official business. In this matter the presumption is, that the act of the clerk was the act of the court. Appointing the committee was an implied authority to the clerk to issue the customary commission, and accepting the report of the committee ratifies the act.

It is lastly objected against the report of the committee, that one of the committee was an original petitioner for the road. Although of the same name, there is no other evidence that they are the same person. The objection appears to be taken first here, instead of at *nisi prius*. The persons constituting the committee were agreed upon by the parties with their eyes open, and the appellants are estopped from this objection after their assent has been acted upon, and the mission of the committee consummated.

Exceptions overruled.

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

ANDREW P. YOUNG, in equity, *vs.* JACOB WITHAM.

Franklin. Opinion January 1, 1884.

Equity practice. Appeal. Decision of single judge on questions of fact.

When an appeal in equity from the decision of a single judge is heard by the whole court upon a report of all the evidence adduced at the original hearing, the decision of such judge, as to matters of fact, will not be reversed, unless it clearly appears that such decision is erroneous. The burden to show the error lies on the appellant.

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ON APPEAL.

Bill in equity to compel the defendant to convey to the plaintiff certain premises in Letter E plantation, Franklin county. The case was heard by a single judge, and certain questions submitted to a jury at the September term, 1882, Franklin county, when the judge ordered the defendant to convey the premises named in the bill in accordance with the prayer of the petitioner and the defendant appealed.

H. L. Whitcomb, for the plaintiff.

James Morrison, Jr. for the defendant.

PETERS, C. J. This is an appeal from the decision of a single judge sitting in a case in equity. The first inquiry is, what weight shall attach to the opinion of such judge upon matters of fact decided by him, when the case is heard by the whole court upon a report of all the evidence adduced at the original hearing? We think the true rule to be that his decision, as to matters of fact, should not be reversed, unless it clearly appears that such decision is erroneous. The burden to show the error falls upon the appellant. Such is the rule in actions at law, when moving against a decision based upon facts and involving no ruling of law, and the same rule should hold good in proceedings in equity. It is so held generally in the cases where the question has arisen.

Reed v. *Reed*, 114 Mass. 372; *Slack* v. *Slack*, 123 Mass. 443; *Hunter* v. *Marlboro*, 2 Woodb. & M. 168; *Jenkins* v. *Eldredge*, 3 Story, 299; *Garner* v. *Pomroy*, 12 Iowa, 149; Story's Eq. Pl. 421. In 1 Barb. Ch. Pr. 395, it is said, "On an appeal the burden lies on the appellant. He must show the decree appealed from to be clearly wrong; otherwise it will be affirmed."

There is good reason for the rule in our practice. Cases are now heard before a single judge mostly upon oral evidence. When the testimony is conflicting, the judge has an opportunity to form an opinion of the credibility of witnesses, not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record. A witness may appear badly upon the stand and well in the record. In the case of *The Glannibanta*, 1 L. R. P. Div. 283, the court said, "We feel the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses, who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements, and the court should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect." This view is repeated in *Bigsby* v. *Dickinson*, 4 L. R. Ch. Div. 24.

Applying this rule, we cannot say that the sitting justice was manifestly wrong in his decision of the case. The evidence was very conflicting. The complainant would sustain an irreparable loss and forfeiture, if he fails to obtain a favorable decree. The complaint is undoubtedly supported by the verdict and findings of the jury in all essential particulars. The judge so understood it, as he based his decree upon the verdict. It was suggested at the argument, that the complainant is not the proper party to sue. Evidently, no such point was taken in the court below, and the evidence in support of it is too misty, vague and unreliable to sustain any such position now.

Decree below affirmed with costs.

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

MINNIE M. BOND, *per prochein ami*, *vs.* CITY OF BIDDEFORD.

York. Opinion January 1, 1884.

Evidence. Defective ways. Report of street commissioner.

A written report to a city of its street commissioner that one of its bridges was decayed, rotten and unsafe, the report having been printed and circulated by the city, is admissible in evidence, in an action against the city for an injury imputable to the defective bridge, for the purpose of proving notice of the defect to the municipal officers.

ON EXCEPTIONS and motion to set aside the verdict.

Action to recover damages for injuries received by the falling of the Bradbury Bridge (so called) in Biddeford, while the plaintiff, a school girl, was crossing December 7, 1881. The writ was dated November 21, 1882, and the plea was the general issue.

The verdict was for the plaintiff in the sum of five hundred dollars, and the defendant moved to set it aside and alleged the following exceptions.

"The presiding judge admitted the report of Alfred Goodwin, street commissioner, upon the point of notice only, objection to which was duly and seasonably made by defendants' counsel and exceptions thereto noted. Also the presiding judge refused to give the following instructions, except as given in the charge:

"First. If the plaintiff's mother was guilty of negligence in sending the plaintiff across the bridge, and the plaintiff acted upon such instructions, it would constitute contributory negligence upon the part of the plaintiff.

"Second. If the plaintiff was guilty of contributory negligence, she is not entitled to recover.

"Third. If the condition of the bridge was such as to give travellers notice that it was being repaired, the plaintiff is not entitled to recover.

"Fourth. Unless the municipal officers of the city had twenty-four hours actual notice of the defect which caused the span to break, which did break, the plaintiff is not entitled to recover.

"Fifth. The fact that the plaintiff knew that other people passed over the bridge would not justify the plaintiff in crossing, if the condition of the bridge was such as to give travellers notice that the bridge was unsafe.

"The defendant being aggrieved by the admission of said testimony and evidence, and by the refusal to instruct the jury as requested, excepts thereto, and prays that their exceptions be allowed."

Upon the first request, the presiding judge said to the jury: "I cannot give you this instruction as it is written, because it would embrace any degree of negligence less than a want of ordinary care. I have given you instructions upon this point, and I do not feel under the necessity of giving you any further instructions upon it."

Upon the second, he said: "This I have already given you, provided her negligence contributed to her injury."

Third, "I cannot give you this request. It would shield any town or city from liability on a way which was under repair if the traveller had notice that it was being repaired, notwithstanding it might be in such a condition, a portion of it left for public travel might be in such a condition, as to be unsafe and inconvenient, and the municipal officers might have had notice of it."

Fourth, "I have given you that instruction already."

Fifth, "I have instructed you fully upon that branch of the case, and I have no occasion to give you any farther instructions."

Sixth, "I cannot give you this request. I have instructed you upon the same point and can give you no further instructions upon it."

Other material facts are stated in the opionion.

W. F. Lunt and *F. W. Guptill*, for the plaintiff, cited: *State* v. *Watson*, 63 Maine, 128; *Roberts* v. *Plaisted*, 63 Maine, 335; *Dunn* v. *Moody*, 41 Maine, 239; *Rogers* v. *Newport*, 62 Maine, 101; *Jacobs* v. *Bangor*, 16 Maine, 187.

N. B. Walker, city solicitor, for the defendants.

The report of Alfred Goodwin, street commissioner, was for the year 1880, and was founded upon an examination made by him in 1880; and before the accident, the bridge had been repaired. The report was therefore inadmissible. The report was never made to the city council, and was simply the declaration of an officer and inadmissible. Abbott, Trial Evidence, page 57, § 62; *Smyth* v. *Bangor*, 72 Maine, 253; *Folsom* v. *Underhill*, 36 Vt. 580.

The evidence is too weak to sustain the burden of proof upon the question of notice, when met by the direct and positive denial of the person to whom notice is attempted to be proved. *Smyth* v. *Bangor*, 72 Maine, 253; *Porter* v. *Sevey*, 43 Maine, 519.

The city through its municipal officer or highway surveyor, must have twenty-four hours notice of the identical defect which caused the injury. Laws of 1879, chap. 206. For the statute is penal in its character and must be construed strictly. *Mower* v. *Leicester*, 9 Mass. 247; *Commonwealth* v. *Springfield*, 7 Mass. 9; *Springfield* v. *Bowdoinham*, 7 Maine, 445.

In making repairs, all that is required of the city is that the traveller shall be warned of his danger. *Frost* v. *Portland*, 11 Maine, 274, approved in *State* v. *Fryeburg*, 15 Maine, 407; *Wilson* v. *Charlestown*, 8 Allen, 137: *Fox* v. *Glastenbury*, 29 Conn. 204; *Jacobs* v. *Bangor*, 16 Maine, 190; *Bellefontaine R. R. Co.* v. *Hunter*, 5 Am. R. 201.

The city was required to exercise no more than ordinary care in notifying travellers of the condition of the way. Angell on Highways, 293; Redfield on Negligence, § § 399 and 376.

The fence at each end of the bridge having been put up properly the night before the accident, and not being down to the knowledge of any municipal officer or the street commissioner, it was a defect of which the city had no notice and can not be liable for it. *Klatt* v. *Milwaukee*, 40 Am. R. 759; *Doherty* v. *Waltham*, 4 Gray, 596.

The plaintiff passed over the bridge a few hours previous to the accident, and could not have failed to see the condition of the way; and if defective, she can not recover without showing that she notified the proper officers of the defect. Laws of 1879, chap. 156.

A knowledge of the way in such cases is sufficient to raise presumption of negligence on plaintiff's part. *Fox* v. *Glastenbury*, 29 Conn. 204; *Folsom* v. *Underhill*, 36 Vt. 580.

In order to enable the plaintiff to recover, she must show affirmatively that she used due care — ordinary prudence. *Spencer* v. *Utica R. R. Co.* 5 Barb. 337; 29 Conn. 204.

If the child is not of such age as to use ordinary care, the want of such care on the parents' part furnishes the same defence, in an action by the child. 21 Wend. 614.

The fifth requested instruction should have been given. 61 Barb. 437.

While the facts are undisputed, it is a question of law whether there is a legal cause of action. *Cotton* v. *Wood*, 9 Eng. Com. Law, 568; *Gilman* v. *Deerfield*, 15 Gray, 577.

PETERS, C. J. Upon a full examination of the case, we do not see that any debatable question arises upon the exceptions, excepting that in relation to notice. Most of the requested instructions were given either as asked for, or with proper qualification. We cannot see that any error was committed by the presiding judge in dealing with the questions presented.

It is contended by the defendants that the report of the street commissioner to the city council, dated December 17, 1881, was not admissible in evidence, as tending to show notice to the city of the alleged defect. This report declares the bridge, where the accident happened, to be decayed, rotten, and unsafe. Prior to the accident, the city printed and circulated the report. The unsafe condition of the bridge being admitted or proved, the use made by the city of the report relative to its unsafety, would seem to be quite satisfactory evidence that the city, through its municipal officers, had notice of the fact. The judge correctly ruled that it was competent evidence upon that question.

Smyth v. *Bangor*, 72 Maine, 249, relied upon by defendants, does not in any degree militate against this position. In that case, the court held that the mere declarations of a town officer were not receivable to prove notice of a defect. There the declarations stood alone, unaccompanied by any official act. Here they are made to the city, in the performance of an official duty. Thereby the city became informed of the condition of the bridge in as effectual and reliable a manner as the thing was susceptible of. The motion for new trial cannot be sustained.

Motion and exceptions overruled.

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

SAMUEL L. BLAISDELL

vs.

JAMES M. MORSE and another.

Franklin. Opinion January 1, 1884.

Deeds. Evidence.

A deed is not invalid because the grantors are descriptively and not individually named in the beginning of the instrument, as "We, the heirs and devisees of Sarah Stearns."

Under such a deed it is necessary to prove that the grantors were such heirs and devisees. As against one who had no title and claimed none, the following was held to be proof enough of the fact: The deed was in proper form, regularly witnessed and acknowledged, and was admitted without objection; Sarah Stearns' agent, after her death, acted as an agent for some of the grantors in looking after the land; and no person other than the grantors had appeared to possess or claim the same.

ON EXCEPTIONS.

Trespass *q. c.* The facts are stated in the opinion.

H. L. Whitcomb, for the plaintiff.

S. C. Belcher, for the defendants.

PETERS, C. J. The plaintiff, or his predecessor, owned a lot of land adjoining the *locus*, occupying a portion of the *locus* under a license from an agent of Sarah Stearns, then its owner. The defendants, taking possession of the *locus*, are sued in trespass by the plaintiff for cutting down trees upon it. Claiming title under Sarah Stearns, the defendants, at the trial, presented a deed purporting to be from her heirs and devisees. The deed was objected to, because the names of the grantors are not inserted at the beginning of the deed. They are named descriptively, as "We, the heirs and devisees of Sarah Stearns," but not individually. The objection was correctly overruled.

The plaintiff requested an instruction, that, if the defendants claim to hold under Sarah Stearns, they must show by title deeds that she had title. That was not necessary. Title may be acquired in ways other than by deed. She had possession at least, and plaintiff himself was occupying under her right of possession.

The principal question of the trial, was, whether there was any or sufficient evidence that the grantors were really the heirs and devisees of Sarah Stearns, as declared in the deed. Slight evidence upon this point would be sufficient as against the plaintiff who himself had no title or pretence of any. A breath will move a straw. The deed was read without proof of execution and without objection. It recites that the signers are such heirs and devisees. It was acknowledged before a magistrate and witnessed by a witness, who presumably knew the parties or some of them. It is not likely that they would be participants in any fraud or forgery in concocting the deed. Fraud is not to be presumed. Such an instrument is entitled to some weight, under present circumstances, from the solemnity of its nature. The case discloses, that Sarah Stearns died, and that the person who was her agent in her lifetime afterwards acted as the agent of some of the grantors named in the deed, in looking after the land. All this is corroborated by the fact that no persons other than the grantors have ever appeared to claim title or possession

as the successors of Sarah Stearns. We think the defendants' title was sufficiently proved.

Exceptions overruled.

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

HUGH JOHNSON *vs.* FRANK JOSEPHS.

Cumberland. Opinion January 1, 1884.

Practice. Pleadings. The right to open and close.

When a plaintiff has anything to prove to make out a full and perfect case, if it be no more than to establish the amount of his damages, where the damages are unliquidated and not nominal or assessable by computation merely, he has the right to open and close.

In an action for an assault and battery the defendant pleaded "*son assault demesne,*" the plaintiff replied "*de injuria,*" and the defendant was allowed to open and close, the plaintiff objecting. *Held*, that the plaintiff had the burden of showing the amount of damages sustained, and that depriving him of the right to open and close is cause for a new trial.

ON EXCEPTIONS by the plaintiff.

Trespass in which the plaintiff claimed damages in the sum of two thousand dollars for an alleged assault and battery by the defendant upon the person of the plaintiff.

The pleadings and the question presented to the law court are stated in the opinion.

H. D. Hadlock, for the plaintiff cited: *Carter* v. *Jones*, 6 Car. & P. 64; *Sawyer* v. *Hopkins*, 22 Maine, 276; *Page* v. *Osgood*, 2 Gray, 260; *Dorr* v. *Tremont Nat. Bank*, 128 Mass. 359; 1 Greenl. Ev. § 76, note 4; *Chamberlain* v. *Gaillard*, 26 Ala. 504; *Benham* v. *Rowe*, 2 Cal. 387; *Young* v. *Highlands*, 9 Gratt. (Va.) 16; *Mercer* v. *Whall*, 48 E. C. L. 447; *Davis* v. *Mason*, 4 Pick. 156; *Norris* v. *Ins. Co. of N. A.* 3 Yeates, 84; *Scott* v. *Hull*, 8 Conn. 296.

M. P. Frank, for the defendant, contended that this case came within the well defined and established rule, that the party having the affirmative of the issue, and consequently the burden of proof shall open and close the case to the jury.

By the pleadings the defendant had the affirmative of the issue. If the defendant had failed to satisfy the jury of the truth of his plea that the plaintiff made the first assault and he only acted in defence, the verdict must have been against him. It was important to him to have the close. *Davis* v. *Mason*, 4 Pick. 159; *Ayer* v. *Austin*, 6 Pick. 224; *Brooks* v. *Barrett*, 7 Pick. 94; *Morse* v. *Jewett*, 5 Dane's Abr. 563.

In this country it is deemed a matter of discretion in the justice presiding to determine in cases of this sort who shall open and close. 1 Greenl. Ev. Part II, c. 3, and cases cited.

The only case that would seem in any measure to support the position of plaintiff is *Sawyer* v. *Hopkins*, 22 Maine, 268, and all there is in that case which sustains the plaintiff is merely a dictum of the learned judge who drew the opinion. The question as to which party should open and close the case was not before the court.

A verdict against the defendant under the pleading would have put him in the position that he would have been in, had he suffered a default, or if judgment had been rendered against him upon demurrer. In that case the plaintiff would have had a right to move for an assessment of damages, and then upon that assessment he would have the open and close. *Hanley* v. *Sutherland*, 74 Maine, 212.

PETERS, C. J. Plaintiff sued for an assault and battery. Defendant pleaded "*son assault demesne*," and plaintiff replied "*de injuria*." Under these pleadings the defendant, against the plaintiff's protest, was allowed by the court "to open and close." This was contrary to what we regard as the well settled practice in this state. The rule of practice and of law in this state, is that, when a plaintiff has to prove *anything* to make out a full and perfect case, he is entitled to open and close. The test is, whether he need put in any proof of any part of his claim. In

this case, the burden fell upon him to prove the extent of the damages sustained. It is a case of unliquidated damages, and not a case of nominal damages, or of damages to be assessed by computation merely.

The plaintiff certainly had something to prove. The counsel for the defendant contends that the defendant's plea confessed everything alleged against him. We think not. It did not admit more than a general demurrer or a default would admit, and that would be nominal damages only. *Hanley* v. *Sutherland*, 74 Maine, 212, and cases cited. The plea of "*son assault demesne*" is but a qualified admission of the injury alleged. The point may be tested in this way: Suppose that, after the pleadings were completed the defendant had rested without any proof whatever. Judgment would go for the plaintiff, no doubt. But for how much? Would the court order judgment for the sum of one thousand dollars, the amount of damages which the plaintiff alleges, or would the plaintiff be required to prove the damages? Can it be, that a plea of *son assault demesne* admits any amount of damages which a plaintiff inserts in the *ad damnum* of his writ? If so, a plaintiff may prevent the plea in many cases by alleging exaggerated damages.

In fact, the defendant cautiously worded his plea to avoid admitting the whole injury charged. He says he did "unavoidably *a little* beat, bruise and ill-treat the said plaintiff." One of the issues of the case, therefore, was whether the beating was little or much. The declaration for an assault and battery is usually formal and general. Under the common form, in our practice, the plaintiff may prove malice as the foundation for punitive damages. The damages are necessarily a matter of uncertainty. The judicial discretion of a jury can be invoked by a plaintiff to settle them, and whatever the pleadings, if in the common form, there must be proof of the nature and extent of the injury sustained. We think there might be great abuse of the practice, if the ruling in this case be sustained. Defendants would adopt the plea of self defence, in order to have the last word, in cases where no real question exists but to have the amount of damages

ascertained. It is not the natural order of things to hear the accused before the accuser is heard.

In the trial of this cause there was testimony upon both sides. No one would doubt that the plaintiff proceeded with testimony after the defendant's side was closed. The defendant had the privilege of closing the argument upon the question of the extent of the plaintiff's injury and amount of damages thereby sustained. To take the lead, a defendant "must admit all the facts necessary to be proved by the plaintiff," and not merely a *prima facie* case. *Spaulding* v. *Hood*, 8 Cush. 602. "When anything is left for the plaintiff to show, he has the right to begin and close." *Thurston* v. *Kennett*, 2 Foster, N. H. 151; *Belknap* v. *Wendell*, 1 Foster, N. H. 175. The latest authorities sustain the plaintiff's view upon this question. See 1 Green. Ev. § § 75, 76, and English and American cases cited in notes of the latest editions. *Lunt* v. *Wormell*, 19 Maine, 100; *Sawyer* v. *Hopkins*, 22 Maine, 276; *Washington Ice Co.* v. *Webster*, 68 Maine, 449; *Page* v. *Osgood*, 2 Gray, 260; *Dorr* v. *Tremont National Bank*, 128 Mass. 359; *Carter* v. *Jones*, 6 C. & P. 64; *Mercer* v. *Whall*, 5 Ad. & El. N. S. 447.

The favor extended to the defendant deprived the plaintiff of a valuable legal right — one highly prized by advocates. It did not rest in the discretion of the trial judge to grant it. The rule should be fixed and certain, and not be subject to the varying judgments of different judges. The bar should know what the rule is, and that it may be depended upon.

Exceptions sustained.

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

WILLIAM TORREY, appellant, *vs.* ZINA H. BLAIR.

Sagadahoc. Opinion January 14, 1884.

Will. Testamentary capacity. Physical pain.

Where a fact is stated in a will in connection with a legacy, indicating a reason for making the legacy, and that fact is denied by one contesting the probate of the will, the burden is upon the contestant to show that the statement is not true.

Suffering from physical pain cannot destroy testamentary capacity while soundness of mind and memory remains.

ON EXCEPTIONS AND MOTIONS.

An appeal from the decision of the judge of probate admitting to probate the will of Mary E. Hitchcock, widow of James P. Hitchcock.

The will contained the following legacy:

"I give and bequeath to Samuel P. Hitchcock, brother of my late husband, three thousand dollars in money, in consideration of the losses he has sustained by endorsements for his brother, James P."

The verdict was in favor of the proponent and the contestant moved to set the verdict aside and for new trial on the ground of newly discovered evidence; he also moved that the decree of the judge of probate be reversed notwithstanding the verdict; and he alleged the exceptions stated in the opinion.

W. Gilbert, for the appellant.

The proponent relied upon the declaration contained in the alleged will that S. P. Hitchcock had suffered loss by the husband of testatrix to justify the provisions of the will in his favor as principal devisee. Contestant contended that to make the alleged fact available evidence in support of the will the proponent must satisfy the jury that the fact existed. But the judge ruled that

since the statement was contained in the will the burden of proof is on the contestant to invalidate it.

The question is whether the will is a true will. And the provisions of the will, and their character, and the propriety or impropriety of them are evidence bearing upon the question. So by this ruling we are to assume that the will is true in order to gain evidence to prove it to be true. This is what logicians call reasoning in a circle.

I press the question whether a fact asserted in a contested will can be assumed in order to afford evidence to prove the will is the act of the decedent, and a true expression of her wish and purpose. This is what the ruling does; and the case comes to the distinct and explicit question whether such a perversion shall receive the sanction of the court and be embodied in the jurisprudence of the state? Is this a fit doctrine to be spread upon the records of the court of final resort, and to be published to the world as the solemn resolve of a tribunal seeking applause of the conscience and the approval of the profession at home or abroad? Or could the ingenuity of a reporter avail to doctor and dress such a decision in a manner to make it even seem decent?

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

SYMONDS, J. The first exception is stated as follows:

"The said Torrey denied that Samuel P. Hitchcock had suffered loss by endorsements for his brother, James P. Hitchcock, and maintained that the assumption of such a fact in the alleged will was without foundation in fact; that the alleged will having been made under a delusion in that regard, that legacy did not express the real will of the alleged testatrix; that in fact, if the will was made by the alleged testatrix when of sound mind and memory, that provision had been induced by false and fraudulent representations of said Blair and said Samuel. He contended that the burden of proof was on the proponent to satisfy the jury of the truth of the fact thus assumed.

"But the judge presiding ruled that as the alleged will stated the alleged fact, it must be considered true unless the appellant had satisfied the jury that it were not true."

Clearly an argument adverse to the alleged will could not be drawn from its mis-statement of fact until it was first proved that the fact was mis-stated therein. The exception alleges the contestant to have been the party who denied the recital in the will; who maintained that the assumption (in the will) of loss sustained by Samuel P. Hitchcock by indorsing for his brother, James P. Hitchcock, was without foundation; and affirmed that the testatrix was under a delusion in that respect induced by false and fraudulent representations which had been made to her.

There was nothing to support this claim, until some evidence was offered to disprove the recital of fact which the will contained. Upon the issue, as the exception states it, the burden of proof was upon the contestant. It was for him to establish the facts which he sought to urge against the probate of the will. The ruling, therefore, was correct.

The second exception, which is insisted upon but not argued by the counsel for the contestant, is as follows:

"The said Torrey among other things requested the judge to instruct the jury that if the alleged testatrix was of sound mind and memory at the time when the alleged will was made, and yet was suffering so much from pain that she could not fully and deliberately consider what she was doing, she could not make a will."

This request assumes that suffering from pain may destroy testamentary capacity, even while soundness of mind and memory remains. It could not properly have been given. The jury were instructed as to the capacity necessary to enable one to make a will in terms to which no exceptions are taken.

After full examination of the case, it is the opinion of the court that the exceptions and the motions for new trial should be overruled. The evidence in support of the latter does not present a case, in which (under the rules of law applicable to such motions) a new trial should be granted on the ground that the verdict is against evidence, nor for newly discovered evidence.

It is unnecessary to consider the question whether the law court has jurisdiction of the motion to disallow the will, notwithstanding the verdict, and to reverse the decree of the probate

court, admitting it to probate; as we are satisfied that upon the evidence such motion should not prevail.

Exceptions and motions for new trial overruled.

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

CITY OF AUGUSTA *vs.* OLIVER MOULTON.

Kennebec. Opinion January 23, 1884.

Pleadings. Pleas puis darrein continuance. Demurrer. Repleader. R. S., c. 82, § 19.

When a plea purports to be an answer to the whole declaration and is found to answer only a part, it is bad in substance and on general demurrer.

Great certainty is required in pleas *puis darrein continuance* and it is a fatal defect if the day of the last continuance is not shown.

Where a plea *puis darrein continuance* is adjudged bad on demurrer, the court may, in the exercise of its discretionary power, award a repleader in furtherance of justice.

ON EXCEPTIONS.

The writ was dated November 13, 1878, and was returnable to the following December term of the superior court. The exceptions do not state when nor why the cause was removed to the Supreme Judicial Court, but do show that at the October term, 1882, of the last named court the defendant filed the plea given below, and the exceptions were to the rulings of the court in overruling a demurrer to that plea.

(Declaration.)

"In a plea of the case for that on the twenty-fifth day of September, A. D. 1866, there was and ever since that time has been and now is, a certain highway in said city known as the South Belfast road, leading from said Augusta to Belfast, which said road was legally established, and said city bound to keep the same in repair, so that it shall at all times be safe and convenient for travelers with their horses, teams and carriages; that said

city, on said day, and from thence hitherto were and now are, the lawful occupants of said road for all purposes of making and repairing the same, and no other person or persons (except the owners of the fee in said road) had or have any right or authority to enter upon (except for the purposes of travel) occupy or interfere with said road. That said city, ever since said day, have been and now are bound by law to keep the same safe and convenient for travelers with their horses, teams and carriages.

"That on the said twenty-fifth day of September, A. D. 1866, the defendant, not being the owner of the fee in said road and without right or color of right, unlawfully and wilfully erected, raised, and from that date to the date hereof, has maintained and now maintains two dams, one upon a certain stream called Worromontogus stream, and one upon what is called back run stream, east of the dam upon the Worromontogus, which said dams so erected, raised and maintained, raised the water in said streams to such a height that it overflowed said road and made the same unsafe and inconvenient for travel by reason of the water thereon, and has greatly damaged the same by washing out the gravel and dirt from said road, and rendering the same soft and muddy, by throwing up drift wood and rubbish on said road, and other damages to said road, which rendered the same at times impassable, wholly on account of said obstructions. That said city has been put to great expense in the repairing of said road, to wit, the sum of two hundred dollars yearly, since said twenty-fifth day of September, A. D. 1866, which said repairs were wholly on account of the flowing and damage caused by the defendant's said dams. That said city has been obliged to raise and have raised said road to protect it from said flowing and damage, and have been put to great expense in so doing, to wit, the sum of one thousand dollars."

(Plea.)

"And now the defendant in the above entitled action by his counsel comes and defends, &c. when &c., and says that the plaintiffs ought not further to maintain their said action against him,

because he says that on the twenty-fifth day of September, 1876, the plaintiffs sued out of the Supreme Judicial Court, in and for the county of Kennebec, a writ setting forth the same identical cause of action set forth in the present writ, and said former writ was duly served on the defendant and entered in said court at the October term thereof, 1876, and thence continued from term to term and the defendant appeared and filed his pleadings and an issue on the merits was thus made up, and the plaintiffs impleaded the defendant for the same identical cause of action declared on this writ, and after a trial by the jury and a verdict in favor of the defendant on said issue, the cause was carried to the law court by the plaintiffs on motion and exceptions and argued; and after full and careful consideration by the law court, the motion and exceptions were overruled and since the last continuance of this action, to wit, on the thirty-first day of May, 1882, a certificate thereof was duly forwarded to the clerk of this court and final judgment on the verdict was entered of record in favor of the defendant and for his costs, as by the record thereof now remaining in said court more fully appears; and the same judgment still remains in full force and not annulled or reversed; and this the said defendant is ready to verify. Wherefore he prays judgment if the plaintiffs ought further to have and maintain their said action against him and for his costs."

Winfield S. Choate, city solicitor, for the plaintiff, cited: 5 Bacon's Abr.* 480,* 479; Gould's Pl. 126, 346, 347; *Jewett* v. *Jewett*, 58 Maine, 234; Stephen's Pl. 98, 215; *Wilson* v. *Hamilton*, 4 Serg. & R. 238; *McKeen* v. *Parker*, 51 Maine, 390; *Brownfield* v. *Braddee*, 9 Watts, (Pa.) 149; 5 Johns. R. 389; 7 Johns. R. 194; *LeBret* v. *Papillon*, 4 East. 502; *Andrews* v. *Hooper*, 13 Mass. 477; Howe's Pr. book II, c. IX, p. 432; Story's Pl. (ed. 1829) 53, and cases cited, 54; 2 Chitty's Pl. (16 ed.)* 571,* 690, and cases cited, *691; *Stilphen* v. *Stilphen*, 58 Maine, 517; *Lincoln* v. *Thrall*, 26 Vt. 304; *Osborne* v. *Rogers*, 1 Saund. 264; 6 Wait's Actions and Defences, 787; *Staple* v. *Spring*, 10 Mass. 73; *Secor* v. *Sturgis*, 16 N. Y. 548; *Rogers* v. *Ratcliff*, 3 Jones, (N. C.) 225; *Jones* v. *Peta-*

luma, 36 Cal. 230; 14 Petersdorf Abr. 89; 3 Bouv. Inst. 317; Yelv. 140; *Ross* v. *Nesbit*, 7 Ill. 252; *Vicary* v. *Moore*, 2 Watts, (Pa.) 451; *Rangely* v. *Webster*, 11 N. H. 299; *Cummings* v. *Smith*, 50 Maine, 568; *Weeks* v. *Peach*, 1 Ld. Raym. 679; *Prince* v. *Nicholson*, 5 Taunt. 333; Blackstone's Com. (Banks & Bro's ed.) 784 and cases cited; *Burley* v. *Burley*, 6 N. H. 204; *Webb* v. *Steele*, 13 N. H. 230; *Wisheart* v. *Legro*, 33 N. H. 177; *Morse* v. *Small*, 73 Maine, 565; Spaulding's Pr. 373, 374; *Adler* v. *Wise*, 4 Wis. 159; *Adams* v. *Filer*, 7 Wis. 306; *Lyon* v. *Marclay*, 1 Watts (Pa.), 271; *Price* v. *Sanderson*, 3 Harr, (N. J.) 426; *Kimball* v. *Huntington*, 10 Wend. 675; *Wallace* v. *M'Connell*, 13 Pet. 143; *Barber* v. *Palmer*, 1 Ld. Raym. 693; *Waldo* v. *Mitchell*, 24 N. H. 229; *Mayberry* v. *Brackett*, 72 Maine, 102; *Andrews* v. *Beecker*, 1 Johns. Ca. 411; *Seaman* v. *Haskins*, 2 Johns. Ca. 284; *Service* v. *Heermance*, 1 Johns. R. 91; *Furman* v. *Haskin*, 2 Cai. 369; *Miller* v. *Heath*, 7 Cow. 101; *Boltons* v. *Lawrence*, 7 Wend. 461; *Patten* v. *Harris*, 10 Wend. 623; *Cruger* v. *Cropsey*, 3 Johns. R. 242; *Rayner* v. *Dyett*, 2 Wend. 300; *Culver* v. *Barney*, 14 Wend. 161.

Baker, *Baker and Cornish*, for the defendant, cited: Stephen's Pl. 157, 158, 160; *Potter* v. *Titcomb*, 7 Maine, 302; R. S., c. 82, § 9; *Clifford* v. *Cony*, 1 Mass. 495; *Stilphen* v. *Stilphen*, 58 Maine, 518; *Neal* v. *Hanson*, 60 Maine, 84; *Mahan* v. *Sutherland*, 73 Maine, 158; Stat. Eliz. c. 5; Stat. 4 and 5 of Anne, c. 16; 1 Chitty Pl. *694, 695; 3 Chitty Pl. 1238-9; 2 Chitty Pl. *702.

BARROWS, J. To the plaintiffs' writ dated November 13, 1878, and alleging with due and proper detail and description the existence upon September 25, 1866, of a highway in their city which they were bound to keep in repair, and the unlawful erection and maintenance by the defendant from that date to the date of the writ, of certain dams which raised the water to such a height as to overflow and damage their road and render it at times impassable, and put them to a yearly expense of two hundred dollars for repairs, and an expense of one thousand dol-

lars for raising the road to protect it from such flowing — the defendant, at the October term, 1882, interposed a plea against the further maintenance of the action, because, he says, that the plaintiffs on September 25, 1876, sued out a writ against him "setting forth the same identical cause of action set forth in the present writ," upon which he pleaded to the merits, had a verdict in his favor, and since the last continuance of this action, to wit, on the thirty-first day of May, 1882, he recovered final judgment on the said verdict. To this plea the plaintiffs filed a general demurrer which was overruled and the plaintiffs excepted to the overruling of their demurrer, asking that they may be allowed to replead in case this court should sustain the ruling at *nisi prius*.

Their counsel now presents an elaborate argument in support of his contention that this is a plea *puis darrein continuance* — that all other defences are thereby waived, and if it is found bad on demurrer, judgment must go peremptorily against the defendant, leaving only a question of damages to be settled — and that the plea is fatally defective in not giving the date of the last continuance, and also that it is bad because it does not show a judgment that bars plaintiffs' recovery, for the reason that it sets up a former judgment covering a part only of the plaintiffs' cause of action, when that cause is a continuing and divisible one and damages are alleged to have accrued since the date of the former writ — in other words, that it is no answer to the claim here alleged for damages accruing between September 25, 1876, (the date of the writ upon which judgment has been rendered) and November 28, 1878, the date of the writ in the present case, and hence a bad plea, because no answer to the whole matter contained in the declaration.

And defendant insists as strenuously upon the overruling of the exceptions and a final judgment in his favor because he says the omission of the date of the last continuance is a defect in form only and cannot be taken advantage of on general demurrer; and as to the objection that the former judgment is no bar to the whole of the plaintiffs' claim, it is not open to them, because they have admitted, by demurring without first praying oyer of

the judgment relied on so as to make it part of their demurrer, that it is the identical cause of action set forth in the present suit as the plea asserts.

We do not think that the position taken by either of the parties can be sustained to its full extent, or that it can be said here that there does "sufficient matter appear in (these) pleadings upon which the court may give judgment according to the very right of the cause." There is enough in the plea itself to negative the assertion that the judgment in the former suit included the whole matter set forth as a cause of action in this.

It is simply impossible in the nature of things that the whole of the claim here set forth could have been embraced in a writ dated September 25, 1876. No admission of the identity of the causes of action which the plaintiffs could make by demurring can countervail the effect of a perusal of the declaration and the plea. There is no answer whatever in the plea to so much of the plaintiffs' claim in this suit as is alleged to have accrued since the date of the writ in the other case. It may be that no damage was suffered by the plaintiffs until since then. Purporting, as it does, to be an answer to the whole declaration, and being found to answer only a part, the plea is bad on demurrer. See *Osborne* v. *Rogers*, 1 Williams's Saunders, 264, and *Earl of Manchester* v. *Vale*, *Id.* 27, and the learned notes of Serjeant Williams on these cases, and the authorities therein cited. See also, *Staples* v. *Spring*, (York Co.) 10 Mass. 72. Moreover it is uniformly held that a plea *puis darrein continuance* is a waiver of all other pleas, and that if held bad on demurrer the defendant is liable to final judgment against him. *Jewett* v. *Jewett*, 58 Maine, 234, and authorities there cited; *Morse* v. *Small*, 73 Maine, 565. It is plain both upon principle and authority that the demurrer to the plea must be sustained. The plea is bad both in form and substance.

But we do not think it follows from this or from the authorities above cited that the court is bound in all cases to render final judgment against the defendant whose plea *puis darrein continuance* is found insufficient, or that all power is taken from the court to award a repleader upon lawful terms when justice seems

to require it. That the defendant is liable to such judgment when nothing appears in the case to show that injustice would thereby be done him, is all that is actually settled by the cases above cited from our own reports. The discretionary power of the court to award a repleader in proper cases is not called in question in them. In *McKeen* v. *Parker*, a hasty reading of which might tend to the opposite conclusion, the ruling in question, really, was that the defendant was entitled to replead as matter of right. The court had the whole case before them, and finding no such right in the defendant, and no application to or exercise of the discretionary power of the court, or any occasion for its interposition, they simply affirmed the general doctrine which unquestionably is that upon the failure of such a plea the defendant has no absolute legal right to replead. Hence judgment will be final unless the court sees cause to exercise its discretionary power to award a repleader in furtherance of justice. That is the extent of these and like decisions. But the whole course of legislation and decision has latterly been to extend the power of the court to enable parties to secure the determination of all causes upon their real merits unembarrassed by the technicalities of pleading.

It cannot be doubted that ample power is left in R. S., c. 82, § 19, to this court and to a judge at *nisi prius* after ruling on a demurrer and before exceptions allowed to permit the party found in fault to replead or amend upon payment of costs, when there is reason to believe that the former pleadings did not properly present the party's case.

Indeed this power may be said to be inherent and incidental, in all courts where it has not been cut off by statute provisions, like the power to take off a default at any time before final judgment when the default has been unwittingly made and it is shown that the defendant has a defence which seems worthy of consideration.

Nor is there anything more sacred and imperative in the duty of the court to render final judgment forthwith after sustaining or overruling a demurrer to a plea *puis darrein continuance*, than after passing upon a demurrer to any sole plea in bar.

We think the same rule should prevail as that which was laid down as applicable in the case of demurrers to pleas in bar in *Mayberry* v. *Brackett*, 72 Maine, 102.

The obligation depends in each instance upon the judgment of the court as to whether all has been heard that merits consideration — whether enough appears in the pleadings to satisfy them that they can, in the language of the statute of Anne, "give judgment thereupon according to the very right of the cause."

The defendant's plea, though not an answer to the whole of the plaintiffs' case, is a perfect defence *pro tanto*, and indicates with no slight force that the question as to the remainder may well be regarded as a debatable one.

We do not think the defendant ought to be precluded from such defence as he may be able to present on the merits to so much of the plaintiffs' claim as the plaintiffs are still at liberty to assert against him. Both parties may probably find it necessary to amend their pleadings in order to present precisely the true limits of their controversy as now defined. The defendant has liberty to replead upon payment of costs since the filing of the demurrer, and upon filing his new pleadings within the time required by the statute and rules of court.

Exceptions and demurrer sustained.
Repleader awarded on payment of costs.

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

ALBERT L. HOLMES and another

vs.

INHABITANTS OF PARIS.

Oxford. Opinion January 1, 1884.

Ways. Notice. Defect. Estoppel. Equitable construction of statutes.

A town is not entitled to the statutory notice (of twenty-four hours) of a defective road, before liability for an injury caused by it, in a case where the encumbrance causing the defect, is created by a surveyor while acting as a servant of the town. In such case the town is estopped from claiming the statutory notice.

Statutes may sometimes be equitably construed, to such an extent, even, as to give to them an effect in direct contravention of their literal terms.

Usually a thing within the letter is not deemed to be within the statute, if contrary to the intention of the statute.

ON EXCEPTIONS.

An action to recover damages sustained June 10, 1882, by reason of a defect in the road, leading from South Paris village to Hebron in the town of Paris.

The writ was dated February 3, 1883.

The defendant demurred to the writ on the ground that it did not allege that the municipal officers, highway surveyors or road commissioners of the defendant town had twenty-four hours actual notice of the defect or want of repair; and the exceptions were to the ruling of the court in overruling the demurrer.

Other material facts are stated in the opinion.

James S. Wright, for the plaintiffs, cited: *Brooks* v. *Somerville*, 106 Mass. 271; *Grimes* v. *Keene*, 52 N. H. 330; *Hubbard* v. *Concord*, 35 N. H. 52; 119 Mass. 273; *Howe* v. *Lowell*, 101 Mass. 99; *Hardy* v. *Keene*, 52 N. H. 370; 55 N. H. 132; *Hayden* v. *Attleborough*, 7 Gray, 338; 107 Mass. 232.

H. C. Davis, for the defendant, contended that the statute of 1877, c. 206, clearly and unequivocally provides that certain officers of the town therein mentioned shall have twenty-four hours actual notice of the existence of the defect before the town is liable under the statute for damages on account of injuries received in consequence of such defect. Not in a particular class of cases but in all cases is this notice requisite to entitle a person injured to maintain an action for damages on account of the injuries thus received.

Whether the law is reasonable or unreasonable is not a question for argument by counsel or adjudication by the court. "The duties and obligations of towns in reference to public highways are derived from statute and are restricted and limited by its express enactments." See also *Brady* v. *Lowell*, 3 Cush. 121; 9 Mass. 247; 126 Mass. 324; 127 Mass. 329; 2 N. H. 392; 36 N. H. 284; 1 Maine, 329; 52 Maine, 118; 51 Maine, 359; 67 Maine, 294; 4 Mass. 57; 16 Mass. 297; 1 Allen, 101, 172, 417; 10 Met. 108; 32 N. H. 435.

PETERS, C. J. This is an action against a town for an injury caused by an alleged defect in its highway. The declaration alleges that "heaps and piles of dirt" were deposited and left in the traveled way by the town surveyor in such condition and position as to render the way defective and unsafe. The statute requires a notice to a surveyor (or some municipal officer) for a period not less than twenty-four hours prior to an accident, to render the town liable. This accident occurred within twenty-four hours after the piles of dirt were deposited upon the way. The only question presented to us at this time, is, whether the twenty-four hours' notice is necessary, when the defect complained of is caused by the surveyor himself while acting as agent and servant of the town.

We incline to the opinion that the statute does not apply to a case such as this. In its literal terms, it does; in its purpose and intent, it does not. This particular provision of the statute was intended for another class of cases. Its purpose is to allow a town a reasonable opportunity to remove a defect after receiv-

ing information of its existence. Notice of a fact to a person who already knows the fact, cannot be useful. There can be no good reason for a town to have information from others of its own acts. When the reason of the law ceases, the law ceases. Twenty-four hours' time, is the length of notice when the town is entitled to notice — to any notice. If the deposits complained of by the plaintiff were left by the surveyor for the purpose of repairing or reconstructing the road, they might not be an unlawful encumbrance. Necessity or accident might be an excuse for their being temporarily there. But if they constituted an unlawful encumbrance, rendering the road defective and unsafe, and there was at the time no excuse or justification for the act of the surveyor, we think the town is estopped from claiming the statutory notice.

Statutes are often in some respects literally deficient by reason of their generality. They are necessarily expressed in general terms. All cases that may arise under them cannot be anticipated. Therefore there must be some flexibility in their interpretation and application to facts. There must be some power and discretion in the courts to consider probable purposes, motives and results. Therefore it is that the common law, from its earliest time, has prescribed that statutes may be equitably interpreted. "Equity," says Lord COKE, "is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason hereof is that the law-makers could not set down all cases in express terms." The maxim contained in this definition came from the civil into the common law.

It has been repeatedly asserted, in both ancient and modern cases, that judges may in some cases decide upon a statute even in direct contravention of its terms; that they may depart from the letter in order to reach the spirit and intent of the act. Frequently has it been judicially said, that "a thing within the intention, is as much within the statute, as if it were within the

letter, and a thing within the letter is not within the statute, if contrary to the intention of it." In Bacon's Ab. (Statute, Rules of Construction) the rule is expressed in these terms: "A statute ought sometimes to have such an equitable construction as is contrary to the letter." The illustrations there given of the rule are pertinent to the present discussion.

The general current of authority runs the same way. Sedgw. on Stat. and Const. Law, 296; Liber's Hermenentics (3 ed. notes by Hammond), p. 283, and cases; *Margate Pier Co.* v. *Hannam*, 3 Barn. & Ald. *266; *Edwards* v. *Dick*, 4 *Idem*, *212; *People* v. *Utica Ins. Co.* 15 Johns. 358; *Jackson* v. *Collins*, 3 Cow. 89; *Whitney* v. *Whitney*, 14 Mass. 88, 92; *Brown* v. *Pendergust*, 7 Allen, 427, and cases there cited; *Winslow* v. *Kimball*, 25 Maine, 493; 2 Dillon's Mun. Cor. (3 ed.) § 1027 and notes. In *Brooks* v. *Somerville*, 106 Mass. 271, which was an action for an injury caused by a defective highway, it is said, "There could be no occasion to notify the defendants of their own acts." In *Monies* v. *Lynn*, 119 Mass. 273, another highway case, it is said: "There is no occasion to prove actual notice to a city or town of its own acts, or of acts which are constructively its own."

Exceptions overruled.

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

STATE OF MAINE *vs.* CLIFFORD J. HARRIMAN.

Lincoln. Opinion February 9, 1884.

Dogs. Domestic animals. R. S., c. 127, § 1.

Dogs are not recognized in the law as belonging to the class denominated "domestic animals."

One cannot be convicted under R. S., c. 127, § 1, (which relates to the killing or wounding of domestic animals) for killing a dog.

APPLETON, C. J., dissenting.

ON EXCEPTIONS by the respondent to the ruling of the court in overruling a demurrer to the indictment.

(Indictment.)

"State of Maine, Lincoln, ss.—At the Supreme Judicial Court begun and holden at Wiscasset, within and for the county of Lincoln, on the fourth Tuesday of October, in the year of our Lord one thousand eight hundred and eighty-two.

"The jurors for said state, upon their oath present, that Clifford Harriman, of Waldoboro, in said county of Lincoln, at Waldoboro in said county of Lincoln, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and eighty-two, with force and arms, one New Foundland dog, called 'Rich' of the value of one hundred dollars, of the goods and chattels of John D. Miller, then and there in the enclosure and immediate care of his master being, did then and there wilfully and maliciously kill and destroy, against the peace of said state, and contrary to the form of the statute in such case made and provided."

R. S. Partridge, county attorney, for the state.

J. E. Moore, for the defendant.

DANFORTH, J. Demurrer to an indictment found under R. S., c. 127, § 1, which provides for killing or wounding "domestic animals." The indictment alleges the killing a dog. Therefore the question involved is, not whether any particular dog or any number of dogs have become so domesticated as to be called domestic animals, but whether as a class they may properly be so called in distinction from that class known in law as *ferœ naturæ*. If the dog belongs to the latter class the indictment must fail for the statute does not cover that class. A distinction has been recognized in the law between the two classes from the origin of the common law, from the earliest date of authentic history, when the wealth of individuals was reckoned by the number of their flocks and herds.

That by the common law the dog belongs to the wild class of animals is recognized by all the authorities, and in that state he

was and is utterly worthless, his flesh even being unfit for food, so that legally he was said to have no intrinsic value and "though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the stealing them amounts to larceny." 4 Bl. Com. 236; 2 Bishop's Crim. Law, § 773. It is true that dogs have extensively become domesticated, so that it is usual and perhaps not an improper use of language to call them "domestic animals," but as they still retain in a great measure their natural propensities, they may more properly be called domestic animals with vicious habits. They still keep their wild characteristics which ally them to the class of animals *feræ naturæ*, so much so, that in their domestic state they furnish no support to the family, add nothing in a legal sense to the wealth of the community, are not inventoried as property of a debtor or dead man's estate, or as liable to taxation unless under a special provision of the statute; but when kept it is for pleasure, or if any usefulness is obtained from them it is founded upon this very ferocity natural to them by which they are made to serve as a watch or for hunting.

From his greater attachment to his master in the domestic state, from which arises a well founded expectation of his return when lost, the law gives the owner the right of reclamation, but in all other respects the owner has only that qualified property in him which he may have in wild animals generally.

These continuing instincts, from which arises the danger that he may at any time relapse into his savage state, have made it necessary in all states to have a code of laws peculiarly applicable to the dog and not applicable to domestic animals; not for the protection of his life, but rather for the protection of the community from his ferocity. *Smith* v. *Forehand*, 100 Mass. 140; 20 Albany Law Journal, 6. Under these laws the dog is recognized as property so far as to afford a civil remedy for an injury but seldom if ever any other. In many cases it is made lawful for a man to kill the dog of another, as when he becomes a public nuisance. 1 Bishop, Crim. Law, § 1080, and note; and in various other instances as provided in our own state. R. S., c. 30.

Thus it will be perceived that originally the dog belonged to the class of animals *ferœ naturæ*, and that up to the present time the law has treated him as continuing in that class and has never recognized him as belonging to the domestic class. The two statutes, c. 30, R. S., and c. 127, the first relating to dogs and the latter to domestic animals are so different that they cannot be reconciled. If a person is liable to be convicted for killing a dog under c. 127, he may be punished for what he has a legal right to do under c. 30.

But as dogs have never been recognized in the law as belonging to the class denominated "domestic animals," and as domestic animals alone are mentioned, it would be contrary to all rules of construction to extend the meaning of a statute so highly penal beyond its exact terms.

Exceptions and demurrer sustained.

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

DISSENTING OPINION BY

APPLETON, C. J. This is an indictment against the defendant for malicious mischief, under the provisions of R. S., c. 127, § 1, which provides that "whoever wilfully or maliciously kills, wounds, maims, disfigures or poisons any domestic animal . . shall be punished by imprisonment not more than four years, or by fine not exceeding five hundred dollars." It will be perceived that the largest discretion is allowed in regard to the punishment to be inflicted or the fine to be imposed.

The indictment alleges that the defendant on July 24, 1882, at Waldoboro, in the county of Lincoln, "with force and arms one Newfoundland dog, called 'Rich,' of the value of one hundred dollars of the goods and chattels of John D. Miller, then and there in the inclosure and immediate care of his master being, did then and there wilfully and maliciously kill and destroy, against the peace of said state and contrary to the form of the statute in such case made and provided."

To this the defendant has demurred, thereby admitting the truth of the allegations contained in the indictment.

The main question is whether a dog is a "domestic animal," for if he be, the defendant is guilty by his own admission and should be held criminally liable.

A dog is the subject of ownership. Trespass will lie for an injury to him. Trover is maintainable for his conversion. Replevin will restore him to the possession of his master. He may be bought and sold. An action may be had for his price. The owner has all the remedies for the vindication of his rights of property in this animal as in any other species of personal property he may possess.

He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been there has been his dog. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master — accompanying him in his walks, his servant, aiding him in his hunting, the playmate of his children — an inmate of his house, protecting it against all assailants.

It may be said that he was "*ferœ naturœ*" but all animals, naturalists say, were originally "*ferœ naturœ*," but have been reclaimed by man, as horses, sheep or cattle, but however tamed, they have never like the dog, become domesticated in the home under the roof and by the fireside of their master.

The dog was a part of the agricultural establishment of the Romans and is treated of as such. There were the *canes villatici* to guard the villa of the Roman senator, the *canes venatici* accompanying him in his hunting expeditions, and the *canes pastorales* by whom his flocks were guarded. Virgil in his Georgics, has given direction as to their management and education. To-day, in many countries they are used for draught, as in France and Holland, and every where regarded as possessing value and as the subject matter of traffic.

The language of the statute is most general, "*any* domestic animal." The words are not technical or words of art. They are the words of the common people and should be construed as such. Nothing would more astonish the people for whom the laws are made than to learn that a bull or a hog was a domestic animal and that a dog was not.

The lexicographers define a dog as a "domestic animal." "A well known domestic animal." Johnson's Dictionary. "A well known domestic animal of the genus *canis*." Worcester's Dictionary. In Bouvier's Law Dictionary, he is defined as "a well known domestic animal." Olway the poet, says of them,

> "They are honest creatures
> And ne'er betray their masters, never fawn
> On any they love not."

So, in the encyclopedias he is *canis familiaris*, and called a domestic animal; so that in the ordinary use of language he is within the clear provisions of the statute under which this indictment was found. "The *domestic* dog has occasioned many legal disputes and the presumption of the common law of England is that he is tame." Campbell on Negligence, § 27.

By R. S., c. 6, § 5, a tax is imposed on dogs. This is a distinct and statutory recognition of their being property and having value, and that the owner has the same rights to their protection that he has for anything else he may own. In New York, dogs were taxed and this was held to be a statutory recognition of them as property and that they were the subjects of larceny. In *The People* v. *Maloney*, 1 Park, (N. Y.) Cr. 598, the court say that if there was no statute on the subject, they should feel bound by the rules of the common law, but "the revised statutes are inconsistent with the common law rule. By them dogs are so far regarded as property as to be in certain cases, the subject of taxation. The owner is made liable for the acts of his dog, thus recognizing that the dog has an owner and consequently that the thing owned is property. For every civil purpose, not only by statute, but by the decisions of courts, a dog is regarded as property." "All of the distinctions as to animals *ferœ naturæ*" observes SETTLE, J., "as to their generous and base natures,

which we find in the English books, will not hold good in this country. . . . . We take the true criterion to be the value of the animal, whether for the food of man, for its fur or otherwise."

In the present case the Newfoundland dog, "Rich," of the value of one hundred dollars, was "in the inclosure and immediate care of his master." He was domesticated.

Whether the property of the master was originally of a qualified nature or not is immaterial. The dog was under his dominion and control. "While this qualified property continues, it is as much under the protection of law as any other property and every invasion of it is redressed in the same manner." 2 Kent's Com. 349.

A dog being a "domestic animal" and property, an indictment is maintainable under R. S., c. 127, § 1, for his malicious destruction. When the statute made malicious mischief indictable, it was held that a dog was the subject of absolute property and the killing of one under the act prohibiting malicious mischief was an indictable offence. *State* v. *Sumner*, 2 Porter, (Ind.) 377. There is such property in dogs as to sustain an indictment for malicious mischief. *State* v. *Latham*, 13 Iredell, 33. In *State* v. *McDuffee*, 34 N. H. 523, which was like this, for maliciously shooting a dog, FOWLER, J., says, "We can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the wilful and malicious injury of the reckless and malignant, as property in fruit, shade or ornamental trees, whether standing in the garden or yard of their owner or in a public street, or any other species of personal property." Dogs have been included under "property" and their malicious destruction has been held indictable. 2 Wharton's Cr. Law, 1082. *A fortiori* is it so, when the owner is subject to taxation for his dog.

It is objected that the indictment does not describe the dog as "a domestic animal." But that is not required, if he be one, any more than it would be to say that a bull, a ram or a sow is a domestic animal. When the statute made it indictable "maliciously" to wound, kill, &c. any horse, cattle or other "domestic

beast," an indictment for wounding a hog, without averring that it was a "domestic beast" was held on the English authorities to be good. *The State* v. *Enslow*, 10 Iowa, 115. If the court will take cognizance that a hog or a bull is a domestic animal or beast without its averment in an indictment, much more will they that the dog is such animal.

Reliance is placed on R. S., c. 30, § § 2, 3 and 4, which impose certain liabilities on the owners of dogs. But these provisions, instead of sustaining, negative the defence. They imply ownership and liability on the part of the owner. They assume the relationship of the household. They recognize the domesticity of the dog — as having an owner or keeper, and of minors and servants as owners and keepers, and make the parent, guardian, master or mistress of such minor or servant responsible for the damages done by the dog so owned. The dog appertains to the household of which the master or mistress is made liable for his misdoings. The owner or keeper thus made responsible for the misdoings of his taxable dog or that of his children should not be left without legal protection when this property is wilfully and maliciously destroyed.

It is true that by § 2, any one may kill a dog under certain conditions therein set forth. But the very section impliedly negatives the right to kill except only when those conditions exist. By its provisions "any person may *lawfully* kill a dog that assaults him or any other person when *peaceably* walking or riding, &c. But it gives no general right to kill dogs. The killing is only *lawfully* done when the person killing is peaceably walking or riding, &c. and not otherwise.

It is said that "if a person is liable to be convicted for killing a dog under c. 127, he may be punished for what he has a legal right to, under c. 30." Not so. He cannot be punished under c. 127, if the killing was justified under the provisions of c. 30. The statutes are perfectly consistent.

But it is argued that the indictment should negative the authority to kill in the cases mentioned in § 2. Such is not the law. The indictment follows the statute. It sets forth clearly an offence. If committed, it is for the accused to establish a justification.

When the enacting clause of a penal statute describes the offence with certain exceptions it is necessary to state in the indictment all the circumstances which constitute the offence and to negative the exceptions. *State* v. *Keen*, 34 Maine, 501. But this principle is not applicable here.

It is to be remarked that the statute, c. 200, of the laws of 1877, requiring the licensing and registration of dogs and that they should wear a collar round the neck with the owner's name thereon, was repealed by c. 72, of the laws of 1878. If it would have been necessary, had the first named statute been in force to have set forth in the indictment, as in *State* v. *McDuffee*, 34 N. H. 527, the facts of such license and registration, which we think it was not, the statute being repealed, those allegations would no longer be required.

The decisions cited in support of the defence do not apply. In *Blair* v. *Forehand*, 100 Mass. 137, and in the other cases in Massachusetts, the killing of the dogs was justified under the police laws of the state authorizing the killing of dogs not licensed nor having a collar. But there are no such statutes in this state — hence their utter want of applicability.

Exceptions overruled.

NATHANIEL P. RICHARDSON, executor, in equity,

vs.

THOMAS H. RICHARDSON and others.

Cumberland. Opinion February 11, 1884.

Corporation. Dividend. Life-tenant. Divorce.

When a dividend upon its stock is declared by a corporation, payable in money, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life-tenant or remainder-man, without regard to the source from which, or the time during which, the profits and earnings were acquired by the company, and regardless of the size of the dividend.

The rule applies, though the dividend comes from assets set aside as a "renewal fund" by a gas-light company, the directors voting to convert the fund into a dividend to stockholders.

A bequest of stock, for her life-time, to the wife of a testator's nephew, the wife being described by her name, is not terminated because the nephew becomes divorced from his wife for her fault and she is married to another.

BILL IN EQUITY by the executor of the last will and testament of Israel Richardson against Thomas H. Richardson, Hannah Harris, Thomas Putnam Richardson, Albert Richardson, Edwina Maud Richardson, Julia Ann Horne, devisees under the will, Jesse Davis, assignee of said Hannah Harris, and the Portland Gas Light Company, to obtain the construction by the court of the fifth clause of the will which is sufficiently recited in the opinion.

Edwina Maud Richardson being under twenty-one years of age, H. R. Virgin was appointed guardian *ad litem*.

W. L. Putnam, for the executor.

J. and E. M. Rand, for Thomas H. Richardson.

Enoch Knight, for Hannah Harris, cited: Schouler's Domestic Relations, 300; Redf. Wills, 613, and cases cited; *Re Boddington*, 27 Albany Law Journal; *Barclay* v. *Wainewright*, 14 Ves. Jun. 66; *Price* v. *Anderson*, 15 Simon, 473; *Preston* v. *Mellville*, 16 Simon, 163; *Johnson* v. *Johnson*, 15 Jurist, 714; *Hooper* v. *Rossiter*, 1 McLean, 527; *Bates* v. *McKinley*, 31 Beavan, 280; *Dale* v. *Hayes*, 40 L. J. Ch. 244; *In re Hopkins*, Trust L. R. 18 Eq. 696; and *Murray* v. *Glasse*, 17 Jurist. 816; *Minot* v. *Paine*, 99 Mass. 101; *Deland* v. *Williams*, 101 Mass. 571; *Leland* v. *Hayden*, 102 Mass. 542; *Heard* v. *Eldredge*, 109 Mass. 258; *Gifford* v. *Thompson*, 115 Mass. 478, and cases cited; *Millen* v. *Guerrard*, Am. L. Reg. June, 1882.

H. R. Virgin, for himself, as guardian *ad litem* of Edwina Maud Richardson, contended that the dividend of twenty-five dollars a share should be considered an accretion to the capital and only the income from the same paid over to the life-tenant. The rule was early settled in England. *Brander* v. *Brander*, 4

Ves. Jun. 800; *Paris* v. *Paris*, 10 Ves. Jun. 184; *Witts* v. *Steere*, 13 Ves. Jun. 363.

Later English cases and Massachusetts cases reviewed by counsel seem to throw some doubt upon the question.

In New York, New Jersey and Pennsylvania the courts have adopted the rule contended for by the counsel for the life-tenant in the early English cases, viz: that the time when the profits were earned determines whether the dividends should be deemed income or capital. If earned prior to the inception of the life-tenancy, then to be considered capital and to be invested and the income only to be paid to the life-tenant; if earned subsequently, then to be considered as income and to be the absolute property of the life-tenant; but if earned partly before and partly after such inception, then to be divided proportionally between income and capital. *Simpson* v. *Moore*, 30 Barb. 637; *Van Doren* v. *Olden*, 4 C. E. Green, 176; *Earp's Appeal*, 28 *Id.* 368.

Counsel commented upon the authorities cited and referred to and upon 2 Perry, Trusts, § 545, note 1; *Crawford* v. *North Eastern Ry.* 3 K. & J. 723; *Williston* v. *Michigan, &c. Ry.* 13 Allen, 400; *Rand* v. *Hubbell*, 115 Mass. 461; *Coleman* v. *Columbia Oil Co.* 51 Penn. St. 74; *Granger* v. *Bassett*, 98 Mass. 462; *March* v. *Eastern R. R.* 43 N. H. 515; and submitted that the size of the dividend nor the time when earned was not the true test; but contended that the true rule was "that the substance and intent of the action of the corporation as shown by its votes in the light of the surrounding circumstances determine the character of the dividend." That the court should not curtail its powers by laying down a rule preventing its looking behind the votes of the corporation.

It is a question concerning the integrity of a trust fund, which is the especial charge of a court of equity, and it is difficult to see how a court can lay down a rule which shall preclude it from following such a fund to its source and keeping it in view all the time. The reason that it is impracticable is not satisfactory, nor does it prove so, for the courts of New York, New Jersey and Pennsylvania do not hesitate to hunt back such funds when occasion demands it.

Counsel then contended in an able argument that the dividend of twenty-five dollars a share was one which, being tested by the rule contended for, by tracing it to its source and ascertaining the substance and intent of the Gas Company, in the light of the circumstances ascertained, went to the remainder-men as capital and should be invested as such and only the income therefrom paid over to the life-tenant.

PETERS, C. J. This case presents the following facts: Israel Richardson died in March, 1867, leaving a will which contains these provisions: "I give and bequeath to Hannah Richardson, wife of Thomas H. Richardson, of Norway, in the state of Maine, during her natural life, the income or dividends from my stock or shares in the Portland Gas Light Company; and after the decease of said Hannah, I give and bequeath said income or dividends, during his natural life, to said Thomas H. Richardson; and from and after the decease of the said Hannah and of said Thomas H. I give and bequeath said income or dividends to the children of said Thomas H. and Hannah, to be paid to them until all of said children shall arrive at the age of twenty-one years;" the stock then to be divided among the children and their legal representatives. In December, 1879, Thomas was divorced from his wife Hannah, for desertion and other causes. She was afterwards married to Oscar A. Harris. Several children of Thomas and Hannah are now living. All interested parties are before the court by a bill in equity.

On May 1, 1882, the Gas Light Company passed the following vote: "Voted, that, in compliance with the urgent request of the city government, a special dividend be made of the renewal fund of this company, amounting to twenty-five dollars on each share, and that the same be payable, on and after July 2, to stockholders of this date." The testator at his death owned 286 shares, of the par value of $50 per share. We were informed at the argument that, since this bill was instituted, another dividend of an equal amount with the foregoing has been declared by the company.

Two questions of law are raised upon the foregoing facts. One is this: Is Hannah (Richardson) Harris deprived of the income of the shares because she is no longer Thomas H. Richardson's wife. Clearly not. The bequest to her is dependent upon no condition but her duration of life. The life estate is given in absolute and unequivocal terms. Naming her as the wife of Thomas H. Richardson was only to make clearer what Hannah Richardson was intended by the will. Nor is there a scintilla of expression from which the idea of trusteeship can be deduced,— nothing to show that it was a legacy to her for the benefit of others, either husband or children. In the best view of family exigencies presented to the mind of the testator when his will was signed, he decided to bestow this bounty upon the person who at that time was Thomas H. Richardson's wife; upon Hannah Richardson.

In behalf of the children of Thomas H. and Hannah Richardson, the heirs apparent, these positions are contended for by their counsel: That dividends, declared by corporations upon their stocks, payable in stock, belong to the capital or corpus; that ordinary and usual money dividends go to the income and belong to the life-tenant; that extraordinary and unusual money dividends go to capital; or, at least, that such a dividend as the one in question goes that way; that the present dividend is peculiar, special and extraordinary; and that it is of the nature of and equivalent to a stock dividend. These propositions have been ably argued by the counsel for the heirs.

The decided preponderance of authority probably concedes the point that dividends of stock go to the capital, under all ordinary circumstances. But we are well convinced that the general rule, deducible from the latest and wisest decisions, declares all money dividends to be profits and income, belonging to the tenant for life, including not only the usual annual dividend, but all extra dividends or bonuses payable in cash from the earnings of the company. We are satisfied that this can be the only safe, sound, just and practicable rule, and that any attempt to engraft refined and nice distinctions upon such rule

will be productive of much more evil than any good that can come from it.

And we would entirely reject the qualification of the rule admitted in some instances by some courts, that the life-tenant is not entitled to so much of the dividend as was earned in the lifetime of the testator. Too much difficulty and uncertainty would attend the practical operation of such a test. Nor do we appreciate any particular legal or moral merit in it. We think the true rule to be, that, when a dividend upon its stock is declared by a corporation, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life-tenant or remainder-man, without regard to the source from which or the time during which the profits and earnings divided were acquired by the company. *Goodwin* v. *Hardy*, 57 Maine, 143; See *Jermain* v. *Lake Shore and Mich. Sou. R. R. Co.* 91 N. Y. 483, and numerous cases in the opinion and arguments. We speak of a dividend of profits and earnings merely. It has been held that, when a corporation dissolves and winds up its affairs, and makes to its stockholders a dividend in cash, arising from all its assets, consisting in part of undivided earnings, the entire amount divided would be capital and not income. *Gifford* v. *Thompson*, 115 Mass. 478.

Should it be admitted that a dividend in stock would be regarded as capital, we do not perceive that the position of the heirs would be materially strengthened by the admission. In the case of a stock dividend, the earnings going to create the dividend belong to the stock — are a part of the capital — are strictly not detached from the capital — and, when thus divided, continue to be capital, in a new and more definite form. All undivided profits pass upon every sale or bequest of the stock or shares, as a mere incident or accessory thereto. Stockholders have individually no control or power over undivided profits,— cannot transfer or dispose of them or any part of them, until a a dividend be declared by a vote of the corporation. In most instances profits may be as valuable to the capital, in the form of funds on hand, as in the form of additional stock. In the case before us, the dividend is payable not in new capital, not in

stock, but in money payable on a certain day. The object of the vote, evidently, was, not to make more stock, but to relieve the stock of the incubus of so great an amount of funds on hand. The presumption is, that the surplus funds were in excess of the business needs of the company. We do not recognize in this dividend anything like a dividend of stock.

It is argued, that the dividend virtually comes from capital, because taken from assets designated by the company as a "renewal fund." But the directors are the best judges of the expediency of using the fund. They best know whether it is needed or not for such purpose. The vote is their decision that it is not needed by the company, and that it should be distributed to the shareholders. If they can, by their vote, determine when earnings shall be turned into stock, they surely can decide when the dividend may be money. Although the dividend amounts to fifty per cent. on the capital shares, our opinion is that it, and all dividends made, or to be made, like it, must be paid to the life-tenant. If in this she is fortunate to-day, she may have been exceedingly less so in the past, and no one can anticipate what may come of the morrow. The declaration of this dividend is a confession by the company, that her previous annual income has, from the caution of its officers, been too small, and is now made up to her. The present atones for the past.

An examination of the following authorities, a few of many that might be cited, and of the cases referred to in them, will clearly show the present drift of judicial and professional opinion upon the questions discussed by us; and will show that, by the great bulk of modern cases, since the law upon the subject matter has emerged from the fluctuations of its evolutionary period, our views as expressed in this discussion are thoroughly sustained. Bouv. Law Dic. (15th ed.) "Dividends;" 18 Alb. Law Jour. 264; 21 Am. Law Reg. 381; *Price* v. *Anderson*, 15 Sim. 473; *Bates* v. *Mackinley*, 31 Beav. 280; Barton's Trust, L. R. 5 Eq. 238; *Cogswell* v. *Cogswell*, 5 Edw. Ch. 231; *Lord* v. *Brooks*, 52 N. H. 72; *Moss' Appeal*, 83 Penn. St. 264 (S. C. 24 Amer. R. 169, note); *Minot* v. *Paine*, 99

Mass. 101; *Read* v. *Head*, 6 Allen, 174; *Rand* v. *Hubbell*, 115 Mass. 461, also cases *supra*.

We think it reasonable that the fund arising from the dividend, contribute toward the costs and expenses of the litigation. By this proceeding it ascertains its true owner. Before this the ownership was questionable.

Decree accordingly.

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

JOHN Q. TWITCHELL and others

vs.

WILLIAM O. BLANEY and another.

Hancock. Opinion February 12, 1884.

Insolvency. Appointment of assignee. Appeal.

No appeal lies from the decision of a judge of insolvency, refusing to confirm the election of an assignee chosen by creditors and ordering a new election. Remedy in such a case would be by bill in equity.

In the matter of appointments the judge of insolvency exercises a discretion, and his action therein is conclusive unless some palpable error or abuse of discretion be committed.

It is not enough to overrule the judge's decision that this court might have decided differently; or that the judge assigns not strictly legal reasons for his action; or that he acts upon grounds of expediency in ordering a new election; keeping a suitable person out of the office would not necessarily be an abuse of power, while keeping an unsuitable person in would be.

ON EXCEPTIONS.

Petition to review a certain order and decree of the judge of the court of insolvency.

(Petition.)

"Hancock, ss. S. J. Court. In the matter of Warren G. Savage, insolvent.

"To the Honorable Justices of the Supreme Judicial Court.

"Respectfully come John Q. Twitchell and James P. Champlin, both of Portland, in the county of Cumberland, copartners doing business at said Portland under the firm name and style of Twitchell, Champlin and Company, and, as well as in their own behalf as in behalf Albert Lewis, T. R. Savage and Company and Files and Jones, all of Bangor in the county of Penobscot, Hattie W. Savage of Ellsworth in the county of Hancock, Cousins and Tomlinson, Ivory L. Bean and Robert Chapman and Company, all of Portland aforesaid, file their petition in equity against William O. Blaney and Leroy S. Brown of Boston, Mass. copartners under the firm name and style of Blaney, Brown and Company, and hereupon allege and say:

"That on the seventh day of February, A. D. 1883, at a session of the insolvency court within and for said county of Hancock, having jurisdiction of proceedings in insolvency, Warren G. Savage of Ellsworth, in said county, upon his own petition was adjudged an insolvent debtor, and that on said seventh day of February a warrant of insolvency was issued out of said court of insolvency against the estate of said Warren G. Savage, and that at a session of said court at Bucksport, on the twentieth day of February, A. D. 1883, a meeting of the creditors of said insolvent to prove their claims and debts, and make choice of one or more assignees of said insolvents' estate, was duly called and held in the presence of said judge; that at said meeting the following creditors appeared by their attorney and proved their debts against said insolvent, which were allowed by said judge, to wit: Albert Lewis, T. R. Savage and Company, Hattie W. Savage, Files and Jones, Cousins and Tomlinson, Twitchell, Champlin and Company, Ivory S. Bean and Robert Chapman and Company, that said creditors and the several debts so proved by them constituted a greater part in number, of said creditors, and value of debts of the creditors present in person and by attorney who proved their debts and voted for assignee of said insolvent,

and that the aforesaid creditors voting as aforesaid, made choice of Charles D. Seaton of Portland, aforesaid, as assignee of the estate of said debtor, one creditor representing $1388 38-100 of proved debts voting for A. P. Wiswell, and all other creditors representing $2731 28-100 of proved debts voting for said Seaton; by reason whereof said Seaton was then and there duly chosen as assignee as aforesaid; that said judge refused to approve of said election of said Seaton, and ordered a new election, on the following grounds, and for the following alleged reasons, to wit:

"First,—Because said Seaton is a resident of Cumberland county. Second,—Because among the assets of said insolvent are certain goods and chattels which are claimed by the firm of Twitchell, Champlin and Company as their own peculiar property, and because said Seaton being the clerk and agent of said Twitchell, Champlin and Company, and the rights of said insolvent estate and of said Twitchell, Champlin and Company and of said creditors, to said goods and chattels being conflicting, said judge considered that said Seaton is unsuitable by reason of said interest, for said trust as assignee as aforesaid; that said new election has not been held nor has any order issued for the same; that said refusal to confirm said Seaton, and said order and decree were erroneous because said Seaton was duly elected assignee according to law, and because he is not in any way incapacitated from acting impartially as said assignee, and because there is no conflict between said Twitchell, Champlin and Company and the mass of creditors, but said Twitchell, Champlin and Company have been active in the interest of the mass of creditors, because said refusal and order were not made by said judge in the exercise of a sound discretion and according to law.

"Wherefore your petitioners pray this honorable court to review said order and decree, and correct the same and to give such relief to your petitioners in the premises as justice and equity require."

Subscribed and sworn to.

The exceptions were to the ruling of the court in dismissing the petition "for want of jurisdiction on the ground that the

remedy should be by appeal from the order of the judge of probate."

William L. Putnam and *George P. Dutton*, for the plaintiffs.

The complainants brought this bill in equity, for the purpose of testing whether the insolvent law was a local county law or a state law; whether it is to be practically interpreted differently in each county, or is to be a harmonious and uniform system for the whole state; whether the discretion at certain points vested in the judge of insolvency is a judicial discretion, or one to be exercised according to his personal whims, caprices, likes and dislikes; whether an amendent is required to the constitution of the state, in *pari passu* with the late amendments to the constitution of the United States, providing that a resident of any county in the state is entitled to all the rights of residents in all the counties of the state, and whether a resident of the county of Cumberland is to be ostracised in the county of Hancock in the insolvency court, in a matter in which no resident of the county of Hancock has any interest whatever, because of the mere fact that the insolvent debtor, who was hopelessly involved, and who has no interest in his estate, resides in that county.

On the question of appeal counsel cited: Stat. 1879, c. 154, § 2; *Harris* v. *Peabody*, 73 Maine, 262.

Hannibal E. Hamlin, for the defendants, cited: Stat. 1879, c. 154, § 3; *Smith* v. *Sullivan*, 71 Maine, 155; *In re Wallace*, 2 B. R. 52; *In re Hunt*, 2 B. R. 166; Stat. 24 and 25, Vict. c. 134, § 116; R. S., U. S. 1878, § § 5034, 5039; *Bates, ex parte*, 1 Ge G. Mac. & G. 452; 16 Jur. 459; 21 L. J. Bank, 20; 5 Jacobs' Fisher's Dig. 6882; 7 B. R. 145; *Woods* v. *Buckwell*, 7 B. R. 405; S. C. 2 Dillon, 38; Bump, Bankruptcy, (7 ed.) 330, 365, 437; *In re Adley Bros.* 2 Woods, 571; *In re Dewey*, 4 B. R. 139; S. C. Lowell, 493; *In re Blodgett and Sanford*, 5 B. R. 472; *In re Malroy*, 4 B. R. 38; *In re Funkenstein*, 1 Pac. L. J. 11; *In re Clairmont*, 1 B. R. 42; *Morgan* v. *Thornhill*, 5 B. R. 1; *Coit* v. *Robinson*, 9 B. R. 289.

PETERS, C. J. This is a petition in equity to review a proceeding of the court of insolvency. The creditors of an insolvent

choosing an assignee, the judge disapproved the choice and ordered a new election. The bill alleges the decree to be unreasonable, asks to have it vacated, and prays for such other relief as the facts justify.

Should the remedy have been by an appeal from the order of the court below, instead of by bill in equity? We think not. The original insolvent act, passed in 1878, may have been broad enough to allow an appeal in a case like this. But the amendment to the act in 1879, (c. 154, § 2, Laws of 1879,) provides that an appeal shall lie only in certain specified cases, and this is not one of those cases. There is an excellent reason why an appeal should not lie in the case. It would necessarily suspend further proceeding with the insolvent estate until the appeal be passed upon by the appellate court. But, under a bill in equity, the court can apply the remedy in such form and to such extent as may be demanded by the exigencies and justice of the case. This view of the law is taken in *Bassett* v. *Hutchinson*, 9 Allen, 199, under a similar statute and similar facts. The statutes of our state allow an appeal from the appointment of an administrator by the probate court, but, to avoid embarrassments arising from such appeal, the judge may appoint a special administrator in case of an appeal, and from the latter appointment an appeal is not allowed. R. S., (1871) c. 63, § 21.

The respondents deny that this court has jurisdiction to entertain a bill in equity to review the action of a judge of insolvency in the matter of official appointments. In our opinion, the insolvent act expressly permits it. It has been virtually so decided. *Harris* v. *Peabody*, 73 Maine, 262. It should be so. There should be some redress, in extreme cases at least, against the abuse of discretionary powers by inferior tribunals. Of course, the remedy must be sparingly and cautiously applied. The action of a judge in matters of discretion, and the appointment of or the refusal to appoint a particular person as assignee comes within his discretion,— is generally conclusive. There must be palpable error and abuse of discretion to justify our interference.

In our judgment, the facts of the present case do not justify the remedy asked for by the petitioners. The reasons given by

the judge for his action may not have been in strictness legal ones. But we cannot say there may not be some expediency in his position. The judge had a right to regard the assignee chosen by the creditors as not fitted for the place. His discretion, not ours, governs. It is not enough to overrule the judge's action, that this court might have acted differently upon the question. Nor does it disturb the result that he gave wrong reasons for a right action. Judge LOWELL thinks, in the matter of appointments, a judge in some cases may act upon a reasonable suspicion. *In re Clairmont*, 1 Low. Dec. 230; *Marvin* v. *Ins. Co.* 85 N. Y. 278; *Ex parte Bates*, 1 De G. M. & G. 452. A satisfactory answer to the complaint of the petitioners is, that by a new election a suitable person may still be chosen assignee. It makes a difference whether the judge keeps an unsuitable person in office, or merely keeps some particular person fitted for the trust out of office. In the former case the injury and abuse may be clear,—while in the latter case the mistake, if it be one, is easily cured. In the latter case, the facts should be of an extraordinary character and urgency to warrant our supervising the action of the judge. No such occasion appears here. See *Snow* v. *Weeks*, 75 Maine, 105.

Exceptions overruled.

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

HORACE E. BUCK, executor, in equity,

vs.

ALBERT W. PAINE and others.

Penobscot. Opinion February 12, 1884.

Will. Trust. Construction. Husband. Heirs. Shelley's case. Costs.

A testator left to trustees an estate for his grandchild; the trust to continue three years; during the three years the trustees to possess and manage the

property and its income, and provide for and pay over to the grandchild at their discretion; at the end of three years the estate to pass to the possession of the grandchild, if then alive; and, "if the grandchild die before the trust ceases, her legal heirs to be substituted in place of deceased in every respect." The grandchild died within the three years, devising all her estate to her husband and others. *Held:*

1. That at the grandfather's death an equitable fee-simple, conditional, passed to and vested in the grandchild; that she could convey or devise such equitable fee, subject to its being defeated by the happening of the condition:

2. That by her death within the three years the condition took effect, terminating her equitable fee, and that the estate thereby passed to her legal heirs as an executory devise:

3. That the words of the will clearly enough create a conditional fee; no particular, or set, or technical words being necessary to create a condition; a common sense construction of the words governs:

4. That the condition subsequent is not repugnant to the prior gift, in the legal sense of the term repugnancy; it is more than repugnant — cuts deeper — overrules and controls:

5. That the granddaughter's husband is not one of her legal heirs, in the sense of the devise over to her legal heirs.

6. That the ancient rule that a limitation over to one's heirs is void, does not apply to these facts; the devise over is not to the testator's heirs, but to the heirs of his grandchild.

The rule in *Shelley's case* has been abolished in this state. R. S. c. 73, § 6.

The costs of this litigation are properly allowable as a charge upon the estate in controversy, under the peculiar circumstances of the case.

On BILL IN EQUITY, by the executor of the last will and testament of Susan H. Buck, the deceased wife of the complainant, whose maiden name was Susan H. Rich, against Albert W. Paine and Thomas A. Rich, executors and trustees under the last will and testament of Sylvanus Rich, and Mary F. Rich and Thomas S. Rich, legatees. The bill was brought to obtain a construction of the will of Sylvanus Rich, and the case was heard on bill, answer and proof.

Barker, Vose and Barker, for the plaintiff.

The case shows that though the will was made some years prior to the death of testator, it was at a time when the testator was very sick, not expected to live, and his children for whose benefit the trust was created were young — one of them lacked about three years of her majority and all were in good health. The only change effected by the will was occasioned by some

trifling bequests and the provision placing the portion of his estate which would descend by law to the children in the hands of trustees. These circumstances clearly show the purpose and intent of the testator.

There are so many authorities upon the construction of wills, one feels like saying as Lord COKE said more than two hundred years ago, "Wills and their construction of them do more perplex a man than any other learning." Some learned judge has said "every will is a law unto itself." The general rule laid down by all authors is tersely stated as follows:

"The intention of the testator is the first and great object of inquiry and to this object technical rules are to a certain extent made subservient." 4 Kent's Com. * 535. See *Brown* v. *Merrill*, 131 Mass. 324.

The legal import of technical language in working a limitation is not to prevail against the manifest intention of the testator, as gathered from the language used, the circumstances of the testator and the subject matter of the bequest. *Hodgson* v. *Ambrose*, 1 Dougl. 337; *Doe* v. *Applin*, 4 T. R. 82; *Smith* v. *Bell*, 6 Pet. 75; *Crocker* v. *Crocker*, 11 Pick. 256; *Holman* v. *Price*, 37 Am. R. 616; *Lassiter* v. *Wood*, 63 N. C. 360; *Richardson* v. *Noyes*, 2 Mass. 58; *Ramsdell* v. *Ramsdell*, 21 Maine, 292; *Cook* v. *Holmes*, 11 Mass. 528.

As in the case last cited so in this case; seeking to divide his property equally, Captain Rich never intended to give one-half absolutely to his son and the other limited to his grandchildren any further than such limitation was necessary to protect the estate till they could control it.

The court in *Lord* v. *Bourne*, 63 Maine, 368, construe the term "legal heirs," and that construction excludes the husband. The court, however, add: "But this is only the *prima facie* construction which may be repelled by evidence of a contrary intention of the testator."

Captain Rich made his will in 1872, before the opinion in *Lord* v. *Bourne*. The only case in this state which had then been reported was *Mace* v. *Cushman*, 45 Maine, 250, which held exactly the reverse of the decision in *Lord* v. *Bourne*.

Any examination of the authorities in this state at the time this will was made, and from such an examination only could an opinion have been given, would have established the fact that a husband of said Susan would have been entitled to his portion of the estate under the strict interpretation of the limitation. May not Captain Rich have acted under this impression? Upon this point see *Cushman* v. *Horton*, 10 Alb. L. J. 124; *Bunnell* v. *Evans*, 14 Alb. L. J. 251; 28 Alb. L. J. 379; *Urich's Appeal*, 27 Am. R. 708; 4 Kent's Com. * 216.

The legacy vested in Susan H. Rich. The general rule seems to be that an estate is vested when there is a present fixed right of future enjoyment. The law favors vested estates and no remainder will be construed to be contingent which may consistently with the intention be deemed vested. 4 Kent's Com. * 202, * 203; *Ewer* v. *Jones*, 2 Salk. 415; *Kimball* v. *Crocker*, 53 Maine, 263; 2 Blackstone's Com. 513; *Eldridge* v. *Eldridge*, 9 Cush. 516: *Shattuck* v. *Stedman*, 2 Pick. 468; 25 Alb. L. J. 196; *Folk* v. *Whitley*, 8 Iredell, 133; *Sanderlin* v. *Deford*, 2 Jones, 74; *Coon* v. *Rice*, 7 Iredell, 217; *McBee ex parte*, 63 N. C. 332; *Worrell* v. *Vinson*, 5 Jones, 91; *Zollicoffer* v. *Zollicoffer*, 4 Dev. & Bat. 438; *Ide* v. *Ide*, 5 Mass. 500; *Ellis* v. *Page*, 7 Cush. 161; 4 Kent's Com. * 507.

A. W. Paine, for the defendants, cited: *Morton* v. *Barrett*, 22 Maine, 257; *Doe* v. *Perratt*, 5 B. & C. 48; *Fisk* v. *Keene*, 35 Maine, 349; *Deering* v. *Adams*, 37 Maine, 264; *Shaw* v. *Hussey*, 41 Maine, 495; *Cotton* v. *Smithwick*, 66 Maine, 360; *Nutter* v. *Vickery*, 64 Maine, 490; *Lord* v. *Bourne*, 63 Maine, 368; *Lombard* v. *Boyden*, 5 Allen, 249; *Loring* v. *Thorndike*, 5 Allen, 257; *Clarke* v. *Cordis*, 4 Allen, 466; *Bassett* v. *Granger*, 100 Mass. 348; *Daggett* v. *Slack*, 8 Met. 450; *Holbrook* v. *Harrington*, 16 Gray, 104; *Tillinghast* v. *Cook*, 9 Met. 146; Wigram, Interpretation of Wills, 15; *Putnum* v. *Gleason*, 99 Mass. 454; *Haley* v. *Boston*, 108 Mass. 576; *Minot* v. *Harris*, 132 Mass. 528; *Albee* v. *Carpenter*, 12 Cush. 382; *Houghton* v. *Kendall*, 7 Allen, 72;

Mace v. *Cushman*, 45 Maine, 250; *Sweet* v. *Dutton*, 109 Mass. 589; *Brown* v. *Bartlett*, 58 N. H. 511; *Smith* v. *Bell*, 6 Pet. 75; *Sheffield* v. *Lovering*, 12 Mass. 490; *Read* v. *Fogg*, 60 Maine, 479; *Read* v. *Hilton*, 68 Maine, 139; *Hun*, v. *Hall*, 37 Maine, 363; *Bowers* v. *Porter*, 4 Pick. 198; *White* v. *Woodbury*, 9 Pick. 136; *Richardson* v. *Wheatland*, 7 Met. 169; *Putnam* v. *Story*, 132 Mass. 205; 4 Kent's Com. 302; *Loring* v. *Eliot*, 16 Gray, 573; *Angell, guardian*, 13 R. I. 630; 9 How. 196; *Tallman* v. *Wood*, 26 Wend. 9; *Wood* v. *Burnham*, 6 Paige, 513; Hill on Trustees, * 328;

PETERS, C. J. This is a bill instituted to obtain the legal construction of the following clauses of Sylvanus Rich's will:

"To Albert W. Paine and Thomas A. Rich, I do give the other half part of all the residue and remainder of my estate, real and personal, subject only to the payment of the other half of my said debts and funeral charges. To have and to hold the same to them, the said Paine and Rich, and the survivor of them and their heirs and assigns forever in trust, for the equal use and benefit of my two grandchildren, Thomas S. and Susan H. Rich, children of my deceased son Henry S. Rich, for the term three years, at the end of which time the trust shall cease, and each one's share shall then go to said children respectively, together with all the net earnings and income thereof not already then paid or delivered to them respectively. My said trustees are to have the entire control and disposition of said half part of said remainder, see to its care and investment, with full power to sell and convey any part of it as they may think proper and best for the interest of all concerned. They may from time to time pay or deliver over to said beneficiaries so much and such part of the said estate thus in their hands, as they may think prudent, and their receipts therefor shall be sufficient vouchers in probate."

"If either of said children die before the trust ceases, his or her legal heirs shall be substituted in the place of deceased in every respect."

One of the "children," Susan H. Rich, died within three years after the death of the testator, disposing of her estate by her will. The question is, whether any interest in her grand-

father's estate passed to her husband and others by her will. We think not. She dying within the three years named, during the continuance of the trust, her death terminated all her interest and right therein. Her attempted devise of a portion of her grandfather's estate fails.

The intention of the testator, Sylvanus Rich, is clear. The use of different words could hardly make it clearer. The estate was to remain in trust for three years; the grandchildren were to depend upon the judgment and discretion of the trustees for the reception of any needed bounty or support during that time; if they survived the testator for three years, they were to receive a full legal fee; otherwise, the estate was to go over to their legal heirs.

The complainant contends that the condition was reasonable as seen at the date of the will, and unreasonable as seen at the date of the testator's death; that the testator was thinking of the condition of the legatee as a minor, and not of her when she would be of age. That may be so. Changes in life making changes in wills desirable supervene in many cases more rapidly than they are realized. Events come swiftly and men move slowly. But we are not permitted to frustrate the intention as found recorded in the will.

The complainant contends that the will of Sylvanus Rich passed a fee to his grandchild, the complainant's wife. There can be no doubt of that. At the testator's death an equitable fee passed to and vested in the devisee. It was a present and not a future gift. The power lodged with the trustees demonstrates the correctness of this view. Rop. Leg. * 553; *Leighton* v. *Leighton*, 58 Maine, 63; *Verrill* v. *Weymouth*, 68 Maine, 318.

The complainant further contends that his wife having an equitable vested fee, she could convey or devise it. The correctness of this view is not to be denied. The misfortune of the complainant is, however, that by the death of his wife within the three years, no estate was left in his wife to be transmitted by her will. Her death, during the continuance of the trust, terminated and defeated the fee. She took under the will an equitable fee, but with a condition subsequent annexed

to such fee, and by the happening of the condition her estate ended. The testator, the grandfather, in his will distinctly declares that, in case of her death before the trust ceases, her legal heirs shall be substituted in her place in every respect.

An estate, subject to a condition subsequent, may descend in the same manner as an indefeasible estate, but the heir (or devisee, or grantee) takes it with the condition annexed. Here the complainant's wife took an equitable fee, and, by her death during the three years named in the will, the estate went over to her heirs as an executory devise. When an estate is devised in fee, with a devise of it over upon the happening of a certain event, the first devisee takes an estate in fee simple conditional, and the devise over takes effect as an executory devise. *Fisk* v. *Keene*, 35 Maine, 349; 2 Red. Wills, 645. Roper calls the estate received by the first taker "an estate vesting *sub modo*, a species of conditional legacy or devise, subject to be divested on the happening of the contingency on which it is given." 1 Rop. Leg. * 601.

The words of the will clearly enough create a conditional devise only. No particular or set or technical words are necessary to create a condition. A common sense construction of the words governs. The expressive word here, the word "if", is quite commonly employed to express a condition. The words "shall be substituted" have an unmistakable meaning in their place. It would be a perversion of the common meaning of common words to deny the testator's intention to create a conditional devise. The books abound with cases that are in principle like the case at bar; showing that the happening of the subsequent condition defeats the precedent estate, although a vested estate. *Richardson* v. *Noyes*, 2 Mass. 56; *Brightman* v. *Brightman*, 100 Mass. 238; 1 Rop. Leg. * 766 and cases; *Idem*, * 601 and cases; 1 Jar. Wills * 848, * 864.

But it is contended that the condition subsequent is repugnant to the prior gift of an equitable fee, and therefore void. In one sense it may be regarded as repugnant. Not in a legal sense, however. It is not an illegal repugnancy. The objection of repugnancy in its proper sense does not apply. It is repugnant

in the sense that a condition in a mortgage is repugnant to the prior granting of a fee. It is different from what is understood as repugnancy; it is more than that; it cuts deeper; it controls and overrules. It is no more repugnant than any other condition subsequent is. A limitation over is void where there is a clear intention of the testator that the first taker shall have an absolute estate. Absolute property gives absolute dominion. You cannot first give an absolute property, and then provide what such absolute owner shall do with it. In the will before us an absolute property is not given — it is given conditionally — given upon a contingency. See for illustrations of the proper distinction, the following authorities: *Stuart* v. *Walker*, 72 Maine, 145; *Copeland* v. *Barron*, *Idem*, 206; 1 Rop. Leg. * 785; 2 Red. Wills, 667; see also, *Hooper* v. *Bradbury*, 133 Mass. 303; and *Broadway National Bank* v. *Adams*, *Id.* 170.

The husband of the devisee cannot be considered one of her legal heirs, in the sense of the term as used in the devise over to "legal heirs". *Lord* v. *Bourne*, 63 Maine, 368.

The ancient rule, invoked by the complainant, that the limitation over is void because to heirs and not to strangers, does not apply. The reason of that rule is that the title by descent is considered the worthier title. And the estate would descend to the heirs in case of forfeiture, whether there was a limitation or not. But here the limitation is not to the testator's heirs. His own heirs are not to come in. The limitation is to the heirs of his grandchildren. For this reason, and other reasons could be added, this point fails the complainant. *Randall* v. *Marble*, 69 Maine, 310; *Lord* v. *Bourne*, *supra*.

The rule in *Shelley's case* has been abolished in this state. R. S., c. 73, § 6.

We think the costs of these proceedings may properly be decreed to be a charge upon the estate in controversy.

Decree according to the opinion.

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

STATE OF MAINE *vs.* MARGARET BENNETT.

Cumberland. Opinion February 13, 1884.

Exceptions.

Exceptions will not be sustained when it is apparent that the excepting party could not have been injured by the rulings to which exceptions are taken.

ON EXCEPTIONS from superior court.

An indictment under R. S., c. 17, §1, for keeping and maintaining a common nuisance.

Ardon W. Coombs, county attorney, for the state.

George H. Townsend, for the defendant.

APPLETON, C. J. Nothing is better settled than that exceptions will not be sustained when it is apparent that the excepting party could not have been injured by the rulings to which exceptions are taken.

A witness was called, to whom the following questions were proposed and the answers excluded. "Have you been arrested charged with theft? Have you ever been arrested charged with any crime? Have you ever been arrested charged with stealing?"

Subsequently, during the progress of the trial, the witness was asked if he was "the same Frank R. Adams who was convicted in the municipal court of Portland, June 24, 1881, for larceny," to which he answered "I was confined there." He was then asked "are you the same one?" to which he replied, "I suppose I am."

It is immaterial to consider the propriety of the rulings first made inasmuch as the questions first proposed were all substantially answered without objection before the close of the trial.

Exceptions overruled.

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

STATE OF MAINE

vs.

MARY L. GARING *alias* MADAM LOPEZ.

Cumberland. Opinion February 13, 1884.

House of ill fame. Evidence.

Upon a trial of one indicted for keeping a house of ill fame it is admissible to prove that there were girls in the house, and that men and women were taken there at all hours of the night.

In such a case when a witness had testified that he stopped all night with a girl, one of the inmates, in the house, it is admissible to show that he soon after suffered from a disease.

In such a case it is admissible to show conversation in the house by its inmates in the presence of the respondent.

ON EXCEPTIONS from superior court.

An indictment under R. S., c. 124, § 9, charging the respondent with keeping a house of ill fame at Portland, from May 15, 1882, till the May term of court, 1883.

Ardon W. Coombs, county attorney, for the state, cited: *State* v. *Carson*, 66 Maine, 116; Whar. Cr. Law, § 809; Whar. Ev. § 541; *Lohman* v. *The People*, 1 Comst. (N. Y.) 379; *Com.* v. *Savory*, 10 Cush. 535; *Smith* v. *Castles*, 1 Gray, 109; 1 Starkie, Ev. § 143; 1 Greenl. Ev. § § 459, 456, 460; 2 Phil. Ev. (C. & H. 4 Am. ed.) 939; *State* v. *Staples*, 47 N. H. 113; *Com.* v. *Kelley*, 113 Mass. 454; *State* v. *Benner*, 64 Maine, 267; Stephens, Ev. 185, 237; *Com.* v. *Sliney*, 126 Mass. 49; *Com.* v. *Kimball*, 7 Gray, 330; *Allen* v. *Lawrence*, 64 Maine, 175; *State* v. *Smith*, 65 Maine, 257; *Merrill* v. *Merrill*, 67 Maine, 75.

H. D. Hadlock, for the defendant, contended that the testimony admitted against defendant's objections was immaterial and irrelevant and should not have been allowed to prejudice the

respondent, "and the reason is that such testimony tends to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them." 1 Greenl. Ev. § 52.

Also that it was the right of the respondent to inquire of the government witness if he had ever been arrested. "There is certainly great force in the argument that when a man's liberty or his life depends upon the testimony of another it is of infinite importance that those who are to decide upon that testimony should know to the greatest extent how far the witness is to be trusted." 1 Greenl. Ev. § 455; 1 Whar. Ev. § § 544, 567; 2 Best, Ev. § 546; 1 Starkie, Ev. § 143; *Wilbur* v. *Flood*, 16 Mich. 40; Cox, Cr. Law Cas. 76; 48 Cal. 335; *Harris* v. *Tippett*, 2 Camp. 638; *Shephard* v. *Parker*, 36 N. Y. 517; *Cundell* v. *Pratt*, 1 M. &. M. 108; *Real* v. *The People*, 42 N. Y. 270; *Hall* v. *State*, 40 Ala. 698; *The People* v. *Blakeley*, 4 Park. (N. Y.) Cr. 176; *State* v. *Patterson*, 2 Ired. 346; *State* v. *Wentworth*, 65 Maine, 241; *Cloyes* v. *Thayer*, 3 Hill, (N. Y.) 564; *Ward* v. *The People*, 6 Hill, (N. Y.) 144; *The State* v. *Foster*, 3 Foster, 348; *Brandon* v. *The People*, 42 N. Y. 265.

Comments of a court in the presence of a jury even upon a correct ruling are cause for a new trial when such comments suggest to the jury the opinion of the court upon a question of fact. *Carne* v. *Litchfield*, 2 Mich. 340.

APPLETON, C. J. The defendant was indicted under the provisions of R. S., c. 124, § 9, for keeping a house of ill fame resorted to for the purpose of prostitution or lewdness, of which offence she was convicted.

Exceptions were duly alleged to the rulings of the presiding justice, which have been elaborately argued.

I. The government called various witnesses to prove that there were girls in the house, and that men and women were taken there at all hours of the night. This was to show that persons of both sexes resorted at all hours of the night to the defendant's house. Without such resorting the offence could not be committed.

II. A sailor was called who testified that he stopped at the defendant's with a girl residing there, that after sailing from

Portland to Philadelphia he found he had a disease. As to what might be the character of the disease, no inquiry was made by the counsel for the defendant. That shortly after leaving the defendant's house, he found himself diseased was a fact which the jury might well consider, particularly when the vigilant counsel for the prisoner made no inquiries as to the length of time he had been diseased nor as to the nature of the disease.

III. While a witness was not allowed to answer the questions whether he had ever been arrested or tried for any offence, he was subsequently permitted to testify in answer to the inquiry of the prisoner's counsel, that he was never convicted to his knowledge and was never tried by any court. The defendant is bound by the answers to his counsel's inquiries and it matters little whether they were given on the occasion of the first or the second time the questions were proposed. His questions were answered.

IV. What was said in the house by its inmates in the presence of the mistress was properly admissible.

V. The defendant called Mrs. Stevens, who testified that she was a member of the Women's Christian Temperance Union; that she was connected with the home for fallen women; that she visited defendant's house for a benevolent purpose, and that she saw nothing improper. After the evidence had been received, the defendant's counsel moved it be stricken out, which the judge granted to be done — and gave him the liberty of having it in or out at his option — which certainly affords him no cause of complaint.

VI. The remark of the presiding judge in reference to the striking out of the evidence of Mrs. Stevens, that ladies did not visit his house for the purpose indicated by her and that the testimony was stricken out at his request was an incidental remark in no way affecting the issue — and affords no reasonable ground for disturbing the verdict.

Exceptions overruled.

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

JAMES D. MATTHEWS *vs.* JAMES M. TREAT.

Waldo. Opinion February 15, 1884.

Fishing privilege. Pleadings. "Close." Amendment.

The owner of the soil between high and low water mark has the exclusive right to catch fish by means of fixtures attached to such soil. This right he may convey with or without the upland and with such limitations and qualifications as he sees fit.

The owner of an exclusive right to catch fish by means of fixtures attached to the soil within certain limits may maintain an action of the case for damages sustained against one who infringes upon that right by erecting upon or attaching to the soil like fixtures within the prescribed limits.

In such an action where the declaration was technically that of trespass *q. c.* charging that the defendant "with force and arms broke and entered the plaintiff's close," followed by a description of the premises, *Held*; that using the word "close" in its more comprehensive sense as indicated here by the words "fishery and fishing privilege" following, is not entirely inappropriate in an action on the case, and as the person and case could be rightly understood an amendment if necessary would be allowed.

ON REPORT.

An action to recover damages for infringing upon the plaintiff's exclusive right of fishing within certain limits on the southerly side of Cape Jellison in Stockton. The writ was dated March 25, 1882.

(Declaration.)

"In a plea of trespass for that the said defendant on the first day of April, A. D. 1880, now last past, and on divers days and times between that day and the date of this writ with force and arms broke and entered the plaintiff's close, fishery and fishing privilege, situated in said Stockton on the southerly side of Cape Jellison, beginning on the south-easterly and up-river corner of plaintiff's homestead lot on the Penobscot bay in said county, on the shore of said bay, and extending by the shore of said bay, down said bay one hundred and fifty rods westerly and southerly

to the southernmost extremity of Squam Point Ledge (so called) with the exclusive right of taking salmon, shad and alewives on said premises, and of all the privileges necessary to carry on said fishery, on which premises near the up-river line of the same the plaintiff has annually erected his fish weirs and used them in taking said three kinds of fish, worth to him annually net two hundred dollars a year, without defendant's interference, and the said defendant well knowing the same, and intending to injure and destroy the plaintiff's said business and to convert the same to his own use and benefit, with force and arms aforesaid and against the plaintiff's remonstrance then and there broke, erected and maintained during the whole fishing season each year a close, built two substantial fish weirs, each year aforesaid, extending from the shore fifty rods and more into the bay aforesaid at or near a big rock just far enough below and down river of the plaintiff's weir to catch all or nearly all the said fish, which would have been caught in the plaintiff's weir, but for the said erection and maintenance of the said defendant's fish weir on said plaintiff's privileges used by him as aforesaid for the purpose of destroying said plaintiff's fishing business, and driving him out of the business and converting the same to his own use.

"Also for that the said defendant on the first day of April, A. D. 1880 and 1881, and on divers days and times between that time and the date of this writ with force and arms broke and entered the plaintiff's close and fishing privilege aforesaid at Stockton aforesaid, and then and there erected and maintained on said plaintiff's fishing privilege during all said fishing seasons two fish weirs, each year, on the up-river side of the southernmost extremity of Squam Point Ledge (so called) or near the southern line of said plaintiff's premises but within his boundary and on his premises, in which weirs said defendant caught a large amount of salmon, shad and alewives, last aforesaid seasons, that would but for said defendant's weir have come into and been caught in said plaintiff's weir built by him the said years on his own premises aforesaid and up-river and above said defendant's said weir.

"And the plaintiff avers that said defendant wilfully and wickedly built and maintained said weirs on plaintiff's said premises for the express purpose of destroying his fishing business and thereby depriving him of the value of said premises, and threatens to continue to so destroy said plaintiff's fishing business, in future of said plaintiff. To the damage of said plaintiff as he says, in the sum of four hundred dollars."

A. G. Jewett, for the plaintiff, cited: *Duncan* v. *Sylvester*, 24 Maine, 482; *Treat* v. *Strickland*, 23 Maine, 234; *Rex* v. *Oldanlesford*, 1 T. R; Eastman's Dig. 353; Angell, Watercourses, (2 ed.) 182-186; *Storer* v. *Freeman*, 6 Mass. 439; *Lapish* v. *Bangor Bank*, 8 Maine, 85.

Thompson and Dunton, for the defendant.

By the express terms of his deed, Treat acquired title on Penobscot bay below high water mark, and by operation of law his title would be extended to low water mark. Colonial Ordinance of 1641; Ancient Charters, c. 63, of Colony Laws; *Pike* v. *Monroe*, 36 Maine, 309; *Parker* v. *Cutler Milldam Co.* 20 Maine, 353; *Winslow* v. *Patten*, 34 Maine, 25.

At best, the deeds through which plaintiff claims only convey an easement in the shore of the land, of which defendant has the fee.

An action of trespass *quare clausum fregit* does not lie for an injury to an incorporeal right or easement. Hilliard on Torts, 612; *Morgan* v. *Boyes*, 65 Maine, 124.

The right of fishing in the sea, and in the bays and arms of the sea, and in navigable and tide waters, is a right public and common to every citizen; and if any individual will appropriate an exclusive privilege in navigable waters, and arms of the sea, he must show it strictly by grant or prescription. *Preble* v. *Brown*, 47 Maine, 284; *Parker* v. *Cutler Milldam Co.* 20 Maine, 353; Angell on Tide Waters, 22, 23, 24; *Moulton* v. *Libbey*, 37 Maine, 472; Colonial Ordinance of 1641; Ancient Charters, c. 63 of Colony Laws, § 2; *Weston* v. *Sampson*, 8 Cush. 347; *Proctor* v. *Wells*, 103 Mass. 216; 3 Kent's Com. 413.

The right of fishing in the sea, and bays, and arms of the sea, and in navigable and tide waters being *prima facie*, a public right, common to all citizens, it follows that only the sovereign power, the legislature in this country, can grant any special or exclusive right to an individual. Angell on Tide Waters, c. 6, p. 102; *Barrows* v. *McDermott*, 73 Maine, 441; 2 Blackstone's Com. 39; *Parker* v. *Cutler Milldam Co.* 20 Maine, 353.

Plaintiff has shown no such grant, nor has he shown any exclusive right by prescription. *Preble* v. *Brown*, 47 Maine, 284.

DANFORTH, J. In this action the plaintiff claims damages for a disturbance of his alleged right of fishery, the limits of which are fully described in the writ. The place is located upon an arm of the sea where the tide ebbs and flows.

The defence besides the general issue, is a denial of the plaintiff's and a claim of title in the defendant, that the right claimed by the plaintiff is a public right, that whatever the defendant has done, was in the exercise of that right and that the plaintiff did not have the exclusive right of taking fish as described in his writ. Thus the defence is put upon two grounds; that of title in himself exclusively and a general right in the public, or a free fishery.

That the public have the right of fishing in all tide waters, by the common law is too well settled to admit of denial. *Moulton* v. *Libbey*, 37 Maine, 472; *Weston* v. *Sampson*, 8 Cush. 347; *Proctor* v. *Wells*, 103 Mass. 216. Thus the defendant as a part of the public and in common with all other persons, would have the right to take fish not only from the deep waters adjacent to the flats described, but also from the water over the flats at flood tide. The fish swimming in the water above, as well as below low water mark, are the property of the first taker whether he has or has not an interest in the soil under the water where they are taken. This right resting in the public can be conveyed only by the public, or the sovereign power which represents the public and can be exercised only by such ordinary methods as will not interfere with private rights.

Since the ordinance of 1641, modified by that of 1647, which is a part of the common law of this state, (*Barrows* v. *McDermott*, 73 Maine, 441) the flats not exceeding one hundred rods in width are the property of the owner of the adjacent upland, or his grantee, subject to the rights of the public to pass over and fish in the waters upon them. This private ownership must necessarily give to the proprietor some privileges which do not belong to the public. Among others is the right of erecting fixtures thereon or attaching them to the shores. Hence while the proprietor of the flats may fasten his seine by grappling to the shore and erect weirs for the purpose of catching fish, those having public rights only cannot do so. *Duncan* v. *Sylvester*, 24 Maine, 482-486; *Locke* v. *Motley*, 2 Gray, 265. This being a private right may, of course, be conveyed by the owner with or without the upland and with such limitations and qualifications as he sees fit. This principle of law was recognized and adopted in a case from Sagadahoc county not yet reported. [*Wyman* v. *Oliver*, *ante*, p. 421, Reporter.]

It is an infringement of this private right, the erection of a weir upon or attached to the flats or shore which is here complained of. Thus the public right of fishery is not involved in this case. The only question at issue is whether the defendant has wrongfully erected a weir within an exclusive right of fishery belonging to the plaintiff.

That each party has a weir or weirs plainly appears from the report of the case. The plaintiff alleges that he has the exclusive right of fishing for salmon, shad and alewives within certain limits described in his writ and that the defendant has erected his weir within those limits and thereby interfered with his privilege. This exclusive right if it exists, is not derived from the sovereign power and must therefore grow out of and in its origin be incidental to an ownership in the flats. In other words it must be confined to a right to catch the fish named by means of fixtures attached to the soil and the interference must be by a wrongful attachment of fixtures to the soil for the same purpose. This directly presents the issue of title claimed by each party and by each traced through mesne conveyances to the same source.

It appears that Josiah Grant was formerly the owner of the upland and of the flats described as incidental thereto. In 1841, Mr. Grant, by a deed of warranty, conveyed to Giles C. Grant, "all the right of taking salmon, shad and alewives, on the southeasterly side of Cape Jellison in said Prospect, beginning at the shore on the southerly line of land of John and Charles Staples, and extending westerly to the southernmost extremity of Squam Point Ledge, so called, together with *all the privileges necessary* for carrying on the said fishing. This deed would necessarily give the exclusive right to catch the fish named within the limits described, by means of fixtures attached to the flats or shore. It could give no more as the grantor had no more to give. *Preble* v. *Brown*, 47 Maine, 284.

This privilege came to the plaintiff through the deeds of Giles C. Grant to Charles Staples and of Robert F. Staples as the representative of Charles. It is true that in the last two deeds the word "all" is not used before the words "the right of taking salmon," &c. But it is also true that the right is conveyed with the same description as in the first with no words to limit or qualify it, and when a thing is thus conveyed we cannot infer that but a part of it is intended.

The defendant claims title to the fishing privilege as incidental to a title to the upland which he obtains by virtue of a will from the same Josiah Grant and mesne conveyances to himself. But in these several conveyances the fishing privilege is not described or alluded to and as it had previously been conveyed he evidently obtains no title to that.

It is further contended that whatever the liability of the defendant it cannot be enforced in this form of action. If this is to be considered an action of trespass *q. c.* the objection would seem to be well founded. For although the title of the plaintiff is to an exclusive right to catch certain fish named within certain well defined limits, a right which is incidental to and grows out of an ownership in the soil, yet the grant does not carry the soil with it. Whether other kinds of fish may or may not be caught there does not appear. But there are other uses to which the

land may be put and which are not conveyed. The title to the soil therefore remained in the grantor and the conveyance was that of an easement, the remedy for an injury to which is case and not trespass *q. c. Duncan* v. *Sylvester*, *supra*; Washburn on Easements, 3 ed. *420; *Morgan* v. *Boyes*, 65 Maine, 124.

The beginning of each count in the declaration, alleging that the defendant "with force and arms broke and entered the plaintiff's close" is technically that of trespass *q. c.* especially followed as it is by a description of the premises, and yet using the word "close" in its more comprehensive sense as indicated here by the words "fishery and fishing privilege" following, it is not entirely inappropriate here, in an action on the case. The fishery is one that may properly be denominated territorial. It covers certain described premises though it may not carry any interest in or title to the soil. The complaint is for entering upon the described premises for a special purpose, which is a violation of the plaintiff's alleged rights and taking the whole of either count in the declaration together we find all the facts set out upon which the plaintiff relies to support his action. It is a statement of the plaintiff's "own case" which is the distinguishing characteristic of an action on the case. *Hathorn* v. *Calef*, 53 Maine, 476-7. Thus the action is virtually if not really an action on the case and the facts are so fully stated that "the person and case can be rightly understood" and if necessary an amendment would be allowed. R. S., c. 82, § 9; *Hathorn* v. *Calef*, *supra*, 478.

Another objection raised in defence, is that the plaintiff does not show that his own weir is within his defined limits. Assuming this to be true, it would not affect his right to maintain this action though it might have a material effect upon the amount to be recovered. His title to the fishery described is the same whether he occupies or not; but his damages might and from the declaration we may suppose they do very largely depend upon that fact. Upon an examination of the report, we find ourselves unable to fix the location of the plaintiff's weir. When a witness testifying from a plan, points out the location upon that plan, it may be sufficient to show to those present whether

the place is within certain limits. But such testimony cannot be taken by the reporter and necessarily the report of the case gives no light in regard to it. The plan is not before us, and if it were, we do not and cannot have the witness to explain. We are therefore unable to decide whether the plaintiff is entitled to recover more than nominal damages.

It is further claimed that the testimony shows that the defendant's weir, of which complaint is made, was built below low water mark, and there is some evidence which tends to sustain that view. If this were so it would be fatal to the plaintiff's action. If he did not use the flats or the shore for the purpose of erecting, fastening or using his weir, he did not interfere with the plaintiff's exclusive rights; but in deep water he would have the same rights as other persons and any interference with others must be decided upon principles of law not involved in this case. But the plaintiff testifies that the defendant's weir was built both upon the flats and in deep water, and though we find the same difficulty to some extent that exists in regard to the plaintiff's weir, yet we infer from this statement that the weir was at least attached to the shore and thus to some extent an invasion of the plaintiff's exclusive right. We come to this conclusion the more easily from the fact that if not true, the error was susceptible of demonstration with the plan and witness to explain.

Thus the plaintiff would be entitled to nominal damages. From the testimony as reported, we find no ground for ordering more. But the counsel claims that the case shows a very much larger sum "under the agreement." We are unable to find such a showing. The plaintiff testifies that the fishery in dispute was worth one hundred dollars a year, "that in his weir he averaged one hundred salmon a year before Treat built there." This however gives us but little light inasmuch as it does not appear that his weir was located within the prescribed limits, or that defendant's weir in any way kept any fish from him. But as a portion of these facts at least must be well known to the parties and susceptible of full proof, to avoid the danger of

injustice, the action should be defaulted and stand for the assessment of damages.

Action defaulted, damages to be assessed at nisi prius.

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

INDEX.

ATTACHMENT.

1. A made a verbal contract to purchase a lot of land of B, took possession of it, erected a building upon it, and failed to pay for the labor and materials which entered into the construction of the building. One lien-creditor attached the building as personal property, and another attached the building with the lot of land as real estate.

Held, that the building became a part of the real estate of B, and that as against him neither creditor obtained a valid attachment upon the building.

Held, also, that B was not estopped from asserting title to the building by verbally disclaiming any interest in it beyond an amount of damages occasioned by an injury to his land by erecting the building upon it.

Dustin v. *Crosby*, 75.

2. In actions to enforce a statutory lien upon buildings, if the debtor's interest be realty, it must be attached as such; and be attached as personalty when it is personalty; the same distinction, as to the mode of attachment, to be preserved as in ordinary suits. *Ib.*

See OFFICER, 1–3.

AUDITORS.

See PRACTICE, (LAW,) 10.

BETHEL STEAM MILL COMPANY.

See NUISANCE, 2.

BETTERMENTS.

Buildings erected on the land of another by one occupying under a contract to purchase become the property of the owner of the soil if the purchase be not completed, and are not betterments. *Tyler* v. *Fickett*, 211.

See PRACTICE, (LAW,) 19, 20.

BOND.

The obligees in a bond for the conveyance of real estate upon the payment of a certain sum of money, and all taxes thereafter legally assessed on the property, demanded of the obligor a deed of general warranty to one of the obligees and the assignee of the other obligee. The assignment was not read to the obligor, (though it was contended that she had knowledge of it) nor was any information given her as to the assessment and payment of the taxes since the date of the bond. The payments required by the bond had

CASES EXAMINED, &c.

1. *Pullen* v. *Bell*, 40 Maine, 314, overruled. *Dustin* v. *Crosby*, 75.
2. *Houlton* v. *Ludlow*, 73 Maine, 583, affirmed. *Minot* v. *Bowdoin*, 205.
3. *Orneville* v. *Pearson*, 61 Maine, 552, considered. *Vassalboro* v. *Nowell*, 242.
4. *Harpswell* v. *Orr*, 69 Maine, 333, considered. *Ib.*
5. *Baxter* v. *Duren*, 29 Maine, 434, partially affirmed. *Milliken* v. *Chapman*, 306.
6. *Hussey* v. *Sibley*, 66 Maine, 192, considered. *Ib.*
7. *Sturdivant* v. *Hull*, 59 Maine, 172, affirmed. *Rendell* v. *Harriman*, 497.

CAVEAT EMPTOR.

See SALES, 2.

CHANNEL.

See BOUNDARY LINE BETWEEN WARREN AND THOMASTON.

CIDER.

See INTOXICATING LIQUOR.

CLOSE.

See FISHING PRIVILEGE, 4.

COLLECTOR OF TAXES.

See TAXES, 3, 6.

CONSTITUTIONAL LAW.

1. The clause in the constitution prohibiting the taking of private property for public uses without compensation, does not prohibit the legislature from authorizing an exclusive occupation of private property, temporarily as an incipient proceeding to the acquisition of a title to, or an easement in the land taken. *Riche* v. *Bar Harbor Water Co.* 91.
2. The mode and manner in which the owner of land taken for public use is to be compensated for the land so taken, are to be determined by the legislature. *Ib.*

CONTRACT.

See ATTACHMENT, 1. CORPORATION, 1. LIVERY-STABLE KEEPER, 1.

CORONER.

See PRACTICE, (LAW,) 11.

CORPORATIONS.

2. When a dividend upon its stock is declared by a corporation, payable in money, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life-tenant or remainder-man, without regard to the source from which, or the time during which, the profits and earnings were acquired by the company, and regardless of the size of the dividend. *Richardson* v. *Richardson*, 570.

3. The rule applies, though the dividend comes from assets set aside as a "renewal fund" by a gas-light company, the directors voting to convert the fund into a dividend to stockholders. *Ib.*

COSTS.

When there are several defendants in a personal action, who join in their pleadings, and the verdict is in favor of one and against the others, the successful party is allowed all his separate costs, and an aliquot part of the joint costs, unless the court is satisfied from special circumstances, a different proportion should be allowed. *Marsh* v. *Parks*, 356.

COSTS IN PROCEEDINGS IN EQUITY.

1. In suits in equity the whole subject of costs rests in the sound discretion of the court. *Stilson* v. *Leeman*, 412.

2. The mere fact that two or more defendants plead severally does not entitle them to tax several costs, especially when they have one and the same solicitor; each case depends on its own facts. *Ib.*

3. Where a bill sought to charge certain real estate (the record title to which was in the defendant, M. L.) with a judgment against her husband (the defendant E. L.) in favor of the plaintiff's intestate, on the ground that it was purchased with the money of the husband and conveyed to the wife without consideration through a conspiracy between the husband and wife and their respective fathers (the defendants J. L. and B. L.); and that at all events, $200 or $300 of the husband's pension money had been expended in repairing the buildings; and one solicitor appeared for all the defendants at the suggestion of the defendant, E. L; *Held*, That each defendant may tax for an answer, but that only one bill for costs accruing after filing of the answers should be taxed. *Ib.*

4. A party is not entitled to costs before a judge at chambers on an interlocutory matter in which he did not prevail. *Ib.*

5. No costs are allowed to be taxed for filing interrogatories unless they are filed in the clerk's office. *Ib.*

DAMAGES.

DEBT.

DECLARATION.

See PLEADINGS, 1.

DEED.

DOMESTIC ANIMALS.

See DOGS.

DOWER.

See PRACTICE, (LAW,) 18, 20.

DUE CARE.

See FRAUDULENT REPRESENTATIONS, 4.

DURESS.

See LANDLORD AND TENANT, 2.

EASEMENT.

See WATERWORKS, 1.

EMINENT DOMAIN.

EMPLOYER.

EQUITY.

EQUITABLE MORTGAGES.

ERROR.

ESTOPPEL.

EVIDENCE.

EXCEPTION.

EXECUTION.

EXEMPTIONS.

EXPERT.

FIRES.

FISHING PRIVILEGE.

FRAUDULENT CONVEYANCE.

FRAUDULENT REPRESENTATIONS.

GIFT.

1. F informed the treasurer of a savings bank that she desired to make a deposit for each of four grandchildren, naming B as one, to which she proposed to make additions from time to time and expressed the hope that with the accumulated interest, the deposits might amount to enough to be of advantage to them when they should reach a suitable age to take charge of the money. She wanted "to do something for the children." The treasurer gave her pass books in the names of each of the grandchildren and entered in each and in the bank books "subject to the order of F during her lifetime." Subsequently she informed B of what she had done and that the money was intended for him and the other children, and she made other deposits and withdrew one dividend. Afterwards F took the several books to the bank and informed the treasurer "that the time had come when she desired to make such a change in the terms of the deposits made for her grandchildren, . . . as would give them full control over them, and the amounts on each book become the absolute property of the parties named therein, and her right to control them should cease. Her expressed wish was, that her claim over the amount of the deposits should be withdrawn as to each case and the books so changed that they would stand in the names of the grandchildren without any restriction whatever," and the treasurer then and there, at her request, erased from the pass books and bank books the original entry "subject to the order of F." She notified B by letter of this change and that the pass books would be delivered the first time they met. B replied with the request that the books might be sent to him. A short time before F's death, she delivered the pass books to W. A. F. with a written order to enable him to draw the amount of each deposit. *Held*,—

1. That the deposit in the first instance created a valid trust and that F controlled the same in trust for B.

2. That the acts and declarations of F at the time of the change in the entry upon the books show a complete and executed gift and divested F of any interest in the deposit as trustee or otherwise, and that she thereafter held the pass book in trust for B.

3. That as W. A. F. subsequently took the book without consideration and with full knowledge of the plaintiff's prior title, he took it subject to that trust, and that it is necessary to B for the more beneficial enjoyment of his gift. *Barker* v. *Frye*, 29.

2. A deed of gift from a husband to his wife is a valid conveyance as against subsequent creditors of the husband, when it does not appear, as one step in a fraudulent design, that it was made with the active and deliberate purpose to put the property beyond the reach of debts which he then intended to contract and not to pay. *Hilton* v. *Morse*, 258.

GUARANTOR.

See PROMISSORY NOTES, 8.

INDICTMENT.

An indictment for larceny, which describes the property stolen as "one case of merchandise of the value of six dollars," and contains no excuse for the want of a more full and definite description, is not sufficient. *State* v. *Dawes*, 51.

INNKEEPER.

An innkeeper having trout, not alive, in his possession on the twenty-seventh day of January, and the tenth and twelfth days of February, 1882, had the same cooked and served to his guests in his hotel at regular meals, the bills of fare for such meals showing such fact; *Held*, That those acts constituted a sale of trout in violation of stat. 1878, c. 75, § 16, as amended by stat. 1879, c. 123, § 4. *Held further;* That by stat. 1879, c. 104, the penalties of stat. 1878, c. 75, § 16, either in its original or in its amended form, were not remitted as to Great Tunk pond. *State* v. *Beal*, 289.

INSANE PERSON.

1. In an action against physicians for falsely certifying, through malice or negligence, to the insanity of a person, who is thereby committed to the insane asylum, and the pleadings raise the issue as to the sanity of such person at the time when the certificate alleges her to be insane, the burden of proof is on the plaintiff in respect to the averment and claim that she was then sane. *Pennell* v. *Cummings*, 163.
2. In such an action the falsehood, and not the insufficiency of the certificate, is the ground of action against the certifying physicians. Without statutory provisions to that effect there cannot be a civil action for damages against a physician, based upon the insufficiency of the methods which he pursued in reaching and certifying a correct conclusion. *Ib.*
3. In such an action it is open to the defendants to prove precisely what were the circumstances under which they acted, what inquiry, investigation and examination they made and what the information was on which they

INSOLVENCY.

INSURANCE, (FIRE).

LIEN.

LIFE-ESTATE.

LIMITATIONS, STATUTE OF.

MILL AND MILL DAMS.

MONEY HAD AND RECEIVED.

MORTGAGES.

NUISANCE.

OFFICER'S RETURN.

OFFICER'S SALE.

OPEN AND CLOSE.

OPINION OF THE COURT.

PARTITION.

See PRACTICE, (EQUITY,) 1.

PARTNERSHIP.

PAUPERS.

See FISHING PRIVILEGE, 4. PRACTICE, (LAW,) 4, 26. TOWNS, 2. WAYS, 3.

PRINCIPAL AND AGENT.

PROBABLE CAUSE.

PROMISSORY NOTES.

See LIMITATIONS, STATUTE OF, 2, 3. TOWNS, 2, 8.

PUBLIC USE.

To constitute a public use authorizing the exercise of the right of eminent domain, it is not required that the entire community, or even a considerable portion of it should directly participate in the benefits to be derived from the property taken. *Riche* v. *Bar Harbor Water Co.* 91.

PUIS DARREIN CONTINUANCE.

See PLEADINGS, 5, 6.

QUARRY.

STATIONARY STEAM ENGINE.

See NEW TRIAL, 2. NUISANCE, 1.

STATUTE, CONSTRUCTION OF.

1. Statutes may sometimes be equitably construed, to such an extent, even, as to give to them an effect in direct contravention of their literal terms. *Holmes* v. *Paris*, 559.

2. Usually a thing within the letter is not deemed to be within the statute, if contrary to the intention of the statute. *Ib.*

STATUTES CITED, EXPOUNDED, &c.

PUBLIC LAWS OF MAINE.

1874, c. 175,	Equity Jurisdiction,	264
c. 232,	Taxes, action for,	298
1877, c. 206,	Defective Ways, Notice,	79
1878, c. 75, § § 15, 16,	Fish, Closetime, Penalty,	289
1879, c. 104,	Penalties, Fishing,	289
c. 123, § 4,	Penalties for Selling Fish at Certain Seasons,	289
c. 158,	Taxes, Suits for Ordered by Town Officers,	298
1880, c. 247,	Intoxicating Liquors, Common Nuisance,	123
1881, c. 68,	Equity Proceedings,	416

PRIVATE AND SPECIAL LAWS OF MAINE.

1864, c. 307,	Boundary line between Warren and Thomaston,	329

REVISED STATUTES.

1871, c. 6, § 75,	Assessors, when Selectmen to be,	239
c. 51, § 41,	Evading Payment of Fare on Railroad,	488
c. 75, § 11,	Lien,	418
c. 82, § 9,	Amendment,	47
§ 19,	Demurrer,	551
c. 86, § 79,	Trustee Process,	52
c. 127, § 1,	Domestic Animals,	562

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STOCKHOLDERS.

See CORPORATIONS.

TAXES.

1. The plaintiff having been arrested for his taxes by a sheriff, under a warrant issued against him by the defendant, a city collector and treasurer, sued the defendant for the arrest, and the defendant justified himself by his warrant. By the tax-act interest upon taxes was collectible after a date fixed therefor by a vote of the city. *Held:* That an assertion in the

WILLS.

1. That the sum of eighteen hundred dollars was an advance to her under the will and was her estate;

2. That being her property the purchase of the mortgage and note was with her funds;

3. That the respondents held the same in trust for her; and that she was entitled to an assignment of the same;

4. That on her death her executor was authorized to demand and entitled to receive an assignment of the same and that equity would compel such assignment. *Buck* v. *Paine*, 347.

3. A testatrix, by her will which was duly probated and allowed, disposed of the residue of her estate as follows:

"*Sixth.* All the balance of my property, real and personal, I give to my son, Daniel F. Whittier, (not including my household property, which I have otherwise disposed of,) five thousand dollars to be at his own disposal at once, the balance to be under his control. Should he die leaving a wife and no children, his widow shall have two thousand dollars of this amount over the five thousand dollars. Should he die leaving issue, said issue shall receive all over and above said five thousand dollars, and should he die leaving no widow or issue, all of said property, over and above said five thousand dollars, shall be equally divided among my grandchildren. The legacies herein given my son Daniel are subject to certain gifts which I have specified to him in writing. Should it be thought expedient to sell any real estate I may leave, my son Daniel may give deeds and apply the proceeds as provided by the provisions of this will." *Held;*

1. That the legacy was an absolute gift of five thousand dollars.

2. That Daniel F. Whittier was legatee for life of the residue, and as such, was entitled to the possession, control and income of it.

3. That the limitations over were not repugnant or void.

Whittier v. *Waterman*, 409.

4. A devise of property personal and real, to the wife of the testator to hold the same so long as she shall remain his widow, followed by a devise over of the same property to a son and one of the daughters of the testator in unequal proportions upon the termination of the estate of the wife therein, gives to the widow an estate for life in such property determinable upon her marriage; and she can convey nothing more by her deed of the realty.

Mansfield v. *Mansfield*, 509.

5. A life-estate in personal property the ordinary use of which is its destruction, is of course equivalent to an absolute gift when the same has been consumed, and the gift of such life-estate in goods and chattels which are liable to be worn out and deteriorated by use, amounts to the same thing if the life-estate lasts long enough. *Ib.*

6. Not so as to moneys, and bank or other stocks that may be expected to yield an income without waste of the principal. But the rule in this state is that the legatee for life of personal property is entitled to the possession,

WITNESS, (ATTESTING).

WORDS.

WRITS.

ERRATA.

Page 86. In the eighteenth line from the top, for "on" read "no."
On page 567, in the eleventh line from the top, for "Olway," read "Otway."