REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSEPH WHITMAN SPAULDING,

REPORTER OF DECISIONS.

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JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN A. PETERS, CHIEF JUSTICE.
HON. CHARLES W. WALTON.
HON. CHARLES DANFORTH.
HON. WILLIAM WIRT VIRGIN.
HON. ARTEMAS LIBBEY.
HON. LUCILIUS A. EMERY.
HON. ENOCH FOSTER.
HON. THOMAS H. HASKELL.

Justices of the Superior Courts.

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

ATTORNEY GENERAL.

HON. HENRY B. CLEAVES.

NOTE.—The opinions in certain of the cases reported in this volume were written and concurred in during their terms of office, respectively, by Hon. JOHN APPLETON, Chief Justice, (term expired September 20, 1883,) Hon. WILLIAM G. BARROWS, Associate Justice, (term expired March 24, 1884,) and Hon. JOSEPH W. SYMONDS, Associate Justice, (resigned March 31, 1884.)

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

SAMUEL BOOTHBY *vs.* EMMA B. BOOTHBY, administratrix.

York. Opinion February 15, 1884.

Executor and administrator. Demand. R. S., 1871, c. 87, § 11. Stat. 1872, c. 85.

An action cannot be maintained against an administratrix for default by her in the performance after the death of her intestate of the condition of a bond given by her intestate, unless the claim was presented in writing and payment demanded thirty days before the date of the writ.*

ON EXCEPTIONS.

An action on a bond given by Richard Boothby in his lifetime to the plaintiff, by the terms of which he was to maintain and support all the persons mentioned in his father's will as therein directed. And the father's will directed that his daughter Phebe and three others "shall have a home and maintenance on my farm and homestead . . . in the same manner that my children have been supported and educated by myself." The will was dated June 23, 1855.

*See R. S., 1883, c. 87, § 12.—REPORTER.

Richard Boothby died January 26, 1871, and letters of administration on his estate were granted the defendant in March, 1881. Phebe Boothby became of age in 1857, and refusal to support her according to the provisions of her father's will as required by the bond since January, 1880, is the breach of the bond alleged by the plaintiff. The writ is dated May 3, 1881. The claim was not presented to the defendant in writing and payment demanded thirty days before the action was brought.

The presiding justice ruled that the action could not be maintained and directed a nonsuit and the plaintiff alleged exceptions.

R. P. Tapley, for the plaintiff.

The report finds that no demand in writing was made upon the defendant administratrix under the statute before this action was brought; we think there may be two answers to this part of the case.

The bond sued upon binds the obligor and his administrators to the performance of duties arising both before and after the decease of the obligor. For a neglect upon the part of the obligor a demand in writing, or rather a claim in writing is to be presented to the representative before the action is commenced. It is to furnish the representative with the nature and extent of the claim of which he is presumed to know nothing.

The action in this case is not founded upon the default of the obligor. He performed during his lifetime. It is for the default of the administratrix, in the non-performance of duties devolving upon her and which never devolved upon the intestate in his lifetime. The claim in fact is not against her as his representative but against her as a party named in the bond, and she in no particular comes within the meaning and spirit of the act of 1872, c. 85, requiring a presentation of the claim in writing before the commencement of action. That statute relates to claims against the testator or intestate,—claims existing at the time of his decease. Here the claim is against this defendant arising after his decease for her own default, and not his. Upon assuming administration she voluntarily became a party to this instrument. If she had given a note as administratrix and failed

to meet it at maturity she would not be entitled to have the note presented to her before action against her. Upon the assumption of administration she became bound under the bond to do certain things. For her failure she is not entitled to previous notice; it is only for his default.

Augustus F. Moulton, for the defendant.

SYMONDS, J. This is an action of debt against the administratrix of the estate of Richard Boothby, upon a bond given by the intestate during his life to the plaintiff. The claim was not presented to the defendant in writing and payment demanded thirty days before the action was brought, and the question is whether under R. S., c. 87, § 11, as amended by the act of 1872, c. 85, this omission precludes recovery.

It is urged that the terms of the bond bind his administrators as well as the intestate himself, that the administratrix since her appointment has herself failed to keep the condition, and that for such default of the administratrix since the death of the intestate an action may be maintained without the previous statutory notice and demand.

The statute provides that "no action against an executor or administrator . . . on a claim against the estate shall be maintained . . . unless such claim is first presented in writing and payment demanded at least thirty days before the action is commenced." The claim which this suit is brought to enforce is clearly one against the estate, upon an obligation given by the intestate in his life, and the language of the statute does not permit such an exception to be made as that for which the plaintiff contends. Moreover, it is the direct intent of the statute to give the executor or administrator thirty days after notice and demand before the estate shall be liable to an action for his own failure to fulfil the contracts or covenants which the testator or the intestate may have entered into in his lifetime. During the thirty days there must always be some legal obligation which the administrator fails to perform, else no liability to suit can subsequently attach to the estate in his hands. It would manifestly be impracticable, therefore, to attempt to except from the

operation of the statute a case, or class of cases, on the ground that the failure of the administrator on his own part to keep the contracts made by the intestate during life exposed the estate to an action at once, for his own default, without notice. Until this action was brought, the administratrix may not have known that the intestate had given the bond declared on. The case in this respect is substantially as if the intestate had given a note payable in installments and had paid those which matured in his life. The administrator failing to pay the next installment, maturing after his appointment, is still entitled to the thirty days notice and demand before suit; and provision is made for the reservation of assets or the liability of heirs and devisees in certain cases where the right of action does not accrue during the period of administration. 1872, c. 85, § § 14–16.

The decisions upon this statute have already established the rule that it is an essential part of the plaintiff's case to prove compliance with its provisions and that unless the claim was presented in writing and payment demanded thirty days before the date of the writ, or unless this requirement was waived, the action cannot be maintained. *Eaton* v. *Buswell*, 69 Maine, 552; *Me. Cent. Institute* v. *Haskell*, 71 Maine, 487; *Stevens* v. *Haskell*, 72 Maine, 244.

Exceptions overruled.

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

CHARLES P. WHITTEMORE *vs.* JOHN W. WENTWORTH.

Somerset. Opinion February 19, 1884.

Statute of frauds. Contract. Evidence. Account books.

A promise by a third person to assume and pay a sum due to a creditor in consideration of the discharge of the original debtor, accompanied or followed by such absolute discharge, is an original and not a collateral promise, founded on a sufficient consideration, and need not be in writing.

While books of accounts are made competent evidence by the adverse party's notification to produce and his examination of them, they are still subject to

be impeached or controlled by evidence that the entries were not made in accordance with the directions given by an agent, whose books they purported to be, and what he said at the time of the reception of merchandise, credited upon the books, is to be regarded as part of the *res gestæ* relevant upon the question of the authenticity and value of the books as evidence. But declarations respecting those entries, not accompanying the making of the entries or of any of the transactions relating to them, are not admissible against his principal.

On exceptions and motion to set aside the verdict which was for the plaintiff in the sum of three hundred and two dollars and thirty-nine cents.

Assumpsit on an account annexed for merchandise sold and delivered. The writ was dated October 17, 1881, and the plea was the general issue.

The material facts are stated in the opinion.

E. N. Merrill, for the plaintiff, cited: *Woods* v. *Clark*, 24 Pick. 39; *Wilson* v. *Sherlock*, 36 Maine, 297; *Stewart* v. *Hanson*, 35 Maine, 509; *Corinth* v. *Lincoln*, 34 Maine, 312; *Gorham* v. *Canton*, 5 Maine, 267; *Baring* v. *Calais*, 11 Maine, 464; 1 Greenl. Ev. § 108; *Lund* v. *Tyngsborough*, 9 Cush. 41; 1 Addison, Contracts, § 210; *Lord* v. *Davison*, 3 Allen, 133; *Stone* v. *Augusta*, 46 Maine, 127; *Enfield* v. *Buswell*, 62 Maine, 128.

John H. Webster and Wentworth, for the defendant, cited: *Blake* v. *Parlin*, 22 Maine, 395; *Moses* v. *Norton*, 36 Maine, 113; *Rollins* v. *Crocker*, 62 Maine, 244; *Doyle* v. *White*, 26 Maine, 341; *Stewart* v. *Campbell*, 58 Maine, 439; *Russell* v. *Babcock*, 14 Maine, 138; *Winslow* v. *Kimball*, 25 Maine, 493; *Swift* v. *Luce*, 27 Maine, 285; *Brown* v. *Chesterville*, 63 Maine, 341; *Willis* v. *Hobson*, 37 Maine, 403; *Merrill* v. *Merrill*, 67 Maine, 70; *Blake* v. *Russ*, 33 Maine, 360; *Craig* v. *Gilbreth*, 47 Maine, 416; *Hazeltine* v. *Miller*, 44 Maine, 177; *Gooch* v. *Bryant*, 13 Maine, 386; *Haven* v. *Brown*, 7 Maine, 421; *Franklin Bank* v. *Steward*, 37 Maine, 519; *Burnham* v. *Ellis*, 39 Maine, 319; *Franklin Bank* v. *Cooper*, 39 Maine, 542; *Lime Rock Bank* v. *Hewett*, 52 Maine, 531; *Curtis* v. *Brown*, 5 Cush. 488; *Nelson* v. *Boynton*, 3 Met. 396; *Loomis* v. *New-*

hall, 15 Pick. 159; *Richardson* v. *Williams*, 49 Maine, 558; *Whipple* v. *Wing*, 39 Maine, 424; *Linscott* v. *Trask*, 35 Maine, 150; *Sanborn* v. *Merrill*, 41 Maine, 467; *Edwards* v. *G. T. Ry.* 48 Maine, 379; S. C. 54 Maine, 105; 1 Greenl. Ev. 8 ed. § § 171, 180.

BARROWS, J. This case is presented upon motion to set aside the verdict as against law and evidence, and upon exceptions to certain instructions given to the jury, and to the admission of certain testimony against the defendant's objections.

The motion cannot prevail. The testimony produced by the plaintiff tends to show that he had furnished one Charles W. Wentworth, the defendant's brother, who kept a shop in Skowhegan, with butcher's meat until he owed the plaintiff more than $200; and the plaintiff hesitating to trust him farther, the defendant intervened and there was talk in the first place looking to the defendant's becoming surety for his brother, whereupon plaintiff called for a written guaranty, which defendant declined to give; but farther conference resulted in defendant's verbally requesting the plaintiff to furnish what beef his brother wanted until after haying, charging the same directly to the defendant and leaving bills therefor running to the defendant with the beef when delivered to the brother. And in like manner it was agreed that one lot which the plaintiff had brought at the defendant's request pending the negotiation but had charged to Charles should be charged over to the defendant and Charles credited with the amount, which was done. This part of the transaction is not denied by the defendant, nor that he ordered from the plaintiff certain other beef to be delivered to his brother and charged to himself. But he denies that this order and contract covered all the beef which plaintiff afterwards delivered to his brother up to the end of the haying season.

Yet while he denies the contract as claimed by the plaintiff and relies on the statute of frauds to relieve him from any verbal undertaking if made, there was more or less in the circumstances and in the subsequent acts and conduct of the parties and in the conversations between them that tended to weaken his denial before the jury and to strengthen the plaintiff's assertions.

His brother Charles who might be supposed to know the facts and to be favorably inclined towards him was not called as a witness in his behalf, and though his deposition had been taken by the defendant and was on the files of the court, it was not used. With the various corroborations of the plaintiff's position both positive and negative which the case presents, the jury were well justified in finding the contract as the plaintiff claimed, and their conclusion must be held final unless it was produced in whole or in part by some misdirection from the presiding judge.

Among the instructions not excepted to, the jury were told that "the inquiry in this case is whether this was a promise to pay the debt of Charles or a contract on the part of John W. Wentworth to incur a debt for the benefit of Charles." The distinction between an original and a collateral undertaking was pointed out and illustrated in further instructions to which no exceptions are taken; and the jury were finally told that "if the bargain was a mere collateral one simply to be responsible for the debt which Charles was to continue to contract with the plaintiff the defendant is not bound and would be entitled to the verdict. If the bargain was to become the original purchaser of the goods from that time and the plaintiff furnished the goods according to that contract, delivering them and the bills to the brother, he would be entitled to maintain the action."

The correctness of these instructions, or of the remark of this court in *Sanborn* v. *Merrill*, 41 Maine, 468, that "an individual may originally undertake to pay for services which are to be rendered or for goods which are to be delivered to another—the question in such cases is on whose credit the services are rendered or the goods delivered . . . and the promise need not be in writing," is not questioned by the defendant here and now. But he complains because the presiding judge went farther and instructed the jury as follows: "Mr. Foreman, if, knowing that you have delivered goods to one of my neighbors I choose to assume that debt as my own, and go to you and say 'if you will give that man credit for what you have charged to him and charge it to me,'—very well; it is proper and legitimate for me to do so, and when you have given the credit to him and trans-

ferred the charge to me—taken me as your debtor, instead of him —surrendered all the claim upon him, and look to me—that would be an original undertaking on my part for which there would be a sufficient consideration to bind me to keep the promise whether it was verbal or written." Keeping in mind the fact that the plaintiff discharged Charles altogether, and remembering the distinction between a collateral and a substituted promise, we think the instruction was susbtantially correct both upon principle and authority. *Wood* v. *Corcoran*, 1 Allen, 405 and cases there cited; *Lord* v. *Davison*, 3 Allen, 131, 133; *Jones* v. *Walker*, 13 B. Monroe, 357.

The radical difference between this case and *Richardson* v. *Williams*, 49 Maine, 558 is that there "there was no evidence that the plaintiff has either cancelled or discharged his claim upon (the original debtor) or assigned it to the defendant." This is the common feature in the cases cited for the defendant and they are consequently inapplicable to the case at bar. The distinction is made prominent in *Stewart* v. *Campbell*, 58 Maine, 439, cited for defendant.

The defendant held an assignment of all his brother Charles' accounts and demands, and was in possession of his books of account kept during the period covered by these transactions. Plaintiff gave him notice to produce them, and upon their production examined them. This gave defendant the right to offer them in evidence; *Merrill* v. *Merrill*, 67 Maine, 70, and cases there cited. They were put into the case by the defendant, and thereupon the plaintiff called one Groder, the clerk who made certain entries therein which the plaintiff desired to account for and control. The books derive all their probative force from the supposition that they are contemporary records made by, or under the direction of the defendant's brother during the progress of the business.

Groder's testimony (to the admission of which exception is taken) tends to show on the contrary that these entries were made by him as a clerk, newly employed, according to his own ideas of proper bookkeeping, and that when the attention of Charles W. Wentworth was called to them he directed the wit-

ness otherwise, giving the reason why these lots of beef should not be credited to the plaintiff on his books. As part of the *res gestæ* and accompanying the delivery of the beef, and bearing directly upon the credit to be given to or withheld from the books as evidence, we think Groder's testimony was competent including the reason which he says Charles Wentworth gave for his directions. *Stewart* v. *Hanson*, 35 Maine, 507, 510.

But the testimony of Brown was to similar declarations of Charles Wentworth not accompanying any part of the transactions to which the records in the books relate, though made during the time they were going on. They stand upon the footing of an agent's recital of a past transaction. We are of the opinion that inasmuch as Charles was not a witness, the defendant's objection to this testimony was well taken—that it should have been rejected as hearsay, and as it may have been accepted by the jury as substantive evidence of the facts stated by Charles Wentworth, and not merely as bearing upon the value of the books as evidence, its admission was prejudicial to the defendant, and that for this cause,

The exceptions must be sustained and a new trial granted.

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

LEMUEL NICHOLS *vs.* PAUL RUGGLES.

Penobscot. Opinion February 20, 1884.

Replevin. Contract. Note. Record. Attaching creditor.

In an action of replevin of the horse named in the following instrument by Lemuel Nichols against an attaching officer who attached the horse as the property of James Newcomb: "Bangor, Sept. 8, 1882. I, James Newcomb, of Carmel, Maine, bought of Lemuel Nichols, Bangor, Maine, one black horse, name Nig, 7 years old, for ($80.00) eighty dollars and interest on same until paid for, which I agree to pay out of my next quarter's mail pay, which becomes due Jan. 1, 1883, on route 184 from Carmel to Kenduskeag, which he

is now carrying. The above horse is to remain said Nichols' until fully paid for. James Newcomb." *Held;*

1. That the instrument should have been recorded under the provisions of R. S., c. 111, § 5.

2. That the instrument contains a note given for personal property bargained and delivered, payable absolutely for a fixed sum in money.

ON REPORT.

Replevin of a horse brought against a constable who had attached it as the property of James Newcomb, on a writ in favor of Carnillus K. Johnson. The plaintiff claimed title under the instrument recited in the head note, as he had been paid no part of the purchase money. The paper was never recorded and Johnson knew nothing of it nor of the plaintiff's claim thereunder.

John Varney, for the plaintiff, contended that the instrument under which he claimed title to the horse was not a note within the meaning of R. S., c. 111, § 5; that the legislative expression there found must be held to mean what is legally and commercially known as a promissory note. Newcomb was under contract with Nichols to carry the mail, and was paid by Nichols ninety dollars and fifty cents a quarter and his agreement to pay for the horse was contingent upon receiving his compensation for mail service. It amounted to an agreement to pay for the horse in mail service.

Counsel cited *Morris* v. *Lynde*, 73 Maine, 88; *Bunker* v. *Athearn*, 35 Maine, 364.

Wilson and Woodward, for the defendant, cited: *Shaw* v. *Wilshire*, 65 Maine, 485; 1 Pars. Notes and Bills, 24, and cases cited, 31; *De Wolfe* v. *French*, 51 Maine, 420; *Redman* v. *Adams*, 51 Maine, 429; *Sears* v. *Wright*, 24 Maine, 278; *Crooker* v. *Holmes*, 65 Maine, 195.

DANFORTH, J. The only question presented by the report in this case is whether the instrument under which the plaintiff claims title to the horse replevied should have been recorded under R. S., c. 111, § 5. If so the plaintiff fails in his title and in his action.

The statute provides that, "No agreement that personal property bargained and delivered to another, for which a note is

given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note; nor when so made and signed in a note for more than thirty dollars, unless it is recorded like mortgages of personal property."

It is conceded that the instrument comes within the statute description in every respect except that it does not contain the note therein required. The objections are that the price to be paid was not payable in money and that its payment depended upon a contingency. But an examination will show that neither of these objections are well founded.

The statute uses the word "note" only, omitting the qualifying adjective "promissory," and whether the construction is to be so limited as to apply only to such promissory notes are recognized by the commercial law with all the requisites required by that law, may well be doubted. It is certain that the term "note" without the qualification is often used in a more extensive sense than with it, and it is equally certain that when used to express a promise to pay, whether in property or money, it is equally within the mischief to be prevented.

In this case, however, the promise is both absolute and to pay in money. There is no condition attached to it and the amount is fixed and definite. It is said that it is to be paid from a particular fund. This may be true; but it is evident that the intention of the parties was that its payment was not to be confined to that fund, but that it was to be paid whether the fund should fail or otherwise. Besides there is nothing in the instrument indicating any uncertainty or contingency as to the fund; and if there were it would not render the promise contingent. Story on Prom. Notes, § 26; *Byram* v. *Hunter*, 36 Maine, 217; *Redman* v. *Adams*, 51 Maine, 429. The fund is established by contract and is more than sufficient to pay the amount promised. The service by which it is to be produced was to be rendered by the promisor and if he fails to perform the service there can be no pretense that such failure would relieve him from the obligation of his promise which is unconditional in its terms. *Sears* v. *Wright*, 24 Maine, 278.

The promise is also to pay in money. The promise to per-

form the service under the contract for carrying the mail is one thing, that to pay for the horse another and a very different thing. The former is for service to be performed, the latter for a definite amount and no words to indicate that it is to be paid in any thing but money.

Judgment for the defendant and for a return of the horse replevied.

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

INHABITANTS OF MONMOUTH *vs.* INHABITANTS OF LEEDS.

Kennebec. Opinion February 20, 1884.

Towns. Disputed lines. R. S., c. 3, § 43.

In a process for settling disputed lines between towns, the acceptance of the report of the commissioners, by the court, is not required by the statute and adds nothing to its force. It is still necessary to look to the report to ascertain whether the alleged controversy is ended by such proceedings. If ended in conformity with the provisions of the statute a new petition for the same purpose cannot be sustained. If otherwise, a new petition may be sustained without any reversal of the prior proceedings.

R. S., c. 3, § 43, requires three persons to be appointed commissioners. This provision is peremptory, and as it relates to a public matter the immediate parties to the process, or either of them, cannot waive it. The commissioners must ascertain and determine the line under oath, and their report must show that all the statute requirements were complied with.

ON EXCEPTIONS.

Petition for the appointment of commissioners to ascertain and determine the line between the towns of Monmouth and Leeds.

The facts are sufficiently stated in the opinion.

Potter and Moody, for the petitioners, cited: *Outhwite* v. *Porter*, 13 Mich. 533; *Goudy* v. *Hall*, 30 Ill. 109; *Wort* v. *Finley*, 8 Blackf. (Ind.) 335; *Webster* v. *Reid*, 11 How. (U. S.) 437; 6 Wait's Actions and Defences, 805, 806; Freeman, Judgments, § 117; *James* v. *Smith*, 2 S. C. 183; *Morris* v. *Halbert*,

36 Tex. 19; *Pen. R. R. Co.* v. *Weeks*, 52 Maine, 456; *Ware* v. *Hunnewell*, 20 Maine, 291; *Hathaway* v. *Persons unknown*, 32 Maine, 136.

F. M. Drew, for the respondents, contended that the action of the court in the former cases on petition of *Leeds* v. *Monmouth* and of *Monmouth* v. *Leeds*, before this court in Androscoggin county, was binding upon the parties here; because it is a well settled principle of law that where a matter has been once determined by judgment or decree of a court of competent jurisdiction between the same parties or their privies it is binding until reversed by proceedings instituted for that purpose, citing the *Duchess of Kingston case*, 20 Howell's St. Tr. 538; *Sawyer* v. *Woodbury*, 7 Gray, 499; *Walker* v. *Chase*, 53 Maine, 258.

The petitioners have had their day in court. If aggrieved at the judgment of the court dismissing their former petition, in Androscoggin county, they should have alleged exceptions. Having once chosen a legal venue they ought not to be allowed to select a new one for no better reason than that they hoped for a better result.

The record shows that in the former case but two commissioners were appointed "by agreement between the selectmen" of the two towns. Where both parties to a cause, for the purpose of saving expense, agree upon the number and the members of a commission, surely there can be no legal objection to the constitution of the commission.

Counsel further ably argued other questions presented by the case.

DANFORTH, J. A petition for the appointment of commissioners to ascertain and determine the line between the towns of Monmouth and Leeds alleged to be in dispute. The defence is that all controversy has been ended by a similar process brought to a conclusion in this court in the county of Androscoggin. The presiding justice "ruled, *pro forma*, that the former proceedings are valid until quashed or reversed by some proceeding in court, and upon this ground only refuses the petition." This ruling having been excepted to, presents the question before the court.

A portion of the former proceedings, as in all cases of this kind, were in court, but the most important were before the commissioners. There is no occasion to reverse them, nor is there any process known to the law by which they can be reversed. This is a statute process, and if the proceedings are in accordance with the statute provisions they are final and conclusive, and the controversy is ended. But if otherwise they are a nullity and the dispute still exists. The duty and authority of the court end with the appointment of the commissioners. The commissioners so appointed "after being sworn to the faithful discharge of their duty and after giving notice to all persons interested of the time and place of their meeting and the purpose thereof, ascertain and determine the lines in dispute . . and make duplicate returns of their doings," one to the court and one to the office of the secretary of state. This report if in accordance with the law is the final action. It neither requires, nor does the statute authorize an acceptance by the court. It may undoubtedly be recommitted or perhaps the commissioners be discharged for sufficient reasons, but its acceptance adds nothing to its force. It could not reach the copy filed in the office of the secretary of state, which is an original report equally with that returned to court. Hence there is no judgment of the court upon its validity, but the line ascertained and determined by the report itself, is by express provision of the statute, to be "deemed in every court of law and for every purpose the true dividing line between such towns." R. S., c. 3, § 43. These principles are the necessary result of the provisions of the statute and were considered and so settled in *Lisbon* v. *Bowdoin*, 53 Maine, 324.

It is true that by the records of the court in Androscoggin county, in the case, it appears that a subsequent petition was put in alleging that the report in the former case was irregular and unauthorized and asking that the case "be reopened and the commissioners instructed to review the line, or that new commissioners be appointed for that purpose." Whether the court had the authority to comply with this request, it is not necessary now to enquire. This petition is not referred to in the exceptions and the ruling of the court does not appear to have been

affected by it, nor is it shown how it could have influenced the ruling. True, the petition was dismissed and it is now claimed that the dismissal is in effect a judgment of the court that the former proceedings were valid. What the effect would have been if that issue had been distinctly presented and the dismissal ordered upon that ground, we have no occasion now to decide. The dismissal was general; no issue appears to have been formed, nor does it appear upon what ground the dismissal was made. If it had been grounded upon the fact that the controversy had been ended by a valid and sufficient return of the necessary number of commissioners, it might have been fatal to the proceeding now before us. That would have been a judgment of the court that the controversy had been ended and without a controversy in the legal sense no petition can be sustained. But the effect of the order of the court as it appears in the record produced, is only that of a nonsuit which does not appear to have been ordered upon the merits of the case.

It necessarily follows that the only question presented here is whether the former proceedings of the court and commissioners show that the controversy alleged in the present petition has been ended; for the existence of a controversy is the ground and only ground, upon which the petition can be sustained; whether by the proper proceedings the line in question has been ascertained and determined as contemplated by the statute, or otherwise,—*Lisbon* v. *Bowdoin*, *supra*.

The report of the commissioners is signed by two persons and it appears that but two were appointed. The statute requires three. The provision is, the "court may appoint three commissioners." This is clearly a case where the intention of the legislature can be accomplished only by the use of "may" in the sense of "shall." It is a duty imposed upon the court, one which the parties have a right to have performed upon proof of the necessary allegations. It relates, also, to a matter in which third persons and the public have an interest, and while it contemplates that commissioners are to be appointed, it provides for three and not for any less number. "The word 'may' in a statute is to be construed 'must' or 'shall' when the public inter-

est or rights are concerned, or third persons have a claim *de jure* that the power shall be exercised." *Low* v. *Dunham*, 61 Maine, 569. Nor can the towns waive this duty for they are not alone interested. Town lines are public matters to be fixed by the legislature alone, either directly or in that way which it provides. In this respect the towns through their selectmen act as trustees, not for their own inhabitants only, but for the public as well. It may be that if three had been appointed and acted, the report of the majority might have been sufficient. But to accomplish this, the required number must first have been appointed. *Williamsburg* v. *Lord*, 51 Maine, 599.

The law and the commission require that the commissioners "after being sworn to the faithful discharge of their duties, and after giving due notice to all parties interested of the time and place of their meeting and the purpose thereof," shall "ascertain and determine the lines in dispute and describe the same," &c. The report shows that the line was run under an agreement by the selectmen before the commission was issued, and so far as appears while they were not under oath, and it fails to show that any thing was done after the commission issued to ascertain the line or that any notice was given of the time, place and purpose of their meeting, but shows only that they "determined" the line under oath and described it, whether in conformity with the previous running or otherwise does not appear. It is said in the argument, and no doubt correctly, that the selectmen of Monmouth had notice and were present at the running before the commission issued, but an amendment of the report in this respect would avail nothing; all that was done before the commission issued and the proper oath administered, is a mere nullity. There is no authority for any such proceedings. All that is shown to have been done under the commission, is that the line was "determined" by the commissioners on oath, while the law requires that every thing required to "ascertain" as well as determine the line shall be done under the commission and shall so appear in the report. *Lisbon* v. *Bowdoin*, *supra*.

As this report fails in these several particulars it does not appear that the controversy has been ended, and therefore the

former proceedings present no obstacle to the receiving and acting upon the present petition.

Exceptions sustained.

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

WILLIAM E. DONNELL

vs.

PORTLAND AND OGDENSBURG RAILROAD COMPANY, AND DENNIS W. CLARK and another, trustees.

Cumberland. Opinion February 23, 1884.

Trustee process.

At the time of the service of the writ on the alleged trustees, they, as a firm, were indebted to the principal defendant railroad company in the sum of $607.58 for freight. Prior to such service the railroad company gave its note for the payment of $550, amply secured, to one of the members of the firm, payable after such service but before the disclosure. At maturity of the note, by agreement between the payee and the railroad company, its amount was credited upon the firm's indebtment to the company; and the note, with the collateral security, was surrendered to the company. *Held,* that the trustees be charged for the whole amount of their indebtment to the company, without deducting the amount of the note.

Ingalls v. *Dennett,* 6 Maine, 79, commented upon.

ON EXCEPTIONS from the superior court.

The facts are stated in the head note and opinion of the court.

W. L. Putnam, for the plaintiff, cited: *Hathaway* v. *Russell,* 16 Mass. 476; *Smith* v. *Stearns,* 19 Pick, 22; *Chipman* v. *Fowle,* 130 Mass. 354; *Peirce* v. *Bent,* 69 Maine, 386.

Haskell and Woodman, for the trustees.

The case shows the writ to be against *Dennis W. Clark et als.* severally, as alleged trustees, and not against any firm of which Clark is a member.

I. If Clark is chargeable at all, it is only on account of the

$607.58, for which his firm, composed of himself and Ashbel Chaplin, was indebted to the principal defendant, and the firm not having been summoned, Clark as a partner thereof should not have been charged. *Warner* v. *Perkins and Tr.* 8 Cush. 518.

II. At the time of service on Clark, he was the payee in a note for $550.00 given by principal defendant to him, for which he held bonds as collateral, and which note he had discounted at the bank by indorsing it, and thereby became liable to see the same paid at maturity. If he had not discounted the note, he could have offset the same in this proceeding against his firm's said debt, even though the trustee process had been against his firm. *Eaton* v. *McKown*, 34 Maine, 510.

Had the principal defendant sued its account against Clark alone, as plaintiff has done, he might have sued the note when it fell due, and offset the judgments or executions, and ought not to be put in a worse position by this suit. It should be competent for the parties to do voluntarily what the law would accomplish for them if appealed to. *Houghton* v. *Houghton*, 37 Maine, 72.

The indebtedness still continued, and in an equitable proceeding like the present, Clark ought to be at liberty to avail himself of it in payment of his firm debt as against the plaintiff. *Boston Type Foundery Co.* v. *Mortimer*, 7 Pick. 166; *Smith* v. *Stearns*, 19 Pick. 20.

III. The bonds held as collateral for the note, cannot be held on trustee process. *Smith* v. *K. P. R. R. Co. and Tr.* 45 Maine, 547; *Bowker* v. *Hill*, 60 Maine, 172.

VIRGIN, J. The disclosure of Clark shows that the two supposed trustees were and are in fact the sole members of a partnership, although they are not described as such in the writ. Service, however, was properly made on each of them. *Hutchinson* v. *Eddy*, 29 Maine, 91; *Warner* v. *Perkins*, 8 Cush. 518.

The disclosure also contains a statement of the accounts between the firm and the principal defendant, from which there appeared, at the date of the service of the writ, a balance of six hundred seven dollars and fifty eight cents in favor of the latter.

The supposed trustees were, therefore, properly charged for that sum by the court below, unless they should have been allowed to deduct the amount of the note given by the principal defendant to Clark individually.

The note was given prior to the service of the writ on the supposed trustees, although it was not then payable; but it matured and was credited on the account by the parties, before the disclosure. If it had been due when the writ was served, and Clark had retained possession of it, it might have been set off, *pro tanto* against the firm's indebtedness; for each partner being liable for his partnership's debts may discharge them with his individual funds, if he so elect. *Robinson* v. *Furbush*, 34 Maine, 509.

Nor would the mere fact that the note was not due when service was made necessarily prevent the set-off, provided it was given prior thereto, and was payable before the disclosure. To be sure it is generally true that a trustee's liability depends on the state of facts as it existed when the process was served on him. But this rule is not universally applicable. Some apparent liability may be necessary at that time; but it may be materially modified and even wholly discharged by subsequent events on the score of equitable set-off, *Marrett* v. *Equitable Insurance Co.* 54 Maine, 537, 539; *Smith* v. *Stearns*, 19 Pick. 20, 23, where the exception is variously illustrated by SHAW, C. J. Moreover it has been held that where a supposed trustee, when the process was served on him, was indebted to the principal defendant, but he had previously, at the request and for the benefit of the defendant, indorsed without indemnity the latter's note which, the defendant having failed, he was legally compelled to pay, the trustee might be allowed to set off the sum paid on the note against the apparent indebtedness. *Boston T. and S. F. Co.* v. *Mortimer*, 7 Pick. 166. And the reason assigned was that if the principal had sued the trustee, although the latter's claim not being then due could not be filed in set-off yet, if at any time before judgment, the plaintiff in the suit had become indebted to him for money paid on a liability incurred before the suit, which the plaintiff had failed and was unable to pay, the

court would grant him a continuance, that he might bring a cross-action so as to have a set-off of judgments or executions, unless there should appear some special cause for refusing such relief. Were it otherwise a trustee's claims might be prejudiced by being made a party, and having them drawn in to be incidentally settled, in a suit between other persons. *Hathaway* v. *Russell*, 16 Mass. 476.

This power of setting off judgments has long been practiced by courts. It depends on no positive statutory provision but is said to rest upon their jurisdiction over suitors and their general superintendence of proceedings before them. *Mitchell* v. *Mafield*, 4 T. R. 123; *Makepeace* v. *Coates*, 8 Mass. 451; *Peirce* v. *Bent*, 69 Maine, 381, and the numerous cases there cited. The application of the doctrine not being founded on any statute or any fixed imperative rule of common law, is addressed to the discretion of courts which they will exercise on a careful consideration of all the facts and circumstances involved in order to promote substantial justice and protect the rights of all parties. *Chipman* v. *Fowle*, 130 Mass. 352. Thus in *Boston T. and S. F. Co.* v. *Mortimer*, *supra*, PARKER, C. J., said: "This decision will not reach the case of a liability incurred after the service of the writ, or where the effect of the liability may be avoided by reasonable diligence on the part of the person liable, to procure payment of the debt by the principal; but we confine it to such a case as we have before us, in which there was actual liability before the service of the writ and an actual payment by necessity before the answer."

In the case at bar, we perceive no equitable considerations which should induce a court, seeking to protect the rights of all parties, to authorize these trustees to deduct from their indebtedness to the company the amount of the note given by the latter to Clark. The original note was given for a loan to be sure; but it had been repeatedly renewed and it was amply secured. The payment of this note or any of its predecessors could have been enforced at any time; and hence there is no special reason for allowing the set-off, especially since such a proceeding would entirely ignore the rights of the plaintiff. Such a result would

become a precedent for a corporation whose managers might be disposed thereto, to secure from foreign attachment all moneys due from persons doing business over its road, and thereby without violating the law, delay its creditors.

If Clark has surrendered his note and security to the corporation, he did it voluntarily and with unnecessary promptness. Had he waited until his rights had been legally determined on the writ to which he was made a party, his interests would have been more satisfactorily protected, perhaps, than they seem to have been *sua motu*. *Parker* v. *Danforth*, 16 Mass. 300, 305.

We are aware that the drift of this opinion is in conflict with that in *Ingalls* v. *Dennett*, 6 Maine, 79; for since the provisions of R. S., c. 86, § 64, went into effect, we do not think a trustee should be charged on a state of facts stated in that case. *Marrett* v. *Eq. Ins. Co.* 54 Maine, 537, 540.

Exceptions overruled.

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

MARY L. GARING *vs.* MARY J. FRASER and others.

Cumberland. Opinion February 23, 1884.

Pleadings. Case. Perjury. R. S., c. 82, § 124. Malicious prosecution.

In an action against several defendants for conspiring together to procure the plaintiff to be indicted and convicted of a crime, by false and perjured testimony, and for causing him to be thus indicted and convicted by such false and perjured testimony, the gist of the action is the alleged tort and not the alleged conspiracy.

At common law an action does not lie against a witness for perjury; and the provisions of R. S., c. 82, § 124, are confined to perjury in civil cases.

A simple *nol. pros.* is not such a determination of an indictment as will entitle the accused to maintain an action for malicious prosecution.

ON EXCEPTIONS to the rulings of the presiding justice in sustaining a demurrer to the following declaration.

(Declaration in writ.)

"In a plea of the case, for that the said plaintiff being a good, true and faithful citizen of this State, and having behaved and conducted herself as such from her nativity to the present time, and so among her neighbors as well as others was known and reputed. Yet the said defendants, not ignorant of the premises, but contriving and maliciously intending to hurt, wound and injure the plaintiff, and her unjustly to vex, molest and disturb, and to cause her to suffer punishment and to be fined, and also imprisoned for a long space of time, and thus to be deprived of her liberty, and thereby to impoverish, oppress and wholly ruin her; did at Portland, in the county of Cumberland and State of Maine, on the second day of January, A. D., 1883, maliciously and wickedly conspire, combine, confederate and agree together amongst themselves to falsely accuse, and by means of false testimony, to procure the plaintiff to be indicted and convicted of the crime of maintaining a common nuisance, an indictable offence by the laws of the State of Maine, and punished by a fine and imprisonment; and did then and there, at the January term of the superior court, within and for the county of Cumberland, held at Portland, aforesaid, on the first Tuesday of January, A. D., 1883, by false, fabricated and perjured testimony, accuse the said plaintiff of the crime aforesaid before the grand jury of the county aforesaid, whereby said grand jury returned into said court a certain bill of indictment in words and figures as follows, viz:" . . .

"Which said indictment the court aforesaid caused to be read, and caused said plaintiff to answer thereto in said court before a jury of the court aforesaid, duly impanneled to try said plaintiff on said indictment procured as aforesaid, and said plaintiff was put on her trial on said indictment in said court on the nineteenth day of January, aforesaid, and the said defendants then and there at said trial before the court and jury aforesaid, gave said false, fabricated and perjured testimony against said plaintiff, and in support of the allegations contained in said indictment procured as aforesaid and by means of said false, fabricated and perjured testimony given as aforesaid before the court and jury

aforesaid the plaintiff was by the verdict of said jury found guilty of the crime charged in said indictment, and the said court thereafterwards on motion of said plaintiff and a hearing thereon, set aside the verdict of the jury aforesaid because of the false, fabricated and perjured testimony given by said defendants at the trial as aforesaid, and thereafterwards the county attorney, who prosecutes for the State of Maine within and for the county of Cumberland, entered on the records of said court a *nolle prosequi* to said indictment, as by the records and proceedings remaining in said court appears.

"By means of the premises aforesaid and the said false, fabricated and perjured testimony given in said court as aforesaid, the plaintiff has suffered great anxiety and pain of body and mind, and has been forced and obliged to lay out and expend divers sums of money in the whole amounting to a large sum of money, to wit, six hundred and fifty dollars, in and about defending herself in the premises, and has been greatly hindered and prevented by reason of the premises from transacting her lawful and legal affairs for the space of twenty-six days, and also by reason and means of the said premises she, the plaintiff, has been, and is, otherwise greatly injured in credit and circumstances. To the damage of the said plaintiff, (as she says) the sum of fifteen thousand dollars."

H. D. Hadlock, for the plaintiff.

The allegations in the declaration are such as show that the act complained of was an illegal act and unlawfully done and therefore malicious. *Page* v. *Cushing*, 38 Maine, 523.

In a legal sense any act, done wilfully and purposely to the prejudice and injury of another, which is unlawful, is against that person malicious. *Com.* v. *Snelling*, 15 Pick. 337; *Wills* v. *Noyes*, 12 Pick. 324; *Mitchell* v. *Wall*, 111 Mass. 492; *Humphries* v. *Parker*, 52 Maine, 502; *Pullen* v. *Glidden*, 66 Maine, 202.

This action is brought to recover damages caused by the perjury of the defendants. The constitution Art. 1, § 19, provides that "every person for an injury done him in his person, reputation

property or immunities, shall have a remedy by due course of law and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."

The 5 Eliz. c. 9, made perpetual by 29 Eliz. chapter 5, § 6, enacted that when any person shall be convicted upon the false testimony of witnesses; that upon every reversal of such conviction the parties grieved may recover his or their damages against all and every such witness.

The law when properly administered gives redress for all injuries caused by the wrongful acts of others, and this ancient statute was enacted for that purpose and it is now undoubtedly common law with us.

As to the effect of entry of *nol. pros.* see: *Brown v. Randall*, 36 Conn. 56; Swift's Digest, Vol. 1, p. 491; SHAW, C. J., *in Parker v. Fareby*, 10 Cush. 281; SHERWOOD, C. J., *in Mayer* v. *Walter*, 64 Penn. 286; *Brook* v. *Carpenter*, 3 Bing. 297; *Jones* v. *Given*, Gilbert's Cas. 185; *Gilbert* v. *Emmons*, 42 Ill. 143; *Chapman* v. *Woods*, 6 Blackf. 504; *Moulton* v. *Beecher*, 15 N. Y. S. C. 100; *Driggs* v. *Burton*, 44 Vt. 143; *Shock* v. *McChesney*, 4 Yeates, 507; *Kelley* v. *Sage*, 12 Kan. 110; *Marbourg* v. *Smith*, 11 Kan. 554; *Morgan* v. *Hewes*, 2 T. R. 225.

M. P. Frank, for the defendants, cited: *Parker* v. *Huntington*, 2 Gray, 124; *Dannehey* v. *Woodsum*, 100 Mass. 195; *Gibson* v. *Waterhouse*, 4 Maine, 226; *Payson* v. *Caswell*, 22 Maine, 212; *Humphries* v. *Parker*, 52 Maine, 502; *Parker* v. *Farley*, 10 Cush. 279; *Bacon* v. *Towne*, 4 Cush. 217; *Brown* v. *Lakeman*, 12 Cush. 482; *Willington* v. *Stearns*, 1 Pick. 497; *Bennett* v. *Davis*, 62 Maine, 544; *Brown* v. *Webber*, 6 Cush. 570.

VIRGIN, J. The plaintiff alleges in substance that the defendants maliciously conspired to falsely accuse, and, by means of false testimony, to procure him to be indicted and convicted of the crime of maintaining a nuisance; that by false and perjured testimony the defendants did accuse him of said crime before the grand jury who found an indictment therefor against him; that

he was tried on said indictment, and, by means of false and perjured testimony given by them at the trial, the jury found him guilty of the charge; that the court set aside the verdict because of said false and perjured testimony; and that thereupon the county attorney entered upon the records of the court a *nolle prosequi* to said indictment with allegations of damages.

The gist of the action is not the conspiracy alleged, but the tort committed by the defendants and the damage resulting therefrom. To charge all the defendants, joint action must be proved, and the allegation of a conspiracy may be a proper mode of alleging it; but for any other purpose it is wholly immaterial, as it does not change the nature of the action, or add anything to its legal force or effect. *Dunlap* v. *Glidden*, 31 Maine, 438; *Parker* v. *Huntington*, 2 Gray, 124 and cases there cited; *Jones* v. *Baker*, 7 Cow. 445; *Wellington* v. *Small*, 3 Cush. 145; *Hayward* v. *Draper*, 3 Allen, 551; *Rice* v. *Coolidge*, 121 Mass. 394; *Randall* v. *Hazelton*, 12 Allen, 414; *Barber* v. *Lesiter*, 7 C. B. (N. S.) 184.

The acts of the defendants are alleged to be false and perjured testimony. But at common law an action will not lie against one for perjury. *Dunlap* v. *Glidden*, 31 Maine, 435, 439; *Severance* v. *Judkins*, 73 Maine, 379; *Damport* v. *Sympson*, Cro. Eliz. 520; *Eyres* v. *Sedgwicke*, Cro. Jac. 601; *Phelps* v. *Stearns*, 4 Gray, 106; *Rice* v. *Coolidge*, 121 Mass. 395, and cases cited.

But it is said that the English Sts. of 5 and 28 Eliz. provide that a party grieved by a judgment obtained by the perjury of witnesses might, after the reversal of the judgment, "recover his damages against every such person as did procure such judgment against him, by action on the case." Assuming, however, that these statutes are in force here, neither of them can be seriously contended to be applicable to this case. To be sure, it is a general rule of the common law and it has been substantially engrafted into Art. 1, § 19 of our constitution, that a man shall have a remedy for every injury. 3 Black. Com. 123; *Ashby* v. *White*, 1 Salk. 21. But the law has more than one idea. And this principle however sound must be understood with such

qualifications and limitations as other principles of law equally sound and important impose upon it. MORTON, J., 11 Pick. 532. Thus notwithstanding the rule first above mentioned, words spoken in the course of judicial proceedings, though they impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if applicable and pertinent to the subject of inquiry. *Barnes* v. *McCrate*, 32 Maine, 442; *Hoar* v. *Wood*, 3 Met. 193. So in the case at bar, while the law declares that every person shall have a remedy for every wrong, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony; but if they perjure themselves they may be indicted and punished therefor. *Barber* v. *Lesiter*, 7 C. B. (N. S.) (ERLE, J.) 186.

The counsel argue this case as if it were an action for malicious prosecution. But assuming this to be correct, then the demurrer must be sustained, for there is no allegation that the prosecution has been determined in favor of the plaintiff or has been finally abandoned. The allegation is that the "county attorney entered on the records of the court a *nolle prosequi* to said indictment." There is a long series of decisions that such a disposition is not of itself sufficient. *Parker* v. *Huntington*, 2 Gray, 128; *Brown* v. *Lakeman*, 12 Cush. 482 and cases there cited; *Parker* v. *Farley*, 10 Cush. 279. And even if we adopt the suggestions as to the inflexibility of the rule of Ch. Jus. SHAW in the last cited case, still there is no allegation that the plaintiff objected to the *nol. pros.*

Exceptions overruled.

PETERS, C. J., WALTON, LIBBEY and SYMONDS, JJ., concurred.

WARREN FOWLER *vs.* ADDISON E. TRUE.

FRANK W. FISKE *vs.* Same.

EVA S. MEACOM *vs.* Same.

Androscoggin. Opinion February 25, 1884.

Trusts. Executors and administrators. Statute of limitations. Devisees. R. S., c. 87, § 16. Stat. 1872, c. 85.

At the death of a trustee who had given no bond as such, if the identity of the trust fund or property is lost, the *cestui que trust* stands in the position of a general creditor of the estate; or if the trust is not terminated the estate becomes at once liable to a new trustee who may be appointed, and the special statute of limitations applies to the demands for the trust funds as it does to other claims against the estate, though a new trustee is not appointed.

When a claim that might have been enforced against the estate of a testator in the hands of his executors has become barred by the statute of limitations as against the executor an action cannot be maintained for the same against the devisee under the provisions of R. S., c. 87, § 16; Stat. 1872, c. 85.

ON report on agreed statement of facts.

These are actions of assumpsit severally brought against the defendant as a devisee of John True, late of Poland, Maine, under the provisions of R. S., c. 87, § 16, as amended by stat. 1872, c. 85. The date of the writs in the first two actions is March 28, 1883, and in the third action, March 30, 1883. The plea was the general issue in each case.

The opinion states the facts.

A. R. Savage, for the plaintiffs.

N. and J. A. Morrill, for the defendant.

SYMONDS, J. These are actions of assumpsit against the defendant as a devisee of John True, who was executor of the will of Samuel True, of Providence, R. I. This will was

admitted to probate in Rhode Island in April, 1866, and in Maine, where Samuel True owned real estate, in January, 1867; the estate was duly administered under the laws of Rhode Island, and in the settlement of his account as executor on August 9, 1869, John True charged himself with a fund in his hands as trustee under the following clause therein: "I hereby bequeath and devise to the children of my deceased sister, Delaney Dennin, who are now living, and to the children or child of any deceased child of my said sister, ... one undivided sixth part of said other half of all my estate, real, personal and mixed, to them, their heirs and assigns forever; and I hereby direct and declare that the portion which will by this clause of my will go to the child or children of Evelina Fisk, who is a deceased child of my said sister, Delaney Dennin, deceased, shall be held by my said brother John in trust, to take care of and manage for the benefit of the child or children of the said Evelina Fisk, until the youngest arrives at the age of twenty-one years; the said trustee, whom I hereby appoint for that purpose, to apply so much thereof toward the support and education of the child or children of Evelina Fisk, during their minority, as he sees fit, and when the youngest arrives at the age of twenty-one years, said trust shall cease and said portion so placed in trust shall be equally divided between the children of the said Evelina Fisk."

This item in the account of John True as executor was allowed, the fund remained in his possession as trustee, was removed by him to Maine, "and the same cannot be further traced. October 12, 1869, he applied to the use of Eva E. Meacom twenty dollars and fifty cents; October 14, 1869, he applied to the use of Warren A. Fisk, now Warren Fowler, twenty-five dollars and fifty cents. Beyond these sums he never paid or accounted to the plaintiffs in any sum whatever, and he never settled any account as trustee." No bond from him in that capacity was ever required or given.

John True died in this State, May 26, 1877, and it is claimed the defendant, as his devisee, has received property sufficient to restore to the plaintiffs, who are the only children of Evelina Fisk, the amount of the trust fund remaining in John True's

possession at his death. The youngest of the plaintiffs became of age March 9, 1883. The writs are dated March 28, and March 30, 1883.

The will of John True was admitted to probate in the county of Androscoggin in July, 1877; the defendant was his executor, gave legal notice of his appointment, July 17, 1877, returned an inventory of the estate, proceeded with the administration, and settled three accounts, one of which purports to be his final account as executor. The claims of the plaintiffs were not filed in the probate office, nor were they presented to the executor in writing and payment thereof demanded, within two years from the notice of appointment. R. S., c. 87 § 12 (1872, c. 85). But it is sought to maintain the present actions against the devisee under R. S., c. 87, § 16 (1872, c. 85).

This is not a proceeding in equity to hold a particular fund or property as charged with a trust, either originally, or by tracing the use of trust funds or the proceeds of trust property in the purchase or procurement of it. The distinct statement of the case is, that the trust fund cannot now be traced. The proceeding is by action at law, of assumpsit, against the trustee personally, through his devisee; not against a trust fund or property. Such an action stands upon the same plane, subject to the same limitation, as an ordinary action of assumpsit against the estate of a deceased person. The statute of limitations applies to any trust which is the ground of an action at law. The rule that the statute does not apply to cases where the technical relation of trustee and *cestui que trust* exists, only holds in cases over which courts of equity have exclusive jurisdiction. Wood. on Lim. 42; *Godden* v. *Kimmel*, 99 U. S. 201; *Pratt* v. *Northam*, 5 Mason, 95. "Executors are charged with no more in virtue of their office, than the administration of the assets of the testator. If at the time of his death there is any specific personal property in his hands belonging to others, which he holds in trust, or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stock or other things, is not assets to be applied in payment of his debts or to be distributed among his heirs; but is to be held

by the executors as the testator himself held it. But if the testator has money or other property in his hands belonging to others, whether in trust or otherwise, and it has no earmark, and is not distinguishable from the mass of his own property, the party must come in as a general creditor; and it falls within the description of assets of the testator. This is the settled law in bankruptcy and in the administration of estates." *Trecothick* v. *Austin*, 4 Mason, 29.

"If the trust is still subsisting in the hands of the executor, as executor, the lapse of four years does not bar a remedy against him. If it has become a mere money transaction, although originating in a trust, then it assumes the character of a debt, and the *cestui que trust* is a creditor barred by the lapse of the four years." *Ib.*

John True having given no bond as trustee and the identity of the trust fund or property being lost, it follows that the plaintiffs at his death stood in the position of general creditors of his estate. Not having presented their claims to his executor nor brought an action within the period of limitations of actions against executors, they seek here to charge upon the defendant as devisee a liability which attached in full force and with a present right of action upon it to the estate in the hands of the executor during the period of administration.

The present periods of limitation under the statutes already cited are two years, from the executor's notice of appointment, for presenting claims in writing and demanding payment, and two years and six months for beginning the action. *Whittier* v. *Woodward*, 71 Maine, 161; *Littlefield* v. *Eaton*, 74 Maine, 516.

In this State, and in Massachusetts from which our law in this respect is derived, heirs and devisees are liable only for demands on which no cause of action accrues till after the period of limitation of suits against the executor or administrator has expired. "By the policy and provisions of our laws, the remedy of a creditor upon the heirs or devisees of a deceased person is extremely limited. Every demand which can be made and enforced against the estate of a deceased person is to be pursued against the administrator, where it can be done, and the whole

estate, personal and real, is in effect made assets in his hands to meet such claims. This object is one of great importance, by securing as far as practicable an early and final settlement of estates, so that the residuum may be distributed among those entitled, free from incumbrances and charges which would lead to protracted litigation. . . . It must appear that the demand was not due and the claim could not have been made until the administration had closed. It is not enough that a mere formal right of action accrues by an act done after the four years. If the demand might have been made, and thereupon an action would have accrued before the expiration of the four years, then it might have been brought against the administrator and will not lie against the heir." *Hall* v. *Bumstead*, 20 Pick. 6.

"It is clear that where the right of action accrues within the four years from the time when notice of the administration is given, no action will lie against the heir; it being the general policy of our laws to secure the settlement of all estates in the probate office by the administrator." *Royce* v. *Burrell*, 12 Mass. 399; *Bacon* v. *Pomeroy*, 104 Mass. 577; *Webber* v. *Webber*, 6 Maine, 127; *Sampson* v. *Sampson*, 63 Maine, 331; *Baker* v. *Bean*, 74 Maine, 17.

On the death of John True and the appointment of his executor, his estate became at once liable to a new trustee, who might have been appointed, for the amount of the trust fund, and the special statute of limitations applies to the plaintiff's demands as to other claims against his estate. Not having been presented in writing within the two years, no action having been brought within two years and six months, from the notice of the executor's appointment, the causes of action set forth in the plaintiff's declarations, being in this proceeding mere personal claims against the estate of the trustee, not based on the identification of trust property, are barred.

Thus, in *Hall* v. *Bumstead*, *supra*, an action against the heirs of a surety upon a guardian's bond, it is said: "But there is nothing to show that this demand might not have been made and enforced, before the close of the administration on Bumstead's estate. If James Child (the guardian and principal in the bond)

died, or if the ward came of age in his lifetime, in either event she became entitled to have the balance in the hands of her guardian paid on demand. In the former case, payment could be enforced by the appointment of a new guardian to act for her, and in the latter, in her own right. . . . . We think it would make no difference, if it should appear that the ward was under the disability of infancy during the whole or a part of the time that the estate was under administration. No such disability has ever been allowed as an avoidance of this statute; on the contrary, the lapse of time under this statute has been regarded as an absolute bar to all claims. We think it is right that it should be so. If the guardian died, whilst the ward was still under age, a new guardian could have been appointed in the mode provided by law, to look after her property in the hands of the former guardian, and to claim it of the surety, if the principal made default or proved insolvent. As it does not appear by this declaration that this claim could not have been made before the administration closed, the action against the heirs cannot be maintained."

This case is cited in *Littlefield* v. *Eaton*, 74 Maine, 520, as authority for the statement "that no disability of the claimant, as by infancy, during the period prescribed, will prevent his claim, if due and payable, from being barred." See also, *Baker* v. *Bean*, *supra*.

In *Sampson* v. *Sampson*, *supra*, the liability of the heir for the debts, covenants and contracts of the ancestor is referred to as "only contingent and eventual, depending upon the absolute inability of the creditor, or claimant, on account of the nature of his claim, to obtain satisfaction through legal process while the estate was under administration, or while the power to compel administration remained."

"In the case of executors and administrators, the limitations imposed by statutes are more stringently enforced than those of the general statute of limitations, both at law and in equity; and it has been held that the omission to embody in the former statutes the exceptions contained in the latter, indicates a purpose to make the bar of suits against executors and administrators

absolute." *Bank* v. *Fairbanks*, 49 N. H. 140; *Atwood* v. *Bank*, 2 R. I. 191.

Without deciding the controverted question, whether the defendant has funds in his hands as devisee of John True, or not, we think the claims of the plaintiffs in these actions were against the estate of John True in the hands of his executor, and, having been barred by the statute of limitations as against the executor, cannot now be enforced in this manner against the devisee.

In each action the entry will be,

Judgment for the defendant.

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

PELEG T. JONES, appellant,

vs.

AMANDA P. MCLELLAN and others.

Sagadahoc. Opinion February 27, 1884.

Wills. Undue influence. Evidence.

At a trial before the jury upon the questions arising upon the probate of a contested will, the proponent requested the following instruction: "That if the jury find that the testator was of sound mind at the time of executing the will they are at liberty to consider his declarations to the attesting witnesses at the time of the execution of the will as evidence of the facts stated, though his declarations at all other times are not to be considered by them as evidence of the facts stated."

Held, the ruling requested was correctly and legally refused.

ON exceptions and motions.

Probate of the will of William F. Jones late of Bowdoin. The jury found that the testator was of sound mind but that the will was procured by undue influence of the legatee.

The head note and the opinion state the material facts.

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

S. C. Whitmore, for the appellees.

SYMONDS, J. During the trial of an issue before the jury relating to the soundness of mind of the testator and to the exercise by the appellant of undue influence in procuring the alleged will, declarations of the testator to the attesting witnesses at the time of executing the will, to the effect that he had written it himself just as he desired to have it; that he had given his property to the appellant because he was the only one who had taken any interest in him or visited or cared for him; that no influence had been exercised or dictation attempted by anybody in regard to the provisions of the will, were received as evidence of the testator's state of mind at the time when the declarations were made, competent for the consideration of the jury so far as they served the purpose of reproducing the man himself before them, and thereby aided them in judging of his capacity and the freedom of his action. The fact that he made such declarations became a part of the evidence in the case. If that fact, in view of all the circumstances, had a tendency, in the judgment of the jury, to prove that his mind was sound and free from undue influences when he made the will, the appellant under the ruling given had the benefit of it. In other words, the testimony was allowed its full force so far as it tended to disclose the testator's understanding or consciousness of the reasons or motives operating on his own mind; that he was not aware of any tendency or impression produced upon his mind by external influences, that he was conscious only of a free exercise of his volition, induced by his affection and gratitude towards his brother, the appellant.

But when it was sought by the request to go beyond this subjective character of the declarations in evidence and to give them an effect, objectively, to prove the existence of external facts such as the declarations averred to exist, the ruling requested was correctly and legally refused. That the testator said at the time of executing the will that the appellant was the only relative who had any interest in him, or came to see him, or took care of him when he was sick, that others only came to steal what they could get, was evidence of his own judgment and feeling in regard to these relatives, not of the truth of his statements about them; that at the same time he said he had written his will

just as he wished it to be, without dictation or influence, was evidence that that was his state of mind in regard to it, that so far as he was himself aware his act was a voluntary one, not the result of the exercise of the illegal influence which was charged. The probability or improbability, upon the whole case, of the exercise of such an influence without the testator's knowledge was matter of argument; but the appellant was not entitled to a ruling that this declaration was evidence of the absence of such influence as a fact by itself, apart from the testator's consciousness. The fallacy of the request is in its attempt to make the mere declarations of the testator evidence of circumstances, conduct, events, when their true office is to reveal his mind, and thereby to aid the jury in deciding the issue whether the alleged will was, or was not, the voluntary act of a sane person.

The exception to the refusal to give the requested instruction is sustained in argument upon the ground (stated also in the request itself) that declarations of a testator, accompanying the act of executing a will, are "evidence of the facts stated, though his declarations at other times are not to be considered as evidence of the facts stated." We think this distinction is not supported by the authorities on the subject. In *Shailer* v. *Bumstead*, 99 Mass. 120, it is said, "The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented. So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it." This case is cited in 1 Greenl. Ev. § 108, as authority for the statement that "upon an inquiry as to the state of mind, sentiments or disposition of a

person at any particular period, his declarations and conversations are admissible. They are parts of the *res gestæ*."

"It should at the same time be remembered that as primary proof that a testator was influenced, in making the will, by fraud or compulsion, his declarations are inadmissible. In such relation they are to be regarded as hearsay. But while such declarations are not admissible to prove the actual fact of fraud or improper influence by another, they may be competent to establish the influence and effect of the external acts upon the testator himself." Whart. Ev. § 1010; *Robinson* v. *Adams*, 62 Maine, 369.

In regard to another class of declarations by the testator, those received as evidence of his intention, Lord DENMAN said in *Doe* v. *Allen*, 12 Ad. and El. 92: "Cases are referred to in the books to show that declarations contemporaneous with the will are alone to be received, but on examination none of them establish such a distinction. Neither has any argument been adduced which convinces us that those subsequent to the will ought to be excluded, wherever any evidence of declaration can be received. They may have more or less weight according to the time and circumstances under which they were made, but their admissibility depends entirely on other considerations."

It is the opinion of the court that the motions for new trial and for probate of the will notwithstanding the verdict, as well as the exceptions, should be overruled.

Exceptions and motions overruled. The decree of the probate court affirmed. The instrument purporting to be the last will and testament of William F. Jones disallowed and rejected, he decreed to have died intestate, and the case remanded to the probate court for further proceedings. The proponent not to recover or pay costs. The contestants to recover costs, to be taxed as between attorney and client, to be paid out of the estate.

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

EDWARDS MANUFACTURING COMPANY, in equity,

vs.

WILLIAM SPRAGUE, trustee, and others.

ZACHERIAH CHAFEE, trustee, *vs.* Same.

Kennebec. Opinion February 27, 1884.

Removal of causes. Practice.

Suits in equity, not related in any way to the provisions of the bankrupt law, in which the only effective relief sought is an injunction to stay proceedings in an action pending in the state court and prevent the levying of an execution issuing therefrom, are not removable to the circuit court of the United States on petition of the plaintiff in the action at law before injunction issued.

Exceptions allowed by the presiding justice, to his orders refusing a petition for removal of a suit into the circuit court of the United States, are to be considered and the questions of law raised determined by the law court.

ON EXCEPTIONS.

The opinion states the material facts.

Baker, Baker and Cornish, for the plaintiffs, cited: *Mahone* v. *R. R.* 111 Mass. 74; *Amory* v. *Amory*, 95 U. S. 187; *Removal Cases*, 100 U. S. 457; *Stone* v. *Sargent*, 129 Mass. 503; *R. R.* v. *McAlister*, 15 Rep. 761; *Jackson* v. *Gould*, 74 Maine, 564; *Carswell* v. Schley, 59 Ga. 19; *Commonwealth* v. *Casey*, 12 Allen, 214; *Morton* v. *Ins. Co.* 105 Mass. 141; *Bryant* v. *Rich*, 106 Mass. 180; *Sewing Machine Co.* v. *Grover & Baker Co.* 110 Mass. 70; *Galpin* v. *Critchlow*, 112 Mass. 339; *Gordon* v. *Green*, 113 Mass. 259; *Du Vivier* v. *Hopkins*, 116 Mass. 125; *N. Y. Co.* v. *Loomis*, 122 Mass. 431; *Pechner* v. *Ins. Co.* 65 N. Y. 195; *Ex parte Wells*, 3 Woods, 131; *Mc Whinney* v. *Brinker*, 64 Ind. 360; *Ins. Co.* v. *Green*, 52 Miss. 332; *Fashnacht* v. *Frank*, 23 Wall. 416; *Ins. Co.* v. *Pechner*, 95 U. S. 183; *Peck* v. *Jenness*, 7 How. 612; *Freeman* v. *Howe*, 24 How. 450; *Randall* v. *Howard*, 2 Black, 585;

Nougue v. *Clapp*, 101 U. S. 554; *Hines* v. *Rawson*, 40 Ga. 356; S. C. 2 Am. R. 581; *Sayer* v. *Gas Light Co.* 14 Fed. Rep. 69; *Ruggles* v. *Simonton*, 3 Biss. 325; *Fisk* v. *Un. Pac. R. R.* 6 Blatch. 362; *Rogers* v. *Rogers*, 1 Paige Ch. 183; U. S. R. S., § 720; *Watson* v. *Jones*, 13 Wall. 679; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *The Slaughter House Case*, 1 Woods, 21; *Moore* v. *Holliday*, 4 Dill. 52; *Bridges* v. *Sheldon*, 7 Fed. Rep. 45; *Wire Co.* v. *Wheeler*, 11 Fed. Rep. 206; *Missionary Co.* v. *Hinman*, 13 Fed. Rep. 161; *Diggs* v. *Walcott*, 4 Cranch, 179; *R. R.* v. *Whitton*, 13 Wall. 287; *Bondurant* v. *Watson*, 103 U. S. 281; *Perry* v. *Sharpe*, 8 Fed. Rep. 23; *Smith* v. *Schwed*, 6 Fed. Rep. 455.

Edmund F. Webb and Appleton Webb, with whom was *Benjamin F. Butler*, for the defendants.

This is not an ancillary proceeding. It is a "suit of a civil nature, at law or in equity," which is removable as described in § 2. The right of removal attaches where suit was brought to obtain an injunction against a citizen of another State. *Fisk* v. *Chicago, R. I. & P. R. R. Co.* 53 Barb. 472; 3 Abb. Pr. N. S. 453; *Stewart* v. *Mordecai*, 40 Ga. 1.

It lies where the object of the bill is to restrain the respondents. *Taylor* v. *Rockfeller*, 25 Pitts. L. I. 137; *Upton* v. *New Jersey S. R. R. Co.* 25 N. J. Eq. 372. In *Stone* v. *Bishop*, 4 Cliff. 593 (1878) jurisdiction was assumed, although one of the parties respondent was a citizen of the same state as the complainant, it appearing that the suit was auxiliary to the original suit commenced, and still pending between citizens of different states. This case, determined in this circuit, is exactly in point, and seems to be conclusive against the complainants' position that this is an ancillary suit and not removable, because the federal court would not have jurisdiction. Where a suit at law was brought in a state court, and while it was pending a suit in equity, relating to the same matter, was brought in the same court, and the defendant removed the suit into the federal court, it was held that the suit in equity was an original suit and was

properly removable. *Charter Oak Fire Ins. Co.* v. *Star Ins. Co.* 6 Blatchf. 208.

Where a citizen of one state filed a petition in a court of the state of which he was a citizen against a citizen of another state, to restrain the execution of a judgment obtained in the state court of the latter against the former, such cause was removable to the federal court, under the act of March 3, 1875, notwithstanding the fact that the federal courts were prohibited, by § 720 of R. S. from granting an injunction to stay proceedings in a state court. *Watson* v. *Bondurant*, 2 Woods, 166.

The fact that a suit is connected with and grows out of matters litigated in a state court, does not prevent the federal court from taking jurisdiction in case. *Hatch* v. *Preston*, 1 Biss. 19. A party brought into a state court by an order to inter-plead, may remove the cause. *Postmaster-general* v. *Cross*, 4 Wash. C. C. 326; *Martin* v. *Taylor*, 1 Wash. C. C. 1; *Freeman* v. *Howe et al.* 24 Howard, 450; only maintains that a suit of this kind is ancillary to the original suit, when the bill is filed on the equity side of the same court in which the suit at law is pending. This bill is in the Supreme Judicial Court, and the suit sought to be restrained is in the superior court of Kennebec county, another and different court. *Bondurant* v. *Watson*, 103 U. S. 286 is an authority in point. This was a bill like the present one, and it was claimed that it was merely auxiliary and incidental to the original cause, but the court said it had all the elements of a suit in equity. It sought relief which no court at law could grant; citations were issued and served upon the defendants; the controversy is the original cause — it was a suit, in which the complainant, (as in this case) sought to be protected from a judgment to which he was not a party.

The original suit in this matter is a suit at law in the superior court, *Wm. Sprague, Trustee*, v. *The A. & W. Sprague Manufacturing Company*. This bill in equity is in the name of the *Edwards Manufacturing Company* v. *William Sprague et als.* and contains new and grave questions not connected with the suit at law.

In the Albany Law Journal of July 21, 1883, page 54, is a case

exactly like the one under consideration. The case was removed to the federal court and the plaintiff moved to remand it on the ground that the federal court had no jurisdiction, the proceedings being merely incidental and auxiliary to the original action in the state court, and so within the decision of *Bank* v. *Turnball*, 16 Wall. 190, and *Barron* v. *Hunton*, 99 U. S. 80; but it was held that the bill instituted in the state court and removed to the federal court, was tantamount to a bill in equity to restrain the defendant from proceeding under an execution and amounted to a new case, and the court followed *Bondurant* v. *Watson*, 103 U. S. 281, and *Barrow* v. *Hunton*, 99 U. S. 83; where it is held that if the proceedings are tantamount to a bill in equity to set aside a decree for fraud then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines* v. *Fuentes*, 92 U. S. 10, is cognizable in the federal court. And we respectfully maintain that this is not an ancillary suit but a new suit, with independent and distinct proposition, in a different court and in the names of new and different parties.

It is the duty of the state court by express command of the statute, the suit being removable, to accept the petition and bond and proceed no further. *Railroad Company* v. *Mississippi*, 102 U. S. 136. By express language of the statute, when the defendant filed his petition, &c. in the case, it became the duty of the state court to accept the security and proceed no further in the cause. This act is mandatory upon the state court, and when the defendant complies with the act, the state court has no further jurisdiction to proceed in the cause. *Stevens* v. *The Phœnix Insurance Company*, 41 N. Y. 154; *Gordon* v. *Longest*, 16 Peters, 97. And every step subsequently taken in the case is *coram non judice*. *Ib.* When the act of congress is complied with, the cause is removed and the state court has no jurisdiction thereafter to proceed further in the action. *Mix* v. *Andes Insurance Company*, 74 N. Y. 53.

SYMONDS, J. These bills in equity allege that there is pending in the superior court for the county of Kennebec an action at law in which Almyra Doyle and William Sprague as her trustee,

two of these respondents, are plaintiffs, and Edmund F. Webb, the third respondent, is their attorney of record; that upon the writ in that action certain real estate was attached as the property of the defendants therein, the A. & W. Sprague Manufacturing Company, a corporation chartered and organized under the laws of the State of Rhode Island; that the real estate so attached was in the possession of the complainants at the date of the attachment, and title to the same is claimed by them under deeds from the A. & W. Sprague Manufacturing Company, preceding the attachment in date. The relief sought is that "the court will decree that neither said attachment nor any levy that may be made by virtue of any execution that may issue in said suit is or will be valid or effectual against your orators' said title and possession; and that your orators' said title and possession may be declared valid; and that said William Sprague, as trustee, and said Almyra Doyle and said Edmund F. Webb, their agents or assigns, may be enjoined both by a temporary and a perpetual injunction from levying any execution to be obtained in said suit upon said property claimed by your orators under the deeds aforesaid and from disputing the title or possession of your orators to the real estate herein before described." The bills state fully the grounds on which this relief is sought.

On the return day of the *subpœna*, before any action had been taken by the court upon the question of issuing an injunction, petitions were filed by William Sprague, trustee, and by Edmund F. Webb, for the removal of the suits into the circuit court of the United States for this district, and the exceptions now presented for consideration are to the ruling of the court denying those petitions, "solely upon the ground that the right of removal, as asked for, does not exist in the present stage of the case." It is urged that under the act of Congress of March 3, 1875, the petitions should have been granted; that by force of the statute upon the filing of the proper petitions and bonds the jurisdiction of the state court ceased, and the suits were removed into the federal court.

The substance of the relief sought, all that can be of any avail in the present position of the parties, is an injunction against the

levying of the execution, which shall issue upon the judgment in the action at law, upon the real estate to which the complainants allege title superior in equity to any that can be derived from the attachment. The exception to the ruling, therefore, presents the questions, whether upon the facts alleged the circuit court has authority in the first instance to issue such an injunction, restraining the respondents from proceeding to judgment in the state court or from enforcing the judgment recovered; and, if not, whether there is a right of removal of the suits in equity to a court whose jurisdiction does not extend to the granting of the relief sought. If these questions are answered in the negative, then it follows that the ruling, denying the right of removal in the present stage of the case, that is to say, before any injunction had been issued by the state court, was right.

In considering this branch of the subject, it may properly be assumed, without deciding, that in all other respects, such as the form of the petitions, the bonds, the citizenship of the parties, the cases meet the requirements of the acts of Congress relating to the removal of actions from the state to the federal courts; and the single inquiry is whether the suits themselves are removable, before injunctions issued. "The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof." *Barrow* v. *Hunton*, 99 U. S. 85.

In *Haines* v. *Carpenter*, 91 U. S. 257, it is said in the opinion of the court by Mr. Justice BRADLEY: "The great object of the suit is to enjoin and stop litigation in the state courts and to bring all the litigated questions before the circuit court. This is one of the things the federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in sect. 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the Bankrupt Law. This objection alone is sufficient ground for sustaining the demurrer to the bill."

The section mentioned (§ 720) reads: "The writ of injunction

shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In *Rogers* v. *Rogers*, 1 Paige, 184, which was a bill in equity, filed in the state court for the purpose of obtaining an injunction to stay proceedings at law in that court, and presents many features in common with the present suit, the opinion of the chancellor holds that "Congress never intended to authorize the defendant to remove any suit or proceeding before a state court, unless the circuit court of the United States had jurisdiction of the subject matter of such suit and had the power to do substantial justice between the parties. In this case, the foundation of the suit is the inequitable prosecution of the suits at law against complainants in the state court; and the relief sought is a perpetual injunction to stay those proceedings. By the commencement of the suits at law, the state courts have gained jurisdiction over the subject matter thereof, and the courts of the United States have no jurisdiction to restrain the petitioners from proceeding therein, or to decree a perpetual injunction, so as to prevent them from collecting the judgments which may be obtained in those suits. The effect of a removal of this cause, therefore, would be to leave the complainants without remedy. . . . . If the petitioners were not willing to trust their rights to the decision of the tribunals of this state, they should have brought their suits in the United States court, and the complainants would then have been compelled to resort to the same tribunal for the purpose of interposing their equitable defense. Having resorted to the state court for justice, they must be content to take such measure of justice, as the law and equity courts of this state mete out to them."

In the present case, as in *Rogers* v. *Rogers*, the petitioners for removal of the suits in equity are plaintiffs in the action at law in the state court, which the proceedings in equity were instituted to enjoin, and seek by their petitions for removal of the latter to have the question of their right to proceed at law in the state court, of their liability to an injunction restraining them on

equitable grounds from obtaining or enforcing judgment and execution therein, withdrawn from the jurisdiction of the state court, and transferred to be determined by the federal court; so that persons asserting equitable rights to stay of judgment and claiming the exercise of the powers of a court of equity to restrain the execution, cannot be heard in the courts of the state in which the judgment is rendered, and the plaintiffs in the action at law will be free to proceed to the levying of their execution, except so far as the circuit court may otherwise determine within the limits of its jurisdictional authority to restrain by injunction the service of final process from state courts. The petitioners for removal, a citizen of Rhode Island, and his attorney of record residing in this state, voluntarily seek the jurisdiction of the state court to recover judgment upon an alleged legal demand, but would remove to a federal tribunal all litigation respecting the rights of interested parties to obtain a decree in equity, limiting or modifying the execution to be issued in that action, or preventing the levy of it upon certain real estate in Maine.

Considerations like these seem to be regarded as conclusive against the right of removal in any case in which the proceeding in equity is not in its nature a separate and independent suit, but only a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. "If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal . . . . the United States court could not properly entertain jurisdiction of the case. . . . . On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding and . . . . the case might be within the jurisdiction of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist." *Barrow* v. *Hunton*, *supra*.

Under this rule, the judgment was that that case should be remanded to the state court as one of which the circuit court

could not take cognizance;—the precise question here presented not arising, because there the injunction had issued from the state court before the petition for removal of the suit into the circuit court was filed.

If the substance of the relief sought, and to which upon sufficient proof the complainants may be entitled, can only be granted by the state court, it would seem to follow that the suit in equity is so connected with the action at law as to prevent its separate removal into the federal court. If the injunction upon the proceedings at law must first issue from the state court, then there can be no right of removal at least till after this has been done.

We find nothing in the later statutes or decisions to indicate that this prohibition against the granting of injunctions by the federal courts to stay proceeding in state courts has been removed. The opinion of the majority of the court in *Gaines* v. *Fuentes*, 92 U. S. 10, seems to hold that the act of congress of March 2, 1867, invests the circuit court with jurisdiction, when the removal is made under that act, although that court could not have taken original cognizance of the action; and therefore that a suit brought by strangers to the estate, to annul a will as a muniment of title and to restrain the enforcement of a decree of a state court admitting it to probate, so far as that decree affected the property of the original plaintiffs, was removable to the circuit court. "In authorizing and requiring the transfer of cases involving particular controversies from a state court to a federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases."

But the same opinion denies that that suit, which it was held should have been removed into the federal court upon the application of the original defendant, was one that must have been brought originally in the state court, and declares that it was, on the contrary, a suit for equitable relief such that if by the law, obtaining in the state, customary or statutory, it could be maintained in one of its courts, whatever designation that court might

bear, it could be brought by original process in the federal court, the legal conditions as to citizenship of the parties being fulfilled;—manifestly distinguishing the suit then before the court from one to enjoin the proceedings or process of a state court, for in the later case of *Dial* v. *Reynolds*, 96 U. S. 340, it is again said: "The *gravamen* of what is desired as to Reynolds is an injunction to prevent his proceeding at law in the state court. Without this, all else is of no account. Any other remedy would be unavailing. Such an injunction, except under the bankrupt act, no court of the United States can grant. With this exception, it is expressly forbidden by law;" citing the U. S. statutes already referred to, and *Diggs* v. *Walcott*, 4 Cranch, 179; *Peck* v. *Jenness*, 7 How. 612; *Watson* v. *Jones*, 13 Wall. 679. See also, *Randall* v. *Howard*, 2 Black. 589; *Nougue* v. *Clapp*, 101 U. S. 554; *Watson* v. *Jones*, 13 Wall. 719; *Bank* v. *Turnbull*, 16 Wall. 190; *Dunn* v. *Clarke*, 8 Pet. 1; *Jackson* v. *Gould*, 74 Maine, 564; *Stone* v. *Sargent*, 129 Mass. 507,

There is nothing in the ruling which requires us to consider that class of cases, of which *Bondurant* v. *Watson*, 103 U. S, 281, is one, in which the state court had already issued the injunction before the right of removal was claimed, and the party applying for the removal sought also a dissolution of the injunction. "It is to be observed that the injunction had already been granted by the state court before the application for removal was made. The interest and purpose of Mrs. Bondurant, who asked for the removal, was to get the injunction dissolved." Under such circumstances, it seems to be held that, inasmuch as the act of March 3, 1875, provides that all injunctions had in the suit before its removal shall remain in full force and effect until dissolved or modified by the court to which the suit is removed, there may be cases in which the question of the permanence, modification or dissolution of such an injunction issued by the state court is one of federal jurisdiction, and in which removal of the suit may be secured by applying therefor at the time and in the manner prescribed by statute. But the ruling below neither

affirms nor denies the right of removal in such a state of facts, and that question is not presented for consideration.

According to the rule of practice stated in *Stone* v. *Sargent*, *supra*, which is belived to accord with what has been the practice in this state, the exceptions allowed by the presiding justice to his orders refusing the petitions for removal of the suits into the circuit court of the United States, are rightly before us, and the questions of law thereby raised are properly to be determined in the first instance by this court although any judgment rendered here will be subject to be reversed on writ of error by the supreme court of the United States. "If the case is within the act of congress, and the proper petition, affidavit and surety are filed in the state court, the circuit court of the United States takes jurisdiction of the cause, although the state court omits, or even refuses, to make any order for its removal. . . . . On the other hand, it is the duty of the state court, before relinquishing jurisdiction of a cause once lawfully brought before it, and discharging that cause from its own docket, to be satisfied that there has been a compliance with those conditions. If the highest court of the state errs in holding that the petitioner is not entitled to remove the cause, its judgment may be revised and reversed on writ of error by the supreme court of the United States, and all proceedings had in the courts of the state after due application for a removal may be ordered by that court to be set aside. But no act of congress, and no adjudication of the supreme court of the United States, has made the opinion of the state court, upon the question whether its own jurisdiction must be surrendered subordinate to the opinion of any federal tribunal below the supreme court."

The learned briefs filed in the present case contain full discussions of the principles and authorities relating to this subject, and have been of great service to the court in the examination and consideration of the numerous recent decisions rendered by various courts upon similar or differing states of fact.

Our judgment is, that there was no error in the ruling given below, that under the statutes of the United States and the construction given to them by the decisions of the court of last resort in

that respect, the supreme court of the United States, suits in equity like these, not related in any way to the provisions of the bankrupt law, in which the only effective relief sought is an injunction to stay proceedings in an action pending in the state court and prevent the levying of an execution issuing therefrom, are not in the first instance, either by original process or under the statutes of removal, within the jurisdiction of the circuit court of the United States; or rather to answer the precise question presented, that these suits were not removable to the federal court on petition of the plaintiffs in the action at law before injunction issued. What questions of federal jurisdiction may arise upon injunctions once issued in such a cause by the state court, cannot be considered in passing upon these exceptions.

Exceptions overruled.

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

STATE OF MAINE *vs.* GEORGE H. MACE.

Hancock. Opinion March 4, 1884.

Indictment. Perjury. Constitutional law. R. S., c. 122, § 5.

An indictment in which the defendant is charged with having committed the crime of perjury "by falsely swearing to material matter in a writing signed by him," is insufficient, even after verdict of guilty.

The legislature cannot make valid and sufficient an indictment in which the accusation is not set forth with sufficient fullness to enable the accused to know with reasonable certainty what the matter of fact is, which he must meet, and enable the court to see, without going out of the record, that a crime has been committed.

The form of an indictment for perjury prescribed in R. S., c. 122, § 5, is not sufficient to meet the requirements of the constitution.

ON EXCEPTIONS.

Indictment for perjury. The verdict was guilty. A motion in arrest of judgment stated as one reason: "Because said indictment does not sufficiently charge an offence against the

respondent under the constitution and laws of the State of Maine." The motion was overruled and exceptions were taken to that ruling.

The indictment was in the form prescribed by R. S., 1871, c. 122, § 5.

George P. Dutton, county attorney, for the State, cited: R. S., c. 122, § 5; *State* v. *Corson*, 59 Maine, 137.

H. D. Hadlock, for the defendant, cited: 2 Whar. Crim. L. § § 2200, 2198, 2234, 2236, 2237, 2243, 2263, 2255, 2616; R. S., c. 122, § 1; Constitution, Art. 1, § 7; 2 Arch. Crim. Pr. 1723–4, 1725, 1727–8, 1735; 2 Bish. Crim. Pro. § § 846, 852, 853, 856, 858; *Com* v. *Knight*, 12 Mass. 274; *Rex* v. *Richards*, 7 D. & R. 665; 1 Whar. Crim. L. § § 264, 285, 288, 372; 1 Bish. Crim. Pro. § § 277, 301, 362, 363; 1 Arch. Crim. Pr. 275–6; *State* v. *Corson*, 59 Maine, 141; Bish. Crim. Pro. (3d ed.) § § 86, 89, 311, 519–521, 618.

WALTON, J. The defendant is charged with having committed the crime of perjury "by falsely swearing to material matter in a writing signed by him." The indictment makes no mention of the character or purpose of the writing. Nor does it state what the matter falsely sworn to was. Nor does it contain any averments which will enable the court to determine that the oath was one authorized by law. The question is whether such an indictment can be sustained. We think it can not. It does not contain sufficient matter to enable the court to render an intelligent judgment. The recital of facts is not sufficient to show that a crime has been committed. All that is stated may be true, and yet no crime have been committed. The character of the writing is not stated, nor its purpose; nor the use made, or intended to be made, of it. For aught that appears, it may have been a voluntary affidavit to the wonderful cures of a quack medicine. Such an affidavit, as every lawyer knows, could not be made the basis of a conviction for perjury. In the language of our statute defining perjury, it is only when one who is required to tell the truth on oath or affirmation lawfully administered, wilfully and

corruptly swears or affirms falsely to material matter, in a proceeding before a court, tribunal or officer created by law, that he is guilty of perjury. R. S., c. 122, § 1. The oath must be one authorized or required by law, to constitute perjury. Swearing to an extra judicial affidavit is not perjury. And the indictment must contain enough to show that the oath was one which the law authorized or required, or it will be defective and clearly insufficient, even after verdict; for the verdict will affirm no more than is stated in the indictment; and if the indictment does not contain enough to show that perjury has been committed, a verdict of guilty will not aid it. We think the indictment in this case is fatally defective in not setting out either the tenor or the substance of the writing sworn to by the accused, to the end that the court might see whether it was one in relation to which perjury could be committed.

Besides, the writing referred to in the indictment may (and it would be strange if it did not) contain more than one statement in relation to matters of fact. The grand jury, upon the evidence before them, may have come to the conclusion that the statement in relation to one of these matters of fact was false, and thereupon voted to indict the defendant, while the traverse jury, upon the evidence before them, may have come to the conclusion that the statement in relation to that matter was true, but that some other statement contained in the writing was false, and thereupon convicted the defendant of perjury in swearing to the latter statement; and thus the defendant would be convicted upon a matter in relation to which he had never been indicted by the grand jury. Surely, an indictment which will permit of such a result can not be sustained.

True, the form followed in this case is one established by legislative authority. But the authority of the legislature in such cases is limited. Undoubtedly the legislature may abbreviate, simplify, and in many other respects modify and change the forms of indictments; but it can not make valid and sufficient an indictment in which the accusation is not set forth with sufficient fullness to enable the accused to know with reasonable certainty what the matter of fact is which he has got to meet,

and enable the court to see, without going out of the record, that a crime has been committed. This the constitution of the state forbids; and to that instrument, the legislature as well as all other tribunals, must conform. The authority of the legislature in this particular, and the extent to which it may go in establishing forms, has been judicially determined in this state, and the arguments, pro and con, need not be repeated here. We refer to *State* v. *Learned*, 47 Maine, 426.

The common law required indictments for perjury to be drawn with great nicety and fullness — more so, it is believed, than the purposes of justice required — and the result was that but few such indictments proved to be sufficient when subjected to a close and searching examination. To avoid this inconvenience, the legislature, in 1865, enacted two forms, which it declared should be sufficient. The first related to perjury committed by persons testifying orally before some court or other tribunal, and, although much briefer than would have answered by the strict rules of the common law, it was held sufficient in *State* v. *Corson*, 59 Maine, 137. The second related to perjury committed in swearing to some writing in relation to which an oath is authorized or required by law; and the sufficiency of this latter form is now for the first time before the law court for consideration; and, for the reasons already stated, and to be found more fully stated in the case cited (*State* v. *Learned*, 47 Maine, 426), we are forced to the conclusion that it is not sufficient; that the legislature, in its laudable desire to prune away the great prolixity of the forms required by the common law, cut too deep, and did not leave enough to meet the requirements of the constitution of the state.

Exceptions sustained.
Judgment arrested.

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

EVELYN B. HOSKINS and another, *vs.* JOB BRAWN.

Penobscot. Opinion March 4, 1884.

Deed. Boom.

Where one, owning the right of fastening a boom to the shore of an adjoining owner and exercising that right in connection with his booms along his own shore, conveys his land "together with all the booms and piers thereon, and privileges thereto appertaining as heretofore used by me," the right of fastening the boom as enjoyed by the grantor passes to the grantee.

ON EXCEPTIONS.

Trespass. The writ was dated December 23, 1879. The plea was the general issue with brief statement.

The facts are stated in opinion.

Peregrine White, for the plaintiff, cited: *Hammond* v. *Woodman*, 41 Maine, 177; Angell, Watercourses, § § 165, 166; *Johnson* v. *Jordan*, 2 Met. 238; Washburn, Eas. and Serv. c. 1, § § 6, 12, 13, c. 11 § 5; *Warren* v. *Blake*, 54 Maine, 276; *White* v. *Bradley*, 66 Maine, 263; *Gayetty* v. *Bethune*, 14 Mass. 49; *Grant* v. *Chase*, 17 Mass. 443.

Davis and Bailey, for the defendant, cited: *Kent* v. *Waite*, 10 Pick. 141; *Lapish* v. *Bangor Bank*, 8 Maine, 90; *Salisbury* v. *Andrews*, 19 Pick. 253; *Atkins* v. *Bordman*, 2 Met. 464; *Harding* v. *Wilson*, 2 B. & C. 39; *Bodenham* v. *Pritchard*, 1 B. & C. 95; *Barlow* v. *Rhodes*, 1 C. & M. 444; *Kooystra* v. *Lucas* v. 5 B. & A. 274; *Whalley* v. *Thompson*, 1 B. & P. 376; *Grymes* v. *Peacock*, 1 Bulstrode, 17; *Bradshaw* v. *Erye*, Cro. Eliz. 570; *James* v. *Plant*, 4 Ad. & E. 170; *Wardle* v. *Brockhurst*, 1 E. & E. 1059; *Pollen* v. *Bastard*, L. R. 12, B. 161; *Hall* v. *Lund*, 1 H. & C. 684; *Evarts* v. *Cochrane*, 4 Macq. Sc. App. 117; *Philbrick* v. *Ewing*, 97 Mass. 134; *Tourtellote* v. *Phelps*, 4 Gray, 378; *Cocheco M'f'g. Co.* v. *Whittier*, 10 N. H. 305; *Pinnington* v. *Galland*, 9 Exch. 1.

WALTON, J. The case is this: In 1846, Ira Wadleigh, being then the owner of lots 19 and 20, on the westerly side of the Penobscot river in Oldtown, with booms and piers thereon, purchased of Samuel Pratt the right of booming and fastening logs on so much of the shore of lot 21 as lay below the point of a ledge, known as Steam Mill Point, with the right of passing and repassing to fasten and move logs along the shore. From that time forward, and until 1861, he fastened the upper end of his boom to a ring-bolt on the point of the ledge mentioned, and used this extension of his boom (as the witnesses testify) mainly as a protection to his booms on lots 19 and 20. When taking in logs he would remove this upper joint of his boom; and when not taking in logs, he would restore it, so as to prevent logs which were being run down the river from entering his booms and mingling with his logs; and the evidence tends to show that this was a great convenience and of great value to the booms on lots 19 and 20. Being thus the owner of this right, and so using it, he, in 1861, mortgaged lots 19 and 20 to George P. Sewall, adding these words, "together with all the booms and piers thereon, and privileges thereto appertaining *as heretofore used by me.*"

The defendant contends that inasmuch as Wadleigh owned the right to extend his boom and fasten it to the shore of lot 21, and had used this right in connection with and mainly as a protection to the booms on lots 19 and 20, and such a use of it being extremely convenient and valuable to those lots, he had annexed the right to them, or to his booms thereon, so that when he mortgaged these lots to Sewall, "together with all the booms and piers thereon, and privileges thereto appertaining," and especially with the words added, "*as heretofore used by me*," the right passed to the mortgagee as one of the privileges or appurtenances of the estate conveyed. But at the trial at *nisi prius* the presiding justice ruled otherwise, and instructed the jury that the "privileges thereto belonging" were such only as lay opposite the shore of lots 19 and 20, and gave no rights on lot 21.

The question is whether this instruction to the jury can be sustained. We think it can not. We perceive no reason for

holding as a matter of law that the privileges or appurtenances conveyed by the deed to Sewall were such only as lay opposite the shore of lots 19 and 20. The right to hitch the upper end of his boom to the shore of lot 21 was an easement; and if this easement was beneficial to and used in connection with the booms on 19 and 20, what legal bar is there in the way of regarding it as one of the privileges or appurtenances of those booms? It is undoubtedly true that an easement on land other than that which is conveyed is not to be created by implication unless the easement is necessary to the beneficial use and enjoyment of that which is conveyed. But the authorities go far to show that easements already created, and in actual use at the time of a conveyance, will often pass, although convenient only, and not absolutely necessary. And we think there can be no doubt that such will be the result if to the clause granting the privileges and appurtenances, the grantor adds the further words, "as now or heretofore used by me," or words of equivalent import. When such words are added the inquiry is not as to what was necessary, but what was in use at the time; and it is to the use and not to the necessity that the evidence should be directed. We think the authorities cited by the defendant's counsel fully sustained these propositions. And see *Baker* v. *Bessey*, 73 Maine, 472, and cases there cited.

We think the jury should have been instructed substantially as requested by the defendant's counsel,—namely, that if Wadleigh owned the right of fastening his boom to the shore of lot 21, and had exercised that right in connection with his booms on lots 19 and 20, and mainly as a protection to them, such right did pass by his conveyance to Sewall, as one of the privileges or appurtenances mentioned in the deed.

Exceptions sustained.
New trial granted.

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

JONES S. KELLEY *vs.* CHARLES A. NEALLEY.

Penobscot. Opinion March 4, 1884.

Statute of Limitation. Fraudulent concealment. Estoppel.

K clothed N with the possession and the apparent ownership of a large amount of unsurveyed lumber, upon the latter's express promise and agreement to account for it truly. *Held*, that for N to take any portion of that lumber without survey, and convert it to his own use, and then to conceal the fact and omit to give K credit for the lumber so taken, is fraudulent in its inception and fraudulently concealed; and against such a cause of action so created and so concealed the statute of limitations will not commence to run until K has discovered the wrong that has been done him. *Held further*, that K is not precluded from recovery in assumpsit for the logs so taken by reason of former litigation between the parties when it appears that the logs sued for were not included in such former litigation, which, in fact, terminated before K had knowledge of this cause of action.

ON REPORT.

Assumpsit on an account annexed for lumber.

In addition to the facts stated in the opinion the report states: "The fact that three hundred and sixteen logs more came through the boom in 1873 than were surveyed could have been ascertained by the plaintiff, had he consulted the books of the boom, which are kept open to inquiry and inspection. . . . The plaintiff did not consult the officers of the boom, or its books, in relation to the logs of 1873, or for any purpose, and had no suspicion of any error or omission until in the year 1877."

Humphrey and Appleton, for the plaintiff, cited: *Ware* v. *Otis*, 8 Maine, 386; *Stevens* v. *Bell*, 6 Mass. 339; *Lawrence* v. *McCalmont*, 2 How. 426; 2 Smith's Lead. Cas. (5th ed.) 291; *Middlesex Bank* v. *Minot*, 4 Met. 325; *White* v. *Platt*, 5 Denio, 269; *Taylor* v. *Bates*, 5 Cowen, 376; *Rathbun* v. *Ingalls*, 7 Wend. 320; *Sheridan* v. *Ireland*, 66 Maine, 65; R. S., c. 81 § 96; *Penobscot R. R. Co.* v. *Mayo*, 65 Maine, 569; *Same* v. *Same*, 67 Maine, 470; *Gerry* v. *Dunham*, 57 Maine, 334; *Burdick* v. *Garrick*, 5 L. R. Ch. App. 241; *Davis* v.

Coburn, 128 Mass. 377; *Clark* v. *Titcomb*, 42 Barbour, 122; Angell, Lim. 170; *Atlantic Nat. Bank* v. *Harris*, 118 Mass. 147; *Jones* v. *McDermott*, 114 Mass. 400; *Bacon* v. *Rives*, 106 U. S. 107; *Lancey* v. *Maine Cen. R. R. Co.* 72 Maine, 39; *Cunningham* v. *Foster*, 49 Maine, 69.

A. W. Paine, for the defendant, contended that the judgment in the case reported upon by referee concluded the plaintiff, and he cannot maintain this suit. That whole lumber transaction was a unit of contract, and the rights of the parties under it were settled by the referee. The case is in principle the precise case of *Lancey* v. *M. C. R. R. Co.* 72 Maine, 34.

The statute of limitations is a bar to the suit; the question is whether the defendant was liable to an action, and if so whether he fraudulently concealed the cause thereof. Counsel contended that both questions should be answered in the negative. When these logs were received they were in part payment of the indebtedness of the plaintiff to the defendant for advances for which he has never been fully paid. So that literally he was not liable to a suit for the logs.

There was no fraudulent concealment. The defendant took all the logs and the plaintiff knew it. The logs were his by lien, and by special agreement. *Given* v. *Whitmore*, 73 Maine, 374; *Penobscot R. Co.* v. *Mayo*, 65 Maine, 566; S. C. 67 Maine, 470; *Rice* v. *Burt*, 4 Cush. 208; *Cole* v. *McGlathry*, 9 Maine, 131.

The plaintiff had the same means that defendant had to ascertain the whole number of logs. There is no fraudulent concealment when the means of detecting any errors is within the reach of plaintiff by inquiry of the officers of the boom, or examination of the books. 3 Mass. 201; *McKown* v. *Whitmore*, 31 Maine, 448; *Rouse* v. *Southard*, 39 Maine, 404; *Nudd* v. *Hamblin*, 8 Allen, 130; *Wells* v. *Child*, 12 Allen, 333; *Atlantic N. Bank* v. *Harris*, 118 Mass. 147; *Wood* v. *Carpenter*, 101 U. S. 135.

WALTON, J. The principal question is whether the plaintiff's right to recover for the three hundred and sixteen logs mentioned in the report is barred by the statute of limitations. We think it is not.

The facts are these: The plaintiff had logging permits which he assigned to the defendant as security for supplies to be furnished for carrying on the operations. It was agreed that the logs which the defendant should receive or take should be accounted for at the rate of thirteen dollars per thousand feet for spruce, and twenty dollars for pine. The plaintiff cut and drove to market between eleven and twelve thousand logs, amounting in feet to over a million and a half. In 1873 the defendant took and converted to his own use three hundred and sixteen of these logs without having them surveyed and without the plaintiff's knowledge or consent; and for these three hundred and sixteen logs the defendant never accounted to the plaintiff, and never informed him that they had been taken.

After the taking of the logs, the plaintiff was sued by one Doane and the defendant summoned as a trustee. It then became the duty of the defendant to disclose truly the state of his accounts with the plaintiff. This he did not do. He disclosed the logs received by him which had been surveyed, but he suppressed the fact that he had taken three hundred and sixteen logs which had not been surveyed. This disclosure was in April, 1876.

In August following the disclosure the plaintiff sued the defendant for the logs disclosed, but did not sue him for the three hundred and sixteen logs not disclosed, being still ignorant of the fact that the defendant had taken them. The defendant filed an account in set-off, and the action was referred, and an award made and accepted, showing a balance of five hundred sixty dollars and seventy-four cents due to the defendant; and during this litigation the defendant continued silent with respect to these three hundred and sixteen logs, and the plaintiff remained ignorant of the fact that the defendant was indebted to him for them.

After this litigation was ended, namely, in May, 1877, the plaintiff became first possessed of information that there were three hundred and sixteen logs not accounted for in the disclosure and subsequent suit, obtaining the information from the person who counted and run the logs to the mills for the defendant.

This suit was commenced in December, 1881, the logs having been taken in 1873, and the principal question, as already stated, is whether the plaintiff's right to recover for them is barred by the statute of limitations; and we again say we think it is not. We think there was such a concealment by the defendant of the plaintiff's cause of action as to bring it within one of the saving clauses of the statute.

The clause to which we refer is as follows:

"If a person liable to any action mentioned herein, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within six years after the person entitled thereto discovers that he has just cause of action." R. S., c. 81, § 92.

We think the taking of the plaintiff's logs in the manner stated was a fraud, and that the neglect to give him credit for them, and the omission to inform him of the facts in relation to them, was a continuation of the fraud; and, within the meaning of the statute cited, constituted a fraudulent concealment of a just cause of action; and the plaintiff remaining ignorant of the facts till within six years of the commencement of his action, we think his right to recover is not barred.

True, it has been held that the mere omission to disclose a cause of action, when no fiduciary relation exists between the parties, and the plaintiff has had the means of discovering the facts, and nothing has been done by the defendant to mislead him, does not constitute a fraudulent concealment. But such is not the law when a fiduciary relation, or one of confidence and trust, exists between the parties, which makes it the special duty of the defendant to report the facts truly. In such cases an omission to disclose what it is the special duty of the defendant to disclose, is a fraudulent concealment. *Bank* v. *Harris*, 118 Mass. 147.

Here, the plaintiff had clothed the defendant with the possession and the apparent ownership of a large amount of unsurveyed lumber, upon the latter's express promise and agreement to account for it truly. The fact that by the terms of the agree-

ment the lumber was to be accounted for at a price named per thousand feet, clearly implied that it was to be surveyed. To take any portion of it without a survey would be a fraud. It would leave the amount uncertain, and make a faithful performance of the defendant's duty impossible. And the case specially finds that such a taking was contrary to the custom of the business. Thus to take, and then to conceal the fact, and omit to give the plaintiff credit for the lumber so taken, is fraudulent in its inception and fraudulently concealed. And against such a cause of action, so created and so concealed, it is the opinion of the court that the statute of limitations will not commence to run until the plaintiff has discovered the wrong that has been done him.

Another ground of defense is that the plaintiff is precluded from a recovery by reason of the former litigation between the parties. *Nemo debit bis vexavi pro una et eadem causa*, says the defendant's counsel. It is a sufficient answer to this ground of defense to say that the case specially finds that the logs sued for in this action were not included in the former litigation. To the end of that litigation the plaintiff did not know that such a cause of action existed.

The report states that if the plaintiff is entitled to recover, and with interest from January, 1874 (the logs having been taken some time during the year 1873) the defendant is to be defaulted for five hundred and twenty-five dollars, and interest from the date of the writ. Undoubtedly he is entitled to interest, or damages equivalent to interest, from the time his logs were taken. True, he has not declared for interest in his account in the writ; but when, as in this case, interest is allowed as damages, it is not necessary to declare for it specially. The *ad damnum* clause in the writ is sufficient.

Judgment for plaintiff for $525, and interest from date of writ.

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

LEWIS KING *vs.* CHARLES C. YOUNG.

Hancock. Opinion March 4, 1884.

Practice. Deed. Trespass. Mussel-bed. Island. Flats.

It is within the discretionary powers of the court to permit a party who has introduced a deed in evidence to withdraw it.

A deed bounded the land conveyed as follows: "Beginning . . . on the bank of Jordan's river; thence running east three hundred and twenty rods; thence south fifty rods; thence west three hundred and twenty rods to Jordan's river; thence northerly by Jordan's river to the first mentioned bounds. *Held*, that the land conveyed extended to low-water mark.

A mussel-bed over which the water flows at every tide is not an island. Such formations are included in what are called flats, and, if within tide waters and within one hundred rods of shore at high water, belong to the owner of the adjoining land, if no water flows between them and the shore when the tide is out.

The owner of the adjoining land can maintain trespass *qu. cl.* against one who enters upon the flats and takes and carries away mussel-bed manure.

ON EXCEPTIONS.

This was an action of trespass *quare clausum fregit* for entering plaintiff's close on the east side of Jordan's river in Lamoine and carrying away mussel-bed manure. The plea was the general issue and a brief statement denying the plaintiff's title and alleging title in the state. The *locus* was a mussel-bed in front of the plaintiff's upland. The verdict was for the plaintiff and the defendant alleged exceptions which are sufficiently indicated in the opinion.

A. P. Wiswell, for the plaintiff, cited: Anc. Chart. 148; *Lapish* v. *Bangor Bank*, 8 Maine, 85; *Montgomery* v. *Reed*, 69 Maine, 510; *Commonwealth* v. *Alger*, 7 Cush. 53; *Mayhew* v. *Norton*, 17 Pick. 357; *Green* v. *Chelsea*, 24 Pick. 77; *Jackson* v. *B. & W. R. R. Co.* 1 Cush. 575; *Saltonstall* v. *Long Wharf*, 7 Cush. 200; *Harlow* v. *Fisk*, 12 Cush. 302; *Moore*, v. *Griffin*, 22 Maine, 350; *Storer* v. *Freeman*, 6 Mass. 439; *Partridge* v. *Luce*, 36 Maine, 16; *Pike* v. *Munroe*, 36 Maine,

309; *Erskine* v. *Moulton*, 66 Maine, 280, Angell, Tide Waters, 68, 69, 71, 72; 2 Black. Com. 26; Tyler, Law of Boundaries, c. 7; Wash. Real Pro. 55; *Emans* v. *Turnbull*, 2 Johnson, 313; *King* v. *Yarborough*, 3 Barn. and Cress. 91; *Adams* v. *Frothingham*, 3 Mass. 352.

Hale and Emery, for the defendant.

In the plaintiff's deed the grantor fixes the starting point "on the bank" and his words cannot be enlarged by the court to include land below the bank. The language of this deed does not include below the bank, or high-water mark. *Storer* v. *Freeman*, 6 Mass. 439; *Lapish* v. *Bank*, 8 Maine, 85; *Nickerson* v. *Crawford*, 16 Maine, 245; *Lincoln* v. *Wilder*, 29 Maine, 178.

The mussel-bed must have been an island when it first appeared above the surface. To whom did it then belong? We say the state. The ordinance of 1647 does not affect the question. That ordinance only conveyed to low-water mark which in this state is ordinary low-water mark. *Gerrish* v. *Union Wharf Co.* 26 Maine, 384. This new formation was below and outside of ordinary low-water mark. The ordinance cannot cross that boundary to reach a larger channel beyond. *Sparhawk* v. *Bullard*, 1 Met. 107; *Ashby* v. *Eastern R. R.* 5 Met. 370; *Walker* v. *B. & M. R. R. Co.* 3 Cush. 22; *Att'y General* v. *Boston Wharf Co.* 12 Gray, 553.

The ownership of this new island depends on the common law by which it seems clear that all new islands forming in the sea belong to the state. 2 Black. Com. 261, 262; Schultes, Aqua. Rights, 115, 138; Hale, *De Jure Maris*, c. 4; *Martin* v. *Waddell*, 16 Pet. 367; Hargrave, Law Tracts, 15; *Benson*, v. *Morrow*, 61 Mo. 345.

The accretion after the formation of the island was to it and not to the plaintiff's land. The well defined channel which at first existed between the mussel-bed and the shore at low water was closed by accretions to the island. All the authorities agree that the title to the accretion is in him who has the title to that to which the accretion appertains, to which it attaches.

In every case where the increment has been adjudged to the adjoining riparian owner it was found as a matter of fact that the increment began on the plaintiff's land and increased from there out by imperceptible degrees. *Morris* v. *Browne*, 25 Alb. Law. J. 98; *Benson* v. *Morrow*, 61 Mo. 345; *Halsey* v. *McCormick*, 18 N. Y. 147; *Saulet* v. *Sheppard*, 4 Wall. 507; *Jones* v. *Johnston*, 18 How. 150; *Deerfield* v. *Arms*, 17 Pick. 41; *St. Clair* v. *Livingston*, 23 Wall. 46; *Boorman* v. *Sunnuchs*, 42 Wis. 235.

As against the king or the state the doctrine is rarely applied, and if at all only on the ground that it cannot be ascertained that the sea formerly covered the soil in dispute. See Hale, *De Jure Maris*, 14; *Att'y General* v. *Rees*, 4 DeGex & Jones, 55.

WALTON, J. This is an action of trespass *quare clausum fregit*. The contention is in relation to the ownership of a mussel-bed in Jordan's River in the town of Lamoine; and the case is before the law court on exceptions.

1. The plaintiff having introduced in evidence a deed, was afterward allowed to withdraw it, the defendant objecting. We think it was within the discretionary powers of the court to allow the deed to be withdrawn; and it is familiar law that to the exercise of a discretionary power exceptions do not lie.

2. The plaintiff claimed title through a deed which bounded the land conveyed as follows: Beginning, "on the bank of Jordan's River, thence running east three hundred and twenty rods; thence south fifty rods; thence west three hundred and twenty rods to Jordan's River; thence northerly, *by Jordan's River*, to the first mentioned bound." The presiding judge ruled that the land conveyed extended to low water mark. The ruling was undoubtedly correct, Jordan's River being an arm of the sea in which the tide ebbed and flowed; and there being no claim that low water mark was more than a hundred rods distant from high water mark; the ordnance of 1641-7 declaring that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea

doth not ebb above a hundred rods and not more wheresoever it ebbs further. And see *Erskine* v. *Moulton*, 66 Maine, 280.

3. As already stated, the contention was in relation to the title of a mussel-bed which had formed in Jordan's River in front of the plaintiff's land, and which by its growth, had finally reached and become attached to the shore. Upon this point the presiding judge instructed the jury that if by natural causes the bed of the river commenced and continued to be raised, or the water commenced and continued to recede, so that by these natural causes, there was an accretion of soil that came above the surface of the water at ordinary low water, and continued to increase until the accretion connected with the plaintiff's shore, so that there ceased to be any channel or sheet of water between such accretion and the shore at ordinary low water, then the accretion would belong to the plaintiff, notwithstanding the highest portion of it was first raised above the surface of the water some distance from the shore; and the judge added that by natural causes he meant the action of the water in washing up gravel, sand, or soil, or the action of the mussel.

We think this ruling was correct. It seems to be settled both in England and in this country that the land of a riparian proprietor may be increased by accretion. This is not denied by the defendant's counsel. But he contends that the increase must be gradual, and from the shore outward; that if an island forms at a distance from the shore, and then, by its own growth, extends inward till it reaches the shore, such new made land will not become the property of the owner of the shore; and in this we think he is correct. He then contends that a mussel-bed is an island, if it first commences to form at a distance from the shore, and there first shows itself above the surface of the water at ebb tide, leaving sufficient water between it and the shore for boats to pass, although by its continued growth it subsequently extends to and connects with the shore, so as to leave no water between it and the shore at ebb tide. In this we think he is wrong. We think a mussel-bed over which the water flows at every tide can not properly be called an island. We think such formations constitute what are called flats; and, by virtue of the

ordinance of 1641–7 belong to the owner of the adjoining land, if within a hundred rods of high water mark and so connected with the shore that no water flows between them and the shore when the tide is out; and it was settled in *Moore* v. *Griffin*, 22 Maine, 350, that the owner of the adjoining land can maintain trespass *quare clausum fregit* against one who enters upon the flats and takes and carries away mussel-bed manure; that neither the ordinance of 1641–7, nor the common law, authorizes the taking of mussel-bed manure from the flats of another person between high and low water mark on tide waters.

Exceptions overruled.
Judgment on the verdict.

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

THOMAS F. ALLEN *vs.* BENJAMIN L. YOUNG.

Penobscot. Opinion March 4, 1884.

Game law. Deer. Stat. 1878, c. 50, § 6.

The transportation of the hide or the carcass of a deer from place to place in this State is not unlawful at any time, if the deer was killed at a time when it was lawful to do so.

ON REPORT.

The writ was dated March 6th, 1883.

(Declaration.)

"Plea of the case for that the said Benj. L. Young at Greenbush, in the county of Penobscot, did on the 17th day of February, A. D. 1883, carry and transport, the hides and carcasses of two deer from his house in Greenbush, in said county of Penobscot, to Milford in the county of Penobscot, said time being within the period in which the carrying or transporting as aforesaid is prohibited by law, against the peace of the State and contrary to

the form of the statutes in such cases made and provided. Whereby, and by force of chapter fifty, of the public laws of 1878, an action hath accrued to the plaintiff, who first sues for the same to have and recover of said Benjamin L. Young, the sum of not less than forty dollars for such carcass or hide so carried or transported, as aforesaid, one-half to his own use and one-half to the use of said county of Penobscot."

It was admitted that the plaintiff was, at the date of the writ, a fish and game warden and a policeman of the city of Bangor.

The defendant admitted the possession and transportation as alleged; but testified that the deer were killed by him in Greenbush, one on the 30th day December, 1882, and one on the 31st day of said December, one and one-half miles from his home; that the carcasses were taken to his home in Greenbush from the place where killed, on January 1st, 1883, where they were kept until February 17th, 1883, when they were transported, as alleged in the declaration, to the nearest railroad station, to be shipped by express by rail to Boston, Massachusetts, for sale, and were taken by plaintiff, from the express messenger at Bangor, *en route* for said Boston. The case was reported to the full court to render, by nonsuit or default, such judgment as the legal rights of the parties require.

Barker, Vose and Barker, for the plaintiff.

Davis and Bailey, for the defendant,

WALTON, J. The act of 1878, c. 50, for the protection of game and birds, declares,

In section 4, that deer shall not be hunted or killed between the first of January and the first of October, under a penalty of forty dollars.

In section 5, that if any person shall have in his possession the carcass or hide of any such animal, during such time, he shall be deemed guilty of having hunted and killed the same contrary to law, but shall not be precluded from producing proof in defense.

In section 6, that no person shall carry or transport from place to place in this state, the carcass or hide of any such animal,

during the period of time in which the killing of such animal is prohibited, under a penalty of forty dollars.

The question is whether, if deer are killed during the time when it is lawful to do so, it is a crime to carry or transport the hides or carcasses from place to place in this state during the time when it is unlawful to kill them,

We think it is not. True, the transportation at such a time seems to be within the letter of the law; but we think such could not have been the intention of the legislature. We can see no possible motive for making such transportation a crime. We can readily see that it would be in furtherance of the purposes of the act to make such transportation *prima facie* evidence of guilt, and thus throw the burden of proof upon the party to show his innocence, as is done in section five with respect to possession; but we fail to see any motive for making the mere transportation of the hide or carcass of a deer from one place to another a crime when the deer has been lawfully killed and is lawfully in the possession of the one who transports it. Certainly one may reasonably doubt whether such could have been the intention of the legislature; and the act being a penal one, a reasonable doubt is sufficient to make it the duty of the court to adopt the more lenient interpretation, and construe the term, "such animal," as meaning an animal unlawfully killed, as was done in construing a similar statute in *Com.* v. *Hall*, 128 Mass. 410.

And in *State* v. *Beal*, 75 Maine, 289, in construing a similar provision in relation to fish, this court, although forced to the conclusion that the fish had in fact been unlawfully taken, expressed the opinion that if they had been lawfully taken, it would not have been illegal to sell or transport them during close time; that such a transportation would manifestly be wanting in the element of illegality against which it was clear when all the provisions of the act were examined together, the penalty was directed, and the statute then under consideration was in terms as comprehensive and as imperative as the one now under consideration.

"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 said judicially 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." *Holmes* v. *Paris*, 75 Maine, 559, and authorities there cited.

Our conclusion is that the transportation of the hide or the carcass of a deer from place to place in this state is not unlawful if the deer was killed at a time when it was lawful to do so.

Plaintiff nonsuit.

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

WILLIAM H. PHINNEY *vs.* JOHN W. DAY.

Washington. Opinion March 4, 1884.

Mortgagor and mortgagee. Tax title. Betterments.

B conveyed land by a mortgage deed to L in 1862, and L's assignee in bankruptcy conveyed the same by deed to P in 1880; again, B conveyed the same land by deed to S in 1868, and S conveyed the same to D in 1871; prior to the conveyance to P the assignee in bankruptcy brought suit against D, declaring on the mortgage, and obtained conditional judgment, and then a writ of possession, upon which formal possession was delivered to him; *Held* in a real action by P against D that P was entitled to judgment, and that the relation of the parties appeared to be that of mortgagee and mortgagor.

It is the duty of one in possession under a mortgagor's title to pay the taxes, and he cannot set up a tax title obtained through his own neglect to pay the taxes in defence to an action for possession brought by one holding the title of the mortgagee.

All improvements made by one holding a mortgagor's title enure to the benefit of the mortgagee or those holding under him.

ON REPORT.

This was a real action in which the plaintiff demanded the possession of certain land in the town of Wesley, formerly known as the Stinchfield farm, and afterwards called the Timothy

M. Blaisdell farm. The writ was dated November 26, 1880. The plea was *nul disseizen*, and a brief statement in which the defendant denied the title of the plaintiff and that of his grantor, and set out that the defendant was in possession as the tenant of Elias Day who was the legal owner of the premises under a tax title, also a claim for betterments.

The material facts are stated in the opinion.

Charles Sargent, for the plaintiff.

John F. Lynch, for the defendant.

WALTON, J. This is a real action, and the relation of the parties seems to be that of mortgagor and mortgagee, the defendant holding the equity of redemption, and the plaintiff the title of a mortgagee. Both parties derive their titles from one Timothy M. Blaisdell; the plaintiff by a mortgage deed from him to Eri and Edwin Longfellow, dated January 16, 1862, and a conveyance from them (by their assignee in bankruptcy) to the plaintiff, dated July 15, 1880; and the defendant by a conveyance from Blaisdell to Charles W. Stinchfield, dated April 17, 1868, and a deed from Stinchfield to the defendant, dated August 14, 1871. And this relation of the parties is confirmed by a judgment of this court. The assignees in bankruptcy of Eri and Edwin Longfellow brought an action against this same defendant in which it was averred that the bankrupts were mortgagees of the same premises demanded in this action, and the defendant did not contest the suit, but allowed judgment to go against him by default. A conditional judgment was rendered, and the condition not having been performed, a writ of possession issued, and formal possession was delivered to the assignees in bankruptcy; and one of them having died, the survivor sold and conveyed the premises to the plaintiff, as already stated.

Such being the relation of the parties we think the plaintiff is very clearly entitled to judgment. Whether the mortgage under which the plaintiff claims, or a prior mortgage upon the same premises, have or have not been legally foreclosed, is unimportant, for it in no way affects the plaintiff's right to the possession of the premises.

The defendant's attempt to set up a tax title to defeat the action can not prevail. The case does not show that the tax was legally assessed, or that the sale was conducted according to law. Besides, the defendant being in possession under a mortgagor's title, it was his duty to pay the taxes and thus prevent a sale, and the law will not allow him to derive an advantage from the non-performance of this duty. And very clearly the plaintiff was under no obligation to deposit with the clerk of the court the amount of the taxes paid by the defendant, or any one else, before proceeding to the trial of his action against this defendant, for in no event could the defendant be entitled to receive it.

And the defendant's claim to be compensated for his betterments is equally unfounded. All improvements made by one holding a mortgagor's title enure to the benefit of the mortgagee, or those holding under him. Besides, the defendant's possession had not continued uninterrupted for a sufficient length of time when this suit was commenced to entitle him to betterments. The case shows that his possession was interrupted in August, 1877, when the writ of possession in the former suit was served upon him, and that was less than four years before the commencement of this suit. The six years' actual possession, which entitles one to betterments, must be the six years immediately preceding the commencement of the suit. *Kelley* v. *Kelley*, 23 Maine, 192; *Page* v. *Finson*, 74 Maine, 512.

Judgment for plaintiff.

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

HARRIET F. MOULTON *vs.* IVORY F. MOULTON and others.

Cumberland. Opinion April 2, 1884.

Divorce. Dower.

Cross libels for divorce pending between a husband and wife were heard together; the court first decreed a divorce on the husband's libel for the fault of the wife and the next day decreed a divorce on the wife's libel for the

fault of the husband, and decreed to her a certain sum in lieu of alimony. Eight months afterwards the husband died and the wife then brought an action against his heirs to recover her dower. *Held*, that she was not endowable.

ON REPORT.

Action of dower. The plea set out the decree of the court on the libel of plaintiff's husband for a divorce by which, the defendant claims, she was barred of her dower.

The opinion states the facts.

John J. Perry, and *H. D. Hadlock*, for the plaintiff.

Stilphen v. *Houdlette*, 60 Maine, 447, is not this case. In that case there were two trials, more than six years apart. Here there was but one trial. If it had been presented to a jury with the same result the verdicts would have been simultaneously rendered. The presiding justice had no discretionary power over the question of dower. R. S., c. 60, § 7. And it cannot be said that the court by indirection could do that which could not be directly done. The judgments are rendered as of the last day unless on motion a special judgment is entered. *Herring* v. *Polley*, 8 Mass. 113; *Chase* v. *Gilman*, 15 Maine, 64; Spaulding's Pr. 217, 218; see, Rules of Court, XXVIII.

Counsel further contended that the second decree amended the first. The rectification of a decree or order is usually made by an alteration of the decree or order itself but when this cannot conveniently be done a supplemental order will be made. *Hawker* v. *Buncomb*, 2 Mad. 391; *Skyimsher* v. *Northcote*, 1 Swanst. 573; *Tomlies* v. *Palk*, 1 Russ. 475; *Hughes* v. *Jones*, 26 Beav. 24; *Wallis* v. *Thompson*, 7 Ves. 292; *Lane* v. *Hobbs*, 12 Ves. 458; *Needham* v. *Needham*, 1 Hare, 633; *Clark* v. *Hall*, 7 Paige, 382; Daniel's Ch. Pr. § 1029; *Park* v. *Johnson*, 7 Allen, 378. The same rule of construction should be applied to these decrees that is applied to statutes, that the earlier is repealed by the later when inconsistent with each other.

Haskell and Woodman, for the defendants, cited: 4 Kent's Com. 54; 2 Bl. Com. 130; *Curtis* v. *Hobart*, 41 Maine, 230; *Stilphen* v. *Houdlette*, 60 Maine, 447.

LIBBEY, J. This plaintiff and Morris M. Moulton, her late husband, at the January term, Supreme Judicial Court, 1882, had libels pending against each other for divorce. They were heard by the court together, and on the nineteenth of January the court decreed a divorce on the husband's libel for the fault of the wife, and on the twentieth of January decreed a divorce on the libel of the wife for the fault of the husband, and decreed to her a certain sum in lieu of alimony. In September following Morris M. Moulton died seized of improved lands, and the plaintiff brings this action against his heirs to recover her dower. The only question presented is whether she is endowable. We think she is not. When the final decree of divorce was entered on the husband's libel for the fault of the wife she was at once barred of her dower in his lands. *Stilphen* v. *Houdlette*, 60 Maine, 447.

True, the court had jurisdiction after the decree in favor of the husband on his libel to enter the decree in favor of the wife on her libel and grant her alimony; *Stilphen* v. *Stilphen*, 58 Maine, 508; but that decree in no way qualified or affected the legal consequences of the prior decree. The bar is just as effectual when a day only intervenes between the decrees as if it was a year.

Judgment for the defendants.

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

FINDLEY J. WATT *vs.* FRANK S. COREY and DAVID B. RICKER.

Hancock. Opinion April 2, 1884.

Malicious prosecution. Excessive damages. Probable cause. Advice of counsel.

In an action for malicious prosecution, for causing plaintiff's arrest upon a warrant charging him with forgery by making unauthorized entries in certain books of accounts, and, upon his discharge, by causing his arrest upon another warrant charging him with embezzlement amounting to larceny. *Held*, that a verdict in favor of the plaintiff in the sum of eleven hundred dollars was not excessive.

In an action for malicious prosecution where the defendant claims that he acted under the advice of counsel, it is for the jury to say whether the fact,

that the attorney and counsellor whose advice was sought was the attorney in a civil suit to recover of this plaintiff the sum alleged in the criminal proceeding to have been embezzled, made the attorney an improper person to consult—whether he was carrying on the suit under such circumstances and with such motives as prejudiced him and rendered him unfit to give fair and impartial advice in the premises.

ON EXCEPTIONS and motion to set aside the verdict.

The opinion states the case and material facts.

Hale, Emery and Hamlin, for the plaintiff, cited: *White* v. *Carr*, 71 Maine, 555; *Hamilton* v. *Smith*, 39 Mich. 222; *State* v. *Bartlett*, 47 Maine, 396; *Day* v. *Moore*, 13 Gray, 522; *Tyler* v. *Dyer*, 13 Maine, 46; Whart. Ev. 148, note 1.

H. A. Tripp, for the defendants, contended that the instruction to the jury was inapplicable to the facts; and that where, as in the case of defendant Corey, the testimony was uncontradicted, that he acted under the advice of counsel in the prosecutions which he instituted, the question of probable cause was one of law to be determined by the court; and that the question submitted to the jury should have been determined by the court. Counsel cited: *Stephenson* v. *Thayer*, 63 Maine, 143; *Webb* v. *P. & K. R. R. Co.* 57 *Maine*, 117; *Taylor* v. *Godfrey*, 36 Maine, 525; *Stone* v. *Crocker*, 24 Pick. 81; *Barron* v. *Mason*, 31 Vt. 189; 2 Greenl. Ev. §§ 406, 454; 22 Maine, 113.

There is no resemblance at all between the circumstances of the case at bar and *White* v. *Carr*, 71 Maine, 555.

BARROWS, J. This is an action for malicious prosecution, in which the jury rendered a verdict in favor of the plaintiff for eleven hundred dollars damages, which the defendants move to set aside as against law and evidence, and because they say the damages are excessive. Prior to June, 1881, the plaintiff had been for several years the storekeeper of the Collins' Granite Company, at Bluehill, having entire control of the company's store, ordering the goods, paying off the men, selling goods, and having the general charge of the books kept in the store. At that time a disagreement seems to have arisen between him and the managers of the company as to the amount of his compensa-

tion, and he ceased to be in the employ of the company, Corey, one of the defendants, taking his place as storekeeper. Ricker, the other defendant, was a director of the company. So far as appears by the testimony in this case, the dispute between the plaintiff and the company was whether the plaintiff had been entitled during the term of his employment to compensation at the rate of fifty dollars a month *and his expenses*, or fifty dollars a month only. The uncontradicted testimony on the part of the plaintiff shows that he was engaged by the managers of the company in Philadelphia to go to Bluehill, and was to receive for his services fifty dollars a month and his personal expenses. The misunderstanding about it seems to have arisen from the fact that the person who acted as secretary at the meeting of the directors at which the formal vote for the employment of the plaintiff was passed, accidentally omitted from his minutes the words, "and expenses," in stating the terms of the engagement, and this omission was discovered at the reading of the record at the next meeting, and another person who was then acting as secretary was ordered to correct it, and did so by inserting the words in the record of the previous meeting. This being afterwards seen by the secretary of the first meeting he drew his pencil through the added words as unauthorized. But the state of the record does not seem to have come to the knowledge of the plaintiff, who proceeded from the first to credit himself on the books of the company (kept under his direction, but open at all times to the inspection of the directors, and actually examined from time to time by the book-keeper of the home office,) with the price or cost of his board. Upon the occurrence of some change in the management of the corporation in June, 1881, the dispute arose. The attorney of the company at Bluehill was directed to bring suit against the plaintiff for alleged deficiencies in his accounts thus accruing. This he did early in September; and on the sixth of the same month a warrant was sworn out by the defendant, Corey, at the instigation, and apparently under the direction of the defendant, Ricker, charging the plaintiff with the crime of forgery in thus crediting himself with a certain sum for board in October, 1878. The plaintiff was arrested on the warrant,

taken before the trial justice, and the case continued to the tenth, to allow the accused to procure counsel. When it came up for hearing it turned out that the credit was not placed on the books by the plaintiff, but by a clerk in the store in the ordinary course of business, and that the books had always been open to inspection by the officers of the company; and the trial justice very properly discharged the plaintiff who, however, was forthwith taken into custody by the officer, upon a warrant procured by the defendants in the same way and upon the same state of facts, but charging the plaintiff not with forgery, but with embezzlement, equivalent to larceny. The trial justice before whom this warrant was returned, a counsellor at law, in Ellsworth, since deceased, rightly discharged the plaintiff upon the statement of the complainant's attorney as to what he expected to prove, and the present suit to recover damages for these groundless and malicious prosecutions was instituted.

Upon a careful review of the testimony we do not see how any other verdict could well have been rendered. The damages are not in our judgment excessive. *Humphries* v. *Parker*, 52 Maine, 508. The motion must be overruled, and judgment rendered on the verdict, unless defendants are found entitled to a new trial upon their exceptions.

Advice of counsel seems to have been the only thing savoring of a justification which the defendants had to rely upon in instituting the prosecutions.

The burden of their complaint in these exceptions is that the judge left it to the jury to say whether the fact that the attorney and counsellor, upon whose advice one of the defendants claimed to have relied, was the attorney of the company employed at the same time in the prosecution of the civil suit against the plaintiff, "made him an improper person to consult — whether he was carrying on the suit under such circumstances, and with such motives as prejudiced him and rendered him unfit to give fair and impartial advice" in the premises. In view of the uncontradicted testimony that the attorney in question, upon the first arrest of the plaintiff, approached him with the proposition that if he would settle the civil suit the criminal proceedings should be

withdrawn, the defendants seem to have little to complain of. The complaints for forgery and larceny, groundless as they obviously were, seem to have been made with a common purpose on the part of clients and counsel to coerce the plaintiff into the adjustment of a questionable, if not wrongful, demand for money, which they were jointly engaged in urging upon him. What other reasonable inference can be drawn from such a suggestion on the part of counsel?

Had the plaintiff requested an instruction that, if this was the case, the advice of counsel thus engaged would have no tendency to show either probable cause or the absence of malice, could the presiding judge have refused to give it?

In *Hamilton* v. *Smith*, 39 Mich. 222, it is well held that where an attorney and client are in complicity in the institution of a groundless prosecution, the latter cannot justify himself by the advice of the former.

Under all the circumstances, the defendants here could ask nothing more favorable than to have the effect of the evidence submitted to the jury as it was. See *Webb* v. *P. & K. R. R. Co.* 57 Maine, 134. It is matter of familiar law that though a legal question has been erroneously or needlessly submitted to the jury, if they have decided it correctly, the verdict will not for that cause be disturbed. Eastman's Digest, Tit. New Trial, III, 2. p. 476. Here, however, the matter was necessarily and properly submitted to the jury as a mixed question of law and fact; and correctly decided, so far as any inference can be drawn from the general verdict. It is not easy to conceive of a case, in which the only element tending to show probable cause is the advice of counsel that the prosecution may be safely commenced, where the testimony upon that point will be so full and indisputable as to justify ruling as matter of law that probable cause is thereby established, so as to entitle the defendant to a verdict. The true doctrine is, that previous consultation with and favorable advice of counsel learned in the law, are facts which have a bearing, both upon the existence of probable cause and the presence or absence of malice in the prosecution complained of (which last is always a question for the jury); but the conditions under

which such consultation and advice will amount to a valid defence, are such as almost inevitably to require the submission of the evidence to the jury, under proper instructions, to find whether those conditions exist in the case on trial. If they do, the jury are to give them effect by applying the instructions to the facts as they find them. It is not every member of the bar whose character and standing are sufficiently known to the court to enable the presiding judge to say that he answers the description of "counsel learned in the law." See *Stevens* v. *Fassett*, 27 Maine, 266. Of those whom he might so regard, the situation may be such in relation to the particular case, as to prevent their opinion from amounting to a justification, or at least to make it doubtful whether it was the unbiased, deliberate opinion of counsel learned in the law and properly informed respecting the case. *White* v. *Carr*, 71 Maine, 555. In *Hewett* v. *Cruchley*, 5 Taunton, 277, it was well said that "it would be a most pernicious practice if we were to introduce the principle that a man by obtaining an opinion of a counsel, by applying to a weak man, or an ignorant man, may shelter his malice in bringing an unfounded prosecution."

But, in addition to this, it is an essential condition that there should be plenary proof that the client communicated to the counsellor all the knowledge and information which he had, respecting the material facts — and not that alone — but also all such knowledge and information as in the exercise of reasonable care and prudence (with due regard to the rights of the party against whom he proposes to proceed) he might have obtained. *Stevens* v. *Fassett*, *supra*; *White* v. *Carr*, *supra*.

There will seldom be a case in which the existence of this condition will not be disputable in view of all the testimony, and hence, necessarily, to be submitted to the jury with distinct instructions as to the effect which their finding upon this point is to have upon their verdict. In *Taylor* v. *Godfrey*, 36 Maine, 525, upon which the defendants mainly rely to support their objection to the course of the presiding judge, in submitting to the jury the effect of such evidence as there was to show consultation and advice of counsel on the part of these defendants,

it will be seen that the court came to the conclusion that assuming all the defendant's evidence on this point to be true, the presiding justice ought to have instructed the jury that it did *not* amount to proof of probable cause. *That* is a contingency much more likely to occur in such a case. Perhaps this case is an illustration of it. But a peremptory ruling against them would not have helped the defendants. Obviously here no ruling favorable to them could have been given. Aside from the matters already referred to, had the defendants with due and decent regard to the rights of the plaintiff, used reasonable care and diligence to ascertain why and how the apparent change in the record of the directors' vote was made, they would have discovered the futility of their contention; and this care and diligence they were bound to exercise before they could claim exemption from liability on account of the advice of counsel. Moreover, the attorney here, in one part of his testimony, denies that he advised these criminal proceedings, and it would rather seem that he was acting under the direction of Ricker, and upon a supposed opinion of other counsel obtained by him elsewhere.

This leads us to remark that a mere loose and general statement of what is done by a defendant in the consultation of counsel, like that made here embodying the testimony that Ricker would have given if he had been present at the trial, cannot, for reasons already adverted to, amount to the plenary proof required of the acts, facts and circumstances which are necessary to make the advice of counsel available as a defence in such an action as this. The details of the statement made by client to counsel, upon which the opinion is predicated, seem to be indispensable in order to enable the jury to determine whether the necessary conditions are fulfilled; and the proof seems to be defective without the testimony of the counsellor, unless its absence is satisfactorily accounted for. A sweeping statement of the client that he submitted all the information he possessed to a respectable lawyer, and in all that he did was guided by that lawyer's opinion, does not place before the jury such a consultation and opinion as the court say in *Stevens* v. *Fassett*, 27 Maine, 283, "will certainly go far in the absence of other facts to show

probable cause and negative malice." No instructions given by the presiding judge misled or tended to mislead the jury against the defendants. The real difficulty was the absence of the necessary proof to maintain their defence or to impeach the case made out by the plaintiff.

The exceptions to the admission of testimony are not insisted on in argument. We see none that are tenable. The original papers in the proceedings before the magistrate or duly authenticated copies thereof, were alike admissible. *State* v. *Bartlett*, 47 Maine, 396. The search for the deceased magistrate's record seems to have been conducted in the right quarter, and it was exhaustive. Parol evidence of the disposition he made of the case, was all that could be given, and was competent and satisfactory.

Motion and exceptions overruled.

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

SOPHIA WILSON *vs.* ALEXANDER CAMPBELL and others.

Washington. Opinion April 2, 1884.

Flowage. Mills and mill-dams. R. S., c. 92.

A complaint for flowage under the mill act cannot be maintained for damage done by flowing of lands, situated below the dam, by water drawn from the dam.

ON REPORT.

Complaint for flowage of plaintiff's land in Deblois on the Narragaugus river by water drawn from the defendants' dam across the river above, at Beddington Lake, during the summer months when the natural flow of the stream was not sufficient to overflow the plaintiff's land.

The complaint did not allege that the mill and dam were erected upon the lands of the defendants.

John F. Lynch, for the plaintiff, contended that the words "flow" and "flowage" in the mill act did not mean simply to flow back. Webster's definitions of the transitive verb "flow" are "to cover with water," "to overflow," "to inundate," "to flood." This is the meaning of the word in the statute, "any person whose lands are damaged by being flowed by a mill-dam," etc. It makes no difference where the land is situated if it is covered with water, overflowed, inundated, flooded by a mill-dam. Now the respondents admit that their dam has caused the complainant's land to be covered with water during the dry season.

In *Wolcott Woollen Man'f'g Co.* v. *Upham*, 5 Pick. 292, the court, referring to the Massachusetts act of 1824 which extended the remedy under the mill act to lands lying below the dam, calls it a "legislative exposition" of former acts.

J. A. Milliken, for the defendants.

VIRGIN, J. Even if the complaint be amended as proposed so as to show that the mill and dam are erected upon the land of the respondents as is required by R. S., c. 92, § 1, and *Jones* v. *Skinner*, 61 Maine, 25, these allegations cannot remedy another quite as serious a difficulty. For only he can recover damages under the mill-act "whose lands are damaged by being flowed by a mill-dam," R. S., c. 92, § 4. This language, especially when considered in connection with other provisions of the chapter, evidently refers to lands flowed by water raised by the dam, and situated above the dam. Thus § 3 provides for a regulation of the time of flowing and the height of the water; § 9 for the appointment of commissioners to determine how far the flowing is necessary; § § 12 and 13 forbid flowing when prohibited by the commissioners and furnish a new remedy in certain cases. Damages caused by water let out of the dam is nowhere hinted at in the statute. If the dam is rightfully built, the statute provides the remedy for persons injured in their lands by flowing caused thereby; but the water thus rightfully accumulated must be let out with ordinary care, or the party will be liable at common law for negligence. *Frye* v. *Moor*, 53 Maine, 583.

Moreover the dam cannot be maintained for any purpose other than that of raising water for working a water-mill. R. S., c.

92, § 1. *Dixon* v. *Eaton*, 68 Maine, 542. The Massachusetts statute is different including flowing below or above the dam.

Complainant nonsuit.

PETERS, C. J., DANFORTH, LIBBEY and SYMONDS, JJ., concurred.

JOSEPH R. SEGARS *vs.* SAMUEL SEGARS.

Lincoln. Opinion April 3, 1884.

Executors and administrators. Practice. Stat. 1877, c. 181.

When a party to a suit dies while it is pending before the law court, and the death has not been suggested on the docket at the time of the receipt of the certificate from the law court, the only course authorized by stat. 1877, c. 181, is an application to a justice of the court to have it carried forward to a subsequent term.

A citation to an executor is prematurely issued when the death of the party is suggested in vacation, and the citation is issued before and made returnable to the earliest subsequent term.

A citation to an executor should be served by a competent officer. An acknowledgment of service by an attorney is not sufficient if not followed by an actual appearance in court.

A citation to an executor must be served at least fourteen days before the term to which it is returnable. A citation made returnable at a certain day in the term, after the first, and served fourteen days before that day, is not sufficient.

ON REPORT.

This action was tried at the April term, 1880, before a jury who brought in a verdict for nine hundred eighty-seven dollars and sixteen cents, and went to the law court on the defendant's motion and exceptions. The defendant died September 7, 1880. The certificate from the law court was received December 24, 1880, and the death of the defendant was suggested in vacation, December 29, 1880. At the April term of the probate court, 1881, the will of the defendant was probated and Wesley Segars

was appointed executor, filed his bond and received letters testamentary. April 11, 1881, citation was issued to the executor in vacation, on application of the plaintiff, which was returned at the April term, 1881, with a written acknowledgment of service; the executor did not appear and the plaintiff filed a motion for judgment, and the case was reported to the law court by the presiding justice. October 16, 1882, on application of the plaintiff, a second citation to the creditor was issued, served by an officer and made returnable October 31, 1882. The executor made no appearance and was defaulted, and the plaintiff filed a second motion for judgment. The presiding justice being doubtful whether the proceedings had been such as to authorize an entry of judgment reported the case to the law court.

A. P. Gould, for the plaintiff.

DANFORTH, J. R. S., c. 77, § 16, as amended by ch. 181 of the acts of 1877, provides that "in all cases where a party to a suit dies while the action is pending before the law court and no suggestion of such death has been made upon the docket of the county where the action is pending, at the time the certificate of decision is received by the clerk of the court in such county, any justice of the Supreme Judicial Court may, in term time or vacation, order such action to be brought or carried forward on such county docket to a subsequent term of the court in such county, in order that such death may be suggested upon the docket, and the proper party or parties entitled to defend or prosecute such suit may enter their appearance therein, and that judgment in said action may be entered up at such subsequent term, in accordance with such certificate from the law court."

The facts in this case so far as they relate to the first motion, bring it within the terms of the statute. The suggestion of the death of the defendant had not been made upon the docket when the certificate was received. It could not be made in vacation by authority of the statute, but the only course authorized, is an application to a justice of the court to have it carried forward to a subsequent term, that it might then be made and an opportu-

nity given to the legal representative to come in voluntarily and thus save the expense of a citation. For this purpose R. S., c. 87, § 7, gives this privilege to the representative until the second term after such death or his appointment, and only authorizes a citation in case of a neglect to come in at such term, and after due notice, judgment to be entered.

Here the suggestion of the death of the party was not only made in vacation but the citation was issued before the earliest subsequent term, and made returnable at such earliest term, and at a time when the action had not been ordered by the proper authority to be carried forward, and was not therefore legally upon the docket. The citation was therefore prematurely issued and is of no effect.

The 38th of the rules of 1874 is applicable only when an action is pending and actually upon the docket, and not to a case like this which has virtually gone from the docket, and which can be restored only by some action of the court or a justice thereof, in accordance with the provisions of the statute. If it were otherwise intended, the statute of 1877, subsequently passed, being inconsistent with it, would operate as a repeal, and since that it has been omitted from the revision of the rules in 1881.

Another insuperable difficulty is a want of a legal service of the citation. In order to render a valid judgment, it is necessary that the court should have not only jurisdiction of the subject matter of the suit but of the person, and in order to acquire that jurisdiction of the person it is necessary that he should be served with the proper process in the mode pointed out by the statute. No such service has been had in this case. True there is an acknowledgment of service upon the process, but no proof of its genuineness, and a judgment entered upon such an acknowledgment would be open to all the defences which might be raised to an action upon a simple contract. The acknowledgment is not by the party himself but by an attorney who does not appear to have been an attorney of record and therefore no proof of his authority and if there were, the writing affords no proof of the "due notice" to the executor which the law requires. In *Gleason* v. *Dodd*, 4 Met. 333, where there was an appearance in court by

an attorney of record it was held that the record furnished only *prima facie* evidence of his authority. Here neither the principal nor attorney puts himself upon the records of the court. This acknowledgment is not an appearance in court. Were it so, that would be a submission in fact to the jurisdiction of the court and one which could be authenticated by the record. *Thornton* v. *Leavitt*, 63 Maine, 384. Unless there is an actual appearance the statute contemplates in such cases a service by a competent officer, one whose acts in that respect authenticated by a written return, are entitled to full faith and credit, such as will of itself be evidence of the acts done and thus be full protection to the clerk and all others who are instrumental in entering up a judgment founded thereon. Whether the acknowledgment is genuine and such as will furnish protection cannot be known until an adjudication be had thereon and such adjudication cannot be had as a preliminary to the judgment, for the necessary party is not in court. This insufficiency might be waived by an actual appearance in court, for that would give a record which would be a protection but in no other way. It is not enough for a party to consent that the court may take jurisdiction of his person; there must be the necessary legal proceedings to bring him within that jurisdiction or an actual submission to it.

At the time the second citation was issued, it may be conceded that from the previous action of the court, the action was properly restored to and brought forward upon the docket. But this citation appears to have been issued without an order from the court, and if it were otherwise it was not served in due season. It bears date October 16, 1882, was served the same day and the court to which it was made returnable began its session on the twenty-fourth of the same month. True, the citation was made returnable on the thirty-first of the month, which if authorized would give the required notice. But for this we find no authority. Rule 38, if it could have had any application or any validity under existing statutes, was not then in force. By its omission in the revision of the rules in 1881 it was repealed. This question then must be decided by R. S., c. 82, § 30, which provides that "service of the summons shall be made upon the executor four-

teen days before *the term* to which it is made returnable," and between the service and that term there were eight days only.

Default off. Action to stand for further proceedings.

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

SYMONDS, J., concurred in the result.

ROMANA C. MAYHEW *vs.* SULLIVAN MINING COMPANY.

Hancock. Opinion April 5, 1884.

Negligence. Master and servant. Fellow-servant. Mining. Evidence. Expert testimony.

One who contracts with a mining company to break down rock and ore for a certain distance to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and keep the drift clear of rock, as the contractor broke it down, is to be regarded as a contractor with and not a servant of the company. He is not a fellow-servant with the superintendent of the company under whose direction his work is performed.

Where there is a binding contract for the performance of a specific job by a contractor for a price agreed, it matters not, in determining the question whether he who has undertaken such job is to be regarded as the mere servant of the other party, what kind of work was the subject of the contract, or whether it was or not a portion of the regular work which the party contracting for it was carrying on.

Where a ladder-hole is cut in a platform to a mine, while it is in active operation, by the direction of the superintendent, and one, who is employed in the mine, for want of a railing, or light, or want of warning, falls through the hole and is injured, the company operating the mine is liable for the damages sustained, whether the person so injured was a servant or contractor.

The testimony of experts is rightly excluded when the subject of the inquiry is one which can be perfectly comprehended and rightly passed upon by the jury without the opinion of experts.

The exclusion of testimony which raises collateral issues is in the discretion of the presiding judge, and is no ground for exception.

ON EXCEPTIONS.

An action of the case to recover damages alleged to have been sustained by the plaintiff by the negligence of the defendants. The opinion states the case. The verdict was for the plaintiff in the sum of twenty-five hundred dollars. At the trial the defendant requested the following instructions to be given to the jury:

"1st. If the negligent construction of the ladder-hole was the negligence of a servant of the company, and the plaintiff was also a servant of the company, the company would not be liable to the plaintiff for such negligence of his co-servant.

"2d. If Mayhew was engaged and employed in the general work of carrying on mining in the company's mine, he would be the servant of the company, whether he was paid by the day or the foot and he could not recover for injury caused by the negligence of any other servant of the company.

"3d. If the work Mayhew was engaged in was a part of the regular work of mining, or a part of the general mining operations in that mine, he was a servant of the company whether paid by the day or foot, and cannot recover of the company for the negligence of another servant of the company when such negligence is also in doing some part of the regular work of a mine.

"4th. If Mayhew was under the direction of the superintendent in his work, which was a part of the general, regular work of mining operations, he would be so far a servant of the company, that he could not recover of the company, for injuries caused by the negligence of another servant of the company, also engaged in the general work of the mine."

Each of which requests was declined. The judge instructed the jury upon this question as follows:

"I instruct you as a matter of law, that if you find the contract as the plaintiff claims it, the plaintiff was not a servant of the defendant corporation within the meaning of the law, and not a co-servant with the day laborers and servants of the corporation and therefore is in no way responsible for the negligence of the servants of the corporation."

The plaintiff claimed prospective damages, and upon this point the judge instructed the jury as follows:

"In contemplation of law, when one receives an injury through the fault of another, he sustains and suffers all the damage that may accrue to him by reason of the injury in the distant future as well as at the moment. The injury is the thing that gives him the right of action, and a right to recover, and the law contemplates that the moment the injury is inflicted all the damage that ever may flow from it is suffered, and therefore only one action is given, only one action can be maintained."

Upon the question of prospective damages, the defendant requested the following instructions:

"1st. To recover for any prospective damages the plaintiff must satisfy the jury from a preponderance of the evidence that there is a reasonable certainty that such damage will ensue.

"2d. To recover for prospective damages it is not sufficient that the plaintiff show that they may ensue. He must prove that it is reasonably certain that they will ensue.

"3d. To recover for prospective damages it is not sufficient for the plaintiff to show that the chances are they will ensue. He must show that it is reasonably certain that they will ensue.

"4th. The amount of the plaintiff's damages for mental suffering is not to be affected by evidence of his language or conduct but by the nature and extent of the injury which caused that suffering, and its natural tendency to produce it."

Each of which requests the judge declined, except so far as the same was given in his charge.

The defendant alleged exceptions.

A. P. Wiswell, for the plaintiff, cited: *Lewis* v. *Smith*, 107 Mass. 334; *Hill Manufacturing Company* v. *Providence and New York S. S. Co.* 125 Mass. 292; *Kidder* v. *Dunstable*, 11 Gray, 344; *Collins* v. *Dorchester*, 6 Cush. 396; *Aldrich* v. *Pelham*, 1 Gray, 510; *Carter* v. *Boehm*, 1 Smith's Lead. Cas. 618; Sherman & Red. Negligence, § 101; *Linton* v. *Smith*, 8 Gray, 147; *Randleson* v. *Murray*, 8 Ad. & El. 109; *Eaton* v. *E. & N. A. R. R. Co.* 59 Maine, 520; *Turner* v. *Great Eastern Ry. Co.* 33 L. T. N. S. 431; *Rourke* v. *White Moss Colliery Co.* 2 L. R., C. P. Div. 205; Jacob's Fisher's Digest, 8913; *King*

v. *N. Y. Cent., &c. R. R. Co.* 66 N. Y. 181 (23 Am. R. 39); *McCafferty* v. *Railroad Co.* 61 N. Y. 178; *Coughtry* v. *Globe Woolen Co.* 56 N. Y. 124; Wharton, Ev. § 153; *Buzzell* v. *Laconia Man. Co.* 48 Maine, 113; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420.

Hale, Emery and Hamlin, for the defendant.

Negligence or its converse is a comparative matter. The jury cannot prescribe a rule, a standard. They cannot enact a law requiring this or that element of safety. They can only say whether the matter as it exists is up to the average. This mining company was bound to keep up to the average. The plaintiff was entitled to ordinary care on its part. How can the jury tell whether the lack of a railing was a lack of ordinary care unless they are told how it is ordinarily in other mines? This was what we attempted to show by witnesses. *Waters* v. *Moss*, 12 Cal. 535; *Fuller* v. *R. R. Co.* 21 Conn. 557; *Raymond* v. *Lowell*, 6 Cush. 531; *Cooper* v. *Central R. R.* 44 Iowa, 134.

If there was negligence it was that of a fellow-servant—the superintendent or Stanley—and the master is not liable. *Lawler* v. *And. R. R. Co.* 62 Maine, 463; *Osborne* v. *K. & L. R. R. Co.* 68 Maine, 49; *Albro* v. *Agawam Canal Co.* 6 Cush. 75.

Was the plaintiff a servant of the company? He was to break down the rock alongside the vein, to leave the vein disclosed. This was clearly a part of the regular work of the mine. It was not a part of the constructing a mine, but a part of operating a mine. Something that must be done to get out the ore. The plaintiff while so employed was a miner at work in the mine for the company. Had he been paid by the day no question could have arisen.

In all cases where it is said that a contractor is not a servant or fellow-servant it will be found that his work was not a part of the every day work of the business.

That contractors are servants, see: *Chicago R. R. Co.* v. *McCarthy*, 20 Ill. 385; *Stowe* v. *Chelsea R. R. Co.* 19 N. H. 428; *Carman* v. *R. R. Co.* 4 Ohio, 399.

As to who may be fellow-servants, see: *Wonder* v. *Balt. R. R. Co.* 32 Md. 411; *Kielley* v. *Belcher Mining Co.* 3 Sawyer, 500; *Valtez* v. *Ohio Ry. Co.* 85 Ill. 500; *Walker* v. *B. & M. R. R. Co.* 128 Mass. 8; *Gibson* v. *N. Y. C. Ry. Co.* 22 Hun. 289; *Dana* v. *N. Y. C. Ry. Co.* 23 Hun. 473; *Gormley* v. *Ry. Co.* 72 Ind. 31; *Zeigler* v. *Day*, 123 Mass. 152; *Johnson* v. *Boston*, 118 Mass. 114.

It is not a case of defective materials or platform as such. It is not within the principle of the cases holding the master responsible to his servant for the neglect of another servant charged with repairs or keeping in order of building or machinery. If the company's servant charged with keeping the platform in good repair had neglected that duty and the accident resulted from that neglect the company would have been liable. Stanley was not repairing the platform. He was making a hole through it for another purpose and a proper purpose. The negligence was not in constructing or repairing the platform but in another mining operation carrying on the mine. If the injury had resulted from imperfect timbering the company would be liable. If it resulted from the misconduct of a servant while timbering the company would not be liable. Counsel cited: *Smith* v. *Lowell M. Co.* 124 Mass. 114; *Killea* v. *Faxon*, 125 Mass. 485; *Kelley* v. *Norcross*, 121 Mass. 508; *Ziegler* v. *Day*, 123 Mass. 152; *Cooper* v. *Hamilton Co.* 14 Allen, 193.

BARROWS, J. The plaintiff claimed to recover damages of the defendants on the ground that, prior to the 3d day of December, 1881, he had entered into a written contract with them to break down the rock and ore for a certain distance so as to disclose the vein in a certain drift in their mine leading northerly from the main shaft at a distance of two hundred and seventy feet from the surface, at an agreed price for each horizontal foot of rock and ore so broken down, he to furnish his own powder and oil and the men to run the machine (who were to be paid by him), the company to furnish the steam drill and keep the drift clear of rock as he broke it down,—that long prior to that date the company had constructed a substantial platform in their

shaft at the 270 foot level and at the entrance of the drift in which the plaintiff and his men were performing their labor under that contract, which platform until that day entirely filled the shaft at that point excepting a hole in one corner known as the bucket-hole,—that it was provided in the contract that the plaintiff and his men were to have the use of the platform and of the bucket to go up and down while performing the contract, —that defendants were bound to keep said platform in a suitable and safe condition for the use of all persons properly upon and using the same, and up to that time it had been used by the plaintiff and others employed in that drift in the ordinary course of their labors daily,—that on that day the defendants carelessly and negligently caused a hole three feet in length by twenty-six inches in breadth to be cut for a ladder-hole in that platform near the centre of it directly back of the bucket-hole and twenty inches distant therefrom, without placing any rail or barrier about it, or any light or other warning there, and without giving the plaintiff notice that any such dangerous change had been made in the platform,— and that without any knowledge of its existence or fault on his part, the plaintiff, in the ordinary course of his business having occasion to go upon the platform fell through this new hole a distance of thirty-five feet, and received serious bodily injury. It appears in the exceptions that the written contract with the plaintiff was in the possession of the defendants, but it was not produced by them, and its full details as given by the plaintiff in his testimony should be regarded as proved. The only modification suggested in defence comes from the testimony of the defendants' superintendent to the effect that "plaintiff in his work was under the direction of the superintendent." There was evidence that the ladder-hole was made by direction of the defendants' "superintendent."

Hereupon the defendants requested various instructions, for the details of which reference may be had to the bill of exceptions, all looking to a finding by the jury that the plaintiff doing his work under the direction of the superintendent and being engaged in the general work of carrying on mining in the company's mine, although he was paid by the foot for the work done by

him and the men in his employ, was not a contractor with but a servant of the defendants, and so not entitled to recover for an injury caused by the negligence of a fellow-servant. The presiding judge refused the several requests, and said to the jury: "I instruct you as matter of law that if you find the contract as the plaintiff claims it, the plaintiff was not a servant of the defendant corporation within the meaning of the law, and not a co-servant with the day laborers and servants of the corporation." The defendants seasonably excepted to this instruction and to the refusal of their requests. The exceptions are not tenable.

1. The defendants found their claim that the plaintiff was simply a servant of the company, and so a co-servant with the superintendent and the man who cut the hole in the platform under his direction, upon the idea that the work he was doing (blasting to disclose the vein) was part of the regular work of the mine, and was done under the direction of the superintendent, and hence they argue that the relation between him and the company was that of master and servant merely, and not that of parties bound to each other as mutual contractors for any purpose except for the rendering and compensation of personal services.

A glance at the abbreviated statement of the terms and conditions of the contract above given will show the fallacy of the claim. Here was a job of a certain number of feet of rock and ore to be broken down at a stipulated price, by one who was to furnish and pay his own assistants and find the materials necessary for the performance of the job. The defendants let this piece of work to be performed by a contractor, instead of employing men to perform it. Had this been a suit brought by one of Mayhew's employees to recover for an injury caused by the negligence of one of the men who was operating the steam-drill which they were to furnish Mayhew under the contract, it would have quickened the perceptions of the defendants as to what constituted a contract with Mayhew, and they would have confidently claimed exemption from liability upon the ground that the man who was running the steam-drill, though paid by them was not *their* servant, but *pro hac vice*, the servant of the contractor, and they would have found in *Rourke* v. *White Moss Colliery*

Co. 2 L. R. C. P. Divis. 205, an authority in point to support their claim, where the subject and terms of the contract were singularly like those in this case in their general character. Similar in principle are *Murray* v. *Currie*, 6 L. R. C. P. Div. 24; *Reedie* v. *R'y. Co.* 4 Ex. Ch. 244; *Pearson* v. *Cox*, 2 L. R. C. P. Div. 369.

This case does not seem to call for an extended review of the decisions, some of them irreconcilably conflicting, touching the liability imposed by law upon masters for the negligent acts of servants in their employ, and what constitutes the relation of master and servant in such cases. That has been done not long since in *Eaton* v. *E. & N. A. R. Co.* 59 Maine, 520; and *McCarthy* v. *Second Parish in Portland*, 71 Maine, 318.

We think it clear that upon the undisputed evidence presented in these exceptions Mayhew was a contractor with the defendants for the performance of this job, and not a servant employed by them, whose services they could dispense with at will, or who could be regarded as assuming any risks arising from the negligence of the company's servant or superintendent. It was directly held in *Eaton* v. *E. & N. A. R. Co. supra*, that the fact that the work was to be done "under the direction of the chief engineer of said company as required by the contract" did not convert the contractors into servants of the railway company, and that fact is all that can be inferred from the testimony of the defendants' superintendent in the present case. Defendants' counsel lay much stress upon the fact that it was part of the regular mining operations that Mayhew was carrying on. But where there is a binding contract for the performance of a specific job by the contractor and those whom he may employ for a price agreed, it matters not, in determining the question whether he who has undertaken such job is to be regarded as the mere servant of the other party, what kind of work was the subject of the contract, or whether it was or was not a portion of the regular work which the party contracting for it is carrying on, or some piece of work incidentally connected with it as necessary or convenient. Such an agreement bears little resemblance to a mere arrangement for the compensation of personal services by the piece instead of by

the day. We think the instruction given was correct upon the uncontradicted testimony, and the requested instructions being inconsistent with it were rightly refused.

2. But elaborate discussion of the relations of the parties to each other in this particular seems the more needless, because we are of the opinion that the case falls into that class which requires an employer at his peril to keep his premises and all ways of access thereto free from unknown dangers not naturally or commonly incident to the work to be carried on there, and makes him liable to his servants and employees, as well as to all others who are there by his invitation, for the existence of secret pitfalls which he negligently permits or causes to be made when damages thereby accrue without the fault of the injured party.

In Thompson on Negligence, Vol. 2, p. 973, we find the law upon this topic briefly stated as follows: "If the master has failed in his duty in this respect, and the servant has, in consequence of such failure, been injured without fault on his part, and without having voluntarily assumed the risk of the consequences of the master's negligence with full knowledge or competent means of knowledge of the danger, he may recover damages of the master." Numerous cases are cited in support of the doctrine thus laid down, and among them *Buzzell* v. *Laconia Man. Co.* 48 Maine, 113; *Shanny* v. *Androscoggin Mills Co.* 66 Maine, 420, in both which and in the cases there cited, it is fully recognized and affirmed. In the full and valuable text book from which the above quotation is made, it is well said also (p. 974) that the servant has a remedy against the master when the injury is in consequence of the direct negligence of the master or his vice-principal in his personal conduct of the work; and, (p. 975) when the carelessness of the master exposes the servant to sudden and unusual danger.

These rules are thus illustrated: "The master may not with impunity expose a servant to dangers not contemplated in his original contract of employment and not connected therewith. Thus the proprietors of an establishment in one room of which about twenty girls were employed deemed it expedient to remove an engine from one room of the factory to another. Being

pressed with business, they made the change in the night-time; and in the morning the machine was left in such a position that the main shaft projected through the wall into this room from four to six feet. In this state the machinery was put in motion. One of the girls in passing near the revolving shaft about her work was caught by it and injured." The employer was held liable. *Fairbank* v. *Haentzche*, 73 Ill. 237.

Now, as to what makes a "vice-principal"; The generally received doctrine is as stated in Wharton on Negligence, § 229: When the employer leaves everything in the hands of the middle-man reserving to himself no discretion, then a middle-man's negligence is the employer's negligence for which the latter is liable."

It cannot be questioned that the superintendent of this mine, to all intents and purposes, had this control of the defendants' business there. Applying these principles to the case before us. Had Mayhew instead of being a contractor been a servant and day-laborer in the employ of the defendants, they must still be held chargeable under the circumstances for the act of their superintendent in thus converting a substantial platform in constant and daily use into a dangerous trap, without light, barrier, or warning to the plaintiff.

The ruling of the presiding judge was not only correct, but the defendant's contention upon the point to which it related was immaterial, and could not affect the result. Nor could it aid the defendants to avoid their liability in such a case, if it appeared affirmatively that the neglect to notify the plaintiff or to guard or light the pitfall which was made by the direction of their superintendent on their premises, was the neglect of a subordinate who did the work. The hidden and extraordinary danger which caused the plaintiff's hurt, bears little analogy to the obvious perils in *Lawler* v. *Androscoggin R. R. Co.* 62 Maine, 463; and *Osborne* v. *Knox & Lincoln R. R. Co.* 68 Maine, 49, which are cited by the vigilant counsel to support their contention that "the improper construction of the ladder-hole (if it was improper), the want of light or railing, or the want of warning was the negligence of the superintendent or Stanley, and if it was the negligence of the superintendent the same rule applies."

Created as the danger here was, by the direction of one who, *quoad hoc*, stood in the place and stead of the defendants themselves, their reasonable duty was to protect the plaintiff against suffering from it unawares, whether he was a servant or contractor.

3. Defendants' counsel argue that this case "is not within the principle of the cases holding the master responsible to his servant for the neglect of another servant charged with the repairs or keeping in order of buildings or machinery," because it is not a case of a platform made of defective materials, or badly put together. They rightly concede that "if the defendants' servant charged with the duty of keeping the platform in good repair, had neglected that duty or insufficiently performed it, and the accident had resulted from that neglect, the company would have been liable." But they seem to derive consolation and encouragement from the undisputed fact that "the platform was strong, properly built of good materials and in good repair," until this hole was made in it by direction of defendants' superintendent. They contend that the negligence which caused the plaintiff's injury was, "in another mining operation — in the carrying on of the work of the mine." We think that the distinction which the counsel seek to draw as to the character of the negligence is not available. It was negligence which exposed the plaintiff to a peril, the risk of which he never assumed. It created a danger in a place where a servant had a right to expect safety. It was the negligence of those for whose fault in this particular the defendants were responsible. That it was committed in furtherance of the defendants' mining operations, can no more aid the defence here than it did in cases of like negligence in *Fairbank* v. *Haentzche*, and *Berea Stone Co.* v. *Kraft*, *supra*.

Nor is it of any importance whether the negligence exhibits itself in the form of chronic remissness, superficial oversight, or positive careless act which introduces unawares a new and serious danger upon premises previously safe. We do not think the scanty protection for servants and employees which they enjoy under the rule, should be abridged by mere subtlety of reasoning and verbal refinements of logic.

4. Nor do the instructions given, respecting the allowance of

damages for the future, furnish the defendants any good cause of complaint. As to damages, the defendants' first request for instructions, besides being fully covered in the charge, was emphatically given in terms; and the other requests, in one form or another, all called for a measure of proof which is not appropriate in the trial of civil causes to the jury, and were for this cause rightly refused.

5. The defendants complain because they were not allowed to ask Stanley (who made this hole in the platform, under the direction of the defendants' superintendent, and who testified that he was a miner of twenty-five years' experience, that he had worked in several different mines and had constructed other ladder-holes, and noticed many more,) the following questions:

"Have you ever known ladder-holes at a lower level to be railed or fenced round?"

"As a miner, is it feasible, in your opinion, to use a ladder-hole with a railing round it?"

"Have you ever seen a ladder-hole in a mine, below the surface, with a railing round it?"

Also that they were not allowed to ask one Dugan (who gave similar testimony as to the length of his experience as a miner, and that he had worked in many different mines and observed the ladder-holes in them,) this question: "From your experience as a miner, whether or not this ladder-hole, as Mr. Stanley left it, was constructed in the usual and ordinary manner of ladder-holes in mines, and in a proper way?"

Defendants' counsel claim that the favorable answers to these questions which they had a right to expect would have tended to show that there was no want of "average ordinary care" on the part of the defendants. We think the questions were properly excluded. The nature of the act in which the defendants' negligence was asserted to consist, with all the circumstances of time and place, whether of commission or omission, and its connection with the plaintiff's injury, presented a case as to which the jury were as well qualified to judge as any expert could be. It was not a case where the opinion of experts could be necessary or useful. See for analogous instances: *Cannell* v.

Ins. Co. 59 Maine, 582, 591; *State* v. *Watson*, 65 Maine, 76, 77, and cases there cited. See also, Lord MANSFIELD'S opinion in *Carter* v. *Boehm*, 3 Burr. 1905, and note to S. C. Smith's Leading Cases, 6th Am. Ed. Vol. 1, part 2, p. 769. If the defendants had proved that in every mining establishment that has existed since the days of Tubal-Cain, it has been the practice to cut ladder-holes in their platforms, situated as this was while in daily use for mining operations, without guarding or lighting them, and without notice to contractors or workmen, it would have no tendency to show that the act was consistent with ordinary prudence, or a due regard for the safety of those who were using their premises by their invitation. The gross carelessness of the act appears conclusively upon its recital. Defendants' counsel argue that "if it should appear that they rarely had railings, then it tends to show no want of ordinary care in that respect," that "if one conforms to custom he is so far exercising average ordinary care." The argument proceeds upon an erroneous idea of what constitutes ordinary care. "Custom" and "average" have no proper place in its definition.

It would be no excuse for a want of ordinary care that carelessness was universal about the matter involved, or at the place of the accident, or in the business generally. Ordinary care is the care which persons of ordinary prudence — not careless persons — would take under all the circumstances. See definition approved in *Topsham* v. *Lisbon*, 65 Maine, 455. "Reasonable care is perhaps as good a term and conveys as correct an idea of the care required." It was held not sufficient to relieve the defendant from the imputation of negligence, to show that the elevator way "was constructed in the manner usual in the defendants' business." *Indermauer* v. *Dames* (in the Exchequer Chamber), 2 L. R. C. P. 310.

The remark in *Low* v. *G. T. R'y Co.* 72 Maine, 320, that "in fitting up a place for business purposes, one is at liberty to consult his own convenience and profit, but not without a reasonable regard for the safety of those whom his operations bring upon his premises upon lawful business errands; in particular, everything which may operate as a trap or pitfall . . . is to

be avoided, if reasonable care will accomplish security to life and limb in that respect," is applicable here.

The tendency of part of the questions to raise collateral issues is obvious.

The exclusion of testimony of that description in the discretion of the judge, is no ground for exceptions. Exceptions to the exclusion of testimony, having a similar bearing and tendency, were overruled in *Lewis* v. *Smith*, 107 Mass. 334; *Hill Manf'g Co.* v. *Providence & N. York Steamship Co.* 125 Mass. 292.

One substantial ground for excluding evidence of collateral facts, is that it is seldom that such identity in all essentials, is found, that a legitimate inference respecting the one case can be drawn from the other, and a host of collateral issues are brought in to distract the attention of the jury from the real point. The fear of this has sometimes, perhaps, produced decisions excluding evidence, which might throw light upon the issue; but the present case well illustrates the absurdity that would attend an indiscriminate admission of it. It is not probable that the defendants could show a single instance where, while a mine was in active operation, a ladder-hole so dangerously located as this, was cut and left without railing or light, or notice to the workmen; and the naked fact (whatever it may have been) as to the existence of railings about such holes in other mines, could not have even the semblance of a bearing upon the contention here, without proof that they were cut under like circumstances.

Here, there was no pretence of any notice to the plaintiff of the existence of the chasm into which he fell.

There is no motion to set aside the verdict as against evidence in any particular, nor any complaint that the damages are excessive.

We find no error in the conduct of the trial, or in the instructions to the jury, which requires correction in order that justice may be done.

Exceptions overruled.

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

JAMES N. CUSHING *vs.* GARDNER F. DANFORTH.

Penobscot. Opinion April 7, 1884.

Forcible entry and detainer. Joint tenants. Trust.

C and D bought a stock of goods and the good will of a store and divided the stock and store, each taking separate portions. The facts and circumstances were such as lead the court to believe that D expected a joint lease of the premises from the owner, and he understood, and had a right to understand, not only from the relationship between C and himself, but from the acts and representations of C, that C would and did obtain such a lease, while, in fact, C obtained a lease in his father's name, who brought forcible entry and detainer against D for the part occupied by him. *Held:*

1. That C was acting in a fiduciary character when he obtained the lease, and that he must be deemed to hold it in trust for D as well as himself.

2. That C's father was a passive trustee for C, and the same trust attached to his lease.

3. That D had an equitable title to the premises, sufficient to maintain his defence against C's father.

ON REPORT.

The opinion states the case and material facts.

Barker, Vose and Barker, for the plaintiff, contended that the defendant, if tenant of anybody, was the tenant of R. J. Cushing, plaintiff's son, and that Cushing was a tenant at will of the whole premises, and his tenancy terminated by mutual agreement between him and the owner. The termination of Cushing's tenancy terminated that of the defendant who held under him. *Coburn* v. *Palmer*, 8 Cush. 126.

The relation of landlord and tenant never existed between the owner, Mr. Bowman, and the defendant. See Bouvier's Law Dict. 574; *Howard* v. *Merriam*, 5 Cush. 570; Taylor's Landlord & Tenant, 10; *Cunningham* v. *Holton*, 55 Maine, 33; *Moshier* v. *Reding*, 12 Maine, 478.

Defendant says he never had any talk with Mr. Bowman, his talk was all with Cushing, until a controversy arose between them, then defendant went to the owner.

If the defendant was a tenant of the owner, the written lease to the plaintiff for a term of years, terminated such tenancy, without the thirty days notice to quit. *Kelly* v. *Waite*, 12 Met. 302; *Esty* v. *Baker*, 50 Maine, 333; *Hollis* v. *Pool*, 3 Met. 350; *Hildreth* v. *Conant*, 10 Met. 298; *Furlong* v. *Leary*, 8 Cush. 409; *Evans* v. *Reed*, 5 Gray, 308.

H. L. Mitchell and C. P. Stetson, for the defendant, cited: *Copeland* v. *Copeland*, 28 Maine, 539; *Caincross* v. *Lorrimer*, 7 Jurist, N. S. 118; Story's Eq. Jur. §§ 15–46; *Chapman* v. *Pingree*, 67 Maine, 198; *Cummings* v. *Webster*, 43 Maine, 192; *Hatch* v. *Kimball*, 16 Maine, 146; *Fogg* v. *Littlefield*, 68 Maine, 52; 1 Greenl. Ev. § 207; *Pope* v. *M. W. P. Co.* 52 Maine, 535; *Thurston* v. *Doane*, 47 Maine, 79; *Morton* v. *Hodgdon*, 32 Maine, 127; *Johnson* v. *Wingate*, 29 Maine, 404; *Carroll* v. *M. L. R.* 111 Mass. 1; *Turner* v. *Coffin*, 12 Allen, 401; *Hinckley* v. *Greany*, 118 Mass. 595; *Horn* v. *Cole*, 51 N. H. 287; *Stevens* v. *Dennett*, 51 N. H. 324; *Warring* v. *Somborn*, 82 N. Y. 604; *Royce* v. *Watrous*, 73 N. Y. 28, 597.

DANFORTH, J. This is an action of forcible entry and detainer, originally entered in the police court, for the city of Bangor, and brought into this court by the plaintiff, and is now before the law court upon a report and exceptions. From the copy of the record filed when the action was entered, it appears that in the police court the defendant with the general issue, filed a brief statement, alleging title in the premises in question to be in Hollis Bowman, under whom he claims as tenant, and that a counter brief statement was filed, alleging that the claim of title "was frivolous and intended for delay." Upon a hearing, this statement, as the records show, was found to be untrue, whereupon the plaintiff removed the case to this court with the records in due form.

At a subsequent term of the court, and without any suggestion upon the docket of any error in the record already filed, the defendant offers what he claims to be an amended record from the police court, but duly authenticated as a complete record of the case, and moves for leave to file it in court as such. This

motion was denied and exceptions were taken. Precisely what the counsel expected would follow an allowance of his motion, or what, in fact, would follow is not very apparent. The first was filed by the party whose duty it was to do so; no defect appears in it, and none has been pointed out, and it is duly authenticated. The second is equally authenticated and differs from the first only in the judgment ordered; and while the first follows the issue as made up, the second does not, but decides the question of title, ignoring the request for a removal of the case upon that issue. The only alternative for the presiding justice was to receive the first and reject the last, or ascertain from other evidence which was the true record of the police court. At the suggestion of the plaintiff he pursued the latter course. After hearing the testimony, which is reported, he made the ruling complained of. This decision simply settled the question as to which was the true record, and was the settlement of a matter of fact rather than of law; but whether the one or the other, it was clearly correct, and the exceptions must be overruled.

Thus the action is brought before this court upon the issue of title only, and the case of *Abbott* v. *Norton*, 53 Maine, 158, upon satisfactory grounds, has decided that that issue alone can be tried here. Hence upon a report, as well as before a jury, all evidence not relevant to that issue must be rejected.

The title set up in defence is that of Hollis Bowman, under whom the defendant claims as tenant. The title of Bowman is not denied, but the tenancy is. In fact both parties claim under him. It is also conceded that the plaintiff, at the commencement of these proceedings, had a written lease from Bowman, running to him alone, while the evidence shows that the defendant had no contract of tenancy with Bowman, either written or verbal, but his counsel claims that the proof shows such transactions and representations on the part of Reuel J. Cushing, a son of the plaintiff, and such relation between the father and son as estops the plaintiff from denying the defendant's tenancy under Bowman.

Upon these transactions and representations there may be some conflict of testimony, but not enough to throw any real

doubt as to the facts upon which the decision of the case must depend.

It appears that on or about April 1, 1881, Daniel White was in possession of the premises in question, as a tenant, under Mr. Bowman, and had been so for many years previous to that date. He had in the store a stock of goods which he was desirous of selling. R. J. Cushing, with the defendant, jointly entered into an agreement in writing with White to purchase his goods, "with the good will of the business carried on in said store." The purchase was completed in accordance with the terms of that agreement, with the understanding that the business was to continue in that store. Before the conclusion of the sale, the purchasers agreed upon a division of the goods, and the portion of the store each was to occupy; and the division was so made, and each paid for his portion and took the part of the store allotted to him. The good will was not, and could not be, divided. It could only be enjoyed jointly and by remaining in the store. Before the completion of the purchase, the defendant not being satisfied with a tenancy at will, urged the necessity of obtaining for their joint benefit a written lease from Bowman. Cushing claimed that this was unnecessary, and finally agreed that he would arrange with Bowman so that they would be safe with a verbal lease only. There was no suggestion that Cushing would take a lease of any kind to himself alone, but the only conclusion which can be drawn from the testimony is that the defendant understood, and from the acts and representations of Cushing was fully justified in understanding that Cushing would, and subsequently that he had, obtained a joint verbal lease from Bowman, and in consideration or as a consequence of that, made the purchase of the goods and paid the money for them. Though Cushing was not a partner with the defendant in the strict sense of that term, the two were acting jointly with one common purpose in view, especially in obtaining the good will of the business, and what was necessary to that, the occupation of the store, which was to, and must come from, Bowman. Cushing undertook to obtain a lease to secure that occupation for the benefit of both. The defendant placed confidence in him that he

would do so, and acted accordingly. He subsequently found that Cushing had taken the lease to himself alone.

Under these circumstances it may well be that R. J. Cushing would be estopped to deny the tenancy of the defendant under Bowman. But whether such an estoppel alone would avail in the defence of this action may well be doubted. But it is not necessary to decide that question. When R. J. Cushing obtained that lease he was acting in a fiduciary capacity, and as an agent for the defendant as well as himself. Under such circumstances it is settled beyond controversy, that he cannot retain to himself any advantage thus secretly obtained, but must be deemed to hold it in trust for him, for whom he was, or in good faith should have been acting. It is so held as between partners. Collyer on Part. § 179; also in case of co-sureties, *Scribner* v. *Adams*, 73 Maine, 541–549, 550, and in the case of trustees, 1 Green. Cruise, 364, and note; 1 Story on Eq. Jur. § 322. In § 323, Story applies the principle to all cases "where mutual agencies, rights and duties, are created between the parties by their own voluntary acts, or by operation of law," and lays down the general rule as follows: "On the whole, the doctrine may be generally stated that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests he is bound to protect, he will not be permitted to hold any such advantage." In 4 Kent, 307 (12 ed.), it is said to be, "a general and well settled principle, that whenever a trustee or *agent* deals on his own account, and for his own benefit with the subject intrusted to his charge, he becomes chargeable with the purchase as trustee. Thus though Cushing held the tenancy in his own name, he held it in trust for the defendant as well as for himself. To hold otherwise would be to permit him to take advantage of his own wrong.

It is, however, contended that Bowman was not cognizant of this wrong and was not bound by it, and when he gave to the plaintiff the written lease it cancelled the tenancy at will. This proposition is evidently true. But under the circumstances of this case it neither helps the plaintiff to make out his case, nor injures the defence.

The proof is abundant to show that in the written lease the plaintiff is a mere passive trustee for his son. He took no part in obtaining it, did not want it, has never paid any rent under it, or at any time occupied the store. The son was the active man in all these matters, procured the lease, has continued to occupy the store as before; paid all the rent, and as he says, it was made in the name of the father, that he might get rid of his tenant. The new lease, therefore, took the place of and was tantamount to a renewal of the old, and is, therefore, subject to the same trusts. 1 Green. Cruise, 364; 4 Kent, 306 (12 ed.).

Hence, though the defendant might not have had a legal interest in the lease, which would entitle him to a defence against any person holding it as a *bona fide* purchaser without notice of the trust, he had an equitable interest sufficient to enable him to defend as against this plaintiff.

Judgment for defendant.

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

ELBRIDGE SOULE *vs.* JOSEPH M. FROST.

Sagadahoc. Opinion April 9, 1884.

Partnership. Tenants in common.

Two persons purchased timber-lands and gave their joint notes, secured by mortgage, for a portion of the purchase money, then as co-partners they cut therefrom and manufactured a portion of the timber. About two years after the business of the firm ceased, one of the partners paid a judgment rendered on one of the mortgage notes, and both joined in a deed of quit-claim of the lands to the mortgagee as a compromise settlement of the mortgage debt. *Held*, that the one who paid the money could maintain an action at law against the other for one-half the amount so paid.

ON REPORT.

Assumpsit to recover one-half of the sum of nine hundred seventeen dollars and sixty-eight cents, alleged to have been paid by the plaintiff on a judgment rendered against the plaintiff and defendant, jointly.

The writ was dated July 9, 1877.

The plea was the general issue with the following brief statement:

"And for brief statement of defence, the defendant not waiving his plea of general issue, by him in pleading pleaded, but insisting on the same, saith that the plaintiff his aforesaid action against him ought not to have and maintain, because he says, the money alleged by the plaintiff to have been paid by the plaintiff to the use of the defendant, if paid, was paid in discharge of a debt, contracted by the plaintiff and defendant as co-tenants of land and co-partners in business by them jointly conducted in connection with the use of said land, and that there are still remaining other affairs of the said co-partnership unsettled, and that a recovery of the plaintiff in said action, and payment of the judgment would not close the affairs of the said firm."

The facts as found by the court are stated in the opinion.

The case was twice argued.

C. W. Larrabee, for the plaintiff.

W. Gilbert, for the defendant.

SYMONDS, J. The case does not show that the plaintiff and the defendant at any time were partners in the title to real estate; that the timber-lands were ever held by them as assets of the firm. The partnership was in the lumbering operation on the land after it had been conveyed to them as tenants in common.

For some reason, which the case does not explain, the plaintiff advanced in cash one thousand dollars, and the defendant five hundred dollars only, towards the purchase of the land, while the joint and several notes of the two were given for the five thousand dollars remaining unpaid, secured by mortgage. All the business of the firm was done from August, 1868, to July, 1869. The mill was burned in September, 1869. On July 15, 1871, the plaintiff paid nine hundred seventeen dollars and sixty-eight cents in discharge of an execution against the defendant and himself, issued upon a judgment recovered on the mortgage notes which had fallen due — that sum, less than the amount due on the execution, being received by the creditor in full satisfaction of it, and the transaction being closed by common consent

by the surrender to these parties of their unpaid mortgage notes, and a release from them to their vendor of their interest in the premises. Half of the sum so paid by the plaintiff in July, 1871, he seeks to recover in this action.

It was paid by one joint debtor, with the knowledge and approval of the other, to discharge the joint debt, and the payment had the effect to release the defendant from an equal liability with the plaintiff. The defence, however, alleges that this was only one of the transactions of a firm, and that the relations between the plaintiff and the defendant as partners and as tenants in common in land, are such as to require resort to proceedings in equity to adjust them.

The statement already made that they were not partners in the ownership of land, is in accordance both with the pleadings and with the evidence. The existence of the firm, therefore, if conceded, does not preclude either party from the right of action at common law to recover an amount due him on account of expenditures (from his own funds) pertaining to the title. The mortgage notes on which the execution was obtained were not the notes of a firm, but of two individuals who had bought lands together. That partnership funds were applied to this payment on account of the land, is not proved. It is denied by the plaintiff, and the circumstances of the case, the failure of the business, the lapse of time, tend to corroborate him. In this situation of the parties, we see nothing in the fact that a partnership existed between them to the extent indicated, and that there has been no adjustment between the partners of the accounts of the firm, its assets and liabilities and the relations of debt and credit between its members — though timber taken from the land by consent may have gone into the firm assets — to defeat the plaintiff's right of action for contribution towards a payment subsequently made by him personally, in discharge of the joint notes of himself and the defendant given by them as individuals, and not as partners, to secure title to the land. The affairs of the partnership stand by themselves. In matters outside of it, the ordinary relation of debtor and creditor may exist between the partners.

As tenants in common of land, in matters not pertaining to the firm, the evidence shows nothing unsettled between the plaintiff and defendant, except this payment of July, 1871. The plaintiff makes no claim in this action on account of his apparent overpayment of five hundred dollars at the original purchase, and the facts in regard to it do not appear. We do not know whether it stands free from partnership transactions or is complicated with them. There is nothing to show what the arrangement or agreement was about it. For all that appears there may have been a consideration for the disparity at the time, or it may have been already the subject of adjustment between the parties. The plaintiff does not now claim, nor does the report show that he has ever claimed, anything due to him from the defendant on that account.

If both these items—the five hundred dollars and the nine hundred seventeen dollars and sixty-eight cents — were in dispute in the present action, and the five hundred dollars stood apart from the firm accounts, as the nine hundred seventeen dollars and sixty-eight cents does, it is not apparent what difficulty there would be, arising from the tenancy in common, in adjusting them according to the express or implied agreement of the parties; but, as the case is presented, only one item is in controversy, and we think the weight of evidence is in favor of the plaintiff's claim, that about two years after the business of the firm ceased he paid out of his own funds the sum of nine hundred seventeen dollars and sixty-eight cents, to discharge a debt on which the defendant was holden jointly with him, after negotiations in which the defendant took part, and to which he acceded by joining in the quitclaim deed given in pursuance thereof, that this payment was distinct from firm affairs, and that the state of facts arising from the tenancy in common in the lands, affords no ground of defence to the action.

Judgment for plaintiff for $458.84, and interest from July 15, 1871.

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

STATE OF MAINE *vs.* SAMUEL ROUNDS.

Cumberland. Opinion April 29, 1884.

Reasonable doubt. Practice. Pleadings.

The term, reasonable doubt, implies that there may be doubts which are not reasonable or rational. It is not a vague or whimsical or merely possible doubt, but an actual, substantial and well-founded doubt.

It is not legally erroneous to say to a jury that the proof of guilt must be to a moral certainty. Still the phrase may mislead, because moral certainty in the popular sense may be taken to be more than moral certainty in the legal sense.

A ruling that the law only requires that degree of certainty in the minds of jurors before rendering a verdict of guilty, as would exist in their minds in coming to a conclusion on matters of grave interest and importance to themselves, is not to be commended for judicial use. It is aided in the present case by additional definition of reasonable doubt.

When one offence is charged as committed in different ways, in different counts in an indictment, a general verdict should be rendered. Separate verdicts of guilty in such case would be repugnant.

In such case a general verdict of guilty means that the offence was committed in some one of the ways alleged; and if the judge instructed the jury that there was no evidence applicable to one of the counts, then that the offence was committed as described in some one of the remaining counts.

ON exceptions from the superior court.

Indictment. The case and material facts are stated in the opinion.

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

H. D. Hadlock, for the defendant.

The court misstated the law in instructing the jury that: "The law only requires that degree of certainty in the minds of jurors before rendering a verdict of guilty, as would exist in their minds in coming to a conclusion on matters of grave interest and importance to themselves." Wharton, Crim. Law, § 707; Bishop, Crim. Prac. § 819; *Com.* v. *Webster*, 5 Cush. 320; Wells on Law & Facts, § 572; *Blocker* v. *State*, 9 Texas Ct.

of App. 279; *Wallace* v. *State*, 9 Texas Ct. of App. 299; *Robertson* v. *State*, 9 Texas Ct. of App. 209; *Jane* v. *Com.* 2 Met. (Ky.) 30.

To justify a verdict of guilty, it is not only necessary that the jurors should be so convinced by the evidence that they would venture to act upon that conviction, in matters of the highest importance to their own interests; but they must, moreover, be so convinced as to exclude from their minds all reasonable doubt of the guilt of the accused.

The foregoing instruction which the court gave the jury, tested by these principles, is liable to several objections. If it did not expressly authorize the jury to find a verdict according to the preponderance of the testimony, it authorizes them to weigh the facts and circumstances, and when thus weighed, if their conclusion was, not that the accused was guilty, but that there was that degree of certainty in the case that they would act upon it in their own grave and important concerns, then they were justified in returning a verdict of guilty.

In this respect the instruction was misleading and calculated to induce the jury to believe that they had a right to decide according to the weight of evidence.

Men frequently act upon their own grave and important concerns, without a firm conviction that the conclusion upon which they act is correct.

This degree of certainty is wholly insufficient to authorize a verdict of guilty in a criminal case. Counsel further cited: *State* v. *Oscar*, 7 Jones (N. C.), 305; *Smith* v. *State*, 9 Tex. Ct. App. 150.

PETERS, C. J. Two bills of exceptions are presented. The important question in the exceptions taken during the trial, relates to a definition given by the learned judge, of the term "reasonable doubt."

Mr. Bishop (1 Crim. Proc. § 1094) says: "There are no words plainer than reasonable doubt, and none so exact to the idea meant. Hence, some judges, it would seem wisely, decline attempting to interpret them to the jury. Negative descriptions

may be safe, and, perhaps, helpful; as, that it is not a whimsical or vague doubt or conjecture, not an impossibility, . . . but it is a reasonable doubt." It is not an unreasonable doubt.

The very term implies that there may be doubts not reasonable or rational. It cannot be a merely possible doubt, for anything relating to human affairs may be in some way subject to possible doubt. It is such an actual and substantial and well founded doubt as would be entertained by a reasonable and conscientious man,—"such a doubt that the reason for it can be examined and discussed." In *State* v. *Reed*, 62 Maine, 129, the following was decided to be a correct definition: "It is a doubt which a reasonable man of sound judgment, without bias, prejudice or interest, after calmly, conscientiously and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner." It is not enough to establish merely a probability of guilt. The rule requires that the guilt shall be established to a reasonable, but not an absolute, demonstrative or mathematical certainty.

What real use can there be in further enlarging or emphasizing an explanation of the term, reasonable doubt? Of course, it is not legally erroneous in this state, to inform a jury that the guilt of the prisoner is to be shown "to a moral certainty." That term has been in too much use to be prohibited now. In *State* v. *Reed*, *surpa*, an intentional omission of the phrase was held to be not erroneous. In Massachusetts it may be omitted, although asked for by the prisoner. *Com* v. *Costley*, 118 Mass. 1. The use of it is criticised in an able and instructive article in the Am. Law Rev. (Vol. 10, p. 663). Mr. Bishop says of it: "Assuming it to be synonymous (with reasonable doubt), practically it will darken more minds, of the classes from whom our jurors are drawn, than it will enlighten." The term is often misleading, or may be, unless judicially explained to the jury. It may be taken to mean more than it really means. Moral certainty, in its popular sense, may be more than moral certainty in the legal sense.

In the present case the learned judge, who presided at the trial, went still further towards the outer circle of judicial limits, and said to the jury, that "the law only requires that degree of

certainty in the minds of jurors, before rendering a verdict of guilty, as would exist in their minds in coming to a conclusion on matters of grave interest and importance to themselves." This exposition of reasonable doubt is strenuously objected to by the counsel for respondent. This definition is substantially in the words of Lord TENTERDEN in a capital case long ago, and has been frequently used by judges since. See 3 Green. Ev. 13th ed. § 29, note. Of this definition Mr. Bishop, in section of Crim. Procedure before cited, says: "If there were no doubt of its accuracy, it might in some circumstances, to some minds, be helpful; yet, on the whole, it is less clear than the phrase it would explain." But its correctness is denied by five or six of the state courts. Still it has been approved by as many other courts. See cases cited by Mr. Bishop. See also *Howser* v. *State*, 5 Geo. 78. Standing alone, the phrase seems to be rather an inadequate and unsatisfactory definition. The trouble with it is, that with all men their own affairs do not necessarily receive the same consideration which they should bestow as jurymen upon the interests of others.

But in the case at bar other definition of reasonable doubt was added. The further instruction was, that "a reasonable doubt is a doubt arising in the mind for which some fair, just reason can be given." This the jury could very well understand. The other phrase is too much objected to by many respectable courts to commend its adoption into judicial use. The rule of reasonable doubt was itself settled upon to rid the law of a great variety of loose and confused definitions and phrases which had been from time to time adopted by different judges to express the judicial idea.

No other question in the first bill of exceptions was much relied upon by counsel, and none needs particular examination by the court.

A bill of exceptions is taken to the overruling a motion in arrest of judgment. The complaint is that the judge told the jury that the fourth count in the indictment was not proved, and still a general verdict was rendered covering that count. The objection cannot be taken upon a motion in arrest. The indict-

ment itself is sound. The respondent should have requested a correction of the verdict before it was affirmed, or should have moved after verdict that the same be set aside, in order to make his objection available. But the point may as well be considered under the motion filed.

There are four counts in the indictment. The first charges the forgery of an order to defraud Frank E. Snow. The second charges the same thing with some unessential difference. The third charges uttering the same order to defraud Frank E. Snow. The fourth charges the same forgery to defraud the Maine Saving's Bank. Here but one offence was charged. But a single act was complained of. Forging and uttering the same paper may or may not be distinct offences. Here they were not. The crime perpetrated was a single act, one transaction.

It was proper to render a general verdict. The counts were good in form and for one offence. A verdict of guilty means that the offence was committed in some one of the forms alleged. Separate verdicts of guilty might have been repugnant to each other. As the jury were instructed to disregard the fourth count for want of evidence applicable thereto, the presumption is that the verdict was founded upon some other count, else a verdict of not guilty would have been rendered. The judgment can be granted upon the other counts and restricted thereto, or a *nolle prosequi* may be entered as to one of the counts or more. The record would be the most in accordance with the evidence as viewed by the court and disclosed by the case, to enter a *nolle prosequi* as to the last two counts; the others to stand. 1 Bish. Cr. Proc. 3d ed. § 1015; *Carlton* v. *Com.* 5 Met. 532; *Crowley* v. *Com.* 11 Met. 575; *Com.* v. *Desmarteau*, 16 Gray, 1; *Com.* v. *Carey* 103 Mass. 214; *Com.* v. *Railroad*, 120 Mass. 372; *Com.* v. *Railroad*, 133 Mass. 383; *State* v. *Whittier*, 21 Maine, 341; *State* v. *Wright*, 53 Maine, 345.

Exceptions overruled.

WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred. LIBBEY, J., did not concur.

ANNIE D. ELSEMORE *vs.* ISAAC P. LONGFELLOW.

Washington. Opinion May 5, 1884.

Officer. False arrest. Pauper. R. S., 1871, c. 24, § 27. Stat. 1879, c. 157.

An action for false arrest does not lie against an officer for serving a precept issued by an inferior magistrate, if the magistrate has jurisdiction of the offence alleged, and the precept upon its face discloses that he has jurisdiction of the person of the offender.

The process discloses jurisdiction of the person against whom it runs, if a proper cause is indicated, though it may be ever so irregularly and imperfectly expressed. Amendable irregularities do not vitiate. To render the officer liable the precept must be absolutely void.

The statutes allow a magistrate to issue a warrant for the arrest of a fugitive pauper, provided the overseers issue an order to a person to bring the pauper home, and the pauper refuses or resists such person, and such person makes the complaint to the magistrate.

The complaint was made directly by one of the overseers, substantially that the overseers did not upon search find the pauper; that she evaded them, and avoided arrest. *Held:* That the warrant issued upon such complaint was unauthorized by the statute and utterly void.

ON REPORT.

An action against a deputy sheriff for false arrest and imprisonment. The writ was dated September 7, 1881. The plea was the general issue, and brief statement wherein the defendant claimed justification under the following complaint and warrant which was placed in his hands for service:

"State of Maine.

"Washington, ss. To Mason H. Wilder, a trial justice in and for the county of Washington: Cyrus C. Rollins, one of the overseers of the poor of the town of Wesley in the county aforesaid, on the twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-one, in behalf of the State of Maine, on oath complains: That Anna D. Elsemore, a person who has her settlement in Wesley aforesaid, but is now and has been for several years supported by the town of Wesley in

the town of East Machias in said county; that the overseers of the poor in said Wesley, desiring the removal of said Anna D. Elsemore from said East Machias to said Wesley, went in person to said East Machias to the house of the mother of said Anna D. Elsemore who refused to deliver up to said Anna D. Elsemore or to inform said overseers where she was, by which said overseers were prevented from obtaining possession of her the said Anna D. Elsemore. And the said Anna D. Elsemore utterly refuses to return to the place of her settlement, to wit, Wesley aforesaid; against the peace of the state," &c. (common form signed and sworn to, and a warrant in common form was issued thereon.)

Other material facts stated in the opinion. By the terms of the report, "If the warrant and return and other facts stated were a justification to the officer, and he had a right to lodge her in a jail to prevent her running away, the officer performing his duties in a prudent and reasonable manner, then the plaintiff to be nonsuit," otherwise the case to stand for trial.

John C. Talbot, for the plaintiff, cited: *Guptill* v. *Richardson*, 62 Maine, 264; 18 Maine, 23; 24 Maine, 180; 39 Maine, 465; *Spaulding* v. *Record*, 65 Maine, 220; R. S., c. 24 § § 22, 23; Stat. 1879, c. 162, c. 157; *Gurney* v. *Tufts*, 37 Maine, 130; *Thurston* v. *Adams*, 41 Maine, 419; *Vinton* v. *Weaver*, 41 Maine, 430; *Nowell* v. *Tripp*, 61 Maine, 426; Constitution of Maine, Art. 1, § 6; Constitution of U. S. 14th amendment; *Portland* v. *Bangor*, 65 Maine, 120; *Dunn* v. *Burleigh*, 62 Maine, 24; *Gross* v. *Rice*, 71 Maine, 241;

Charles Sargent, for the defendant, cited: *Whipple* v. *Kent*, 2 Gray, 410; *Savacool* v. *Boughton*, 5 Wend. 170; *Coon* v. *Congden*, 12 Wend. 496; *Parker* v. *Walrod*, 16 Wend. 514; *Nowhall* v. *Tripp*, 61 Maine, 426; *Dominick* v. *Eacker*, 3 Barb. 17; and contended that as trial justices have jurisdiction of the subject matter by express provision of the statute, it could not be required of the defendant, as deputy sheriff, to determine questions of law or of fact and ascertain whether or not the complaint and warrant contained more or less than was

legally required. He only knew, and was required to know, that the magistrate had jurisdiction of the subject matter.

Counsel further cited: *Beach* v. *Furman*, 9 Johns. 229; *Warner* v. *Shed*, 10 Johns. 138; *Donahoe* v. *Shed*, 8 Met. 326; 5 Selden, 208; 3 Green. 40; *Hart* v. *Dubois*, 20 Wend. 236; *Suydam* v. *Keys*, 13 Johns. 444; *Thurston* v. *Adams*, 41 Maine, 419; *Chase* v. *Fish*, 16 Maine, 132; 13 Maine, 36; *Wilmarth* v. *Burt*, 7 Met. 257; *Henderson* v. *Brown*, 1 Caines, 92; *Dwinnels* v. *Boynton*, 3 Allen, 312; *Fisher* v. *McGirr*, 1 Gray, 45; *Stevenson* v. *McLean*, 5 Humph. 332; *Barner* v. *Barbour*, 1 Gilman, 401; *Parker* v. *Smith*, 1 Gilman, 411; 9 Conn. 140.

PETERS, J. This is an action against an officer for false arrest and imprisonment, the question involving the sufficiency and validity of the papers under which the officer acted. The theory of the law is, to protect an officer in his acts of official duty so far as it reasonably can without injustice to others. The rule should be liberally interpreted in the officer's behalf.

The proceedings in this case were instituted for the removal of a pauper from one town to another, by force of the statutory provisions contained in § 27, ch. 24, R. S., of 1871, and ch. 157, laws of 1879. The subject matter was within the jurisdiction of the magistrate who issued the process to the officer. The important question is, whether a proper process was issued or not; whether the process disclosed a jurisdiction over the *person* of the plaintiff; in other words, whether the process under which the defendant acted was valid or void.

The officer is protected unless the process is void, and unless he can see from the face of the process itself that it is void. If the process shows its want of validity, the officer is not justified in acting under it. Irregularities, merely, that are amendable do not vitiate it. An officer has a right to suppose that what may be amended will be amended. Amendable defects do not even justify an officer in refusing to serve the process. Although the cause of action may be ever so informally and imperfectly expressed, still, if a proper cause is indicated, the process may be legal on its face. The officer stands upon defensible ground

unless the process be absolutely void. *McGlinchy* v. *Barrows*, 41 Maine, 74; *Thurston* v. *Adams*, *Id.* 419; *Gurney* v. *Tufts*, 37 Maine, 130; *Nowell* v. *Tripp*, 61 Maine, 426, and cases; Big. Cas. Torts, 277; Bou. Law Dic. "Arrest."

Under those rules, and upon the doctrine of the cases most favorably interpreted for the officer, we are forced to the conclusion that neither the facts indicated upon the papers themselves, nor those adduced in evidence, show that the magistrate had any jurisdiction over the person of the plaintiff in the matters alleged. The proceedings were void.

What facts would it have been necessary to allege in order to afford protection to the officer? That the plaintiff was a pauper; that is alleged. That the overseers gave a written order to some person to remove the pauper; that is not alleged. That such person requested the pauper to go with him, and that she refused or resisted; that is not alleged. That such person makes the complaint; that is not alleged. No statutory cause is alleged. A naked order to arrest would not have been sufficient. Reason must be given. Illegal reasons are given. Legal reasons are omitted. If the illegal allegations be expunged, the complaint would be little more than blank paper.

The act of 1879 allows the complaint to be amended at any time before judgment according to the facts. It was not amended. It must be amended according to the facts, and not contrary to or beyond the facts. There is no evidence or suggestion of the existence of any facts to be incorporated into the complaint beyond those alleged. The officer had no reason to believe in the existence of any facts not alleged which could have made the proceedings valid or his own acts justifiable.

Action stands for trial.

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

JOHN CONNOR *vs.* JEREMIAH T. GILES.

Penobscot. Opinion May 5, 1884.

Sales. Law and fact. Province of the jury. Practice.

A sale of a horse to be kept by the seller till a future day, and if then brought to the purchaser to be paid for, there being no payment or formal delivery, and the purchaser obtaining no possession further than that the horse was present when the conversation took place, is not a sufficient sale and delivery against one in the condition of a subsequent purchaser. The first sale was conditional only.

It is the province of the jury to find what words were used and the meaning of them, where an oral bargain is made. But the court may inform the jury what interpretations of the language used would be possible and permissible, and the jury must determine the meaning within the limits prescribed.

A judge may withhold a case from the consideration of the jury when there is no evidence upon which they can in any justifiable view find for the party producing it, upon whom the burden of proof is imposed.

It is not enough to require submission to a jury, that there may be a crumb or scintilla of evidence. It must be evidence of legal weight.

ON EXCEPTIONS.

Trover for the alleged conversion of a horse and wagon. The defendant claimed title to the property under a mortgage, dated October 4, 1881, and duly recorded October 20, 1881.

The verdict was for the defendant. The other material facts are stated in the opinion.

B. L. Smith, for the plaintiff, contended that the transactions of October 18, 1881, transferred the title of the property to the plaintiff, that a sale was then perfected, that the parties so intended, and the language and acts of both parties indicated the intention that the seller relinquished all further claim and control as owner and the buyer assumed the same with its consequent liabilities. *Bethel S. M. Co.* v. *Brown*, 57 Maine, 18.

Any mere formal words of delivery and acceptance would have been superfluous, for the case discloses that an arrangement was made at the same time for the seller to keep the horse for the

buyer till Saturday following. See *Brooks* v. *Powers*, 15 Mass. 246; *Ingalls* v. *Herrick*, 108 Mass. 353; *Barret* v. *Goddard*, 3 Mason, 114; *Hotchkiss* v. *Hunt*, 49 Maine, 213; *Boynton* v. *Veazie*, 24 Maine, 286; *Weld* v. *Came*, 98 Mass. 154; *Calkins* v. *Lockwood*, 17 Conn. 154; *Stinson* v. *Clark*, 6 Allen, 340; Story, Sales, § § 298, 312, 353, 362; Benjamin, Sales, § § 313–317.

The question should have been submitted to the jury. *Houdlette* v. *Tallman*, 14 Maine, 400; *Willard* v. *Randall*, 65 Maine, 81; *Dyer* v. *Libby*, 61 Maine, 45; *Weber* v. *N. Y. Cent. &c. R. R. Co.* 58 N. Y. 451.

Hale, Emery and Hamlin, for the defendant, cited: *Phillips* v. *Hunnewell*, 4 Maine, 376; *Merrill* v. *Parker*, 24 Maine, 89; *Merrill* v. *Curtis*, 18 Maine, 272; *Kohl* v. *Lynn*, 34 Mich. 360; Jones, Chat. Mortg. 247.

PETERS, C. J. The question of this case concerns the date when a purchaser, under whom the plaintiff claims, got a completed sale and delivery of a horse. If it was on October 18, 1881, the horse was plaintiff's; if on October 22, 1881, the horse was defendant's. The defendant's mortgage of the horse was recorded between the two dates. The testimony of the purchaser was this: That on the 18th he examined the horse; rode after him with seller; made an offer which was not accepted; the seller drove away; afterwards came back, and says, "make me an offer;" I said, "I will give one hundred and twenty-five dollars;" seller says he will trade for that; I said "I didn't want the horse till Saturday (22nd), and if he would keep him till Saturday,—take his horse and keep him till Saturday, and then you bring him in and you shall have your pay." He says, "all right." On Saturday the seller came in with the horse, and the buyer took him and paid the money.

The court ruled that the jury would not be authorized to find that a sale, completed by delivery, was accomplished before Saturday. We believe that to be right. All was contingent and conditional before that day. There was no delivery until then. The seller had the horse in hand when the conversation about a

sale took place, and the horse did not pass out of his possession until Saturday. There was no attempt at delivery of any kind on the 18th. The nearest that the purchaser came to any possession of the horse before Saturday, was riding after him on a trip of trial, after which the parties parted, coming to no agreement.

The plaintiff says that the jury are to ascertain the meaning of the parties when an oral bargain is made. That is correct. The jury are to find what words were used and the meaning of them; thereby finding the facts. By words, and the meaning of words, facts are expressed. If facts (not words merely) are proved or admittted, and are uncontradicted, their legal effect is more often a question of law. A jury is not to be allowed to successfully establish wild or insensible, or perverse or impossible propositions. They are to be advised by the court in some respects. The court may inform them what interpretations of the language used would be possible or permissible, and the jury may decide what idea was intended. This province of the court necessarily results from the corrective power it possesses over erroneous verdicts in civil causes.

The plaintiff further contends that, if we accord to the jury the province of passing upon the facts, they should have been permitted to decide whether there was a delivery or not. But a jury cannot be permitted to find there is evidence of a fact when there is not any. A plaintiff cannot read his writ to the jury, and claim a verdict without submitting *any* evidence. Nor can he do so where the evidence is too slight or trifling to be considered and acted upon by a jury. The evidence must have some legal weight. There is no practical or logical difference between no evidence and evidence without legal weight.

The old rule, that a case must go to the jury if there is a scintilla of evidence, has been almost everywhere exploded. There is no object in permitting a jury to find a verdict which a court would set aside as often as found. The better and improved rule is, not to see whether there is any evidence, a scintilla, or crumb, dust of the scales, but whether there is any upon which a jury can, in any justifiable view, find for the party

producing it, upon whom the burden of proof is imposed. Here the unquestioned evidence shows no delivery if it does a sale. It cannot show it. Bou. Law Dic.; Scintilla of Evidence; *Beaulieu* v. *Portland Co.* 48 Maine, 291; *Brown* v. *E. & N. A. Railway*, 58 Maine, 384, and cases; *Rourke* v. *Bullens*, 8 Gray, 549.

Exceptions overruled.

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

SAMUEL A. MAXFIELD *vs.* AZRO H. JONES and ELLEN D. JONES.

Penobscot. Opinion May 5, 1884.

Practice. Opening a case to the jury. Contract. Failure of consideration.

While it may be a good practice for plaintiff's opening counsel to state, in addition to his own case, the expected defence and plaintiff's answer to such defence, exceptions do not lie to a judge's refusal to allow the counsel to do so. It is a question within the discretion of the judge presiding.

Plaintiff held notes against defendant; defendant delivered goods to plaintiff in payment of the notes; before the notes were surrendered by plaintiff the defendant was declared a bankrupt and the sale became thereby void. *Held:* That the plaintiff could recover upon the notes upon the ground that the consideration for a promised surrender of the notes had failed.

The bias or prejudice of parties as witnesses should be shown by brief testimony in a general way, and not by prolix and prosy details.

ON exceptions by both parties and motion of the plaintiff to set aside the verdict.

Assumpsit on a promissory note signed by both of the defendants, dated July 23, 1877, for $800. The plea was the general issue. The verdict was for $1134.39 against Azro H. Jones and in favor of the other defendant.

Barker, Vose and Barker, for the plaintiff, cited in support of his exceptions: *Huntington* v. *Conkey*, 33 Barb. 220; *Ayrault* v. *Chamberlain*, 33 Barb. 233; Colby's Prac. 236; 3 Bouvier's Inst. 333, § 3044; *Davis* v. *Mason*, 4 Pick. 156; *Scripps* v. *Reilly*, 24 Am. R. 575.

Jasper Hutchings, for the defendants, in support of their exceptions, cited: *Ellis* v. *Wild*, 6 Mass. 321; *Dakin* v. *Anderson*, 18 Ind. 52; *Levy* v. *Bank of U. S.* 1 Binn. (Pa.) 27; *Leavitt* v. *Beers*, Hill & D. (N. Y.) 221; *Caruthers* v. *Corbin*, 38 Ga. 75; *Green* v. *Jones*, 38 Ga. 347; *King* v. *King*, 37 Ga. 205; *Luzenberg* v. *Cleveland*, 19 La. Ann. 473; *Freeman* v. *Bass*, 34 Ga. 355; *Bicknell* v. *Dorion*, 16 Pick. 478.

PETERS, C. J. Each side presents exceptions. The plaintiff's grievance is this: The action is upon a note. His counsel, in opening the cause to the jury, undertook to state what defense would be set up against the note and the plaintiff's reply to such defense. He was not permitted to do so. If he was about to state the grounds of defense correctly, and that could have been easily ascertained, we think it would have been the better course to allow the counsel to make the statement. The note made out only a *prima facie* case, not disclosing the real controversy. A case can be better understood if the actual issues are made known in advance of the reception of the testimony. It is not uncommon, in our pratice, for a judge to ask counsel to state the respective positions relied upon before proceeding with the evidence. In Spaulding's Prac. it is said, "The opening counsel may state the matter of defense, if it appears from the record, or from a notice of set-off, or the like, and also the evidence by which he can disprove it." It seems just as reasonable to state the supposed defense in cases generally, if the plaintiff's counsel has knowledge or an intimation of it. The plaintiff contends that this denial of the court is cause for a new trial. We do not concur with him to that extent. We think, as a rule, this is a matter within the discretion of the presiding judge and not reviewable upon exceptions. Evidently, no substantial legal right was taken away.

The facts, shortly stated, upon which the defendant's exceptions are based, are these: The plaintiff held the note in suit and other notes against the defendants; the principal defendant sold and delivered to the plaintiff a stock of goods and merchandise in payment of the notes; the plaintiff kept possession of the notes, apprehending that the defendant might be forced into

bankruptcy in season to render the sale of goods to him void; it turned out so, the plaintiff getting no benefit whatever from the sale, and being compelled to account with the defendant's assignee in bankruptcy therefor.

The judge correctly ruled that the consideration for the promised surrender of the note had failed, and that the plaintiff could maintain his action upon it. The assignment in bankruptcy, by its retroactive effect, rendered the sale to the defendant void. A vender in possession impliedly warrants his title to the thing sold. *Thurston* v. *Spratt*, 52 Maine, 202; *Huntingdon* v. *Hall*, 36 Maine, 501. For the breach of warranty, or failure of consideration, the purchaser can rescind. *Marston* v. *Knight*, 29 Maine, 341; *Bryant* v. *Isburgh*, 13 Gray, 607. Suing the note rescinds the sale. The defendant contends that the object of the sale was to defraud the seller's creditors. He cannot set up such a defense. *Butler* v. *Moore*, 73 Maine, 151. The purchaser does not get that for which he was to pay. It is the same rule as that which applies in favor of a buyer who buys forged shares in a corporation; or forged bills or notes; or who gets an article different from that which was described in the sale. He can recover back money if he paid money; or recover in specie any property passed over to the seller. Here the buyer has in his own hands the note which he was to surrender for the goods, and can collect the same. *Eichholtz* v. *Banister*, 17 C. B. (N. S.) 708; *Chapman* v. *Speller*, 14 Q. B. 621. See, Benj. Sales (3 Am. ed.), § 423, and cases in note.

The motion to set aside the verdict should not prevail. There was a sharp conflict of testimony between the parties, and the jury could appreciate the merits of the case better than we can. An excessive amount of immaterial and useless testimony is incorporated into the reported case. Its only purpose could be to show the animus of the parties as witnesses. That fact should be exhibited in a general way and not by prolix and prosy details.

Motion and exceptions overruled.

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

ELIJAH SMITH *vs.* AZRO H. JONES.

Penobscot. Opinion May 5, 1884.

Arrest. Witness. Contempt of court. Practice.

An action for damages does not lie against a plaintiff for the arrest upon civil process of a defendant, who was at the time privileged from arrest as a witness (without a writ of protection) returning home from court. The remedy consists in an application for a discharge from arrest; the most expeditious mode being by summary motion to the court or some judge thereof.

A person ordering an arrest of a witness upon civil process, may be punished for contempt of court for interference with its business.

ON EXCEPTIONS and motion to set aside the verdict.

An action to recover damages for causing the plaintiff's arrest in the Province of New Brunswick, and his imprisonment for two days, when on application to the court there he was discharged because he was at the time privileged from arrest, as he was returning home from Woodstock, New Brunswick, where he had been attending court as a witness. The plea was the general issue. The verdict was for the plaintiff in the sum of eight hundred dollars.

Other material facts stated in the opinion.

Barker, Vose and Barker, for the plaintiff.

The plaintiff was a witness in a foreign jurisdiction, and as such entitled to the fullest extent of the law, granting him privilege from arrest. *Norris* v. *Beach*, 2 Johns. 294; *Seaver* v. *Robinson*, 3 Duer, 622; *Pell's case*, 1 Rich. 197; *Thompson's case*, 122 Mass. 428; *Wood* v. *Neale*, 5 Gray, 538; *May* v. *Shumway*, 16 Gray, 86; *Hopkins* v. *Colburn*, 1 Wend. 292; *Person* v. *Grier*, 66 N. Y. 124.

The earlier English cases treated this privilege rather as the privilege of the court, punishable, if invaded, by fine and imprisonment for contempt. To a certain extent this doctrine has been recognized in this country. This privilege may extend to

the court while the trial is in progress or before it has commenced; but when, as in this case, the trial had closed and the witness was half way home, the court has had all the protection necessary for the transaction of its business, and the only person to whom the privilege becomes of importance is the witness himself. How can it be said to be solely a privilege of the court when the witness himself can waive it? It has been held a personal privilege which the witness may waive. 1 Whar. Ev. § 390; 1 Greenl. Ev. § 316; *Brown* v. *Getchell*, 11 Mass. 13; *Chase* v. *Fish*, 16 Maine, 132.

The English court in the case of *Whalley* v. *Pepper*, 32 E. C. L. 603, lays down the general rule that where a person causes the arrest of a privileged party with full knowledge of the facts, he is liable in an action of damages; and the same rule is intimated in *Andrews* v. *Martin*, 104 E. C. L. 369.

The decisions in this country seem to indicate two separate rights and two separate remedies. (1) The invasion of the rights and dignity of the court, punishable by fine and imprisonment for contempt. (2) The invasion of the right of personal liberty of the witness for which he may maintain an action against any person causing his arrest, who does so with a full knowledge of the facts. *In re Healey*, 38 Am. R. 713; 1 Chitty's Pl. 128–9; 7 Johns. 538; 9 Johns. 116; 3 T. R. 183; Cooley, Torts, 189, and cases cited; *Churchill* v. *Siggers*, 3 El. & Bl. 929. Counsel also cited: *Grainger* v. *Hill*, 4 Bing. (N. C.) 212; *Krug* v. *Ward*, 77 Ill. 603; *Shaw* v. *Reed*, 16 Mass. 450; *Foster* v. *Dow*, 29 Maine, 442; *Moulton* v. *Lowe*, 32 Maine, 466; *Mussey* v. *Colville*, Alb. L. J. March 17, 1883; *Savage* v. *Brewer*, 16 Pick. 456.

J. Hutchings, for the defendant, cited: *Magnay* v. *Burt*, 5 Ad & El. N. S. 381; Cooley, Torts, 192; *Stokes* v. *White*, 1 C. M. & R. 223; *Yearsley* v. *Heane*, 14 Mees. & W. 322.

PETERS, C. J. The plaintiff sues the defendant for causing his arrest upon a civil process in defendant's name, in the Province of New Brunswick, while the plaintiff was returning from a court in the Province, at which he had been in attendance as a

witness, to his home in Maine. The defendant knew that the plaintiff was a returning witness at the time. Our view of the law is that the action cannot be maintained.

The question is satisfactorily solved by an examination of the nature and extent of the privilege from arrest, which the law accords to witnesses.

It is not a natural right. It is contrary to common right. The plaintiff was arrested in pursuance of a general right, in a manner precisely as any other debtor could have been. The claim was suable. The court had jurisdiction. The capias was legally issued. He stood upon the footing of all debtors.

The plaintiff's privilege was not an absolute right. It was not an absolute right of freedom from arrest, such as belongs to members of the royal family of England, or to ambassadors and some others; not the case of total exemption from arrest, such as the law extends to persons discharged from arrest by bankruptcy or insolvency proceedings; or where the law forbids arrest for the collection of demands. The right is afforded by the law not so much for witnesses as for parties to suits. Some cases assert that it is a privilege of the court and not of the witness. Other cases incline to the idea that it is a privilege of parties rather than of courts. But that is a distinction without difference. The idea is the same. Courts exist for the benefit of parties. It is a policy of the law established for the facilitation of the public business. It is a protection thrown about a witness more for the sake of others than himself. It is clear that a person ordering an arrest of a witness, may be punished for contempt of court for interference with its business.

It is, at most, a conditional or contingent right of the witness. He may take it or not as he pleases. All the authorities affirm that the privilege may be waived. Therefore, the arrest cannot be void; is only voidable. The arrest remains valid until avoided. And the witness can avoid the arrest only by applying to the court for a discharge. He waives the privilege unless he applies for a discharge.

The plaintiff complains that a refusal to uphold his action refuses him a remedy. That is not so. We have just intimated

what the proper remedy is. It is an application for a discharge from the arrest. He may be discharged by a judge upon summary motion. He may sue out a *habeas corpus*. He may procure his writ of protection in advance of starting for or from court, if circumstances make it reasonable to ask the mediation of court for the purpose. The law does not declare that a witness shall not be arrested, but gives to him the right to free himself from arrest, if he desires to, and points out several ways by which it may be accomplished. It is not a right so much to avoid being arrested, but is a right to terminate the arrest. It is said, however, that a person may be under such pressure of imprisonment as to be powerless to obtain the action of a court or judge before suffering actual incarceration. This would not often happen. A writ of protection would ordinarily prevent the dilemma. An officer might be liable for an abuse of authority, if he exceeds his duty and acts roughly and oppressively. And, of course, an action would lie against the creditor who proceeds maliciously and without probable cause.

How can a creditor know that his debtor, who is a witness, will insist upon the privilege, until the debtor asserts it? And how can he know that the court will grant a discharge if asked for? It is to some extent a discretionary matter with a court or judge, whether a witness shall be discharged upon arrest. How can this discretion be anticipated by a creditor? And why should the creditor be required at his peril to correctly settle the question whether the debtor is at court in good faith or not,—or whether he has overstaid his privilege,—or whether unnecessarily loitering on the way,—judicial questions that can be easily and summarily settled by a judge in or out of court without much expense to parties. It is not at all unreasonable to cast upon the court, and to relieve parties from, the responsibility of such questions.

The precise question here presented has not received very much attention from courts, and there is an almost total absence of judicial expression in favor of the plaintiff's position where the privilege is at common law and not by statute. The remedy by action was established long ago in New York by statutory

enactment, which is an implication that the remedy did not exist there at common law. And this accounts for intimations in cases in that state that damages for a breach of the privilege are recoverable. Paine and D. Prac. Arrest. *Snelling* v. *Watrous*, 2 Paige, 314; *Salhinger* v. *Adler*, 2 Robt. 704. Some English statutes give a right of action in some cases, or establish other special remedy, for a violation of the privilege of freedom from arrest; from which an implication arises that no such remedy exists at the common law in that country. Tidd's Practice lays down the various remedies that are available for a violation of the privilege from arrest belonging to witnesses and all other persons or parties in necessary attendance upon courts, and omits all mention of a right of action for damages. Text writers generally are silent upon the question. In 2 Add. Torts (4 Eng. ed.), 796, it is said, however, that "the privilege does not form the ground of any action at law." And in Cooley's Con. Lim. (5th ed.), 162, (*135), it is said, in note: "The arrest is only voidable; and in general the party will waive the privilege unless he applies for discharge by motion or on *habeas corpus*."

Not many decided cases touch the point. The early experimental actions were against officers, and all of them failed. But much of the reasoning of the courts really went against any action, disregarding any distinction between officer and party. The early cases are cited and commented upon in *Carle* v. *Delesdernier*, 13 Maine, 363. See *Chase* v. *Fish*, 16 Maine, 132. Some phases of the question are touched in later cases. *Wilmarth* v. *Burt*, 7 Metc. 257; *Aldrich* v. *Aldrich*, 8 Metc. 102; *Edward Thompson's Case*, 122 Mass. 428; *Person* v. *Grier*, 66 N. Y. 124. Several English cases take strong ground against the maintenance of such an action. In *Yearsley* v. *Heane*, 14 M. & W. 322, it is said: "The protection is limited to the fact of the individual so arrested being entitled to be discharged." In the same case it was said by POLLOCK, C. B., "Did the legislature mean to give more than this, that if the party was arrested he might be discharged,— whereby he has the full benefit of the protection? I think not." *Ewart* v. *Jones*, 14 M. & W. 774; *Stokes* v. *White*, 1 Crom. M. & R. 223; *Rideal* v. *Fort*, 11

Ex. 847; *Magnay* v. *Burt*, 5 Ad. & El. 381. In a note to *Stokes* v. *White*, *supra*, in the edition by Hare and Wallace, careful annotators, it is said, upon the authority of the cases determined in the court of Exchequer Chamber, that "an arrest by the sheriff, under a writ from any of the Queen's Courts, of a person privileged from arrest by reason of attendance as a witness under the process of another court, does not form the ground of any action at law for damages, but is only the subject of an application to the court, under whose authority the party had been compelled to appear as a witness; the privilege being, not that of the person, but that of the court, and therefore of discretionary allowance."

Exceptions sustained.

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

WILLIAM H. DOUGHTY *vs.* PENOBSCOT LOG DRIVING COMPANY.

Penobscot. Opinion May 5, 1884.

Negligence. Fellow-servants.

Persons who are employed under the same master, derive authority and compensation from the same common source, and are engaged in the same general business, although one is a foreman of the work, and the other a common laborer, are fellow-servants; and take the risk of each other's negligence; the principal not being liable to the injured servant therefor. 76 143 f94 555

An exception to the rule exists if the master has delegated to the foreman or superintendent, the care and management of the entire business, or a distinct department of it; the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master.

A crew of men were engaged under a foreman or superintendent in repairing a dam for a log-driving company, incorporated by the laws of the state, when one of the laborers was injured by the carelessness of another who acted under the direction and immediate observation of the foreman in doing the particular act complained of. *Held:* That the foreman and laborers were fellow-servants within the rule exculpating the company from liability.

ON REPORT.

An action to recover damages for personal injuries received while in the employ of the defendant.

(Declaration.)

"In a plea of the case, for that the plaintiff, being in the employ of said defendant company, on the 13th day of March, A. D. 1882, as a laborer in the repair of a dam belonging to said company, at the foot of Chesuncook Lake in the County of Piscataquis, and working upon said dam under the eye and direction of one Jasper Johnson, an employee of said defendant company, having the entire charge and control of such repairs, and the men thereon employed, to wit: fitting a wooden prop to hold one end of a plank that held the gate in position, and against which plank said gate was pressing towards said plaintiff by a great force, and while so employed by the direction of said Johnson, and in the use of ordinary care, and before said prop was completed and set as contemplated, and was necessary to support said plank, one Edward Lambert, also an employee of said defendant company, under the direction and control of said Johnson, by the order of said Johnson and under his immediate eye, sawed off a pin which held the end of said plank, near the plaintiff, which plank so suddenly loosened, swung—said Johnson well knowing it would—with great force against the plaintiff, who was greatly hurt and injured, and by reason thereof has suffered great pain, has been unable to labor, and has been put to great expense in the care and surgical aid necessary to his recovery therefrom, and plaintiff avers that said hurt and injuries were the result of, and occasioned by the carelessness and negligence of said defendant company by their servants as aforesaid, and to the damage of said plaintiff (as he says) the sum of one thousand dollars, which shall then and there be made to appear with other due damage."

To this declaration the defendant filed a general demurrer, which was joined, and the case was reported to the law court with the agreement that if the demurrer was sustained a nonsuit should be entered, otherwise the case was to stand for trial.

Barker, Vose and Barker, for the plaintiff.

We recognize the principle that the master is not liable to one servant for the negligence of a co-servant. But we invoke in

this case the other principle, "that when the master delegates to another the entire control over his business, or a particular department therof, leaving its management and direction to such person's discretion, the person to whom such power is delegated stands in the place of the master as to all duties resting upon the master to his servants; and his acts or omissions relative thereto are the acts and omission of the master himself."

There is enough in the writ and declaration with facts of which the court will take judicial knowledge to bring this case within the rule above quoted, and to show negligence so gross as almost to amount to malicious intent. See Wood on Mast. & Serv.

A. W. Paine, for the defendant, cited: 2 Hilliard, Torts, 438; *Carle* v. *B. & P. C. Railroad Co.* 43 Maine, 269; *Beaulieu* v. *Portland Co.* 48 Maine, 291; *Lawler* v. *And. R. Co.* 62 Maine, 463; *Osborne* v. *K. & L. R. Co.* 68 Maine, 50; *Blake* v. *M. C. R. Co.* 70 Maine, 63; *Scott* v. *Mayor, &c.* 38 E. L. & Eq. 477; *Farwell* v. *B. & W. R. Co.* 4 Met. 49; *Seaver* v. *B. & M. R. Co.* 14 Gray, 466; *Priestley* v. *Fowler*, 3 Mee. & W. 1; *Brown* v. *Maxwell*, 6 Hill, 592; *Zeigler* v. *Day*, 123 Mass. 152; *O'Connor* v. *Roberts*, 120 Mass. 227; *Harkins* v. *St. S. Refinery*, 122 Mass. 400; *Summersell* v. v. *Fish*, 117 Mass. 312; *Johnson* v. *Boston*, 118 Mass. 114; *Albro* v. *Agawam Co.* 6 Cush. 75; *Hard* v. *Vt. C. R. Co.* 32 Vt. 473; Redf. Railway, 388, 387 and notes; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Dunham* v. *Rackliff*, 71 Maine, 345; *Noyes* v. *Smith*, 28 Vt. 59; *Ormand* v. *Holland*, 96 E. C. L. 102; *Kelley* v. *Boston Lead Co.* 128 Mass. 456; *Walker* v. *B. & M. R. Co.* 128 Mass. 8; *Holden* v. *Fitchburg R. Co.* 129 Mass. 268; *Wright* v. *N. Y. C. R. Co.* 25 N. Y. 562.

PETERS, C. J. The general rule that a master is not liable for an injury caused to a servant by the carelessness of a fellow-servant in the same common employment, unless the master is negligent in some matter he expressly or impliedly contracts with the servant to do—is the well settled law of this state.

Who is a fellow-servant within the meaning of the rule, is a question much discussed, upon which the authorities very essen-

tially disagree. Different courts entertain different theories and views. This general rule has been extracted from the authorities: "The decided weight of authority is to the effect that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who take the risk of each other's negligence." 2 Thomp. Neg. 1026. This seems to be an unobjectionable definition; but, being general, difficulty arises in applying it to cases.

The author proceeding further, says, p. 1028, "The fact that the negligent servant, in his grade of employment, is superior to the servant injured, does not, in the opinion of most of the courts, take the case out of the rule; they are equally fellow-servants, and the master is not liable. Within the meaning of this rule, a mere *foreman* of work is generally regarded as a fellow-servant with those under his control. But if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department thereof, then the rule may be different."

These views are in general acceptable to us, and we think our own cases are in accord with them. *Carle* v. *Railroad*, 43 Maine, 269; *Buzzell* v. *Laconia Co.* 48 Maine, 113; *Beaulieu* v. *Portland Co. Id.* 291; *Lawler* v. *Androscoggin Co.* 62 Maine, 463; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Blake* v. *Maine Central R. R. Co.* 70 Maine, 60.

It is said in some cases that the exception to the rule presses more strongly against corporations than against natural persons. This is not generally admitted. We do not see why the principle would not be the same. But corporations are more likely to deal through general agents than individuals and firms are. Of course, these rules, like most rules, have their exceptions. We shall only get blinded in our way, if we look for other paths than the one called for to reach a conclusion in the case before us. But with these guides, the difficulty still remains of deciding whether the foreman or superintendent is a "middle-man," possessed with all the powers and responsibilities of a principal,

—a "vice-principal standing in the principal's place." The author before quoted says: "A true expression of the rule seems to be, that, in order to charge the master, the superior servant must so far stand in the place of the master as to be charged with the performance of duties towards the inferior servant, which under the law, the master owes to such a servant." Thomp. Neg. 1031.

Instructed by these rules and legal definitions, our minds incline to the opinion that the present action is not maintainable. The question may not be free of all doubt, but it seems to us that the greater weight of argument, based both upon authority and principle, points that way.

Here was a common job of work of repairing a dam by a log-driving company. Presumably, many men were employed without any essential distinction of the service to be individually performed. Some one of the men must act as leader or director of the crew. Johnson does not appear to be a general manager, but merely a foreman in a particular, special, job of work. The plaintiff very well knew the nature of the service to be performed. Certainly, one of the ordinary risks of the employment was that some man among them might make a miscalculation or mistake. The plaintiff was sent upon no special errand of peril. The act complained of was committed under the foreman's eye; but under the plaintiff's eye as much, as far as appears. The accident was not a strange if an unusual affair. It would not differ much in kind from many accidents that might happen to a person working in a crew or company of men, whether engaged in driving logs, or mending dams or passage-ways for driving logs, or at farm work, or at mechanical business.

It would be profitless to examine or cite many of the analogous cases that bear upon the facts of this case. A few of those bearing a close resemblance to the case in hand may serve to illustrate the correctness of our view of the question presented. Cases in our own state are good illustrations, we think. In the case at bar, the men employed with the plaintiff were working upon some timber by way of repairing a dam, when a stick was forced against the plaintiff, injuring him. So in *Beaulieu* v. *Portland Co. supra*, the plaintiff was injured by the falling of a

timber upon him, and he failed to recover. In *Lawler* v. *Androscoggin Co. supra*, the injury was caused by the plaintiff going into a culvert to repair it, when it was dangerous to do so, the service being expressly ordered of the injured party by the road master of the defendant corporation; and it was held that the plaintiff in that case could not recover. It will suffice to cite other analogous and closely resembling cases. *Duffy* v. *Upton*, 113 Mass. 544; *Zeigler* v. *Day*, 123 Mass. 152; *Kelley* v. *Norcross*, 121 Mass. 508; *Killea* v. *Faxon*, 125 Mass. 485; *McDermott* v. *Boston*, 133 Mass. 349; *Floyd* v. *Sugden*, 134 Mass. 563; *Wigmore* v. *Jay*, 5 Exc. 354.

Plaintiff nonsuit.

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

CHARLES A. STROUT, by S. C. STROUT, guardian and next friend,

vs.

SAMUEL E. PACKARD and others.

Cumberland. Opinion May 15, 1884.

Evidence. Joint assault. Hazing.

In an action against several individuals for a joint assault, evidence of misconduct on the part of some of the defendants before and after the assault, tending to show a combination among them, should be limited in its application to those defendants against whom such acts of prior or subsequent misconduct are proved. It is not evidence against the other defendants.

ON EXCEPTIONS and motion to set aside the verdict.

(Declaration.)

"In a plea of trespass, for that said defendants, at Brunswick, in said county of Cumberland, on the twenty-fifth day of October, A. D. eighteen hundred and eighty-one, with force and arms, assaulted the said Charles A. Strout, and then and there, beat, bruised, wounded and ill-treated him, and then and there struck him, said Charles, a violent and dangerous blow, upon the

left eye, with a dangerous weapon, to wit, a piece of coal, of the weight of, to wit, one pound, thereby inflicting serious bruises and contusions of the head and face, and a dangerous and painful injury to the left eye of said Charles, wholly destroying the sight of the same for a long time, to wit, two weeks, and endangering the sight therefrom, permanently, from which injury he has suffered, and is still suffering, and will continue to suffer great pain, and has been put, and will continue to be put, to great expense for medical attendance and nursing; and other enormity to the said Charles, the defendants then and there did, against our peace; also for the said defendants, at Brunswick, in said county of Cumberland, on the twenty-fifth day of October, last past, wantonly, wickedly and unlawfully conspired, confederated and agreed together, to attack, assault, insult and otherwise injure in their person, and deprive of their property, certain members of the Freshman class of Bowdoin college, in said Brunswick, one of said members being the said Charles A. Strout, who was then and there in the lawful and peaceable occupation of his own room, in Appleton Hall, so called, belonging to said college, and being so confederated together, said defendants, in the execution of their said purpose and agreement, then and there with force and arms, unlawfully made an assault, upon said Charles A. Strout, then and there being in his room as aforesaid; and him the said Charles did beat, bruise and grievously wound, and throw dangerous missiles through the windows of the room of said Charles, and at his head, one of them, to wit, a large piece of hard coal, of the weight of, to wit, one pound, so thrown by defendants at said Charles, and through his said window, struck said Charles on and over the left eye of said Charles, inflicting a dangerous wound and blinding the sight of the left eye of said Charles for a long time, to wit, two weeks, from which injury the said Charles was and is in great danger of losing the sight of said eye, and has ever since suffered great pain and prostration, and will continue to suffer great pain, and mental distress, and has been and will be put, to great expense of medical attendance, medicines and nursing. To the damage," &c.

Writ is dated November 15, 1881. The plea was the general issue. The verdict was against all the defendants in the sum of twenty-five hundred dollars.

The facts are sufficiently stated in the opinion.

A. A. Strout, N. and H. B. Cleaves, and Strout, Gage and Strout, for the plaintiff, upon the question discussed in the opinion, contended that it is not necessary that the judge should use the language of the request; he may use his own language and embody several requests in one instruction. *State* v. *Reed*, 62 Maine, 129.

It is sufficient if the substance of the requested instruction is given. *Foye* v. *Southard*, 64 Maine, 389; *State* v. *Watson*, 63 Maine, 128; *Roberts* v. *Plaisted*, 63 Maine, 335.

The instructions were not limited to the mere fact that the evidence could not be used to show the assault or a motive for it; but the jury were told that it was not admitted, and was not to be used to "prejudice the defendants by showing that they had been engaged in other wrongful proceedings," nor to prove the likelihood they would do such an act, nor to raise a probability against the defendants, but that it was admitted simply to establish, so far as it might in their minds tend to establish, what the common design of the defendants was upon that night, and only so far as it tended, in their judgment, to develop the nature of the common object, in pursuance of which the defendants were out upon this occasion; but, "that in determining whether any one of the defendants threw the coal, they will lay out of the case any evidence with regard to their conduct on previous or subsequent occasions, and that it is not to be considered by the jury, unless they first find that one of the defendants threw the coal which injured the plaintiff, and then only as bearing upon the question whether the other defendants were aiders or abettors in that act." The latter being in the exact language of a request of defendants, and all being much more favorable to defendants, and so not subject to exceptions. *Staples* v. *Wellington*, 58 Maine, 453; *Gardner* v. *Gooch*, 48 Maine, 487; *Merrill* v. *Merrill*, 67 Maine, 70.

The defendants were assembled together on the night of plaintiff's injury from some motive and with some object, and for what was certainly a proper subject of inquiry by the jury, and any evidence legally tending to show it was proper for their consideration. It is well settled that evidence may be received of facts which happened before or after the principal transaction when the knowledge or intent is a material fact. 1 Greenl. Evidence, § 53.

A similar rule has been applied in cases of fraudulent transfer of property, when evidence of other fraudulent conveyance made about the same time was received. *Stockwell* v. *Silloway*, 113 Mass. 384; *Warren* v. *Williams*, 52 Maine, 346; *Howe* v. *Reed*, 12 Maine, 515.

So in cases of false pretences, evidence of similar false pretences made to others about the same time is received. *McKenney* v. *Dingley*, 4 Maine, 172; *Hawes* v. *Dingley*, 17 Maine, 341.

So upon indictment for larceny, evidence that respondent, after the larceny, was in possession of other bills, though not identified, was admitted. *Commonwealth* v. *Montgomery*, 11 Met. 535.

So in an action for money claimed to have been appropriated by defendant, evidence was admitted that while in employ of plaintiffs he was the owner of property far exceeding his salary and receipts. *Railroad* v. *Dana*, 1 Gray, 101.

So in an action against a railroad company to recover for the destruction of buildings by fire, claimed to have been communicated by defendant's locomotives, evidence was admitted that during the same summer, *some* of defendant's locomotives scattered fire, and without showing that the one which plaintiffs claimed communicated the fire was among the number, or that they were similar in make, state of repair or management. *G. T. R. Co.* v. *Richardson*, 1 Otto, 470.

So in indictment against one for procuring a miscarriage, after proof of a common illegal purpose between defendant and other parties, their acts and declarations in his absence, in pursuance of the common purpose, are admissible against him. *Commonwealth* v. *Brown*, 14 Gray, 419.

To prove a conspiracy to commit a particular fraud, a like

fraud committed by the alleged conspirators about the same time on a third party, is held admissible in evidence. Hilliard on Torts, Vol. 2, page 309.

And it is not necessary that the conspiracy should first be established, the order of time as to the admission of evidence resting wholly with the judge. If the jury, from the legal evidence, are satisfied that this was a conspiracy, or common illegal purpose, then such evidence as just mentioned is competent. *Place* v. *Minster*, 65 N. Y. 89. As to the admission and use of testimony of this character, see also, *Butler* v. *Watkins*, 13 Wall. 464; *Commonwealth* v. *McCarthy*, 119 Mass. 354; *Commonwealth* v. *Merriam*, 14 Pick. 519; *Commonwealth* v. *Tuckerman*, 10 Gray, 197; *Commonwealth* v. *Choate*, 105 Mass. 451; *Commonwealth* v. *Bradford*, 126 Mass. 42.

Evidence of these acts was not admissible generally, but for a particular purpose; and the court, in their instruction properly limited the effect of the evidence to the purpose for which it was competent. All these authorities show that the instruction as to the use of this testimony was sound law, and much more favorable to the defendants than they had the right to have it.

Charles F. Libby, for the defendants, cited: *Parker* v. *Huntington*, 2 Gray, 127; *Randall* v. *Hazelton*, 12 Allen, 414; *Miller* v. *Shaw*, 4 Allen, 501; *Jordan* v. *Osgood*, 109 Mass. 457; *Com.* v. *Jackson*, 132 Mass. 16; *Vosburgh* v. *Moak*, 1 Cush. 453.

SYMONDS, J. This was an action against seven defendants, charging them with a joint assault upon the plaintiff, and claiming to recover damages therefor. The act of assault was the throwing of a piece of coal, which struck the plaintiff over the eye and injured him seriously. It was, of course, the act of one person. To show a concert of action on the part of the defendants, such as to affect them with a joint liability for this act of one, evidence was received of the misconduct of some of the defendants at other times, which the plaintiff claimed tended to prove a general design on their part, as upper classmen in Bowdoin

college, to harass the members of the Freshman class, of whom the plaintiff was one.

The court said to the jury: "Evidence was offered, which you will remember, as to the acts of some of these defendants in other cases, at other times. It is necessary that you should understand precisely what that evidence was offered for, and what use you can properly make of it. It was offered and admitted simply to establish, so far as it might in your minds tend to establish, what the common design of the defendants was upon that night. Evidence was offered to show what some of the defendants, and the parties with whom they were out on other evenings shortly before, did at the rooms of other Freshmen. Now this evidence was admitted only, because, as to those of the defendants who did not actually throw the coal, the proper decision of the question may require evidence of the intention and purpose for which the seven defendants were out together that night, and what kind of acts and invasions of the Freshmen in their rooms were to be expected when parties were out upon such an expedition, and so to indicate what kind of a concert of action subsisted between the defendants on the night when the plaintiff was hurt."

The defendants seasonably requested the instruction, "that evidence of such (prior or subsequent) misconduct, on the part of any of these defendants, is not evidence against the other defendants not participating in the acts." This request was refused by the court and the limitation which it contained was not included in any of the instructions given to the jury in the charge.

The declaration alleged a joint assault. The averment of a conspiracy was of no account except that, under it, it might be proved in any legal way that the hand which threw the coal carried into execution the purpose of the seven. Evidence of prior or subsequent misconduct on the part of some of the defendants was only admissible for the purpose of proving, as among them, the existence and character of the combination or conspiracy alleged. The fact that a conspiracy exists, or the extent to which it goes, is not to be proved as against A, by the

declarations or the acts of B, with which no connection on the part of A is shown, and which do not appear to have been made or done in furtherance of a common design entertained by both. That a joint purpose of the seven was carried into effect by throwing the coal in this instance, was not to be proved by showing previous acts of combination and torts committed in pursuance thereof by three or four only. Precisely the limitation which the request contained was required in the legal statement of the case; that the testimony to misconduct on the part of some of the defendants before and after this assault, tending to show a combination among them, and offered and received only as "evidence of the intention and purpose for which the *seven* defendants were out together that night, and what kind of acts and invasions of the Freshmen in their rooms were to be expected when parties were out on such an expedition, and so to indicate what kind of a concert of action subsisted between the defendants on the night when the plaintiff was hurt," should have been limited in its application to those defendants against whom such acts of prior or subsequent misconduct were proved.

The evidence was offered only for the purpose of proving the presence and the scope of a joint intent in the single act, whether there was on this occasion a common purpose among the several defendants and whether it extended to the throwing of such a missile under such circumstances. The previous act of one was not evidence to prove this against another, who did not participate in that act. The mind of one is not to be revealed by the act of another, till some relation between the two is shown in the doing of that act.

In the introduction of evidence, the court was careful to limit the effect of the admissions, said to have been made, after the fact, to the president of the college by several of the defendants, so that they should be regarded by the jury in each instance as evidence only against those by whom the admissions were made. "The witness will recollect that the statements are evidence *only* against those who made the statements; *not* against others. He must be careful as to his recollection of the particular persons who made the statements." This was correct (*Comm.* v.

Ingraham, 7 Gray, 46), and we think it is as true of an earlier or later act of one of the defendants, when offered to show the existence of a combination or common intent, as it is of such an admission by one. That a joint purpose of the seven took effect in this single act of assault by one, could not be proved against all by showing acts of alleged combination among some of them at other times, not participated in by the others. Such an act, as against those not paticipating in it, did not tend to prove that they had any common purpose with the others whatever, either when the act was committed, or on the night of this assault.

The distinction is clear between the rule of evidence which applies here, and the rule which, when a conspiracy has once been proved *aliunde*, while it continues receives the declarations and acts of one conspirator, in furtherance of the common design, as evidence against even his absent associates. The jury were directed at the trial that the testimony under consideration was received for the purpose of proving what legally must be otherwise proved, before the evidence becomes admissible under this later rule, namely, the existence of the common design and its presence in a particular transaction. A conspiracy being proved among a certain number of men, the act of one in pursuance of the common plan, may be the act of all. But a man is not to be proved to be a conspirator, having a joint illegal intent with others in a particular assault which he does not personally commit, by showing the misconduct of the others on previous occasions in which he does not participate. How far the evidence of misconduct at other times, as disclosed in the report, may tend to show a combination on the part of any of the defendants to do such a wrong as that of which the plaintiff complains, need not here be considered; but there can be no doubt that such evidence, received to prove a common plan or purpose within the scope of which the committing of such an assault as this was included, must legally be confined to its effect to disclose the existence of such plan on the part of those against whom the acts are proved.

"Where two or more persons are associated for the same illegal purpose, any act or declaration of one of the parties in

reference to the common object, and forming a part of the *res gestæ*, may be given in evidence." *Am. Fur Co.* v. *United States*, 2 Pet. 365; *Nudd* v. *Burrows*, 91 U. S. 438. In the present case the question was whether the defendants were associated, for an illegal purpose, on the night of the injury to the plaintiff, and on that issue evidence of the misconduct of some of them at other times was received as generally admissible against all, while a request to limit the effect of it was refused. Each defendant had the right to claim that his joint liability for an assault should not be established, in whole or in part, by the acts of others, with which he was in no way connected. It is to be observed, as the court ruled at the trial, that "the gist of the action is not the conspiracy, but the damage done to the plaintiff by an act which is alleged to have been done by the defendants. The averment that the act done was in pursuance of the conspiracy, does not change the nature of the action. It is still an action of trespass for an assault and battery alleged to have been jointly committed by the defendants upon the person of the plaintiff; and it is to be tried and determined upon the principles applicable to actions of that description." The material inquiry, therefore, as to each one of the defendants, was, whether he shared in the commission of this particular assault, or not.

The existence of a conspiracy, as we understand it, is not in the first instance to be proved against one by the mere act or declaration of another, but, beyond that, if the existence of the conspiracy were fully proved as to some of the defendants, that fact had no tendency to decide adversely to the other defendants the vital question whether they took part in that conspiracy, and in such a way, to such an extent, as to make them joint trespassers in this transaction.

"The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one, in furtherance of that

design, a part of the *res gestæ*, and, therefore, the act of all. It is the same principle of identity with each other that governs in regard to the acts and admissions of agents, when offered in evidence against their principals, and of partners, as against the partnership." 3 Greenl. Ev. § 94.

"It is, of course, understood, that to entitle the declarations of a co-conspirator to admission, the conspiracy must first be proved *aliunde*. 2 Whart. Ev. § 1206.

Now, in the present instance, the evidence of misconduct by some of the defendants at other times, was not received to be connected with other evidence, showing that such misconduct at those times was in pursuance of a common plan in which all were involved — which plan extended to and included the commission of the principal tort — but was expressly received as in itself substantive evidence of the existence of the common plan among all the defendants; "to establish, so far as it might in your minds tend to establish, what the common design of the defendants was upon that night;" . . . as "evidence of the intention and purpose for which the *seven* defendants were out together that night, ... and so to indicate what kind of a concert of action subsisted between the defendants on the night when the plaintiff was hurt."

We can find no authority, and we can see no reason, for allowing the jury to regard the disconnected act of one of the defendants at another time and place as evidence pertinent to the issue, whether another defendant was guilty of a joint trespass on the night in question. This was the effect of the rulings given, accompanied with the refusal to give the instruction requested.

Notwithstanding the great learning of the charge given to the jury in this case, we think there was a defect in it in this respect which tended to the prejudice of the legal rights of the defendants, and may have been decisive of some of the important issues of the trial.

Exceptions sustained.

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

GEORGE D. SANDERS *vs.* ELBRIDGE L. GETCHELL and others.

Kennebec. Opinion May 16, 1884.

Selectmen. Electors. Student. Residence. Damages.

By a statute of the state, selectmen are not liable for refusing to receive the vote of a qualified voter, unless their action is "*unreasonable*, corrupt or wilfully oppressive"; if corrupt or wilfully oppressive, it must be unreasonable; if not unreasonable, no liability attaches.

Their action cannot be deemed unreasonable, when the question decided by them is so doubtful that reasonable and intelligent men, unaffected by bias or prejudice, might naturally differ in their views about it, if the question is such that there is room for two honest and apparently reasonable conclusions to be reached. Reasonable mistakes are excused; unreasonable mistakes bring liability.

The question is not whether their acts appear to the officers themselves to be reasonable, but whether reasonable in fact; ignorance is not an excuse. When a person accepts a town office, he vouches for his competency to perform its duties at least ordinarily well.

The constitution of the state provides that the residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated. This does not prevent a student gaining a voting residence in such place if other necessary conditions exist. He does not acquire a residence because a student, but may acquire one notwithstanding that fact.

Bodily presence and an intention by the student to remain in such place only because a student, or only as long as a student, do not confer domicil; the intention must be more than to make the place a temporary home, or student's home merely; it must be an intention to establish an actual, real, and permanent home in such place; to remain there for an indefinite period, regardless of the duration of the college course.

The presumption is against a student's right to vote in such place, if he comes to college from out of town. His calling the place his home, or beliving it to be his home, does not legally make it such. It is not his view of the facts that governs; the facts themselves govern the question. Each case must depend upon its peculiar facts.

Where selectmen commit an unreasonable act—intending no wrong or injury—the damages should not be exemplary or severe.

ON REPORT.

An action against the selectmen of Waterville for unreasonably and wilfully omitting to place the name of the plaintiff on the

voting list and unreasonably, wilfully and oppressively refusing so to do, or to permit him to vote at the September election of 1882. The writ is dated September 23, 1882. The plea was the general issue. By the terms of the report the court were to render such judgment as may be proper. The opinion states the material facts.

Baker, Baker and Cornish, for the plaintiff, cited; *Asby* v. *White*, 2 Ld. Ray'd, 958; *Gardiner* v. *Ward*, 2 Mass. 244; *Kilham* v. *Ward*, 2 Mass. 236; *Lincoln* v. *Hapgood*, 11 Mass. 350; *Capen* v. *Foster*, 12 Pick. 487; *Gates* v. *Neal*, 23 Pick. 308; *Humphrey* v. *Kingman*, 5 Met. 162; *Blanchard* v. *Stevens*, 5 Met. 298; R. S., c. 4, § 71.

F. A. Waldron, also for the plaintiff.

Edmund F. Webb and Appleton Webb, for the defendants.

We maintain, first that the plaintiff was not entitled to the right of suffrage, in Waterville, because he was not a legal resident therein. Art. II of the constitution; sect. I, among other things provides, "nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the town, or plantation, where such seminary is established." The same section requires a residence, established for three months, next preceding the election, as a qualification of an elector.

We maintain that the plaintiff left Foxboro and went to Waterville solely to obtain a liberal education at a seminary of learning; that he had no other intention or purpose and intended to leave Waterville as soon as he had accomplished his special purpose. Plaintiff said, he intended to take the two courses in Waterville, which he did, and then go to Newton. And he did just what he said he intended to do. He was a student at college and nothing else. In *Granby* v. *Amherst*, 7 Mass. 1, it was held that four years residence at Dartmouth College in the usual course had no effect whatever upon a legal settlement. Now there was no change in the plaintiff's relations, evidenced by any physical acts, after he made up his mind in 1878–9, to become a resident of Waterville. He was still a student, no new relations, only an operation of the mind; no change of occupation;

remained in the college buildings the same. His residence was still a student's residence and no other. The opinion of the Massachusetts court, 5 Met. 587, which is referred to by several witnesses, is sound law covering the facts upon which it was based, but the facts are not parallel to this case at all. The constitution's provision is different from ours.

By R. S., c. 4, § 3, the selectmen are required to be in open session to receive evidence of the qualifications of persons claiming the right to vote. In receiving the application of persons claiming the right to vote and deciding thereon the selectmen are acting in a *quasi* judicial capacity. *Donahoe* v. *Richards*, 38 Maine, 392. They are public officers, exercising a discretion in the discharge of a public duty, cast upon them by law, and they are not liable while acting in good faith, and without motive. The plaintiff's counsel at the time of trial relied upon the case of *Lincoln* v. *Hapgood*, 11 Mass. 350, decided in 1814, where it is held that selectmen are liable without notice. That is not law now in Massachusetts. The hardship upon public officers was so great that the legislature changed the rule of law. This decision is at variance with the law of England. *Harman* v. *Tappenden*, 1 East, 563, and with most of the states of the union.

In *Wheeler* v. *Patterson*, 1 N. H. 88, it was held that an action would not lie against a moderator of a town meeting for refusing to receive the vote of a person legally qualified to vote, without showing malice. In this case *Lincoln* v. *Hapgood et als.* was considered and distinctly overruled. In *Jenkins* v. *Waldron*, 11 Johnson's Rep. 114, it is held that an action will not lie against inspectors of an election for refusing the vote of a person legally qualified to vote without proving malice — that officers required by law to exercise their judgment, are not answerable for mistakes in law or mere errors of judgment without any fraud or malice. *Drewe* v. *Coulton*, 1 East, 563, was an action against the defendant as returning officer of the borough of Saltash for refusing the vote of the plaintiff in an election of members of parliament, it was held that the action would not lie without proof of malice. In *Asby* v. *White*, 2 Ld. Raymond, 938, the court say "there is no instance of an action of

this sort maintained for an act arising merely from error of judgment."

In *Temple* v. *Mead*, 4 Vt. 535, the court say *quere* whether an action lies against an officer presiding for refusing to receive a legal vote where this is not malicious but only an error of judgment on a point considered doubtful.

The selectmen are acting, not in behalf of themselves, they have no interest in the matter, they have no fee, but they sit as referees or judges and the parties are the applicant claiming the right to vote—the candidates and all the qualified electors. The selectmen must decide one way or the other. They hear the evidence; they weigh it; they hear the parties and their counsel and their friends. They are acting and they decide under a solemn oath. After investigation they are to determine what is to be done. If acting in good faith, they err, it is merely what is incident to all tribunals; to hold them legally responsible, in such a case, would be to punish them for their honest convictions in a matter they are obliged to decide. *Donahoe* v. *Richards*, *supra*.

The Massachusetts cases referred to by the plaintiff's counsel have but little bearing on this case because they hold that an action lies against the selectmen in case like this without proof of malice. *Blanchard* v. *Stearns*, 5 Met. 298, on page 301, the court says the statute of that state recognizes that they may be liable; and that without proof of malice, or any wilful and corrupt purpose. That is not our statute. Our statute negatives that position, hence those decisions are not germain to this case.

PETERS, C. J. The plaintiff sues the selectmen of Waterville for refusing to place his name on the list of voters in that town for the state election held in September, 1882.

The question arises as to the extent of the liability of selectmen for refusing to receive the vote of a qualified elector. And this involves the construction of the statute, in its application to the facts of the present case, which provides that "in no case shall any officer of a city, town or plantation incur any punishment or penalty, or be liable in damages by reason of his official

acts or neglects, unless they are *unreasonable*, corrupt, or wilfully oppressive." R. S., (1871) ch. 4, § 63. The case calls for our views as to what would be an unreasonable act or neglect. If the act be corrupt or oppressive, it would surely be unreasonable. An act may be unreasonable, and fall short of being either corrupt or oppressive. The fact that unreasonableness is the least in degree of the wrongs that may be imputed to officers, supersedes the necessity of our troubling ourselves with the meaning of the other terms. If the defendants were not unreasonable in their action, no liability attaches.

The condition of the law applicable to such actions, as it stood before the statute above quoted was enacted, is instructive upon the question presented. The rule in England, and in most of the states in this country, has long been, that returning officers and inspectors of elections who are required to pass upon the qualification of voters, possess judicial functions in so doing, and are not liable to damages for rejecting a vote unless the rejection be malicious or wilful as well as wrongful. English judicial opinion at first inclined the other way, but after memorable contests over the question, such came to be the settled law of that country. Almost all the courts in this country have acted upon the same rule. Cool. Con. Lim. *617. See remarks of SHAW, Ch. J., in *Blanchard* v. *Stearns*, 5 Met. p. 300.

This doctrine, however, has its difficulties and dangers. Courts have always appreciated the fact that there are potential arguments both for and against it. The Massachusetts court, before the separation of Maine from that commonwealth, with some degree of hesitation, adopted the contrary doctrine, holding selectmen liable who merely reject a vote wrongfully. *Lincoln* v. *Hapgood*, 11 Mass. 350. That court, however, has refused to apply the principle in analogous cases; thereby making the application of the rule exceptional upon grounds of public policy. *Spear* v. *Cummings*, 23 Pick. 224. In *Capen* v. *Foster*, 12 Pick. 485, SHAW, Ch. J., said: "It has been regarded as a question of doubt and difficulty, whether, upon strict principle, a public officer who acts honestly and according to the best of his judgment, in the discharge of his duty, and who through such

honest mistake and error of judgment, denies to a citizen his right of voting, should be answerable in an action for damages.'"

Our own court recognized the earlier Massachusetts cases as binding on it, and applied the principle in several cases. *Lord* v. *Chamberlain*, 2 Maine, 67; *Jones* v. *Cary*, 6 Maine, 448; *Osgood* v. *Bradley*, 7 Maine, 411. But refused to apply the principle in analogous cases. *Donahoe* v. *Richards*, 38 Maine, 376, 379. The case of *Osgood* v. *Bradley*, *supra*, excited a good deal of attention, and, immediately after its announcement, the present statute, before quoted, was passed, having been first enacted in 1831.

A good deal of embarrassment has been felt by the country generally respecting the increasing difficulties standing in the way of a fair and honest administration of the duties of returning boards, and quite a number of the states have endeavored to correct abuses by statutory enactments. Of the act of Maine we have spoken. Massachusetts legislated upon the subject, and now requires the voter to present to the selectmen sufficient evidence of his right to vote. Mass. Gen. St. ch. 7, § 10. Rhode Island passed a similar statute. In Massachusetts the officers are still liable for refusing a vote when it is tendered with sufficient accompanying evidence. *Blanchard* v. *Stearns*, 5 Met. 298. While in Rhode Island the court holds that the selectmen act in a judicial capacity in deciding whether the evidence is sufficient or not, and are liable only for a corrupt or malicious decision. *Keenan* v. *Cook*, 12 R. I. 52. In New York, (and also in other states) the present scheme is to reduce the judicial function of officers, and confide more in the judgment and conscience of the voter. The person desiring to vote there, has the right to do so upon making affirmative answers, upon oath, to certain interrogatories propounded to him,—the law imposing severe penalties for false answers. *Goetcheus* v. *Matthewson*, 61 N. Y. 420.

What then, in view of the history of this question, and of the difficulties and embarrassments that beset it, may be considered, generally speaking, an unreasonable act of selectmen in refusing to receive the vote of a person qualified to vote. The officers must act honestly and reasonably. If their action be such as

sensible and impartial men generally would approve, they would no doubt be justified. But cases may occur of so close and doubtful a character, either upon the law or fact, that even reasonable and impartial men would be likely to differ in their judgments upon the question. Occasionally there are contentions that could be decided either way, and the decision not be unreasonable. We think the selectmen would not be liable to an action for their refusal to receive a vote, if the question presented to them be so doubtful that reasonable and competent men, unaffected by bias or prejudice, might naturally differ in their views upon it; if the question be such that there is room for two honest and apparently reasonable conclusions to be reached. There would be no justice, under our statute, in holding selectmen to absolute legal and technical accuracy in all things. The very object of the statute was to change such a rule. The statute implies that mistakes may be made, but excuses them unless unreasonably made. The liability for error is not absolute but conditional. The presumption of correctness is with the officer. The more doubtful the case, the stonger the presumption. Says SHAW, Ch. J., in *Blanchard* v. *Stearns*, *supra*, "It is a presumption entitled to greater consideration in doubtful cases of domicil, where very competent judges might well think differently in regard to the preponderance of the evidence, and very honestly come to opposite conclusions, upon the same statement of facts."

This view of the controversy requires that town officers shall be accountable for intelligence enough to be able to perform the official services required of them at least ordinarily well. Ignorance cannot excuse them. It is not altogether whether their acts are reasonable in their own estimation, but whether reasonable in fact. Men may act unreasonably and not know it. If they knew their acts were unreasonable, they would be acting corruptly or maliciously. When a person accepts a town office, he vouches for his competency to perform its duties.

Another question is to be considered, and that is, under what circumstances does a student at a seminary of learning acquire a voting residence in the place where such seminary is situated.

The constitutional interdiction is in these terms: "The residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated." It is clear enough that residing in a place merely as a student does not confer the franchise. Still a student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily presence in a place coupled with an intention to make such place a home will establish a domicil or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient. The intention must be, not to make the place a home temporarily, not a mere student's home, a home while a student, but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or limited to the duration of the academical course. To constitute a permanent residence, the intention must be to remain for an indefinite period, regardless of the length of time the student expects to remain at the college. He gets no residence because a student, but being a student does not prevent his getting a residence otherwise.

The presumption is against a student's right to vote, if he comes to college from out of town. Calling it his residence, does not make it so. He may have no right to so regard it. Believing the place to be his home is not enough. There may be no foundation for the belief. Swearing that it is his home must not be regarded as sufficient, if the facts are averse to it. Deception or misconstruction should not be encouraged. The constitutional provision should be respected.

Each case must depend largely upon its peculiar facts. The question is not always of easy solution. One difficulty is this, that all the visible facts may be apparently consistent with either theory, — that of a temporary or a permanent home. The Massachusetts court, in a discussion of the question (5 Met. 589), presents such descriptions of fact as might be of a controlling weight upon the two sides of the question, very clearly, in the following remarks: "If the student has a father living; if he still remains a member of his father's family; if he returns

to pass his vacations; if he is maintained and supported by his father; these are strong circumstances repelling the presumption of a change of domicil. So, if he have no father living; if he have a dwelling house of his own; or real estate of which he retains the occupation; if he have a mother or other connections, with whom he has been before accustomed to reside, and to whose family he returns in vacations; if he describes himself of such place, and otherwise manifests his intent to continue his domicil there; these are all circumstances to prove that his domicil is not changed.

"But if, having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if, having no parent, or being separated from his father's family, not being maintained or supported by him; or, if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there, without intending to return to his former domicil; if he depend on his own property, income or industry for support; these are circumstances, more or less conclusive, to show a change of domicil, and the acquisition of a domicil in the town where the college is situated." The cases generally are of the same tenor. *Vanderpœl* v. *O'Hanlon*, 53 Iowa, 246; *Fry's Election Case*, 71 Penn. St. 302.

The facts of the case are quite beyond dispute. They were urgently presented to the defendants. There was no reason to deny or disbelieve them.

The plaintiff was thirty-two years old; left his father's home in Patten, in this state, when nineteen; never afterwards received parental support or was under parental control; visited home afterwards, only occasionally and briefly; his father's home was, soon after his leaving, changed from Patten to other places; at the age of nineteen he was in business for himself in Foxboro, Massachusetts; after coming of age he was taxed and voted for several years in that place; in 1875, at the age of twenty-four, he entered a classical school at Waterville, and in 1878 entered college there, graduating in 1882; in 1879 he formed the purpose of making Waterville his home for an indefinite period

of time, and was taxed and voted there from that date until 1882, when, against his protest, his name was by the defendants omitted from the lists; he has ever since claimed and regarded Waterville as his home, a friend's house being open to him when there, though possessing no property there of consequence, and entering a theological institution in Newton, Massachusetts, in 1882, where he has since remained as a student.

We think a man in such a situation should have had in 1882 the privilege and ability of possessing a domicil somewhere, and it could not easily be in any place unless in Waterville. To deprive him of his right to vote under such circumstances was not reasonable. That the town officers acted honestly we are not inclined to doubt. That they committed a mistake — at least an unintentional wrong — we feel convinced.

We do not, however, concur with the plaintiff that the damages should be either exemplary or severe. We think the wisest and most just conclusion, in view of all the circumstances, will be to accord to the plaintiff no greater damages than sufficient to carry the costs. In *Lincoln* v. *Hapgood*, *supra*, it is said: "The court would determine that a sum, comparatively not large, would be excessive damages in a case, where no fault but ignorance or mistake, was imputable to the selectmen."

Judgment for plaintiff for $25 damages.

BARROWS, DANFORTH, VIRGIN and SYMONDS, JJ., concurred. LIBBEY, J., did not sit, having been of counsel.

WILLIAM G. SHATTUCK and others, appellants from the decision of the County Commissioners.

York. Opinion May 17, 1884.

Ways. Elliot Bridge Company.

The charter of the Elliot Bridge Company, (private laws 1879, c. 128,) contains in section 6 a provision in these words: "Provided no way shall at any time hereafter be located, or existing way altered, leading from said bridge

toward York beach, in the town of South Berwick, which shall be for the necessary convenience of said company, unless the entire cost and expense of building and maintaining such new way, or altering such way, shall be defrayed by said company during the continuance and maintenance of said toll bridge." A petition was presented to the county commissioners asking that the road contemplated in that provision of the charter "be widened, straightened, and in some places to be new located." This petition was refused by the commissioners, and the committee appointed on appeal reported "that as the common convenience and necessity require the location as prayed for in the original petition, the judgment of said commissioners on the aforesaid petition should be in the whole reversed." On report to the law court to give such direction to the case as the law requires: *Held*, that the report be recommitted to the committee with instructions, after notice to the bridge company and hearing, to determine either (1) that the way would not be of common convenience and necessity, and thereby affirm the doings of the commissioners; or (2) that it would be of such convenience and necessity, and, in that case, the bridge company would be relieved from all obligations of building or repairing the way; or (3) that the way would be of common convenience and necessity, because of its convenience and necessity to the bridge company, and not otherwise. In the latter case, the road-alteration can be established only upon some provision that will impose the expenses of constructing and repairing upon the company.

ON REPORT.

The case and material facts appear in the head note and opinion.

The case has once before been considered by the law court and is reported in 73 Maine, 318.

R. P. Tapley, for the appellants.

George C. Yeaton, for the appellees.

The whole issue (all issues) must be determined by the court of original jurisdiction in the first instance, to furnish sufficient foundation for an appeal, and until such court renders a final judgment, the jurisdiction of the appellate court cannot attach. Freem. on Judg. c. 1, § § 20, 33, 34, 36; Powell on App. Proc. c. 1, § 30; c. 9, § § 9, 16, and cases cited *in notis*.

Inasmuch, then, as the report of the committee, which is an arm of the appellate court, cannot legally first find issue (2), their report cannot be recommitted; its acceptance, as it is, the court has already refused; there is no other course for this court to pursue, in relation to it, than to reject it; and it seemed

to follow, equally inevitably, that the apppeal itself should be dismissed as irregularly, because prematurely taken, and hence the whole case, in this court, *coram non judice*. *Craighead* v. *Wilson*, 18 How. 199; *Mordecai* v. *Lindsay*, 19 How. 199.

WAITE, C. J., in *Crosby* v. *Buchanan*, 23 Wall. 420, 453, says: "Cases cannot be brought to this court upon appeal in parcels. We must have the whole of a case or none," etc. *Green* v. *Fisk*, 103, U. S. 518; *vide* also *Norton* v. *Hood*, 12 Fed. Rep. 763 (C. C. E. D. La. May, 1882), and cases cited in reporter's note.

If the merits of the controversy as to all the parties be disposed of, then the judgment is final and may be appealed from. *Martin* v. *Crow*, 28 Tex. 614. See also a well-considered late case in same State, *Linn* v. *Arambould*, 55 Tex. 611.

"Clearly . . . the finding should dispose of all material issues . . . or the judgment is erroneous." *Wisc. River Lumber Company* v. *Plumer*, 49 Wis. 666.

Bently v. *Jones*, 4 How. Pr. R. 335, holds directly that an appeal taken "before the final determination of all the issues in in the suit" should be dismissed. In *Colcord* v. *Fletcher*, 50 Maine, 398, the court declares the invalidity of an award, not making "final disposition of the matters referred" to result from its analogy to a judgment, and cites to like effect: *Lincoln* v. *Whittenton Mills*, 12 Met. 31, *Boyce* v. *Wheeler*, 133 Mass. 554; *Elliot* v. *Elliot*, 133 Mass. 555.

Somewhere before a final judgment the Elliot Bridge Company must become a party, and to bring in a new party is always the province of courts of original jurisdiction, and never of courts of appellate jurisdiction. *Shattuck, appl't*, 73 Maine, 318.

PETERS, C. J. The following facts appear, either expressly or by implication, in the case: In 1879 certain persons besought the legislature to be incorporated as the Elliot Bridge Company, with the right to erect a toll-bridge over the river which is the boundary line, at South Berwick, between Maine and New Hampshire. The inhabitants of South Berwick opposed the

granting of the charter, evidently upon the ground that, if the bridge should be built, it might impose a burden upon that town of constructing a new road, or reconstructing an old one, from the bridge through their town to or towards York Beach. In order to appease South Berwick's opposition to the charter, the petitioners to the legislature assented, by way of compromise, to annex to the charter prayed for the following condition, viz: "Provided no way shall, at any time hereafter, be located, or existing way altered, leading from said bridge towards York Beach, within the town of South Berwick, *which shall be for the necessary convenience of said company*, unless the entire cost and expense of building and maintaining such new way, or altering such way, shall be defrayed by said company during the continuance and maintenance of said toll-bridge." The charter obtained and the bridge built, a petition goes to the county commissioners for the very alteration of the road contemplated by the movers of the above proviso. The commissioners refused alteration; and a committee, appointed upon an appeal to this court, recommend and allow the alteration asked for. The report of the committee is held in abeyance because, among other reasons, the bridge company had no notice to be heard before the commissioners or committee. The case is reported to us for such action as will best preserve the rights of all parties.

Supposing the petition to be sent back either to the commissioners or the committee, the first question would be, we think, to decide whether the new road is or not required by common convenience and necessity, irrespective of its necessity and convenience to the bridge company. In other words, is the new road demanded for the convenience and necessities of the general public, excluding the company, its convenience and necessities, its wants or advantages, wholly from the calculation. If so, then the road should be laid out for and be built by the public. In deciding this question, the position of things is not to be considered as if no bridge were there. But the bridge being there, and the public using it, is the general community—not including the bridge company as any part thereof—to be accommodated by the proposed alteration of road, to such an extent as to make

the new road a public convenience and necessity. The legislature could not have intended to take from the public their right of having a new road located. But it did intend that if the general public did not need the road, they should not be taxed to build one for the benefit merely of the bridge company. And the community should not be deprived of the road, if of public convenience and necessity to them, although it would at the same time be of advantage also to the company.

If, however, the new way is not demanded for the convenience and necessities of the general public, excluding the wants and interests of the bridge company wholly from the calculation, then is the way demanded by such convenience and necessity, by including their wants and interests in the calculation. If so, then the road will be of common convenience and necessity, within the meaning of the act of incorporation, only or mainly because of its "necessary convenience" to the company. And, in such case, the company should bear the expense of building and maintaining the road.

In this view of the matter, we think the report should be recommitted to the committee, with special instruction. There is no occasion to go back of the committee to the commissioners. They have already decided against the road, and the question now is whether their decision shall be sustained or reversed.

The committee must determine either, (1), that the way *would not* be of common convenience and necessity, and thereby affirm the doings of the commissioners; or, (2), that it *would* be of such convenience and necessity, and in that case, the bridge company would be relieved from all obligations of building or repairing the way; or (3), that the way would be of common convenience and necessity because of its convenience and necessity to the bridge company, and not otherwise. In the latter case, the road-alteration can be established only upon some provision that will impose the expenses of constructing and repairing it upon the company.

Here, then, comes an embarrassing question. How can the bridge company, if the road be laid out for their benefit, be made responsible for the expenses? We can see but one practica-

ble way. The committee's report may be conditional. The court at *nisi prius* can refuse to accept the same, or to allow it to become operative, until the company shall first pay or secure to the town of South Berwick a sum of money, which shall be determined by the court to be a fair indemnity for the town against its liabilities on account of the laying out in that town, during the continuance and maintenance of the bridge; or the court may accept an indemnity for the town in other form, if assented to by the parties, or if deemed feasible by the court. While the settlement of that question would be largely left to the discretion of the sitting judge, the compensation or indemnity should precede the acceptance of the report. The machinery for laying out, making and repairing the way belongs to the state, and cannot be delegated to the company. The company should be notified to be present at the hearing of parties.

It will be seen, at a glance, that the statutory condition annexed to the act incorporating the bridge company, is an impracticable and awkward amendment. It should be considered whether it does not need legislative correction.

Report recommitted.

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

JOHN W. VEAZIE, in equity, *vs.* ANNIE V. FORSAITH and others.

Penobscot. Opinion May 22, 1884.

Contract. Deed. Construction. Principal and income. Trusts.

When the words of a written instrument are of doubtful import or susceptible of different interpretations, the circumstances under which the instrument was made, and the object to be obtained, may be considered by the court to enable it the better to ascertain the real intention of the parties from the language used. But when the language is free from doubt, it must govern, and cannot be construed by outside circumstances. It is the duty of the court to construe the contract between parties, but it cannot make a new one for them.

In the principles of interpretation, applicable to wills, the object is to ascer-

tain the intention of the testator alone. But in the case of a deed, not only the intention of the grantor is to be ascertained, but the understanding of the grantees, as well, or perhaps more accurately what they should reasonably have understood from the language used.

A trust deed provided that the trustees were "to keep and maintain the principal of said trust estates safely invested according to their best judgment, and from the income thereof to pay me the sum of five thousand dollars ($5000) each year during my natural life." *Held:* The principles of interpretation, applicable to cases of this kind, leave no doubt that the annuity is to be derived from income alone.

Interest due on notes accrues from day to day, and when to be appropriated to income, may be apportioned, and unlike an annuity or dividend, which can be credited to income when payable, it is, when received, to be credited to income for the time during which it accrued.

A part of a trust estate, created by a trust deed, consisted of notes due from an estate which was insolvent. Without going through a process of insolvency, after paying other debts against the estate in full, the remainder of the property, by the agreement of all the parties interested, was appropriated to the payment of these notes, and in consideration thereof the notes, both principal and interest, were discharged, though not paid in full. *Held:* the loss is to be borne *pro rata* by the principal and interest, and the interest less the loss thus ascertained, is to be credited to the income for the years in which it was earned and the remainder to the principal, except that portion of the interest earned before the date of the trust deed, which is to be credited to the principal.

Where the rent of mill property, held by trustees, is paid in repairs, it may be properly omitted from their account. It is not chargeable to them either as principal or income.

Temporary repairs of trust property are chargeable to the income and not to principal.

Where a trust deed requires the trustees to care for, manage, and keep the trust property according to their "best judgment," it is their discretion which the grantor confided in and not that of the court. If not exercised in good faith the court may interfere, but not otherwise. It is for the trustees to decide whether repairs shall be temporary or permanent.

BILL IN EQUITY.

Heard on bill, answer and proofs.

One question presented in the case involved the construction of a deed of trust which is thus set forth in the bill:

"Complainant says that on or about the twenty-seventh day of February, A. D. 1879, by his deed then executed, acknowledged and delivered and since recorded, he conveyed for the reasons and purposes hereinbefore and in said deed given to his said children upon the trusts therein expressed and implied, all the

rest and residue of his property, real and personal, which property is briefly described in said deed and included his son's said notes, so far as unpaid, and the mortgages securing them, and the unpaid notes of Gilman, Webster, Quimby and Weed, and their said mortgage to complainant. Said deed of trust is in substance, as follows:

"I, John W. Veazie, of Bangor, in the county of Penobscot and State of Maine, having fully determined to retire from active participation in business, in order, whilst leaving for myself independent support during life, also to express my affection for and confidence in my two children, Alfred Veazie, of Bar Harbor, in the county of Hancock, and State of Maine, and Annie Veazie Forsaith, wife of William J. Forsaith, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts; and in consideration of one dollar to me in hand, paid by the said Alfred Veazie and Annie Veazie Forsaith, the receipt of which is hereby acknowledged, have sold, assigned, transferred and set over, and do hereby, sell, assign, transfer and set over unto the said Alfred Veazie and Annie Veazie Forsaith, certain property and interests in property, both real, personal and mixed, as follows, namely:

"Seventeen (17) promissory notes signed by Alfred Veazie payable to my order, all dated May 6, 1869; nine (9) of them being for the sum of eight thousand dollars ($8000) each, payable in 2, 3, 4, 5, 6, 7, 8, 9 and 10 years, respectively, from date thereof with interest annually. The one payable in three years from date thereof, bearing an indorsement January 1, 1871, of $6712.51. Eight (8) of said notes being for the sum of seven thousand dollars ($7,000) each, payable on the sixth day of November, in the years 1871, 1872, 1873, 1874, 1875, 1876, 1877 and 1878, respectively, at the Veazie Bank of Bangor, with interest annually.

"Also the mortgage securing the nine of said notes first named, dated May 6, 1869, and recorded in registries of deeds as follows: Penobscot, volume 395, page 398; Hancock, volume 135, page 433; Piscataquis, book 57, page 279; together with all my interest in the mortgaged premises.

"Also a personal mortgage of bank and railway shares, securing the eight of the notes last above named, dated May 6, 1869, not recorded, and all my interest in the mortgaged property.

"Also a promissory note of the said Alfred Veazie for $6250. dated May 21, 1874, payable on demand with interest at seven per cent per annum.

"Also six (6) promissory notes for the sum of nine thousand dollars ($9000) each, dated January 23, 1871, signed by Samuel B. Gilman, James Webster, Edward L. Quimby, and Wyatt Weed, payable to my own order with interest annually, in 5, 6, 7, 8, 9 and 10 years, respectively, from date thereof; also the mortgage securing said notes, and of even date with them, recorded in Penobscot registry of deeds, volume 408, page 167, and all my interests in the mortgaged premises.

"To have and to hold to them, the said Alfred Veazie and Annie Veazie Forsaith, and the survivor of them, and his or her heirs or assigns, in trust, for the following uses and purposes, and upon the special confidence and trust following, that is to say: To keep and maintain the principal of said trust estates safely invested according to their best judgment, and from the income thereof, to pay to me the sum of five thousand dollars ($5000) each year during my natural life, provided the same is called for by me, and payable from time to time as called for.

"2d. From the annual income remaining after the above payment is made to me, to pay to Annie Veazie Forsaith the sum of two thousand dollars ($2000) annually, during my life, payable to her in quarterly installments of ($500) five hundred dollars, on each of the first days of January, April, July, and October of each year during my life.

"3d. From the annual income of said trust estate remaining after the annuity to myself and the one provided to be paid to Annie Veazie Forsaith, to pay to Alfred Veazie the income of said estate up to the sum of two thousand dollars ($2000) per annum, and what remains of said income, if anything, to pay and divide equally between the said Alfred Veazie and Annie Veazie Forsaith, during my life. Furthermore, there is imposed upon said trustees the support and tender care of Miss Ann M. Bartlett,

the sister of my late lamented wife, that they in conjunction with myself, shall support her in the style of living to which she has long been accustomed in my family, and that she reside in my late homestead which I have this day conveyed by deed to the said Alfred and Annie Veazie.

"Finally to provide from the income of the trust property or otherwise, within two years from my decease, the sum of ten thousand dollars ($10,000) which shall be subject to my appointment and distribution if I so choose, by will or other written instrument, and after the execution of all the trusts herein created, that they, the said Alfred Veazie and Annie Veazie Forsaith, should have and hold said property the subject of this trust in whatsoever form it may be, and wherever situated, as their absolute property discharged of said trust. To them and their heirs and assigns in fee simple forever, share and share alike, and be entitled at once to the possession of the real and personal property constituting said trust estate.

"In case of the death of either or both of my children before the termination of this trust, their respective heirs succeed in right of inheritance by representation.

"The above is under date of February 22, A. D. 1879.

"And under date of February 27, 1879, is added the following in substance:

"Before the final delivery of the deed and declaration of trust contained on the foregoing four pages, I make the following modifications therein to wit:

"1st. Either of my children, the said Alfred and Annie V. may dispose by will of their interest in the estate embraced in the trust.

"2d. In case of the decease of the said Annie V. Forsaith, before my decease, and consequently within the period of the continuance of the trust, I appoint William J. Forsaith, her husband, to be co-trustee in her place and stead, and direct Alfred Veazie, trustee, to make conveyances and releases, to make said substitution or filling of vacancy effectual, and in case of the death of the said Alfred, during the continuance of the trust, then his wife, Etta Hodsdon Veazie, or whomsoever else he, the

said Alfred, may by will or other proper instrument appoint, is appointed co-trustee in his place and stead, and the surviving trustee is to make conveyances accordingly.

"3d. The setting apart of ten thousand dollars within two years from my decease, is made conditional and contingent upon the existence of a will or other written instrument disposing of it.

"4th. Full authority is given to the trustees to manage the trust in every respect, without recourse to any court for authority, for execution of deeds or otherwise.

"And the said Alfred Veazie and Annie V. Forsaith then and there accepted said trust, under their hand and seal, and entered upon the performance of its duties."

The other questions are stated in the opinion as well as the facts relating to them.

J. Hutchings, for the plaintiff.

Complainant claims that he is entitled under the trust deed to his five thousand dollars a year, upon call, income or no income.

If complainant were claiming under a will, with provisions as to his five thousand dollars a year, like those in the trust deed, he would have what the books call a demonstrative legacy.

The deed begins with expressing complainant's purpose and intention in making the conveyance of saving for himself "independent support during life."

The five thousand dollars a year is charged upon the whole estate, and not upon any part of it. If the income is not sufficient, the principal must make good the deficiency.

In support of this claim we rely upon many decided cases, especially upon the cases of *Pierrpont* v. *Edwards*, 25 N. Y. 128; and *Smith* v. *Fellows*, 131 Mass. 20. See also *Colville* v. *Middleton*, 3 Bevan, 570 (43 Eng. Ch. Rep. 569); *Phillips* v. *Gutteredge*, 3 DeGex, Jones and Smith, 332 (68 Eng. Ch. Rep. 331) (1862); *Pearson* v. *Helliwell*, Law Rep. Eq. 411 (1870); *Boyd* v. *Buckle*, 10 Simons, 595 (16 Eng. Ch. Rep.) (1840); *Arundell* v. *Arundell*, 1 Mylne & Keene, 316 (7 condensed Eng. Ch. Rep.); *Newton* v. *Stanley*, 28 N. Y. 61.

That in the case at bar, it is a deed instead of a will, under which complainant claims, should make no difference in its construction. There is the same reason for so construing the deed, that Mr. Veazie may have his five thousand dollars a year, income or no income, as if it were a will instead of a deed.

Wilson and Woodward, for the defendants, cited: *Grant* v. *Black*, 53 Maine, 373; *Morse* v. *Marshall*, 13 Allen, 288; *Sanborn* v. *Clough*, 40 N. H. 316; Hill on Trustees, Part 2, c. 2, Art. 2; 2 Williams, Ex'rs (6 Am. ed.) 1360–1; *Smith* v. *Fellows*, 131 Mass. 20; *Stewart* v. *Chambers*, 2 Sandf. Ch. 382; *Pierrepont* v. *Edwards*, 25 N. Y. 128; *Baker* v. *Baker*, 7 DeG. McN. & G. (56 Eng. Ch. R. 691); S. C. 6 H. L. Rep. 616; *Stetfox* v. *Sugden*, Johnson's Ch. Cas. 234; *Mitchell* v. *Wilton*, 23 Weekly Rep. 789. Note 2 White & Tudor's Lead. Cas. 616; *Foster* v. *Smith*, 1 Phillips, 629; 1 Perry on Trusts, 350; Hill on Trustees, * 192; *Nichols* v. *Eaton*, 91 U. S. 716; *Wood* v. *Pennell*, 51 Maine, 52; *Chase* v. *Deming*, 42 N. H. 274; 3 Redf. Wills. (Ed. of 1877) 433: *In Re Grabowski's settlement*, L. R. 6 Eq. 12; *Cox* v. *Cox*, L. R. 8 Eq. 343; *Maclaren* v. *Stainton*, L. R. 11 Eq. 382; *Parsons* v. *Winslow*, 16 Mass. 361; *Watts* v. *Howard*, 7 Met. 478; *Sohier* v. *Eldredge*, 103 Mass. 345; *Amory* v. *Lowell*, 104 Mass. 265.

DANFORTH, J. February 27, 1879, the complainant conveyed in trust to his son and daughter the most of his property. At, or about, the same time he conveyed to the same grantees the remainder of his property absolutely. Soon after these conveyances the son died, and by a provision in the trust deed his widow became his successor in the trust. This trust deed is the foundation of the present suit, and out of it arise several questions which are presented for decision by the bill, answers and proof.

What is the proper construction of that part of the deed which provides for the annuity to be paid to the plaintiff and grantor? Is it a charge upon the income only, or if there is a deficiency in that, shall such deficiency be paid out of the principal? The plaintiff claims that the latter is the true construction while the respondents contend for the former.

To sustain the plaintiff's view much reliance is placed upon the undisputed fact that the deeds included all his property and left him without any means of support, except such as was provided in the trust deed.

It is undoubtedly true that when the words of a written instrument are of doubtful import, or susceptible of different constructions, the circumstances under which it was made, and the object to be obtained may be proved to enable the court more intelligently to ascertain from the language used the meaning of the parties. But when the language is free from doubt, and leaves no uncertainty as to the meaning of the parties, it must govern and cannot be controlled by any outside circumstances, whatever may be the equities growing out of them. In this case there is no doubt as to the meaning and proper construction of the deed which can, to any extent, be removed by the fact referred to. Were there any doubt whether the plaintiff intended to provide himself with an annuity, this fact might be of service in settling that question. But there is none. The language upon this point is so clear as to leave no question as to the provision, or the amount of it. The difficulty seems to be that as the respondents view it, the provision made does not accomplish the desired end. If the plaintiff's expectations in this respect have been disappointed, if his sagacity or judgment have failed him and his estimates were too large, without any fault on the part of the respondents, it is a misfortune which the court cannot remedy; it cannot affect the construction of the deed. By well settled law the court may and must interpret a contract when the parties disagree, but it cannot make a new one to correct any errors of judgment into which one, or the other of the parties may have fallen. This deed must be interpreted by the light obtained from its own language alone.

The principles of interpretation, by which this plaintiff seeks to maintain his construction of this deed, are those applicable to wills, and the cases cited are those in which the meaning of a testator comes in question. But the two cases are entirely different, and the rules of construction depend upon different facts and different principles. While in construing a will the

relative rights of the different legatees are to be settled, yet the governing power is the intention of the testator alone. His is the property given, he can do with it as seemeth to him right. The legatees are but the objects of his bounty, and must submit to that which has been provided for them. Hence in a will the great purpose is to ascertain the meaning of the testator only. A deed is a contract, and in construing it we are to ascertain the meaning or the understanding of both parties to it. True, in this case the property was that of the plaintiff, and he had the right to make such a disposition of it as he chose. In the conveyance he had a right to impose such conditions as he saw fit. But having imposed them it was optional with the grantees to accept or reject the whole deed. The acceptance of this deed necessarily involved the assumption of the duties and obligations imposed by the conditions. They obtained a title to the property for a consideration which, in this case even, may in the end prove to be equal to the full value of the property conveyed. But whether so or not it is sufficient to require the court to ascertain from the language used, how the grantees understood, or ought to have understood the provisions of the deed; or what they were getting as well as the obligations assumed. Besides the words imposing the obligation to pay, are the words of the plaintiff, selected by him to secure a benefit to himself, as well as to impose an obligation upon others. If, therefore, their meaning is uncertain there is no reason why the ordinary rules applied in such cases, should not be applied here and the meaning taken more strongly against the grantor.

Still, notwithstanding the difference in the instruments to be construed, the cases cited by counsel may, render some aid, though as Lord BROUGHAM says in *Baker* v. *Baker*, 6 H. L. Cases 626–7: "It has been very justly observed, in regard to cases like this, where the sole question that arises is upon the construction of a will, and where the object is to ascertain the meaning of the words used by the testator, that nothing, generally speaking, can be more unfruitful than a reference to other cases where, instead of the question arising upon a principle of law, or a rule of law, the whole question arose upon the

meaning of the words used in the will; and the least difference between the case at bar and the case cited, will make all the difference in the world, and render the case cited utterly useless."

It is unnecessary to examine all the cases which have a bearing upon this question, for there is a remarkable unanimity in them, and no real inconsistency in those cited, or which might be cited upon the one side or the other. So far as cited they relate to the construction of wills, and as Lord BROUGHAM says, "present no question arising upon any principle of law, but upon the meaning of the words used," that being the only thing to be ascertained.

The only question involved in these cases, in which we are now interested is, when a legacy or annuity is given with directions that it be paid from income or a particular fund, by what rules of construction shall we ascertain whether the testator intended that such legacy should be a specific or a general one; whether the direction for the payment is demonstrative, or is the legacy to fail if the fund from which it is to be paid fails. All the cases hold that whether the legacy be the one or the other, must depend alone upon the intention of the testator as gathered from all the words used which may throw any light upon such intention.

The case of *Smith* v. *Fellows*, 131 Mass. 20, is probably as favorable to the plaintiff as any which has been, or can be cited. In this case the testator, after giving certain legacies to his wife, in addition gave her an annuity of "one thousand dollars per year during her lifetime, the same to be paid from the income of my property." This annuity was held to be a demonstrative legacy, and upon the failure of the income, payable out of the principal of the estate. This was upon the ground that it was the intention of the testator that his wife should be thus provided for, "that is, it was the gift of a fixed sum, which is to be paid annually, and is not made contingent or dependent upon the income of any specific portion of his estate," and that "the residue which was bequeathed to the daughter was described as that which remains after the payment of the debts and expenses, and the payment of the *legacies* mentioned in the will." Here were two legacies,

one to the wife, payable out of the income of the estate, the other to the daughter of that part of the same estate, "which remains after the payment of the legacies." Thus the legacy to the daughter, though diminished by the payment to the wife out of the principal, is not interfered with as given. It stands in the precise terms of the will, and is received as provided. The expressed intention of the testator is carried out in regard to both legacies. The decisive test seems to be, in this and other cases of the same class, that the capital from which the income is derived is bequeathed, not as a specific bequest, but as a residue after the payment of the annuity.

This principle, and the authorities sustaining it, are quite fully discussed in the case of *Greville* v. *Browne*, 7 H. L. Cases, 688, decided in the house of lords in 1859, and which *Smith* v. *Fellows*, and numerous other cases in Massachusetts and New York afterwards followed. In *Greville* v. *Brown*, on page 696-7, Lord CAMPBELL says: "For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by the legacies, and that what is afterwards given, is given minus what has been before given, and, therefore, given subject to the prior gift." Again, in the same case, on page 700, Lord CRANWORTH, quoting from Sir John LEACH, "with reference to the words, the rest and residue of my real and personal estate," states the rule thus: "That the rest and residue mean something after something has been deducted. After what has been deducted? Why, that which has been given before; and that appears to me to solve the whole difficulty." In accordance with the rules of construction established by these cases of *Smith* v. *Fellows* and *Greville* v. *Brown*, are the decisions in the several cases cited by the counsel and many others which have been decided within the last century and a half.

There is, however, another class of cases of equal authority with those just considered, and in fact, not inconsistent with

them, in which it is held that a legacy when payable out of a specified fund, as from an income, whether an annuity or otherwise, is not a charge upon the principal from which that fund is derived, but must stand or fall with the fund itself. This is when both the legacy thus to be paid and that by which the principal is disposed of, are either, or both specific.

A leading case of this class is that of *Baker* v. *Baker*, 6 H. L. Cases, 616, reported also in 56 Eng. Com. L. R. 691, in which it was held that an annuity could only be paid from the income as directed and that failing, the insufficiency could not be made up from the capital. In this case the testator gave all his real and personal estate to his brother in trust, and directed his trustee to raise thereout and invest in good securities such a sum of money as when so invested should produce the clear annual income of two hundred pounds and pay to or permit his wife to take such income in two half yearly payments during her life or widowhood, and after her decease or second marriage, the said trustee was to stand possessed of the principal and the stocks, funds and securities in which the same should be invested, in trust for himself, brothers and sister in equal shares. The residue of his estate after taking out sufficient to raise the annuity for the wife was given to his brothers and sister. Upon the settlement of the estate the whole amount was insufficient to raise the two hundred pounds. The provision with regard to the residue was, therefore, immaterial, for there was none. It was not the residue of the capital from which the income was obtained, but the residue of the estate after the capital was taken out. Both these legacies were held to be specific. The testator clearly intended that his wife should have the annual income of two hundred pounds during life or widowhood. It is equally clear that he intended that his brothers and sister should have the principal from which that income was to be obtained, that the principal should not be diminished while producing the income. Both these intentions could not be carried out. Which should fail? Evidently that which of necessity must fail, that for which no sufficient means had been provided. If the residue of the capital only had been given, it would have been evidence that

the testator intended that at all events the full annuity should be paid, and the means of paying both legacies would have been provided.

It is noticeable that this case was first decided by the master of the rolls, and the other way upon the authority of *Wright* v. *Callender*, 2 DeG. M. & G. 652, which was a case where the residue of the capital was given over. The appellate court, reversing the decision of the master, admit the correctness of the conclusion in *Wright* v. *Callender*, but distinguish it on the two grounds that there the whole language show that the weekly allowance was to be paid in full, and the residue only was given over.

Another noticeable and instructive feature shown in *Baker* v. *Baker*, is that while it was apparent that the testator supposed that he had property more than sufficient to produce the two hundred pounds yearly, it turned out otherwise, and showed that he was mistaken in his estimate. Instead of drawing an inference from this that he intended the full amount of the annuity to be paid, it was not permitted to affect the construction, on the ground that if it should, the court would "under a state of circumstances never in the testator's contemplation give a different construction to the will, and impose, as it were, a new intention upon the testator."

In all respects this case bears a striking resemblance to the one at bar and would be decisive of it, if the instrument to be construed were a will instead of a deed. No case cited, and so far as we have been able to ascertain none can be, which to any extent weakens its authority. Its reasoning is instructive and satisfactory. Upon grounds already stated, it is stronger for the defendants when applied to the deed.

The language of the deed in question, is so clear and explicit that even without authorities there would seem to be no doubt as to its meaning. The property is first conveyed to the grantees, not in general terms, but each piece by a specific and definite description, "to have and to hold to them, the said Alfred Veazie and Annie Veazie Forsaith, and the survivor of them, and his or her heirs and assigns, in trust, for the following uses and

purposes, and upon the special confidence and trust following, that is to say: To keep and maintain the principal of said trust estates safely invested according to their best judgment, and from the income thereof to pay me the sum of five thousand dollars each year during my natural life, provided the same is called for by me, and payable from time to time as called for." Then comes the provision for the disposition of the remaining income, and that for the support of Miss Bartlett and the provision for the raising of ten thousand dollars "from the income of the trust property or otherwise" subject to the distribution of the grantor at his decease. Then comes the following provision: "And after the execution of all the trusts herein created, that they, the said Alfred Veazie and Annie Veazie Forsaith, should have and hold said property, the subject of this trust, in whatsoever form it may be and wherever situated, as their absolute property discharged of said trust." Here is the conveyance of specific property to the grantees, which in the end they are to hold absolutely. It may be in a different form from that conveyed, but the same property. They are to hold it not subject to the trust but "the said property the subject of this trust." These words are descriptive of the property they were to "hold absolutely" and not of the manner in which they were to hold it. Hence they were to hold absolutely the same property originally conveyed in whatever form it might be. This grant having been accepted, and a consideration paid in the form of services to be rendered, has all and more than all the sanctity, force and effect of a specific legacy. After the delivery of the deed without fraud it could neither be rescinded nor modified except by the consent of the parties. *Storer* v. *Pool*, 67 Maine, 217. It is true that this grant was in trust and the consideration is an obligation to perform that trust. But this renders the grant none the less specific though the holding becomes absolute only after the discharge of the trust. What then is the trust? for the vital question here is, what has the grantor secured to himself in relation to the annuity. He has not reserved to himself an annuity, with a direction that it shall be paid out of the income, but it is a part of the

income itself. This too has the nature of a specific legacy as clearly as words can make it so. The language is "to keep and maintain the principal of said trust estates * * * and from the income thereof to pay," etc. It is just as much the duty of the trustees "to keep and maintain the principal" as it is to pay the annuity, and their duty is performed in regard to the payment when they pay so much of it as the income will allow. Suppose these trustees should be discharged. This would not annul the deed or modify its terms. Others must be appointed in their place and the obligation would rest upon them to perform the duties imposed by the deed. In that case the present trustees would become *cestuis que trust* simply, with all the rights of property, except the possession, which they now have. The duties of the new trustees would be precisely those resting upon the present ones, but they would be answerable for their faithful performance both to the grantor and the grantees. To the latter for the keeping and maintaining the principal and for the conveyance of the whole of it at the end of the trust, to the former for the payment of the annuity. Here are two trusts. If both cannot be complied with that clearly must fail for which insufficient provision has been made, as in *Baker* v. *Baker*. The present trustees can be required to do no more than would devolve upon strangers under the same deed.

That the grantor made and disposed of two distinct funds, the principal and income of his estate, is further evident from the fact that he did not reserve to himself the whole of the income, but only a portion of it. A part is given to each of the grantees and the payment to these is required in terms just as absolute as to himself. The only difference is that one has the precedence of the other, and only the final disposition is qualified by the words "and what remains of said income if *anything*."

This disposition of the income shows clearly that the grantee had a full belief that the income would be very much more than sufficient to supply his annuity. It may therefore be that he was mistaken in his estimate of the future production of his property. But this cannot be considered in the construction of the deed; otherwise we may construe the deed under "circumstances never

in the contemplation of the grantor and impose upon him a new intention," as in *Baker* v. *Baker*. Much less have we a right to change the construction which the grantees might fairly have given to it when accepted by them and thus impose additional burdens upon them.

The bill prays for a full account of the trust property which has come into the possession of the trustees, of the income received and their application of it. That account has been rendered and it is admitted that it is a true account of all the trust property and money that had at that time come into the hands of the trustees; and that they had paid the several sums and for the purposes stated.

It appears from this account that nothing was received or paid out upon income for the first year of the trust, ending February 27, 1880. The plaintiff claims that two sums which were received at a later date, one of which is credited to income of 1880, the other to the principal, should both have been credited to income for 1879. The trustees not admitting this, say the plaintiff is not entitled to his annuity for that year, as he made no demand for it within the year and thereby forfeited it. As the plaintiff is by the provision of the deed, to receive his annuity each year, "provided the same is called for by me" (him) and as called for, and as the remainder of the income for each year is otherwise disposed of, it must follow that in the absence of a demand or a waiver, he would forfeit his annuity for that year. The plaintiff, however, claims that there was a demand, or if not, a waiver.

There is an allegation in the bill that a demand for the annuity was made each year. This is not denied in the answer, and it is claimed that here is sufficient proof of the demand. The allegation is somewhat indefinite, but it would be admissible evidence of some force tending to show by way of admission, the truth of the statement. But at the hearing it does not appear to have been used as such. The case, however, does show a transaction between the parties, which must be considered equivalent to a demand, or a waiver of one.

In the summer of 1879, one of the trustees, whose notes

constituted a considerable portion of the trust property, died, and his estate proved insolvent. In the uncertainty resulting, the remaining trustee was unwilling to pay any thing upon the annuity until is should be ascertained whether there would be any income. In this emergency, it was agreed between the parties that the plaintiff should raise some money on his own notes indorsed by the trustee, as the plaintiff in his testimony expresses it, "to tide over till we could get something out of the estate." Three thousand dollars, or thereabouts, were thus raised, the notes subsequently paid by the trustees and charged to income for 1880, the year in which they were paid. It is apparent that both parties understood this transaction as having reference to the income for 1879, if there should be any.

It is necessary, therefore, to ascertain whether the case shows any such income.

In the account we find credited to income for 1880, $3780.00 for fourteen months' interest on the Gilman, Webster and Co.'s notes. This appears to have been received April 9th of that year, less than two months from February 27, 1880. Hence the most of that interest was earned during the year 1879, and when received should be credited to that year. Unlike an annuity or a dividend which is not earned until it becomes payable and therefore cannot be apportioned, interest accrues from day to day and can be apportioned. The beneficiary will be entitled to so much as has accrued for the time being, though not payable till a subsequent day. Perry on Trusts, § 556, and cases cited.

Whether by changing this credit, or its proportional part, to the year 1879, where it belongs, will make any difference in the result, is not so apparent; as it is already credited to income and the plaintiff seems to have had the full benefit of it.

The same principles would apply to the item of $437.50, charged to the trustees on income account, April 7, 1880, as one year's interest on the Alfred Veazie note for $6250. A part of this interest must have accrued during the year 1879 and should have been charged to the trustees on that year's income. This note, it appears, was secured and was paid in full and the interest correctly credited to income with the above exception.

It is also claimed that the amount paid on the Alfred Veazie notes, except that above named, which is credited to principal, should in part be credited to income.

These notes were a part of the original trust property. When the maker died, it proved that his estate was largely insolvent. It was not, however, so represented, but it was agreed by all interested, including the plaintiff in this case, that the executors of that estate should convey all the property belonging to it after all other debts were paid, to these trustees in payment of these notes. This property was insufficient to pay the principal and therefore the trustees credited it to the principal of the trust fund, contending that no interest had been paid, while the plaintiff contends that both principal and interest were paid in the same proportion. All the notes were upon interest, payable annually, and the principal of each had become payable at the time of this arrangement. The property conveyed in payment was received by the trustees at different times, and no valuation of it was agreed upon, except that it was receipted for by the trustees at the appraisal made to the executors. If these payments had been made upon the notes in the usual course of business, each payment in the absence of an appropriation by the parties, would have been appropriated to the payment of interest so far as necessary and the balance to the principal, and under this rule all the interest would have been paid and the loss would have fallen upon the principal. It is, however, as clearly competent for the parties in this case to make an appropriation of the amount paid, as in any other. There was perhaps here no appropriation in terms made, but in effect there was. By the implied if not express agreement of both trustees and beneficiary, the notes were discharged, both principal and interest. The executors must have so understood it, otherwise they would hardly have been protected in neglecting to render the estate insolvent. We could hardly expect the plaintiff to have consented to a discharge of his interest without any consideration, for he would have received something if the estate had been rendered insolvent. If then, under such an agreement the notes were as completely discharged as they would have been in insolvency,

we must hold that the interest was paid as well as the principal, that the payments were in effect appropriated to both, and an equal percentage must be allowed upon each. This is also the equitable view of it. Here were two funds for the purposes of the trust, the principal and the interest, belonging to two different parties. Both funds were discharged by the payment of a given sum less than the whole, by the consent of all interested. Why should not the loss be borne *pro rata?*

The authorities cited upon either side, though in some respects unlike this case, sustain the view that the beneficiary is not to sustain more than a ratable share of the loss, with the exception perhaps of *Grabowski's case*, L. R., 6 Eq. 12, in which it was held that there could be no apportionment, but the lesser fund which had been paid into court, must be treated as principal and the annuitant would be entitled to the use of that, but not to the fund itself. The opinion gives no reason or grounds upon which the conclusion is based. The loss occurred by the fault of the trustee, and the claim was for a part of the amount recovered of the trustee to cover the loss of interest or income which would but for the default, have been earned after the loss and before the recovery. The inference is that in the opinion of the court, from the terms of the settlement no such interest or income was earned. Otherwise the case would seem to be overruled by the case of *Cox* v. *Cox*, L. R., 8 Eq. 343, in which the loss accrued before the trustees received the principal, but in which some interest had been earned after it came into their hands and before the amount of the loss was ascertained. In this case it was held that the amount recovered by the trustees, should be apportioned between the capital and interest. But as the beneficiary was entitled to recover interest since the loss, only upon that part which should be credited to the principal in the apportionment, it was necessary to ascertain what amount of capital at the given rate of interest, would produce the amount recovered at the time it was recovered, and the difference between that capital and the sum recovered would be the amount due the beneficiary for past interest, and the division was so made. To the like effect are the cases of *Maclaren* v. *Stainton*, L. R., 11

Eq. 382, and *Parsons* v. *Winslow*, 16 Mass. 361. While these cases are authority for making an apportionment between the capital and interest of the sum received in payment of the notes in the case at bar, they are not so as to the manner in which that apportionment is to be made. In this case as in those, the interest was included in the amount recovered. But in this, the interest had been earned and was a sum due at the time of the compromise. Both principal and interest were definite sums discharged by that compromise, and hence as above stated, the sum received should be ratably divided between the two sums.

In this division it does not follow that the whole amount of interest due upon the notes is to be considered as one sum and credited to income. The trust deed was finally executed February 27, 1879. The plaintiff is entitled to his annuity only from that time. Hence whatever interest had then accrued and was unpaid, if any, should be credited to the principal and that which has accrued since, and before the settlement, should be credited to income for the years in which it was earned, subject, of course to the discount.

As the trustees credited the whole amount received, at the time it was received, to the principal, it will be seen that since that period they have been accounting for the income for the whole fund received, when they were required to account only for that less the amount deducted on account of interest. It does not appear what that income may have been and perhaps it is not material for as they have retained that sum in their hands it is but equitable that they should account for whatever income they may have received from it, and it does not appear that they have accounted for any more.

In 1880 the mills which were a part of the trust property had been leased to Ring and Ayer. By the terms of that lease the lessees had a right to pay a portion or all of the rent in repairs upon the mills. Upon settlement it was found that they had thus paid $2943.36 which sum was allowed them and in the account rendered this item is omitted. The plaintiff claims that it should be credited to income for that year as so much rent received. But it was not received by them as rent, nor

does it appear that the repairs were such as would be permanent improvements or add to the permanent value of the mills, therefore they did not receive the amount as principal. But the conclusive reply to this claim is that by a clear preponderance of testimony it appears that this lease in this form, was made at the suggestion and with the consent of the plaintiff and it is now too late to set up such a claim even if it had been otherwise allowable. There is an item of $837.86 charged to income for 1880, and it is claimed that this should have been charged to principal. On what ground it should have been so charged does not appear. It was paid to the agent having charge of the mills and there is no evidence whatever to show that it or any portion of it was for improvements or permanent repairs, nor was it to put the mills in a condition to be rented, for they had already been leased and prior to that a considerable sum had been taken from the capital and expended in repairs. On the other hand there is abundant proof that none but temporary repairs were made, such as are properly chargeable to income.

It is also claimed that a portion of the repairs made in 1881 should be charged to the capital and not to income, but no particular portion of the amount or any particular item of repair is specified. The same remarks applied to the last item are applicable to the repairs for this year. The plaintiff and all his witnesses testify that no permanent repairs were made but all were temporary,—made only for the purpose of keeping the mills running for the time being, and that they were so is a cause of serious complaint on the part of the plaintiff and the main ground upon which he asks for the removal of these respondents. If then these repairs were properly made they are chargeable to income. If they should have been more permanent and thorough in the first instance, so as to have been properly chargeable to capital, then that they were not so made, may be a cause of complaint. But whether it would be such a cause of complaint as will authorize or require any interference by the court is a question for consideration. Thus is presented the question as to the power and duties of these trustees in respect to these repairs arising from the deed under which they are acting.

The provision of the deed important in this connection reads thus: "To keep and maintain the principal of said trust estates *safely* invested according to their *best judgment*." For this purpose the deed conveys to the trustees the full legal title to the property therein described. These mills were not a part of that property, except as they were covered by a mortgage given to secure some notes which were. It was thought best by all concerned to take the mills under the mortgage together with a sum due from the city of Bangor for an injury done to them by building a dam lower down the river, and discharge the notes. Thus they became the property of the trustees subject to the trust. They were not purchased as an investment but taken as a supposed necessity in payment of a debt. Were they that kind of property which in the exercise of a sound judgment, could properly be purchased as an investment for trust funds? The evidence largely preponderates in favor of the theory that they are not, and what is of more importance still, the trustees unite in saying that in their judgment they are not. There is nothing in the case to show that such is not their "best judgment," or that it is not honestly and faithfully exercised. There is every inducement for them to do so. They are interested not only to keep the property safely but equally interested with the plaintiff in obtaining from it as large an income as is compatible with its safety. This discretion given to the trustees by the deed faithfully exercised is the controlling power. It cannot be subjected to that of the court. It is the judgment of the trustees in which the plaintiff confided and not that of the court. *Sohier* v. *Eldridge*, 103 Mass. 345, 352; *Hawes Place Cong. So.* v. *Trustees Hawes Fund*, 5 Cush. 454; Perry on Trusts, § 511.

We must therefore treat this mill property as the trustees did, not as a fit permanent investment for the trust funds, but to be disposed of in such way and in such time as would be for the interest of that fund, considering both the capital and the income. This disposition necessarily includes the repairs to be made such as should be charged to capital as well as such as may be charged to income. Ordinarily no repairs to such property can be charged to capital. The life tenant whether legal or equitable,

cannot as a general rule thus incumber the remainder. When real estate is purchased for an investment, or however obtained if the trustees decide to keep it as such, they may make such repairs as they deem necessary to put it into a good rentable condition at the expense of the capital; after that they must be kept in repair at the expense of the income. *Sohier* v. *Eldridge*, *supra; Parsons* v. *Winslow*, *supra.* Repairs made at the expense of capital, are to that extent an investment of so much of the trust fund; and are therefore justifiable only when the realty upon which they are made is itself an investment and a proper one of that fund. In this case a considerable sum taken from the capital was expended in repairs upon these mills. No complaint that too much was taken, is made; hence whether that was properly taken is not now before the court, nor whether judiciously expended or that such repairs were insufficient as that was a matter within the discretion of the trustees and the case fails to show that they did not act with due fidelity and in accordance with their "best judgment."

Another ground upon which the removal of the trustees is asked is their general bad management arising from a want of experience and incompetency. The proof fails entirely to show any want of good management, either in the repairs which have already been considered or otherwise. The plaintiff himself seems to have had very much to do in the supervision of the repairs, and in other respects the proof shows no cause of complaint. There seems to have been a considerable falling off in the value of the property and a disappointment of what was probably a just expectation of the amount of income to be derived from it. But this appears to be imputable to a change of business and insolvency of debtors and perhaps other causes, rather than to any fault on the part of the trustees.

The allegation that one of them has abandoned all right to any part in the management is negatived by the evidence. It is true that they have to a large extent employed agents to assist in the business affairs of the trust; but this was made necessary by the condition and situation of the property, as well as by the extent of the work to be done, and the case shows that these

agents and assistants were fitly chosen and were not only competent but faithful to the trust reposed in them.

The want of experience or knowledge of business in the trustees was as well known to the plaintiff at the time of their appointment as since, and wherever there has been a failure on this account, if any, the want has been fully supplied in the labor and advice of men in whom there was no lack in this respect.

These suggestions show that there is no occasion for the court to intefere by way of injunction to prevent the sale of the mill property. The proof shows that such an interference would not be judicious and the plaintiff by the discretion which he gave the trustees in the deed, has taken that power from its jurisdiction.

Thus all that remains to be done is to change the income account so that the portion of interest on the Gilman, Webster and Company notes earned in the year ending February 27, 1880, should be credited to income for that year, instead of to the following year, as it now is. This can be done by an inspection of the note.

Also apportion the interest upon the Alfred Veazie notes and credit that part which has been paid, upon the principles laid down in this opinion, to the income of the different years in which it was earned.

In order to ascertain what interest has been paid upon these notes settled under the compromise, if the parties do not agree upon the appraisal as the value of the property turned out in payment, it will be necessary to have a master appointed to ascertain that value and the time of the several payments.

This may make some other changes necessary in the account, such as changing the time for charging the amount paid on the notes given by plaintiff and indorsed by one of the trustees in 1879, as that should offset the income of 1879 so far as it goes.

Case to stand for the appointment of a master to adjust the trustees' account in conformity with this opinion.

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

ABEL W. ROWELL, guardian of ALDEN S. HUNNEWELL,

vs.

DAVID PATTERSON, administrator of the estate of RICHARD HUNNEWELL.

Somerset. Opinion May 29, 1884.

Administrator. Insane person. Statute of limitations. Stat. 1872, c. 85.

The limitations of the stat. 1872, c. 85, for presenting claims against an estate to the administrator, and bringing an action thereon, apply to claims held by an insane person, though such person has no guardian during the two years next after the notice of the appointment of the administrator.

ON REPORT.

Assumpsit by the guardian of an insane person, against the administrator of his father's estate. Richard Hunnewell died October 30, 1879; the defendant was appointed administrator, February 3, 1880, and gave notice of his appointment, February 9, 1880. Alden S. Hunnewell has been insane ever since his father's death, but had no guardian until June 6, 1882, when Mr. Rowell was appointed. June 30, 1882, the guardian presented the claim sued to the administrator, in writing, and demanded payment.

The suit was brought August 21, 1882.

By the terms of the report if the action was maintainable the case was to stand for trial, otherwise a nonsuit was to be entered.

Walton and Walton, for the plaintiff.

Here is an insane person who has not the capacity to bring an action and as to whom the cause of action does not accrue until the disability is removed. R. S., c. 81, § 85. See *Oliver* v. *Berry*, 53 Maine, 206; *Lancey* v. *White*, 68 Maine, 32.

Turner Buswell, for the defendant, cited: *Scott* v. *Hancock*, 13 Mass. 162; *Brown* v. *Anderson*, 13 Mass. 201; *Hall* v. *Bumstead*, 20 Pick. 2; *Baker* v. *Bean*, 74 Maine, 18; *Littlefield* v. *Eaton*, 74 Maine, 516.

LIBBEY, J. We think it clear that this action is barred by the act of 1872, c. 85. The statute contains no exception in favor of insane persons or infants. Claims held by them against the estate of a deceased person are barred by the limitation as well as those held by others. *Baker* v. *Bean*, 74 Maine, 17; *Hall* v. *Bumstead*, 20 Pick. 2; *Van Steenwyck* v. *Washburn*, 28 Albany Law Journal, 483.

Whether sound public policy required an exception from the limitation in favor of insane persons and infants, was a question for the determination of the legislature. It did not deem it wise to make such exception. A construction by the court making it would be judicial legislation. We know no rule for the construction of statutes which would authorize it.

Plaintiff nonsuit.

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

CYRUS STEVENS *vs.* JOSEPH R. KING and others.

Kennebec. Opinion May 29, 1884.

Deeds. Boundaries. Ponds. Mills and mill-dams. R. S., c. 92, § 1.

The following boundaries were given in a deed: "thence easterly on said line to Wilson pond; thence northerly by the shore of said pond to Hiram Norris' land." *Held*, that the land conveyed extended to low-water mark.

To maintain a complaint for flowage under R. S., c. 92, it must appear that the dam which caused the flowing was erected or maintained on the land of the defendants.

ON REPORT.

Complaint for flowage under R. S., c. 92.

The description in plaintiff's deed of the land flowed was as follows:

"Also one other lot or parcel of land situated in Wayne, and bounded as follows, viz: Beginning on the easterly side of the aforesaid county road, leading from Orren M. Blaisdell's dwell-

ing house to Wayne village, at the northerly corner of my land, on the line between me and Crosby Gordon; thence easterly on said line to Wilson pond; thence northerly by the shore of said pond to Hiram Norris' land; thence westerly on the line between me and said Norris to the aforesaid county road; thence southerly by the east side of said road to the place of beginning; containing sixty acres, more or less,being the same land conveyed to me by Elijah Wood of Winthrop."

Other material facts are stated in the opinion.

By the terms of the report the law court was to determine the boundaries of the complainant's deed upon Wilson's pond, whether at high-water or low-water mark; also to determine if the complainant had made out a *prima facie* case; if so the action was to stand for trial, otherwise nonsuit to be entered.

J. H. Potter, for the plaintiff, upon the question as to the boundary of plaintiff's land, cited: *Wood* v. *Kelley*, 30 Maine, 47.

Upon the question as to the defendants' title to the land on which the dam was maintained counsel cited: *Davis* v. *Stevens*, 57 Maine, 593; *Williamson* v. *Carlton*, 51 Maine, 449.

Bean and Beane, for the defendants, upon the first question, cited: *Bradley* v. *Rice*, 13 Maine, 198; *Nickerson* v. *Crawford*, 16 Maine, 245; *Lowell* v. *Robinson*, 16 Maine, 357; *Robinson* v. *White*, 42 Maine, 209; *Bradford* v. *Cressey*, 45 Maine, 9.

Upon the second question: *Jones* v. *Skinner*, 61 Maine, 25; *Morton* v. *The Franklin Co.* 62 Maine, 455; *Russell* v. *Turner*, 62 Maine, 496; *Hill* v. *Baker*, 28 Maine, 9; *Moor* v. *Shaw*, 47 Maine, 88; *Turner* v. *Whitehouse*, 68 Maine, 221.

WALTON, J. This is a complaint for flowage, and the first question is whether the plaintiff's deed bounds him on Wilson pond at high or low-water mark. We think it bounds him at low-water mark.

Lands bounded upon rivers above the ebb and flow of the tide generally extend to the middle of the stream. But lands bounded on fresh-water lakes and ponds extend only to low-water mark.

Of course they may be bounded at high-water mark. But, in the absence of a clearly expressed intention to the contrary, the

presumption is that they extend to low-water mark. Such is the settled law of this state.

In *Bradley* v. *Rice*, 13 Maine, 198, the court held that lands bounded on a pond extend only to the margin of the pond, and not to the center of it. But the question was not raised or considered whether the boundary would be at high or low-water mark.

But in *Wood* v. *Kelley*, 30 Maine, 47, this question was considered, and the court held that lands bounded on a fresh-water pond extend to low-water mark.

The language of the plaintiff's deed, after describing the point of beginning, is as follows:

"Thence easterly on said line to Wilson pond; thence northerly by the shore of said pond to Hiram Norris' land."

The defendants contend that when, as in this deed, land is bounded by the shore of a pond, it extends only to high-water mark.

The answer to this argument is that such is not the necessary result. The shore of a pond, being the space between high and low water, necessarily has two sides, a high water side and a low water side; and land bounded by the shore may be bounded by the high water side or the low water side. If the side lines of a parcel of land, starting back from the pond, run to the shore, and there stop, and the line between these two points runs along the shore, of course the land will be bounded by the high water side of it. But if the side lines are described as running to the pond, the result will be otherwise. The legal force and effect of such a description are to carry the land to the pond at all stages of the water, which is equivalent to saying that it extends to low water mark; and if the line between these two points is run along the shore, it must be along the low water side of it; and the land will be bounded at low-water mark.

And such is the effect of the description in the plaintiff's deed.

The first line is described as starting at a point back from Wilson pond, and thence running to the pond. The *terminus* of the line is not the shore, it is the pond itself; and the legal effect is to carry the line to the low water side of the shore; and, as

the next course starts from that point and runs along the shore, it necessarily runs along the low water side of it; and the land is bounded at low water mark.

Another question is whether the plaintiff has made out a *prima facie* case. We think he has not.

A complaint for flowage is a statutory proceeding. It is not authorized by the common law. And, to maintain it, the statutory conditions must be complied with; one of which is that the dam which causes the flowing must have been erected or maintained upon the land of the defendant. The language of the statute is that any man may "upon his own land" erect and maintain, etc. R. S., c. 92, § 1. And it is for such an erection or maintenance only that a complaint for flowage is authorized. In other cases the common-law remedy still exists, and must be resorted to for redress of injuries occasioned by the unlawful flowing of another's land. *Jones* v. *Skinner*, 61 Maine, 25; *Crockett* v. *Millett*, 65 Maine, 191; *Goodwin* v. *Gibbs*, 70 Maine, 243.

Upon this point the plaintiff's proof fails. He does not show that the dam which flows his land is on the land of the defendants.

He shows a quit-claim deed of a fractional part of the premises from Orcutt (the assignee in bankruptcy of one Stanton) to four of the five defendants; but he shows no title whatever in the fifth.

This the plaintiff's counsel admits; and the other deeds put into the case by the plaintiff show that nothing passed by the quit-claim deed, the whole title being at the time of its execution in other parties. But if the quit-claim deed had conveyed to these four defendants all which it purports to convey, it would only make them tenants in common of a fractional portion of the premises, and there would be other joint tenants or tenants in common not joined in the suit; and this alone is fatal to its maintenance. *Turner* v. *Whitehouse*, 68 Maine, 221; *Moor* v. *Shaw*, 47 Maine, 88; *Hill* v. *Baker*, 28 Maine, 9.

The result is that under the agreement of the parties stated in the report a nonsuit must be entered.

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, LIBBEY and EMERY, JJ., concurred.

JOHN C. HARKNESS *vs.* GEORGE W. MCINTIRE.

Waldo. Opinion May 30, 1884.

Real action. Rents and profits.

A contract was made between two persons for the sale by one to the other of a lot of land. The purchaser made a part payment and went into the possession and occupation of the premises. Afterwards the contract was rescinded and the purchaser brought an action for what he had paid towards the land and recovered without any deduction for the use of the premises. *Held*, in a writ of entry by the seller, that he was entitled to recover with the land the value of the rents and profits.

ON REPORT.

Writ of entry. The tenant went into possession May 10, 1880, and the writ was dated October 3, 1881. If the demandant was entitled to *mesne* profits the report provided that they were to be assessed at the rate of eighteen dollars a year between those dates.

The other material facts are stated in the opinion.

Joseph Williamson, for the plaintiff.

William H. Fogler and Philo Hersey, for the defendant.

Plaintiff cannot recover for *mesne* profits in this action:

1. Because he has not set forth any claim for them in his declaration. *Pierce* v. *Strickland*, 25 Maine, 440; *Larrabee* v. *Lumbert*, 36 Maine, 440. The statute in force when the above cases were decided,—R. S., 1841, c. 145, § 14, is identical with the present statute. R. S., c. 104, § 12.

2. Because the tenant's possession was by consent of the demandant, without any agreement or expectation to pay rent, under a verbal agreement to purchase, part payment of the purchase money having been made. *Jewell* v. *Harding*, 72 Maine, 124.

LIBBEY, J. This is a writ of entry to recover a lot of land in the possession of the defendant. The plaintiff's right to recover is admitted. The only question presented to us is whether

the plaintiff is entitled to recover rents and profits of the premises for the time the defendant had been in possession prior to the commencement of the action.

By the report it appears that on the 10th day of May, 1880, the defendant made a verbal contract for the purchase of the demanded premises, paying $150 down, and agreeing to pay the balance in three annual payments of $50 each, and entered into possession under that contract. The defendant commenced a suit against the plaintiff to recover back what he had paid towards the purchase, and at the October term, 1882, recovered the $150 which he paid in part payment, less certain lumber cut from the place, which was the subject of an account in set-off. Nothing appears to have been deducted for rents and profits. The ground upon which the plaintiff in that suit recovered back what he had paid towards the purchase, does not distinctly appear; but we infer from the facts and evidence reported, it was on the ground that the contract for the purchase had been rescinded by the parties.

The general rule is that when a plaintiff recovers judgment in a writ of entry, he may recover damages for the rents and profits of the premises. R. S., c. 104, § 11. But cases may arise when upon equitable as well as upon technical grounds, the plaintiff may not be entitled to rents and profits. *Jewell* v. *Harding*, 72 Maine, 124.

When the contract between the parties was rescinded they stood in relation to the subject matter as if no contract had been made. The defendant had been in possession, taking the rents and profits of the premises. They were not deducted from the sum he sought to recover back of the plaintiff. No equitable or legal reason is shown why he should not be charged with them in this suit. The case is unlike *Jewell* v. *Harding*, *supra*. In that case the defendant had purchased the demanded premises, taking what both parties supposed was a good deed; but it was not sealed, and the plaintiff claimed to recover the premises upon that ground. When the action was commenced, the defendant had an equitable title which the court, in equity, would compel the plaintiff to perfect by sealing his deed.

Not so in this case. When the contract was rescinded, the defendant ceased to have any rights, legal or equitable, under it. He could recover back what he had paid in part execution of it, and the plaintiff became entitled to the rents and profits of the land. We see nothing that takes the case out of the general rule.

In accordance with the stipulations of the report,

Judgment for the plaintiff for the land, and for rents and profits assessed at $25.10.

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

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

Penobscot. Opinion May 31, 1884.

Principal and agent. Promissory notes. Clerk of corporations. Officers de facto.

The defendants gave the plaintiff a note reading: "$1000. Carmel, April 22, 1876. For value received, we, the subscribers for the Carmel Cheese Manufacturing Co. promise to pay William Simpson, or order, one thousand dollars in six months from date, with interest. F. A. Simpson, Rufus Work, A. S. Garland." *Held*, that an action upon the note could not be maintained against the signers as it did not purport to be their promise but the promise of their principal, and if given without proper authority the agents may be liable in another form of action. Nor could an action of money had and received be maintained against them where they received the money as agents and disposed of it for the benefit of their principal before the commencement of the suit and without notice to withhold it.

Where the recording clerk of a corporation has not been sworn he is still an officer *de facto* and his acts as such are binding upon third parties. The opinion of the court in this same case, reported 72 Maine, 40, affirmed.

ON REPORT.

Assumpsit on promissory note recited in the head note. The writ contained a count on the note and another for money had and received, and was dated July 17, 1879.

By the terms of the report the law court was to render such judgment as the law and evidence, legally admissible, required.

The opinion states the material facts.

A. L. Simpson, for the plaintiff.

Charles P. Stetson, for the defendants.

DANFORTH, J. This case has once been before the law court upon exceptions to the ruling of the justice presiding excluding certain testimony offered, and holding the defendants liable upon the note in suit. The exceptions were sustained, the court holding that upon the testimony the note was the contract of the principal and not that of the defendants; 72 Maine, 40. In considering the case at that time the court assumed as true the facts offered to be proved, as it does and must in all cases where the question is upon the admissibility of testimony.

The case is now before the court upon a report which includes the evidence then excluded. The most or all of it is again objected to. Upon a review of the case we see no occasion to modify or change the conclusion then arrived at. The testimony does not purport to, nor does it, in any respect or in any degree modify, control or change the terms of the contract, but rather confirms the inference to be drawn from the language therein used, if, in that respect any doubt had previously existed. It was not offered for the purpose of releasing the defendants from any obligation which they had assumed in the written contract, for which it would have been clearly inadmissible, but rather that the authority of the defendants as agents and the circumstances under which the note was made might appear, to enable the court by a more intelligent construction of its terms to ascertain whether in the language of R. S., c. 73, § 15, it might "be regarded as the . . . contract of such principal," and being such it could not be that of the agents.

It is thus evident that the court did not then misapprehend the issue before it, as suggested by counsel. It is undoubtedly true that the decision would not be binding upon the corporation, as it is not a party to the suit, but the facts proposed to be proved were before the court, put in by the defence, and the real

question was whether they were sufficient to show that the note was that of the corporation and thus relieve the defendants, for it could not be the note of both. The court, as we still think, very properly held that they were sufficient, and therefore held that the note was that of the corporation and not that of the defendants, its agents.

The testimony then excluded is now before us, and upon a careful examination we are necessarily led to the conclusion that the facts then assumed as such, are now proved. Some objections are made to the validity of the organization and authority of the company. But we see no foundation for them. The certificate of organization seems to have been drawn up strictly in accordance with the provisions of the statute and was properly recorded. "The corporation had elected the necessary officers who had acted and served as such, had for sometime carried on the business contemplated by its charter, had contracted debts and exercised the functions of a corporate existence. It is therefore too late to deny that the corporation had a legal existence." *McClinch* v. *Sturgis*, 72 Maine, 297. There was a note of the corporation expressly authorizing the defendants "to hire money to meet the demands of the company," and this vote necessarily carried with it, as incidental to it, the authority to give the usual and proper evidence of the money borrowed and the terms upon which it was borrowed. That the recording clerk was not sworn is an objection not open to the corporation and therefore not available to this plaintiff. He was still an officer *de facto*, and as such his acts are binding upon third parties. *Oldtown* v. *Blake*, 74 Maine, 280. The money was obtained in pursuance of the vote, and though a part of it was paid upon a note of which these defendants were the makers, it was in fact, all appropriated to the debts of the corporation.

But suppose this testimony should all be excluded as the plaintiff desires, what then would be the result? It would be not only useful but clearly necessary to hold the corporation, if the action were against it. But it is not. It is against another party who were agents. Though it is entirely competent for agents to give a note making themselves personally responsible

for the debt of their principals, yet they are not so holden unless the note contains apt words to bind them, unless upon its face it is their promise and does not purport to be the promise of another. It is evident from the former opinion in this case and from the authorities there cited that the note does not contain the promise of the defendants. There are in it no apt words to bind them, but the promise is expressly made for the corporation. The testimony introduced has no tendency to fasten that promise upon them, nor would that or any other having that tendency be competent for the purpose. So far as the action is founded upon that contract it must stand or fall with it. Any proof offered, whether in writing or otherwise, must correspond to the allegations in the writ. If they have signed a note purporting to bind a principal without authority, the note is simply void. The agent thus doing may be liable in another form of action, but certainly not in a suit upon a contract into which he never entered. This seems to be clear upon principle and is supported by a decided preponderance of authority. It may be considered as well settled law in this state and Massachusetts. In New York, while the earlier decisions were opposed, the later are in favor. It is not necessary to cite all the cases or discuss them in detail. The following will give all the light necessary: *Harper* v. *Little*, 2 Maine, 14; *Stetson* v. *Patten*, *Id.* 358; *Noyes* v. *Loring*, 55 Maine, 408; *Ballou* v. *Talbot*, 16 Mass. 461; *Abbey* v. *Chase*, 6 Cush. 54, *Jefts* v. *York*, 4 *Id.* 371; S. C., 10 *Id.* 392; *Bartlett* v. *Tucker*, 104 Mass. 336; *Bray* v. *Kettell*, 1 Allen, 80; 1 Parsons on Cont. 68 and note.

Thus it is evident that the defendants cannot be holden upon the note declared upon even though they had no authority to bind the principal; nor can they be holden upon the count for money had and received; for whatever money they had was received as agents, and disposed of for the benefit of their principal before the commencement of the suit and without notice to withhold it.

Judgment for defendants.

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

ANONYMOUS.

Middle District. Law term, 1884.

Counsel fees in capital cases. R. S., c. 134, § 14.

Where two or more persons are jointly indicted for a capital felony, and different cousel are assigned them by the court, and they are by order of the court tried jointly, the court cannot allow as compensation for all the counsel a sum exceeding one hundred and fifty dollars for any one trial, including services upon appeal or upon exceptions before the law court.

PER CURIAM.

It is the opinion of the court that, where two or more persons are jointly indicted for a capital felony, and are, by order of court, tried jointly, and on application therefor the court assigns different counsel for each, the judge presiding has authority, under the statute, to allow not exceeding one hundred and fifty dollars in all for the services of counsel for any one trial, including services upon appeal or upon exceptions before the law court.

Agreed to at Law Term, Middle District, 1884.

ANDREW KELLY *vs.* WARREN BRAGG.

Penobscot. Opinion June 2, 1884.

Pleadings. Amendment. Practice.

The declaration set out: "In a plea of trespass, for that the said Bragg at Bangor, aforesaid, on the first day of June, A. D. 1882, with force and arms, by means of certain inanimate objects, to wit, certain shade trees, broke and entered plaintiff's close, situated . . . and having so entered, (to wit: by setting certain trees in his own land and allowing them to grow over and project upon the land of the plaintiff above described,) shaded and obstructed plaintiff's windows, injured the roof of his house, causing it to decay, and other wrongs . . . greatly incumber the said close, and prevented the plaintiff from having the use thereof in so ample a manner as he otherwise would have done." *Held*, that the action in the form of trespass *quare clausum* is not maintainable upon the facts averred.

Where the facts of the case are stated in the declaration, the court at *nisi prius* has the power to allow an amendment, by adding a new count for the same cause even after the plaintiff has closed his case and the defendant moved for a nonsuit.

ON EXCEPTIONS.

Trespass *quare clausum*. The verdict was for the plaintiff for ten dollars, and the defendant alleged exceptions to the allowance of an amendment, as fully stated in the opinion.

The exceptions further alleged:

"The court among other things, instructed the jury, that this is an action of trespass for breaking and entering plaintiff's close; that there is a further count for allowing trees to grow so as to overhang the soil of the plaintiff, his house and lot adjoining, for which he seeks compensation. And that if the defendant planted the trees and allowed them to grow, and they injured the plaintiff's land, or injured his house by moisture and decay, and loss was occasioned thereby, an action *quare clausum* may be maintained for it. That there is another question—the defendant does not own the land, that it is owned by his wife, and the question is, is the action maintainable against him? That for purposes of this trial the court instructed the jury, that although the defendant was not the owner of the premises, yet if he was occupying them, controlling the land, planting trees, and continuing the trees on the land by his will, planting, trimming, and doing as he chose, for the purposes of this action, he may be considered responsible, it being for his own acts. The jury rendered a general verdict for plaintiff. To the allowance of said amendment, and to all of said rulings and instructions, the said defendant excepts, and prays that his exceptions may be allowed."

Barker, Vose and Barker, for the plaintiff.

Charles Hamlin and A. L. Simpson, for the defendant.

LIBBEY, J. When the plaintiff introduced his evidence and stopped, the defendant moved for a nonsuit on the ground that the evidence did not sustain the action in the form of trespass *quare clausum*. Thereupon the plaintiff, against the defendant's objection, had leave to file a new count in case.

We are of opinion that the facts do not support the action in the form of trespass *quare clausum*, and it remains to determine whether the amendment was legally allowable. We think it was.

The original declaration alleged all the facts, and contained the technical allegation of breaking and entering. But it is clear that the particular facts of the case, set out in detail, do not support the allegation of breaking and entering.

It was an appropriate declaration in case, leaving out that allegation, and stated fully the plaintiff's "own case." In fact, the new count, in its averment of facts is the same as the original count. By the original declaration the defendant could not have failed to understand the case. The amendment did not require a change in his plea, nor did it in any way change his defence so far as the merits of the case were concerned. The modern tendency of courts is to great liberality in the allowance of amendments. When the court has jurisdiction of the parties and of the case, it should have and exercise the power to allow amendments of the pleadings, in the furtherance of justice, so that the case may be tried on its real merits. Our conclusion is sustained by *Rand* v. *Webber*, 64 Maine, 191; and by the recent case, *Matthews* v. *Treat*, 75 Maine, 594.

In the other rulings excepted to we can see no error.

Plaintiff's motion and defendant's exceptions overruled.

PETERS, C. J., WALTON, DANFORTH and EMERY, JJ., concurred.

SUSAN J. CHASE *vs.* REDDINGTON J. KENNISTON and another.

Kennebec. Opinion June 2, 1884.

Civil damage act. Intoxicating liquors. Amendment. Deposition. Stat. 1872, c. 63, § 4.

In an action under the civil damage act, one count in the writ was as follows: "And the plaintiff further alleges that on the third day of October, 1880, and on divers other days in the month of said October, her said husband

bought of said defendants at their said store in Gardiner, one pint of intoxicating liquors, though they were forbidden by plaintiff so to sell, which her said husband then and there drank, and thereby became intoxicated, and in consequence thereof incapacitated to attend to business, and failed to provide plaintiff with means of support for a long time, to wit, one month, to plaintiff's great injury, and plaintiff was otherwise injured thereby." Before proceeding to trial the plaintiff was permitted to amend by adding the following specification: "And the plaintiff alleges that her said husband while so intoxicated, October 3, 1880, threw at her a cup, and hit, and beat, and bruised her with it; whereby plaintiff suffered great bodily harm and was put to great bodily and mental pain." *Held*, that the amendment did not introduce a new cause of action and was allowable.

Where a deponent, on objection by counsel, refuses to answer relevant and material questions put to him by opposite counsel, the deposition is not admissible in evidence.

A fair and correct construction of stat. 1872, c. 63, § 4, requires the plaintiff in an action based upon that statute to prove to the satisfaction of the jury by a preponderance of evidence, that the defendant caused or contributed to the intoxication of her husband in the manner stated in the statute, in some appreciable or essential degree.

ON EXCEPTIONS from superior court.

This is an action on the case brought under stat. 1872, c. 63, § 4, and generally known as the civil damage act. The writ was dated November 15, 1882. The verdict was for the plaintiff in the sum of seven hundred and two dollars, and the defendant alleged exceptions, which so far as considered, are sufficiently stated in the opinion.

Loring Farr and *Herbert M. Heath*, for the plaintiff, cited on the allowance of the amendment: *Haley* v. *Hobson*, 68 Maine, 167; *Smith* v. *Palmer*, 6 Cush. 513; *McGee* v. *McCann*, 69 Maine, 82; *Gilmore* v. *Mathews*, 67 Maine, 517; *Schneider* v. *Hosier*, 21 Ohio, 98; *Mulford* v. *Clewell*, 21 Ohio, 191; *Emory* v. *Addis*, 71 Ill. 273; Abbott's Trial Ev. 775.

The deposition of Chase was admissible. A deponent is a witness. *Bliss* v. *Shuman*, 47 Maine, 252. I find no authority of *nisi prius* practice to justify the striking out of relevant and material evidence already given, because a witness refuses to answer a subsequent question. The witness is in contempt, and the court may punish the recusant witness, but not punish the party. When the court has unlimited power (R. S., c. 82, § 91)

to punish the witness for the purpose of eliciting the whole truth why suppress that which has been elicited?

The magistrate has the same power to coerce a witness. *Call* v. *Pike*, 68 Maine, 219. In taking the deposition he performs a part of the judicial functions of the court, and the court has no other justification in suppressing a deposition when formally presented, than it has for striking out the testimony of a witness when he steps from the stand. 1 Greenl. Ev. § 554; *Cooper* v. *Bakeman*, 33 Maine, 378; *Harris* v. *Brown*, 63 Maine, 52; *Stinson* v. *Walker*, 21 Maine, 215; *Hall* v. *Houghton*, 37 Maine, 413.

If it be said that the court under the law of practice and procedure has the power, unless prohibited by statute, to control witnesses and their testimony, we rejoin by stating, not by virtue of those fixed rules by which courts, as well as parties are bound, and for the disregard of which exceptions lie, but within the discretionary power of the presiding justice to which exceptions do not lie. Spaulding's Practice.

Such seems to be the law in Massachusetts. *Cole* v. *Hall*, 131 Mass. 90; *Savage* v. *Birckhead*, 20 Pick. 172. But the statutes of Massachusetts differ from ours. The magistrate has not the authority there, that is given by our R. S., c. 107, § 29, to compel the witness to answer.

In this case the defendant waived all right to complain of the refusal of deponent to answer, because he continued the cross examination. Otherwise it would be in his power if he elicited any evidence favorable to his side to put it in; if unfavorable to keep it out. *Com. Bank* v. *Union Bank*, 11 N. Y. 203; *Frazier* v. *Smith*, 10 Iowa, 591; *Alverson* v. *Bell*, 13 Iowa, 308; *Graydon* v. *Gaddis*, 20 Ind. 515; *Palmer* v. *Ins. Co.* 47 N. Y. Sup. Ct. 455.

Exceptions are taken to the reasons given by the presiding judge for admitting the deposition. They will not be sustained if the ruling is correct, though the reasons be incorrect. *Prescott* v. *Hobbs*, 30 Maine, 345; *Warren* v. *Walker*, 23 Maine, 453.

But the ruling and the reasons were both correct. Evidence that sales by persons not parties to the action contributed to

cause the intoxication is not competent even in mitigation. *Fountain* v. *Draper*, 49 Ind. 441; *Hackett* v. *Smelsley*, 77 Ill. 109; *Emory* v. *Addis*, 71 Ill. 273; 38 Iowa, 486; 133 Mass. 86; Abbott's Trial Ev. 782.

Baker, Baker and Cornish, and *L. Clay*, for the defendants, cited on the question of the amendment: *Chesley* v. *King*, 74 Maine, 170; *Annis* v. *Gilmore*, 47 Maine, 152; *Parkman* v. *Nutting*, 59 Maine, 398; *Ball* v. *Claflin*, 5 Pick. 303; 19 Pick. 517; *Milliken* v. *Whitehouse*, 49 Maine, 527.

Upon the admission of the Chase deposition, counsel cited: *Savage* v. *Birckhead*, 20 Pick. 167; *Robinson* v. *B. & M. R. R.* 7 Allen, 393; *Stratford* v. *Ames*, 8 Allen, 577; *Akers* v. *Demond*, 103 Mass. 318; *State* v. *Blake*, 25 Maine, 350; *Low* v. *Mitchell*, 18 Maine, 372; *State* v. *Wentworth*, 65 Maine, 234; 1 Greenl. Ev. § 451.

LIBBEY, J. The defendants' first exception is to the allowance of the amendment to the third count in the plaintiff's writ. This count charged, in substance, that on the third day of October, 1880, her husband bought of the defendants one pint of intoxicating liquor which he drank and thereby became intoxicated, and in consequence thereof incapacitated to attend to business, and failed to provide the plaintiff means of support for one month, and that she "was thereby otherwise injured." The presiding judge allowed the plaintiff to amend by adding the following: "And the plaintiff alleges that her said husband, while so intoxicated, October 3, 1880, threw at her a cup, and hit her, and beat and bruised her with it, whereby the plaintiff suffered great bodily harm, and was put to great bodily and mental pain."

It is insisted by the counsel for the defendants that this amendment was not legally allowable, because it introduced a new cause of action, and new elements of damage.

We think it does not introduce a new cause of action, and that it was legally allowable. Under the statute upon which the action is based, the *cause* of action against the defendants is, that they caused or contributed to the intoxication of the plaintiff's husband, by selling him the intoxicating liquor, by reason of

which the plaintiff was damaged. Act of 1872, c. 63, § 4; *McGee* v. *McCann*, 69 Maine, 79. She set out in her declaration the damage to her means of support, and that she "was thereby otherwise injured." This last allegation is too general to authorize proof of her damages by the assault. The amendment is limited to the same specific tort of the defendants, set out in the original count, and authorized no proof of an assault by the husband, except from the same intoxication, and at the same time alleged. It introduced no new cause of action, but was merely a more specific allegation of the damages, resulting from the cause alleged, which were not before sufficiently specified. We think our conclusion is fully sustained by the following authorities: *Heath* v. *Whidden*, 24 Maine, 383; *Wilson* v. *Widenham*, 51 Maine, 566; *Clark* v. *Swift*, 3 Met. 390; *Haley* v. *Hobson*, 68 Maine, 167. There are strong reasons for the allowance of an amendment in cases like this. The plaintiff can maintain but one action for the same tort, unless it be a continuing tort, and if the court has no power to allow the amendment, the plaintiff must become nonsuit and commence anew, or prosecute the action to judgment, losing a part of the damages sustained.

The second ground of exception is to the admission of the deposition of John P. Chase, the plaintiff's husband, taken at her request. The objection to the deposition was, that the deponent, on cross examination by the defendants' counsel, refused to answer relevant and material questions, and thereby deprived the defendants of his knowledge of facts material to the issue. On cross examination several questions were put to the deponent which were objected to by the attorney for the plaintiff, and the deponent refused to answer them. Among them are the following: "Have you bought intoxicating liquors of any other person or persons in Kennebec county since June 1, 1879, except these defendants?" "Have you not accused other persons in Gardiner of selling you intoxicating liquors, since June 1, 1879." "Have you not demanded of other persons, besides the defendants, money to pay your fines upon the ground that they had sold you intoxicating liquors since June 1, 1879?"

These questions were relevant and material. They embraced

the period covered by the plaintiff's writ. They were material upon two issues. 1. Upon the fact of sales by the defendants, upon which the parties were at issue. If the husband had bought of others about the time involved, it would tend to account for liquor used by him, and have some tendency to support the defendants in their denial of sales. 2. The parties were at issue upon the fact whether the defendants caused, or contributed to the husband's intoxication. If he had bought liquors of other parties, and used them, it was material upon this issue. The facts were peculiarly within the knowledge of the deponent. He was a willing witness. The plaintiff by objecting to the questions, at least suggested to the witness not to answer, and made no effort to have him answer. If the witness had answered the questions, his answers might have satisfied the jury that his intoxication on the occasion of the assault upon the plaintiff was caused by liquors bought of other parties. In a large degree the deposition upon material issues of fact, is *ex parte*. If the deponent had refused to answer any questions on cross examination, the defendants would be deprived of the privilege which the statute gives them, and the deposition would be clearly *ex parte* and inadmissible. It would not have the sanction of the oath taken by the deponent to testify to "the whole truth." We do not know where to draw the line between a refusal to answer any questions on cross examination, and a refusal to answer material questions relating to facts within the knowledge of the deponent. The rejection of the deposition could not have been a hardship to the plaintiff, for she had testified that her husband was well and at Gardiner, where he might have been called into court in a few hours. It should have been rejected. *Savage* v. *Birckhead*, 20 Pick. 167; *Robinson* v. *B. & W. R. R. Co.* 7 Allen, 393.

But if, as contended by the counsel for the plaintiff, the deposition was properly admitted and the refusal to answer should go to the credit of the deponent only, then we think the judge was in error in his charge to the jury in what he said to them upon this subject. The judge, after stating to the jury "that as to his (the deponent's) refusal to answer the question whether he

had procured intoxicating liquors elsewhere, during the time, or on or about the dates specified in the plaintiff's writ, it was not prejudicial to the defendants," used the following language: "Because under the statute, your attention has been specially called to it by counsel in their arguments, and you must have observed it, specially from the reading of the statute, if the defendants contributed *at all* to the intoxication by their intoxicating liquors sold to the husband of the plaintiff, they would be liable. If then he had a pint of intoxicating liquors purchased of them in his possession, and drank one spoonful a day, and obtained enough elsewhere for the next three weeks to continue intoxicated all the time, the defendants would be liable during all those three weeks for that intoxication, although contributing only to the extent of a spoonful per day." The degree of discredit which the jury might attach to the refusal to answer should depend largely upon the fact whether the question was pertinent and related to a matter material to the issue. The judge was in error in saying to the jury that the refusal of the deponent to answer was not prejudicial to the defendants, and this assertion was calculated to influence the jury. He was in error also in the reasons which he gave, as matter of law, for his opinion. They contained a rule of law applicable to the case which we think unsound. The statute gives a right of action to any person as therein specified, "against any person or persons who shall, by selling or giving any intoxicating liquors, or otherwise, have caused or contributed to the intoxication" of the person doing the injury. Whether the defendants caused or contributed to the intoxication was a question of fact for the jury. We think, under a fair construction of the statute, the plaintiff must satisfy the jury that the defendants contributed to the intoxication in some appreciable or essential degree. It is not sufficient that the defendants added a drop to the pint that intoxicated, which in theory may have had the effect of "a drop in the bucket" to produce the result. It is not well to set a jury to speculating on such a fine theory. The court cannot, as matter of law, tell the jury that if the defendant furnishes a spoonful a day of the liquors used by the person who becomes

intoxicated and does the damage, he is liable. It is not a question of law but of fact, and the jury must determine it, from the evidence, in accordance with the meaning of the statute as we have construed it.

We do not deem it necessary to examine the other questions raised by the exceptions.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN and HASKELL, JJ., concurred.

HIRAM O. PIERCE *vs.* ELBRIDGE L. GETCHELL and others.

Kennebec. Opinion June 2, 1884.

Right to vote. Unreasonable act of selectmen. R. S., c. 4, § 63. Damages.

The action of selectmen in refusing to permit a legal elector to vote on the ground that his name was checked, that another man had falsely personated him and voted under that name, is unreasonable, and renders them liable to an action under R. S., c. 4, § 63.

No elector can be legally disfranchised by being falsely personated by another who votes in his name.

Where the act of the selectmen in refusing to permit a legal elector to vote is unreasonable but not corrupt, punitive damages will not be awarded in an action against them by such elector.

ON REPORT.

The writ was dated December 30, 1882. The plea was the general issue. The opinion states the material facts.

J. Baker and F. A. Waldron, for the plaintiff, cited:

Ashly v. *White*, 2 Ld. Raym. 388; *Gardiner* v. *Ward*, 2 Mass. 244; *Kilham* v. *Ward*, 2 Mass. 236; *Lincoln* v. *Hapgood*, 11 Mass. 350; *Capen* v. *Foster*, 12 Pick. 487; *Gates* v. *Neal*, 23 Pick. 308; *Humphrey* v. *Kingman*, 5 Met. 162; *Blanchard* v. *Stearns*, 5 Met. 298; *Osgood* v. *Bradley*, 7 Maine, 411; *Donahoe* v. *Richards*, 38 Maine, 393; *People* v. *Pease*, 27 N. Y. 45; *People* v. *Holden*, 28 Cal. 123; *Oldham election case*, 1 O'Malley and H. Elec. Dec. 153; *Atwood* v. *Chapman*, 68 Maine, 38; 3 Allen, 1; 7 Allen, 155.

Edmund F. Webb and Appleton Webb, for the defendants.

Can it be said that by following the statute and the advice of two lawyers that the selectmen acted "unreasonable, corrupt or wilfully oppressive?" The question was before them. They must decide it one way or the other and if they acted honestly they are protected.

They were not liable if their decision was wrong, if they decided on the best light they could get. They were acting judicially. *Weeden* v. *Richmond*, 9 R. I. 128; *Keenan* v. *Cook*, 12 R. I. 52.

The rejection must be wilful and malicious as well as wrong. *Ashly* v. *White*, Ld. Raym. 938; Smith's Lead. Cas. 342 and note. *Harman* v. *Tappenden*, 1 East, 555; *Weckerly* v. *Geyer*, 11 Serg. and R. 35; *Jenkins* v. *Waldron*, 11 Johns. 114; *Wheeler* v. *Patterson*, 1 N. H. 88; *Carter* v. *Harrison*, 5 Blackf. 138; *Harlow* v. *Young*, 37 Maine, 88; *State* v. *Small*, 1 Fairf. 109; *Drewe* v. *Coulton*, 1 East, 563; *Donahoe* v. *Richards*, 38 Maine, 392.

LIBBEY, J. In this action the plaintiff seeks to recover of the selectmen of Waterville for the denial of his right to vote in that town at the annual election in 1882.

The plaintiff's right to recover, involves the construction of R. S., c. 4, § 63, which provides that "in no case . . . shall any officer of a city, town or plantation . . . be liable in damages for his official acts or neglects, unless they are unreasonable, corrupt, or wilfully oppressive."

This statutory provision has been carefully examined and construed by this court, in *Sanders* v. *Getchell*, *ante*, p. 158, and no further consideration of it is necessary in this case. In our opinion the only question involved in determining the liability of the defendants upon the evidence reported, is whether their action in refusing to permit the plaintiff to vote was *unreasonable*.

The facts are not materially in dispute. The plaintiff was a legal elector in Waterville, and his name was on the list of voters as H. O. Pierce. In the forenoon of the day of election, one Edgar O. Pierce presented himself to the selectmen and claimed the right to vote. They asked his name and he told them it was Edgar O. Pierce, or E. O. Pierce. They informed him that his

name was not on the list of voters, but that the name of H. O. Pierce was there. He then said his initials were H. O., that he was sometimes called H. O. Believing his statement to be true, without requiring him further to identify himself as H. O. Pierce, they permitted him to vote by that name, and checked it.

In the afternoon the plaintiff presented himself and offered his vote. He was informed by the defendants that his name was checked; that another man had voted under the name of H. O. Pierce. He then produced evidence of his identity as H. O. Pierce, whose name was on the list; that he had not voted, and had the legal right to vote. A full investigation satisfied the defendants of these facts, and that Edgar O. Pierce had falsely personated the plaintiff and deceived them. The plaintiff then offered his vote again and claimed that it should be received, but the defendants refused to receive it. We think the refusal was clearly unreasonable within the meaning of the word as defined in *Sanders* v. *Getchell*, *supra*. It appears to us that the question was one upon which men of common intelligence, acting fairly and without bias, could not be expected to take opposite sides. The defendants claim that they were justified in their action, because two gentlemen present, who were lawyers, declared that the plaintiff should not be permitted to vote as it would invalidate the election; and fearing that effect, they refused the vote.

We cannot conceive how two *lawyers* giving their opinions upon their responsibility as such, could express such an opinion. It must have been inspired by political interest or bias rather than by legal learning. The idea that, because a fraudulent ballot had been put into the ballot box, which, if it would change the result, any tribunal, having power to determine the election, would reject, the reception of the honest, legal ballot would invalidate the whole election, is to say the least, unique. No elector can be legally disfranchised by being falsely personated by another as in this case. The defendants were so advised by several lawyers, among them the solicitor for the town, whose opinion was given at the request of the chairman of the board, and that they ought to permit the plaintiff to vote.

It remains for us to assess damages. We think the defendants did not act corruptly, and therefore punitive damages should not be awarded. The plaintiff is entitled to actual damages. The defendants did not refuse to credit the plaintiff's statements in regard to his rights. There was nothing in their action calculated to degrade him. He was disfranchised for one election only. There is no rule by which damages can be computed, and upon the whole we think twenty-five dollars a fair sum to award the plaintiff.

Judgment for the plaintiff for $25 damages.

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

DAVID L. HUNTER *vs.* FRANCIS E. HEATH and another.

Kennebec. Opinion June 3, 1884.

Practice. Motion to dismiss. Exceptions. Error.

A motion to dismiss lies only to some defect which can be seen on inspection of the writ. It does not lie when, to support or resist it, proof is necessary *dehors* the writ.

The law court can act on a bill of exceptions only in the form in which it is made up and allowed at *nisi prius*.

ON EXCEPTIONS.

This was a writ of error, and when the action came up for a hearing, the defendants filed a motion to dismiss the action. The court granted the motion and ordered the action dismissed, and the plaintiff alleged exceptions to that ruling, and made the writ and motion to dismiss a part of the exceptions.

[Writ.]

"State of Maine, Kennebec, ss. To the sheriffs of our respective [L. S.] counties, or either of their deputies, Greeting.

"We command you, that you make known unto Francis E. Heath of Waterville, and Augustine Crosby of Benton, county of Kennebec and State of Maine, partners under the firm name of Heath and Crosby, that they appear, if they see cause, before

our Supreme Judicial Court, to be holden at Augusta, within and for our county of Kennebec, on the first Tuesday of August next, to answer to David L. Hunter of Clinton, in said county, in a plea of error, whereas the said Hunter alleges that in the process, proceeding and judgment had before the Supreme Judicial Court in and for our said county of Kennebec, at a term beginning on the first Tuesday of August, 1873, said judgment having been rendered on the report of F. P. Haviland, referee on a submission entered into March 17, 1873, wherein the said Heath and Crosby were plaintiffs, and the said Hunter was defendant, there occurred the errors hereinafter specified, by which the present plaintiff was injured and for which he therefore seeks that said judgment may be reversed, recalled or corrected, as law and justice may require, that is to say, the following errors, viz. :—

"I. That neither before nor after said submission was signed and executed, did the referee therein named, give the plaintiff in error any notice of a time or place for hearing the matter submitted, nor were there any witnesses sworn or examined at any time, but an award was made without the knowledge of the plaintiff in error and without any trial or hearing of the matters submitted, and a report made therein to the Supreme Judicial Court in and for the county of Kennebec, at the August term, 1873, without the knowledge of this plaintiff, and a judgment obtained thereon against said plaintiff in error wrongfully and in his absence.

"II. That by reason of the premises, and relying on the assurance of said referee after the execution of said submission that no award should be made until a full hearing should be had, the plaintiff in error was deceived and had no reason to suppose and did not suppose any award in the premises had been made, or any report thereon rendered to said court, and therefore was not present himself or by attorney, and was deprived of his right to file exceptions to the acceptance of said report.

"III. In this, that if any hearing was ever had by said referee on the matters submitted, or any of them, after the signing of said submission, it was *ex parte* and without the knowledge or consent of said plaintiff in error and in his absence.

"IV. In this, that the bark, logs and lumber described in said submission, and the land from which they are alleged to have been taken and on which damage was claimed to have been done, never belonged to the defendants in error, and that they never had any right, title or interest therein, all of which this plaintiff was prevented from showing, by reason of the premises set forth in the preceding assignments of error.

"V. In this, that the said submission was not a statute submission, but only a submission at common law, and ought not to have been returned to the Supreme Judicial Court at all, and that court had no jurisdiction of the same, and could not enter up any valid judgment thereon, and said judgment is void.

"VI. In this, that the award of said referee does not follow the submission, nor decide all the claims or matters specified by the demand which is the basis of said submission, but is uncertain, incomplete, and void, and no valid judgment could be rendered upon it.

"VII. In this, that the amount allowed by said referee is grossly excessive and greatly exceeds not only the value of the item passed upon by said award, viz: the damages done on the Eaton tract, but the value of all hemlock bark and lumber taken therefrom as specified in said demand. Wherefore said judgment is erroneous.

"Hereof fail not, and have you there this writ with your doings thereon.

"Witness, John Appleton, Chief Justice, at Augusta, this 16th day of June, in the year eighteen hundred and seventy-seven.

Wm. M. Stratton, Clerk."

(Defendants' motion to dismiss.)

"And now the said defendants come and move the court to quash the plaintiff's writ, because:

"I. The errors assigned contradict the record.

"II. The plaintiff in error had a remedy by exceptions from the judgment of the court, accepting the report of the referee, upon which report judgment was rendered by the Supreme Judicial Court.

"And for divers other good and sufficient reasons.

"Wherefore they pray judgment, and that the judgment aforesaid may be affirmed and stand and remain in full force, vigor and effect.

By E. F. Webb, their attorney."

Baker, Baker and Cornish, for the plaintiff.

E. F. Webb and Appleton Webb, for the defendants.

WALTON, J. This case is before the law court on exceptions. It is a writ of error, and the exceptions state that when the action came up for a hearing, the defendants filed a motion to dismiss the action, and that the court granted the motion and ordered the action dismissed. On what ground the motion was sustained is not stated in the bill of exceptions; and, on inspection of the writ, we fail to see any ground on which such a motion could be rightfully sustained. It contains an assignment of errors, which, if sustained by proof, would be sufficient cause for reversing the judgment; and, of course, no proof could be offered, or considered by the court, on a mere motion to dismiss. Such a motion lies only to some defect which can be seen on inspection of the writ alone. It does not lie when, to support or resist it, proof is necessary *dehors* the writ. *Badger* v. *Towle*, 48 Maine, 20; *Chamberlain* v. *Lake*, 36 Maine, 388.

A motion to dismiss is not a proper plea on which to raise an issue of fact for the court or the jury. And if it were, the exceptions in this case do not show that any proof was offered in support of the motion or considered by the court. The record of the judgment in the original suit is not made a part of the bill of exceptions, and it does not appear that it was seen or acted upon by the judge at *nisi prius*. Consequently, it cannot properly be seen or examined by the law court; for it is no part of the case as made up for the law court. The exceptions are very brief, and some error may have occured in making up the case. But the law court can act upon it only in the form in which it is presented. As the case is presented the ruling at

nisi prius appears to have been incorrect, and the exceptions must be sustained.

Exceptions sustained.

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

CALVINA A. BOURN *vs.* JOHN L. DAVIS AND WIFE.

Kennebec. Opinion June 3, 1884.

Deceit. False representations by vendor as to appraised value of the property.

False and fraudulent representations by the vendor to the vendee concerning the appraisal of the property by appraisers, appointed by the probate court, as to the value placed upon it by the appraisers, are not sufficient to sustain an action of the case for deceit in the sale or exchange of property.

ON exceptions from superior court.

The case and material facts are sufficiently stated in the opinion.

John H. Potter and *George J. Moody*, for the plaintiff, upon the question considered in the opinion as to the allegation and proof of a false statement by defendants as to the value at which his property had been appraised, argued:

We submit that this allegation was material, that it was the misstatement of a fact given to and understood by the plaintiff as a fact, as an official act performed by three men appointed by a court of record and under their solemn oaths. These men were selected from the neighborhood where the estate lies, they were disinterested, they were commissioned by the judge of probate, they were under oath, and made a record of their doings on the very commission under which they acted and returned the same to the court whence it issued. The appraisal, the value of that estate, was now no longer a matter of opinion, but had become a fixed fact, the estate had now received a fixed and legal value. By that appraisal the value of the claims of creditors were ascertained, the character of the

estate whether solvent or insolvent was determined, and by it the administrator must be governed.

The value was ascertained by the court of probate, although done by persons appointed thereby. It is now no more the expression of an opinion than is the undisturbed verdict of a jury, or the decision by one of your honors on a question of fact.

But this representation was a representation of the act of third parties and therefore is not an expression of opinion but the statement of a fact, and if false then fraudulent. *Manning* v. *Albee*, 11 Allen, 520; *Belcher* v. *Costello*, 122 Mass. 189.

Therefore we submit, that it was the representation of a material fact, and being false it was fraudulent. And what could more influence a person than such a representation?

But it may be urged that this being a matter of record was open to the examination and inspection of the plaintiff, and that she by due diligence might have ascertained the truth. But these questions were submitted to the jury, and they were repeatedly instructed that these questions they must decide, and as there is no evidence that they assessed any damage on account of this representation, we have a right to assume that they determined this question of fact, and if they found that she had not used due diligence in regard to the same, they entirely disregarded it.

Bean and Beane, for the defendants, cited: *Holbrook* v. *Connor*, 60 Maine, 578; *Bishop* v. *Small*, 63 Maine, 12; *Long* v. *Woodman*, 58 Maine, 49; *Medbury* v. *Watson*, 6 Met. 246; *Hemmer* v. *Cooper*, 8 Allen, 334; *Manning* v. *Albee*, 11 Allen, 520; *Cooper* v. *Lovering*, 106 Mass. 79; Add. Torts, 1017.

SYMONDS, J. Case for deceit alleged to have been practised by the defendants in effecting an exchange of real estate with the plaintiff.

One of the allegations of fraud relied upon at the trial was that the defendants said the place in Belfast, which they exchanged with the plaintiff for her farm in Fayette, was valued by the appraisers upon the estate of Lydia A. Hollis, mother of

the defendant, Grace U. Davis, at one thousand dollars, when in fact the appraisal was only two hundred and twenty-five dollars.

In this respect the jury were directed by the presiding judge that if the defendants stated "as a matter of fact, that the appraisal had been made by the official appraisers under their oaths in performing their official duty under the laws of this state and that statement was false (and there is no dispute, I believe, about the fact that the appraisal was two hundred and twenty-five dollars instead of one thousand dollars), and was known by them to be false at the time, and was made for the purpose of deceiving the plaintiff and as an inducement to her to make the exchange, and she did rely upon it and was thereby induced to make the exchange," it was a fraudulent misrepresentation which would give the plaintiff a right of action to recover the damages which she sustained thereby. The ruling appears to have been a *pro forma* one, and, the verdict being for the plaintiff, the question of its correctness is reserved upon exceptions by the defendants.

It is the general rule at least in Massachusetts and Maine that an action of tort for deceit in the sale of property does not lie for false and fraudulent representations by the vendor to the vendee concerning its cost or value, or the prices which have been offered or paid for it. *Long* v. *Woodman*, 58 Maine, 52; *Holbrook* v. *Connor*, 60 Maine, 578; *Martin* v. *Jordan*, 60 Maine, 531; *Bishop* v. *Small*, 63 Maine, 12. "When a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it, such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable." *Medbury* v. *Watson*, 6 Met. 259; *Gordon* v. *Parmelee*, 2 Allen, 212; *Hemmer* v. *Cooper*, 8 Allen, 334; *Mooney* v. *Miller*, 102 Mass. 220; *Cooper* v. *Lovering*, 106 Mass. 78; *Parker* v. *Moulton*, 114 Mass. 99; *Poland* v. *Brownell*, 131 Mass. 138; *Page* v. *Parker*, 43 N. H. 368.

With this rule established, it is difficult to see how a distinction can be drawn so as to hold a false statement about an appraisal

of property actionable, when proof of similar misrepresentations in regard to prices offered or actually paid for it would fail to support the action.

It will be observed that in this case the false affirmations alleged are by the vendor to the vendee, personally or by agent, not as in *Medbury* v. *Watson*, *supra*, by a third person who stands "in the light of a friend who has no motive nor intention to depart from the truth, and who thus throws the vendee off his guard and exposes him to be misled by the deceitful representations." This is the distinction drawn in that case, between misstatements of this class by the vendor and the same by a person who assumes to be disinterested, not between misrepresentations by the vendor on the one hand as to what he himself had paid and on the other as to what had been paid by third persons, as the *dicta* in *Manning* v. *Albee*, 11 Allen, 522 and *Belcher* v. *Costello*, 122 Mass. 190, would seem to imply. We can see no difference in legal effect between a misrepresentation by the vendor in regard to the price which he paid, and one by him in regard to the price paid by other persons. The case of *Medbury* v. *Watson* draws no such distinction and the other cases cited only purport to follow that.

In this respect, then, the misrepresentations as to the appraisal stand upon the same footing as that class of affirmations of cost and value, which the authorities hold are not material. They were made by vendor to vendee. The ruling so regards them. In another respect they are even less dangerous to a vendee in the exercise of common diligence; the proceedings of appraisers upon estates being matters of public record and therefore open to the inspection of all persons interested. Notwithstanding the official character of the action of the appraisers, it still expresses only the judgment of individuals as to the values of property, and from the time of *Harvey* v. *Young*, Yelv. 21 *a*, it has been held as a general rule that mere affirmations of value between vendor and vendee are not actionable, though false; "for it was but the defendant's bare assertion that the team was worth so much, and it was the plaintiff's folly to give credit to such assertion."

The extension of this rule to false statements about prices paid or offered seems to include its application to fraudulent representations, such as appear in this case, about an appraisal of property.

In *Buxton* v. *Lister*, 3 Atk. 385, a decree for the specific performance of an agreement to buy timber-trees was resisted on the ground that the plaintiff had procured the contract by representing that two timber-merchants had valued the trees at three thousand five hundred pounds, when in fact their valuation was only two thousand five hundred pounds. Lord HARDWICKE held that this, if proved, was good ground for refusing to decree specific performance, for such a decree is in the discretion of the court and should be entered only when the agreement is certain, fair and just in all its parts. This case is cited in 2 Kent's Comm. 487, as illustrating the greater strictness of the rule in this respect in equity than at law, and also as showing that in equity there is a distinction between enforcing specifically and rescinding a contract. "It does not follow that a contract of sale is void in law merely because equity will not decree a specific performance."

Under the principle which the decisions in this state have established, we think that proof of the fraudulent representation alleged in regard to the appraisal of property was not sufficient to sustain the action.

Exceptions sustained.

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

JOSEPH FARWELL and another *vs.* DAVIS TILLSON.

Knox. Opinion June 3, 1884.

Statute of frauds. Contracts which are not to be performed within one year.

When the statute of frauds is relied upon in defence to an action for breach of a contract, on the ground that it was not to be performed within a year, it should be pleaded specially; then it is open to the defence, notwithstanding

formal objection may not have been taken to certain testimony introduced, tending to show an oral contract.

To defeat the application of the statute of frauds by the happening of a contingency, it must be such a contingency as renders performance of the contract possible within the year.

Where a contract is partly oral, and conflicting evidence is introduced of the conversations which were alleged to have resulted in a completed contract, the questions, whether a contract was in fact made and, if so, what were its terms, are for the jury.

Effect is to be given to an oral contract if proved, unless upon the whole case it appears affirmatively that it is not to be fully performed within a year.

The statute of frauds does not apply to contracts which simply may not be performed within the year, even if they probably will not or are not expected to be so performed, but it does apply to those which are not to be performed within that time; it includes any agreement, which by a reasonable construction of its terms, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within that period.

In determining the question of the time of the performance of a contract, it is proper to consider the circumstances and situation of the parties, so far as known to each other, and the subject matter of the contract.

ON EXCEPTIONS and motion to set aside the verdict, by the plaintiffs.

Assumpsit to recover a balance due from defendant as owner of a cargo, on a general average, to the plaintiffs as owners of schooner Joseph Farwell, also for amount of loss sustained by the plaintiffs by the failure and refusal of the defendant to permit the plaintiffs to carry from Hurricane Island to Baltimore, ten thousand tons of granite, according to contract stated in the opinion; loss alleged, fifteen thousand dollars.

The plea was the general issue and brief statement setting up, among other defences, the statute of frauds.

The contract between the defendant and the government, referred to in the opinion, was dated April 22, 1873, and its provisions, material to this case, were as follows:

"The parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry at Hurricane Island, state of Maine, and deliver at the site of the aforesaid building [United States Custom House to be built at St. Louis,] as much gray granite as may be required by the plans to be adopted by the treasury department for said building;

provided, that should such gray granite be found unsuitable for the moulded and enriched work of the superstructure of said building, above the first story, the parties of the second part agree to furnish granite therefor from other quarries subject to the approval of parties of the first part.

"And the parties of the second part further agree to furnish and deliver said granite at such times and in such quantities as may from time to time be ordered by the party of the first part, and that the granite shall be of the best quality to be obtained from their quarry aforesaid, and of uniform color, free from flaws, stains or discoloring matter and to the entire satisfaction of the party of the first part; . . .

"And the parties of the second part further agree to furnish such number of men as may from time to time be deemed necessary by the party of the first part for the proper prosecution of the work, and provide such shops, sheds and other buildings as may be necessary for the performance of the work and for the accommodation of the workmen without cost to the government or compensation for their use, or for rent of the land on which they may be erected. And the said parties of the second part further agree to cut as well as furnish and deliver all granite herein contracted for, at such times as may be required by the said party of the first part, and in default thereof to forfeit and pay to the United States the sum of one hundred dollars ($100) per diem for each and every day thereafter, until the final completion of the same, which sum shall be deducted from any moneys which may be due them, and if that amount be not due them, then their bondsmen are to be held liable for any deficiency, to be recovered of them by suit, in the name of the United States. And the said parties of the second part further covenant and agree to and with the party of the first part, to lease and hereby do let and lease their quarry or quarries at Hurricane Island, Maine, with all and singular the tools, buildings, wharves and appurtenances thereunto pertaining unto the said party of the first part, with full right, authority and power to enter upon, occupy and use the same, or procure therefrom any or all such stones as parties of the second part shall fail, omit or decline to

furnish, and said lease shall continue in full, until the final completion of the delivery of the granite herein contracted for; it being understood and agreed that the object of this lease is to secure the party of the first part a sufficient and suitable supply of granite for said building from the quarry or quarries aforesaid, and that such entry or occupancy of the said premises shall not be made by the party of the first part, unless the parties of the second part shall be in default, and unless the party of the first part shall give to the parties of the second part eight (8) days' notice of their intention so to do . . . and in case of said default or failure to comply with the conditions of this contract at the end of said eight (8) days the party of the first part shall enter into full and complete possession." . . .

The verdict was for plaintiffs in the sum of three hundred sixty-one dollars and thirteen cents, and the jury found specially that there was no binding contract between the plaintiffs and the defendant for carrying the granite for the St. Louis building from Hurricane Island to Baltimore.

Other material facts stated in the opinion.

A. P. Gould, for the plaintiffs.

I. The terms of the contract, so far as they are put in issue by the pleadings, are undisputed, and its construction was, therefore, for the court. *Atwood* v. *Clark*, 2 Maine, 249; *Homans* v. *Lambard*, 21 Maine, 308; 2 Parsons, Contr. 4, 68; *Todd* v. *Whitney*, 27 Maine, 480; *Short* v. *Woodward*, 13 Gray, 86.

There is no difference in this respect between a written and an oral contract, when the terms of the oral contract are clearly proved and undisputed. *Homans* v. *Lambard*, *supra*; *Short* v. *Woodward*, 13 Gray, 86.

The declaration complains only of a breach of that part of the contract which is wholly written in the proposal, to wit: The refusal to permit the plaintiffs to freight the stone to Baltimore. There is no complaint of a breach of the clause, "and all other conditions as to water and detention, are as you have talked to us." This related to terminal facilities and unreasonable detention of vessels and nothing else. No other talk was referred to in

the proposal, and it was error to admit testimony of other conversations and to treat them as a part of the contract.

The terms being in writing and undisputed, so far as they related to the issue, the meaning and construction of the contract were for the court.

It was error to instruct the jury that it was for them to consider the testimony of defendant as to conversation with the plaintiffs relating to the length of time for the performance of his contract with the government, or the contract of the Baltimore and Ohio railroad, and that testimony was erroneously admitted. It was adding terms to the plaintiffs' contract, without their consent. If the court had put a construction on so much of the offer and contract, as was in issue by the pleadings, no such addition to the contract would have been made.

II. It does not appear by the terms of this contract that it could not have been performed within one year; and it is not, therefore, within the statute of frauds. R. S., c. 111, § 1, p. 5; *Linscott* v. *McIntire*, 15 Maine, 201; *Duffy* v. *Patten*, 74 Maine, 396; *Herrin* v. *Butters*, 20 Maine, 119; *Fenton* v. *Embler*, 3 Burr. 1278; *Boydell* v. *Drummond*, 11 East, 142; *Walker* v. *Johnson*, 96 U. S. 424; *Russell* v. *Slade*, 12 Conn. 455; *Clark* v. *Pendleton*, 20 Conn. 495; *McLees* v. *Hale*, 10 Wend. 426; *Moore* v. *Fox*, 10 Johns. 244; *Dresser* v. *Dresser*, 35 Barb. 573; *Gault* v. *Brown*, 48 N. H. 190; *Peters* v. *Westborough*, 19 Pick. 364; *Anon.* 1 Salk. 280; *Peter* v. *Compton*, Skinner, 355; 2 Kent's Com. (12 ed.) 510, note c.; Abbott's Trial, Ev. 363.

In *Hearne* v. *Chadbourne*, 65 Maine, 302, there was a departure from the principle that it must appear by the terms of the contract that it was not to be performed within a year, but to the extent only, of permitting it to be shown by the acts of the parties when the time for the performance of the contract was to commence, the contract being silent on this point. If *Hearne* v. *Chadbourne* is good law, and is to be considered as deciding that evidence other than the terms of the contract, is to be received, to enable the defendant to set up the statute of frauds, then *Linscott* v. *McIntire*, *supra*, and *Herrin* v. *Butters*, *supra*,

are not good law. Those cases have not been overruled but are cited in *Duffy* v. *Patten*, *supra*, as still law.

Reference in the plaintiffs' written proposal to the defendant's "St. Louis contract," was simply for the purpose of showing for what building they proposed to carry the stone, and it did not make that whole contract a part of their proposition.

III. But there was nothing upon the face of the St. Louis contract to show that it was not to be performed within a year; on the contrary it appears by its stipulations that the government might have required Tillson to furnish all the stone therein contracted for within a year.

If the plaintiffs were bound to look into the defendant's contract with the government, they could not have discovered by it, that the stone were not all to be carried in one year. No quantity of stone is mentioned in that contract. The size of the building is not given from which an estimate of quantity might be made. The stipulation was "as much gray granite as may be required by the plans *to be adopted* by the treasury department for said building."

It was not certain that all the granite should come from Hurricane Island. In reading the contract the plaintiffs would have perceived that the major part of the stone might be required from other places. In that contingency it would be absurd to say that Tillson could not, with a sufficient force, obtain and ship, at least to Baltimore, all the granite in one year. He was not restricted by the terms of his contract.

If, upon a contingency which might happen to shorten the time of performance, it does not appear that the contract could not have been performed within a year, it is not within the statute. Browne, Stat. of Fraud, § § 275, 278 *a*, 279, 280; *Gault* v. *Brown*, *supra*; *Blanding* v. *Sargent*, 33 N. H. 239; *Artcher* v. *Zeh*, 5 Hill, 200; *Lyon* v. *King*, 11 Met. 411; *Lapham* v. *Whipple*, 8 Met. 59; *Dresser* v. *Dresser*, *supra*; *Peters* v. *Westborough*, *supra*; *Kent* v. *Kent*, 18 Pick. 569; *Roberts* v. *Rockbottom Co.* 7 Met. 46; *Russell* v. *Slade*, *supra*; *Walker* v. *Johnson*, *supra*; *Smith* v. *Westall*, 1 Ld. Raym. 316.

There was another contingency in the defendant's contract with

the government by which it might have been terminated within a year. Upon any breach of his contract the government might upon eight days notice enter into the possession of the quarries and complete the quarrying, dressing and delivery of the stones. This was clearly a contingency which might happen within a year.

By their offer the plaintiffs were bound, not to carry all the granite necessary to complete the St. Louis building, but only so much of it as Tillson should deliver under his contract. They could not have insisted upon the right of carrying all the stone required for the building and recover damages of the defendant for the failure to give them the privilege of doing it. If Tillson's right of delivery was terminated by the act of the government then the plaintiffs' contract would thereby be discharged. See *Lyon* v. *King* and *Peters* v. *Westborough*, *supra*.

There is no analogy in the case of *Tatterson* v. *Suffolk M'f'g Co.* 106 Mass. 56.

IV. The testimony of the defendant that he told Farwell "that the supervising architect had informed him that it would take at least three years to complete the building" and that those bidding "were to have three years to do the work," was inadmissible for another reason than that given. Tillson's contract with the government was in writing and there was no such thing in it. The plaintiffs' proposal referred to the contract, not to conversation with the architect.

What the architect told the defendant previous to signing the contract could have no effect upon it. The parties were bound by what was written. There is no pretense that this statement was a modification of the contract after it was written. The instructions of the court upon this subject seem to us clearly wrong.

V. The defendant's want of readiness to perform his contract with the government was not admissible to show the time required by him for its performance against either the plaintiffs or the government. All the testimony on that subject was wrongfully admitted and the rulings relating to it were erroneous.

If the plaintiffs were bound to look into the government contract to ascertain their duty, it was only to the terms of the writing which they referred to in their offer. They were not required to consider whether Tillson was able to perform that contract. The agreement was plain to perform within eight days after demand.

VI. The defendant waived the statute at the trial. The statute requires, simply written evidence of the contract when demanded. In this case the contract was proved by the plaintiffs by oral evidence without objection. Brown, Stat. of Frauds, § 135; *Bird* v. *Munroe*, 66 Maine 346; *Howard* v. *Sexton*, 4 N. Y. 157; *Lawrence* v. *Chase*, 54 Maine, 201; *Williams* v. *Robinson*, 73 Maine, 186; *Holbrook* v. *Armstrong*, 10 Maine, 31; *Montgomery* v. *Edwards*, 46 Vt. 151.

C. E. Littlefield, for the defendant, cited: *Homans* v. *Lombard*, 21 Maine, 313; *Brown* v. *Orland*, 36 Maine, 376; 2 Parsons, Contr. (6 ed.) 482, *n.* 6, 498; *Vicary* v. *Moore*, 27 Am. Dec. 323; *Rawson* v. *Knight*, 73 Maine, 341; *Bank* v. *Dana*, 79 N. Y. 108; *Hanly* v. *Caldwell*, 35 Ark. 156; *Bradford* v. *Railroad Co.* 7 Rich. (S. C.) 201; *School Dist.* v. *Lynch*, 33 Conn. 330; *Gardner* v. *Clark*, 17 Barb. 538; *Cobb* v. *Wallace*, 5 Coldw. (Tenn.) 539; *Edwards* v. *Goldsmith*, 16 Pa. St. 43; *Sawyer* v. *Hammatt*, 15 Maine, 40; Greenl. Ev. § 201; Wharton Ev. § § 1103, 1108, 618; *Storer* v. *Gowen*, 18 Maine, 176; *Whitwell* v. *Wyer*, 11 Mass. 10; *Dorlen* v. *Douglass*, 6 Barb. 451; *Ins. Co.* v. *Newton*, 22 Wall. 32; *Stover* v. *Metzgar*, 1 Watts and S. 269; *Stacey* v. *Randall*, 17 Ill. 467; *Hill* v. *Huntress*, 43 N. H. 480; *Stephens* v. *Baird*, 9 Cow. 274; *Makepeace* v. *Harvard Coll.* 10 Pick. 302; 5 Pick. 395; 15 Texas, 303; 11 Vt. 221; 5 Ill. 561; 15 Vt. 672; 10 Wis. 443; *Stone* v. *Sanborn*, 104 Mass. 319; *Wilson* v. *Randall*, 67 N. Y. 338; *Hunt* v. *Utica*, 18 N. Y. 443; *Com'rs* v. *Rhoades*, 26 Ohio St. 411; *Bacon* v. *Cobb*, 45 Ill. 47; *Littlefield* v. *Winslow*, 19 Maine, 394; 3 U. S. Digest, (1st. series) 447, 871; *Robinson* v. *Fiske*, 25 Maine, 401; 22 Barb. 314; 46 N. H. 249; *Merrill* v. *Gore*, 29 Maine, 346;

8 Mass. 214; 11 Pick. 151; 19 Ala. 146; 9 Ind. 135; *Montgomery* v. *Ins. Co.* 16 B. Mon. 427; 1 Metc. (Ky.) 71; 4 Metc. (Ky.) 267; *Lockwood* v. *Barnes*, 3 Hill, 131; *Blair Town Lot, &c.* v. *Walker*, 39 Iowa, 411; *Moore* v. *Fox*, 10 Johns. 244; *Foster* v. *McO'Blenis*, 18 Mo. 91; *Rogers* v. *Brightman*, 10 Wis. 66; *Burney* v. *Ball*, 24 Ga. 516; Browne, Stat. Frauds, § § 279–282; *Hill* v. *Hooper*, 1 Gray, 131; *Doyle* v. *Dixon*, 97 Mass. 208; *Somerby* v. *Buntin*, 118 Mass. 279; *Hearne* v. *Chadbourne*, 65 Maine, 306; *Harriman* v. *Sanger*, 67 Maine, 442; *Mathews* v. *Fishe*, 64 Maine, 101.

Symonds, J. On July 22, 1873, the following proposition in writing was made by the plaintiffs to the defendant: "We offer and will bind ourselves to freight the stone to Baltimore for your St. Louis contract for $2.20 per ton for cut stone, provided you load and discharge same with assistance of crew, and all other conditions as to water and detention are as you have talked to us." This bid was accepted orally by the defendant.

The St. Louis contract, to which the writing refers, was one by which the defendant had agreed to furnish and deliver to the government, on terms defined therein, the granite required for the construction of a custom house then proposed to be erected in St. Louis. One ground of defense at the trial of the present action was that this contract between the government and the defendant was "not to be performed within one year from the making thereof;" that as the agreement between the plaintiffs and the defendant, which was completed by the acceptance of the written proposition already stated, related to the performance of a part of the government contract, the carriage of the stone which the defendant was bound to deliver to the government at the site of the proposed building in St. Louis, and to its performance in a respect in which that contract was not to be performed within one year from the date of the agreement between the plaintiffs and the defendant, it must be true of this latter agreement that it was not to be performed within a year from its date, since it was based upon the St. Louis contract, adopted it as one of its terms and impliedly followed it in point of time

for performance; and therefore that, if proved, the agreement between the plaintiffs and the defendant, which the declaration charges the defendant with breaking, was within the statute of frauds and did not sustain the action, neither the contract nor any memorandum or note of it being in writing signed by the defendant.

Exception is first taken to the ruling that, "where, as in this case, that ground of defense (the statute of frauds) is claimed in the pleadings and is insisted upon at the trial . . . . . it is open to the defendant, notwithstanding formal objection may not have been taken to certain testimony introduced tending to show an oral contract." The claim is that, although the statute of frauds was pleaded in bar of the action, the failure to interpose an objection to certain testimony introduced by the plaintiffs, tending to prove an oral contract, was a waiver of that ground of defense.

This claim of the plaintiffs is not in accordance with the practice of the courts. In Browne, Stat. Frauds, § 508, it is said: "With regard to contracts, the statute being regarded as not affecting their validity, it is held that unless the privilege, of requiring statutory evidence, given by it to the party resisting the enforcement of the contract is sufficiently claimed by him in some proper pleading, the court will proceed with the contract under common law rules;" and in § 515, as to proceedings in equity, "By the unbroken course of more modern decisions it is now settled that, although the defendant admit the agreement, it cannot be enforced without the production of a written memorandum, if he insist upon the bar of the statute. As was said by Sir William Grant, 'It is immaterial what admissions are made by a defendant insisting upon the benefit of the statute; for he throws it upon the plaintiff to show a complete written agreement, and it can no more be thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement.' The American courts have also fully accepted this doctrine."

In this state and in Massachusetts, at least, the proper method of insisting upon the statute of frauds as a ground of defense in

a case like the present is to plead it specially, (*Lawrence* v. *Chase*, 54 Maine, 196; *Bird* v. *Munroe*, 66 Maine, 346; *Boston Duck Co.* v. *Dewey*, 6 Gray, 446; 1 Chit. Plead. 16th Am. Ed. * 507) and, when this has been done, a failure to object to certain evidence tending to show an oral contract, that is to say, to certain evidence which does not prove the issue, is not a waiver of the issue itself; especially when the whole course of the trial shows that, in point of fact, the precise issue of the pleadings was the one to which the controversy before the jury related and upon which the rulings of the court were given.

Moreover, the contract declared on was indisputably an oral one. The written proposition referred to previous conversations between the parties for some of the conditions on which it was made. The acceptance was oral. The principal question was whether the agreement was within the statute of frauds for the reason that it was not to be performed within one year, or whether the time of performance was such as to leave it valid without writing. Neither the court nor the jury, as the case might be, could pass upon that question till the whole agreement was stated in evidence. It by no means appears that formal objection to "certain testimony introduced tending to show an oral contract," could have been sustained, if it had been made.

By the terms of the contract between the government and the defendant, in the event of default or failure of performance by the defendant and after eight days notice in writing, the government might enter into possession of the quarries and work them to complete the contract at the expense of the defendant; the contract containing a lease of the quarries to the United States for that purpose. It is contended that under this provision a contingency might arise within a year and terminate the contract between the plaintiffs and the defendant; so that for this reason it was not within the statute of frauds.

The substance of this claim seems to us to be, that the defendant, having agreed with the plaintiffs for them to carry to Baltimore the stone for the St. Louis contract, might legally terminate his agreement with them by throwing upon the

government through his own default the burden of performing what his contract required him to do; in other words, that having given the plaintiffs by his agreement with them the right to perform for him a part of the government contract, the defendant might lawfully neglect or refuse to fulfil it on his part, and thereby render his agreement with the plaintiffs impossible of performance. We think, on the contrary, it was an implied term in the contract between these parties that, in the absence of facts which would legally excuse or justify a failure on the part of the defendant to do so, he should keep his government contract, so far as was necessary to enable the plaintiffs to perform the agreement he had made with them; and that the possibility of default in this respect was not a contingency, which excluded the application of the statute of frauds on the ground that it might happen within the year and, if it happened, the contract was performed, but simply a possibility that the defendant, having made two agreements, one with the plaintiffs and one with the government, might fail to keep either of them. The two contracts are so closely connected that in a certain sense one seems to be but an incident of the other. The construction of the earlier contract materially affects the construction of the later. As was said to the jury, "If the government by fair construction of its contract might have required performance within a year, it would follow that the defendant might have required of the plaintiffs the performance of their contract, the carriage of the stone, so cut, within a year." The same would be true if the defendant had the right to perform and could have performed within that time, though the government could not have required it. In *Hill* v. *Hooper*, 1 Gray, 133, it is said, "It is the settled construction of this clause of the statute, that unless the agreement can be completely performed within a year, no action can be maintained on it." The same rule is given in *Doyle* v. *Dixon*, 97 Mass. 212, and repeated in *Bernier* v. *Cabot Manufacturing Co.* 71 Maine, 508. "If the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee

or of another person within a year, is not sufficient to take it out of the statute. . . . .

"If the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not." We think this language is as true of a contingency such as is here alleged as of one arising from the uncertainty of life. To defeat the application of the statute of frauds, the contingency must be one which renders performance of the contract possible within the year; otherwise, the words of the statute apply, the agreement is one "not to be performed within one year from the making thereof."

The contract declared upon being partly oral, and conflicting evidence having been introduced in regard to the conversations which were alleged to have resulted in a completed contract, the questions whether a contract was in fact made and, if so, what were its terms, were for the jury; and its legal effect might properly be submitted to the jury as a mixed question of law and fact, they finding the facts and the court directing as to the legal results which followed. *Homans* v. *Lambard*, 21 Maine, 308; *Smith* v. *Faulkner*, 12 Gray, 256.

The principal exceptions relate to the rulings given to guide the jury in determining whether the oral contract, if proved, was one not to be performed within a year, in the sense intended by the statute of frauds, and, therefore, without effect to sustain the action which had been brought upon it. The substance of the rulings seems to be that this is simply a question of the legal construction of the contract, that in this respect such aids as the law allows in other instances of disputed construction are to be sought in the situation of the parties and the subject matter of the contract, in determining what the parties intended by the language used; and that if the contract, legally construed, is one not to be performed within the year, the statute applies. The jury were told that this clause of the statute does not apply to contracts which simply may not be performed within the year, even if they probably will not or are not expected to be so

performed, but only to those which are not to be performed within that time; that it includes any agreement which by a reasonable construction of its terms, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention within that period; and that effect was to be given to the oral contract, if proved, unless upon the whole case it appeared, affirmatively, that more than the year was required for its performance. "We want to put ourselves in the position of these contracting parties at the time they made the contract, for the purpose of finding out what they intended by it — not for the purpose of making any new contract for them — so that we may see things in the light in which they were before the parties at that time, and be able to apply the contract to the subject matter, and so get more closely to the intent of the parties as declared by the language of the contract itself. For this purpose I have received evidence tending to show what this contract was, what it related to, what the subject matter was, what amount of labor was to be done, what time was required in doing it, what vessels there were for doing it — so far as these things were known to the plaintiffs and no further — what other quarries there were in the vicinity which were available to the defendant and acceptable to the government, so far as these facts were known to the parties at the date of this bid, what means or opportunities there were for increasing the facilities for doing the work, all the circumstances and situations of the parties, and then it is for the jury to say what this contract means. . . . . Was it within the understanding and intention of the two contracting parties, as declared by the contract, that it might be performed within a year? . . . . . The subject matter of a contract might be a thing which could not possibly be done within a year. A consideration of the subject matter would show just as clearly that it was not to be performed within a year, as if there was an express agreement in the terms of the contract, that it was not to be performed within a year. So, also, a consideration of the circumstances and subject matter might show that performance of it, within a year, would require such extraordinary methods, such extraordinary appliances or resources

as could not by fair construction be regarded as within the intention of the parties, at the time when the contract was made; and the question is, considering the subject matter, and the situation of the parties as known to each other, and reading the contract in the light which these give, whether by fair construction, it was within the understanding and intention of the parties as expressed in the contract, that it might be performed within a year, or not."

In support of the exception to these rulings, many authorities are cited by the learned counsel for the plaintiffs to the effect that it must appear by the terms of a contract, affirmatively, that it cannot be performed within a year, or the statute of frauds does not apply. We do not object to this statement as a general rule of law, and it is in very few of the cases cited, that we find anything which seems to us essentially inconsistent with the rule given to the jury at this trial. The meaning of the terms of a contract, it need not be said, is to be ascertained by interpreting them in the light of the subject matter to which they relate. They may mean one thing when used in reference to one subject, or by parties in one situation, and another thing when used under other circumstances in regard to another subject, and the true construction in each instance will be that which applies the contract to the *res*, about which the parties were dealing, and reproduces the intent which they themselves have expressed in it. A description of the nature and extent of the work stipulated to be done, in the absence of express provision on the subject, may be an indispensable element in determining whether the work was by the contract to be done in a year, or whether the contract was one not to be performed in that time. It may show performance impossible in that period, or so impracticable as to be plainly beyond the scope and intent of the agreement as expressed in the language used. The duty of the defendant to deliver the granite "at such times and in such quantities as might from time to time be ordered," as was said in the ruling, did not require of him immediate performance, upon demand, of the whole contract. Time must be allowed to execute the work, and the limitations upon the right of demand, which necessarily result from that fact, must apply.

The granite was to come from the quarry on Hurricane Island. The capacity of that quarry is involved. Should the granite at that quarry be found unsuitable for the moulded and enriched work of the superstructure of the building, the defendant was bound to furnish granite therefor from other approved quarries; and the plaintiffs at the trial were allowed to offer evidence that there were other quarries in the vicinity available for the purpose of supplying the granite under the contract, as one of the facts of the situation, to be considered by the jury in determining what period of time was required for performance, and whether the defendant had sustained the burden of proving that the contract was one not to be performed within the year. If the government had not the right to exact performance within the year from the acceptance of the offer of July 22, 1873, and the defendant could not have performed in that time, then it followed that the plaintiffs' contract was one the performance of which must extend beyond a year from its date. "The collection of such intention" — that expressed in a contract — "by inferences from stated terms, or from actual circumstances, or both, is the office of interpretation. The adjustment of such intention to paramount law is the office of construction." Story on Cont. § 631. "The oral evidence does not usurp the authority of the written instrument; it is the instrument which operates; the oral evidence does no more than assist its operation . . . . by pointing out and connecting its terms with the proper subject matter." 3 Stark, Ev. 756; 1 Chit. Cont. 11th Am. Ed. 148.

Notwithstanding *dicta* and some decisions, especially among the earlier cases, which tend to sustain the position assumed for the plaintiffs, we regard the rule of law as established in this state by the opinions in *Herrin* v. *Butters*, 20 Maine, 119, and *Hearne* v. *Chadbourne*, 65 Maine, 302, in conformity with the rulings which were made at the trial. In the latter case, it is said: "It is true that in the absence of any words or acts of the parties, indicating the contrary, an agreement to work for a year means, to work for that time commencing forthwith. The referee reports no express stipulation in the contract to overcome this presumption; but he sets out the acts of the parties showing the

contemporary interpretation which both put upon it, and this places the case directly within the doctrine laid down in *Herrin* v. *Butters*, 20 Maine, 119; *Peters* v. *Westborough*, 19 Pick. 364; and *Boydell* v. *Drummond*, 11 East, 142, where the old idea that it must be expressly and specifically agreed that the contract is not to be performed within the year, as expressed in *Moore* v. *Fox*, 10 Johns. 244; and *Fenton* v. *Embler*, 3 Burr, 1278, is so far modified as to include cases where such appears to have been the understanding of the parties."

At the same time that we regard the rule of law as settled in this state, upon principle we see no reason why any other than the general rules of construction should apply in determining when a contract is to be performed, with reference to the applicability of the statute of frauds.

In Browne, Stat. Frauds, 4th Ed. § 279, it is said: "The statute, finding the parties perfectly free to make a certain contract without a writing, provides, simply, that if that contract does by its terms expressed, or from the situation of the parties reasonably implied, require more than a year for its performance, they must put it in writing. In other words, it must affirmatively appear from the contract itself, and all the circumstances that enter into the interpretation of it, that it cannot in law be performed within the space of a year from the making;" and in § 281, "Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year, will not prevent the statute from applying. . . . Such an accomplishment must be an execution of the contract according to the understanding of the parties."

The cases upon this question are too numerous to justify a separate discussion of them, in view of the fact that we regard it as substantially settled in this state. A thorough examination of them leads to the conclusion that the rule stated by Browne and adjudged to be the law in *Hearne* v. *Chadbourne*, *supra*, is right upon authority, as we think it is, also, in principle; and

that there was no error in this respect in the rulings at the trial.

What was said in the conversations which made the oral part of this contract, was for the jury to decide. We do not think the court could say in the first instance as matter of law, that a talk about detention could not include anything which might affect the period for performance of the contract. That was for the jury, and the ruling was correct that "if in the conversation between the parties, as to water and detention, anything was said which formed a part of the contract in regard to the time for the performance of the contract, that is to be considered by the jury in determining the question whether it is within the statute of frauds or not."

Mr. Farwell, one of the plaintiffs, in direct examination, had stated without objection the conversations which preceded the making of the bid, and, besides the circumstances showing his knowledge of all the facts at the time when he made the written proposition for his firm, he says that "the defendant had told me when I inquired of him, and was talking about the bid, about facilities, etc. I inquired about how much stone he thought there would be; he said his impression was about thirty-two thousand tons."

Motion and exceptions overruled.

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

AUGUSTUS H. CORSON *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion June 3, 1884.

Railroads. Negligence. Fellow-servant. Evidence. New trial.

In an action for personal injuries alleged to have been caused by the negligence of the employer in retaining the services of a fellow-servant who was careless, and whose carelessness caused the injury, a witness testified that he considered the fellow-servant slow and lazy, and not fit for the service, he was so slow, and witness had so informed the agent of the employer; and in answer to a question, if the fellow-servant was competent and careful in

the performance of his duties, witness testified: "Yes, he was always careful about his work." *Held*, that this evidence was not sufficient to establish the negligence of the employer.

The jury is not authorized to decide that a person is unfit to be employed as a brakeman on a railroad, on account of what they saw or supposed they saw, or could read in his face and manner while testifying before them as a witness, and determine from that, alone, that the railroad company was negligent in employing such a person.

On motion to set aside the verdict from the superior court.

This is an action on the case for injuries alleged to have been received by the plaintiff, while an employee of the defendant corporation. The jury returned a verdict for the plaintiff in the sum of four hundred dollars.

H. M. Heath, for the plaintiff.

G. C. Vose, and *Baker, Baker and Cornish*, for the defendant.

WALTON, J. The plaintiff, a brakeman on the Maine Central railroad, in attempting to couple an engine and tender to a train of freight cars, and in order to adjust the couplings, stepped between the buffer of the tender and the freight train, and the latter moved down upon him and jammed him against the buffer and injured him. For this injury he has recovered a verdict against the railroad company, upon the ground that it was caused by the carelessness of a fellow servant, who, being habitually careless and incompetent, and known to be such to the agent of the road who employed him, was not a fit person to be employed.

Assuming it to be settled law that a railroad corporation is liable for an injury to one of its servants, caused by the carelessness of a fellow servant, when the managing officers of the corporation have employed, or continued in the employment of the corporation, such fellow servant, knowing him to be habitually careless in the performance of his duty, and his carelessness is the direct and efficient cause of the injury; and assuming that in this case the plaintiff's injury was caused by the carelessness of his fellow servant, Arnold, we come to the inquiry on which the case turns; namely, is the evidence of Arnold's alleged habitual carelessness, and the knowledge of it by the

officers of the corporation, sufficient to justify and sustain a verdict for the plaintiff.

We think it is not. Arnold was employed as a brakeman. At the time of the accident he lacked but three or four months of being twenty-one years of age. He had then acted as a brakeman for a considerable portion of the time for more than a year. The report of his testimony indicates that he possessed at least an average amount of intelligence. So far as appears, up to the time of this accident, he had never been guilty of a careless act. One witness, (Joseph B. Chandler,) says he considered him slow and lazy, and that he had so informed Mr. Geo. A. Alden, the agent of the road by whom Arnold was employed; but this witness, as well as every other witness examined upon the point, testifies that he was competent and careful in the performance of his duty; that his only complaint to Alden was that he was slow and lazy; that he was not fit to be on the train he was so slow. Being asked if Arnold was competent and careful in the performance of his duties, the witness answered, "Yes, he was always careful about his work." And yet this is the only witness relied on by the plaintiff to prove Arnold's habitual carelessness, and the negligence of the defendant corporation in hiring such a man. Instead of sustaining the proposition, his testimony negatives it.

The plaintiff's counsel says that the jury saw Arnold and studied him; that upon his face and in his manner they could read carelessness; and he then asks if the court can say that the jury erred when the man is not and cannot be seen by the court.

To this we answer that if the jury undertook to decide that Arnold was an unfit person to be employed as a brakeman, on account of what they saw, or supposed they saw or could read in his face and manner while testifying before them as a witness, they did fall into a very grave error. As well might a jury find a man guilty of murder because in their opinion they could see guilt in his face. The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict upon,—not even against a railroad corporation. In a case like this, the law imposes upon the plaintiff the burden of proving that the

defendant corporation has been guilty of negligence in employing a man known to be unfit for the place which he is to fill; and we feel no hesitation in saying that this burden cannot be sustained by the man's looks and manner while testifying as a witness. In judging of his credibility as a witness, it is an advantage to see and hear him testify. But in judging of his fitness to act as a brakeman on a railroad train, the law requires something more than his appearance upon the witness stand.

We have thus far assumed that the plaintiff was injured by the carelessness of his fellow-servant, Arnold. But of this the evidence by no means satisfies us. It seems to us plain that the plaintiff's injury was the result of his own inconsiderateness, to call it by no harsher name; and that no act is proved to have been done by Arnold, which, under the circumstances, could be rightfully characterized as careless or wanting in ordinary care and prudence. The plaintiff voluntarily, and as it seems to us, unnecessarily and carelessly, placed himself in a position of great danger; and we think that this carelessness on his part was more than contributory—that it was the sole cause of his injury.

Motion sustained. Verdict set aside.
New trial granted.

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

MARTHA M. DOYEN by JESSE M. DOYEN, her father and next friend,

vs.

ALBERT LEAVITT and others.

Franklin. Opinion June 4, 1884.

Bastardy process. Bond. R. S., c. 97, § § 3, 4.

The sureties on a bond given in compliance with R. S., c. 97, § 3, cannot be relieved of their liability, unless they surrender the principal in court before final judgment, or unless the principal complies with the order of the court

by payment, and giving the statute security for future payment, to aid in the maintenance of the child.

ON REPORT.

Action on a bond given by Leavitt as principal and the other defendants as sureties in compliance with the provisions of R. S., 1871, c. 97, § 3.

The trial in the filiation proceedings was had on the tenth day of the March term, 1882, and resulted in a verdict of guilty. On the twelfth day of the term the court convened at an earlier hour than usual, and adjourned finally before nine o'clock in the forenoon. On that day the presiding justice caused the following entry to be made in the case.

"The respondent adjudged to be the father of the child and stand charged with its maintenance (with the assistance of the complainant) as follows: . . . To give bond with sufficient sureties in the sum of $300 to the complainant, to perform the foregoing order, and to give bond to the town liable for the maintenance of the child with sufficient sureties in the sum of $200 and to be committed until he gives them. Respondent to be produced to-day." Immediately after adjournment, the respondent appeared at the clerk's office and was committed on a copy of the order of the court at his own request.

In June following, he cited the complainant under R. S., c. 113, to attend to his disclosure, when and where he was permitted by the justices to take the poor debtor's oath.

H. L. Whitcomb, for the plaintiff, cited: *Corson* v. *Tuttle*, 19 Maine, 409; *Taylor* v. *Hughes*, 3 Maine, 433; *Hodge* v. *Hodgdon*, 8 Cush. 294; *Doherty* v. *Clark*, 3 Allen, 151;

S. Clifford Belcher, for the defendants, contended that the surrender of the principal at the clerk's office, on the day and immediately after the final adjournment under the circumstances of the case relieved the sureties; that it could not be done during the early hour when the court was in session and for that reason the presiding justice put these words into the order: "Respondent to be produced to-day."

Unless these words mean that the sureties may surrender the respondent at any time during the day in which the order is made with the same effect as if they had produced him before passing the order, they are without meaning or force.

Counsel further contended, that the action of the principal in going to jail was a performance of the bond. It was in compliance with and abiding the order of the court. *Towns* v. *Hale*, 2 Gray, 199; *Power* v. *Fenno*, 10 Gray, 249; *Young* v. *Makepeace*, 108 Mass. 233.

EMERY, J. This is an action of debt on a bond given by Leavitt as principal, and by the other defendants as sureties, under R. S., 1871, chap. 97, sec. 3.

The defendants claim: 1st, to have discharged themselves from this bond by a surrender of Leavitt, the principal, in court before final judgment as provided by sec. 4, of chap. 97; 2nd, to have fulfilled the conditions of the bond.

I. Section 4, provides that the sureties on such a bond as this, may relieve themselves from liability by surrendering the principal "in court at any time before final judgment," in the filiation proceedings. In this case the final judgment was rendered on the last day of the term. Even if its details were not finally settled in writing till afterward, the judgment must date of that last term day. It could not date of any later day. The principal in this bond had not been surrendered in court, prior to this last day. He was not present in court at the time of the passage of the order, nor at any time during its session on the last day. After the adjournment he went to the clerk's office, and then gave himself up to the sheriff out of court, and went voluntarily into jail. This giving himself up to an officer out of court, and after final judgment and final adjournment, was not a surrender of him "*in court* before final judgment."

There is no provision in this statute for a surrender to an officer, or to the jail, nor for any surrender after judgment. The surrender must be "in court" while it is in session, and before final judgment in the case. If the defendants wished to avail themselves of the statute mode of relief, without performing the

conditions of the bond, they should have seasonably and strictly complied with the statute. The memorandum, "respondent to be produced to-day," could not vary the express language of the statute. The early and brief session of the court on the last day was no legal excuse for the failure to surrender. The principal was bound to take notice of the sittings and adjournments of the court, to follow the case through its various steps until final judgment was rendered in due course of law. He was bound to take notice of each step in the proceedings, and to attend personally when his personal attendance was by law necessary. SHAW, C. J., in *Hodge* v. *Hodgdon*, 8 Cush. 296, 297.

The defendants did not relieve themselves by the statute surrender.

II. Have the defendants complied with the conditions of the bond? The meaning and requirements of the condition of such a bond as this, were fully considered by this court in *Taylor* v. *Hughes*, 3 Maine 433. It was there expressly held that the condition of such a bond was not fulfilled, unless the principal *complied* with the order of court for the maintenance and for the giving the statute security therefor. This construction was expressly affirmed by this court in *Corson* v. *Tuttle*, 19 Maine, 409. In this last case, the order in the filiation proceedings was, that the respondent stand committed till he complied with the order, and he was in fact committed by the court. The defendants in the suit on the bond claimed that such order and commitment discharged the original bond, but the court held that such was not the effect, and that the conditions of the bond still remained unfulfilled, and awarded judgment for the plaintiff.

The two cases cited are decisive of this, for the defendants do not claim that the order of court was actually complied with, by payment and by giving security for future payments. We have examined the Massachusetts cases cited by defendants' counsel, but see no reason for reversing the decisions of this court. It was the duty of the defendants to have the principal personally in court at the time of the order, to abide the order. If he was not there personally, it was a breach of the obligation to appear. If he was there, and did not comply with the order by paying the

money, or giving the required security, such failure was a breach of the obligation to abide. SHAW, C. J., in *Hodge* v. *Hodgdon*, 8 Cush. 297.

The conditions of the bond were not performed.

Judgment for plaintiff.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

BOSTON AND MAINE RAILROAD COMPANY, in equity,

vs.

WARRIOR MOWER COMPANY and others.

Penobscot. Opinion June 4, 1884.

Contract. Damages to personal property, rights of special and general owners to.

A mower company, the owner of a lot of mowing machines, consigned and forwarded them to D, by virtue of a contract under which D was to pay the freight on them and sell them for a specified commission and account to the company for them at a specified price. *Held:*

1. This contract did not change the title in the machines.

2. D had such special property in the machines as to enable him to maintain an action against a carrier for a wrongful act to the property, in which he would recover, not only his own damages, but such as accrued to the company as general owners.

3. While D might assign his own interest in the judgment to be recovered in such action, he could not assign that which belonged to the general owner.

4. The neglect or refusal of the company to commence and prosecute the action for such damage, is not a waiver of their claim, and they are not estopped from asserting it.

5. A sale of the property after the damage had accrued would not transfer the claim for damages.

6. There can be no division between the company and D, of the damages to be recovered in D's action, until the same have been asssessed.

7. The refusal of the company to prosecute the action makes it equitable that the expenses of that litigation should first be deducted from the judgment recovered, and other expenses, if any, for which D would have a lien, and the balance divided according to their several interests.

ON EXCEPTIONS.

Bill of interpleader, which states on the twenty-first of July, 1877, Daniel M. Dunham brought an action against the plaintiff for damage sustained by the detention of thirty-three mowing machines and a lot of parts. That action went to the law court (*Dunham* v. *B. & M. R. R. Co.* 70 Maine, 164) where it was determined that it could be maintained, and it was sent back for an assessment of damages, and was pending when these proceedings were instituted. In August, 1879, the Warrior Mower Company, notified the plaintiff that the damages to be recovered in such action, belonged to that company. In December, 1879, George W. Dunham notified the plaintiff that action had been assigned to him, and that he claimed the damages that might be recovered in the same. December 17, 1879, Henry L. Mitchell brought an action against Daniel M. Dunham and this plaintiff as the alleged trustee. And the bill alleged that the plaintiff was ready and willing to pay whatever sum might be found due in that action, to such of the parties, if any, as were legally entitled to the same.

This action was referred to referees who were to determine the facts, and present for the decision of the court all questions of law arising upon the facts.

The exceptions were to the *pro forma* ruling of the court, accepting the report of the referees.

(Report of referees.)

"We, the undersigned, referees appointed by the foregoing rule of court, met the parties, agreeably to previous notice at Bangor, on the 21st day of November, 1881, and also on the 22d of said November, and also on the 6th, 7th, 8th, 9th, 10th, 12th days of December, 1881, and also on the 11th, 12th, 13th, 14th, 27th, 28th, 29th days of December, A. D. 1882, and heard their several pleas, proofs and allegations, and we do award and determine, and this is our final award and determination in the premises as follows, to wit:

"That Henry L. Mitchell, one of the original respondents in this case at the hearing, abandoned all his claim, and he is, therefore, no further to be considered as a party to this case.

"We find that early in March, 1876, the Warrior Mower Company, of Little Falls, in the state of New York, by contract in writing, appointed Daniel M. Dunham, of Bangor, Maine, as agent for sale of the 'Warrior Mower' machines and extra parts of machines for the season of 1876, and said Dunham accepted such agency.

"Said Warrior Mower Company agreed to furnish said Dunham such number of machines and extra parts in good order as said Dunham should call for, for the purpose of selling the same on commission.

"Said Dunham by same contract agreed to use due diligence in endeavoring to sell the same and in maintaining their reputation; also to receive and provide for proper storage for all machines until sold, to pay all freights and charges thereon, and attend to setting up and putting same in successful operation, and to attend to collecting or renewing notes therefor; and to sell said machines for cash or notes, amount payable by purchasers to be paid one-half November 1st, 1876, balance July 1st, 1877, with interest at 7 per cent. and to remit promptly as soon as received to said Warrior Mower Company its proportion of all cash and notes, to report, in full, all machines and extra parts sold on or before the 1st day of September next after the sale, and all machines and extra parts on hand, and to pay all taxes.

"The said Warrior Mower Company, to retain title to all such mowers and extra parts until sold and paid for.

"Said Dunham, for sale of said mowers, was to retain as his commission, a specified part of the retail price of said mowers, and as his commission on extra parts 60 per cent of the regular list prices net at factory.

"The thirty-three mowers detained by Boston and Maine R. R. Co. were:

Eight three feet six inch. mowers, retail price,	$90 00
Seventeen four feet three inch. mowers, retail price,	100 00
Eight four feet seven inch. mowers, retail price,	105 00

"Said Dunham was to retain from these prices as his commission as follows:

For three feet six inch. mowers,	$30
For four feet three inch. mowers,	30
For four feet seven inch. mowers,	32

"The value of the extra pieces detained by the railroad company we find to be $115.90,— 60 per cent of which would belong to said Dunham as commission on sale.

"Said Dunham had been selling such machines and other articles for said Warrior Mower Company for commission, for several years previous, on nearly the same terms as contained in agreement of 1876. By the books of the Warrior Mower Company, there appeared to be due Dunham in April, 1876, the sum of $57.33; but during the next two years, D. M. Dunham was found to be largely indebted to the Warrior Mower Company.

"At the close of business in 1878, the Warrior Mower Company claimed that D. M. Dunham was indebted to the company in the sum of $5887.35, and the books and accounts so shew, but D. M. Dunham claimed that at the end of said season of 1878 the said company were owing him justly an indefinite but very large amount.

"The investigation of this matter involved the examination of numerous witnesses and of very many accounts. We find as matter of fact for the purposes of this case, that at the close of said season D. M. Dunham was owing said company the sum of $5000.

"In the year 1876 said Dunham called the attention of the company to his claim for damage to his business caused by detention of machines, &c., by the Boston and Maine R. R. Co. and recommended that a suit be brought for damages.

"The Warrior Mower Company did not regard with favor any such suit, and neglected and declined to have anything to do with such suit, saying in substance that railroads had so much power and influence that it was hard to fight them.

"In the winter following and later, said Dunham endeavored to get the Mower Company to bring the suit, or assist him in such suit, but the company refused to do so. He then informed the company (W. M.) he should bring such suit; and he did so July 21st, 1877.

"In 1878 Dunham offered to assign the suit to the Mower Company, and stated to them they could get enough out of it to pay his, Dunham's, indebtedness to them but the Mower Company declined the offer and refused to have anything to do with the suit, and made no claim of title thereto till after the opinion of the court in said suit was announced, viz. July 21st, 1879; see Maine Reps. Vol. 70, page 164.

"On March 30th, 1878, D. M. Dunham assigned to his son, George W. Dunham, one of the respondents, all his right and interest in said law suit against said Boston and Maine Railroad in part payment for his, G. W. Dunham's, services for the thirty three months preceding the assignment.

"This assignment was duly recorded August 11th, 1879, in Alton, to which town said Dunham had removed.

"There was no controversy as to the length of George W. Dunham's service; but the value of such services was much in dispute. For the purposes of this case we find the balance due George W. Dunham for such services to have been at date of said assignment, $500.

"In the spring of 1878, about May 18th, by a written agreement of that date, between said Warrior Mower Company and said D. M. Dunham, said Warrior Mower Company took charge of Dunham's agency business, and continued it through the season, and thereafter the business between the Warrior Mower Company, and said Dunham ceased.

"In said agreement of May 18th, D. M. Dunham thereby 'sells, transfers, and assigns to said Warrior Mower Company and its assigns, all his right, title and interest in all stock, implements and tools in the shop (now) then occupied by him in Bangor, also all notes, book accounts and uncollected debts due, or to become due him, also all implements, tools or other property, of any description, belonging to him, that may be elsewhere than in the shop above mentioned, household goods, horses, wagons and harnesses only excepted.'

"It was further provided in said agreement that the Warrior Mower Company was 'to purchase the above designated property

and sell it to what they considered the best advantage and credit the account of D. M. Dunham with the net proceeds.'

"Also 'to sell . . . Warrior Mowers, Randall Harrows and extra parts, and credit the account of said D. M. Dunham with the net proceeds of such sale, over and above the regular wholesale price of such mowers, harrows and extra parts, and to run the shop in such manner as it may seem best, and to credit the above mentioned account with the net proceeds; also to employ said D. M. Dunham with his team until the season of sales is over and settlement made, and to pay him for such services the sum of fifty dollars per month.'

"We find that the facts of ownership of the thirty-three machines and extra parts detained, when detained by the railroad in July, 1876, were, as set forth in the agreement of March, 1876, and that they were all charged over, by the Warrior Mower Company, to D. M. Dunham when disposed of; and that they were all disposed of before the close of the season of 1877, and before July 21st, 1877, date of Dunham's writ against the Boston and Maine Railroad.

"The wholesale price of mowing machines, such as were detained, was ten dollars less in 1877 than in 1876.

"We decide as matter of law on the foregoing findings of facts as follows:

"1st. That Daniel M. Dunham, under contract of March, 1876, had such an interest in said detained machines and extra parts as entitled him after their sale, viz. on July 21st, 1877, to bring and maintain action for their detention against the Boston and Maine Railroad.

"2d. That said D. M. Dunham did not sell and convey to the said Warrior Mower Company his said claim by his agreement and assignment of May 18th, 1878.

"3d. That if Dunham's said claim against the railroad was included in said sale and assignment of May 18th, 1878, the Warrior Mower Company is estopped to claim it by virtue of their conduct towards Dunham, and their assertions and refusals to him in regard to it, before it was brought and up to the time

the opinion of the court was rendered thereon, that said conduct, assertions and refusals amounted to a waiver of their claim.

"4th. That said D. M. Dunham's claim was duly assigned to George W. Dunham, and that he, said George W. Dunham, is legal owner of the same.

"5th. That if any of our foregoing rulings of law are incorrect so that said Mower Company can have any ownership in said claim in suit, the amount of said Mower Company's claim would be ten dollars on each of the thirty-three machines detained, being $330, and 40 per cent of extra parts valued at $115.90 being $46.36, in all $376.36 (three hundred seventy-six dollars and thirty-six cents), and that George W. Dunham, assignee, should be entitled to the balance of such sum or amount as may be recovered.

"We append hereto a schedule of all the witnesses who testified before us for the several parties, and their fees, and we determine that in case our fourth finding as matter of law is sustained by the court, said George W. Dunham should be paid by said Warrior Mower Company the fees of all his witnesses attending the hearing, except of himself and D. M. Dunham, parties to the suit, viz. the fees of the last eight witnesses named in annexed schedule of witnesses, amounting to $15.80. But if the court shall determine that there is a joint ownership of the claim in suit, between said Warrior Mower Company and George W. Dunham, as is referred to in our fifth finding as matter of law, then each of said parties shall pay his own witnesses.

"Bangor, January 28th, 1863."

Wilson and Woodward, for the Boston and Maine Railroad Company.

Barker, Vose and Barker, for the Warrior Mower Company.

H. L. Mitchell, for D. M. Dunham and George W. Dunham.

DANFORTH, J. Whether this bill is maintainable as an interpleader is a question not now before the court. By the reference the parties have waived such objections as might have been raised to it as such, and the subsequent proceedings may

be considered as a substitute for the interpleader. *Atkinson* v. *Manks*, 1 Cowen, 691. Hence the only questions arising are such as are presented by the exceptions. The rule required the referees to determine the facts and present to the court for decision such questions of law as shall arise thereon. This they have done and the *pro forma* acceptance of their report presents the correctness of their finding in matters of law.

There are several rules of law laid down by the referees, the object of which is to settle, as contemplated in the bill, the ownership of the damages to be recovered in an action now pending for their assessment between the defendant, Daniel M. Dunham as plaintiff, and the complainant in this bill as defendant. The contest over what may be the fruits of that suit, is between the defendants, the Warrior Mower Company on the one hand and George W. Dunham on the other, both claiming as assignees under Daniel M. Dunham, the plaintiff. The referees find that the assignment to George W. Dunham is valid and that there was none to the Mower Co. Whether this latter finding is correct, is immaterial; for, if the validity of the assignments were the only question involved, that to G. W. Dunham is certainly of equal validity with the alleged assignment to the Mower Co. and being of an earlier date would prevail. But the company claims under another and a different title, that of ownership in the property, a wrong to which is the foundation of the action in which these damages are claimed. As the plaintiff in that action could transfer only his own interest in it, it is apparent that if this claim of the company is found valid it must prevail over the assignment. It therefore becomes necessary to ascertain the relative rights of D. M. Dunham and the Mower Co. in the former action.

But the referees find as matter of law that the Mower Co. is estopped to set up such title by virtue of its conduct towards Dunham and by its assertions and refusals to him in regard to the action, both before and after it was brought. This ruling so far as it relates to the claim under the assignment, is clearly correct, for the facts show a refusal to accept such a transfer and without an acceptance it could be of no effect. But under the

other claim of title there is no estoppel. The facts show no deception, no misrepresentation of facts by which the plaintiff was led astray, or placed himself in a position different from what he otherwise would have done, no act or word inconsistent with the assertion of a right on the part of the company. The most that the facts show, was a refusal on the part of the company to assert its claim in the way and manner proposed; no surrender of the claim, no attempt to make any transfer of it to any one. If Dunham had any interest which he could enforce in that action, the company were under no legal or moral obligation to prosecute the action for his benefit; if he had no such interest a refusal by the company would not aid him. Without an interest he could not sustain his suit. That action has by the court been decided in his favor and the measure of damages given.

Ordinarily when a plaintiff sustains his action it is presumed that the whole amount of damages recovered will belong to him. In fact the injury to him or to his property is the measure of the damages. But while this is the general rule there are exceptions, not to the extent or measure of damages, but to the interest the plaintiff may have in them. It is true that an action cannot be maintained unless the plaintiff has an interest in the subject matter of the suit, but he may do so when he is not interested to the full extent of the damages to be recovered. Such are the familar cases of injury to property in which there is a general and special owner, as bailor and bailee, consignor and consignee, principal and factor. In such cases the action may not be brought in the names of the two jointly, but may in the name of either. In the action now in question the subject matter was mowing machines and parts of mowing machines. The damage claimed rests upon a neglect of the carrier by which the property was improperly delayed in its transit. The facts show that the title to the property was in the Mower Company; that it had consigned and forwarded the machines to Dunham by virtue of a contract under which Dunham was to sell them for a specified commission and account to the company for them at a specified price. Dunham was also to pay the

freight. This contract, while it did not change the title in the machines and pieces, gave Dunham such a special property in them as to enable him to maintain the action in his own name, and the consignment and forwarding the property, thus setting it apart and putting it into the hands of the carrier for his benefit, gave him a constructive possession sufficient for that purpose; and as the injury was a result of a single wrongful act to the whole property the damage could not be apportioned but must all be recovered in that one action, the judgment in which would be conclusive against any suit by the general owner. 2 Redfield on Railways, (3d Ed.) 171; Chitty on Pleading, (16th Ed.) 71; *Little* v. *Fosset*, 34 Maine, 545; *Nesmith* v. *Dyeing Co.* 1 Curtis, C. C. R. 130; *Sumner* v. *Hamlet*, 12 Pick. 76; *Sewall* v. *Nichols*, 34 Maine, 582; *Gowen* v. *Cary*, 1 Abb. (N. Y.) Pr. 285; *Wade* v. *Hamilton*, 30 Ga. 450. Hence Dunham, in his suit, is entitled to recover not only his own damages but such as have accrued to the Mower Company as general owners. The measure of damages as held by the court in that case can be applicable upon no other theory. If then Dunham should receive the whole damage recoverable in his suit he would be entitled to retain his own share and the balance he would hold as trustee for the Mower Company. *White* v. *Webb*, 15 Conn. 305; *Little* v. *Fosset*, *supra*.

While Dunham might assign his own interest in the judgment and undoubtedly his assignment to G. W. Dunham would transfer that interest, that which belonged to the general owner he could not assign, for to that he had no title. The first finding of the referees, so far as they hold that Dunham had such an interest in the machines and extra parts, as would enable him to maintain the action, is correct. But so far as they put it upon an acquisition of title by a sale by him and a charging over by the company, it is erroneous. The damages would belong to those who were owners at the time of the injury and a subsequent sale of the machines would transfer no claim to such damages. If it were so Dunham would be divested of his claim as well as the Mower Co. But there was no sale to Dunham. By the terms of the contract he was to account for the machines when

sold. In the sale he was acting as the agent of his principal and the contract of sale was not between Dunham as the vendor and the purchaser, but between the general owner and the purchaser. The charging over was in effect simply a charging him with the proceeds in accordance with the contract. But even this charging over would not prevent the principal following the proceeds in the hands of the purchaser who would not be authorized after notice from the principal to pay the agent any farther than to the extent of his lien. *Edmond* v. *Caldwell*, 15 Maine, 340; *Kinder* v. *Shaw*, 2 Mass. 398, *Kelley* v. *Munson*, 7 Mass. 319; *Thompson* v. *Perkins*, 3 Mason, 232; *The ship Packet*, *Id.* 334; *United States* v. *Villalonga*, 23 Wallace, 41.

The fifth finding of the referees so far as now appears, would give the Mower Company all the damages to be recovered, and perhaps more. It is in fact too early to make a division of the fruits of the first suit, for we have not sufficient facts. The damages have not yet been assessed and though the court have given the measure of damages in that suit, which is in accordance with that established in *Weston* v. *Grand T. R. Co.* 54 Maine, 376, yet as in that case, it must be considered as somewhat elastic. The referees speak of Dunham's claim as one of injury to his business. If that is all he can prove under the allegations in his writ it may be that legally he can prove no more than nominal damage. This decision rests upon the ground that by the allegations in his writ he is entitled to recover damages in accordance with the principle laid down by the court in his suit. The referees find the damages to the Mower Company alone to be the difference in the price of the machines when they should have arrived and their value one year after, or the next season. This is not the measure established by the court and would very probably lead to a different result. If the machines arrived too late for sale in the season of 1876, so that it was necessary to keep them over, we might well suppose they would be worth less when they did arrive than at the beginning of the next season, especially if the keeping over should be attended with expense. Again the facts show that the value of the machines was made up by the commission and the price to be paid to the company

for them but they do not show whether the company received the price according to the contract, or whether Dunham received his commissions and other expenses for which he had a lien in full or in part, or nothing. All these facts are necessary to be known before a division of the proceeds can be made.

The refusal on the part of the company to prosecute the action, though not an estoppel to its claim to a fair proportion of the fruits of the litigation, does make it equitable that the expenses of that litigation should first be deducted and other expenses, if any, for which Dunham would have a lien and the balance divided according to their several interests.

Exceptions sustained.

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

MARGARET G. RUGGLES, executrix in *scire facias*,

vs.

GEORGE S. BERRY and SAMUEL D. WYMAN.

Knox. Opinion June 4, 1884.

Bail. R. S., c. 85 § 1.

Where the creditor takes judgment for a sum as debt or damage in excess of the *ad damnum* in his writ, and attempts to hold the bail therefor, by giving them notice on an execution embracing such excess, the sureties on the bail bond are discharged,

In an action of *scire facias* against the sureties on a bail bond, it did not appear to the court that the bond was returned with the writ, and that the clerk made a note on the writ, that a bail bond had been so filed, as required by R. S., 1871, c. 85, § 1, *Held*, by WALTON, BARROWS and DANFORTH, JJ., that the sureties on the bail bond were thereby discharged.

ON REPORT.

This was an action of *scire facias* by the executrix of the last will of John Ruggles, against the sureties on a bail bond given in a civil action brought by John Ruggles in his lifetime against Moses Call. That writ was dated September 12, 1873.

It commanded the officer to attach property to the amount of two thousand dollars and the *ad damnum* was placed at twelve hundred dollars. Judgment was rendered January 2, 1882, (rescript from law court received February 9, 1882,) for one thousand three hundred eighty-one dollars and seventy cents, as debt or damage, and two hundred six dollars and seventeen cents costs of suit. Execution issued on that judgment, March 10, 1882, the names of the bail were not minuted upon it, but the defendant Berry was notified by the officer holding the execution, June 10, 1882. An *alias* execution issued on the same judgment July 14, 1882, the names of the bail were minuted upon that execution and they were notified by the officer September 23, 1882. The report provided, "the law court to render such judgment as the legal rights of the parties may require; and it is agreed by the parties that either party may move an amendment of the report, and if the amendment would affect the legal rights of the parties, the law court shall allow the same or discharge the report, and order the action to stand for trial in the court below."

Other material facts stated in the opinion.

A. P. Gould, for the plaintiff, contended that it was competent to notify the bail on an *alias* execution. Their liability continued for one year.

It was not necessary that a note should be made by the clerk that a bail bond had been filed, nor that any record of that fact should be made, nor that the names of the bail be entered on the execution. The statute is directory merely, and is intended for the benefit of the plaintiff, that his officer may more readily learn upon whom to serve notice. Sureties on the bond are not harmed by the neglect. They would hardly have ground of complaint if the officer did not find them at all. *Mahurin* v. *Brackett*, 5 N. H. 9; *Bean* v. *Parker*, 17 Mass. 591; *Crane* v. *Keating*, 13 Pick. 339.

The counsel further contended that the bail were not discharged. The bond was for $4000. The writ commanded the officer to attach property to the value of two thousand dollars; it contained two counts each of which stated that the defendant was indebted to

the plaintiff in the sum of one thousand dollars "on the day of the date of the writ." The auditor's report stated the balance due from the defendant to the plaintiff "at the date of the writ, nine hundred three dollars and thirty-five cents." The verdict was for that sum. The judgment was for the amount of the verdict with interest to the date of judgment. That made one hundred eighty-one dollars and seventy cents more than the *ad damnum*, but the increase was only for interest given as damages for the detention of the payment of the sum alleged to be due and found to be due at the date of the writ. Such a judgment is valid until reversed for error. *Smith* v. *Keen*, 26 Maine, 411.

But the judgment was not greater than the *ad damnum* as a whole. "To the damage . . . one thousand two hundred dollars which shall then and there be made to appear *with other due damages*."

Has the last clause no meaning? It did not appear in writs issued by courts of Massachusetts till 1698.

See Acts and Res. of the Province of Mass. Bay, vol. 1, pp. 82, 317. (ed. 1869) ; 1 Chit. Pl. (8th ed.) 419 ; 1 Wheaton's Selwyn's N. P. (5th Am. ed.) 585 ; *Allen* v. *Hunt*, 3 Zabr. 376.

Counsel further contended that where the cause of action is set out in the writ, and by accident the *ad damnum* is too small the court would readily allow an increase of the same ; and if the judgment is taken for no more than the amount attached, neither bail nor subsequent attaching creditors are harmed thereby. The same is true if judgment is taken for a larger sum than the *ad damnum*, but less than the attachment,

See *Seeley* v. *Brown*, 14 Pick. 177 ; *Morse* v. *Sleeper*, 58 Maine, 329 ; *Laighton* v. *Lord*, 28 N. H. 237 ; *McLellan* v. *Crofton*, 6 Maine, 328 ; *Ball* v. *Claflin*, 5 Pick. 303 ; *Miller* v. *Clark*, 8 Pick. 412 ; *Merrill* v. *Curtis*, 57 Maine, 152 ; 2 Saunders, 60 a, note, (3) ; 1 H. Black, 76 ; *Mitchell* v. *Gibson*, 1 H. Black, 233 ; *Hefford* v. *Alger*, 1 Taunton, 218 ; 8 Durn. and East, 28 ; 7 D. and E. 370 ; Cowper, 71 ; 2 Ld. Raym. 1564 ; *Dahl* v. *Johnson*, 1 Bosan. and Pull. 205 ; *Searle* v. *Preston*, 33 Maine, 214 ; *Langley* v. *Adams*, 40 Maine, 125 ; 1 Sutherland, Damages, 759 ; *Putnam* v. *Hall*, 3 Pick. 445 ; *Nash* v. *Whitney*, 39 Maine, 341.

W. H. Hilton, for the defendants, cited: *Langley* v. *Adams*, 40 Maine, 125; *Bean* v. *Parker*, 17 Mass. 602; *Matoon* v. *Eder*, 6 Cal. 57; R. S., c. 85, § 1; *Hewins* v. *Currier*, 62 Maine, 236; *Packard* v. *Brewster*, 59 Maine, 404; *Niles* v. *Drake*, 17 Pick. 516; *Gale* v. *Boyle*, 6 Cush. 138; *Thurston* v. *Prentiss*, 1 Mich. 193; *Lang* v. *Scott*, 1 Blackf. (Ind.) 405; *Almy* v. *Harris*, 5 John. (N. Y.) 175; *Renwick* v. *Morris*, 7 Hill, (N. Y.) 575; *Smith* v. *Lockwood*, 13 Barb. 209; *Com. of Poor* v. *Gains*, 3 Brev. (S. C.) 396; *Banks* v. *Darden*, 18 Ga. 318; *Laverty* v. *Chamberlain*, 7 Blackf. (Ind.) 556; *Ham* v. *The Hamburg*, 2 Iowa, 460; *Manning* v. *Merritt*, 1 Clark, (N. Y.) 98; *Low* v. *Dunham*, 61 Maine, 566; *Stine* v. *Franklin Co.* 48 Mo. 167; *State* v. *Saline Co.* 48 Mo. 390; *Phelps* v. *Hawley*, 3 Lans. (N. Y.) 160; *State* v. *Buffalo*, 6 Neb. 454; *Est. of Ballentine*, 45 Cal. 696; *Morse* v. *Sleeper*, 58 Maine, 329; *Hyer* v. *Smith*, 3 Cranch, C. C. 437; *Robeson* v. *Thompson*, 9 N. J. L. 97.

BARROWS, J. There are two objections to the maintenance of this process against the defendants as bail for Moses Call, in the suit originally brought by the plaintiff's testator against him,— either of which we think must be regarded as fatal.

I. It is incumbent upon those who would avail themselves of a statute remedy to make it appear that the requirements of the statute have been strictly observed in all essential particulars. Chapter 85, of the Revised Statutes of 1871, consists of regulations for the taking of bail in civil actions and for the subsequent proceedings thereon. It is under and by virtue of its provisions that "the original creditor may have a writ of *scire facias* in his own name, from the same court against the bail." This process supersedes and precludes any other remedy upon the bail bond given to the officer making the arrest. *Hewins* v. *Currier*, 62 Maine, 236.

But to entitle the original creditor to maintain it, we think it should be made to appear that the mandate in § 1, that "the bond shall be returned with the writ, and the clerk shall note on the writ that a bail bond is so filed," has been performed. Not only does the report fail to show that these requirements of the statute

were observed, but there is pregnant evidence that they were wholly neglected. It is a significant circumstance that upon the first execution issued in the original case of *Ruggles, Ex'x*, v. *Call*, the notice to bail was given to Berry and one George W. Philbrick, as the sureties of Call upon the bail bond, and no notice was given to Wyman, the co-defendant with Berry in this process, except upon an alias execution issued several months later. It is hardly possible that this should have occurred if the bail bond had been duly returned, and noted by the clerk. Had this been done, it is reasonable to suppose that "the names of the bail, their addition and place of abode if inserted in the bail bond," would have been placed by the clerk on the margin of the execution as directed by § 5, and no such mistake as calling upon one who never became bail, would have been made. The learned counsel for the plaintiff claims that these defects do not exonerate the bail,—that the provisions in § § 1 and 5 are directory merely, and intended for the benefit of the plaintiff only, in order that his officer may more readily learn upon whom to serve notice, and that the sureties on the bail bond cannot be harmed by the neglect. This view is plausible rather than sound. We think the provisions in the first section which were violated in the present case, were introduced for the benefit and protection of the bail and the officer making the arrest as well as of the plaintiff, and were intended, to borrow the phrase used by MELLEN, C. J., respecting another provision in *Holmes* v. *Chadbourn*, 4 Maine, 13,—"to guard them against any improper management on the part of a creditor with a view to implicate them." Among the objects which those provisions were obviously designed to secure, was facility in the making of the necessary proofs to satisfy the court, and obtain the proper record in cases of surrender of the principal under § § 7 and 8—as to which the bail might be embarrassed if the plaintiff could, without endangering his own security, pocket the original writ and bond leaving no trace of them in the entries by the clerk under the suit, or on the files of the court. And the bail are entitled to like facilities for the procurement of the copies called for in § 4, in cases of surrender within fifteen days before the entry of the action. Another end to

be gained by having the bond returned with the writ and noted by the clerk, is suggested by the reasoning of the court in *Bean* v. *Parker*, (a leading and instructive case upon this topic,) 17 Mass. 591, 604. If the bail wish to arrest the principal at a distance from home—in another State, it may be—how else can they so conveniently procure evidence of the fact that they are his bail? The bail and the officer have as great an interest in the observance of these provisions, as the plaintiff in the action. In fine, under our system, the taking of bail and the matters operating to fix, or discharge the sureties, are made so much the subject of statute regulation, that we think the creditor, to entitle himself to the benefit of the security, must see to it that the bond is returned into court with the writ and that the clerk makes the proper note on the writ as required in chap. 85, § 1.

II. The plaintiff took judgment for a sum as debt or damage, exceeding by nearly two hundred dollars the *ad damnum* in her writ. Her vigilant and persistent counsel elaborately urges that this should not be regarded as operative to discharge the bail,—that it does not affect the validity of the judgment, which is good until reversed on error, and not reversible for this cause under our laws, because capable of being cured by an amendment,—that the bail have not been harmed by the error, and cannot be until the final entry of judgment upon the *scire facias*,—and finally he claims that "if the court should be of the opinion that the bail would be discharged, if the judgment should remain as it now is, the error can be cured by entering a *remittitur* for the amount of damages which is in excess of the *ad damnum*;" and thereupon he asks the court to delay the decision, or discharge the report under a provision therein contained, authorizing either party to ask an amendment and the law court to allow the same, or discharge the report and order the case to stand for trial in the court below.

But we think it be must regarded as *res adjudicata* in this State, that an amendment increasing the *ad damnum* will discharge the bail taken on mesne process; *Langley* v. *Adams*, 40 Maine, 125; that it was rightly held in *Morse* v. *Sleeper*, 58 Maine 331, that an amendment increasing the *ad damnum* dissolves an attachment,

and that the same result follows when the creditor takes judgment for a sum in excess of the *ad damnum*, and proceeds to levy without amending; that such amendments or irregularities as will dissolve an attachment, will in general discharge bail; that not only will increasing the *ad damnum* by amendment discharge the bail, as directly decided in *Langley* v. *Adams*, *supra*, but that, taking judgment for a sum in excess of it, and attempting to hold the bail therefor by notice will have the same effect; that it does not comport with sound policy to delay the decision or discharge the report to permit the amendment proposed, for if it should be allowed, creditors might thereby be tempted to take their chance of gain at the expense of sureties on a bail bond in the expectation that if the attempt failed, nothing would be lost, all might be set right by an amendment.

It is questionable moreover, whether an amendment, if allowed, could have the effect to revive the liability of bail once discharged in this way. The English system of taking bail is so different from ours, that their decisions cannot well be applied to cases arising under our statutes. It was well said by SHAW, C. J., in *Crane* v. *Keating*, 13 Pick. 342, that "the whole subject of the giving and taking of bail in civil actions is founded on statute, limited, regulated, and controlled by it; that a bail bond partakes very little of the nature of a contract between the parties in whose names it is taken, but is rather *a legal proceeding in the course of justice*, the effect of which is regulated by statute"; and we think it best that all suitors who have occasion to rely on such securities should understand that a careful observance of the statute requirements, and an avoidance of dangerous irregularities in the prosecution of their suits are requisite to make them available.

The view which we have taken of these two points, renders it unnecessary to examine the other matters relied on in defence.

Judgment for defendants, and for their costs.

WALTON and DANFORTH, JJ., concurred.

VIRGIN, LIBBEY and SYMONDS, JJ., concurred only in the second point stated in the opinion.

LEWIS F. STRATTON, in equity,

vs.

EUROPEAN AND NORTH AMERICAN RAILWAY and others.

Penobscot. Opinion June 5, 1884.

Fires set by locomotives. Railroads. Trustees. Equity. Pleadings.

Where trustees of the bondholders are in possession and operating a railroad, under a mortgage for the security of bondholders, they are liable, to the extent of funds received by them in operating the road, to keep the road, buildings and equipments in repair, furnish such new rolling stock as is necessary, pay the running expenses and apply the balance to the payment of any damages, arising from misfeasance in the management of the road, and after that to the mortgage, as the rights of the parties may require. A claim for damages to property by fire, communicated by a locomotive while passing along its track at a time when the road was in the posession of and operated by such trustees, does not depend upon proof of malfeasance or negligence, but is an incident to the running of the road and may be considered a part of the running expenses, and is therefore an equitable lien upon the funds liable in the hands of the trustees.

Where such trustees have paid and conveyed to a new corporation, formed by the bondholders, any such funds upon which there was such a lien to that extent the new corporation would be liable in equity to the person suffering the damage.

In such case the bill should contain averments that at the time of the alleged injury and demand for payment, the trustees had in their hands or under their control, any such funds, or that they subsequently conveyed any such funds to the new corporation.

ON exceptions to the ruling of the court that the following bill in equity was not sustainable upon the facts therein stated.

"State of Maine.

"To the Honorable Justices of the Supreme Judicial Court, sitting as a Court of Equity, at Bangor, in and for the county of Penobscot:

"The bill of complaint of Lewis F. Stratton, of Bangor, in said county, against the European and North American Railway, a corporation doing business at said Bangor, duly organized under the laws of said state, and Hannibal Hamlin and William B. Hayford, trustees, as hereinafter set forth.

"And now said Stratton gives the court to be informed, that he is now and for three or more years past has been possessed and seized as owner of several lots of land situate in Mattawamkeag, in said county, and especially of lots numbered 113, 124, 125, 135, 137, 138 and 150, and other lands adjoining the same, all which were covered with a heavy growth of wood and timber of great value, and that the railroad known as the European and North American Railway, in its course from Bangor to Vanceboro, passes over and across the said lands, so that all said lots are adjacent to or in the immediate neighborhood of said railroad; that on or about the 16th day of June, A. D. 1880, while the locomotive employed in the service of the said road was passing along the track of said road in due course of business and travel, fire was carelessly, or in some other improper way communicated by the locomotive engine to the growth, and the trees growing upon said lots of land including trees suitable for timber as well as fire wood, and the same were thereby destroyed, the said fire raging for many days and very extensively over the whole or very large portion of all said lots, to the very great damage of your complainant, viz.: to the damage as aforesaid of three thousand dollars, all through the fault and carelessness of the parties having the care of and using said road and the engine aforesaid, whereby by virtue of the statute in such case provided, the parties aforesaid have, as complainant charges, become liable to pay your complainant the full value of such wood and timber thus destroyed as damages for such injury.

"And your complainant further avers that the property and ownership of said railroad was formerly in the European and North American Railway Company, which company, duly incorporated and organized under act of incorporation from the legislature of said state, built and finished said railroad, and were the legal owners thereof;—that while owners thereof, said Railway Company by deed bearing date March 1, 1869, conveyed the same in mortgage to J. Edgar Thompson and Hannibal Hamlin in trust to secure a certain large number of bonds for one thousand dollars each, or sums equivalent, thereto,

amounting in all to two million dollars, all of which remain due and unpaid at this time, excepting as hereinafter described;— that said Thompson having deceased, William B. Hayford was appointed by said court, according to law, to take his place as such trustee, and having been so appointed duly accepted said trust; that said company having failed to pay its said bonds and coupons attached thereto, according to the terms of said mortgage, the said Hamlin and Hayford, on petition of the holders of said bonds, were by said court's order duly placed in possession of said road as such trustees for the benefit of said bondholders, and as their agents as well as trustees, and they accordingly, under and by virtue of such order and judgment of said court, did take immediate possession of said railroad, said order having been passed on September 22, 1876, and thereafter as such trustees for said bondholders and for their benefit, they, the said trustees, continued to operate said road and run the engines and trains of said road over and along the same, from said Bangor to said Vanceboro, and across and over the said lands of this your complainant, until the thirteenth day of October, A. D. 1880, they, said trustees, duly accounting to said bondholders for all income and proceeds thereof; and that said fire, by which your complainant's lands were burned over as aforesaid, was kindled and promoted by the locomotive engine of one of the trains so run and operated by said trustees as aforesaid, for the benefit of said bondholders.

"And your complainant further gives the court to be informed that the said company, mortgagor as aforesaid, having failed to pay its bond coupons as provided in and by said mortgage, the said bondholders in manner provided by law on the third day of October, A. D. 1877, commenced proceedings to foreclose said mortgage and said proceedings having been legally prosecuted, the said mortgage was fully foreclosed on the third day of October, A. D. 1880, the said fire having taken place within said time, and that thereupon the holders of said mortgage bonds, and thus of said mortgage itself, under and according to the provisions of the statute in such case provided, on the thirteenth day of October, A. D. 1880, formed and organized

themselves into a corporation under the name of the European and North American Railway, being the company against which this suit is instituted, and thereupon, upon such organization, the said trustees conveyed the said railroad and its appurtenances and all the rights of said trustees, to said corporation thus newly formed, and the said corporation then and there accepted said conveyance, the same being subject to all liens and charges and to the payment of same, which were incurred in the running of the road as aforesaid by said trustees, for their benefit.

"And thereupon your complainant being aggrieved by the loss suffered by him as aforesaid by the fire communicated as aforesaid by the locomotive engine of said road, while so run by said trustees, in the interest of said bondholders, did commence an action at law before said court to recover damages therefor against said new corporation formed by such bondholders, and also another action at law against said trustees, being the defendants, aforesaid in this suit. And so the said actions having been tried before the said court, as a court of law, after mature deliberation they have decided that no such suit at law can be maintained against either, and therefore have ordered judgment for defendants with costs in both.

"Whereupon your complainant alleges, that he having suffered a great injury as aforesaid to his property, and having by the constitution of the state, therefor "a remedy by due course of law"— and the court having as aforesaid decided that he has no remedy by action, and thus in the language of the statute, being without "a plain, adequate and complete remedy at law."

"Therefore may it please your honors to grant to your orator your writ of subpœna directed to said defendants named as aforesaid, therein requiring them at such time as to your honors may seem fit, to appear and answer to the allegations of this bill—and that thereupon, after a proper hearing of the parties, you would order and decree, that the damages suffered as aforesaid by your orator, by the fire communicated as aforesaid, by the locomotive engine of the train so run and operated by said trustees, in the interest and as the agents of said bondholders, and thus of said new corporation, are and form an equitable

lien and charge upon said railway, and thus an equitable mortgage of the property so held at the time by the trustees and afterwards conveyed as aforesaid by said trustees to said new company, defendant herein; and further that the said company be ordered or charged to pay all damages suffered as aforesaid, by reason of said fire under the circumstances detailed as aforesaid, the same to be assessed in such a manner as to your honors may seem fit and proper, the same to be paid within such time as your honors may think proper to allow and determine, and in default of such payment, that a forfeiture or sale of said road, or such other remedy as to your honors may seem fit and proper be ordered, to the end that full payment may be assured of all damages to be so assessed, with costs.

"And further that your honors may award and decree such other and further remedy in the case as to equity may appertain in the premises.

Lewis F. Stratton.
By Albert W. Paine, his attorney."

A. W. Paine, for the plaintiff.

Charles P. Stetson, for the defendants.

DANFORTH, J. This is a bill in equity, before the court upon exceptions. The presiding justice "ruled *pro forma* that upon the facts stated in the bill, it is not sustainable." The answer is made a part of the case, but no proof has been put in, and there is no occasion for any, for in considering these exceptions, we must assume the facts stated in the bill as true.

The case shows a claim for damages done to the complainant's land, over which the railroad was located, by fire communicated from the locomotive engine in use upon the road at the time. The road was in the possession of and operated by the defendants, Hamlin and Hayford, as trustees, under a mortgage given by the original corporation to secure bonds issued by that company. The trustees had commenced proceedings for a foreclosure which was completed October 3, 1880; and on the thirteenth of the same month they "conveyed the road with its appurtenances and all the rights of said trustees" to the defendant company, a

corporation organized by such of the bondholders for whose benefit the mortgage was given, as chose to come in.

It has been decided that neither of these parties are personally liable in an action at law for the damages claimed. *Stratton* v. *E. & N. A. Ry.* 74 Maine, 422. Are they or either of them liable in equity and to what extent?

That equity is a proper, if not the only remedy, there can be no doubt. It is expressly given by the act of 1877, c. 197, which is an amendment of R. S., 1871, c. 77, § 5, p. 6, providing for equity jurisdiction "in cases arising out of the law, providing for the application of receipts and expenditures of railroads by trustees under mortgage."

The foundation of the plaintiff's claim rests upon R. S., 1871, c. 51, § 32, which is in these words: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury." This provision first enacted in 1842, c. 9, § 5, was with some change of language incorporated into the R. S., of 1857, and has been continued in the form in which we now find it, up to the present time. If we consider this act as a part of the charter under which the plaintiff's land was originally taken, it gives him no vested rights as against these defendants. As it originally stood, the provision was that for an injury done, "by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible," &c. This was the provision when the charter was granted and when the land was taken. This gave the claim against the corporation owning the railroad, and against that alone. In this case the injury occurred before the foreclosure was completed, and hence while the original corporation was the mortgagor and the owner against all, except the mortgagee. But before the injury the change was made, the party using the engine became liable, and that change is recognized as valid. If then, it may be changed in one respect, it may be in another. But this change has been more comprehensive than that already referred to. In 1857, c. 57, provisions were made by which the trustees might take possession under a mortgage, in which the covenants had been broken, and under

which the liability of the trustees was limited to the funds in their hands, and personally to malfeasance and fraud, as now. This was long previous to the injury complained of. Thus, though the law upon which this claim rests has not been repealed, it has been materially changed, and by other sections modified from time to time without any questions raised as to the right of the legislature to do so, although in many instances such change and modifications must have interfered with vested rights, if the original provision was so a part of the charter as to render this liability to pay for such injury a part of the consideration for the land taken, or for the license for running over the land.

But in the strict sense this law was not a part of the charter, or of any charter, but rather a public law affecting the public generally, and, therefore, within the control of the legislature. That it is within the power of the legislature to grant railroad charters with the right of eminent domain, making provisions for the payment of damages for private property taken, must now be conceded. In this, as well as other charters, provision for such payment, independent of this act, providing for the payment of injury from fires, had been made and payment received or waived by the land owner. This act was passed in consideration of the hazard arising from the use of the engine, not to the land owner particularly, or chiefly, but to the citizens generally, and without a consideration moving from any citizen, except that general right of protection which all may claim from the sovereign power, which gives no vested right to any one, but rests in the discretion of the legislature. What is conclusive upon this point is the fact that the law does not apply exclusively to the owner of land taken, but as well to every person who owns property liable to be burned, and within the reach of fire that may be communicated by the engine, though not entitled to damages, on account of the location of the railroad. The legislature may then modify or even repeal the law if it sees fit.

But the law has not been repealed. It still stands, but the corporation to which it originally applied in its full force, and which would have been liable as the owner of the road, is not now liable, for at the time of the injury it was not in the use of

the engine. Nor was the defendant corporation in any legal sense, operating the road at the time of the injury, for it was not then in being. The trustees were operating the road, and were so far within the terms of the statute. But in a subsequent section of the same chapter their duties and liabilities are fixed. The old corporation which would otherwise have been liable to pay this claim, had become insolvent, unable even to pay the lien upon the road. It was, therefore, taken under the mortgage in accordance with these provisions of law, but as the road is of comparatively small value, unless it can be continued in use, and as the mortgage covered the franchise, and as it is a matter of public interest the legislature saw fit to authorize the trustees, not only to take possession, but to run it in the interest of all concerned. The trustees, though selected by the bondholders, were affirmed by the court, and may be deemed similar to assignees in insolvency and the property in the keeping of the law. It was, therefore, not only competent but necessary for the legislature to provide for the duties and liabilities of the trustees, while in possession of and operating the road. This it has done, and while all liens are preserved, as the road is operated very largely to preserve these liens and make them valuable, provision is made for the running and other expenses to be paid from funds which might otherwise belong to the mortgagees and be applied in the reduction of their debt. But this liability of the trustees is expressly limited to funds or property in their hands, except for malfeasance or fraud; for that they would be personally liable, as well as when they assume any liability by contract or otherwise. They are to "keep an accurate account of the receipts and expenditures of such road." "They shall from the receipts, keep the road, buildings and equipments in repair, furnish such new rolling stock as is necessary, and the balance, after paying running expenses, shall be applied to the payment of any damages arising from misfeasance in the management of the road, and after that according to the rights of the parties under the mortgage." The plaintiff's claim is equally a lien upon the receipts, whether arising with or without misfeasance or carelessness even. It is, in fact, incidental to the running of the road,

and may be considered a part of the running expenses, as the ordinary repairs of the road or equipments made necessary by wear or accident. If it had been paid by the trustees and charged in their account rendered the new company, it would have been allowed as a legal expenditure. Whether it is a lien upon the property of the road specifically covered by the mortgage, it is not necessary now to decide. If there is any of the money or property now in the hands of the trustees, upon which there is this equitable lien, they are liable to account for it under this process.

The bill alleges that the trustees "duly accounted to said bondholders for all income and proceeds" of the road, and that upon the organization of the bondholders into a new corporation, which is the defendant company, they conveyed to said corporation, "the said railroad and its appurtenances, and all the rights of said trustees."

In the answer the respondents say, "that in October, 1880, when they, said Hamlin and Hayford, as trustees, as aforesaid, did give possession of said railroad and make conveyance as aforesaid to said new corporation, they did pay, give and deliver all the property, moneys, accounts in their charge to said new corporation, and thereupon said trustees, were discharged."

This would be a discharge of the trustees from their trust, but leave them liable still to account for their stewardship to whomsoever, by the terms of the trust, had a right to call upon them. But what is, perhaps, of more importance in this case, is, that if this is not a direct statement of the fact, it affords a very strong inference that the trustees have paid money or conveyed property, or done both, to the defendant corporation which in equity should have liquidated this plaintiff's claim. If so, by a familiar and wide spreading principle of equity, the corporation is liable in this process to account for it to the extent to which it has been so received, whether it has been appropriated to reduce the bonded indebtedness, which under the circumstance so far as relates to money received by the trustees as income from the road, is secondary to this claim, or to any purpose which has not a priority to it. This principle of equity is sustained and

illustrated in *Amory* v. *Lowell*, 1 Allen, 504, and cases there cited.

But the difficulty in this case is, that the fundamental facts upon which the plaintiff's claim must rest, are not alleged in the bill. The decree cannot go beyond the allegations and proof. The liability of the trustees rests upon the fact that when the injury complained of occurred, and a demand made upon them for the payment they had in their hands, or under their control, money or property, which under the principles herein laid down, should have been appropriated to the payment of the damage. In the bill we find no such allegation. The only allegation in reference to this matter is the statement that the "trustees continued to operate said road and run the engines and trains . . . over the lands of this complainant, until the thirteenth of October, 1880, they, said trustees, duly accounting to said bondholders for all income and proceeds thereof." There is nothing in this statement tending to show any delinquency on the part of the trustees, but the inference would rather be that they have in all respects performed their duties.

The liability of the defendant corporation must depend upon its having received money or property from which the plaintiff is entitled to receive his pay. No such allegation appears. The only statement is that "upon such organization, the trustees conveyed the said railroad and its appurtenances, and all the rights of the said trustees to said corporation, thus newly formed."

Hence, as the bill now is, the ruling of the presiding justice was correct, and the exceptions must be overruled, unless upon motion at *nisi prius* the bill is amended.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

WALTON, J., did not sit.

NATHANIEL WILSON, JUNIOR, in equity,

vs.

MELLVILLE W. PAGE and others.

Penobscot. Opinion June 7, 1884.

Mortgage. Foreclosure. Notice.

A recital that "Nathaniel Wilson, of Orono, Penobscot county, by his deed of June 3rd, 1862, recorded in Penobscot registry of deeds, volume 320, page 118, conveyed to S. H. Blake, of Bangor, in mortgage, a certain parcel of land in said Orono, containing six and one-half acres, more or less, being the same premises conveyed to said Blake, by James Page, 30 March, A. D. 1858, recorded in Penobscot registry of deeds, vol. 285, page 184, excepting a small portion of same, heretofore released by said Blake to Davis Estes; meaning, hereby, the same premises conveyed by said Blake to said Wilson, June 3rd, 1862," is a good description in a notice for foreclosure.

It is not invalidated because the excepted parcel was conveyed not to Davis Estes, but to his wife, Susan Estes, the same misnomer appearing in the deed to and in the mortgage from Wilson, and no misapprehension or mistake arising from it.

The notice is not required to be published "three weeks successively," so as to continue for the space of twenty-one days; it is to appear in three consecutive weekly issues of a newspaper.

ON REPORT.

Bill to redeem inserted in a writ dated March 1, 1883. The notice of foreclosure was given in August, 1878, and the legality of the foreclosure was the only question at issue before the law court. The opinion states the facts.

N. Wilson, for the plaintiff, cited: *Blake* v. *Dennett*, 49 Maine, 102; *Chase* v. *Savage*, 55 Maine, 543; *Chase* v. *McLellan*, 49 Maine, 375.

Barker, Vose and Barker, for the defendants, cited: *Allen* v. *Bates*, 6 Pick. 460; 20 Pick. 121; 22 Pick. 277; 9 Gray, 351; *Pearce* v. *Savage*, 45 Maine, 90; *Chase* v. *Savage*, 55 Maine, 543; *Bragg* v. *White*, 66 Maine, 157.

PETERS, C. J. Samuel H. Blake, conveyed a parcel of land to Nathaniel Wilson. Wilson mortgaged it back to Blake by a

description the same as that in the deed. Blake foreclosed the mortgage by the same description, and sold and conveyed the foreclosed premises to the respondents by the same description. The complainant seeks to redeem upon the same description, and his point is that the foreclosure proves to be ineffectual because the notice does not "intelligibly" describe the premises. The idea is this: That the description was sufficient to convey by, to mortgage by, to sell and again convey by, to found a bill to redeem upon, and not sufficient when embodied word for word in a notice to foreclose.

Our own opinion is, that the old, familiar description affords a better notice than any other would. Ordinarily, the mortgagee is not required, in his notice of foreclosure, to give a better description of premises to, than he received from, the mortgagor. The statute says the description must be "intelligible." The main design of the statute is, not to require more description than the mortgage affords, but to prevent unintelligible descriptions, when, as in many cases, short notices contain less. The description in all mortgages and deeds, as well as in notices to foreclose, must be intelligible, "capable of being understood or comprehended," in order to render the instrument valid. Descriptions, however, rarely prove themselves. The identity of an estate conveyed must generally be shown to some extent by parol evidence. *Chase* v. *McLellan*, 49 Maine, 375; *Smith* v. *Larrabee*, 58 Maine, 361.

The premises are thus described in the published notice: "Nathaniel Wilson, of Orono, county of Penobscot, by his deed of June 3, 1862, recorded in Penobscot registry of deeds, vol. 320, page 118, conveyed to S. H. Blake, of Bangor, in fee and mortgage, a certain parcel of land, in said Orono, containing six and one-half acres, more or less, being the same premises conveyed to said Blake by James Page, 30 March, A. D. 1858, recorded in Penobscot registry of deeds, vol. 285, page 184, excepting a small portion of same heretofore released by said Blake to Davis Estes; meaning, hereby, the same premises conveyed by said Blake to said Wilson, June 3, 1862." A reference to the deed from Page, and the references contained

in that deed, are enough, finally, to disclose that lot number eleven, in Orono, according to some survey, was intended to be conveyed. There is no evidence in the case to indicate any difficulty in tracing out the boundaries of the land covered by the earlier deeds. Blake's grantor received from E. P. Treat a conveyance of the land plainly described by metes and bounds. The mortgagee and his assignee knew that a mortgage existed. The notice was sufficient to inform them that a foreclosure of it was initiated. See *Welch* v. *Stearns*, 74 Maine, 71, 75.

The description of premises first embodies an entire tract, and then deducts and excepts therefrom a small parcel conveyed by Blake to Davis Estes. It turns out that the conveyance was not to Davis Estes, but to his wife, Susan Estes. The same misnomer appears in the deed to, and in the mortgage from Wilson, as well as in the deed of Blake to the respondents. No misapprehension or mistake appears to have been occasioned by the misnomer. Probably it better identified the mortgage, to take even its defective description. *Ryder* v. *Mansell*, 66 Maine, 167.

It is contended that the notice was not published "three weeks successively" before recorded, that is, not twenty-one days before. The law does not require it. It was published in three consecutive weekly issues of the newspaper. The record in the registry of deeds must be "within thirty days after such last publication." Therefore it may be within one day after. The right of redemption expires in three years from the first publication. R. S., c. 90, § 6.

Bill dismissed with costs.

BARROWS, DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

GEORGE CROCKER and wife, *vs.* JOHN MCGREGOR.

Penobscot. Opinion June 7, 1884.

Evidence. Fright of horses.

In an action for an injury to the plaintiff alleged to have been caused by the fright of her horse, by steam escaping from the defendant's mill, situated on the margin of the public highway; *Held*, that evidence was admissible to show that other horses, ordinarily safe, when driven by it on other occasions a short time before and after, when the construction and use of the mill were the same as when the plaintiff was injured, were frightened by it.

ON EXCEPTIONS and motion to set aside the verdict, by the defendant.

The case is stated in the opinion.

John Varney, for the plaintiffs, cited: *Hill* v. *R. R. Co.* 55 Maine, 439; *Eaton* v. *N. E. Tel. Co.* 68 Maine, 63; *House* v. *Metcalf*, 27 Conn. 631; *Calkins* v. *Hartford*, 33 Conn. 57; *Darling* v. *Westmoreland*, 52 N. H. 401; *Kent* v. *Lincoln*, 32 Vt. 591; 1 Whar. Ev. Title, "Relevancy;" 74 N. Y. 603; 11 Hun, 218; *Avery* v. *Syracuse*, 36 Hun, 537.

Charles P. Stetson, for the defendant, contended that the testimony of witnesses to the effect that other horses were frightened on days before and after the accident by steam at the defendant's mill, was inadmissible. True, there is a conflict of the authorities upon this question, but Greenleaf, Starkie and Phillips, and the courts of this state and Massachusetts, are against the admission of such evidence. *Hubbard* v. *R. R. Co.* 39 Maine, 507; *Parker* v. *Portland Pub. Co.* 69 Maine, 173; *Collins* v. *Dorchester*, 6 Cush. 396; *Aldrich* v. *Pelham*, 1 Gray, 510; *Kidder* v. *Dunstable*, 7 Gray, 104; *Gahagan* v. *B. & L. R. R.* 1 Allen, 187; *Schoonmaker* v. *Wilbraham*, 110 Mass. 134; *Blair* v. *Pelham*, 118 Mass. 420.

After referring to cases in conflict, counsel argued that the rule adopted in the cases decided by the courts of Maine and Mass-

achusetts, and the reasoning of them are more satisfactory and most likely to produce a fair trial in this class of cases.

If the testimony, as to other horses being frightened at other times is admissible, the defendant must come into court prepared to try many cases instead of one, and bring witnesses in each case to show the character of the horse, the skill of the driver, the condition of the harness and carriage, whether the steam caused the fright, and all the circumstances.

It is said that such testimony is admitted only for the purpose of showing that the steam from the mill might frighten ordinary horses. But the jury cannot appreciate or make application of this nice distinction. The testimony is not confined by them to the purpose for which it is admitted, but affects their judgment and conclusion as to the other points of the case.

LIBBEY, J. This action comes before this court on exceptions and motion. It is for an injury to the female plaintiff, alleged to have been caused by the fright of her horse by steam escaping from the defendant's mill, situated on the margin of the public highway, which the plaintiff alleges was a public nuisance to the travel over the way.

The exception is to the admission of evidence produced by the plaintiff. Witnesses for the plaintiff were permitted to testify that, when travelling by the mill with horses well broken and ordinarily safe, their horses were frightened by the escaping steam. This evidence was limited to a short time before and after the plaintiff's injury, when the mill was in the same condition as when she was injured; and was admitted for the sole purpose of showing the capacity of the escaping steam to frighten ordinary horses. We think it was properly admitted.

The issue was, whether the mill as constructed and used, with the steam escaping into the way, was a nuisance to the public travel. Evidence showing that it naturally frightened ordinary horses when being driven by it, was competent to show its effect upon the public travel, its character and its capacity to do mischief. Its effect on horses was not dependant upon the acts of men, which may be the result of incapacity or negligence, but

was caused by action of the inanimate thing upon an animal acting from instinct. It was not to show that other parties were injured at the same place by the same cause, and is, therefore, distinguishable from cases against towns for injury from defects in a highway, in which this court has held that evidence of accidents to others at the same place is inadmissible, because it raised too many collateral issues. Here the only issue is the effect of the sight and sound of the steam upon ordinary horses, as tending to show that travel over the way was thereby rendered dangerous. *Hill* v. *P. & R. Railroad Co.* 55 Maine, 439; *Burbank* v. *Bethel Steam Mill Co.* 75 Maine, 373. We think the competency of the evidence rests upon the same principle as evidence, in actions against railroad corporations for damage by fire, alleged to have been set by coals or sparks from a passing locomotive, that the same locomotive, or others similarily constructed and used, have emitted sparks and coals, and set fire at other places and on other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of. *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454; *Whitney* v. *Inh's of Leominister*, Mass. Supreme Court, not yet reported. 17 Rep. 173.

We have carefully examined the evidence reported, upon which the motion to set aside the verdict is based; and while we think the verdict might properly have been for the defendant, still there is sufficient in favor of the plaintiff, if the jury believe it, to authorize the verdict for her. We cannot say that the verdict is so clearly wrong as to require the court to set it aside.

Exceptions and motion overruled.

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

CHARLES W. BERRY, Petitioner for Review,

vs.

DANIEL B. TITUS, Administrator.

SAME *vs.* SAME.

Knox. Opinion June 9, 1884.

Review. Exceptions. Practice.

A review granted "so far only as necessary to revise the assessment of damages" is substantially upon condition that at the new trial the petitioner shall be precluded from raising any other issue, and one that the court in the exercise of its legal discretion may lawfully impose.

Exceptions do not lie to the granting of a review in the exercise of a legal discretion.

ON EXCEPTIONS.

Two petitions for review.

At *nisi prius* the presiding judge made the following rulings and decisions which were put in writing by him and filed in the case, viz. . . .

"At the March term 1879, Charles Titus, the respondent's intestate then in full life, was defendant in a réplevin action brought by the petitioner Berry for a horse fifteen years old and not worth over fifty dollars. Said Charles Titus had the action dismissed for want of a sufficient replevin bond and he had judgment for a return, and the clerk was appointed to assess the damages.

"In May following Charles Titus died. In the latter part of August, an administrator having been appointed, the damages for detention were assessed at one hundred and seventy-five dollars, and judgment was made up as of the March term; and this is the suit which the petitioner seeks to review in one of the above petitions.

"The administrator forthwith brought an action returnable at the September term, 1879, upon his judgment for damages and

recovered in the same, and the other petition relates to this suit.

"And now at the September term, 1882, having heard the testimony in the above entitled causes, I am satisfied that no sufficient reason for reviewing said action of replevin so far as the title and right of possession of the horse are concerned, is shown; but I find that through mistake, accident and misapprehension, injustice has been done in the assessment of the damages which were assessed in said action of replevin, and I therefore grant a review of the said action of replevin so far as may be necessary to revise the assessment of damages therein; and I grant the review of the other action which is so connected with this action of replevin that the same ought to be held to abide the final result upon the review of the assessment of damages in the action of repelvin."

To all which rulings and decisions so far as they applied to granting a review of a part of the original judgment therein described, and to the decision of the judge ordering a review of the second judgment, the defendant excepted.

C. E. Littlefield, for the petitioner, cited: *Jackson* v. *Gould*, 72 Maine, 335; *Tuttle* v. *Gales*, 24 Maine, 395; *Jones* v. *Eaton*, 51 Maine, 387; *Boyd* v. *Brown*, 17 Pick. 453; *Dyer* v. *Rich*, 1 Met. 192; *Haley* v. *Dorchester Ins. Co.* 12 Gray, 545; *Kent* v. *Whitney*, 9 Allen, 62; *Negus* v. *Simpson*, 99 Mass. 388; *Hunter* v. *Farren*, 127 Mass. 481; *Merchants' Ins. Co.* v. *Abbott*, 131 Mass. 397; *Robbins* v. *Townsend*, 20 Pick. 345; *Winn* v. *Columbian Ins. Co.* 12 Pick. 279; *Foye* v. *Patch*, 132 Mass. 113.

A. P. Gould, for the defendant, contended that there could be no review of a part of a judgment, and that it was error in the judge to direct that the judgment be opened for the reassessment of damages, while he decided that there was no ground for a general review of the action; that there is no authority for such a decision and the court has held that it can not be done in *Sturdivant* v. *Greeley*, 4 Maine, 534; that the statute is the same as when *Sturdivant* v. *Greeley*, was decided and the

whole statute is adapted to a review of an entire judgment only; and there is no authority for the issuance of a writ of review, which is limited to the retrial of only a part of the original judgment, and no proceedings are provided which are adapted to such a partial retrial.

Counsel further contended that no legal ground was set forth in the petition for a retrial on the question of damages; and that there was no error in assessment of damages by the clerk.

HASKELL, J. The trial at *nisi prius* was upon two petitions for review. The first sought to review an action of replevin, wherein a judgment for a return of the horse replevied was ordered and that the damages for the taking should be assessed by the clerk, who thereupon assessed the same at one hundred and seventy-five dollars, and entered judgment against the petitioner accordingly.

The second sought to review a judgment recovered in an action upon the judgment for damages recovered in the replevin suit. The presiding justice found that through mistake, accident and misapprehension, injustice had been done in the replevin suit by the assessment of damages, and therefore granted a review of the same so far as necessary to revise the assessment of damages therein; and also granted a review of the other action, which he states in the exceptions "is so connected with this action of replevin that the same ought to be held to abide the final result upon the review of the assessment of damages in the action of replevin." To these "rulings and decisions, so far as they apply to the granting a review of a part of the original judgment therein described and to the decision of the judge ordering a review of the second judgment, the defendant excepted" and his exceptions were allowed.

The justice holding this trial was authorized by statute to grant one review in these actions, if he should find that by accident or mistake, "justice had not been done and that a further hearing would be just and equitable." The justice did find that through accident and mistake, injustice had been done in the action of replevin in the assessment of damages. This

finding is conclusive, and to it exceptions do not lie, and none were taken, but to the action of the court in granting a review of the replevin suit so far only as necessary to revise the assessment of damages therein, exception was taken, and it is argued that an action cannot be reviewed in part, that a review must be granted or denied, and if granted, that a retiral of all the issues in the original action must follow.

The grounds for review in these cases appealed to the discretion of the court. It could not be had of right, but solely because the court in the exercise of its judicial discretion saw fit to grant it. A court in the exercise of that discretion may impose terms and conditions upon which the rights or privileges granted shall be exercised or enjoyed. *Tuttle* v. *Gates*, 24 Maine, 397; *Jones* v. *Eaton*, 51 Maine, 386.

The granting of the review in the replevin suit was substantially upon the condition, that at the retrial the petitioner should be precluded from raising any other issue than to contest the damages to be assessed against him for the taking of the horse replevied. The condition imposed is in the defendant's favor; it is reasonable, and of it he should not complain.

Moreover, the court granted a review of the action of replevin, "so far as may be necessary to revise the assessment of damages therein." If it is necessary to grant the review without any conditions, terms or limitation, in order to reach the injustice complained of, then such was the decision of the court, and the review has been granted accordingly. *Wilbur, Pet'r for Review*, v. *Dyer*, 39 Maine, 169.

Upon the second petition, the court granted a review of the action, wherein judgment was recovered upon the judgment in the replevin suit. In so doing the court does not appear to have ruled upon or decided any question of law to which exception was taken, but acted solely within the scope of its legal discretion not subject to exception or appeal. It is true that the court expressed its views as to the proper disposition of the suit, which, no doubt, will be followed in dealing with it at *nisi prius*, but they were not rulings in matters of law, and could not be excepted to. *Emerson* v. *McNamara*, 41 Maine, 565;

Scruton v. *Moulton*, 45 Maine, 417; *Sturtevant* v. *Randall*, 49 Maine, 446.

In both cases the entry must be,

Exceptions dismissed.

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

PLEASANT HILL CEMETERY

vs.

ISAAC N. DAVIS AND RETIAH D. JONES, trustee.

Androscoggin. Opinion June 10, 1884.

Trustee process. Assignment law. Insolvent law.

The former assignment law, did not create or even give validity to assignments for benefit of creditors, but only regulated or controlled them. The repeal of the assignment law, by the enactment of the insolvent law, left such assignments to be governed by the rules of the common law, when the insolvent law is not invoked.

Where a creditor, not a party to the assignment, instead of proceeding under the insolvent law, resorts to a trustee process of attachment in a common law action, he cannot, in the absence of fraud, revoke or undo what has been done and executed at the time of his attachment, nor by such process avoid any rights then acquired by third parties under such assignment.

ON EXCEPTIONS.

This was an action of assumpsit; the principal defendant was defaulted, and the question reserved for the full court was the amount for which the trustee should be charged.

The alleged trustee disclosed an assignment to him by the principal defendant, dated November 14, 1878, under the provisions of c. 70, of the R. S. of 1871. At the May term, 1879, of the probate court for Androscoggin county, the alleged trustee filed his first account and the same was settled, and the sum of $1278.63, by order of said court, was distributed to the creditors, who had become parties to the assignment. The plaintiff was

not one of the parties. In that account the alleged trustee charged and was allowed "forty days time and labor in taking inventory of and selling goods, two hundred dollars." At the December term, A. D. 1879, of the probate court, the alleged trustee filed his second account, and the same was duly settled, and the sum of $2095.19 was ordered distributed to the creditors who had become parties to the assignment. In that second account the alleged trustee charged and was allowed "percentage upon disbursements of $4068.36," two hundred dollars. At the time of the service of this writ, there was in the hands of the alleged trustee and now remains, the sum of $257.75, collected from the estate of said debtor in cash and certain promissory notes enumerated in the disclosure. At the time of service of the writ on the alleged trustee, all the sums due the creditors under the two orders of distribution above referred to, had been paid except fifty dollars. The alleged trustee had received from the creditors, to whom said sum was ordered distributed, their verbal orders to pay said sum to Mrs. Davis, the wife of Isaac N. Davis, the debtor, and had agreed to so pay said sum. After the service of the writ upon him, he paid said sum of fifty dollars to the creditors to whom it had been ordered distributed, viz: Forty dollars to Fletcher and Company, and ten dollars to Harris and Company.

The presiding justice ruled *pro forma* that the said alleged trustee should be charged for $257.75, and the notes named in said disclosure, subject to a prior attachment in a suit against the same principal defendant in favor of Stetson L. Hill, now pending in this court.

To this ruling the plaintiff alleged exceptions.

N. and J. A. Morrill, for the plaintiff.

The assignment law was repealed by the insolvent law. *Smith* v. *Sullivan*, 71 Maine, 150.

In *Lewis* v. *Latner*, 72 Maine, 487, it was held that a person summoned as a trustee who holds goods, effects and credits of the principal defendant by virtue of an assignment under R. S., 1871, c. 70, will be charged as trustee.

The two sums of two hundred dollars each, which Jones charged and retained for services, was as much in his hands at the time of the service of the writ as the $257.75. He cannot claim it on the ground that it was allowed him by the judge of probate, for that court had no jurisdiction. Although this seems to be a new question in this state, we find two cases in Massachusetts directly in point. *Bartlett* v. *Bramhall*, 3 Gray, 257; *Brown* v. *Coggeshall*, 14 Gray, 134.

Counsel also insisted that the trustee should be charged for the fifty dollars which he paid two of the creditors after the service of the trustee writ, and claimed that the trustee should be charged for $707.75, and the notes named in his disclosure.

F. M. Drew, for the trustee, cited: Bump, Fraudulent Conveyances (1st ed.), 336, 422–3; *Canal Bank* v. *Cox*, 6 Maine, 395; *Nat. Merchants' and Traders' Bank* v. *Eagle Sugar Refinery*, 109 Mass. 38; *Brown* v. *Silsby*, 10 N. H. 521; *Guild* v. *Holbrook*, 11 Pick. 101; *Ames* v. *Blunt*, 5 Paige, 20; *Jacobs* v. *Remsen*, 36 N. Y. Ct. App. 668.

EMERY, J. The assignment in this case from the debtor Davis to the assignee Jones for the benefit of Davis' creditors was made, and the trusts executed, in accordance with the old assignment law, R. S., 1871, c. 70. If that chapter had been in force at the time, this assignment and the proceedings under it were apparently regular and valid, and the plaintiff here could only hold such surplus as might revert to the debtor after full administration. But the enactment of the new insolvent law of 1878, repealed the old assignment law of 1871, *Lewis* v. *Latner*, 72 Maine, 487, and at the time of this assignment, there was no statute authorizing it, and the probate court had no jurisdiction in any proceedings under it, and could give them no validity.

The plaintiff therefore, while not claiming there was actual fraud, sufficient at common law to avoid the conveyance, does claim that this transfer of property from Davis to Jones, to administer for Davis' creditors, was void in law by force of the insolvent law, and that Jones had no right to take possession of

the property, nor to administer it, and that even now, after full administration, could be charged in this process, if necessary, for all such property so taken by him. But the plaintiff, in fact, only claims that the trustee be charged, additionally, with the fifty dollars paid over to creditors since the attachment and with the amount reserved by him as compensation for services under the assignment.

This assignment was contrary to the provisions of the insolvent law, and could, of course, have been avoided at any time, and the assigned property recovered from Jones by the assignee in insolvency, if Davis had been put into insolvency and that statute set in motion. *Smith* v. *Sullivan*, 71 Maine, 150. The plaintiff, however, did not invoke the aid of the insolvency statute, but resorted to a process of attachment in a common law action. This raises the question whether and how far this assignment, and the proceedings under it, can be avoided by an attaching creditor.

It is common learning that at common law an insolvent debtor could convey his property to certain of his creditors to pay them in full, and leave the others unpaid. Such a conveyance to one creditor, paying him in full, no trust being reserved for the debtor, could not be avoided by a subsequent attaching creditor. Conveyances of all or a portion of a debtor's property to trustees for the benefit of some or all of his creditors, were also early recognized in Maine and Massachusetts as valid in favor of such creditors as assented thereto, against subsequently attaching creditors. They were not considered against the policy of the law. In the absence of any statutes providing for the distribution of an insolvent's estate, such conveyances or assignments seemed to be the only means by which an insolvent could do justice to all his creditors. It seems to have been a common way of avoiding the harshness of the "grab law," as the attachment law has been called. *Hatch* v. *Smith*, 5 Mass. 42; *Lupton* v. *Cutter*, 8 Pick. 303; *Brinley* v. *Spring*, 7 Maine, 241. Only such creditors, however, as had previously assented to the assignment, were protected against attaching creditors. As to prior assenting creditors the assignments were upheld, and attaching creditors only came in

before such creditors as had not previously assented. *Canal Bank* v. *Cox*, 6 Maine, 395; *Copeland* v. *Wild*, 8 Maine, 411. It will be seen from the cases cited, and from many others, that assignments like this were common, and were recognized by the courts as lawful before the enactment of any statute upon the subject; the first statute in relation to assignments for the benefit of creditors, having been passed in this state in 1836. These statutes did not create such assignments. They were enacted to regulate and control them. The repeal of the assignment laws, no new statute being enacted, would leave assignments as they were before the passage of the laws.

The insolvent statute of 1878, while repealing the chapter in relation to assignments, does not enact that such assignments shall be absolutely void as between the parties. They are not *contra bonos mores*. They stand good as before, at common law, until assailed by some one claiming rights against them under the insolvent law. Only an assignee under the authority of a court of insolvency can overthrow rights acquired by parties under this assignment. *National Mechanics' and Traders' Bank* v. *Eagle Sugar Refinery*, 109 Mass. 38, and cases there cited. *Hanscom* v. *Buffum*, 66 Maine, 246.

We think the plaintiff by this process of attachment cannot revoke anything that has been done prior to his attachment, and cannot diminish any rights then acquired by other parties. He must be content with things as he finds them at the time of his attachment.

The trustee would seem to have acquired a right to compensation. He was employed by the debtor to render the services. He did render them. He seems to have administered the estate to the satisfaction of all parties to the assignment. Apart from the insolvency statute which does not apply here, there seems to be no moral or legal objection to a debtor employing a suitable person to take his property, administer it, and pay his debts with it. He may do all this himself or he may employ one to do it, and if he does employ one, such person is entitled to reasonable compensation. The adjudication of the judge of probate upon the trustee's accounts or upon his charges, is of

course of no binding force as the judge had no jurisdiction, but the trustee rendered his accounts with his charges and they seem to have been assented to by all parties to the assignment. The trustee deducted the amount from the funds in his hands, and we think he had a right to. *Guild* v. *Holbrook*, 11 Pick. 101; *Canal Bank* v. *Cox*, 6 Maine, 395; *Jacobs* v. *Remsen*, 36 N. Y. Appeal, 668. In the case of *Bartlett* v. *Bramhall*, 3 Gray, 257, cited by plaintiff against the allowance of compensation, the assignment was avoided by insolvency proceedings. In that assignment too, it was expressly provided that in case of insolvency proceedings, the assignment should be void, and the trustee should turn over everything, deducting only his expenses, and disbursements, and enough for indemnity against liabilities. In *Brown* v. *Coggeshall*, 14 Gray, 134, cited by plaintiff to the same point, the trustee was assignee under insolvency proceedings against the debtor *in invitum* which proceedings were afterwards found to be void *ab initio*. The debtor never employed the trustee, never assented to his rendering any services about the property but resisted his interference. The trustee therefore could claim nothing for services against the debtor or an attaching creditor.

As to the fifty dollars in the trustee's hands, which had been figured in his distribution account, as accruing to certain creditors, parties to the assignment, that sum would be protected in their favor as prior assenting creditors against this attachment, upon the principles already stated. The sum belonged to the creditors to whom it had been assigned in the account. The trustee was holding it for them, not for the debtor. They had before the attachment directed the trustee what to do with it. The debtor could not recover it from the trustee, nor could an attaching creditor. The right of action was in the creditors to whom it was assigned. *Frost* v. *Gage*, 1 Allen, 262.

The case, *Lewis* v. *Latner*, 72 Maine, 487, does not conflict with our decision here. In that case the only question submitted was, whether the trustee was chargeable at all, whether the process was maintainable. It does not appear what was held by the attachment.

The trustee in this case has not excepted. The plaintiff only excepts, and his claim to have the trustee charged for anything additional, cannot be sustained.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.

THOMAS CROSWELL and another *vs.* ORRIN TUFTS.

Franklin. Opinion June 10, 1884.

Officer. Sale on execution. Attachment. Seizure.

An officer holding seven executions against the same debtor made seizure of debtor's real estate in season to preserve the attachments and gave due notice of sale, but failed to make the sale at the time appointed therefor; and thereupon he made a second seizure on six of the executions at the same time and after due notice sold the property. *Held*,

1. That the failure to sell at the time appointed under the first seizure dissolved the attachments made on the original writs.

2. That by the second seizure each judgment creditor acquired a lien on one-sixth of the land seized, if that part did not exceed in value the amount of his debt, and it was the duty of the officer to make the sale in a manner to secure to each his lien.

The seizure and return to the register of deeds, of the debtor's lands, on the ground that the service of the execution must be suspended by reason of the prior attachments, can be shown only by the officer's return thereof on the execution.

ON REPORT.

An action against a sheriff for the alleged malfeasance or misfeasance of a deputy in the service of an execution.

The writ was dated September 8, 1877. The plea was the general issue.

After the testimony was taken at the trial the case was withdrawn from the jury, by consent, and reported to the law court, who were to draw inferences as a jury might, and render judgment according to the legal rights of the parties.

The material facts are stated in the opinion.

H. L. Whitcomb, for the plaintiffs.

S. Clifford Belcher, for the defendant.

LIBBEY, J. The facts necessary to the determination of the rights of the parties in this case are these:

Seven of the creditors of the Sandy River Iron Foundry and Manufacturing Company, a duly organized manufacturing corporation, brought actions against said company, and at the March term of the Supreme Judicial Court, for the county of Franklin, on the 22nd day of March, 1877, judgment was rendered in each action. Successive attachments of real estate had been made on the writs, the plaintiffs' being the seventh and last in the order in which they were made. Executions were duly issued on each judgment and delivered about the same time, and within thirty days from the rendition of judgment, to A. T. Tuck, a deputy sheriff under the defendant, for service. On the 21st day of April following, within thirty days from the rendition of said judgment, said Tuck seized all the real estate of said corporation, in said county, on each of said executions, and duly advertised it for sale on the 25th of May, 1877, at ten o'clock, in the forenoon.

By reason of a mistake in the hour of sale, Tuck did not arrive till it was too late to make a sale under the notice given. And the same 25th of May, he made and returned a new seizure on each of the executions at the same time, and gave notice of sale on the 14th of June following. The sale was duly adjourned till the 21st of June, when he sold the lands on some of the executions, but made no sale, and applied no portion of the proceeds of sale on the plaintiffs' execution, and returned it August 1, 1877, in no part satisfied.

The defendant claims that the plaintiffs on the 25th of May, before the second seizure, agreed that Tuck should make the seizures at that time and sell on the executions in the order of the original attachments. This the plaintiffs deny, and on careful consideration of the evidence, taken in connection with the officer's returns, we are not satisfied that such an agreement was made.

Upon these facts what are the rights of the plaintiffs? When the officer failed to make sale upon the first seizure at the time appointed therefor, the attachments on the original writs were dissolved. All the executions were then in his hands. He seized all the lands of the debtor corporation on six of the executions at the same time, the other execution having been satisfied, and made return of the seizures. There is nothing in the case to relieve him from the legal consequenses of his returns. By them the plaintiffs obtained a lien on one undivided sixth part of the lands, if it did not exceed in value the amount of their debt and costs. *True* v. *Emery*, 67 Maine, 28. It was the legal duty of the officer to make sales and apply the proceeds thereof according to the legal rights of the parties under the seizure. He did not do so. For his default in that respect the defendant is liable to the plaintiffs for the loss they sustained thereby. The whole amount of the sales of the lands was one thousand one hundred eighty-one dollars and seventy-one cents. One-sixth of that sum is less than the amount due on the plaintiffs' judgment, and for that sum with interest from the 21st of June, 1877, the plaintiffs are entitled to judgment,

The plaintiffs claim to recover the whole amount of their debt upon another ground. They claim that after the seizure on their execution on the 21st of April, the further service of the execution was suspended, and the officer filed in the office of the register of deeds a copy of his return, etc., as provided in R. S., c. 84, § 24; and, that when the prior attachments were dissolved by the failure to sell on the 25th of May, it was his duty to proceed and perfect the seizure on their execution by sale of the property. The answer to this claim is that the officer made no return on the execution of such seizure, suspension of service, and return to the office of the register of deeds. Without such return on the execution by the officer, the plaintiffs' attachment was not preserved but was dissolved with the others.

If it is claimed that it was the duty of the officer to make such return and that he is liable for his neglect in that respect, the declaration is not framed to present such a case. It contains no averments of such neglect of duty; but if it did, we think it

may well be doubted if the case is one where the further service of the execution was suspended by a prior attachment, within the true construction of R. S., c. 84, § 24. The judgments were all rendered at the same time; execution was issued in each case and all of them put into the hands of the same officer for service within thirty days from rendition of judgment. We perceive no reason why service of all of them could not have been completed as provided in § 21 of the same chapter. In such case the plaintiffs would have got nothing on their execution as the proceeds of sale would have been exhausted in satisfying the prior attachments. The case however, does not require a decision of this question.

Judgment for the plaintiffs for $196.95 and interest from June 21, 1877.

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

STEPHEN GOULD

vs.

PATRONS' ANDROSCOGGIN MUTUAL FIRE INSURANCE COMPANY.

Cumberland. Opinion June 10, 1884.

Fire insurance. Sale of property.

A policy of fire insurance provided that if the building was sold or transferred, the policy would be rendered void, unless ratified to the assignee thereof, by the written consent thereon, signed by the president and secretary, or any two directors of the company. *Held*, that a sale of the buildings without a transfer of the policy, rendered the policy void.

ON report from the superior court.

An action upon a policy of fire insurance to recover for a loss by fire of the property covered by the policy.

The opinion states the material facts.

John J. Perry, for the plaintiff, contended that there was a sufficient transfer and assignment of the insurance policy; that Faunce was the agent of the company and the delivery of the policy with the written assignment made by Faunce, the agent, upon the back of the policy constituted a lawful transfer of the policy; that the oral assignment was valid in law and the reducing of that to writing was the carrying out of the understanding and intention of the parties, and the lack of signature to the assignment was cured by the actual delivery of the policy. Counsel cited: 16 Gray, 448; 56 Maine, 371; 122 Mass. 34; 1 Parsons, Contracts, (3d ed.) 197; *Littlefield* v. *Smith*, 17 Maine, 327; *Porter* v. *Bullard*, 26 Maine, 448; *Pollard* v. *Ins. Co.* 42 Maine, 221; *Jones* v. *Witter*, 13 Mass. 304; *Grover* v. *Grover*, 24 Pick. 261.

Counsel further contended that notice of the transfer and assignment to Faunce, the agent, was notice to the company, citing: Stats. 1873, c. 148, § 6, and 1874, c. 90.

If there was no expressed assent of the company to the transfer, it was because of the negligence of the agent or secretary, in either case the plaintiff was not in fault and should not suffer.

N. and J. A. Morrill, for the defendant, cited, *Tomlinson* v. *Monmouth M. F. Ins. Co.* 47 Maine, 232; *Eastman* v. *Ins. Co.* 45 Maine 307.

LIBBEY, J. On the 7th of July, 1877, the defendant company insured Eunice Crooker in the sum of one thousand dollars on her farm buildings against fire for the term of five years. She paid the cash premium and gave her deposit note for fifty-two dollars and fifty cents.

On the first day of May, 1878, she mortgaged the premises to one Luther Perkins. The policy was not assigned and no notice of the mortgage given to the defendants. October 25, 1879, she conveyed the premises by absolute deed to said Perkins. The policy was not assigned to Perkins, and nothing was said about it and no notice of the sale was given to the defendants.

April 5, 1880, Perkins conveyed the premises to the plaintiff with no agreement about the insurance. Some time afterwards in a conversation about getting insurance on the buildings, Perkins

informed the plaintiff that Mrs. Crooker had a policy on them, and the plaintiff went to her and got the policy, and carried it to Perkins and requested him to transfer it to him. Perkins declined to take charge of it, and referred him to Mr. Faunce, who took Mrs. Crooker's application and forwarded it to the defendants when the policy was made.

At the request of the plaintiff, Perkins took the policy to Faunce and requested him to get it transferred to the plaintiff. Faunce took it and undertook to make the assignment, but said to Perkins he did not know as the company would consent to it. He wrote upon the policy, under date of April 10, 1880, an assignment to be signed by Mrs. Crooker, and sent the policy to the secretary of the company without getting Mrs. Crooker to execute the assignment, and with no explanation of the purpose for which it was sent. The secretary, not noticing the pretended assignment, supposed it was surrendered, and wrote upon it "surrendered," and cancelled the deposit note.

The buildings were burned February 14, 1881. In our opinion, these are all the facts disclosed in the report, which need be considered in determining the rights of the parties.

The fifth condition of the policy provides that "if the building is sold or transferred, the policy is void unless ratified to the assignee thereof as per by-laws." The sixth condition provides, among other things, that "if the insured shall have mortgaged the property without the consent of the company, certified on the back of the policy by the president and secretary, or by two of the directors, then the policy shall be absolutely void. Article 8 of the by-laws, requires the consent of the company to be in writing on the policy, signed by the president and secretary, or by two of the directors.

By the absolute sale of the buildings by Mrs. Crooker to Perkins, without a transfer of the policy, under the conditions aforesaid it became void. She ceased to have an insurable interest in the property, and no longer had any legal interest in the policy which she could assign to the plaintiff, if she had undertaken to do so; but the evidence does not satisfy us that she ever did sell and assign the policy, either by parol or in writing to the

plaintiff. If she had done so, and the company with full knowledge of all the facts, had ratified it and admitted the plaintiff a member, he might recover. But the case not only fails to show that the facts were communicated to the company, but fails to show that the company consented to the assignment, either by parol or in writing, or that Faunce, if he was the agent of the company, gave such consent, as he informed Perkins when he took the policy, that he did not know that the company would consent.

We can see no ground upon which the action can be maintained.

Judgment for the defendants.

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

JOHN DORR *vs.* LUTHER DAVIS.

Penobscot. Opinion June 9, 1884.

Guardian and ward. Probate court. R. S., c. 67, § 2.

The care of the person and education of a minor, whose parents are dead, devolve upon his guardian.

Such minor cannot acquire a residence in another county from that in which the guardian was appointed that will oust the judge of probate, who appointed such guardian, of jurisdiction over the minor and his estate, and the appointment of a new guardian by the judge of probate in another county, while the first guardianship continues, is void.

Under R. S., c. 67, § 2, the probate court that first acquires jurisdiction over a minor and his estate, by appointing to him a guardian, is the proper court to determine whether, when such minor arrives at the age of fourteen years, and nominates a new guardian, such nominee is suitable, and should, under all the circumstances, be appointed.

Title to the property of a minor under guardianship, remains in the ward, and is not in the guardian.

A guardian who takes a note payable to himself as guardian, in payment of a debt due the ward, holds the same in trust. He may negotiate it by indorsement, and the indorsee can maintain a suit thereon in his own name. The maker cannot repudiate his promise to pay to the order of the payee of the note.

ON REPORT.

Assumpsit on the following note:

"$209. Wellington, January 24, 1871.

"For value received I promise to pay Harrison Dorr, or his order, as guardian of Warren Dorr and Rosetta Dorr, two hundred and nine dollars, the first day of January, A. D. 1874, with interest annually. David Davis,

Witness, E. F. Harvey. Luther Davis."

[Stamp, 15 cts.] Indorsed, "Harrison Dorr."

Writ dated August 8, 1874. Plea, general issue, and brief statement that plaintiff has no title in or to the note; and also that the note has been paid by defendant to Nancy A. Smith, the legal guardian of Rosetta Dorr, to whom said note belonged.

The action was reported to the law court, who were to draw inferences as a jury might, and enter such judgment as the law required.

The opinion states the material facts.

Josiah Crosby, for the plaintiff.

D. D. Stewart, for the defendant, contended that the language of the note and the fact that the consideration came from the ward and not from the guardian, made the ward the legal payee, and, therefore, the note was not legally indorsed, and the plaintiff had no title to it, and could maintain no action upon it. *Gilmore* v. *Pope*, 5 Mass. 491; *Conkey* v. *Kingman*, 24 Pick. 115; *Railroad Co.* v. *Benedict*, 5 Gray, 561; *Trustees* v. *Parks*, 1 Fairf. 441; *State* v. *Boies*, 2 Fairf. 474; *Garland* v. *Reynolds*, 20 Maine, 45; *Turnpike Co.* v. *Whiting*, 10 Mass. 327; *Whitney* v. *Wyman*, 101 U. S. 395; *Nichols* v. *Frothingham*, 45 Maine, 220; *Bank of Newbury* v. *Baldwin*, 1 Cliff. 519; *Irish* v. *Webster*, 5 Maine, 171; *Sanford* v. *Phillips*, 68 Maine, 432.

Creditors of the ward may attach the property of the ward, notwithstanding it is under control of the guardian, or it may be levied on execution; and it may be reached by trustee process. *Hicks* v. *Chapman*, 10 Allen, 463; *Spring* v. *Woodworth*, 4 Allen, 327; *Bancroft* v. *Consen*, 13 Allen, 50; *Trull* v. *Trull*,

13 Allen, 407; *Field* v. *Schieffelin*, 7 Johns. Ch. 150; *Smith* v. *Ayer*, 101 U. S. 320; *Carter* v. *Bank*, 71 Maine, 448; *Wood* v. *Dummer*, 3 Mason, 312.

If a creditor is entitled to take it, certainly a new guardian must be. The functions and powers of the old one cease instantly upon the appointment of a new one. *Burgess* v. *Keyes*, 108 Mass. 43; *Atkinson* v. *Atkinson*, 8 Allen, 15; *Conant* v. *Kendall*, 21 Pick. 38.

The appointment of the new guardian, Mrs. Smith, was in all respects legal and valid, and all power of Harrison Dorr, the first guardian, ceased on that day as fully and completely as if he were dead, "terminated by operation of law." *Mansur* v. *Pratt*, 101 Mass. 62; *Woodbury* v. *Hammond*, 54 Maine, 343; R. S., c. 67, § 2.

HASKELL, J. The judge of probate for the county of Piscataquis appointed Harrison Dorr guardian for two minors under the age of fourteen years, resident in that county. Soon after this appointment, one of the minors, Rosetta, went to live with her aunt in the county of Somerset. When this minor arrived at the age of fourteen, she applied to the judge of probate for the county of Somerset, to appoint the aunt with whom she lived her guardian. The judge, acting upon this nomination, appointed Nancy A. Smith, the aunt, guardian for Rosetta, and issued to her letters of guardianship. The latter guardian, thereupon, demanded of the first guardian the estate of Rosetta in his hands, which he refused to surrender, but retained it until Rosetta was married, and then, having settled his account in the probate court, paid the balance to Rosetta with the assent of her husband, and took her receipt for the same.

At the time of the demand upon the first guardian by the second, the former had in his possession, belonging to Rosetta, the note in suit, which he afterwards negotiated to the plaintiff. The defendant, prior to the commencement of this suit, had paid the note to the second guardian, and now claims that payment was to the lawful owner of the note, and that the plaintiff took it with notice that it was the property of Rosetta, and could only

be collected by her guardian in the county of Somerset, to whom he had paid the same.

Harrison Dorr became the legal guardian of Rosetta, a minor resident in the county of Piscataquis. To him the statute gave the care of the person and education of Rosetta, unless she had a parent living competent to do it. The case shows her father was dead and that his widow survived him, but it does not appear that the widow was the mother of Rosetta. The inference is, that her mother was not living. The care and education of Rosetta devolved upon Harrison Dorr, her guardian. *Coltman* v. *Hall*, 31 Maine, 196; *Peacock* v. *Peacock*, 61 Maine, 211.

Under these circumstances, Rosetta could not acquire a residence in the county of Somerset, while living there with her aunt, that would oust the judge of probate for Piscataquis of jurisdiction in the premises, which he had already acquired and lawfully exercised. She remained in Somerset by the permission of her guardian, who could at any time have taken her from that county and provided for her a home in the county of Piscataquis. It is unreasonable to hold, that a minor, allowed by a guardian to live in another county from that in which he was appointed, could meanwhile acquire a residence, that could defeat the authority of her guardian over her.

Moreover, when a court once acquires jurisdiction over a cause, it cannot be divested of it by a change in residence of any of the parties. *Morgan Heirs* v. *Morgan*, 2 Wheat. 290, 297; *Mollan* v. *Torrance*, 9 Wheat, 537; *Dunn* v. *Clarke*, 8 Peters, 1; *Clarke* v. *Mathewson et al.* 12 Peters, 171.

A minor, who is over fourteen years of age, "may nominate his own guardian, and if approved by the judge, such nominee shall be appointed, although the minor has a guardian." R. S., c. 67, § 2.

The nomination must be approved by the judge who is to make the appointment. This statute means, that the judge of probate, who first acquired jurisdiction over the minor and his estate, and has already appointed a guardian, shall determine whether the minor's nominee for a new guardian is suitable, and should under all the circumstances be appointed in the place and stead of the

one already performing that duty. If one judge of probate can interfere with the administration of a ward's estate under the direction of another judge of probate in another county, as contended for in this case, he can do it in any case, whenever a minor, who has a guardian, chances to live in his county. Interminable confusion and tiresome litigation would surely follow. So long as Harrison Dorr remained guardian by authority of the judge of probate for Piscataquis, it was not in the power of another probate judge, sitting in another county, to vacate his trust and end his authority over his ward's person and estate. Any attempt so to do by the judge of probate in Somerset county could not avail, as he had no jurisdiction in the premises, and his appointment of Nancy A. Smith, guardian to Rosetta Dorr, was illegal and void, and the payment to her set up in defense cannot prevail.

Title to the property of a minor under guardianship remains in the ward, and is not in the guardian. The latter is the legal agent of the ward, and must sue the *choses* of the ward in the ward's name. Suits touching the ward's property must be against the ward, and not against the guardian. The debt represented by the note in suit belonged to the ward. That debt was the consideration for defendant's promise to pay the note to Harrison Dorr. He held the note in trust for the ward. That trust was disclosed by the note, and if misappropriated it could be followed wheresoever it was negotiated. The promise, nevertheless, was to Harrison Dorr or his order, and he ordered it paid to the plaintiff. It was not for the defendant to deny his own promise and refuse payment to the order of the payee of the note. There is no merit in his defense, and the entry must be,

Judgment for the plaintiff for $209, with interest from January 24, 1871.

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

JOHN A. NORTHROP, appellant,

vs.

CLARENCE HALE, administrator.

Cumberland. Opinion June 10, 1884.

Evidence. Pedigree. Declarations.

On the question of pedigree, declarations are admissible, (1) When it appears by evidence *dehors* that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern. (2) That the declarant was dead when the declarations were tendered, and (3) That they were made *ante litem motam*.

Thus, in determining who are the rightful distributees of an intestate estate, the declarations of the intestate's sister (since deceased) in whose family the claimant was not only born and brought up, but in which the intestate herself also lived, when the claimant was born, and for several years thereafter, are admissible, when made *ante litem motam* for the purpose of showing that the claimant was the natural son of the intestate who had not then been married.

ON EXCEPTIONS.

An appeal from the decree of the judge of probate.

The opinion states the case.

Nathan and Henry B. Cleaves, and *M. P. Frank*, for the plaintiff, cited: 1 Greenl. Ev. § § 103, 104; 1 Whar. Ev. § 208; *Waldron* v. *Tuttle*, 4 N. H. 378; *Vowles* v. *Young*, 13 Ves. 146; *Goodright* v. *Moss*, Cowper, 594; *Tyler* v. *Flanders*, 57 N. H. 626; *Haddock* v. *B. & M. R. R.* 3 Allen, 300; *Hargrave* v. *Hargrave*, 2 C. & K. 701 (61 E. C. L. 702); *Barnum* v. *Barnum*, 42 Md. 304; *Canton* v. *Bentley*, 11 Mass. 442; *Stein* v. *Bowman*, 13 Pet. 220; *Ellicott* v. *Pearl*, 10 Pet. 434; Starkie, Ev. * 1104; Reynold's Stephen, Ev. 53.

Drummond and Drummond, and *Clarence Hale*, for the defendant.

The testimony offered was properly excluded.

1. The rule admitting hearsay, or reputation, in certain questions of pedigree, cannot be extended to admitting testimony of

a deceased relative to prove illegitimacy. The admission in certain cases of testimony as to declarations of certain relatives, in matters of birth, descent and kindred questions is an exception to the familiar rules of evidence, excluding hearsay, and is only permitted from the extreme difficulty of getting any testimony on such subjects. Such testimony is always looked upon with disfavor by courts, and only admitted from the necessity of the case, on the ground that the statements of members of the immediate family of a person, previous to a controversy, about such person's birth and descent are entitled to weight as being the best evidence the case affords. But courts have not permitted illegitimacy as a substantive fact to be proved by such evidence, for the reason that "a child, if illegitimate, can have no family;" and therefore the reason of the law in respect to family admissions fails. Taylor, Ev. (Ed. of 1872,) 535; Phillips, Ev. (Ed. of 1859,) 272; *Crispin* v. *Doglioni*, 3 S. & T. 44, and 8 Law Times Reports, 91.

For example, the declarations of an illegitimate child as to the pedigree of himself or any other member of his father's family are not admitted in testimony, for the reason that it is not distinctively a "family admission," the bastard not having a family. *Craufurd* v. *Blackburn*, 17 Md. 56; *Doe d. Bamford* v. *Barton*, 2 Moody and Robinson, 28; *Chapman* v. *Chapman*, 2 Conn. 349.

In the case at bar, the court will see the extreme danger of admitting such testimony; the petitioner does not offer the declaration of a mother to establish the legitimacy of her own offspring, but the testimony of a woman alleged by him to be his aunt, to establish the fact that the child was the illegitimate child of another woman, and that the other woman was the sister of the declarant. There is no pretence that these declarations were ever acted on or remembered by Diana J. Johnson until after the contest arose. The risk of perjury in receiving evidence of a witness who undertakes to state what he heard a person say who is long deceased, is freely commented on by courts. An unprincipled witness has no fear of being contradicted and punished; an imaginative witness, or one who

has long and morbidly gone over his case in his mind, may have really wrought himself up to believing that he heard a deceased person say what such person never thought of saying. Taylor on Ev. *supra*; *Crouch* v. *Hooper*, 16 Beavan, 186; *Carter* v. *Buchanan*, 9 Ga. 541.

2. The declarations of Mary Northrop do not appear from the exceptions, to have been made to a person who had any interest in ascertaining the truth in relation to the matter. It is a requisite of such testimony, that in order to be admissible, it must appear that the person who offers to show that such declaration was made to him, must also show that he had some interest either as a relative, heir, creditor, or in some way in learning from the declarant the truth of the matter. Else courts cannot presume that the declarant would have made solemn and important declarations or that the witness himself would have that interest in the subject which would enable him to remember for many years and to state correctly. This position is fully sustained in recent cases cited in the Vienna Juristische Blaetter; see also Alb. Law Jour. vol. 24, p. 444; see *Cuddy* v. *Brown*, 78 Ill. 415; *Jones* v. *Jones*, 36 Maryland, 457.

3. It does not appear from the exceptions, that the excluded testimony was in respect to declarations which were so clear, explicit, and given under such circumstances as to be admissible in evidence. The case shows simply that the excluded declarations were "relative to the birth and parentage of said John A. Northrop." But not all statements relative to birth and parentage are to be received in testimony. For example, statements which are not clear or explicit, are not admissible; nor statements given under circumstances to indicate bias or prejudice. The case must clearly bring the excluded testimony within the rule admitting such testimony, or the ruling of the judge at *nisi prius* cannot of course be overthrown.

VIRGIN, J. This is an appeal from a decree of the judge of probate, wherein he ordered a distribution of an intestate estate and adjudged, against the claim of the appellant, that he was not the natural son of the intestate, but was the legitimate son of the intestate's sister.

In the supreme court of probate to which the appeal was taken, the same question was submitted to a jury who found against the appellant.

At the trial of the issue it appeared *inter alia* that the appellant was born in Steubenville, Ohio, and was brought up there in the family of the intestate's sister, in which also the intestate resided at the time of the appellant's birth and for several years thereafter. The appellant tendered the "declaration of Mary Northrop (the intestate's sister) relative to the birth and parentage of John A. Northrop," the appellant. What the specific declarations were, the bill of exception fails to disclose. It is sufficiently general to include declarations that the appellant was the lawful son of the declarant, which was claimed by the appellee. The admissibility of such a declaration would not be successfully challenged under any known rule of evidence. For the practice in such cases seems to be that some evidence of the requisite relationship (though the exact degree may not be essential perhaps, *Vowles* v. *Young*, 13 Ves. 140) *dehors* the declarations must be shown before they can be admitted. *Fuller* v. *Randall*, 2 Moore & P. 24; *Plant* v. *Taylor*, 7 Hurl. & Nor. 237; *Gee* v. *Ward*, 7 E. & B. 514. And this evidence is primarily addressed to the presiding justice, who, before admitting the declarations, must be satisfied that a *prima facie* case of the requisite relationship has been made out. *Jenkins* v. *Davis*, 10 Q. B. 313, 322; *Hitchins* v. *Eardley*, L. R. 2 P. & D. 248. And the facts shown, the birth, place of birth, the bringing up and the name of the appellant, are ample *prima facie* evidence of relationship to warrant the admission of the declaration mentioned. 4 Camp. 416; *Viall* v. *Smith*, 6 R. I. 417. Still there is some apparent discrepancy in the practice. *Blackburn* v. *Crawford*, 3 Wall. 175; *Jewell* v. *Jewell*, 1 How. 219, 231; *Alexander* v. *Chamberlain*, 1 Thomp. & Cook (N. Y. Sup. Ct.) 600.

But the appellant could not be aggrieved by the exclusion of a declaration which would disprove his claim and his exception for such an exclusion could not therefore be sustained.

Yet, considering the appellant's claim together with the facts

and admissions disclosed in the bill of exception, we can have no doubt that the declarations tendered and excluded had a direct bearing upon the issue, and that the question intended to be raised by the parties, is: Whether, in determining who are the rightful distributees of an intestate estate, the declarations of the intestate's sister (since deceased), in whose family he was not only born and brought up, but in which also the intestate herself lived when the appellant was born and for several years thereafter, are admissible for the purpose of showing that he was the natural son of the intestate, who had not then been married.

All of the authorities seem to concur in holding that while her declarations would be competent to show the appellant to be her own illegitimate son, born before her marriage, yet under a rule founded, as Lord MANSFIELD said, "in decency, morality and policy," her declarations would not be allowed to prove her own son illegitimate if born in wedlock. *Goodright* v. *Moss*, Cowp. 591; 1 Greenl. Ev. § § 253, 344; *Haddock* v. *B. & M. Railroad*, 3 Allen, 300; *Abington* v. *Duxbury*, 105 Mass. 287. Can her declarations be admitted to show the illegitimacy of her unmarried sister's son born and brought up in her own family? This involves no bastardizing of her own issue.

Formerly the declarations of servants, physicians and intimate friends have been admitted at *nisi prius* in the English courts. But in *Johnson* v. *Lawson*, 2 Bing. 86, the court unanimously rejected the declarations of a deceased housekeeper. BEST, C. J., remarked that the admission of evidence in such cases must be subject to some limits; limiting declarants to relatives connected by blood or marriage afforded a certain and intelligible rule; and if that were passed, an almost endless inquiry as to the degree of intimacy between the family and the declarant might be involved. Since that decision, all modern authorities exclude declarations coming from neighbors, intimate acquaintances, etc. of the family, as being mere hearsay evidence. *Vowles* v. *Young*, 13 Ves. 147; *Whitelocke* v. *Baker*, 13 Ves. 514; *Jackson* v. *Browner*, 18 Johns, 37, 39. It has, therefore, become a universally recognized exception to the general rule

excluding hearsay, based on various sound considerations, that as to certain facts of family history, usually denominated pedigree, comprising *inter alia*, birth, death and marriage, together with their respective dates, and, in a qualified sense, legitmacy and illegitimacy, declarations are admissible; (1) When it appears by evidence *dehors* the declarations that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern; (2) That the declarant was dead when the declarations were tendered; and (3) That they were made *ante litem motam*. 1 Greenl. Ev. § § 103, *et seq.* & notes; 1 Whart. Ev. § § 201, *et seq.* & notes; 1 Taylor, Ev. § § 571, *et seq.* & notes; Best, Prin. Ev. (Am. ed.) § 498 & notes.

Lord Ch. ELDON said such declarations "are admissible upon the principle that they are the natural effusions of a party who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of the truth, . . that they must be from persons having such connection with the party to whom they relate, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth and cannot be mistaken."

Lord Ch. ERSKINE declared that the "law resorts to hearsay evidence of relations upon the principle of interest in the person from whom the descent is to be made out." *Vowles* v. *Young*, *supra*. This view was adopted by Prof. Greenleaf. 1 Greenl. Ev. § 103. And Mr. Taylor sums up the authorities by declaring such declarations admissible coming from such sources, as relatives "may be supposed to have the greatest interest in seeking, the best opportunities for obtaining, and the least reason for falsifying, information on the subject." 1 Taylor, Ev. § 571. Do not the qualifications of Mrs. Northrop come fully up to these requisitions?

In *Goodright* v. *Moss*, Cowp. 571, the declarations of parents were held admissible, after their decease, to prove that their son was born before their marriage and was therefore illegitimate; and this case is not questioned on this point in Berkley, Peerage, case 4, Camp. 401.

In *Vowles* v. *Young*, *supra*, a new trial was granted because the declarations of a husband that his wife was illegitimate, were rejected.

In *Haddock* v. *B. & Maine Railroad*, *supra*, a mother's declarations were admitted to prove the illegitimacy of her daughter by showing that the mother was never married.

So, where the question was whether the plaintiff's mother was the legitimate child of the ancestor, whose land was in dispute and the record showed the latter's marriage at a certain date, the ancestor's declaration—that "unless he made a will, Louisa (plaintiff's mother) could get nothing,"—was held competent to go to the jury on the question of her illegitimacy. *Viall* v. *Smith*, 6 R. I. 417. See also *Barnum* v. *Barnum*, 42 Md. 251,304.

It would seem, therefore, that the declarations of the intestate would be admissible to show that the appellant was her illegitimate son; and if the mother's declarations would be, why would not be those of the mother's sister, in whose family the child was born and brought up, and in which the mother lived at the time and for years after?

It is urged that there are some English authorities which somewhat tend otherwise.

In *Bamford* v. *Barton*, 2 Moo. and R. 28, where one K. died seized of land, leaving none but illegitimate children, to whom he willed for life, his property with remainder to his own lawful heirs, who brought ejectment claiming the devisees for life to be dead; and to prove it, offered the declarations of one of them, who had since died, to prove the decease of the other, PATTERSON, J., at *nisi prius*, held the declarations inadmissible on the ground that the declarant was not, in point of law, a member of the family of his reputed father." We also entertain the same opinion, and for the same reason.

In *Crispin* v. *Doglioni*, 2 S. & Tr. 44, decided in the probate court in England, in 1863, the plaintiff claimed to be the natural son of the intestate. To prove it, he tendered the declarations of a deceased brother of the intestate. Sir C. CRESWELL, after remarking there was no case in point, held the declarations inadmissible, saying: "The admissibility of

hearsay evidence is exceptional, and ought not to be carried further than the decisions in the books, for it is a departure from the first rule of evidence. I can well understand that when a matter is likely to be discussed and well known in a family, a member of the family may be allowed to give evidence of it; but in this case the plaintiff, according to his own account, is *fillius nullius*, by our law. The question is whether a declaration of one brother may be admitted as to another brother having had intercourse with a woman, and having had a child by her; I think it ought to be excluded." We cannot perceive any objection to this ruling. No one can pretend that it comes within the exception admitting hearsay, for the putative father has no relationship with his bastard son, and hence the case is not applicable to the case at bar. Moreover, the case is especially sound in England, and it might there be considered as applicable to a case having the same facts as in the case at bar. For by the common law, in order to "render odious illicit commerce between the sexes and to stamp disgrace on the fruits of it, notwithstanding the punishment usually fell upon the innocent, it was thought wise to prohibit the offspring from tracing their birth to a source which is deemed criminal by law." *Cooley* v. *Dewey*, 4 Pick. 95. Hence bastards were said by the common law to be the "children of nobody," and could not transmit by descent except to their own offspring. 1 Black. Com. 459; 2 Kent's Com. (12th ed.) 212-13; *Hughes* v. *Decker*, 38 Maine, 153, 160. And such was the law in this state until 1838, when the legislature, as have the legislatures of several other states, ameliorated the rights of illegitimate children. "This relaxation in the laws in so many states," says Ch. KENT, "of the severity of the common law, rests upon the principle that the relation of parent and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary consequence of consanguinity." 2 Kent's Com. (12th ed.) 214. By the statutes of this state, "an illegitimate child is the heir of his mother," and "his estate descends to his mother when he dies intestate without issue," R. S., c. 75, § § 3 & 4.

We are of the opinion, therefore, that inasmuch as the relationship of sister existed between the intestate and the declarant, and, by force of the statute, that of mother and son between the intestate and the appellant, the declarations came literally within the exception and are consequently admissible; and that the jury should be allowed to pass upon their weight, if they find they were ever made, in connection with the other testimony in the case.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, SYMONDS and EMERY, JJ., concurred.

ELIZABETH HILL *vs.* ARCHIBALD MCNICHOL, Administrator.

Washington. Opinion June 11, 1884.

Mortgage. Record. Notice. Unrecorded deed.

When the record of a mortgage is defective it is not notice of such mortgage. Thus, a mortgage for the security of two thousand dollars was recorded as one for two hundred dollars; *Held*, that the record was no notice of the two thousand dollar mortgage.

When a purchaser of real estate, without notice of a prior unrecorded deed, for a valuable consideration conveys to one who had notice thereof, the title of the latter is not impaired by the notice.

ON EXCEPTIONS.

This was an action for money had and received against the defendant as administrator on the estate of Monroe Hill, deceased, brought under the statute, appeal having been taken from the report of the commissioners of insolvency on said estate.

The writ contained four classes of claims, the first of which was for breach of covenant in the deed of Monroe Hill to her, by reason of outstanding mortgages, one of which from George S. Bixby to Ann Lindsay for two thousand dollars was recorded as a two hundred dollar mortgage. The writ alleged that she paid $2612.93 to discharge this mortgage. The verdict was in favor of the plaintiff on all classes of claims and amounted to $14,575.21.

Other material facts bearing upon the question considered by the court are stated in the opinion.

Strout and Holmes, *M. N. McKusick*, and *George N. Hanson*, for the plaintiff.

A. Libbey, for the defendant, cited: *Trull* v. *Bigelow*, 16 Mass. 409; *Pierce* v. *Faunce*, 47 Maine, 507; *Brackett* v. *Ridlon*, 54 Maine, 426.

VIRGIN, J. Whether or not the plaintiff was entitled to recover the item of two thousand six hundred twelve dollars and ninety-three cents, which she claimed to have paid to discharge the mortgage of Bixby to Lindsay on the premises conveyed to her by the defendant's intestate, was one of the questions involved at the trial and which the jury must have found in behalf of the plaintiff.

If the mortgage was duly recorded prior to the delivery of the deed to her, then it was an incumbrance within the intestate's covenant of warranty. But by the record in the registry of deeds, the mortgage purported to be one for the security of two hundred dollars instead of two thousand dollars. And the presiding justice correctly instructed the jury that this record was "not proof of the record of the two thousand dollar mortgage." *Frost* v. *Beekman*, 1 Johns. Ch. 288; S. C., 18 Johns. 544; *Stevens* v. *Bachelder*, 28 Maine, 218; Jones, Mort. § § 550 *et seq.* and notes.

The presiding justice also instructed the jury that if the mortgage was not recorded, then they "would inquire whether there was any evidence in the case to show that the plaintiff had any knowledge of the mortgage. That if there was no such evidence and no record, then the mortgage became a nullity as against these parties; . . and if she paid it, she paid it in her own wrong and could recover nothing for it. If, on the other hand, they are not satisfied that it was not recorded; or if they are satisfied that this plaintiff had knowledge of it before her deed was delivered, then they should inquire as to the amount which she paid."

Our opinion is that the latter alternative is erroneous. Long before the enactment of R. S., c. 73, § 8, the delivery of an executed deed by the owner of the fee transferred the estate from the grantor to the grantee, and it was effectual, without registration, against the grantor and his heirs, but not against a subsequent purchaser and grantee. *Farnsworth* v. *Childs*, 4 Mass. 637; *Marshall* v. *Fisk*, 6 Mass. 24. It was also early decided that a subsequent purchaser, having notice of a prior unregistered deed, is affected in the same way and to the same extent as if such deed had been recorded (*Copeland* v. *Copeland*, 28 Maine, 525; *McMechan* v. *Griffin*, 3 Pick. 149); basing the doctrine upon the fraud which results in permitting a junior purchaser to defeat a prior conveyance or incumbrance of which he has notice. *Cheval* v. *Nichols*, Stra. 664. The statute above cited, therefore, simply established by positive enactment what had been previously settled by judicial decisions except as to "devisees."

Again, in early times it was decided that where a purchaser, without notice of a prior unregistered deed, and for a valuable consideration, had conveyed to one who had notice thereof, the title of the latter was not impaired by the notice; the former having an indefeasible title could convey it to the latter, "because otherwise an innocent purchaser, without notice, might be forced to keep his estate," or "the sale of estates would be very much clogged." *Harrison* v. *Forth*, Prac. Ch. 51; *Lowthor* v. *Carlton*, 2 Atk. 139; *Pierce* v. *Faunce*, 47 Maine, 507; *Brackett* v. *Ridlon*, 54 Maine, 426; *Boynton* v. *Rees*, 8 Pick. 329; *Flynt* v. *Arnold*, 2 Met. 619; *Bell* v. *Twilight*, 18 N. H. 159. Carried out to its logical conclusion, the doctrine leads to the following result: If the holder of a fee conveys to one who omits for the time being to record his deed, and thereafter the grantor makes another conveyance of the same premises to a second grantee having notice of the prior unregistered deed, the former grantee holds the title against the second even if the latter's deed is recorded. Moreover if any number of conveyances be made in the chain of title derived from the second grantee, each with like notice of the prior unrecorded deed, the

first grantee will still hold the title although all the deeds except his own are duly recorded; and he can perfect his title by recording his deed. If, however, any one of the second grantee's successors purchase without notice of the first grantee's prior unrecorded deed and place his own deed on record, the title of the first grantee under his unrecorded deed is gone forever. Jones, Mort. § 575, and notes. *Flynt* v. *Arnold*, *supra*.

Applying this rule to this case, it follows that the instruction limiting the notice of the existence of the Bixby unregistered mortgage to the plaintiff was erroneous; for if any one of her predecessors (and there were several) in title, running back to, and including Bixby's immediate grantee had no "actual notice" of the mortgage, it ceased from that time to be an incumbrance. The defendant's requested instruction should therefore have been given.

As this view necessitates a new trial, we need not express any opinion upon the other questions.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH and HASKELL, JJ., concurred.

STATE OF MAINE *vs.* DANIEL WILKINSON.

Sagadahoc. Opinion July 16, 1884.

Practice. List of witnesses before grand jury. Stat. 1883, c. 190. Exceptions.

An objection that the foreman of the grand jury did not return into court a list of witnesses sworn before the jury in finding an indictment, comes too late if first taken after verdict; and, whenever taken, the objection is not fatal, the statutory provision requiring a list to be returned being directory merely and not mandatory and the court having the power to supply the omission in other ways.

A judge is not required to respond to a request for instructions of a merely speculative character and not material to the issue, however correct the same may be as abstract propositions; nor to repeat in other form legal propositions already correctly and fully given.

If counsel thinks that a judge in the charge has stated the testimony inaccurately, or expressed any opinion upon it, or that he has used an illustration

unfavorable to his client, the objection should be made before the jury retire, and cannot avail when made for the first time afterwards.

On exceptions and motion in arrest of judgment.

Indictment for the murder in the summer of 1883, in Bath, of William Lawrence, a night watchman of that city. The jury returned a verdict of murder in the first degree.

The opinion states the questions presented to the law court and the material facts relating thereto.

Henry B. Cleaves, attorney general, and *Frank J. Buker*, county attorney, for state.

Herbert M. Heath, for the defendant, contended that stat. 1883, c. 190, requiring the foreman of the grand jury, in returning into court before the jury was discharged a list of witnesses who testified before the grand jury, should state the cases in which each witness testified, was mandatory; and the failure so to do could be taken advantage of by motion in arrest. *Com.* v. *Edwards*, 4 Gray, 1.

Counsel argued that a list returned by the county attorney was not a sufficient compliance with the statute. That officer is not named in the statute requiring the list.

The grand jury might have examined witnesses of their own motion, in the absence of the county attorney, or without his knowledge. In that event, his certificate would be untrustworthy.

The statute requires the list to be returned into court before the jury is discharged. This requirement is plainly for the purpose of having the presence of the jury to correct possible errors in the list. But the jury was discharged on the fourth day, and the county attorney furnished his list on the sixth.

The list returned by the foreman was insufficient. It was after the arraignment and nine days after the discharge of the jury.

If this be deemed a compliance with the statute, then the very object of the statute is defeated.

The third and fourth requests should have been given. The instruction was important as measuring the respondent's belief

that he was being unjustifiably attacked. If the shooting by Kingsley was unjustifiable then Wilkinson had a legal right to draw his revolver and no inference of malice could be allowed from the act.

Upon the fifth request, counsel cited: Wharton's Homicide, § § 241, 981, 537; *Mockabee* v. *Com.* 78 Ky. 380; 1 East. P. C. 303; and upon the sixth request, 23 Ind. 231.

Counsel contended that the seventh request was material and that no part was given.

PETERS, C. J. A question arises in relation to the list of witnesses returned into court by the foreman of the grand jury. Until lately the statute required that a general list of all the witnesses sworn before the grand jury should be returned into court by the foreman before the jury is discharged. It now requires that the foreman shall return a list before the discharge of the jury, specifying the cases in which the witnesses testify. The general list was returned without the specification. After the grand jury was discharged, in order to supply the omission, a list of the witnesses sworn before the grand jury in procuring the indictment of the prisoner, was presented to his counsel by the county attorney, and a list of the same witnesses was also brought into court by the foreman; both lists having been presented before the trial began. After verdict the counsel for the accused moves in arrest of judgment for the omission stated.

The objection comes too late. It should be made, if at all, before and not after trial. If the list can be dispensed with before trial, it is useless afterwards. It would give the accused an undue advantage to be allowed to reserve the objection until after an unfavorable verdict. The government should have the earliest opportunity to avoid the predicament. The right of objection, if it existed, has been waived. The cases speak very positively to this effect. *Com.* v. *Betton*, 5 Cush. 427; *Lord* v. *State*, 18 N. H. 173; *State* v. *Norton*, 45 Vt. 258; 1 Bish. Cr. Proc. § § 126, 959; and numerous cases cited.

But we go further than that, and are satisfied that the objection, whenever taken, is not fatal to the proceedings. We think that

the statutory provision is directory merely — not mandatory — and that an omission of its requirements does not, as a matter of right, furnish ground for exception.

If the list is of the exact and literal consequence ascribed to it by counsel, then objection might arise if by mistake a name be omitted from it or improperly added to it, or if a name be incorrectly written —too nice considerations to be supposed to have been intended by the legislature. The list is no part of the finding of the grand jury or the verdict of the trial jury. Neither jury performs any duty in relation to it. The requirement is that the foreman shall return it into court, — a merely formal and ministerial duty imposed upon that official.

A satisfactory answer to the claim of the defendant's counsel is that a true list can be furnished through other means and sources, if the foreman neglects his duty. The defendant's counsel does not complain that a true list was not seasonably furnished for his use, but he complains that it was not furnished in the manner called for by an exact and literal compliance with the statute. The statute provides no losses or conditions for non-compliance. There are many provisions in the statutes, imposing duties upon jurors, clerks and officers, which are merely directory in their character, it being the province of the court to see that they are not disobeyed to the injury of any one. In *Dawson* v. *The People*, 25 N. Y. 399, a statute requiring the filing of an indictment was held to be directory. It is in that case by the court said: "The omission to file it does not avoid the indictment, there being no words of the statute indicating an intent of the legislature that the indictment should be void, if not filed."

In *State* v. *Smith*, 67 Maine, 328, it was decided that the requirement that venires for grand jurors should issue forty days before a certain date, is directory merely to the clerk, and not a limitation on his power to issue.

Where a departure from the statute can work no harm or injury, and the thing to be done can be accomplished in some way other than by strict statutory compliance, and there is nothing to indicate that the legislature designed that the act

should be done exclusively in the manner prescribed or not at all, in such cases the duty imposed is directory merely. The present case falls within this rule. *Com.* v. *Edwards*, 4 Gray, 1. To have a list is a right. The manner of getting it may be a matter of judicial discretion. In some capital cases the list has been furnished by prosecuting officers. *Com.* v. *Knapp*, 9 Pick. 496, 498; *Com.* v. *Locke*, 14 Pick. 485. The list of witnesses indorsed upon an indictment or information, may be amended for cause even after a trial has begun. *People* v. *Hall*, 48 Mich. 482.

Exceptions are taken to the refusal to give certain requested instructions. Those not abandoned by counsel at the argument are the following:

"Third. That if officer Kingsley had killed Wilkinson at the time when he testifies he fired his revolver, such killing would not have been justifiable or excusable, and officer Kingsley would have been liable to indictment therefor.

"Fourth. That officer Kingsley acted unlawfully in shooting at the time and under the circumstances testified to by him.

"Fifth. That to find the respondent guilty of murder of either degree, the jury must find that the arrest of the respondent by Lawrence was legal, and that Wilkinson knew that Lawrence was an officer.

"Sixth. To find express malice, the jury must be satisfied that Wilkinson formed the design to kill Lawrence, and meditated upon the design before the act was committed.

"Seventh. If the jury find that Wilkinson drew his revolver at the time officer Kingsley fired, and his intent in so doing was merely to defend himself against any further shooting from Kingsley, then such intent so formed in Wilkinson's mind was not a felonious intent to take life, and cannot be considered by the jury as proving or tending to prove the element of malice."

The third and fourth requests called for the judge to express an opinion upon a question or questions not material to the issue. We can learn the circumstances alluded to only from the charge of the judge and the admissions of counsel. The evidence is not reported, although made a part of the bill of exceptions. It

seems that Wilkinson, the alleged murderer, being armed with deadly weapons, and engaged in the middle of night with confederates in a store-breaking expedition in the city of Bath, while fleeing to escape arrest, was fired upon by Kingsley, a night watchman of that city. In pursuing his flight, Wilkinson came upon Lawrence, another officer, whom he instantly killed with shots from a revolver. The indictment charges the murder of Lawrence. It was not in the least necessary for the jury to be informed upon any speculative propositions concerning the prisoner's relations with Kingsley, such as were involved in the requested instructions. "A jury should be told where the main question or knot of the business lies," said Lord HALE of the duties of judges. These requests ask for more than that.

The fifth request answers itself. It asserts the doctrine that even if legally arrested, Wilkinson could not be guilty of murder for killing Lawrence, unless he knew Lawrence was an officer.

The sixth request needs no discussion. An examination of the charge shows that the element of deliberation and premeditation was very fully, clearly, and correctly expounded.

The learned counsel evidently places chief reliance upon his exception to the refusal to give the seventh requested instruction. We entertain no doubt that all that was properly asked for here was given in the charge of the judge, and in a manner as forcible and favorable as the request itself, if not more so. We think the linking of the facts is more orderly, and the implications clearer, in the charge than in the request. The judge said:

"On the other hand, it is claimed in behalf of the prisoner that he had no such design or purpose, that he had no intention of killing any one, that the shooting was instantaneous, that it was the result of the confusion and fright caused by officer Kingsley discharging his revolver, and it is urged upon you that you cannot infer from the evidence anything more than this state of facts, and, therefore, that your verdict should be for the second degree and not for the first. I instruct you that if you find the facts as claimed by the counsel for the prisoner, that he had no design to kill any one, no design to use his deadly weapon upon any one and inflict either death or serious harm, up to the

moment he used it, and used it as the result of the confusion and fright caused by the other officer's discharging his weapon, then you ought not to find a verdict of murder in the first degree."

It is argued, however, that this statement eliminates from the requested instruction, the contention of counsel that the accused might not be guilty of murder, even though he had the intention to kill Kingsley in order to save his own life. But in another connection this principle was fully and properly accorded to the accused by the judge, where the following was said:

"Now, it is claimed on the part of the counsel for the prisoner that the shooting was intended by him in self defense, that he had been unlawfully fired at by policeman Kingsley, and that he thereupon drew his revolver to defend himself against such unlawful violence, and that the shooting was for such purpose. And I have been requested to instruct you that if that was so he cannot be declared to be guilty of murder in the first degree. I so instruct you."

The judge supposed a case to illustrate a definition of law to the jury, the prisoner being the actor in the suppositive case, and the counsel thinks it was prejudicial to his client. We think such an effect not to have been possible. If counsel thought otherwise, he should have notified the judge at the time, when there was an opportunity for disclaiming any wrongful or injurious implication. *Smart* v. *White*, 73 Maine, 332.

It is contended that some of the sentences of the charge assume matters to be true that were not proven. The judge should have been notified of his error, if it were such, before the jury retired. *Harvey* v. *Dodge*, 73 Maine, 316. But we can see clearly that the objection is unfounded. The objection to single passages vanishes when the whole charge appears. The judge was speaking hypothetically in the expressions complained of; warning the jury to wholly disregard and reject the testimony commented upon unless they believed it to be true. The judge expressed no opinion upon "any facts in issue." Counsel themselves sometimes get in error from a one sided view, as did the ancient disputants about the color of the fabled shield, one side of which was white and the other black. The appearance of a

case depends much upon the point of observation from which it is viewed.

A motion is pending, upon an appeal allowable under R. S., c. 134, § 27, to set aside the verdict for the incompetency of one of the jurors, who is alleged to have expressed an opinion before going upon the panel, before whom the defendant was tried. Clearly, the motion cannot be sustained.

Exceptions and motion overruled.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

LEVI HIBBARD, petitioner for *habeas corpus*,

vs.

CYRUS K. BRIDGES.

CUMBERLAND. Opinion July 22, 1884.

Industrial School for Girls. Habeas corpus. Stats. 1873, c. 141; 1878, c. 63; 1879, c. 87.

In hearing complaints under the statutes regulating the commitment of girls to the Maine Industrial School for Girls, when satisfied of the truth of the allegations, the court may order her committed to the "custody and guardianship of the officers, of said school during her minority, unless sooner discharged by process of law."

Where no such order or judgment is passed, there is nothing to appeal from, and the court has no power to order the girl to pay two dollars and fifteen cents, for copies of the record and the entry in the appellate court and to procure bail and in default thereof to be committed to jail.

In such cases, the mittimus should show the jurisdiction of the court by reciting among other facts, that the complainant was the parent or guardian of the girl, or the municipal officers, or "three respectiable inhabitants," of the city or town where she was found.

The question as to the constitutionality of the law, prescribing the proceedings and process for committing girls to the Industrial School, is not decided by the court.

ON REPORT on agreed statement of counsel.

The opinion states the case and material facts.

H. D. Hadlock, for the plaintiff.

Drummond and Drummond, for the defendant.

LIBBEY, J. This is *habeas corpus*, for the release of Lizzie Hibbard, the plaintiff's minor daughter, aged eight years, from alleged unlawful restraint by the defendant.

The defendant made return upon the writ, that he holds said Lizzie, as city marshal of Portland, by virtue of a mittimus issued by the municipal court of Portland, for her commitment to jail. The mittimus is made a part of the case, and is the only evidence of the defendant's authority to hold said child in custody. The legality of her imprisonment must be determined by the mittimus by virtue of which she is held. *O'Malla* v. *Wentworth*, 65 Maine, 129. We think it is insufficient on two grounds.

1. The proceedings against the girl are based upon act of 1873, c. 141, as amended by act of 1878, c. 63, and act of 1879, c. 87. By section first of said act complaint may be made to the judge of probate, trial justice or judge of a municipal or police court, for the commitment of any girl between the ages of seven and fifteen years for the causes therein specified, to the custody and guardianship of the officers of the Industrial School for Girls, by a parent or guardian of the girl, "or any three respectable inhabitants of any city or town where she may be found." The complaint is not for a crime or misdemeanor. The statute confers on the courts named a special jurisdiction for the guardianship of girls between the ages named. They may be taken from their parents, and restrained of their liberty in the Industrial School for Girls, during their minority. The mittimus should show the jurisdiction of the court. In this case it recites that the girl was brought before the court "on complaint of C. K. Bridges, J. F. Langmaid, and Benj. Gribben." It does not recite that they were "respectable inhabitants" of Portland where the girl lived and was found, nor that they were inhabitants of Portland. In this respect it is insufficient to show the jurisdiction of the court.

2. The same section of the act provides that, "the judge or justice . . . may examine into the truth of the allegations

of the complaint, and if satisfactory evidence thereof is adduced, and it appears that the welfare of such girl requires it, he may order her to be committed to the custody and guardianship of the officers of said school during her minority, unless sooner discharged by process of law." In this respect the mittimus recites merely, that "satisfactory evidence of the truth of said allegations is adduced, and it clearly appears that the welfare of said Lizzie Hibbard requires that she be committed to the custody and *management* of the *managers* of the Maine Industrial School for Girls." It does not appear that any order was passed that she be "committed to the custody and guardianship of the officers of said school during her minority." It does not appear that any order was passed for her commitment. By § 9 of said act, any girl ordered to be committed to the school may appeal from such order. Here no order or judgment was passed, and there was nothing to appeal from. The court had no power to order the girl to pay two dollars and fifteen cents for copies of the record and the entry in the appellate court and to procure bail; and in default thereof to be committed to jail. So far as the mittimus shows, the appeal and these orders were merely void.

For these reasons, Lizzie Hibbard must be discharged.

Other questions have been very ably and elaborately argued by counsel. One of them is the question of the constitutionality of the act under which this proceeding is had. It is claimed that the process for the commitment of girls to said school for the causes named in the first section of the act, is in violation of article 1, § 6 of the constitution of this state, and of § 1 of the 14th amendment of the constitution of the United States, because it deprives the girl of her liberty without "due process of law," or "the law of the land." It is said that no crime, no wrong, is charged against the girl, but that by the provisions of the act, as construed by the learned counsel for the defendant, she is arrested and restrained of her liberty, and subjected to all the disabilities and burdens incident to a criminal prosecution, while the object to be accomplished is merely to place her under guardianship, for her nurture and proper mental and moral education. This is a very grave question, but as it is not

necessarily involved in the determination of the rights of the parties in this case, we think it the better practice not to attempt to determine it. If the act is subject to this objection the legislature can amend it, so as to provide process for the commitment for the causes named in the first section, purely civil in its character, similar to the proceedings for the appointment of guardians by the probate courts, or in some other manner which will remove this objection.

Lizzie Hibbard is discharged from imprisonment.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

SOMERSWORTH SAVINGS BANK

vs.

WILLIAM A. WORCESTER and another.

York. Opinion July 30, 1884.

Scire facias. Principal and surety.

A judgment creditor in a judgment against two or more debtors rendered upon a promissory note given in New Hampshire, upon which note one of the debtors was surety, levied his execution upon real estate of the principal and surety in this state, subject to a prior attachment, and on account of prior incumbrances and defects in the levy, the creditor took nothing by the levy. *Held* in *scire facias* to revive the execution, that the proceedings under the prior execution did not discharge the surety.

ON REPORT.

Scire facias. The defendants were defaulted and the case reported to the law court with the agreement that if the court should be of the opinion that the defense offered, if proved, afforded a legal defense to either of the defendants, the default should be taken off and the case stand for trial.

The opinion states the material facts.

Copeland and Edgerly, for the plaintiffs, cited: *Treat* v. *Dwinel*, 59 Maine, 341; *White* v. *Cushing*, 30 Maine, 267; *Reed* v. *Wilson*, 39 Maine, 585; *Smith* v, *Eaton*, 36 Maine, 298; *Baker* v. *Davis*, 22 N. H. 37; *Concord Bank* v. *Rogers*, 16 N. H. 9; *Barney* v. *Clark*, 46 N. H. 514.

William L. Putnam, for the defendants.

The allegations of the writ are admitted. The writ alleges that the estate levied on cannot be held by reason of "prior incumbrances and defects in the levy." It does not allege that the prior incumbrances were unknown to plaintiff when he levied. This is an essential allegation. *Grosvenor* v. *Chesley*, 48 Maine, 372.

In *City Bank* v. *Young*, 43 N. H. 461, the ordinary rule that the creditor must use ordinary diligence in availing himself of securities, is fully recognized.

As to effect of abandoning attachments or seizures on execution, the New Hampshire court — see *Barney* v. *Clark*, 46 N. H. 516 — has proceeded no farther than our court had in *Page* v. *Webster*, 15 Maine, 249. Consequently, we seem to be left to the usual presumption, that on this precise point the law of New Hampshire is the same as given in *Springer* v. *Toothaker*, 43 Maine, 381, which on page 386 apparently adopts the dissenting opinion in *Fuller* v. *Loring*, 42 Maine, 481, and is recognized as law in *Chipman* v. *Todd*, 60 Maine, 284.

The law of *Barney* v. *Clark*, *ante*, and *Page* v. *Webster*, *ante*, is not inconsistent with *Toothaker* v. *Springer*, — see the latter case, page 385.

After making the seizure, the creditor was at liberty, either with or without recording his seizure as provided in R. S., c. 84, § 24, to have required the surety to pay his debt and take the benefit of the seizure; and if the surety refused to do this, the creditor would have been justified in collecting from the surety. He chose, however, to proceed himself; and, by a gross blunder, through mere negligence, accepted a levy which was void, because in making the appraisal the attachment was deducted, though R. S., c. 84, § 24, already cited, gave a clear remedy for such case. It was the creditor's blunder, because he persisted in levying,

notwithstanding the attachment, and notwithstanding the provision of R. S., just cited; and because when he accepted this void levy, thirty days from judgment had not expired, and he was at liberty to make a new seizure.

In *Wulff* v. *Jay*, 7 Queen's Bench (L. R.), 756, where the creditor had neglected proper formalities to a bill of sale held as collateral, he was made to bear the loss as against the surety.

This case is cited in Burge on Suretyship (Morgan's edition), pages 438 and 439; which latter authority seems to sustain us, both as to point of diligence required and the effect of abandonment of seizure on execution.

There is one special reason why this proceeding should not be against the surety. He cannot exercise the option of releasing the land provided in R. S., c. 76, § 18.

LIBBEY, J. This is *scire facias* for a new execution on a judgment in favor of the plaintiff against the defendants, and one Lord, who has deceased since the rendition of judgment, the first execution having been returned satisfied by a levy on the lands of the defendants.

The judgment was rendered on a promissory note, in which William A. Worcester was principal, and George Worcester and said Lord were sureties, which relation of the parties was known to the plaintiff. The lands of the principal were attached on the original writ, subject to a prior attachment in another suit, which was pending when the levy was made; and the lands were appraised and taken subject to that attachment. For this cause it is admitted that the levy was void and conveyed no title to the plaintiff.

It is claimed by the learned counsel for George Worcester, that the failure of the plaintiff to seize the lands on the execution and record the seizure as provided in R. S., c. 84, § 24, and thus preserve the attachment until the prior attachment should be disposed of, and instead thereof making the void levy, discharged said George Worcester as surety, and that no new execution should be issued against him.

The plaintiff corporation was located in New Hampshire, and the note was made and dated there. The counsel on both sides

agree that the rights of the parties are to be determined by the law of that state.

In *Bank* v. *Rogers*, 16 N. H. 9, the supreme court of that state held, that where the creditor brings his action against the principal debtor and attaches his property, and afterwards discontinues the action, or fails to preserve the lien created by the attachment, the surety is not thereby discharged. The same rule was reaffirmed in *Barney* v. *Clark*, 46 N. H. 514. It is regarded the settled law of that state, and we think it is decisive of this case. The plaintiff corporation did not voluntarily discharge its attachment. It did so by mistake of law. It could not be required to seize and record the seizure, and await, for an indefinite period of time the issue of the prior attachment; nor could it be required to levy without regard to the prior attachment, and thus take the hazard of losing the land levied on by the enforcement of that attachment. The surety had the means of knowing the proceedings on the execution. He was a party to it, and his lands were taken by the levy, as well as those of the principal. If he desired the benefit of the attachment of the lands of the principal, he could have satisfied the debt, and taken charge of the service of the execution, and thereby have accomplished his purpose. Failing to do so, he cannot equitably complain that the plaintiff did not subject itself to the long delay of awaiting the issue of the prior attachment.

Default to stand. New execution to issue as prayed for.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

STATE OF MAINE *vs.* DENNIS KELLY.

Sagadahoc. Opinion July 30, 1884.

Murder. Jurisdiction. Fort Popham.

The courts of this state have not jurisdiction of murder or manslaughter committed within Fort Popham near the mouth of Kennebec River.

When a mortal blow or wound is inflicted in a fort of the United States and the person struck or wounded, dies out of the fort, the crime cannot be regarded as committed where the person dies.

ON REPORT.

Indictment for the murder of Francis A. Smith by shooting and mortally wounding, July 29, 1882, within the limits of Fort Popham, a fort of the United States, from the effects of which shooting and wounding death ensued at Phipsburg, outside the limits of the fort, August 13, 1882.

The defendant pleaded in abatement to the jurisdiction of the court. Thereupon, Asa Bird Gardiner, Judge Advocate, U. S. A., and Wilbur F. Lunt, U. S. Attorney for the district of Maine, appeared in behalf of the United States, and presented the following claim to the jurisdiction:

"State of Maine, Sagadahoc, ss. Supreme Judicial Court, December Term, 1882. *The State of Maine*, by indictment, vs. *Dennis Kelly*.

"And now the above entitled cause having come on to be heard on the indictment therein, and the said defendant having filed a plea to the jurisdiction of this honorable court therein, and issue having been joined thereon, now therefore upon said indictment and plea to the jurisdiction and the several pleadings thereunder, the United States of America, by their duly authorized counsel, come into court and respectfully appraise this honorable court that the said United States claim exclusive jurisdiction and cognizance of the crimes alleged in said indictment and of the person of the said defendant to be proceeded against under the

laws of the said United States for the crimes in said indictment alleged.

"The attention of this honorable court is respectfully invited to the fact that the immediate action taken by the authorities of the State of Maine against the defendant for the alleged crimes and his early release upon bail have prevented the said United States from proceeding earlier in the premises or apprising this honorable court of its claim of exclusive jurisdiction, all of which is respectfully submitted.

Asa Bird Gardiner, Judge Advocate.
Wilbur F. Lunt, U. S. attorney for Maine,
counsel for the United States of America."

"Bath, December 29th, 1882."

Henry B. Cleaves, attorney general, and *Frank J. Buker*, county attorney, for the State of Maine, cited: 1 Chitty Crim. Law, 177; *Goodwood's case*, 1 Leach C. C. L. 432; *King* v. *Coombs*, 1 Leach C. C. L. 169; *State* v. *Moore*, 26 N. H. 448; 2 Inst. 318; 1 Hale P. C. 427; *Com.* v. *Macloon*, 101 Mass. 8; *U. S.* v. *Bladen*, 1 Cranch C. C. 458; *King* v. *Hargrave*, 5 Car. & Paine, 510; *Com.* v. *Linton*, 2 Va. 205; *U. S.* v. *McGill*, 4 Dall. 427; *U. S.* v. *Armstrong*, 2 Curtis C. C. 446; *State* v. *Bowen*, 16 Kansas, 475; *License Case*, 5 How. 504; *U. S.* v. *De Witt*, 9 Wall. 44; Cooley Const. Lim. (3 ed.) 573; U. S. R. S., c. 2, § 1; R. S., c. 131, § 3; Opp. Att'y Gen. U. S., 199; *U. S.* v. *Cornell*, 2 Mason, 60; *State* v. *Underwood*, 49 Maine, 181; *Com.* v. *Parker*, 2 Pick. 550; St. 2 Geo. II, c. 21; *Tyler* v. *The People*, 8 Mich. 320; *Stoughton* v. *State*, 13 Smedes & M. 255; *Minnesota* v. *Gessert*, 21 Minn. 369; *U. S.* v. *Wells*, Dist. of Maine, 11 Am. L. Reg. 424; *Moore* v. *People of Illinois*, 14 How. 13; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Coolbroth*, 3 Wall. 334; U. S. R. S., c. 5, § 1342; Articles of War, Art. 58; *Coleman* v. *Tenn*, 97 U. S. 509; Benet Courts Martial, 115; *Steiner's Case*, 6 Op. U. S. Att'y Gen'l 413; *Howe's Case*, 6 Op. U. S. Att'y Gen'l 511; *People* v. *Adams*, 3 Denio, 207; *Com.* v. *Roby*, 12 Pick. 496.

Asa Bird Gardiner, judge advocate, U. S. A. and *Wilbur F. Lunt*, U. S. attorney for the district of Maine, for the United States, cited: Stats. 1857, c. 115; 1862, c. 114; U. S. Const. Art. 1 § 8, par. 17; 1 Kent, Com. § 429; *U. S.* v. *Cornell*, 2 Mason C. C. 60; *U. S.* v. *Davis*, 5 Mason C. C. 356; *Com.* v. *Clary*, 8 Mass. 72; U. S. R. S., § § 5339, 5341; *Fox* v. *State of Ohio*, 5 How. 410; *Houston* v. *Moore*, 5 Wheat. 21; *Prigg* v. *Com. of Penn.* 16 Pet. 539; 1 Bishop Crim. Law, (7 ed.) § § 113, 115 and notes; 1 Bishop Crim. Pro. (2 ed.) § 51 and notes 6, 7; *Rex* v. *Burdett*, 4 Barn. & Ald. 358; *Regina* v. *Lewis*, 7 Cox Crim. Cas. 277; *Rex* v. *Hargrave*, 5 Car. & Payne, 510; *State* v. *Gessert*, 21 Minn. 369; *State* v. *Bowen*, 16 Kansas, 476; *Riley* v. *State*, 9 Humphrey's, 656; *People* v. *Gill*, 6 Cal. 637; *Green* v. *State*, 66 Ala. 41; *U. S.* v. *Charles J. Guiteau*, Official Report, Part III, 1838, 2578, 2634; *Stearns* v. *U. S.* 2 Paine, C. C. 300; *U. S.* v. *Bevans*, 3 Wheat. 386; *U. S.* v. *Holliday*, 3 Wall. 407; *U. S.* v. *Peters*, 5 Cranch, 115; *Slocum* v. *Mayberry*, 2 Wheat. 1.

Washington Gilbert, for the respondent.

WALTON, J. The question is whether the courts of this state have jurisdiction of the crimes of murder or manslaughter committed within Fort Popham near the mouth of the Kennebec river.

We think they have not. Fort Popham is a United States fort. It is erected on land purchased for a fort; and the purchase was made by consent of the legislature of this state. The constitution of the United States declares that congress shall have power to exercise exclusive legislation over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and, in the exercise of this power, congress has enacted what the punishments for murder and manslaughter shall be when committed within any fort, arsenal, dock-yard, magazine, or other place under the jurisdiction of the United States, and conferred authority upon the federal courts to try the persons charged with these offenses.

The conclusion is, therefore, inevitable that, the courts of this state do not have jurisdiction of the crimes of murder or manslaughter committed in a United States fort. In fact, we do not know that this proposition is denied by any one.

But it is said that, although a mortal wound may be inflicted within a fort, still, if the person wounded dies elsewhere, the crime must not be regarded as having been committed in the fort, but at the place where the person dies; and that in such a case, the courts of the latter place have jurisdiction. It is undoubtedly true that the courts of the latter place do sometimes have jurisdiction. But we are satisfied that when this is so, it is not because the crime is to be regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, can not change the locality of the crime.

And this brings us to the only question in relation to which there can be any doubt in this case; and that is, whether our statute, which declares that if a mortal wound is inflicted, or poison administered, on the high seas, or without the state, whereby death ensues within the state, such offense may be tried in the county where the death ensues. R. S., c. 131, § 3.

Perhaps it is a sufficient answer to say that this statute was not intended to apply to the United States forts which are within our state; that by its terms it applies only to the high seas, and other places, without the state; that the purchase of land by the United States for a fort, while it confers upon congress the exclusive power to legislate for it, does not take the land out of the state. It is still within our territorial limits. But we do not rest our decision upon this ground. Another, and, as it seems to us, a conclusive answer is that, the power of congress to legislate for the territory on which a United States fort is erected, is declared by the federal constitution to be exclusive. Consequently, there can be no concurrent jurisdiction. And any statute of the state, which should attempt to exercise

such a jurisdiction, must necessarily be unconstitutional and void. Congress has provided for the punishment of crimes committed within the forts of the United States. It has expressly provided for the punishment of murder and manslaughter. R. S., U. S. § § 5339, 5341, 5343. And conferred exclusive jurisdiction upon the federal courts. *Ib.* § 629, cl. 20. How, then, can a state court take jurisdiction? Clearly it can not, unless when a mortal blow or wound is inflicted in a fort, and the person struck or wounded, dies out of the fort, the crime is regarded as committed where the person dies; and this, as already stated, is a doctrine which we cannot sustain. It is condemned by the weight of modern authority, English as well as American, and is opposed to reason.

The authorities bearing on the question will be found in Bishop's Criminal Law, vol. 1, § § 69, 154; Bishop's Criminal Procedure, chap. 4; *Commonwealth* v. *Macloon et als.* 101 Mass. 1, and in the Report of Guiteau's Trial for the murder of President Garfield.

The plea in abatement is sustained, and the prisoner surrendered to the United States authorities.

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

EDWARD C. ALLEN *vs.* JAMES H. SMITH and another.

Cumberland. Opinion July 30, 1884.

Water-fixtures. Sinks. Water-closets. Nuisance.

Properly constructed water-closets and other water-fixtures are not nuisances. Nor are landlords responsible for the carelessness of their tenants in the use of such fixtures.

ON REPORT from the superior court.

An action on the case against the owners of building No. 50, Union street, Portland, for damage done to the plaintiff's

goods and merchandise stored on the first floor of the building, April 22, 1881, by water escaping from the water-fixtures on the second floor occupied by Jury and Thompson, for the purpose of manufacturing shoes.

The writ was dated June 10, 1881. The plea was the general issue.

The opinion states the material facts.

Strout and Holmes and *E. P. Payson*, for the plaintiff.

We put the liability of defendants upon three grounds: (1) Negligence. (2) Nuisance. (3) Trespass.

We claim that the facts show the defendants to have undertaken to put the water-fixtures into a safe condition; to keep them there; and neglected to do either. They did not lease, as they undertook to do, safe fixtures. They did not restore them to, and maintain them in, a safe condition, as they undertook to do, — as indeed they not only undertook, but commenced to do. They knew the state they were in from the noisome, foul, obstructed water-closet, to the old, bent, clogged waste pipe, and the faucet that could not be closed, and they knew that these fixtures were the direct conductors of the water of Lake Sebago to the delicate goods of the plaintiff; and knowing all this they consented to the natural consequence — an overflow. If this be not negligence, bordering upon the culpable, we are at a loss to know what, in an action of tort, would be entitled to the term. We do not need to repeat the testimony here to establish this ground of their liability, which is abundantly supported by the following cases. *Burrows* v. *M. G. & C. Co.* L. R. 7 Ex. 96; *Toole* v. *Beckett*, 67 Maine, 544.

We had no more control of the pipes in Jury and Thompson's room, than had plaintiff of the roof in this last case. *Priest* v. *Nichols*, 116 Mass. 401 and cases.

We do not deny that the fixtures were let to tenant; but unlike the landlord in *McCarthy* v. *Savings Bank*, 74 Maine, 321, this landlord let unsafe fixtures, assumed to keep them safe, and failed, or neglected to do so. *Payne* v. *Rogers*, 2 H. Black. 350; *Lowell* v. *Spaulding*, 4 Cush. p. 279; *Milford* v.

Holbrook, 9 Allen, p. 21; *Freidenburg* v. *Jones*, 63 Ga. 612.

Nuisance. There is no doubt that equity would have enjoined the use of Sebago with such fixtures, had plaintiff known, and shown to a court, the facts as they existed. Story, Equity, § § 927, 928. As it did the storing of gunpowder. *Crowder* v. *Tinkler*, 19 Ves. 617; and the storing of merchandise in an unsafe building. *Mayor, etc. of London* v. *Bolt*, 5 Ves. 129.

Plaintiff did not know of the facts; but if he could have claimed an injunction against such a source of damage *in futuro*, can he not now be remunerated in this action? These water pipes were, if not an existing, at least a potential nuisance; and the landlord who leases such a nuisance is liable for its results. *House* v. *Metcalf*, 27 Conn. p. 640; Wood, Nuisance, pp. 6, 102; Bacon's Abridg. vol. 7, p. 232 and cases; *Anonymous*, 11 Mod. 8; *Rooth* v. *Wilson*, 1 B. & A. 59; *Gilbert* v. *Beach*, 4 Duer, 423; *Fish* v. *Dodge*, 4 Denio, 311; *Panton* v. *Holland*, 17 Johnson, 92; *Owings* v. *Jones*, 9 Md. 108; *Pickard* v. *Collins*, 23 Barbour, 444; *Brown* v. *Bussell*, Law Report, 3 Queen's Bench, 261; Taylor's Landlord and Tenant, § 175 and 175 A.; *Shipley* v. *Fifty Associates*, 106 Massachusetts, 200; *Looney* v. *McLean*, 129 Mass. 33; *Homan* v. *Stanley*, 66 Penn. 464.

Our declaration is sufficient for this cause of action. *Norcross* v. *Thoms*, 51 Maine, 503.

Trespass. This word does not fully express our claim. We do not mean that defendants entered our premises, but that they brought a dangerous agency in an unsafe receptacle upon their own premises, for their own advantage, and failed to restrain it from escaping and injuring us in our premises. The general principle, for whose application we are contending, is thus stated.

"The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it

seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have occurred; and it seems to be but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law whether the thing so brought be beasts, or water, or filth, or stenches." Judgment of BLACKBURN, J., in *Fletcher* v. *Rylands*, L. R. 1 Ex. 265. The case went then to the House of Lords; where Lord CAIRNS, the Lord Chancellor, after quoting the above, adds: "In that opinion I must say I entirely concur." *Rylands* v. *Fletcher*, L. R. 3 E. & I. App. 330.

In this country it has been denied in New York (unless there be negligence in the use or introduction of the agency). *Losee* v. *Buchnam*, 51 N. Y. 476; criticised in New Hampshire, — the opinion erroneously ascribing it to unjust principles. *Brown* v. *Collins*, 53 N. H. 442; substantially followed in Massachusetts, in *Ball* v. *Nye*, 99 Mass. 582, and approved in *Shipley* v. *Fifty Associates*, 106 Mass. 198, as stated in *Gorham* v. *Gross*, 125 Mass. p. 238, by GRAY, C. J.

"The general rule of law" stated . . . in *Fletcher* v. *Rylands*, and approved by this court in *Shipley* v. *Fifty Associates*, is that "the person who, for his own purposes, brings on his land 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." It has been thus remarked upon in this state, — "Whether the same principles will be applied by this court to similar circumstances we need not stop to inquire until such an occasion presents itself." VIRGIN, J., *Simonton* v. *Loring*, 68 Maine, p. 165.

Aside from its weight as a precedent merely, and the approval

of Massachusetts cases, there are the following reasons why its doctrine should be recognized in this state:

First. It is a right doctrine; for a man should not be allowed to purchase a gain for the price of another's injury, even if not technically liable as a trespasser.

Second. It is an ancient doctrine, for the precedents cited and principles applied by BLACKBURN, J., are found in that older common law, which is as much the heritage of Maine as of England, and recognized in many cases for analogous injuries. For illustrative proof of this, see as to animals: *May* v. *Burdett*, 9 Ad. & El. 101 (58 E. C. L.); *Cox* v. *Burbridge*, 13 C. B. (N. S.) 438 [106 E. C. L.]; *Card* v. *Case*, 5 C. B. 622 (57 E. C. L.); U. S. Dig. vol. 1, p. 272, § 63. As to dangerous instruments: *Townsend* v. *Wathen*, 9 East, 277. Cesspools: *Tenant* v. *Goldwin*, 1 Salk. 21, 360, and 2 Ld. Raymond, 1089. Reservoirs: *Wilson* v. *New Bedford*, 108 Mass. 261. Privies: *Ball* v. *Nye*, 99 Mass. 582. Odors from a tomb: *Barnes* v. *Hathorn*, 54 Maine, 125. Vapors and stenches: *Banford* v. *Turnley*, 3 B. & S. 61 (113 E. C. L.). Fire — until stat. 6 Ann C. 3, limited liability to negligence: *Filliter* v. *Phippard*, 11 Ad. & E. N. S. *354; *Higgins* v. *Dewey*, 107 Mass. 494, and notwithstanding this limitation as to fire. Smoke from a furnace: *Rich* v. *Basterfield*, 2 C. & K. (61 E. C. L.), 259. Sparks from an engine: *Power* v. *Fall*, L. R. 5 Q. B. Div. 600. Also fall of material from building: *Jager* v. *Adams*, 123 Mass. 26. And snow slides: *Shipley* v. *Fifty Associates*, *ante*; *Preston* v. *Drew*, 33 Maine, p. 562.

Third. Because it is the firmest ground upon which the decisions that a landlord who demises an actual or potential nuisance is liable for all damages therefrom, can be logically sustained. Taylor's Landlord & Tenant, § 175.

William L. Putnam, for the defendant.

WALTON, J. The plaintiff's goods being stored in the basement of a building on Union street in Portland, were damaged by the overflow of a water-closet in the room above. The waste

water from a sink was discharged through the water-closet, and, on the night of the accident, the water was left running in the sink, and the water-closet becoming clogged, the water in the bowl overflowed and run down into the room below and did the damage complained of. It is agreed that the amount of the damage was two hundred and fifty-one dollars. The question is whether the defendants, who were the owners, but not the occupants, of the building, are responsible for this injury. We think they are not.

Properly constructed water-closets and other water-fixtures are not nuisances. They are among the greatest of modern conveniences. They not only save labor and add to our comfort, but they promote health and cleanliness, and thus tend to prolong life. True, they are in some respects a source of danger. So are stoves and furnances. But they are not on that account to be regarded as nuisances. Nor are landlords responsible for the carelessness of their tenants in the use of such fixtures. *McCarthy* v. *Savings Bank*, 74 Maine, 315, and cases there cited.

The evidence in this case satisfies us that the negligence, if any, which caused the plaintiff's damage, was not the negligence of the defendants, but the negligence of their tenants. The water-closet seems to have been a suitable one, and in good repair. The evidence shows that it frequently became clogged, and had to be cleared out. But that must have been on account of the improper use of it, and not on account of any defect in its construction. Complaint is made of the pipe which conducted the water from the sink to the water-closet. It is said that it was old and small, and had a "kink" in it, which rendered it liable to become stopped. This may be true. But it seems to have worked well enough on the night of the accident, for it conveyed all the water from the sink to the water-closet. This is proved by the fact that it was the water-closet and not the sink that overflowed. At least, the evidence leaves no doubt in our minds that such was the fact. Complaint is also made of the supply-faucet of the sink. It is said that it had become leaky and could not be shut off tight. Of this there seems to be no doubt. The second story of the building was used as a shoe-shop, and this

sink and water-closet were in the second story, and used by the workmen. Mr. Jury, a member of the firm who occupied the shop, says he was the last one to leave the shop the night before the overflow; that when he left there was a little stream running from the faucet about half as big as a pipe stem; that the diameter of the waste-pipe was about one inch; that no overflow had ever taken place before that time, although "this little stream" had been running several nights before this; that when he got there in the morning there was water on the floor, the sink was half full of water, and the water-closet bowl was full, and water was running from the faucet in the sink, as near as he could judge, a stream half as big as a pipe-stem. Being asked how the water happened to overflow that night when it had never overflowed before, he answered, "I think the water-closet that night, by some means or other, got stopped, so the water could not run through at all, and the consequence was it run over from the bowl." And no other or different explanation of the accident is given by any one. Here then, we have the cause of the accident. It did not occur because the four-inch soil pipe of the water-closet, and the one-inch pipe of the sink, were not large enough to carry off a stream of water half as large as a pipe stem, or one twice that size; nor because such a stream of water was left running into the sink, and could not be shut off closer. Such streams of water, as the evidence shows, are often left running purposely to prevent freezing. The direct proximate cause of the accident was the stoppage of the outlet of the water-closet, so, as Mr. Jury expressed it, "the water couldn't run through at all, and the consequence was it run over the bowl." The cause of this stoppage is not explained. An explanation is not difficult, however, when we consider the purpose for which this floor of the building was being used, and the number of persons that had access to the closet, and the kind and quantity of waste that would be likely to be thrown into it. It is enough to say that in our judgment it was not owing to any fault in the closet itself; for that appears to have been one of the safest and best in use, and in good repair. The fault, if any, must have been in the

use made of it; and for that, the defendants were not responsible. The closet was not a nuisance *per se;* nor did it become so through any fault of the defendants.

Judgment for defendants.

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

SETH M. CARTER, administrator, *vs.* MARK LOWELL and others.

Androscoggin. Opinion July 30, 1884.

Wills. Legacy.

By her last will and testament a testatrix gave all her property of every name and nature (except a watch) to twenty-five of her relatives, naming them,— a sister, two brothers and twenty-two nephews and nieces. And she first declared that it should be divided among them equally. But by a subsequent clause she said: "Excepting, also, it is my will that the several shares of my property to my nephews and nieces named, shall be in the same proportion, by right of representation, as if all my brothers and sisters were living at my decease, and I had given my property to all my brothers and sisters and nephews and nieces named, each one to have the same share as the other." The testatrix had seven brothers and sisters in all — three living and four dead. *Held,* that in the distribution of the estate, it should be divided into twenty-nine shares; that each of the twenty-five legatees named should have one of these shares, and that the four remaining shares be distributed among the children of the four deceased brothers and sisters of the testatrix, *per stirpes.*

ON REPORT.

Bill in equity by the administrator, with the will annexed, of the estate of Betsey L. Bearce, late of Auburn, to obtain a construction of the following item of her will:

"Item 1. I give, bequeath, and devise unto Mark Lowell, Daniel Lowell and Vesta Burbank, children of my deceased brother, James Lowell; to Mark Lowell, my brother, John A. Lowell, Hubbard Lowell, Benjamin P. Lowell and Lizzie Irish, his children; to William L. Bonney, Tristam Bonney, Henry Bonney, and George Bonney, children of my sister deceased, Polly Bonney; to Charles Lowell, Helen Whitney, Margie

Etheridge, Henry Lowell, and Louisa Lowell, children of my deceased brother, Stephen Lowell; to William Lowell, my brother, Mrs. Carrie Perkins, S. Arthur Lowell and W. G. Lowell, his children; to Miriam Shaw, my sister, Huldiannah Cushman and Edward Shaw, her children; to Russell Howard, the only child of my deceased sister Margie Howard, all my property of every name and nature, real, personal and mixed, of which I may die seized and possessed, to be divided equally between all said persons, brothers, sister, nephews and nieces, excepting the property I shall name hereafter in my will, and excepting, also, that it is my will that the several shares of my property to my nephews and nieces named shall be in the same proportion, by right of representation as if all my brothers and sisters were living at my decease, and I had given my property to all my brothers and sisters and nephews and nieces named, each one to have the same share as the other."

"Item 2. I give and bequeath to the nephew of my deceased husband, Samuel R. Bearce, the gold watch and chain left by my late husband."

J. M. Libby, for Russell Howard, one of the defendants.

Frye, Cotton and White, for the other defendants.

WALTON, J. By her last will and testament, Betsey L. Bearce gives all her property of every name and nature (except a watch) to twenty-five of her relatives — a sister, two brothers, and twenty-two nephews and nieces. And she first declares that it shall be divided among them equally. But by a subsequent clause she says: "It is my will that the several shares of my property to my nephews and nieces named shall be in the same proportion by right of representation as if all my brothers and sisters were living at my decease, and I had given my property to all my brothers and sisters and nephews and nieces named, each one to have the same share as the other." It appears by the will that the testatrix had seven brothers and sisters in all — three living and four dead. If the latter were not dead, and were added to the legatees, the whole number of the legatees

would be twenty-nine; and if the estate were then divided equally among them, the share of each would be one twenty-ninth. The two provisions of the will are thus seen to be in conflict. Under the first clause each of the twenty-five legatees named is entitled to one twenty-fifth of the estate; under the second, to only one twenty-ninth, leaving, apparently, four twenty-ninths undisposed of. And here arises the difficulty. What shall be done with these four shares? Shall they be divided among all of the legatees equally, or shall they go to the children of the four deceased brothers and sisters, "by right of representation?" We can not resist the conviction that the latter was the intention of the testatrix. It seems to have occurred to her that under the first provision of the will the children whose parents were living were likely to fare better than the children whose parents were dead; that they were getting an equal share at the beginning, and might by inheritance get their parents' share also; and that it was to avoid this apparent inequality that the second clause was added. It seems to have been her desire that to this extent the seven branches of her family should all fare alike.

It is therefore the opinion of the court that in the distribution of the estate, it should be divided into twenty-nine shares; that each of the twenty-five legatees named should have one of these shares, and that the four remaining shares be distributed among the children of the four deceased brothers and sisters of the testatrix, *per stirpes*.

And as this is a suit brought by the administrator in good faith to obtain a construction of the will upon a point in relation to which doubts might well exist, we think the costs of the suit should be paid out of the estate.

Decree accordingly.

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

ALFRED KNOWLTON, in review, *vs.* E. C. HERSEY and another.

Cumberland. Opinion July 30, 1884.

Contract. Guaranty.

K wrote to H the following letter: "Gentlemen,—The bearer of this letter, my son-in law, . . . wishes to place a stock of groceries in his provision and meat store, in this place. To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order of you." *Held*, that the letter did not create a continuing liability; that when the stock of groceries had been selected, and, with the aid of K, had been paid for, the latter's liabilities ended.

ON REPORT.

Writ of review. Original judgment was rendered on default at the December term, 1881, of the superior court, Cumberland county, for $83.83 with interest from the date of writ, making $87.45 debt and $31.90 costs of suit.

The opinion states the material facts.

John J. Perry and *J. W. Knowlton*, for the plaintiff in review, cited: *Monk* v. *Beal*, 2 Allen, 585; *Glidden* v. *Child*, 122 Mass. 433; *Chapin* v. *Lapham*, 20 Pick. 467; *Mussey* v. *Rayner*, 22 Pick. 230; *Sylvester* v. *Staples*, 44 Maine, 496; *Richardson* v. *Insurance Co.* 46 Maine, 398; *Cocheco Bank* v. *Berry*, 52 Maine, 302; *Hawes* v. *Smith*, 12 Maine, 429.

Drummond and Drummond, for the defendants in review, contended that the contract of Knowlton was an original and not a collateral undertaking, that it was the intention of the parties that the credit was to be extended to him and not to Young, and cited: *Norris* v. *Spencer*, 18 Maine, 324; *Homans* v. *Lambard*, 21 Maine, 308; *Copeland* v. *Wadleigh*, 7 Maine, 141; *Griffin* v. *Derby*, 5 Maine, 476; *Hunt* v. *Adams*, 5 Mass. 358; *Thayer* v. *Wild*, 107 Mass. 449; *Duval* v. *Trask*, 12 Mass. 154; *Chapin* v. *Lapham*, 20 Pick. 467; *Cahill* v. *Bigelow*, 18 Pick. 369; *Anderson* v. *Hayman*, 1 H. Bl. 120; *Jones* v. *Cooper*, Cowp. 227; *Raines* v. *Stony*, 3 C. & P. 130; *Glidden* v. *Child*, 122 Mass. 433; *Monk* v. *Beal*, 2 Allen, 585.

The letter placed no limit upon the amount of credit to be given, and is to be construed in the light of the facts and circumstances, in considering the question of the continuing liability of Knowlton. And the fact that the defendants in review relied upon the credit of the plaintiff in review in making the sales is a fact and circumstance that show, at least, their understanding of the letter and the intention of the parties.

Counsel cited: *Douglass* v. *Reynolds*, 7 Pet. 119; *Bell* v. *Bruen*, 1 Howard 169; *Bent* v. *Hartshorn*, 1 Met. 24; *Hargreave* v. *Smee*, 6 Bing. 244; *Mason* v. *Pritchard*, 12 East, 227; *Mayer* v. *Isaac*, 6 M. & W. 604; *Melville* v. *Hayden*, 3 B. & A. 389; *Lee* v. *Dick*, 10 Pet. 482.

WALTON, J. On the 25th of February, 1880, Alfred Knowlton of Liberty, Maine, wrote a letter to E. C. Hersey & Co. of Portland, of the following tenor.

"*Gentlemen*: The bearer of this letter, my son-in-law, Mr. Arthur Young, wishes to place a stock of groceries in his provision and meat store in this place. To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order of you."

The question is whether or not this letter created a continuing liability. It appears that Mr. Young went with it to Hersey & Co., selected groceries to the amount of $432.45, for which his father-in-law, Mr. Knowlton, signed notes, which were subsequently paid. This was in February, 1880. In April, May and June following, Young ordered other groceries, to the amount of $83.83; and the question is whether, by virtue of the foregoing letter, Mr. Knowlton is liable for this last bill.

We think he is not. It seems to us that the letter was not intended by the writer, and could not properly be understood by those to whom it was addressed, as creating a continuing liability. It expresses a willingness to aid Mr. Young in starting a new branch of business, but fails to express an intention to continue such aid in the future. In the language of the letter, the aid which the writer proposes to render is to enable Mr. Young "to *place* a stock of groceries in his provision and meat store," not

to replenish or keep such a stock good afterwards; and that when the stock of groceries had been selected, and, with the aid of Mr. Knowlton, had been paid for, the latter's liability ended, and that two months after, other goods could not be sold to Mr. Young on Mr. Knowlton's credit, without the latter's consent, and a new promise to be accountable for them. Such being our conclusion, there is no occasion to consider the other questions argued by counsel.

Judgment for Mr. Knowlton, the plaintiff in review.

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

ALVIN B. SPENCER, Guardian of ROSCOE L. WENTWORTH,

vs.

LYDIA CHICK and another.

York. Opinion July 30, 1884.

Wills. Life-estate. Tenants in common. Partition.

A testator made the following disposition of his real estate in his will: "I give and devise to my said beloved wife, for and during the term of her natural life my homestead farm, upon which I now live and my other real estate in said Berwick. . . I give and bequeath to my son Edward Wentworth and my daughter Lydia Chick, wife of John Chick, equally, all the personal and real estate that I have above bequeathed and devised to my beloved wife, after her decease, during the natural lives of my son Edward Wentworth and my daughter Lydia Chick, and, after the decease of the said Edward and Lydia, all the above property is to descend to my two grandsons, Timothy Wentworth and George E. Chick, children of said Edward Wentworth and Lydia Chick, during the natural lives of the said Timothy and George E. and then descend to their heirs or legal representatives." *Held*, that the effect of the will was to vest a life-estate in the testator's widow; then a life-estate in his two children, Edward Wentworth and Lydia Chick; then a life-estate in their two children, Timothy Wentworth and George E. Chick; then a fee simple in their heirs; and that the son and only heir of Timothy took an estate in fee simple, and as a tenant in common of

one-half of the real estate, which no conveyance made by the owner of any preceding life-estate could defeat, and was entitled to have it set out to him in severalty on petition for partition by his guardian.

ON REPORT on agreed statement of facts.

Petition for partition.

All parties claim their title directly or by mesne conveyances under the will of Timothy Wentworth, the material portion of which is recited in the head note.

Timothy Wentworth, the testator, his widow and his son Edward all died prior to January 1, 1865. Timothy Wentworth, the grandson, died Febuary 2, 1876, leaving a widow and one child, Roscoe L. Wentworth, born in January, 1870, whose guardian is the petitioner.

The respondents are Lydia Chick who is in possession of a part of the demanded premises and George E. Chick who is in possession of the remainder of the demanded premises.

In March, 1865, Timothy, the father of Roscoe L. conveyed by quit claim deeds, one to Lydia and one to Lydia and George E. a portion of the first piece described in the petition, and in October, 1869, he conveyed by quit claim deed the second piece described in the petition to George E.

Wells and *Burleigh*, for the plaintiff, cited: *Wood* v. *Little*, 35 Maine, 107; *Bigelow* v. *Littlefield*, 52 Maine, 24; R. S., 1871, c. 73, §§ 6, 7; *Hamilton* v. *Wentworth*, 58 Maine, 101; 2 Bl. Com. 180; *Miller* v. *Miller*, 16 Mass. 59; *Burghardt* v. *Turner*, 12 Pick. 534; 1 Wash. Real Prop. *408, § 9.

Rufus W. Nason, for Lydia Chick.

William J. Copeland, for George E. Chick.

The ward of the petitioner has neither seizin nor right of entry. R. S., c. 88, § 1. *Baylies* v. *Bussey*, 5 Maine, 152. R. S., c. 73, § 7, does not abolish joint tenancies. Estates are still joint tenancies when so expressed. It is not necessary that the word "joint" be used in expressing the tenancy. *Shaw* v. *Hearsey*, 5 Mass. 521; *Fox* v. *Fletcher*, 8 Mass 274; *Appleton* v. *Boyd*, 7 Mass. 131; 12 Mass. 279.

The devise to Edward and Lydia was a joint one—expressed by the word "equally"—it ended with the life of the survivor. If a joint estate every word in the devise has its full and natural meaning. The reversion was given to George and Timothy jointly. If Edward and Lydia were tenants in common then the estate of George might commence at the death of one and the estate of Timothy at the death of the other; but if joint tenants then the estates of George and Timothy would commence at the same time—the death of the survivor—that accords with the language of the devise.

A fee simple was given to George and Timothy. The remainder over was void for remoteness. The remainder to their heirs or legal representatives gives George and Timothy the power of disposing the remainder. The words "legal representatives" mean something. They mean devisees or grantees. In this case they mean George as the grantee of Timothy, and the deed bars any claim of the plaintiff's ward now or hereafter.

WALTON, J. Undoubtedly the petitioner is the owner in common of one half of the real estate described in his petition and entitled to the partition prayed for. The effect of Timothy Wentworth's will was to vest a life estate in his widow; then a life estate in his two children, Edward Wentworth and Lydia Chick; then a life estate in their two children, Timothy Wentworth and George E. Chick; then a fee simple estate in their heirs; and the widow, and Edward Wentworth, and Timothy Wentworth (grandson of the testator), being dead, the petitioner, (being the son and only heir of Timothy, the grandson of the testator), takes an estate in fee simple, and as a tenant in common, of one half of the real estate so devised by his great grandfather, and is entitled to have it set out to him in severalty, as prayed for in his petition.

The will of Timothy Wentworth did not create joint estates in the devisees; it created estates in common. "Conveyances not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed." R. S., c.

73, § 7. It is not otherwise expressed in the will of Timothy Wentworth. There is no word or phrase in it which can by any possibility be construed as expressing an intention that the devisees should take as joint tenants. Consequently, they take as tenants in common; and upon the death of one of these tenants in common, his estate passes on to his successor.

Nor did the will create estates tail, which could be barred by conveyances made by the owners of the life estates. A life estate and an estate tail are different things. An estate tail is one which is limited to the heirs of the donor's body; that is, to his children and his children's children, and so on, in a direct line, indefinitely. A devise to one for life and to his heirs generally, does not create an estate tail. And the owner of the life estate can not by a conveyance bar the estate of the heir. He can convey no greater estate than that which he owns; namely, an estate which will continue so long as he lives, and no longer. Consequently, the conveyances made by the petitioner's father did not defeat the estate of the petitioner. He takes under his great grandfather's will an estate in fee simple, which no conveyance made by the owner of any of the preceding life estates could defeat. 1 Wash. Real Prop. c. 4, § § 22, 24; R. S., c. 73, § § 5, 6; 1 Wash. Real Prop. c. 5, § 18, and cases cited in note 5.

Partition ordered as prayed for.

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

OTTO SHARP *vs.* ERNESTO PONCE.

Cumberland. Opinion July 30, 1884.

Rescinding of a contract. Fraud. Damages. Sales.

To rescind a contract of sale of merchandise, which has been delivered, on the ground of fraudulent representations of the seller, the buyer must restore the goods to the seller, if they are of any value, or offer to restore them under such circumstances as show an existing intention and ability to deliver them into the possession of the seller, if he elects to accept them.

When such a contract has not been rescinded the buyer is liable for the contract price, less the damages occasioned by any fraud that was practiced upon him in the sale.

On exceptions and motion to set aside the verdict from the superior court.

Assumpsit on a bank check for two hundred and sixty-seven dollars, given by the defendant to one Rosenburg in part payment of certain spectacles sold and delivered to the defendant. The verdict was for the defendant. The material facts are stated sufficiently in the opinion. The case has been once before considered by the law court, and is reported in 74 Maine, 570.

Clarence Hale, for the plaintiff, upon the question considered in the opinion, cited: *Miller* v. *Barber*, 66 N. Y. 558; *Winningham* v. *Redding*, 6 Jones (N. C.), 126; *Camp* v. *Simon*, 34 Ala. 126; *Nealon* v. *Henry*, 131 Mass. 153.

M. P. Frank, for the defendant.

It appeared in evidence, uncontradicted, that there was every effort made after the discovery of the fraud to return or tender back the goods, but the vendor avoided.

He was notified by letter that the contract was rescinded, and the defendant has been unable to get access to him, but he is and always has been ready to return the goods. This is all that could be required, to enable him to set up the fraud as a complete defense as against the original vendor, and a person not a *bona fide* holder for value, but having knowledge of the fraud, could stand in no better situation. *Walker* v. *Thompson*, 61 Maine, 349; *Thayer* v. *Turner*, 8 Met. 553; *Gilmore* v. *Holt*, 4 Pick. 257; *Borden* v. *Borden*, 5 Mass. 67; *Hathorne* v. *Hodges*, 28 N. Y. 486; *Smith* v. *Smith*, 30 Vt. 139.

Walton, J. A buyer of goods, who is induced to make the purchase by the fraudulent representations of the seller, has a right to rescind the contract of sale; and if he does so, he will have a complete defense to an action for the price. Or, he may abide by the contract, in which case he will not have a full defense to an action for the price, but he may have the damages

occasioned by the fraud deducted from the contract price. But, to rescind, and thus lay the foundation for a full defense to an action for the price of the goods, he must restore them to the seller, or offer to do so, if they are of any value. And the offer must be made under such circumstances as show an existing intention and ability to deliver them into the custody of the seller, if he elects to accept them. The expression of a willingness to restore, or an intention to do so, or notice to the seller to come and get them, is not sufficient to rescind the contract of sale. *Norton* v. *Young*, 3 Maine, 30.

In this case, the defendant claims to have been defrauded in the sale to him of a quantity of spectacles, and the action is by the indorsee of a negotiable bank check given in part payment of the price. The spectacles have never been returned to the seller. The defendant still has them in his possession; and he admits that they are of some value — fifty or seventy-five dollars. Nor has he offered to restore them to the seller for the purpose of rescinding the contract of sale. He testifies that he wrote to the seller to come and get the glasses and he would pay ten per cent of the price. But this was not an offer to rescind. It was an offer to perform one of the conditions of the contract. It was agreed at the time the contract was made that the seller should take back any of the goods, less ten per cent of the cost. And when the defendant wrote him to come and get the goods, and he would pay the ten per cent, it was an offer made in pursuance of the terms of the contract, and not notice of a repudiation or rescission of it.

Such being the condition of things, it is clear that the defendant is in no condition to make a full and complete defense to the suit. Undoubtedly, he may have the damages occasioned by any fraud that was practised upon him deducted from the contract price; but, inasmuch as he still retains the goods for which the check in suit was given, there is not an entire failure of consideration, and no reason is perceived why the plaintiff should not recover the balance. And yet this fact seems to have been entirely overlooked at the trial, and the plaintiff recovered nothing. The

jury returned a verdict for the defendant. The verdict is clearly wrong, and must be set aside.

Motion sustained. Verdict set aside.
New trial granted.

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

GEORGE MOORE *vs.* CASPER E. MARSHALL.

York. Opinion July 30, 1884.

Trust. Sale. Money had and received.

C and G were tenants in common of a parcel of real estate, C conveyed his part to G and took G's note therefor. Both parties agreed that the sale was one only in form, that C was to continue the actual owner of one-half and that G should not be required to pay the note. G sold and conveyed a part of the land and paid to C a portion of the purchase money received therefor. C, then, in violation of the understanding, sold the note and G was compelled to pay it, principal and interest, to the purchaser. *Held*, that by the sale of the note C violated a trust and thereby forfeited his right to retain that portion of the purchase money received from G and that assumpsit for money had and received was a proper form of action in which to recover it.

ON REPORT.

The opinion states the case.

Copeland and Edgerly, for the plaintiff, cited: *Butler* v. *Moore*, 73 Maine, 151; *Perkins* v. *Dunlap*, 5 Maine, 268; *Jellison* v. *Jordan*, 68 Maine, 373; *Kidder* v. *Hunt*, 1 Pick. 328; *Thompson* v. *Gould*, 20 Pick. 134; *Hoag* v. *Owen*, 57 N. Y. 644; *Churchill* v. *Stone*, 58 Barb. 233; *Graves* v. *Wait*, 59 N. Y. 156; *Murray* v. *Richards*, 1 Wend. 58; *Spring* v. *Coffin*, 10 Mass. 31; *Lawrence* v. *Carter*, 16 Pick. 12; *Gardiner Mfg. Co.* v. *Heald*, 5 Maine, 381; *Hilton* v. *Homans*, 23 Maine, 136; *Dyer* v. *Wilbur*, 48 Maine, 287; *Gilman* v. *Cunningham*, 42 Maine, 98; *Millett* v. *Holt*, 60 Maine, 169;

Braley v. *Goddard*, 49 Maine, 115; *Dwinel* v. *Stone*, 30 Maine, 384; *Gilmore* v. *Black*, 11 Maine, 485; *Howard* v. *France*, 43 N. Y. 593; *Raymond* v. *Bearnard*, 12 Johns. 274.

G. C. Yeaton and *H. V. Moore*, for the defendant.

From the unconflicting evidence of both it seems clear that they were either copartners in buying and selling land, or in any case tenants in common of a lot of land purchased, paid for, held, and lots sold therefrom on joint account with all current expenses and proceeds of sales equally divided, with a large portion of the land still unsold and now in the sole possession of the plaintiff, who has the entire legal title thereto, and no account whatever between the parties ever having been settled.

If plaintiff and defendant were copartners in the business of buying the tract of land and allotting it and selling the lots as opportunity arose, there having been no settlement between them, neither can maintain assumpsit against the other for any matters arising therefrom. *Holyoke* v. *Mayo*, 50 Maine, 385; 2 Ewell's Lindley on Part. 1029, and notes, 651, 15, 20, 57, *et seq.*; *Ryder* v. *Wilcox*, 103 Mass. 24; *Dudley* v. *Littlefield*, 21 Maine, 418.

But if plaintiff and defendant are to be regarded merely as tenants in common of real estate, neither can maintain an action against the other for his share of money received therefrom until there has been a settlement between them. *Maguire* v. *Pingree*, 30 Maine, 509; *Knowlton* v. *Reed*, 38 Maine, 246; *Gowen* v. *Shaw*, 40 Maine, 56; *Moses* v. *Ross*, 41 Maine, 360; *Wright* v. *Eastman*, 44 Maine, 220; *Lane* v. *Tyler*, 49 Maine, 252; *Millett* v. *Holt*, 60 Maine, 169; *Shepard* v. *Richards*, 2 Gray, 424, 427; *Terry* v. *Brightman*, 132 Mass. 318.

Finally, whether partners or not, or cotenants or not, indeed whatever may be their relation to each other, how can assumpsit be maintained for money voluntarily paid by the plaintiff to the defendant, under no mistake of fact? There is no suggestion of a loan; they were all payments of what upon all the facts now known both parties then believed was due to defendant. The

contract between them by virtue of which these payments were made has never been rescinded by the plaintiff; he still holds about five acres of the land. *Rand* v. *Webber*, 64 Maine, 191; *Butler* v. *Moore*, *supra*.

WALTON, J. This is an action for money had and received. It is before the law court on report, the court to render such judgment as the law and the evidence require.

The facts are these: The plaintiff and the defendant were owners in common of a parcel of real estate. The defendant conveyed his half to the plaintiff, taking therefor a note for one thousand dollars. Both parties agree that this transaction, though in form a sale, was not intended to be such in fact; that the understanding was that the defendant should continue to be regarded as the real owner of one-half of the land as before the conveyance, and that the plaintiff should not be required to pay the note. What the motive for this arrangement was, is not clear, the plaintiff's testimony tending to prove that it was for the purpose of placing the title beyond the reach of an unfriendly creditor, while the defendant testifies that it was to enable the plaintiff to sell the land and give a good title to it without calling on him to sign the deed. But both parties agree that it was intended to be a sale in form only, and that the plaintiff should not be required to pay the thousand dollar note which he had given as the nominal or pretended consideration for the conveyance. Such being the condition of the title, and the understanding of the parties, the plaintiff sold a portion of the land for about fifteen hundred dollars, and of this sum the defendant received between four and five hundred dollars. The defendant then, in violation of the understanding between him and the plaintiff, sold the thousand dollar note, and the plaintiff was compelled to pay it, principal and interest, to the purchaser.

The plaintiff now claims that, inasmuch as the defendant has, by his wrongful act, compelled him to pay for the defendant's half of the land, and the defendant has received his pay for it, the defendant is no longer entitled to retain the money (between

four and five hundred dollars) which he received at the time portions of the land were sold to other parties; and we think the plaintiff's claim is well founded. The defendant received the money in the execution of a trust existing between him and the plaintiff. He has violated that trust, and thereby forfeited his right to retain the money. And to allow him to retain it would in effect enable him to receive pay for a portion of his land twice. In equity and good conscience this money belongs to the plaintiff; and this is a proper form of action in which to recover it.

Judgment for the plaintiff for $449.81, and interest from the time the money was received by the defendant to date of judgment.

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

THOMAS B. FERNALD *vs.* GEORGE W. YOUNG.

Waldo. Opinion August 1, 1884.

Trespass. Tender. Practice. R. S., c. 82, § 20.

When a tender of amends has been made for an involuntary trespass, for which an action of trespass is commenced, the money must be brought into court on the first day of the return term of the writ to be of avail under the provisions of R. S., c. 82, § 20.

ON EXCEPTIONS.

Trespass on lands. The defendant pleaded the general issue and filed a brief statement disclaiming all title to the land described in the writ, and alleging that the trespass was involuntary, and that before action brought he tendered sufficient amends therefor.

At the trial it was admitted that before action brought the defendant tendered the plaintiff the sum of three dollars, but the money was not brought into court at the return term, nor at any

time, until after the testimony was out, when it was placed in the hands of the clerk.

The jury returned a verdict for the plaintiff in the sum of two dollars, and found specially that the trespass was involuntary.

After verdict the defendant moved for costs. The presiding judge denied the motion and ordered judgment entered up for costs for the plaintiff.

From this ruling, denial and order of the presiding judge, the defendant alleged exceptions.

Knowlton and Knowlton, for the plaintiff.

Fogler and Hersey, for the defendant.

PER CURIAM.

In actions of trespass on lands, the defendant may file a brief statement disclaiming all title to the land described, and alleging that the trespass was involuntary, or by negligence or mistake, or in the prosecution of a legal right, and that before action brought he tendered sufficient amends therefor; and if on trial he establishes the truth of his allegations, he shall recover costs. R. S., c. 82, § 20. The question is whether one who has made such a tender will lose the benefit of it if he does not bring the money into court on the first day of the return term of the writ. It is the opinion of the court that he will; that such must be regarded as the settled law of this state; that in this particular there is no difference between tender of money due on contracts, and tender of amends for torts.

STATE OF MAINE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion August 1, 1884.

Railroad crossings. Accidents. Contributory negligence. Damages. Jury.

It is settled law in this state that in actions against railroad companies for injuries to persons, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed, did not by his want of ordinary care contribute to produce the accident.

One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is *prima facie* guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must be regarded as established.

In a prosecution, by indictment, against a railroad company for negligently causing the death of a person at a crossing, the amount of the forfeiture between the minimum and maximum sums fixed by the statute, should be assessed by the jury.

On EXCEPTIONS and motion to set aside the verdict.

Indictment against the Maine Central Railroad Company for negligently causing the death of Adoniram Judson Pickard at a railroad crossing in Carmel, on the twenty-sixth day of December, 1882, prosecuted for the benefit of his widow and children.

The opinion states the material facts.

J. Hutchings, and *F. H. Appleton*, county attorney, for the State, upon the question of contributory negligence, argued:

The next question is, was Doct. Pickard in the exercise of due care and diligence when he was killed? Upon this branch of the case, the first that naturally arises is, — upon whom is the burden of proof, to show care and diligence by him, or the want of it? — The law required him to exercise ordinary care — such care as a prudent man would ordinarily exercise in like circumstances; or, to state it in a negative form, the law requires that he should not have been negligent or careless. The statute upon which this prosecution rests, in requiring care and diligence by the person killed, in order to a recovery, did not intend to set up any new rule of evidence, or any rule of evidence at all. It meant simply to recognize and apply the common law doctrine of contributory negligence.

Upon whom then is the burden, at common law, to prove or disprove contributory negligence in the plaintiff, or the person represented by the plaintiff. Care and diligence is the rule in human conduct, negligence the exception. Ordinary care, by its very terms, imports that it is such care as men ordinarily, generally, exercise.

The ordinary conduct, character, and experience of men are some of the grounds upon which presumptions rest. A man is presumed to be sane — to be innocent of crime — to love life. See Wharton on Negligence, § 1247; to act in good faith; to be of good character; to be legitimate, if born in a civilized country. These, and many other presumptions recognized by law, and relied upon by parties, change the burden of proof; or, to speak more accurately, stand in place of proof. These presumptions rest upon the above named grounds. They are in accordance with the general rule of conduct and experience; all of them, however, are subject to exceptions, and some of them to very numerous exceptions.

Having proved the accident and death, we cannot rest there; we must next prove that the defendant corporation, or its servants, were negligent or careless. To require this is, in effect, though not in words, to presume the railroad and its servants diligent and careful. If the burden is upon us to go further and also prove, before we may rest our case, that Doct. Pickard was careful and diligent, this, in effect, is to presume that he was careless.

There is high authority for saying that the burden is on the defendant to prove contributory negligence, unless such negligence already appears in the plaintiff's case. Prof. Wharton, in his book upon Negligence, § 423, says — "That the plaintiff, by his negligence, so contributed to the injury as to break the casual connection between such injury and the defendant's act, is a matter of defence which, in the ordinary process of proof, it is incumbent on the defendant to make out." *Thompson* v. *The North Missouri R. R.* 51 Mo. 190.

In *C. & P. R. R. Co.* v. *Rowan*, 66 Penn. St. 393, THOMPSON, C. J., for the court, says — "As the love of life and the instinct of preservation are the highest motive for care in any reasoning being, they will stand for proof of care until the contrary appears."

In *R. R. Co.* v. *Gladmon*, 15 Wallace, 401, Mr. Justice HUNT, in delivering the opinion of the court, said, "While it is true that the absence of reasonable care and caution on the part of

one seeking to recover for an injury so received, will prevent a recovery, it is not correct to say that it is incumbent on him to prove such care and caution. The want of such care, or contributory negligence, as it is termed, is a defence to be proved by the other side."

The decision upon this point, in the 15th of Wallace, was approved in *Indianapolis & St. Louis R. R. Co.* v. *Horst*, 3 Otto, 291. The cases of *Johnson* v. *Hudson River R. R. Co.* 20 N. Y. 65; *Newson* v. *N. Y. C. R. R. Co.* 29 N. Y. 383; *Hegan* v. *8th Ave. R. R. Co.* 15 N. Y. 383; *State* v. *M. & L. R. R.* 52 N. H. 528, and *Oldfield* v. *N. Y. & H. R. R. Co.* 3 E. D. Smith, 103; *Cassidy* v. *Angell*, 12 R. I. 447(1879), are in point and in favor of our contention. In Abbott's Trial Ev. in a note on page 595, containing a full citation of authorities, it is stated that the rule for which we here contend is also applied in the states of Alabama, California, Maryland, Minnesota, New Jersey, Ohio, Texas and Wisconsin, besides the states above named. In *Foster* v. *Dixfield*, 18 Maine, 380, SHEPLEY, C. J., for the court, says, "It may well be doubted whether this (proof by plaintiff of diligent care) should be required in all cases."

If, however, it be claimed that the burden of proof upon the question of contributory negligence is not an open question in this state, we reply, that the court has not decided that the burden is upon the prosecution to show diligence and care in cases of instant death; and upon this question of the burden of proof there are reasons for distinguishing between the class of cases in which an action is given for the death itself, and only when the death is instantaneous, and the other and much more numerous class or classes of cases where the injured party survives, and the action is for the loss and injury in life. In the latter class of cases, the plaintiff, knowing the facts, may, especially upon this issue, greatly assist in the preparation for trial, and, what is of much more consequence, he may come into court and tell the story of the accident. In the former class of cases, the victim is dead and can do nothing.

According to the decided cases, the diligence required consists specially, in the first instance, at least, in the use of one's eyes

and ears. The traveller approaching a crossing is, ordinarily, to a reasonable extent, expected to look and listen for approaching cars. Accidents which result in immediate death to travellers at railroad crossings, happen both night and day. Some of them, no one, unless you except the victim himself, sees at all. Many of them no one sees under circumstances so as to tell how they happened. If there are by-standers, they will not ordinarily know whether the person killed did listen and look or not. It is not negligence, nor negligence *per se*, not to stop one's team and then look or listen before going on to a railroad crossing. *Plummer* v. *R. R. Co.* 73 Maine, 591, and cases there cited.

In cases of instant death, where the person killed was in the exercise of due care and diligence, the wrong of the defendants, upon which the prosecution is grounded, destroys the best witness of the care and diligence exercised by the person killed, and, in most cases, makes it extremely difficult to produce satisfactory evidence of diligence and care. In such cases, therefore, to put upon the prosecution the burden of proving that the person killed was exercising care and diligence, is hard and harsh. If the burden to disprove care and diligence in the person killed is put upon the defense, it will relieve courts of much of the embarrassment that has been felt in many of these cases.

The conflict, however, between the courts, that take different views upon this question of the purden of proof, is, perhaps, as said by Wharton, only superficial. Wharton's Negligence, § 426. It is probably of not very much consequence in the case at bar. The cases all concur in this, that diligence and care in the person injured or killed may be proved by circumstances; how slight circumstances, is well shown in the before cited case of *Foster* v. *Dixfield*. The cases generally agree in this, too, that, especially in cases of instant death, very slight evidence of diligence and care in the person killed is sufficient.

Doct. Pickard was, and had been for years, a regular medical practitioner. His age, his family, his business, all repel the charge that he was careless. In *Thomas* v. *D. L. & W. R. R. Co.* 19 Blach. C. C. Rep. 529 (1881), the court say, "The

absence of any fault upon the part of the defendant may be inferred from the circumstances in connection with the ordinary habits, conduct, and motives of men. The natural instinct of self preservation, in the case of a sober and prudent man, stand in the place of proof,"—citing, *Johnson* v. *The Hudson R. R. Co.* 20 N. Y. 65.

Neither the time of evening—about half-past six,—nor the kind of weather—for it was a pleasant night,—nor the distance he was going—about two miles,—nor the errand upon which he went—which was to bring home one of his little children from a visit to a friend's house,—would induce haste, hurry, or risk. With a wife and four children whom he had just left, and going to get a fifth child to carry home with him, it is incredible that he should knowingly risk or be careless of his own life.

Wilson and Woodward, for the defendant, cited upon questions discussed in the opinion: *St. L. A. & T. H. R. R. Co.* v. *Manly*, 58 Ill. 309; *Merrill* v. *Hampden*, 26 Maine, 240; *Dickey* v. *Maine Tel. Co.* 43 Maine, 496; *Brown* v. *E. & N. A. R. Co.* 58 Maine, 387; *Warner* v. *N. Y. C. R. R. Co.* 44 N. Y. 471; *Butterfield* v. *Western R. R. Co.* 10 Allen, 532; *Allyn* v. *B. & A. R. R. Co.* 105 Mass. 77; *Hinckley* v. *Cape Cod R. R. Co.* 120 Mass. 257; *Com.* v. *B. & L. R. R. Cor.* 126 Mass. 69; *Park* v. *O'Brien*, 23 Conn. 345; *Cordell* v. *N. Y. C. & H. R. R. Co.* 75 N. Y. 332; *Hart* v. *Hudson River Bridge Co.* 84 N. Y. 62; Pierce on Railroads, 298-300, 344-5; *Gaynor* v. *O. C. & N. R. Co.* 100 Mass. 208; *R. R. Co.* v. *Houston*, 95 U. S. 702; *Grows* v. *M. C. R. R. Co.* 67 Maine, 104; *Wilds* v. *H. R. R. Co.* 24 N. Y. 440; *Salter* v. *U. & B. R. R. Co.* 75 N. Y. 280; *Brown* v. *M. & St. P. R. Co.* 22 Minn. 166; *Com.* v. *Fitchburg R. R. Co.* 10 Allen, 192; *Reynolds* v. *N. Y. C. & H. R. R. Co.* 58 N. Y. 248; *Baxter* v. *Troy & Boston R. R. Co.* 41 N. Y. 504.

Counsel contended that the amount of the forfeiture should be fixed by the court, and argued: A forfeiture is the same as a fine, and fines and forfeitures are classed together. See § 13, c. 131, R. S.

In the original statute on this subject, to be found in § 2, c. 161, public laws of 1866, the penalty is called a fine, instead of a forfeiture. The change made in the revision of the statutes was only a verbal change. A comparison of the statute in this state, with the statutes of Massachusetts, may give some aid in considering the subject. See § 212, c. 112, public statutes of Massachusetts.

Two remedies are there given, either of which, but not both, may be followed. One a fine, within the limits specified in our statute, the other an action for damages, within the same limits. One of the principal reasons for giving these alternative remedies, must have been to allow a choice of tribunals to determine the amount to be paid. The legislature of this state, has chosen to give only one of the remedies, the fine or forfeiture. "A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the commonwealth." *Carey* v. *Berkshire R. R. Co.* 1 Cush. 475.

"A common law action, surviving under the statute to the administrator, and an indictment under the statute, do not cover the same ground. In the former, damages for the personal injury to the deceased are alone recovered; in the latter, the purpose is to secure some compensation for the loss to them, as well as to inflict some punishment for the offence. In one, damages are recovered by the legal representatives, which in the due settlement of the estate may never come to the relatives. In the other, the amount of the fine, within the limit named in the statute, is fixed by the court, and paid to the use of the widow and children, in equal moieties, or to the next of kin, as the case may be." *Com.* v. *Metropolitan R. R. Co.* 107 Mass. 236. Here is an express declaration of the Supreme Court of Massachusetts, that the amount is to be fixed by the court.

WALTON, J. This is an indictment against the Maine Central Railroad Company for negligently causing the death of a person. It appears that December 26, 1882, at about half past six o'clock in the evening, Doct. Pickard of Carmel, in an attempt to cross the railroad with a horse and sleigh, was struck by a passing train and instantly killed. A trial has been had and a verdict of guilty returned against the railroad. The question is whether the evidence justified this verdict. We think it did not.

It is settled law in this state that, in prosecutions of this kind, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed, did not by his own want of ordinary care contribute to produce the accident. *Gleason* v. *Bremen*, 50 Maine, 222; *State* v. *Grand Trunk Railway*, 58 Maine, 176.

In the case first cited it was held that the law is clear and unquestioned that the plaintiff must satisfy the jury, as an affirmative fact, to be established by him, as a necessary part of his case, that at the time of the accident, he was in the exercise of due care. And in the second case cited it was held, after a full and careful examination of the question, that in the trial of indictments against railroads to recover the forfeiture created by our statute for negligently causing the death of a person, "the same rules of evidence, and the same principles of law, should be applied, as in like cases when redress is sought by a civil action for damages."

We must, therefore, regard it as settled law in this state that, in this class of cases, whether in form civil or criminal, the burden of proof is upon the party prosecuting to show due care on the part of the person injured or killed, at the time of the accident; or, in other words, that his want of due care did not contribute to produce the injury complained of.

In this case, there is not only a total want of such evidence, but the proof, as far as it goes, tends strongly to establish the contrary. No one witnessed the accident except the engineer and fireman on the train. The engineer's account of the transaction is that, as he approached the crossing, and when the engine was not over fifteen feet from it, the horse came right up into the

head-light, and the pilot of the engine took right under the sleigh, and threw the deceased right up on to the head-board; that he stopped the train as soon as he could, and went forward and found the man dead upon the front of the engine. The fireman says he saw nothing till they went on to the crossing; that he then got a glimpse of a horse and saw a man come up on to the pilot. These are the only accounts we get of the transaction. How it happened that the deceased drove on to this crossing directly in front of an approaching train is left to conjecture alone.

It is claimed that no bell was rung or whistle sounded; and that, in consequence of this failure, the deceased was not apprised of the approach of the train. The evidence seems to us to preponderate most overwhelmingly in favor of the fact that the bell was rung and the whistle sounded. But suppose they were not, still, it seems to us impossible to believe that the deceased undertook to cross the track in ignorance of the approach of the train. He was a man of mature years, and in the full possession of his faculties. His sight and hearing were good. He lived in the immediate neighborhood of this crossing, and must have been acquainted with the time and speed of the trains. The evening was still, and the ground frozen, and the rumbling of the train could be heard at a great distance. The head-light was on, and the cars all lighted, and the deceased's view of an approaching train for a considerable portion of the way as he drove from his house to the crossing unobstructed. If, under these circumstances, the deceased undertook to cross the track in ignorance of the approach of the train, the inference is irresistible that he did not exercise that degree of vigilance which the law requires. He could not have used his eyes nor his ears as the law required him to use them. The fact must not be overlooked that the train was very near, as otherwise he would not have been struck by it. One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is *prima facie* guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must

be regarded as established. The excuse offered in this case is not satisfactory. The evidence so overwhelmingly preponderates in favor of the fact that the bell was rung and the whistle sounded that we can not regard the alleged negligence of the railroad company in these particulars as proved. But if we concede that this was a question of fact for the jury, and that the court has no right to interfere with their finding, still, the inference is irresistible that the deceased did not exercise that degree of vigilance which the law requires, or he would have known of the approach of the train without these signals. And if not ignorant of its approach (which we believe to be the fact) then the relation of cause and effect between the alleged negligence and the accident is wanting; and the verdict must be regarded as wrong upon that ground. It is not enough to establish negligence and an accident. It must also be shown that the negligence was the cause of the accident. An omission to ring the bell or sound the whistle could not have been the cause of the accident if the deceased had notice of the approach of the train by other means. Our belief is that the deceased did have such notice; that he could not have been so unobservant as to neither see nor hear the approach of that train; and, consequently, that the alleged negligence in omitting to ring the bell or sound the whistle could not have been the cause of the accident. But if he did not have such notice; if he drove on to that crossing in total ignorance of the approach of a train; then the conclusion seems to us inevitable that he must have been exceedingly negligent in the use of his eyes and his ears. So that, whichever view we take, the verdict is clearly wrong. In the one case the want of the relation of cause and effect invalidates it; in the other, contributory negligence.

Similar views are expressed and similar conclusions sustained, even in those states in which it is held that the burden of proof to show contributory negligence is on the defendant. *A fortiori* they ought to prevail, where, as in this state, the burden of proof is not upon the defendant to show contributory negligence, but upon the party prosecuting to show the absence of it.

In *Railroad* v. *Heileman*, 49 Pa. St. 60, the court held that the omission of a traveler when approaching a railroad crossing to

look and listen for approaching trains is negligence *per se;* not merely evidence of negligence, but negligence itself, and should be so declared by the court, and not submitted to the jury; that while it is true that what constitutes negligence is generally a question of fact for the jury, it is not always so; that when the law fixes the standard of duty, an entire omission to perform it, is not merely evidence of negligence to be submitted to a jury, it is negligence itself, and should be so declared by the court; that even on a common road, travelers must look out for the approach of other vehicles passing; that this is more necessary at railroad crossings, because movements upon a railroad are more rapid, and because the consequences of a collision are likely to be more disastrous; that precaution, looking out for danger, is a duty imposed by law, and that to rush heedlessly on to a crossing over which the law allows engines of fearful power to be propelled, without looking and listening for a coming train, is not merely an imperfect performance of duty, it is an entire failure of performance.

And in *Railroad* v. *Beale*, 73 Pa. St. 504, Mr. Justice SHARSWOOD, in delivering the opinion of the court, says that there never was a more important principle settled than that which declares that the omission to look and listen for the approach of trains before attempting to cross a railroad track, is not merely evidence of negligence to be submitted to a jury, but negligence *per se*, and to be so declared by the court; that it is not so important to the railroad companies as to the traveling public; that the omission of this duty often results in collisions by which the lives of hundreds of passengers are lost; and that travelers should be taught that the performance of this duty is due, not only to themselves, but to others also.

In *Railroad* v. *Crawford*, 24 Ohio St. 631, the law upon this subject seems to us to be stated accurately. It is there said that unquestionably ordinary prudence requires a person in the full enjoyment of his faculties, before attempting to pass over a known railroad crossing, to use his faculties of hearing and seeing for the purpose of discovering and avoiding danger from an approaching train; and that the omission to do so, without a

reasonable excuse therefor, is negligence, and will defeat an action to recover for an injury to which such negligence contributed.

In *Dascomb* v. *Railroad*, 27 Barb. 221, it is said in a case very similar to the one we are now considering, that when negligence is the issue, it must be a case of unmixed negligence; that this rule is important, salutary in its effects, and should be maintained in its purity; that the careless are thereby taught that if they sustain an injury to which their own negligence has contributed, the law will afford them no redress.

In *Wilcox* v. *Railroad*, 39 N. Y. 358 (a case in every essential particular like the one now under consideration), the court held that when one is killed in attempting to cross a railroad track within the limits of a public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars, in season to have avoided them, had he first looked before attempting to cross, it is to be presumed that he did not look; and that, by omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence, which precludes a recovery; that in crossing a railroad track ordinary sense, prudence, and capacity, require a traveler to use his ears and eyes so far as he has an opportunity to do so, and a failure to do so, is negligence sufficient to preclude a recovery for any injury he may receive, in case of accident; and that the negligence of the company in not ringing the bell or sounding the whistle, is no excuse for the traveler's neglect. After citing many authorities, Mr. Justice MILLER said: The effect of the cases cited is to sustain the principle that, where the negligence of the party injured or killed contributes to produce the result, he can not recover; and that the omission of the company to ring the bell or sound the whistle near the crossing of a highway does not relieve the person who is about to pass over the highway from the obligation of employing his sense of hearing and seeing, to ascertain whether a train is approaching.

In *Railroad Company* v. *Houston*, 95 U. S. 697, it was held that the omission of the engineer in charge of a railroad train to sound its whistle or ring its bell does not relieve a

traveler from the necessity of ascertaining by other means whether or not a train is approaching; that negligence of the employees of the company is no excuse for negligence of the traveler; that the traveler upon the highway is bound to listen and to look, before attempting to cross a railroad track, in order to avoid an approaching train, and not to go carelessly into a place of possible danger; that if he omits to look and listen, and walks thoughtlessly upon the track, or if looking and listening, he ascertains that a train is approaching, and instead of waiting for it to pass, undertakes to cross the track, and in either case receives an injury, he so far contributes to it as to deprive him of all remedy against the railroad company; that if one chooses to take risks he must suffer the consequences; that they can not be visited upon the railroad company; that in such cases it would not be error to instruct the jury peremptorily to return a verdict for the defendants.

The cases in which similar views are expressed are very numerous. But the soundness of the views expressed in the cases already cited, is so self-evident, that we deem it unnecessary to cite other cases to support them. It will be seen that it is not important to determine whether Doct. Pickard's negligence consisted in not ascertaining that a train was approaching, or in knowingly attempting to cross in front of it. In either case, it defeats a recovery. And in the latter case, for the further reason that it destroys the relation of cause and effect between the alleged negligence of the defendants and the accident.

One other question remains for consideration; and that is, whether the amount of the forfeiture in this class of cases shall be assessed by the court or the jury. We think it should be assessed by the jury. It seems to be uniformly held, both in England and in this country, that when damages are given for the death of a person, they are to be measured by the pecuniary loss sustained by those to whom the damages are given. This of course raises an issue of fact in relation to which the evidence may be conflicting. It is therefore a fit question to be submitted to a jury. Besides, if it is not submitted to the jury, two trials

may be necessary, one to ascertain the guilt of the defendant, and the other to ascertain the amount of the forfeiture; for the judge who tries the case to the jury may not be the one to render judgment in the case; and the latter can not assess the damages or forfeiture without first hearing the evidence upon the question of pecuniary loss; and, in some cases, the latter may be the more important of the two trials. It is therefore the opinion of the court that the amount of the forfeiture, between the minimum and maximum fixed by the statute, should be assessed by the jury.

Motion sustained and the verdict set aside.

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

GEORGE A. BACHELDER, in equity,

vs.

WILLIAM M. BEAN and another.

Penobscot. Opinion August 1, 1884.

Equity. Injunction. Judgment.

A court of equity will not enjoin the enforcement of a judgment except upon some distinct equitable ground which neither was nor could have been set up as a defence to the action at law.

ON REPORT.

General demurrer to bill in equity, submitted for the decision of the law court by the justice presiding at the April term, 1883. Either party had permission to refer to the printed copy of the case between the same parties, at law, in which the same matter was involved.

(Bill.)

. . . "And now said Bachelder gives this honorable court to be informed that some time previous to the year A. D. 1859, John B. Hill and others as proprietors, owned a large tract of land in Greenfield, in said county, embracing particularly lots number

four and five, in the third range of lots in said town; that previous to that time, one Joseph LeBallister entered into possession and occupied said lot number four, and continued to occupy and improve it for several years, until the summer of the year 1859, when William T. Garland purchased his said possession and improvements consisting of certain clearings of land and certain buildings erected thereon, and entered into possession thereof under and in recognition of the title of the true owners, the said Hill and others. In order to purchase the said LeBallister's said improvements and possession, which said LeBallister had made under an agreement to purchase the fee of said Hill and others, it became necessary for said Garland to borrow the sum of one hundred dollars wherewith to pay for the same. In order to effect such a loan, he applied to one Samuel Pratt, then of said Oldtown, and since deceased, which loan said Pratt then made to him. And at the same time, said Garland requested said Pratt to purchase for him, the said Garland, the proprietor's title to the lot so occupied by him, being said lot number four. And thereupon for the purpose of accommodating said Garland, according to his such request, said Pratt did consent to make such purchase, and accordingly on the seventh day of July, A. D. 1860, did make such purchase for his said Garland's special benefit. And on that day after agreeing upon the terms of the sale and purchase, a deed was made by said proprietors to said Pratt for the purpose of conveying said lot number four to him according to the wish and understanding between said Pratt and Garland on the one side, and said proprietors on the other, all of whom bargained for the lot then occupied by said Garland, and on which the buildings were erected as aforesaid. But so it happened by accident and without design on the part of any one in making said deed, the word, descriptive of the lot and its number, was made to read 'five' instead of four, so that according to the literal and legal meaning of the deed, lot number five was conveyed instead of number four, said lot number five being a wild lot and of little relative value, and said lot number four being the lot on which all said improvements had been made and possession thereof had, so that there was an

unquestionable mistake made by inserting the word 'five' instead of 'four' in the deed expressive of the number of the lot intended to be conveyed.

"And thereupon said Pratt having purchased the lot as aforesaid, and having taken the deed as aforesaid, and all parties supposing the lot number 'four' was the land actually conveyed, said Pratt permitted said Garland to remain in possession thereof as the same was purchased at his request and for his benefit, until the cash payment was made therefor, when said Pratt conveyed the same premises to said Garland, by deed bearing date May 28, 1863, on which day it was executed and delivered to said Garland. And the said Garland at the same time reconveyed the same land to said Pratt in mortgage to secure the balance of the consideration money, for which three notes were given amounting to three hundred and eight dollars, which notes were described in and secured by said mortgage, and the same are still due and unpaid, except to a small amount, and said mortgage undischarged. The said deed from said proprietors to said Pratt containing the following words as part of the description, viz: 'This deed being intended to convey the soil of said lot, but not to convey the improvements made by Joseph LeBallister on the same;" and the said deed from said Pratt to said Garland containing the following clause, viz: 'Being same conveyed to me by John B. Hill *et als.* July 7, 1860," and said mortgage containing the following clause: 'Being the same land this day conveyed by said Pratt to said Garland.' No improvements having been made on said lot 'five.'

"And thereupon the deeds having been made as aforesaid by intention of all parties thereto, for the purpose of making good the title of said lot number four on which said Garland resided, the said Garland was permitted to reside thereon and cultivate and improve the same, occasionally paying small sums on said notes until after the death of said Pratt, he never having ascertained the mistake.

"And the plaintiff further alleges that said Pratt died in September, A. D. 1863, being still ignorant of the mistake in said deed, but still supposing the lot to have been conveyed

which was intended. And after the death of said Pratt as aforesaid, said mortgage continued in the family as a part of the assets of his estate, and the plaintiff being the husband of one of the only two heirs of said Pratt, in behalf his wife and for his own interest as connected with the estate, he came to hold in the distribution of the assets of said estate two-thirds of the whole mortgage and notes secured thereby, and his wife and heir of her father the other third.

"And on the other side the remaining interest of the proprietors, especially so far as the two lots in question are included, came into the ownership of S. and J. Adams, to whom a deed was made by the then owners on the first day of March, A. D. 1881, of all interest in said lots.

"And the plaintiff further alleges, that for a long time the said mistake was unknown to any one, until some two years after the death of said Pratt, when the former owner of a part of the premises, in about the year 1865, ascertained the mistake and gave all parties notice thereof, but inasmuch as said Garland manifested no disposition to take any advantage of the mistake, but on the contrary made occasional payments on the notes the matter was permitted to remain quietly as it was. And so it remained until the year 1880, when, to his surprise, plaintiff found out and ascertained that said Garland had conveyed the lot on which he had in the mean time resided from the time of his purchase of the improvements in 1859 as aforesaid, to the time of said deed, to this defendant, William M. Bean, the deed bearing date November 15, 1880, and that said Bean had entered and taken possession of the premises, the deed reciting the fact in substance that said Garland claimed title by twenty years adverse possession and disseizin.

"That thereupon by deeds bearing date March 11, 1881, the said Bachelder and wife as successors to said Pratt in the title on the one part, and said S. and J. Adams as owners of lot number four and other lots on the other part, in order to correct said mistake and make each other's title what in equity it was intended to be and equitably was, made each to the other reciprocal deeds of the lots in question, said Adams' conveying all their interest

in lot number four to said Bachelder, and said Bachelder and wife conveying to said Adams' all their interest in said lot number five. And the said Bachelder being thus the legal holder of the title at once entered into possession of the premises, and was in peaceable possession thereof, when the said Bean commenced an action of ejectment or writ of entry for the same, claiming the title and ownership by virtue of a disseizin and prescription for more than twenty years, and the said Bachelder as defendant setting up in defense against the same, the fact, in denial, that no such title had been acquired by such possession, the same not being adverse and of a nature such as gave title. But notwithstanding the said defense the court have, viz: on the fourteenth day of December now present, rendered judgment for plaintiff in said suit, and execution has issued to put him in possession of said premises, and the plaintiff is about to serve said process and put your complainant out of possession and seize the hay cut on said premises and now on storage in the barn on said premises." . . .

The bill prayed for an injunction and that defendant be required to release the premises to the plaintiff.

A. W. Paine, for the plaintiff, argued:

That the injunction prayed for, under the circumstances of this case, should be granted. I cite from a great number of cases at hand, the two following from our own reports, viz: *Burr* v. *Hutchinson*, 61 Maine, 514; *Hinckley* v. *Haines*, 69 Maine, 76, and cases *passim*.

That the injunction may be decree against the judgment and execution, as well as before suit, the authorities are beyond number. I cite simply our own reports. *Devoll* v. *Scale*, 49 Maine, 320.

In 7 Cranch, 336, the supreme court of the United States say an injunction lies against a judgment "when the defence was one which the party could not avail himself of at law."

That is just our case, the court having decided in this that the defence could not be thus availed of.

This whole case is so fully supported by the very able discussion on this subject of injunctions by Mr. Kerr, that I feel that noth-

ing more need be added. See Kerr, Injunctions, * 587 to * 596; 46 Conn. 65.

Davis and Bailey, for the defendants, cited: *St. Johnsbury* v. *Bagley*, 48 Vt. 75; *Fletcher* v. *Warren*, 18 Vt. 48.

WALTON, J. This is a bill in equity, the prayer of which is that the defendants may be enjoined from the enforcement of a judgment. The case is before the court on demurrer to the bill.

We think the demurrer must be sustained. The judgment which we are asked to enjoin was recovered in a real action. The issue tried was whether the plaintiff's grantor had obtained a title to the demanded premises by disseizin. It was urged in defense that the possession had not been adverse, and so did not ripen into a title. The evidence was reported to the law court and the case there decided. The judgment was in favor of the plaintiff. (See *Bean* v. *Bachelder*, 74 Maine, 202.) The defendant in that suit now seeks to enjoin the enforcement of the judgment on precisely the same ground on which he sought to prevent its recovery. This the law will not allow him to do. A court of equity never enjoins a judgment except upon some distinct equitable ground which neither was nor could have been set up as a defense to the action at law. An issue once tried in a court of law is never retried by a court of equity. The parties have had their day in court, and they must abide by the result.

The rule was correctly stated by Chief Justice MARSHALL in *Marine Insurance Company* v. *Hodgson*, 7 Cranch, 332. It is that any fact which clearly shows it to be against conscience to execute a judgment at law, and of which the complainant could not have availed himself at law, or which he was prevented from availing himself of by fraud or accident, unmixed with any fraud or negligence of himself, or his agent, is ground for enjoining the judgment; but a legal defense, actually made at law, is not ground for enjoining the judgment, though the court may think it ought to have prevailed.

"It is now, I apprehend, well settled," said REDFIELD, J., in *Emerson* v. *Udall* 13 Vt. 477, "that a court of equity will not examine into the foundation of a judgment of a court of law,

upon any ground which either was tried, or might have been tried, in the court of law. The judgment of a court of law is conclusive upon all the world as to all matters within its cognizance. If a party fail by not presenting his defense, when he should have done it, he can have no redress in a court of equity. Much less can he expect relief in a court of equity, when he has had a full trial at law upon the very grounds which he now wishes to urge anew."

To the same effect is 2 Story's Equity, § 894, and High on Injunctions, § 96.

The judgment which we are now asked to enjoin was obtained after a trial of the action upon its merits. It was not a judgment obtained upon a default. It was not a judgment obtained upon any narrow or technical grounds. It was a judgment obtained after a full and careful trial, in which the defendant was aided by the same able and learned counsel who now aids him in the prosecution of this suit for an injunction; and it will not be denied that the same facts were relied upon in the defence of that suit which are now relied upon in the prosecution of this; and if these facts were sufficient to justify enjoining the judgment which was recovered in that suit, they would have been sufficient to prevent its recovery. It was there held, as the published opinion of the court shows, that the plaintiff's grantor had obtained a perfect title to the land by disseizin; and, further, that if the then defendant, now plaintiff, ever had any equitable title to the land, he had parted with it, and taken in lieu thereof, the title of those who had been disseized, and thereby lost their title; and, consequently, that he had neither a legal nor an equitable title.

We can not now discuss the correctness of the decision in that action; not because we have any doubt of its correctness; but because we deem it improper to do so. The parties have had their day in court. They have been heard, and their several titles to the land in controversy adjudicated; and it would be a bad precedent if the court should now consent, when sitting as a court of equity, to discuss the merits of a judgment rendered by them when sitting as a court of law. It is sufficient to say that we deem the title to the land in controversy *res adjudicata*, and

that the facts stated in the bill are not sufficient to require or justify a court of equity in interfering with it.

Bill dismissed with costs.

PETERS, C. J., DANFORTH, LIBBEY and EMERY, JJ., concurred.

SAMUEL H. BLAKE and another,

vs.

BANGOR SAVINGS BANK.

Penobscot. Opinion August 1, 1884.

State lands. Public lots.

In 1864, in pursuance of a resolve of the legislature, 23,040 acres of township No. 11, Range 17, W. E. L. S., in Aroostook county, were by the state conveyed to four academies, and by subsequent conveyances to the Bangor Savings Bank. In 1875, the remainder of the township, except 230 acres reserved for public uses, were conveyed by the state to the plaintiffs, and also the right to cut and carry away the timber and grass on the lands reserved for public uses. In 1881, the bank permitted timber to be cut from that part of the township owned by it, and received pay therefor. In assumpsit for money had and received against the bank to recover a ratable proportion of the amount received for the stumpage, on the ground that one thousand acres ought to have been reserved for public uses from that portion of the township held by the bank. *Held*,

1. That the action could not be maintained.
2. That the plaintiffs' license to cut the timber and grass on the public lots only applied to the public lots reserved from that portion of the township conveyed to them.
3. That if public lots must be regarded as reserved upon this township, they must be located upon the portion last conveyed by the state.

ON REPORT.

Assumpsit on account annexed and for money had and received.

The description in the land agent's deed, under which the defendant bank holds title, was as follows:

"All that part of township No. 11, in Range 17, W. E. L. S., which lies east of a line drawn across the town from north to

south, parallel with the east line thereof and six miles distant westerly therefrom, containing 23,040 acres more or less." No exception or reservation of any kind was made in the deed.

In the land agent's deed to the plaintiffs, the description was, "the west part of township No. 11, in Range 17, W. E. L. S., containing, exclusive of the reservation, 6671 acres more or less, reserving from said west part of said township, for public uses, 230 acres, averaging in quality and situation with other lands in said township." And at the same time the land agent conveyed to the plaintiffs "the right to cut and carry away the timber and grass from the lots reserved for public uses in township number eleven, in the seventeenth range, W. E. L. S., to continue until the township shall be incorporated into a town, or organized into a plantation."

No incorporation or organization has ever been had, nor has there been any location of the public lots reserved in plaintiffs' deed, nor of any lots for public uses in the whole township.

Other material facts stated in the opinion.

Powers and Powers, and *E. H. Blake*, for the plaintiffs.

A. W. Paine, for the defendant.

WALTON, J. It appears that township No. 11, Range 17, W. E. L. S., in Aroostook county, contains 29,941 acres.

In 1864, January 8, in pursuance of a resolve of the legislature, 23,040 acres, on the easterly part of the township, were conveyed to four academies, and by subsequent conveyances became the property of the Bangor Savings Bank.

In 1875, October 28, the remainder of the township, except two hundred and thirty acres reserved for public uses, was conveyed to the plaintiffs; and also the right to cut and carry away the timber and grass on the lands reserved for public uses.

In 1880–1, the Savings Bank "permitted" timber to be cut from that part of the township owned by the Bank, and received pay therefor.

The plaintiffs claim to recover of the Bank a portion of the money thus received on the ground that, although no lands were

reserved for public uses on that part of the township to which this "permit" applied, still, a thousand acres ought to have been reserved, and that they are entitled to a ratable portion of the money received for stumpage, the same as if a thousand acres had in fact been reserved.

We do not think this claim can be maintained. It seems to us that the plaintiffs' license to cut and carry away timber and grass from the lands reserved for public uses, applies only to such lands as were in fact reserved, and not to lands not reserved, even if it should be admitted that a further reservation ought to have been made. Fairly and rationally construed, it seems to us that the language of the plaintiffs' deed can be applied only to existing facts, — that is, to lands already actually reserved, — and not to lands which, if it be admitted that they ought to have been reserved, were not. On that part of the township conveyed to the plaintiffs, such a reservation had been made. On that part owned by the Savings Bank, such a reservation had not been made. We think the plaintiffs' deed applies only to the former and not to the latter. And it is the opinion of the court that if public lots must be regarded as reserved upon this township, they must be located upon the portion last conveyed, and not upon the portion first conveyed, and, consequently, that it is the plaintiffs' lands, if any, that must bear the burden, and not the lands of the defendants. We do not think the plaintiffs have, or ever had, a right to cut timber or grass on that part of the township now owned by the Savings Bank. Consequently, they are not entitled to any portion of the money received by the Savings Bank for stumpage.

Other objections to the plaintiffs' right to recover, are urged in defense; but it is unnecessary to consider them, as the one already referred to, is, in the opinion of the court, fatal to a recovery.

Plaintiffs nonsuit.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

WILLIAM T. PEARSON and another *vs.* HENRY ROLFE.

HENRY ROLFE *vs.* HENRY T. PEARSON.

Penobscot. Opinion August 4, 1884.

Mill-owners. Mill-dams. Right of passage. Waters. Reasonable use.

A mill-owner upon a floatable river is not under legal obligation to provide a public way, for the passage of logs over his dam, better than would be afforded by the natural condition of the river unobstructed by his mills. The right of passage is to the natural flow of the river or its equivalent.

A mill-owner is not under legal obligation to furnish any public passage for logs over his dam or through his mills at a time when the river at such place, in its natural condition, does not contain water enough to be floatable if unobstructed by mills, although the river is generally of a floatable character.

Whenever a river, with mills upon it, is floatable, and the mill-owner and those who want to float logs past the mills are desirous of using the water at the same time, all parties are entitled to reasonable use of the common boon; the right of passage is the superior, but not an usurping, excessive or exclusive, right; the law authorizing mills puts some incumbrance upon the right of passage.

What is a reasonable use is a question of fact, and depends upon the size and nature of the stream, the extent and kinds of business upon it, and all other circumstances.

ON REPORT.

The first action is for trespass. The writ dated August 31, 1880, alleged that the defendant at Oldtown, August 30, 1880, with force and arms wilfully, and without the consent of the owner let loose the plaintiffs' boom in the Penobscot river by reason whereof a large number of logs ran by the boom into the plaintiffs' mill-pond and the plaintiffs were put to great expense in sluicing the logs out of the pond. *Ad damnum* one thousand dollars.

The second action is case. The writ, dated September 18, 1880, alleges that the defendant on the first day of June, 1875, and various other times between that day and the date of the writ unlawfully erected, maintained and kept a dam across the Penobscot river at Great Works in Oldtown, and unlawfully omitted, neglected and refused to provide a suitable sluice or place of

passage for logs being driven down the river by the plaintiff and caused great loss, damage and detention to the plaintiff in his business of driving logs. *Ad damnum* five thousand dollars.

The two cases were submitted together to the law court to render such judgment as the rights of the parties require in each case; damages, if any, to be assessed at *nisi prius*.

The cases were ably argued upon the law and facts by *Wilson and Woodward*, and *John Varney*, for William T. Pearson and Co. and by

Chas. P. Stetson, and *J. A. Blanchard*, for Rolfe.

It is common learning that the right of erecting and maintaining dams and mills upon a river which is navigable for logs, must be deemed as in subjection to the paramount right of passage of the public, and that all hinderances and obstructions to navigation, without direct authority from the legislature, are public nuisances. *Knox* v. *Chaloner*, 42 Maine, 150; *Dwinel* v. *Barnard*, 28 Maine, 554, 567; *Moor* v. *Veazie*, 32 Maine, page 356; *Brown* v. *Chadbourne*, 31 Maine, 19. Angell and Ames on Water Courses, §554, note 2. (7th ed.)

That when the river is unlawfully obstructed, any individual who has occasion to use it in a lawful way, may remove the obstruction. Angell and Ames on Water Courses, § 563; *Treat* v. *Lord*, 42 Maine, page 557; *Arundel* v. *McCulloch*, 10 Mass. 70.

And that any person receiving special damage from such obstruction, may maintain an action therefor. *Brown* v. *Watson* 47 Maine, 161.

Applying these principles to the facts in these cases, we claim that Rolfe was justified in his action in removing the boom, and that he is entitled to judgment in the first named case, and that in the other case he is entitled to recover, as damages, the increased expense of getting his logs through.

But plaintiffs while admitting that the Penobscot river at this point is navigable, say that in season of drouth and at the time of the alleged injury, Rolfe could not have driven his logs by Great Works, in the river in its natural state, and therefore their detention of his logs, and their refusal to shut down their mills

and give him a passage for his logs, were not wrongful. We claim that Rolfe was entitled to have passage for his logs in the river, and the water as it then was, even if it be shown that logs could not have been driven down the river, in its natural state, at that time of drouth; that if the dams of plaintiff improve the river for driving logs, Rolfe could use that improved condition of the water for that purpose, in the same manner as he could the river in its natural state, and the same principles of law which would give him, as one of the public, the paramount right of navigation in the public highway applied to the river and the water as it then was, with plaintiffs' dams and mills upon it. This is an important question to be settled by this case; important as establishing for the future the rights of those having logs to be driven down the river in the summer season, and the rights of the owners of extensive mills below, requiring from time to time during the season, some seventy-five millions of feet of logs, for the supply of their mills.

The cases above cited, *Brown* v. *Chadbourne*, and *Treat* v. *Lord*, say that a river has the character of a navigable river although not navigable at all seasons of the year, and even if in its natural state it is so obstructed, by obstructions which could be removed, that logs could not be driven in it.

And the case of *Dwinel* v. *Barnard*, 28 Maine, 562, lays down the following principle: "Should a person obstruct the flow of the waters of the river or stream over their accustomed bed, so that they could not be used as formerly, for the purpose of boating or of floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to make use of them in the new channel, as they had been accustomed to use them in their former channel." Mr. Eddy, a witness for plaintiffs, and interested in the result of this suit, as much or in the same manner, as Pearson, says, that the river could be improved so that logs could be driven in case of drouth, if there were no dam and mills there, and that more convenient passage could be made for logs in the present works, but adds: "in severe drouth there is not water enough to drive logs there and run the mills too, one or the other must yield."

The character of the river being established as a public highway, Rolfe had a right to use it for the navigation of his logs, and to use the water as it then was, and to have the benefit of any improved condition of the river for navigation, made by the dams there. *Holden* v. *Robinson Company*, 65 Maine, 215.

The position which plaintiffs take in this case is not sound, because it is impracticable. It would make the navigation of the river subject to the will of the mill-owner, and to his opinion or the opinion of others, as to whether, at a particular season, long years past, logs could be driven down the river, in its natural state, at this point; — because it deprives the public of the improvements which might be made in the river, so that it would be navigable in cases of drouth, — because the amount of water which would have run in the river at the present time, if the dam was not there, must be a matter of conjecture, and entirely too uncertain for the determination of the rights of the public and those navigating the river.

The character of the river being established as navigable, as a public highway, the public have a right to use it at all times and seasons, and the adjoining owner cannot, by making improvements on the highway, deprive the public of the use of it.

A man improves the highway in front of his house — he cannot say to the traveler, to the public, — "You cannot drive over this highway, because at some time, before I improved it, you could not have driven over it, or could have driven over it with difficulty." He cannot say to the traveler — "You cannot drive over this highway which I have improved, unless you pay me for the use of it, or for the inconvenience you may occasion to me by using it."

PETERS, C. J. The controversy in these cases arises from a conflict between log-owners and mill-owners as to their respective rights in the use of the water at certain falls in the Penobscot river at West Great Works, in the town of Oldtown. Pearson represents mill-owners,— Rolfe represents log-owners. Pearson has mill structures upon his privilege, with such appendages as dams, sluices and booms. Rolfe had a quantity of logs in the

river which he was unable to drive over the dam at Pearson's mills, unless Pearson would shut down his mill-gates, thereby suspending his own business of manufacturing, until water enough should accumulate in his mill-pond to float the logs over. This Pearson refused to do, basing his refusal upon the allegation that the drift-way in the dam, without shutting down his working gates, afforded all the facility for floating logs by his mills that existed in the river at that place in its natural state,— as much as there would be provided his mills and all of his structures were entirely out of the way. Rolfe contends that the facts were otherwise, but further contends that Pearson, even if he represents the facts truly, having it within his power to furnish more water than the natural facility and flow, was under an obligation from his situation to do so.

The counsel for Rolfe contends that the doctrine of *reasonable use* applies; and that, if the river in its natural condition would not furnish a sufficient flow, Rolfe was entitled to the use of the river in its changed condition for his purposes. We think this position cannot be maintained. Our idea is that the doctrine of reasonable use does not apply when the river is *not* naturally floatable; but does apply when it *is* naturally floatable or log-navigable, when both parties can use the natural flow and desire to use it at the same time. We are well satisfied that, whenever logs cannot be driven over a particular portion of a fresh water river such as the Penobscot above the flow and ebb of the tide, while in its natural condition, such portion of the river is not at such time navigable or floatable, and that the use of the water at such time, and place, so far as he needs the same for his own purposes, belongs exclusively to the riparian proprietor. We think an examination of well settled principles, as illustrated by the decisions, affecting the respective rights of the parties in river easements and privileges, inevitably leads to such conclusion.

Rolfe, unquestionably, had the general right to use the river as a passage-way for his logs. All navigable waters are for the use of all citizens. In a technical sense at the common law, the Penobscot river would be regarded as navigable only so far as its waters flow and reflow with the tide. But it is navigable in fact,

or in a popular sense, or according to a common law of our own, above the reach of the tides. The reason of the old common law rule, the rule of the English courts, is the reason of the rule in this country. The germ of the doctrine is the same in both countries. We refit the rule to more extended and liberal applications, under the stimulating influences that arise from the wants and necessities of our business, the magnitude of our rivers, and the extensiveness of the internal and inter-state commerce of our country.

The Penobscot river at the place in question, as before intimated, was floatable only,—floatable, because capable of valuable use in bearing the products of the forests to markets or mills. A floatable stream is the least important of the classes of streams called navigable. Rolfe had the right to use the river so far as it was a floatable river, in such parts or places and at such times as it was floatable. He had the right to avail himself of its navigable capacity for floating logs. But only so far as it was navigable or floatable in its *natural condition*. It is the natural condition of a stream which determines its character for public use. And it must be its navigable properties in a natural condition, unaided by artificial means or devices. It is well settled in this state and elsewhere that, if a stream is not susceptible of valuable use to the public for floatable purposes, without erections for raising a head, it cannot legally be deemed a public stream, even though it might be easily converted into a floatable stream by artificial contrivances. *Wadsworth* v. *Smith*, 11 Maine, 278; *Brown* v. *Chadbourne*, 31 Maine, 9; *Treat* v. *Lord*, 42 Maine, 552; Wood, Nuis. (2d ed.) § 463, and cases. The log driver takes the waters as they run, and the bed over which they flow as nature provides. Nor has any person the right, unless upon his own land, or under legislative grant, to remove natural obstructions from the bed of a river in order to improve its navigation. This is clear from the same authorities.

On the other hand, what rights have the adjudged cases accorded to the riparian proprietor in merely floatable and non-tidal stream? It is settled in this state that he owns the bed of the river to the middle of the stream. He owns all the rocks

and natural barriers in it. He owns all but the public right of passage. The right of passage does not include any right to meddle with the rocks or soil in the bed of the river. If rocks are taken, the owner may sue in trespass for the act, or may replevy them from the wrong-doer. Gould, Waters, § § 77, 93 *a*, and note. *June* v. *Purcell*, 36 Ohio St. 396; *Ross* v. *Faust*, 54 Ind. 471; *Watson* v. *Peters*, 26 Mich. 508; *Braxon* v. *Bressler*, 64 Ill. 488. Stone cannot be quarried without compensation from the bed of a private stream for the purpose of constructing a public bridge over the stream. *Oberman* v. *May*, 35 Iowa, 89. The owner may maintain trespass *quare clausum* for an unlawful invasion of land covered by water. *Morris Canal Co.* v. *Jersey City*, 26 N. J. Eq. 294; *Walker* v. *Shepardson*, 4 Wis. 495; *Moor* v. *Veazie*, 31 Maine, 360. Ice formed upon a floatable fresh water stream, is the property of the riparian proprietors. *Wash. Ice Co.* v. *Shortall*, 101 Ill. 46; *Mill River Man. Co.* v. *Smith*, 34 Conn. 462; *Paine* v. *Woods*, 108 Mass. p. 173, and cases. See, for several pertinent matters, 19 Am. Law Reg. (N. S.) pp. 145, 337, and cases there cited and discussed.

The mill-owner occupies other vantage ground. His structures are legalized and protected by the statutes of the state. A part of the public right is granted to him, for a supposed gain which the public obtains through the use of mills. He is authorized to build dams and erect mills upon the privilege and to raise a head of water for his use. His stores of water are his property. A person who casts waste into his mill-pond to his injury is liable therefor. *Dwinel* v. *Veazie*, 44 Maine, 167. A log-owner is liable if he unnecessarily encumbers the pond of a mill-owner with his logs. The log-owner's general right is that of passage, not of rest. *Brown* v. *Black*, 43 Maine, 443. There may be, however, exceptions or qualifications to this. R. S., c. 42, § 8.

In the light of these principles governing the rights of the parties, how can it be admissible for the log driver to claim for his purposes more of the river than the natural flow or its equivalent? Can he claim a better passage than would be possible to him were there no structures upon the privilege? If he cannot,

without the land-owner's consent, erect dams himself to create a head for facilitating the driving of logs, can he impress into his service the use of dams lawfully erected for other useful purposes by other men? If he has no right to remove or interfere with natural obstructions, to the owner's injury, how can he intermeddle with legally authorized artificial obstructions which do not deprive him in any respect of the ordinary and natural flow? Each is a legal property, the natural and the artificial obstruction. Neither necessarily impairs any subsisting legal right. The only obligation which the law lays upon the mill-owner is not to injure the river passage. He is not required to make it better.

The mill act declares that an owner may erect and maintain a water mill, "and dams to raise water for *working it*." How can he have the water for working his mill, if others may take it without his consent for other uses? If others may take from him more than the natural flow, when and how often and in what quantities may it be thus taken? Is it to be a reasonable use? How much is a reasonable taking by one man of another's property without compensation? Where does the doctrine of mutual concession come in, if the mill-owner is to reap no advantages from the plan? Would not Pearson be permitted to remove his structures, leaving the river in its natural state? If he can do that, cannot he hoist his mill-gates at his pleasure for business purposes, allowing the water to pass his mills in manner and quantity equivalent, as near as may be, to its ordinary condition and natural flow?

Let it be borne in mind that the complaint against Pearson is not that he kept back the natural flow, but that he refused to keep it back, — that he would not shut down his gates and suspend his business in order to keep it back. The demand was that he should suspend his own sawing and shut down his mill-gates until the accumulation of water in the mill-pond might be enough to create a navigable flow through the public passage. It would be a curious legal spectacle to see a mill-owner mulcted for not allowing log-owners the use of his dam and mills to create, not a natural, but an unnatural, flow upon the river. It would be a different thing, however, if Rolfe asked for only

such a facility of passage as the river in its natural condition would have afforded.

The counsel for Rolfe invokes in his behalf the doctrine maintained by several cases, that, where one person improves the navigability of a stream, all other persons having the right to use the stream, may use it in its improved condition. That principle must be admitted. If the channel of a floatable stream is changed or deepened by riparian proprietors for the purpose of making its navigation less difficult, any person using the stream has the benefit of the improvements. Such a result is unavoidable. The same rule applies to a highway upon land. If a man improves a highway in front of his own land, a traveler may use the improved highway. He must do so, if he uses the way at all. He can no longer use the way as it was. But this doctrine cannot apply to the cases before us. Here the navigable character of the river has not been improved. The gist of the complaint against the mill-owner is virtually that he would not improve it, when he had the means and power of doing so at easy hand. Here the channel is neither deepened nor widened. The case here differs widely from any case that can be cited in affirmance of the doctrine contended for. Had Pearson improved the navigability of the river for his own use, he would have bestowed the same benefit upon others. But he intended no such improvements either for himself or others. *Holden* v. *Robinson Co.* 65 Maine, 215, is relied upon by counsel for Rolfe. An incidental remark in the opinion in that case was to the effect that a log-owner was entitled to the water raised by a mill-dam. But it was to get *down to* the dam, and not to get over or past it. That authority, therefore, is not in the least in our way. In coming *to* any mill-dam, logs must necessarily pass over the water as raised by the dam. *Dwinel* v. *Barnard*, 28 Maine, 554, is also relied upon, as approving the doctrine that if a new passage is *substituted* for an old one, the new one is open to the use of all. We entirely concur in that view. In such a case, no natural stream — in fact no stream — is left in the old channel. But in the case at bar, we are assuming for the purpose of argument, that the full natural stream is left. The

court, in the case referred to, places its theory upon the fact that the flow of the waters was so changed "that they could not be used as formerly." Here, it is contended that they can be used as formerly without interfering with Pearson, and that the river, at the time in question, was allowed its natural and accustomed flow, or its equivalent.

The fact that it would be a convenience to the public to use more than a natural flow from the head of water raised by mill erections, cannot influence the question in the least. The extra stores of water collected by the mill-owner for his use, are his own. They could be taken by the state for the public for a compensation; or the state could authorize the owner to dispose of their use for a toll. Gould, Waters, § 35; Cool. Con. Lim. *592. The legal position espoused by the mill-owner in the cases presented for our decision, is sustained by the effect of the views entertained by the court in *Wadsworth* v. *Smith*, *supra*, and is emphatically and quite directly defended by the case of *Thunder Bay River Booming Co.* v. *Speechly*, 31 Mich. 336; authorities relied on by counsel for Pearson.

It will be seen that we have thus far discussed the relative rights of the parties upon the supposition that Pearson's structures and his management of them did not deprive Rolfe of as good a chance of passage as the natural stream would have afforded at the time and place. We do not affirm the fact to be so. We express no opinion upon any disputed fact. We give the rule upon which the facts are to be considered. It is said that the rule may not be a just one, because of the difficulty of observing the operations of nature after the erection of mill-dams. The objection is not formidable. Other evidence may be substituted. Proof of the general character of the river, of its volume and flow above and below the place in question, would be among other things an important matter. A jury would not encounter more difficulty than that which attends very many contested cases. At all events, the difficulty of proof does not ordinarily dispense with the necessity of proof.

Another difference of opinion exists between the parties upon the facts adduced. That is as to what their respective rights

may be in the use of the water when there exists a natural flow sufficient to make a floatable stream, but both parties need the water for their different purposes at the same time, and the use of the water by one injuriously interferes with its use by the other. In such a condition of things, as before expressed, the maxim or doctrine of reasonable use applies. If they cannot both enjoy the same thing at the same time, each must take to himself and concede to the other a reasonable use of the common boon. The right of passage is the paramount or superior right, and necessarily so from the very nature of things. It is a right to move on or by. The stationary obstacle must necessarily yield in order to give it a chance to go by. It is not an *exclusive* right. It is not a privilege of moving at all times, with any quantities, and without any delay, and under all circumstances. The two rights come in conflict. One does not destroy the other. Each influences the other. The legislature has surrendered some part of the public right to the mill occupiers for the supposed public good. The mill-owner must not materially and essentially prevent or delay the public passage.

The law authorizing mills necessarily puts some encumbrance upon the rights of passage.

In Cool. Torts, 583, the author says: " The reasonableness of the use depends upon the nature and size of the stream, the business or purposes to which it is made subservient, and on the ever-varying circumstances of each particular case. Each case must stand upon its own facts, and can be a guide in other cases only as it may illustrate the application of general principles. Such general rule should be laid down as appears best calculated to secure the entire water of the stream to useful purposes." The same doctrine is excellently presented by DICKERSON, J., in *Lancey* v. *Clifford*, 54 Maine, 487, and by RICE, J., in *Dwinel* v. *Veazie*, 50 Maine, 479. The want of space forbids quoting from the cases at much length. In the former it is said: "Each right is the handmaid of civilization; and neither can be exercised without, in some degree, impairing the other. This conflict of rights, therefore, must be reconciled. The law furnishes a solution of this difficulty by allowing the owner of

the soil over which a *floatable* stream, which is not technically nagivable, passes, to build a dam across it, and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passage-way for the public by or through his erections. In this way both these rights may be exercised without substantial prejudice or inconvenience." In *Dwinel* v. *Veazie*, *supra*, it is said: "To give either interest absolute prerogative would be destructive to both. Hence the rights of each must be so exercised as not unnecessarily or unreasonably to interfere with or obstruct the rights of the other. And such is the law."

In Gould on Waters, a new and excellent work, at section 110, it is said: "The rights of the public are not superior to private rights, in streams that are merely floatable, *to the same extent* as in rivers which are capable of more extended navigation. In the latter the public right extends equally to all navigable portions of the river. But the right of floatage is not paramount to the use of the water for machinery, and the rights of the public and those of the riparian owners are both to be enjoyed with a proper regard to the existence and preservation of the other. . . . In streams which are only floatable, the riparian owner is only bound not to obstruct its reasonable use for that purpose." To this the author appends a long list of citations. It is to be noticed that the author remarks that the right of floatage is not paramount to the use of the water for machinery. That is, not of such paramount character as to prevent the erection of dams, bridges, and flumes and the like, which do not prevent a reasonable chance for public passage. The right of passage is the dominant right, because it is a right that cannot be very well exercised unless the other right temporarily yields to it. But its use must not be usurping, excessive or unreasonable. Wood, Nuis. (2nd ed.) § § 464, 465, and cases. Cool. Con. Lim. (5th ed.) 731.

With these enunciations of opinion upon the legal questions presented, we think the cases need no further attention or consideration at our hands. While the report allows us to decide the facts, we think that duty should be performed by

a jury, if the parties cannot agree upon a referee or commissioner for the purpose, or cannot settle the question themselves.

The parties would act wisely to indulge a spirit of mutual forbearance and concession in these matters. In no other way are the embarrassments and difficulties, usually incident to such contentions, avoidable. The rule that governs some of their rights is a general and necessarily an indefinite one. Emergencies may often arise when the different interests will clash. Discreet words and acts are a better resort, in the first instance, than law-suits.

Cases to stand for trial.

DANFORTH, VIRGIN, LIBBEY, EMERY, FOSTER and HASKELL, JJ., concurred.

TURNER BUSWELL *vs.* JANE EATON and others.

Somerset. Opinion August 6, 1884.

Action. Administrator. Surplusage. Devise.

B defended an action as administrator, recovering costs. Judgment was entered up in his name as administrator, when it should have been in his own name. The execution was issued in the same way, was levied in the same way and this (real) action is instituted in the same way for the recovery of the premises levied upon. *Held*:—That all the proceedings are of the same effect as if in the plaintiff's name individually, and that the accompanying descriptions of him as administrator are wholly unessential and rejectable as surplusage.

A testator devised to certain persons real estate upon condition that they paid certain of the testator's notes, and, in case of non-payment by them, he devises the land to other persons upon payment of the notes by them. *Held*:—That the first persons took an estate in fee conditional, subject to being defeated or devested for non-performance of the condition, and then to go over to other persons conditionally, and that the estate remained absolutely in the first takers by their payment of the notes.

ON REPORT.

Writ of entry to recover an undivided half of lot No. 58 in Solon. The plea was joint *nul disseizen*, with brief statement.

The opinion states the material facts.

The following is a copy of item four of Moses Eaton's will, referred to in the opinion:

"Item 4th. I give, bequeath and devise to Samuel Eaton and Jona. Eaton, lots 58 and 112 in the north half of said Solon, on condition that they pay or cause to be paid, a certain note on which I am holden to Elisha Coolidge of Solon for about $160, also a note of about $180 to Samuel E. Morrill of Athens, also a note signed by said Samuel and Jonathan to me for $100, and in case they do not pay said notes, then I bequeath and devise said lots to Moses Eaton, 2d, my nephew, on condition that he pay said notes."

In their argument at law court plaintiff's counsel asked leave to amend by striking out the surplusage if the action should have been in the name of the plaintiff individually.

D. D. Stewart and *Turner Buswell*, for the plaintiff.

Baker, Baker and Cornish, for the defendants.

PETERS, C. J. The plaintiff was defendant in an action as administrator upon his father's estate, and recovered judgment in the action for his costs. Instead of issuing an execution to him for costs in his own name, the judgment and execution were made running to him in his representative capacity. The execution was levied upon the estate demanded in the present action. The present is a real action in the name of the plaintiff as such administrator. The fact is that the judgment, levy and action belong to the plaintiff, and more properly should have been in his individual name. The estate of his father has no interest in them. But the accompanying designation or description of person is harmful to no one, and, if not removed by amendment, may be considered as unessential parts of the proceedings, and may be rejected as merely surplusage. The maxim *utile per inutile non vitiatur* applies. Useless allegations, separable from those that are useful, may be rejected as surplusage. *Gilmore* v. *Mathews*, 67 Maine, 517. Or they may be stricken out. *Bean* v. *Ayers*, *Id.* 482. The redundant matter serves to explain to us at least the foundation upon which the judgment

rests. The writ in the present action would be more symmetrical, if shorn of the irrelevant matter indicated by the amendment asked for.

A question, more of fact than of law, is presented by the report, namely, whether the judgment debtor was the owner of the estate levied upon. We entertain no reasonable doubt that he was. He was the owner by devise, if he performed certain conditions required of him under item four of Moses Eaton's will. The will gave him an estate in fee conditional, subject to being defeated or devested, and to go over to other parties, if the conditions were not performed. The fact of possession and claim by him, and of non-possession and non-claim by the parties secondarily entitled under the will, enforced strongly by corroborative circumstances, satisfies us that the devisee did perform the conditions laid upon him by the terms of the will. *Buck* v. *Paine*, 75 Maine, 582. Several questions of law are learnedly presented by counsel, but, in our view, there is not a necessity of considering them in the present discussion.

Amendment allowed. Judgment for demandant.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

Ex parte JOHN O. HAINES.

In re FREDERICK HOYT and another.

Somerset. Opinion August 6, 1884.

Insolvent law. Composition. Discharge. Appeal. R. S., c. 70, § 62.

An appeal does not lie to the Supreme Judicial Court from a decree of a judge of the court of insolvency, granting a discharge to an insolvent debtor who has made a composition with creditors under R. S., c. 70, § 62. The remedy for a creditor contesting the discharge is by an action as provided by that section.

ON EXCEPTIONS.

An appeal from the decree of the judge of the court of insolvency granting a discharge to the insolvents under R. S., 1883, c. 70, § 62. The presiding justice at *nisi prius* ruled that no appeal lies to such a decree, and to this ruling the appellant alleged exceptions.

J. Wright, for the appellant.

E. N. Merrill, for the insolvents.

PETERS, C. J. The question presented is, whether an appeal lies to this court from a decree of a judge of insolvency, granting the discharge of an insolvent debtor who makes a composition with creditors under § 62 of c. 70 of the R. S., of 1883. We think no appeal lies.

By § 12 of such chapter it is provided that "no appeal in insolvency lies in any case arising under this chapter, unless specially provided for herein."

Appeals are specially provided for, in the matter of a debtor's discharge, under § § 44 and 49, but those sections do not seem to be appropriate or applicable to a composition under § 62. The latter is a special and not the common and ordinary proceeding. In lieu of an appeal under § 62, a special and stringent remedy of another sort is provided. An action to recover his debt is allowed to any creditor who deems himself defrauded. This privilege is not accorded to creditors under any other provision of the insolvency law.

There are, apparently, good reasons for granting a special rather than the general remedy for cases falling under § 62. A composition is a voluntary compromise, in which each creditor acts for himself, rather than for all the creditors. The debtor must make payment of the percentage, or secure it, before his discharge is obtainable. He needs the use and possession of his estate to enable him to do so. One creditor may have been induced by fraudulent means to agree to the compromise, and it be otherwise with creditors generally. One creditor may be satisfied with the result, and another not so. We think in a majority of cases it would put difficulties in the way of composi-

tion proceedings, if the debtor might be sent to an appellate court before a discharge is finally granted to him.

Besides the remedy by action, each creditor acting by himself, the equitable jurisdiction of the court can be invoked in proper cases, the court having under the insolvency law ample powers in that respect. *Twitchell* v. *Blaney*, 75 Maine, 577.

Exceptions overruled.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

JACOB T. THORNDIKE *vs.* EMERSON ROKES.

Knox. Opinion August 6, 1884.

Shipping. Charter-party. Master. Charterer. Agent.

Under a charter-party with the master to carry a full cargo of promiscuous timber from ports in Virginia to a port in Maine, the charterer paying "for the use of the vessel" for the voyage so much per ton for the amount carried, the master is not liable in damages for not taking timber too large for a vessel of the size and character of his vessel, properly equipped and fitted for such a voyage, to take.

Even if the master, without his fault, was unable to take on board some sticks tendered to him at one port, the loading to be completed at another port, on the same bay, still he had no right to attempt to tow the sticks by his vessel to the second port, at the risk of the charterer, without the consent of the charterer, or of some one authorized in his behalf.

The charterer was not present at the loading. A person of whom he purchased the lumber at the first port, delivered it alongside. The same person was hired by the charterer to go in the vessel to the second port, to see to the finishing of the loading there. There was no other person to represent the charterer at either place. *Held:* That, if the master, while towing the sticks, lost them, without any negligence on his part, and undertook to tow them at the risk of the charterer at the request of the person alluded to, he would not be responsible for the loss. The circumstances of such person's position would allow him to represent the charterer to that extent.

ON EXCEPTIONS.

Assumpsit to recover balance of freight of schooner *Defiance* for transporting a cargo of ship timber from Marattico and

Dividing Creeks in Virginia, to Bath, Maine, in 1876. The writ was dated August 9, 1879. The verdict was for the plaintiff for one hundred and forty-seven dollars, and the defendant alleged exceptions which, with the facts relating thereto, are sufficiently stated in the opinion.

Rice and Hall, for the plaintiff.

A. P. Gould, for the defendant.

PETERS, C. J. The schooner *Defiance* was chartered by the defendant to carry a load of promiscuous timber from ports in Virginia to a port in Massachusetts or Maine. The master of the vessel took on board all the timber ready for him at Marattico Creek, excepting three sticks, which, for their unusual or inconvenient size, he alleges he could not load upon the vessel until she should be sunk deeper into the water by completing the loading at the other port. He therefore undertook to tow the sticks by the vessel from Marattico, down the Rappahannock river twenty-five miles, to Dividing Creek upon Chesapeake bay, and the sticks were lost during rough weather while being towed between the two ports.

The judge in his charge to the jury said: "Both parties are supposed to know, when the charter was made, the size, general appearance and general character of the vessel. The vessel should be in as good condition and equipment as vessels of her class and kind ordinarily are. If not in such a state of equipment, not provided with the means for doing the work to be done, the master who made the charter-party would be guilty of negligence, and, if that caused the injury, would be liable therefor." The defendant contends that to place the master's liability under the contract upon the basis of negligence, was misfitting; that the duty to take the cargo was absolute and unconditional, whether the vessel was capable of so much burden or not. We do not think so. Negligence here is spoken of in the sense of omitting to perform a duty imposed by the contract. The ruling imputes negligence upon a supposition that the vessel is not in every way well fitted for a vessel of her class and size.

But the charter-party did not require the vessel to take timber too large for one of her tonnage. The master did not promise that the timber should be taken at all events. He was to take such a cargo as his vessel in a suitable condition could take. The defendant chartered the whole of the vessel, and was to pay for its use a given sum per ton for all that should be carried. The case in this respect does not differ from that of *Husten* v. *Richards*, 44 Maine, 182.

The charge contains the further ruling that the jury should determine whether it was an act of negligence or not for the master to undertake to tow the timber from port to port. This was not correct. The true question upon the facts presented for the jury to decide was this: Upon whose risk was the towing of the sticks actually undertaken? Was it upon the master's or the charterer's account?

If the master took the timber in tow upon the risk of its owner, and did not act negligently after taking it, he is exonerated from liability for its loss. The charter-party expressly excepts "the dangers of the seas, fire and navigation of every nature and kind." But we are of opinion that this clause did not of itself authorize the master to attempt to tow any timber anywhere; that it does not refer to or contemplate such a thing; and that the master took the timber in such way upon his own risk, unless it was done upon the risk of the defendant at the request of some person authorized to act in his behalf.

The plaintiff contends that a person by the name of Gregan assumed the responsibility of the act in behalf of the defendant, and that from his relations with the defendant Gregan had authority enough for the act. The defendant denies that any such authority belonged to Gregan. It appears that Gregan sold the timber in question to the charterer, and was to deliver it alongside the vessel. He was also hired by the defendant to accompany the vessel to Dividing creek and to see to the finishing of the loading there. There was no other person to represent the defendant at either place. He says he delivered the timber at Marattico as fast as it could be taken. We think it necessarily results, from his position with the parties, that Gregan could to

some extent deal with the master as an agent of the defendant. Of course, such limited and circumstantial authority would not justify the master in any extreme or clearly wrongful act, even if assented to by Gregan. But he could take a conditional delivery of the sticks from Gregan, and retain the right to return or leave them, if, without his own or the vessel's fault, he found upon experiment that he could not take them on board. And Gregan would be warranted in taking them back into his own custody, and if he did so, and then procured the plaintiff to take the timber in tow, we do not see how the master can be held answerable for the sticks that were lost in towing, unless some negligence of his, after taking them in tow, occasioned the loss.

Exceptions sustained.

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

STATE *vs.* GREENLIEF HASKELL.

Kennebec. Opinion August 6, 1884.

Cruelty to animals. Complaint. Demurrer. Pleadings.

A count in a complaint, is not bad for duplicity because it alleges that the defendant "did cruelly torment, torture, maim, beat, and wound his horse, and deprive said horse of necessary sustenance;" only one offense is alleged, and the different descriptions of it are not repugnant.

The words in the same count, "and the said defendant did then and there fail to provide said horse with proper food, drink and shelter," imply another and distinct offense, but may be rejected as surplusage, this statutory offense being inadequately charged, for want of allegation that the defendant at the time had "the care and custody" of the animal.

ON exceptions from superior court.

Complaint for cruelty to animals made before the municipal court of Augusta where the respondent appealed from the decision of the municipal judge.

The opinion states the case.

Wm. T. Haines, county attorney, for the state, cited: *Com.* v. *Lufkin*, 7 Allen, 579; *Com.* v. *Thornton*, 113 Mass. 457;

Com. v. *McLellan*, 101 Mass. 34; *Com.* v. *Whitman*, 118 Mass. 458.

E. W. Whitehouse, for the defendant, cited: Bishop, Crim. Pro. § § 189–193; *State* v. *Burgess*, 40 Maine, 592; *State* v. *Smith*, 61 Maine, 386; *Com.* v. *Tuck*, 20 Pick. 356; *State* v. *Hood*, 51 Maine, 363; *Com.* v. *Holmes*, 119 Mass. 195.

PETERS, C. J. The complaint containing a single count, is demurred to for duplicity. It is contended that at least two offenses are set out in the one count. The complaint recounts that the defendant did, a horse belonging to himself, "cruelly and unlawfully torment, torture, maim, beat, wound, and deprive of necessary sustenance." Thus far the complaint is not amenable to the objection alleged. Thus far only one offense is charged. But it is alleged to have been accomplished by different means. Proof that any of the means were used proves the offense. Proof that all the means described were used proves no more. The penalty is not necessarily more in the one case than in the other. *State* v. *Lang*, 63 Maine, 215.

The means alleged should not be repugnant. It is objectionable to allege in one count that an offense was committed in two different and utterly inconsistent ways. The count should not charge an impossibility. 1 Bish. Crim. Proc. § 436. The count, so far as quoted, is not repugnant. It is not unnatural or inconsistent to say that all of the acts thus alleged were done to the horse at the same time.

The complaint, however, further recites that the respondent did then and there "fail to provide said horse with proper food, drink and shelter." These words, no doubt, are employed to charge another and distinct offense. The first clause of § 29, c. 124, R. S., describes one offense, and the second clause another. One offense implies an act done; the other an act omitted. One clause makes *any* person liable to punishment who cruelly ill-treats an animal in any of certain ways named. The other clause makes only the person "who has the charge and custody" of the animal liable for an unnecessary failure to provide for his wants. *Com* v. *Whitman*, 118 Mass. 458.

The complaint, therefore, would be bad for duplicity if the two offenses were completely alleged. But the offense lastly described is not adequately alleged. It lacks the necessary averment that the respondent had "the charge and custody" of the animal. It is not an offense to neglect to feed an animal, if the person complained of has not the charge and custody of such animal. A count charging two offenses is not double, if one is adequately and the other inadequately alleged. The latter allegation may be rejected as surplusage. *State* v. *Palmer*, 35 Maine, 9.

Exceptions overruled.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

STATE OF MAINE *vs.* MARY E. BARROWS.

York. Opinion September 26, 1884.

Evidence. Murder, testimony of a co-defendant.

In the separate trial of one of two persons jointly indicted for murder, the other defendant, even while the indictment is still pending against himself on a plea of not guilty, may with his own consent, be called as a witness and allowed to testify against his co-defendant.

ON EXCEPTIONS.

Indictment against Oscar E. Blaney and Mary E. Barrows for the murder of Thomas Barrows at Kittery, on the fourteenth of November, 1883. The respondents severally pleaded not guilty. On motion of Mary E. Barrows a separate trial was granted her and she was first put on trial.

The opinion states the question presented by the exceptions.

Henry B. Cleaves, attorney general, and *Frank M. Higgins*, county attorney, for the state, cited: R. S., c. 134, § 19; Const. of Maine, Article 1, § 6; Hawkins, P. C. Vol. 4, b. 2, § 95; *Rex* v. *Gerber*, Temple & Mew. 647; *Rex* v. *Gallagher*, 13 Cox, C. C. 61; *Winsor* v. *Rex*, Exch. Ch. 7 B. & S. 490 (118

E. C. L. 178); *State* v. *Jones*, 51 Maine, 125; *Com.* v. *Reid*, 8 Phila. 385; *People* v. *Whipple*, 9 Cow. 707; *United States* v. *Ford*, 99 U. S. 594; *George* v. *State*, 39 Miss. 573; Whart. Cr. Ev. (8 ed.) § 439; *State* v. *Calvin*, R. M. Charl. 151; 1 Arch. Cr. Pr. & Pl. 479; 1 Bish. Cr. Pro. § 1079; *Marler* v. *State*, 67 Ala. 55; 2 Starkie, Ev. 1, 12; 1 Starkie, Ev. 143; 1 Greenl. Ev. § 379; *Jones* v. *Georgia*, 1 Kelley, 610; *Wixon* v. *The People*, 5 Parker's Cr. Rep. 119; Best, Ev. (Morgan Ed.) 170; *Noyes* v. *State*, 41 N. J. 429; *State* v. *Brien*, 3 Vroom, 414; *Hunter* v. *State*, 11 Vroom, 495; *Com.* v. *Marsh*, 10 Pick. 57; *Com.* v. *Brown*, 130 Mass. 279; *State* v. *Dyer*, 59 Maine, 303; *State* v. *Black*, 63 Maine, 212.

Ira T. Drew, *William Emery*, and *John B. Donovan*, for the defendant.

At the common law the witness, although not himself on trial, was not competent, even for the prosecution. Bishop on Crim. Proc. (3d ed.), § § 1020, 1166; *Edgerton* v. *Commonwealth*, 7 Bush, 142; *State* v. *Bruner*, 65 N. C. 499; *People* v. *Donnelly*, 2 Park. C. C. 182; *Lindsay* v. *People*, 63 N. Y. 143; *Rex* v. *Ryan*, Jebb, 5; *State* v. *Mooney*, 1 Yerg. 431; *Man* v. *Ward*, 2 Atk. 229.

Where the co-defendant is offered for the defence, the cases, many of which are cited by Bishop in notes to the passages above cited, are almost unanimous against his competency at the common law; and the cases that dispute this are led by *Jones* v. *State*, 1 Kelly, 610; *Garrett* v. *State*, 6 Mo. 1, of which the former is merely an *obiter dictum* that the witness, if he had been offered, would have been admissible; and the latter was severely criticised in *McMillen* v. *State*, 13 Mo. 30, and overruled by *State* v. *Roberts*, 15 Mo. 28, the last case being followed by the subsequent decisions in that state. The main ground of objection is, that he is a party to the record. *State* v. *Jones*, 51 Maine, 125; *Commonwealth* v. *Marsh*, 10 Pick. 57; *Commonwealth* v. *Smith*, 12 Met. 238; *State* v. *Young*, 39 N. H. 283; *People* v. *Bill*, 10 Johns. 95; *Adwell* v. *Commonwealth*, 17 B. Mon. 310; *State* v. *Worthing*, 31 Maine, 62,

64; *Moss* v. *State*, 17 Ark. 327; *State* v. *Nash*, 7 Iowa, 347; *Thompson* v. *Commonwealth*, 1 Metcalfe, 13; *Baker* v. *United States*, 1 Minn. 207, and many other cases.

The expressions of some writers and cases to the effect that a co-defendant is a good witness for the prosecution, if not himself on trial, are, when traced back, found to be based on obscure passages of ancient authors or reports, hardly any of which passages are so strong as the language of ALLEN, J., in *Lindsay* v. *People*, *supra*. "An accomplice is in all cases a competent witness for the prosecution;" though that language must have been intended to convey some meaning consistent with other parts of the opinion.

For example, Wharton's statement (Crim. Ev. § 439) that such a witness is admissible for the prosecution rests on three citations: *Rex* v. *Gerber*, T. & M. C. C. 647; *Noyes* v. *State*, 12 Vroom, 429; *Rex* v. *Gallagher*, 13 Cox. C. C. 61.

In *Rex* v. *Gerber*, the matter is said to be settled by 1 Hale, P. C. 305; *Rex* v. *Ellis*, MacNally, 55; *Lee* v. *Gansell*, 1 Cowp. 3; Com. Dig. Testmoigne, witness, A. 3; Hawk. P. C. bk. 2, c. 46, ss. 90 *et seq.*

The citations from Hale and Hawkins will be discussed hereafter. In *Rex* v. *Ellis*, a *nol pros.* was entered. In *Lee* v. *Gansell*, it was held that a witness convicted of perjury is competent before judgment. Comyns merely says an accomplice in the same crime is a good witness before conviction, which is of course true in some circumstances, *e. g.*, if he is indicted separately or not indicted, and certainly not true in all circumstances, *e. g.*, if he is jointly indicted and tried; and undoubtedly means only that his being an accomplice does not of itself exclude him. None of these has any tendency to settle the question.

Wharton's second case, *Noyes* v. *State*, merely affirms *State* v. *Brien*, 3 Vroom, 414, and this makes the witness competent for either party, thereby contradicting the decision of this court in *State* v. *Jones*, *supra*. The case cited in *State* v. *Brien*, in support of the decision, are *King* v. *Desmond*, Noy, 154; *Rex* v. *Davis*, 3 Keb. 136; *King* v. *Bedder*, Sid. 237; *Reg.* v. *Lyons*, 9 C. & P. 555; *Rex* v. *George*, 1 C. & Marsh, 111.

The first contains merely the ancient doctrine of approvers. The second and third are cases where defendants against whom there was no evidence were admitted as witnesses for their co-defendants. They have no bearing on the point except on the supposition that the defendants were admitted without acquittal or *nol pros.* as to which the reports are silent; if they were so admitted then, since they were on trial, the cases are opposed by an overwhelming array of later authorities. The fourth has already been discussed. In the fifth the witness had pleaded guilty.

The text writers cited in *State* v. *Brien* are Hale, Starkie, Hawkins, Russell and Roscoe.

Hale says (1 Hale, 305): "But in these and the like cases, (1) the party that is witness is never indicted, because that doth much weaken and disparage his testimony, but possibly not wholly take away his testimony. (2) And yet, though such a party be admissible, as a witness in law, yet the credibility of his testimony is to be left to the jury, and truly it would be hard to take away the life of any person upon such a witness;" but a little below he says, "If A B and C be indicted of perjury on three several indictments concerning the same matter, A pleads not guilty, B and C may be examined as witnesses for A for yet they stand unconvicted, although they are indicted." This is one of the standard citations for both sides of the question. The most probable construction would seem to be that he knows the practice to be never to indict an accomplice that the government intends to use as a witness; he gives a plausible reason; he, of course, cannot quote decisions as to the competency of such a witness, since the point cannot, according to his statement, ever have been raised; he is in doubt as to how it would be decided, if raised; he thinks that, even if such a party should be decided to be admissible as a witness, yet, etc.; but it has been decided that when the indictments are several, the defendant in one is admissible on the trial of another. Moreover, it may be that the witness he thinks possibly competent is one separately indicted; though as such a one would be

admissible for the defendant, his competency for the prosecution would probably not have been thought doubtful.

Hawkins says (P. C. bk. 2, c. 46, § 90 [in some editions 94]): "It has been long settled, that it is no exception against a witness that he hath confessed himself guilty of the same crime, if he have not been indicted for it; for if no accomplices were to be received as witnesses, it would be generally impossible to find evidence to convict the greatest offenders." And further on (*id.* § 91 [or 95]): "Also it hath been often ruled that accomplices who are indicted, are good witnesses for the king until they be convicted." And again (*id.* § 94 [or 98]): "Also it hath been adjudged, that such of the defendants in an information against whom no evidence is given, may be witnesses for the others." These sections are also cited on both sides. The first seems to be rendered nearly meaningless by the second; for its last sentence shows that the admissibility of such a witness for the prosecution was in his mind the same as is expressly stated in the second, and it can hardly be that the not having been indicted had been thought to be an objection to the witness, or that a previous confession had been thought to make him worse than one made on the witness stand. Again, nothing is said as to whether the supposed indictment is joint or several, and in the last cited section no intimation is given that the defendants, who were to be witnesses for the others, should first be acquitted, of which there can be no doubt whatever, since all are on trial.

The statements of Hale and of Hawkins, therefore, are loose and vague, and their meaning, so far as applicable to this case, is uncertain.

Starkie says (2 Starkie on Evidence, 4th Am. ed. 22): "An accomplice, as it seems, is a competent witness, and may be examined, although he is indicted along with others, provided he be not put upon his trial at the same time with the others (i)." And note (i) is: "Qu. and see 1 Hale, 305 [quoting a portion of the extract before given in this brief, and italicizing the words, '*but possibly not wholly take away.*'] See also *Rex* v. *Ellis*. MacNally, 55." So far, therefore, as Starkie is an authority, he

is for the competency of the defendant for either party; and he is cited to the compentency for a co-defendant in *Garrett* v. *State*, *loc. cit.* But he is plainly in doubt.

Russell (2 Russ. on Crimes, 3d ed. by Greaves, 956,) quotes the second of our quotations from Hale (which is only that a defendant who has pleaded guilty is admissible for a co-defendant), and cites the passage just quoted from Starkie and *Rex* v. *Lyons*, *supra*. He has no other authorities.

Roscoe (Crim. Ev. 9th ed. 130,) cites our first section from Hawkins, *R.* v. *Gerber*, *supra*, and *Winsor* v. *R.* L. R. 1 C. C. R. 396; S. C. 35 L. J. M. C. 161; the latter case being since 14 and 15 Vict. c. 99, s. 1, and also being *obiter* since the improper admission of evidence is not error in the technical sense.

In Wharton's third case the witness had pleaded guilty.

Of the three cases, then, the first is supported only by the fact that Hale was not sure such a witness might not be admitted, and that Hawkins and Comyns use language vague enough to let in, if taken without qualification, not only such a witness, but even a defendant actually on his trial; the second is supported in addition by the hesitating opinion of Starkie, by the opinion of Russell based thereon, and by that of Roscoe, and both Starkie's opinion and the case itself are inconsistent with the view of this court in *State* v. *Jones*, *supra*; the third is not in point.

It is probable that any other authority against the law claimed by this defendant may be examined with the same result as Wharton.

PETERS, C. J. Mary E. Barrows and Oscar E. Blaney were jointly indicted for murder. She was separately tried. Blaney, without any further disposition of the indictment as to him than his plea of not guilty, was called as a witness against her. The bill of exceptions presents the question, whether, if two are indicted jointly, and one pleads not guilty, his testimony, if he consents to be a witness, is admissible for the state on the separate trial of the other defendant.

In this state, it is a question to be decided upon the principles of the common law as amended or modulated by statutory provisions.

As a question simply at common law, although there is a contradiction in the cases, the preponderance of authority seems to favor the admission of a co-defendant, not on trial, as a witness, if called by the prosecution. There is very much less authority allowing him to he sworn as a witness for the defense. Whether the distinction be a sensible one or not, it has prevailed extensively. There are really but a few adjudged cases upon the point whether such testimony is admissible for the state, for the reason, probably, that a prosecuting attorney can avoid the question by omitting to indict one party, or by obtaining separate indictments. The defendant having no such election, the cases affecting the testimony in his behalf are more numerous.

Most of the authors on evidence evidently adopt the view that the testimony is admissible when offered by the state. Although but little authority is adduced to support their statements, and the doctrine is not very clearly or positively stated in some instances, still such a general concurrence of favorable expression has much weight upon the question. It goes far to show the common opinion and practice. Hawkins, P. C. book 2, ch. 46, § 90; 1 Hale, P. C. 305; 2 Starkie, Ev. 11; Roscoe, Crim. Ev. (9th ed.) 130, 140; 2 Russell, Crimes, 957. Mr. Wharton says, "An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a co-defendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered." Whart. Cr. Ev. (8th ed.) § 439. Mr. Greenleaf states the same rule. He says, "The usual course is, to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in guilt." 1 Greenl. Ev. § 379.

The counsel for the defendant places especial reliance on Mr. Bishop as an opposing authority. That learned commentator

evidently attaches more weight to that side of the question than other writers do. 1 Bish. Cr. Proc. (3rd ed.) § § 1020, 1166. But Mr. Bishop states that all the cases are not in accord with his text, and also says, in a note to the section cited *supra*, that the late English doctrine seems to differ from the rule recognized by him. We find it to be so. Late English cases are quite emphatical to that effect. *The Queen* v. *Thompson*, L. R. 1 C. C. 378; *The Queen* v. *Winsor*, L. R. 1 Q. B. 390; *The Queen* v. *Payne*, L. R. 1 C. C. 349; *The Queen* v. *Deeley*, 11 Cox. C. C. 607. The defendant's counsel, however, in their able and exhaustive brief, contend that the late English cases are based upon acts of parliament in amendment of the common law. It cannot be so, for Chief Justice COCKBURN in *The Queen* v. *Payne*, *supra*, declares the rule to be according to the law "as it has existed from the earliest times," and other judges gave their opinion that the new enactments were not intended to apply to criminal cases. See cases, *supra*.

The question before us does not appear in any reported case in this state. *State* v. *Jones*, 51 Maine, 125, approaching the question nearer than any other case, merely decides that when two are indicted, and one pleads guilty, his testimony is admissible for the other defendant. KENT, J., says in the opinion: "It seems to be settled that he cannot be thus called whilst the charge in the indictment is pending and undisposed of against him. And this, whether he is to be tried separately or jointly." That is, the defendant cannot be called by the co-defendant. The latter remarks are a correct statement of the law of New York, and New York cases are cited in support of it. See 17 Alb. L. J. 421. In 1876, however, the privilege of calling a co-defendant to testify, before that time possessed by the prosecution only, was extended by a legislative enactment to all parties. 18 Alb. L. J. 160. The case of *Lindsay* v. *The People*, 63 N. Y. 143, relied upon by the defendant's counsel, upon a correct understanding of it, does not contradict previous decisions in that state.

The argument against the admission of such evidence does not strike us with much force. It is almost universally admitted

that an accomplice separately indicted may be a witness for the state, and any distinction arising between trials on a joint indictment and trials on separate indictments is not readily appreciated. The crime is supposed to be jointly committed in either case. If there are separate indictments, the fact of joint criminality is not withheld from the jury. It is not improper to aver it by way of recital or description. The interest and motives of the witness, must be the same whether he is to be afterwards tried under the same or another indictment. As said by BEASLEY, J., in a convincing argument of the question in *State* v. *Brien*, 3 Vroom, 414: "The only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper with the charge against the culprit whose trial is in progress."

The reason at first given for not allowing a party to testify was his interest. The old common law shuddered at the idea of any person testifying who had the least interest. But that reason failed sometimes. In many civil cases a party had no interest. Then it was decided that public policy or expediency prevented the reception of the testimony. A party to the record was not permitted to testify, whether interested or not. If only a nominal plaintiff, he could not testify either for the plaintiff or defendant. *Kennedy* v. *Niles*, 14 Maine, 54. Without much reasoning upon the subject, the law pronounced against it. The rule was general. But, as stringent as the rule was, it did not apply to indictments to its full extent. The parallel between civil and criminal cases was not kept up. If a man was indicted and pleaded guilty, he could testify for his co-defendant. *State* v. *Jones*, *supra*. If, however, he was sued for the same cause, and became defaulted, he could not testify for his co-defendant. *Gilmore* v. *Bowden*, 12 Maine, 412. Courts seemed inclined not to regard a co-defendant in a criminal case as a party, unless "a party to the issue on trial." That distinction is taken in the English cases before cited. To be incompetent to testify, the defendants must be in charge of the same jury. Mr. Starkie struck the same key, who declared that "an indictment against

several is several as to each." It is plainly seen that there is much authority and reason for regarding an indictment of two or more persons as in effect, a joint and several indictment; joint, when the accused are tried jointly; and several, when tried separately.

But, as before intimated, we are not to look upon the question before us as exclusively one at common law. Our statutory enactments bear upon it. They have weakened if not abrogated the argument of public policy. It was, no doubt, the design of the legislature that the objection to the competency of parties as witnesses should be removed in both civil and criminal cases. In civil cases the door is opened widely. In criminal cases the provision is this: "In all criminal trials, the accused shall, at his own request, but not otherwise, be a competent witness. . . The husband or wife of the accused is a competent witness." R. S., c. 134, § 19. While this enactment does not cover the present question with literal exactness, it approaches it, affects and influences it, and requires us to examine the matter in the light of the legislative policy declared by it. If both defendants were on trial at the same time either could testify. *Com.* v. *Brown*, 130 Mass. 279. If the argument for the defendant is sound, then the common law rule has become reversed. Defendants can testify against each other when tried together, and cannot so testify when tried apart. We do not assent to such a proposition.

The admission of the evidence did no injustice. It bore less heavily upon the defendant than it would have if the witness had not been himself indicted. As Lord HALE says, the indictment against him "doth much weaken and disparage his testimony." It would present a singular inconsistency in criminal procedure, if even one's wife may be compelled to testify against him, and a co-defendant, on trial, may be called from the dock to the witness stand, but a companion in guilt, included in the same indictment, not on trial, be excluded therefrom.

Exceptions were taken to some portions of the charge of the judge to the jury. No argument has been submitted in their

support. They are clearly untenable, and require of us only a passing word.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

STATE OF MAINE *vs.* ANDROSCOGGIN RAILROAD COMPANY.

Cumberland. Opinion October 15, 1884.

Pleadings. Declaration. R. S., 1871, c. 46, § 23. Stat. 1872, c. 16.

In penal actions the declaration must present a case strictly within the provisions of the statute, directly averring every essential fact, instead of leaving it to be gathered by argument or inference.

It an action against a railroad corporation to recover the penalty prescribed by R. S., (1871) c. 46, § 23, as amended by st. 1872, c. 16, for not making "a return of the names of all its stockholders, their residence, the amount of stock owned by each, and the whole amount of stock paid in," an allegation that the "defendant corporation is and for a long time has been a corporation duly organized, and existing under the laws of this state," does not sufficiently aver the material fact that any stock was ever issued.

ON EXCEPTIONS to the ruling of the court in overruling a demurrer to the declaration.

The opinion states the material facts.

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

William L. Putnam, for the defendant.

VIRGIN, J. This is an action of debt by the state to recover the penalty prescribed in R. S., of 1871, c. 46, § 23 as amended by St. 1872, c. 16.

The defendant by general demurrer challenges the sufficiency of the declaration. To constitute a good declaration in actions of this nature, it must present a case strictly within the provisions of the statute on which the action is based, omitting nothing which the law deems essential in the form of declaring. Thus in an action of debt against a constable for the penalty given by

statute, for serving two executions issued by a justice of the peace and taking fees therefor before giving bond, the court, on demurrer, held the declaration bad for not setting out the amount of the debt and thereby showing that the precepts were within his authority to serve. "It is insisted," said WESTON, J., "that all processes, issuing from a justice, must necessarily be within a constable's jurisdiction; and these appearing of that description, the plaintiff was not bound to aver that they were such as a constable might serve. If this were true, it might be replied, that in a penal action an essential fact ought to be directly averred, instead of being left to be gathered by argument and inference." *Barter* v. *Martin*, 5 Maine, 76.

Even following the precise language of the statute is not necessarily sufficient. Thus where the statute imposed a fine upon any person who "maliciously or wantonly breaks glass in any building not his own," an allegation strictly following this language was held insufficient, inasmuch as "glass in a building" meant glass forming a part of a building, and should be so averred. *Com.* v. *Bean*, 11 Cush. 414. So, where a city ordinance prohibited, under a penalty, letting cattle "stop to feed" on any highway, etc., an allegation that the defendant suffered two cows to "stop and feed" on a certain highway named, was held insufficient, the court holding that the declaration should show that the cows were allowed to "stop and graze or feed on the grass growing on the street." *Com.* v. *Bean*, 14 Gray, 52.

The complaint before us is, that neither the clerk nor the treasurer of the defendant corporation has made to the secretary of the state a "return of the names of all its stockholders, their residence, the amount of stock owned by each, and the whole amount of stock paid in to said corporation," as required by R. S., of 1871, c. 46, § 22, as amended by St. 1872, c. 16.

A complete answer to this complaint may be found in the fact that the corporation never issued any stock, and that hence no such return was possible and contemplated by the statute. Whether such a fact exists or not we are not directly informed by any averment in the declaration. It might possibly be inferred

from the allegation that the "defendant is and for a long time has been a corporation duly organized and existing under the laws of the state." But, in the language of WESTON, J., *supra*, it is an essential fact and ought to be directly averred, instead of being left to be gathered by argument and inference. We cannot go outside of the declaration for information on this subject, for only such facts as are properly pleaded therein, are admitted by the demurrer. We suggest also that while amending the declaration in the particular above mentioned, the plaintiff had better aver also that the defendant "holds property liable to be taxed," which he can do on payment of costs since the filing of the demurrer.

Demurrer sustained. Declaration adjudged bad.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

A. C. WADE

vs.

THOMAS BESSEY, and EDWARD and MICHAEL CULLEN, Trustees.

Piscataquis. Opinion October 15, 1884.

Assignment of wages. Trustees' process. R. S., c. 111, § 6.

Future wages to be earned under a present contract imparting to them a potential existence, may be assigned although the contract may be indefinite as to time and amount, unless affected by the statute requiring registration.

R. S., c. 111, § 6, providing that no assignment of wages is valid against any other persons than parties thereto, unless recorded in the town or plantation, organized for any purpose, in which the assignor is commorant while earning such wages, does not affect an assignment when the assignor is commorant, while earning the wages, in an unorganized township.

ON EXCEPTIONS to the ruling of the court in discharging the trustees.

The trustees disclosed that in the fall of 1882, the defendant was hired for them by Levi T. Pike, to work for them in the

woods, and he worked for them in the unorganized township, called Brassua, from October 30, 1882, until the service of the writ March 23, 1883, when they were indebted to him for wages in the sum of one hundred and six dollars; that while the defendant was thus working for them he lived in their camp at Brassua, and his family resided in Brighton; that at the time Bessey was employed he gave Pike the following assignment of his wages:

"Brighton, Oct. 28th, '82. This may certify that I have this day signed over all of my wages, also all of my boy's wages, that we may earn in the woods this winter, for Edward Cullen and Brother to secure said Pike for goods furnished my family, also a bill already in said Pike's book. Thomas Bessey;"

that this paper was recorded in the town clerk's office, Brighton, and sent to the trustees when Bessey comemenced work; and that Pike claimed all the wages due to Bessey and had notified the trustees thereof.

Brown and Carver, for the plaintiff, contended that the paper given by Bessey to Pike was not valid as against the plaintiff as an assignment of wages, because it contained no apt words of conveyance or assignment, at most it was only a certificate, and because there was no evidence that, at the time the paper was given, Bessey had entered into any contract of labor with the trustees, and further, because the assignment was not recorded in the place where Bessey was commorant while earning the wages, nor in the oldest adjoining town or organized plantation, citing: R. S., c. 111, § 6; *Hope Iron Works* v. *Holden*, 58 Maine, 146 *Farnsworth* v. *Jackson*, 32 Maine, 419; *Emerson* v. *E. & N. A. R. R. Co.* 67 Maine, 387.

Henry Hudson, for the trustees.

VIRGIN, J. It has been generally held that a thing having a potential existence may be sold or mortgaged. This proposition is variously illustrated in *Farrar* v. *Smith*, 64 Maine, 74, and in *Emerson* v. *E. & N. A. Railway Co.* 67 Maine, 392. And while the mere expectation of earning money cannot, in the absence of any contract on which to found such expectation, be assigned,

future wages to be earned under a present contract imparting to them a potential existence, may be assigned, although the contract may be indefinite as to time and amount. *Taylor* v. *Lynch*, 5 Gray, 49; *Hartley* v. *Tapley*, 2 Gray, 565; *Emery* v. *Lawrence*, 8 Cush. 151. The assignment, therefore, if legally made, was valid, unless the statute of registration renders it invalid as to the plaintiff who seeks to reach the wages of the defendant in the trustees' hands.

R. S., c. 111, § 6, provides that no assignment of wages is valid against any other person than the parties thereto, unless it is recorded in the "town or plantation organized for any purpose, in which the assignor is commorant while earning such wages." But the disclosure shows that the assignor was not "commorant in a plantation organized for any purpose while earning such wages," but in the unorganized township of Brassua. The case is, therefore, not within the provisions of the statute, and is not affected thereby.

Our opinion also is that it is valid in form although we should not expect to see it in any book of approved forms. There can be no doubt as to the intention of the parties. The consideration is expressed, and the instrument is dated and signed. And the omission of the assignee's christian name cannot make it void, especially since only one person of that surname appears to claim the wages and he is the one who furnished the supplies as the consideration of the assignment which he produces.

Exceptions overruled.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

SAMUEL H. TALBOT, JR. *vs* INHABITANTS OF EAST MACHIAS.

Washington. Opinion October 15, 1884.

School agents, not entitled to pay for services.

A school agent's mere election and performance of official duties, raise no implied promise on the part of the town to pay him for such services.

In the absence of any implied contract or statutory provision entitling him to pay for official duties rendered, a school agent can maintain no action therefor against his town.

ON MOTION to set aside the verdict.

Assumpsit for services rendered as village school agent, for the years 1880 and 1881, fifty dollars. The writ was dated July 10, 1882. The plea was the general issue. The verdict was for the plaintiff in the sum of thirty-seven dollars and eighty cents, and the defendants moved to set aside the verdict.

John F. Lynch, for the plaintiff.

J. C. Talbot, for the defendants.

VIRGIN, J. The legislature has imposed upon towns the general duty and responsibility of supporting schools within their respective limits, with such aid as the state shall afford. *Dore* v. *Billings*, 26 Maine, 56; R. S., c. 11. To this end they are required to raise money (§ 6), are authorized to divide their territory into districts (§ 1), or abolish them (§ 3), and choose school agents (§ 4). Such agents are public officers whose official powers and duties are expressly prescribed by the statute. R. S., c. 11, § § 93, 95. Their mere election and performance of official duties, raise no implied promise on the part of the district or of the town to pay them for their services. *Walker* v. *Cook*, 129 Mass. 578, and cases there cited; *Holland* v. *Lewiston F. Bank*, 52 Maine, 564; *Sawyer* v. *Pawner's Bank*, 6 Allen, 207; *Hall* v. *Verm. & M. R. R. Co.* 28 Vt. 401.

Assessors of towns are expressly entitled to pay, by the statute. R. S., c. 6, § 102. But there is no like provision concerning school agents. And in the absence of any implied contract, or any statute provision entitling them to pay for official services rendered, no action can be maintained to recover therefor.

Motion sustained. New trial granted.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

WILLIAM SPRAGUE, trustee of ALMYRA DOYLE,

vs.

A. AND W. SPRAGUE MANUFACTURING COMPANY.

Kennebec. Opinion October 15, 1884.

Attachment, right of grantees to defend in cases of. R. S., c. 82, § 19.

R. S., c. 82, § 19, providing that "grantees may appear and defend suits against their grantors in which the real estate is attached," does not apply to a grantee whose conveyance was prior to the attachment. Nor does it give to a grantee a vested right to appear and defend a suit without application to the court.

ON EXCEPTIONS from superior court.

The opinion states the case.

Edmund F. Webb and *Appleton Webb*, for the plaintiff.

Baker, Baker and Cornish, for Mr. Chafee.

VIRGIN, J. Assumpsit to recover an alleged balance of account. The real estate of the defendant situated in Kennebec county, was attached September 20, 1882, and the writ was returnable to and was entered at the December term following. On the ninth day of the term, defendant was defaulted by agreement. On the fifth day of the succeeding February term, Z. Chafee filed a petition, alleging therein that he holds a mortgage deed from the defendant, dated December 5, 1873, and duly recorded, and a deed of release and confirmation from the defendant, dated April 6, 1874, and duly recorded, covering all of the real estate attached by the plaintiff; that he is informed and believes that there is a good defence to the action; and he prays that he may be admitted to defend it, in accordance with the provisions of st. 1879, c. 152.

On the seventeenth day of the last named term, the plaintiff filed a discharge of his attachment of the real estate, in accordance with the provisions of R. S., (1871) c. 81, § 66.

At the succeeding April term, the presiding justice overruled the prayer of the petition to which exception was alleged and allowed.

The statute under which the petitioner claims the right to appear and defend this action provides: "Grantees may appear and defend in suits against their grantors in which the real estate is attached." St. 1879, c. 152; R. S., c. 82, § 19.

There are several reasons why we think the court below was right in denying the prayer of the petition:

1. The provision is applicable only to grantees whose conveyances were subsequent to the attachment; otherwise their duly recorded deeds would take precedence of the attachment, and they would have no occasion to defend.

2. The attachment having been legally discharged, the petitioner's case is no longer within the condition mentioned in the statute, and he stands the same as if no attachment had been made.

3. If we look outside of the bill of exceptions and thereby learn that the petitioner holds the conveyance as trustee for the creditors of the defendant, we see no imperative reason for sustaining the petitioner's prayer, inasmuch as the judgment cannot conclude him, not being a party thereto. *Vide Waterman* v. *A. & W. Sprague Man'f. Co.* decided in 1882 by S. J. C. of R. I. and not yet published.

The petitioner contends that the statute gave him a vested right to appear and defend without any petition. We hardly think any one could appear in an action who was not a party thereto, unless he brought himself within some statutory provision, as in this case, and show that his case was one contemplated by the statute.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

INHABITANTS OF UNITY *vs.* INHABITANTS OF BELGRADE.

Waldo. Opinion October 15, 1884.

Paupers. Marriage. Insane person. R. S., c. 59, § 2; c. 60, § 1.

By the provisions of R. S., c. 59, § 2, no insane person is capable of contracting marriage; and by R. S., c. 60, § 1, the marriage of an insane person when solemnized in this state is absolutely void.

When, in the trial of an action for the recovery of pauper supplies, the validity of an alleged marriage becomes material, it may be impeached by proving the insanity of one of the parties thereto, when the marriage was solemnized in this state.

ON EXCEPTIONS.

Assumpsit to recover for pauper supplies furnished to Julia A. Jackson and her three children.

At the trial the plaintiffs introduced evidence of a marriage between Julia A. Jackson and one Gustavus A. Farnham whose settlement was admitted to be in the defendant town, whereupon the defendants were permitted to introduce evidence, against the plaintiffs' objections, tending to prove that at the time of the marriage Farnham was insane. And the presiding justice instructed the jury that if they found that Farnham was insane at the time the marriage ceremony was performed, the marriage would be void, and the plaintiffs could not, for that reason, maintain this action.

To this ruling and instruction, the verdict being for the defendants, the plaintiffs alleged exceptions.

William H. Fogler, for the plaintiffs.

It is not competent to question the validity of a marriage on account of the insanity of one of the parties in the trial of a collateral issue, such question can be determined only in a process instituted for the purpose of testing such validity. See definition of marriage in *Adams* v. *Palmer*, 51 Maine, 480.

The relation is *publici juris*. A decent regard for the rights of others, for the peace of mind of the parties to the marriage,

for the good name of children begotten by parents under the sanction of proper and lawful marriage ceremonies, demand that this question should not be made a foot-ball by contesting litigants, but that a marriage, duly solemnized according to the laws of the state, should be held sacred until the subject has been judicially investigated and the fact established by the proper tribunal, and in the way provided by the statute, for the government of all parties for all time.

The expediency, at least, of the method of procedure for which the plaintiffs contend is declared by the elementary writers. 2 Greenl. Ev. § 464, note 2; 2 Kent, 77.

Although the marriage of a lunatic is absolutely void without any decree of nullity in Massachusetts, yet, the question whether lunacy existed to an extent to annul the marriage, can not be raised collaterally. The fact must be decided in such a way as to be fixed for all purposes and for all parties.

The same provision is made by the statute of New York.

In this state the question has not been judicially decided. In *Atkinson* v. *Medford*, 46 Maine, 510, the question was not raised, or discussed, or decided.

It is an open question. The court is called upon first to determine what is right; what is salutary; what is for the good order of society, and the peace of mind of all persons who enter into the bonds of matrimony.

If it is best for the public, best for the parties concerned, that the validity of a marriage shall be questioned and brought into controversy, incidentally, to be decided in one way in one cause, and the contrary in another suit; that the social *status* of parents should be thrown into doubt, and the legitimacy of children brought into discredit, at the will of litigants, and left in doubt and discredit, even after the decision of the cause in which the question is raised, then, of course, the ruling of the judge at *nisi prius* must be sustained.

Baker, Baker and Cornish, for the defendants, cited: 1 Bish. Mar. and Div. § § 105 (49), and cases cited, 124, 125, 136; *Ferlat* v. *Gojon*, 1 Hop. Ch. 478; S. C. 14 Am. Dec. 554;

Gathings v. *Williams*, 5 Ired. 487; S. C. 44 Am. Dec. 49, and note, p. 54; *Elliott* v. *Gurr*, 2 Phillim. 19; 1 Black. Com. p. [524], [526], [527]; *Jenkins* v. *Jenkins Heirs*, 2 Dana, (Ky.) 103; S. C. 26 Am. Dec. 437; *Foster* v. *Means*, 1 Speer's Eq. 569; S. C. 42 Am. Dec. 332; *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Crump* v. *Morgan*, 3 Ired. Eq. 91; S. C. 40 Am. Dec. 447; *Powell* v. *Powell*, 18 Kansas, 371; S. C. 26 Am. Rep. 774; note to *Gathings* v. *Williams*, 44 Am. Dec. 55, and cases; R. S., c. 59, § 2; R. S., c. 60, § 1; note to *Jackson* v. *King*, 15 Am. Dec. 368; see *Wiser* v. *Lockwood*, 42 Vt. 720; *Middleboro'* v. *Rochester*, 12 Mass. 363; *Mount-holly* v. *Andover*, 11 Vt. 226; S. C. 34 Am. Dec. 685; *Goshen* v. *Richmond*, 4 Allen, 460; *Atkinson* v. *Medford*, 46 Maine, 510.

VIRGIN, J. As no person can contract a valid marriage when incapable of giving an intelligent consent thereto, the marriage of an insane person, though formally solemnized, is a nullity. *Middleboro'* v. *Rochester*, 12 Mass. 363; *Atkinson* v. *Medford*, 46 Maine, 510; 1 Bish. Mar. & Div. (5th ed.) § § 105 and 125; Sch. Dom. Rel. 25, 29. Moreover the statute expressly provides, not only that, "no insane person is capable of contracting marriage," (R. S., c. 59, § 2) but also that such a marriage, "if solemnized in this state, is absolutely void." R. S., c. 60, § 1. And as the law, in the absence of any statutory requirement, does not require so useless a ceremony as that of annulling, by a special proceeding, a marriage which has no existence, but is absolutely void *ab initio*, its invalidity may be shown in any proceeding, in any court whenever the question arises collaterally. Sch. Dom. Rel. 24; 1 Bish. Mar. & Div. *supra; Gathings* v. *Williams*, 5 Ired, 487; S. C. 44 Am. Dec. 49, and note, p. 54.

Such has been the invariable practice in this court ever since the separation. Thus in an action for the recovery of pauper supplies, the plaintiffs were permitted to impeach the validity of an alleged marriage of the female pauper, by showing that the marriage was solemnized by a minister at his own house, neither of the parties residing in that town as required by st. 1786, c.

3; *Ligonia* v. *Buxton*, 2 Maine, 102. So, in a similar action, proof was allowed that a former husband of a married woman was still living when she married another man. *Pittston* v. *Wiscasset*, 4 Maine, 293; *Harrison* v. *Lincoln*, 48 Maine, 205; *Howland* v. *Burlington*, 53 Maine, 55; *Augusta* v. *Kingfield*, 36 Maine, 235. So, in the trial of a writ of entry, the defendant was permitted to impeach the marriage of the demandants' father (under whom they claimed as heirs) by showing that their father was a mulatto and their mother one-eighth indian. *Bailey* v. *Fiske*, 34 Maine, 77. So, in the trial of a complaint under the statute brought to compel the respondent to contribute towards the support of his alleged grandchild, the defendant was allowed to show a former marriage of the child's mother to impeach the latter marriage of which the pauper was the offspring. *Hiram* v. *Pierce*, 45 Maine, 367. So, in *Atkinson* v. *Medford*, 46 Maine, *supra*, the marriage was collaterally impeached by showing the insanity of one of the parties thereto.

The same practice prevailed in Massachusetts, until the enactment of Mass. st. 1845, c. 222, which provided that the validity of a marriage shall not be questioned in the trial of a collateral issue on account of the insanity or idiocy of either party. *Goshen* v. *Richmond*, 4 Allen, 458.

But while we have no such statute, and while in cases of void marriages no special judicial proceedings are necessary to declare them void, we do have a statute founded on grounds of prudence and propriety, providing in substance that, when the validity of a marriage is in doubt, either party may file a libel as for divorce, and the court shall decree it annulled or affirmed according to the proof. R. S., c. 60, § 18. And when a marriage is annulled on account of insanity, the issue is the legitimate issue of the parent capable of contracting marriage. R. S., c. 60, § 19.

The practice of collaterally impeaching marriages declared by the statute to be absolutely void, has been too long established to be changed in the absence of any statute to that effect.

Exceptions overruled.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

WILLIARD K. ATWOOD *vs.* ABBEY HIGGINS.

Somerset. Opinion October 21, 1884.

Pleadings. Married women. Stats. 1881, c. 39; 1876, c. 112.

In a plea of coverture in abatement, the allegations recognized as necessary are, that of coverture at the time of the commencement of the action and its continuance by the continued life of the husband up to the time of filing the plea.

The affidavit to a plea in abatement may be made by an attorney or agent; and by stat. 1881, c. 39, (R. S., c. 77, § 4), may be made before the entry of the action, or the filing of the plea.

Stat. 1876, c. 112, does not authorize the wife to defend alone an action against her for an alleged tort not relating to property or personal rights, nor does it relieve the husband of liability for such a tort.

ON EXCEPTIONS.

An action of slander. The writ was dated March 24, 1883. The defendant filed the following plea:

"*Williard K. Atwood* v. *Abbey Higgins*. Supreme Judicial Court, Somerset County, September Term, A. D. 1883.

"And now the said Abbey Higgins comes and defends the wrong and injury when, &c. and prays judgment of the plaintiff's writ and declaration aforesaid, because she says that at the time of the issuing of the said writ of the said plaintiff, she was and still is married to one William J. Higgins, her husband, who is still living, to wit, at Fairfield, in said county of Somerset, and this she is ready to verify. Wherefore because the said William J. Higgins, her said husband, is not named in said writ and declaration, she prays judgment of said writ and declaration, and that the same may be quashed, and for her costs.

Abbey Higgins.

By David D. Stewart, her attorney and agent."

"State of Maine, County of Somerset, September 18, 1883.

"Personally came David D. Stewart above named, on this eighteenth day of September, A. D. 1883, and made oath that the foregoing plea is true in substance and in fact. Before me,

Turner Buswell, justice of the peace."

To this plea the plaintiff demurred, and the exceptions are to the ruling of the court in overruling the demurrer and sustaining the plea in abatement.

Brown and Carver, for the plaintiff, cited: *Tweed* v. *Libbey*, 37 Maine, 49; Gould, Pl. c. 3, § § 57, 47; 27 Maine, 549; 31 Maine, 569; 33 Maine, 225; 44 Maine, 92, 482; 58 Maine, 246; 65 Maine, 108; 71 Maine, 360; 20 Maine, 145; 56 Maine, 42; 37 Maine, 49; 31 Maine, 302; *Furbish* v. *Robertson*, 67 Maine, 35; Stephen's Pl. 356, 84; 1 Chitty, Pl. 463; 1 Curtis, C. C. 494; 59 Maine, 172, 90; 72 Maine, 40; 61 Maine, 83, 121; 16 Mass. 461; 98 Mass. 101; 4 Allen, 403; 112 Mass. 387; 119 Mass. 189; 5 Allen, 338; 106 Mass. 561; 68 Maine, 87; 1 Black. Com. 443, 445; 4 Bing. (N. C.) 96; Starkie, Slander, 333; 2 Wm. Saunders, 47; 67 Maine, 304, 251; 33 Maine, 196; 54 Maine, 156; 51 Maine, 308; 59 Maine, 298; 66 Maine, 182; Addison, Torts, § 1313; Dicey, Parties, 501, 502; 72 Maine, 115; 58 Maine, 139; 64 Maine, 177; 57 Maine, 586; 55 Maine, 358; 4 Oregon, 298; 41 Maine, 405; 2 Green, Cr. L. R. 286; 70 Maine, 281; 74 Maine, 287; 5 C. & P. 484; *Wright* v. *Leonard*, 30 L. J. 367.

D. D. Stewart, for the defendant, cited: 2 Black. Com. 433; 2 Kent's Com. 149, 154, 161; *Marshall* v. *Rutton*, 8 T. R. 545; 3 Black. Com. 414; 1 Chitty Pl. 93; *Hobbs* v. *Hobbs*, 70 Maine, 382; *Libby* v. *Berry*, 74 Maine, 288; *Ferguson* v. *Brooks*, 67 Maine, 251; *Swift* v. *Luce*, 27 Maine, 288; Story's Pl. (2d ed.) 94; 1 Chitty Pl. (16th ed.) 469, 733, 480, 479, 470; 2 Chitty Pl. (16th ed.) 270, 272, 273; *Freeman* v. *Freeman*, 39 Maine, 426; *Calais* v. *Bradford*, 51 Maine, 416; *Evans* v. *Stevans*, 4 T. R. 225; *Potter* v. *Titcomb*, 3 Fairf. 55, 56; *State* v. *Sweetsir*, 53 Maine, 438.

DANFORTH, J. This is an action of tort in which the defendant files a plea of coverture in abatement. To this plea the plaintiff files a general demurrer, and raises several objections, both to its form and substance. As to the form, the pleader has followed

the precedent found in Story's Pleadings, 95, and in 2 Chitty on Pleadings, (16th ed.) 272. This precedent has stood the test for many years, and no authority has been cited in which it has been held insufficient. The issue presented is that of coverture, and the allegations recognized as necessary, are that of coverture at the commencement of the action and its continuance by the continued life of the husband up to the time of filing the plea. 1 Chitty on Pleadings, (16th ed.) 465; 1 Saund. Repts. 291, b; *Horner* v. *Moor*, 5 Burr. 2614. Both these allegations are found in this plea. But it is objected that there is no sufficient allegation of the residence of the husband within the state. Such has been held to be necessary in the case of a joint contractor where there is no presumption of residence. But if necessary, in a case of coverture where the residence of the wife is presumed to be that of the husband, we find it in this plea in the very words of the precedent referred to, and so connected with the previous allegation of coverture, that it must be understood as referring to the same period of time.

The affidavit, both as to the person making it and the time when made, is objected to. In 1 Chitty on Pleadings, 479, it is said that the affidavit may be made by the defendant or a third person. In this case it was made by the attorney and agent who signed the plea, not with the purpose of binding the conscience of the defendant, but to bind his own, and upon his own responsibility. Nor are there any facts stated in the plea which might not be within his own knowledge. If this is not in terms authorized by the rule of court, it is not inconsistent, but is a compliance with it.

The affidavit was made on the return day of the writ, but was not filed until the day following. Whether this was sufficient under the decision in *Bellamy* v. *Oliver*, 65 Maine, 108, it is not necessary now to inquire. Since that case was decided, the statute of 1881, c. 39, R. S., c. 77, § 4, has been passed, providing that the affidavit "may be made at any time before the entry of the action, or before filing the same."

In substance, the plea is well founded. It is not denied that under the common law such an action could not be maintained

against the wife alone. It is also a familiar principle of law that a statute in derogation of the common law will be strictly construed. In other words, courts will consider the common law in force until it has been repealed or modified by the legislature. That the wife's disabilities in prosecuting and defending suits upon contracts have long since been removed, may be conceded. But in cases of tort, these disabilities, so far as applicable to this action, remain unless removed by statute of 1876, c. 112. *Ferguson* v. *Brooks*, 67 Maine, 251; *Abbott* v. *Abbott*, *Id.* 308–9.

By this statute, the wife may, with or without her husband, prosecute and defend an action, either of tort or contract, "for the preservation and protection of her property and personal rights, or for the redress of her injuries." Whether the option here given her to defend alone or jointly with her husband, would enable her to maintain her plea in abatement, it is unnecessary now to decide. It is sufficient that the case at bar does not come within the terms, or spirit even, of the statute. It is not an action for the protection of the wife's property or personal rights. Nor is it for the redress of any injury to her. No such issues are or can be involved. It is rather an action against the wife, purely and simply for a wrong alleged to have been committed by her. The only statute which can be invoked to relieve the wife of her disability in such a case as this, or the husband of his liability, is that of 1883, c. 207, R. S., c. 61, § 4, and whether this would or would not, it is of too late a date to have any application here.

Exceptions overruled.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

LAURA E. CHAPMAN *vs.* INHABITANTS OF NOBLEBORO.

Lincoln. Opinion October 21, 1884.

Ways. Defects. Notice of injury. Amendment.

In an action for injury received because of a defect in a way, amendments which are merely additional to the description of the alleged defect and the manner in which the accident happened do not introduce a new cause of action and are within the discretion of the presiding justice.

The notice to the town officers within fourteen days after an injury is received because of a defect in a way must be in writing and its sufficiency is a matter of law for the court.

Testimony tending to show a greater distance of the defect from a given point than that mentioned in the notice is not competent to change the notice or to prove its insufficiency; but it is competent and material as bearing upon the identity of the locality of the defect, described in the notice, with that where the injury was received.

ON exceptions by the defendants.

An action for the recovery of damages for personal injuries sustained May 2, 1883, by the plaintiff by reason of defective way in the defendant town.

The writ was dated September 17, 1883. Before going to trial, on motion of plaintiff and against defendants' objections, the court allowed amendments of the declaration in plaintiff's writ by interlineation of the following words after the words "travelled way" to wit: "And projecting above the surface of the same nine inches;" and also after the word "root," the words, "or another root lying there embedded and projecting above said way."

There was evidence tending to prove that the distance from the residence of Cyrus Winslow and Judson Genthner, northerly to the defect complained of in plaintiff's writ, was from one hundred and six to one hundred and ten rods. The defendants contended that the location of the defect, which caused the injury, was not sufficiently designated in the written notice required to be given within fourteen days after injury.

The presiding judge among other things instructed the jury, as follows: "Assuming that you find that fact (twenty-four hours

notice) in her favor, then it is necessary that she should prove that she gave notice to the town of the injury, state circumstantially how it occurred, the amount of damages which she claims, within fourteen days after the accident occurred. A written notice has been served in this case. I consider it to be an admitted fact, (if I am wrong, counsel will correct me) that that notice was delivered to the proper officer within fourteen days after this accident occurred. I instruct you as matter of law that this notice is sufficient in form. The form of the notice is a question of law for me. I instruct you that so far as the form is concerned it is legally sufficient. . . . I instruct you as matter of law that the notice was sufficient. It being admitted that it was delivered, you will have no difficulty upon that point."

To the allowance of the amendments and to the said instructions and rulings of the presiding judge the defendants alleged exceptions.

(Notice.)

"Damariscotta, May 15, 1883.

"To the selectmen of Nobleboro, gentlemen:

"You are hereby notified that on the second day of May, 1883, I met with an injury caused by a defect in the road leading from Genthner's corner in Nobleboro to Jefferson, at a point in Nobleboro about sixty to eighty rods northerly of the residence of Cyrus Winslow and Judson Genthner. The defect consisted of a hole in the travelled part of said road, which had been worn or gulled out ten inches below the surface of a long root over which the travel passed, into which the wheel of the carriage in which I was riding, dropped, and between the spokes of which the projecting end of the root was thrust, causing the carriage to suddenly stop. The carriage was broken, and I was thrown violently out of the carriage upon the ground, striking upon my face and chest, wrenching my neck and shoulders, so that the same was severely strained and sprained, and also severely injuring my spine, and jarring and injuring my whole person; by reason of which I have been and still am suffering great pain and distress.

"For these injuries I claim from the town of Nobleboro, the sum of two thousand dollars, as damages.

(Signed.) Laura E. Chapman."

A. P. Gould, for the plaintiff.

William H. Hilton, for the defendants, contended that the amendments gave a different description of the defect than that stated in the notice and therefore introduced a new cause of action. *Milliken* v. *Whitehouse*, 49 Maine, 527.

Only such writings as can be expounded without the aid of extrinsic facts are for the court to interpret. *State* v. *Patterson*, 68 Maine, 473.

It would seem that the written notices in *Larkin* v. *Boston*, 128 Mass. 521, and *Rogers* v. *Shirley*, 74 Maine, 144, could be expounded and interpreted without the aid of extrinsic facts. In this case the extrinsic facts showed the notice to be fatally defective, but they were not passed upon by the jury.

Might not the jury very properly have considered whether the plaintiff had pointed out to the municipal officers in her written notice the location of the identical defect which caused the injury.

Counsel further contended that the notice in this case was not sufficient as a matter of law, citing: *Cronin* v. *Boston*, 135 Mass. 110; *Hubbard* v. *Fayette*, 70 Maine, 121; *Blackington Rockland*, 66 Maine, 332; *Veazie* v. *Rockland*, 68 Maine, 511.

DANFORTH, J. The plaintiff was permitted to amend her writ under the objection of the defendant in two respects. The first of the amendments is, not a change in, but an addition to the description of the alleged defect in the way, and the second relates to the manner in which the accident happened; leaving the accident itself and the result of it the same. There is, therefore no change in the cause of action, either in the alleged defect or the result of it, and the allowance of the amendments was within the discretion of the presiding justice.

The construction given by the presiding justice to the notice to the town after the accident happened, is also objected to. It

is claimed not only that the construction was wrong but that it should have been left to the jury. There are cases where the force and effect of a written instrument used as evidence in connection with other evidence written or oral to prove a given proposition must be submitted to the jury. But that is not this case. The notice is not put in to prove a defect, or any other point in the case except to enable the party to show what notice was given and that the court may judge whether it is in compliance with the law. The statute, requiring the notice, requires that it shall be in writing and clearly defines what it shall contain. It is not to be varied by any "extrinsic facts" whatever. It is simply a question as to the meaning of the terms used and whether it is a compliance with the statute. It is therefore by the well settled rules of law the duty of the court to construe it. *Rogers* v. *Shirley*, 74 Maine, 144–151; *State* v. *Patterson*, 68 Maine, 473; *Larkin* v. *Boston*, 128 Mass. 521.

The only objection made to the notice is, that it does not sufficiently define the location of the alleged defect. There is no question about the road, but it is described as being "about sixty to eighty rods northerly of" a given point. Were there no description of the alleged defect this might possibly be considered somewhat indefinite. But here is such a description that when seen it could hardly be mistaken. "The legislature, in requiring the party to be notified of the place, intended such notice of the locality as to enable the precise spot where the injury was received to be ascertained with substantial or reasonable certainty." *Larkin* v. *Boston*, *supra*, 523. In this case the generality of the distance mentioned puts the officers upon their guard and it can be no hardship for them to examine the road the distance required for the defect so fully described as readily to be recognized when seen.

But it seems that the objection to the notice does not so much rest upon this indefinite statement of the distance, as upon the fact which the case shows that "there was evidence tending to prove" that the distance from the given point "to the defect complained of in the plaintiff's writ was from one hundred and six to one hundred and ten rods." How strong this tendency

was, or whether satisfactory to the court or jury, does not appear. It may be that the preponderance of testimony left the fact as stated in the notice. But if it were otherwise and the larger distance was established as the correct one, still in the absence of any suggestion of more than one defect answering the description, it would throw no doubt upon the fact as to the defect relied upon; nor would it contradict the general statement in the notice. But whether it would do so, or otherwise, it could not affect the language of the notice, or render that uncertain which in and of itself was certain.

It should be borne in mind that the location of the defect in the notice and in the writ are two separate and distinct things. A proper notice is undoubtedly a condition precedent to recovery. When that is offered in proof the court must pass upon its sufficiency. If found wanting the case can make no further progress. If found sufficient the plaintiff proceeds with the testimony. If the testimony fails to show that the injury was caused by the same defect described in the notice the suit must fail. Upon this as upon other points in the case the burden is upon the plaintiff and this question is clearly one of fact to be submitted to the jury. In this case if the jury had found the defect described in the notice within the distance therein mentioned and another similar one at a greater distance where the accident happened they would not only have been authorized, but required to find for the defendants on the ground that the plaintiff had failed to show that the defect described in the notice was the cause of the injury. Upon this point the evidence introduced as to distance was competent and material, not to show the sufficiency or insufficiency of the notice, but as bearing upon the question of identity of the place described in the notice with that where the injury was received. No exceptions are made to the instructions given or omitted upon this point; we must assume therefore that in this respect there was no error.

Exceptions overruled.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

FRANCIS M. JOHNSON

vs.

THOMAS MCGINLY and others.

Penobscot. Opinion October 25, 1884.

Poor debtor. Justice de facto.

The disclosure of a poor debtor is not absolutely void because one of the persons selected to hear it had, subsequent to the date of his qualification as a trial justice, held the incompatible office of constable.

ON REPORT.

Debt on poor debtor's bond. During the life of the bond the debtor disclosed and was discharged as a poor debtor. No question was made as to the regularity of these proceedings. John Estes was chosen by the debtor as his magistrate and he acted as such. He was at the time holding a commission as trial justice to which office he was appointed, and qualified prior to 1881, for Penobscot county. In 1881 and 1882, he was chosen a constable in the town of Lincoln, and in each instance was sworn and qualified and gave bond as such, and acted as such, and was so acting in 1882, when the disclosure was made. If because of disqualification of Mr. Estes, the discharge of the poor debtor was void, the report provided that the defendants should be defaulted, otherwise the plaintiff was to be nonsuited.

W. C. Clark, for the plaintiff, cited: R. S., c. 113, § 24; Constitution, Art. 3, § 2; 3 Maine, 484; 64 Maine, 195; 49 Maine, 16; 61 Maine, 31; 66 Maine, 482; 24 Maine, 166; 33 Maine, 414; 39 Maine, 465; 42 Maine, 327; 49 Maine, 412; 35 Maine, 129.

A. W. Weatherbee, for the defendants.

VIRGIN, J. The disclosure of a poor debtor is not necessarily void as being made *coram non judice*, although one of the justices chosen to hear it had, at the time, ceased to be an officer *de jure*.

Mr. Estes, chosen by the debtor, held a commission of trial justice and had been duly qualified under it. The disclosure took place within seven years of the date of his commission. He acted under a regular appointment and qualification, no question of his official character being suggested to, or occurring to either party at the time.

Nor did the fact that, subsequent to his appointment and qualification as a justice and before the making of the disclosure, his election and qualification as a constable, render the disclosure void. To be sure he ceased to be a justice *de jure*, when he qualified as a constable. *Stubbs* v. *Lee*, 64 Maine, 195; *Pooler* v. *Reed*, 73 Maine, 129. So would he have ceased to be a justice *de jure*, had his commission expired by limitation. But that fact alone would not have rendered his subsequent acts done *colore officii*, void so far as the public or third persons interested therein, are concerned. *Brown* v. *Lunt*, 37 Maine, 423. For as to all others save himself his subsequent acts are those of an officer *de facto*; and the acts of an officer *de facto*, performed by virtue of his office are as valid as to all other persons as if he were an officer *de jure*; and they cannot be called in question in any suit to which he is not a party. *Brown* v. *Lunt*, *supra*; *Belfast* v. *Morrill*, 65 Maine, 580; *Petersilea* v. *Stone*, 119 Mass. 465; *State* v. *Carroll*, 38 Conn. 449.

Our opinion is that Estes' acts were those of an officer *de facto*, and that the tribunal organized to hear, and did hear the disclosure of the principal defendant had jurisdiction; and consequently, under the stipulation in the report, the entry must be,

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

JOHN WENTWORTH *vs.* HENRY K. SAWYER and another.

Somerset. Opinion October 25, 1884.

Attachment of personal property. Exemption. Trespass. Amendment.

The attachment of hay in a mow on mesne process is preserved by the officer, by filing with the town clerk a copy of his return and certificate of other facts required by R. S., c. 81, § 24.

By filing such a copy and certificate with the clerk, the officer does not deprive himself of the right to regain actual possession of the property attached, whenever necessary for its preservation.

The amendment of a writ, by striking out the middle letter in the name of the defendant, will not dissolve an attachment of personal property when the suit is between the original parties, and no rights of third persons intervene.

When an officer in the attachment and removal of hay does not leave the requisite amount to keep the stock which the defendant owns, exempt from attachment, at the time of the attachment, he thereby becomes a trespasser as to so much as is taken beyond what is authorized by law, but not *ab initio* as to all the hay taken.

ON REPORT.

Trespass for taking and carrying away seven tons of hay which belonged to the plaintiff. The writ was dated December 4, 1882. The plea was the general issue and brief statement setting forth the defence stated in the opinion.

The opinion states the material facts.

John H. Webster, for the plaintiff.

If a valid attachment was made it was not preserved. If preserved, the officer's duty towards it and his jurisdiction were ended, and moving the hay afterwards constituted a trespass.

As the common law required property attached to be kept by the officer or his servant, so is the law to-day, except when express statutes make other provisions. And if the officer or his servant suffers it to go into the hands of defendant, the attachment is discharged, even if a receiptor be taken. *Knap* v. *Sprague*, 9 Mass. 258; *Campbell* v. *Johnson*, 11 Mass. 184; *Bridge* v. *Wyman*, 14 Mass. 190–3; *Gower* v. *Stevens*, 19 Maine, 92; *Pillsbury* v. *Small*, 19 Maine, 435; *Nichols* v. *Patten*, 18

Maine, 231; *Thompson* v. *Baker*, 74 Maine, 48; *Sanderson* v. *Edwards*, 16 Pick. 144; *French* v. *Stanley*, 21 Maine, 512; *Mitchell* v. *Gooch*, 60 Maine, 110; *Waterhouse* v. *Bird*, 37 Maine, 326.

The fact that it has been deemed necessary to provide by special enactment for retaining an attachment lien upon some articles without retaining possession, is conclusive proof that as to all others the lien can only be retained by actual possession.

The first statute provision for retaining a lien by virtue of an attachment of articles capable of being removed, without removal, that I find, is c. 60, § 34, statutes of 1821, which allows hay in barn, sheep, horses, neat cattle to be left with the debtor on security given, etc. What the necessity of that enactment if without it, on security given, the lien could be retained and the property remain with the debtor? The same provision, with the omission of sheep, is incorporated into every revision of the statutes since made. R. S., 1841, c. 114, § 37; 1857, c. 81, § 34; 1871, c. 81, § 23, and is now the law of this state.

By these statutes since March 15, 1821, a mode, in addition to the common law mode of retaining an attachment lien was provided, making two modes of retaining lien, on hay in the barn, horses and neat cattle, and from March 15, 1821, to July 31, 1841, on sheep. On July 31, 1841, by that revision, c. 114, § § 39, 40, 53, 54, 55, 56, 57, 58, three different modes applicable to different articles therein specifically named are provided, and by § 52, a fourth, applicable to all articles is provided, by which a lien by attachment or its equivalent is retained. Those different provisions applicable specifically to the same specific articles have been re-enacted in the various revisions since, and are now the law of this state. R. S., of 1857, c. 81, § § 35, 47, 48, 49, 50, 51 and 46; R. S., 1871, c. 81, § § 23, 24, 29, 30, 31, 32, 33 and 28.

All these different provisions being in the same chapter, are to be construed so as to harmonize and to give effect to each, if possible. 1 Black's Com. 89; *Merrill* v. *Crossman*, 68 Maine, 412; *Winslow* v. *Kimball*, 25 Maine, 493; *Ingalls* v. *Cole*, 47 Maine, 530; *Dwelly* v. *Dwelly*, 46 Maine, 379; *Collins* v.

Chase, 71 Maine, 434; *Holbrook* v. *Holbrook*, 1 Pick. 248; *Com.* v. *Cambridge*, 20 Pick. 267; *Com* v. *Kimball*, 24 Pick. 366; *Cleveland* v. *Norton*, 6 Cush. 380.

The naming of living animals in R. S., 1841, c. 114, § 53, *et seq.*; R. S., 1857, c. 81, § 47, *et seq.*; R. S., 1871, c. 81, § 29, *et seq.* is conclusive evidence that hay in the barn is not subject to any other provision in those chapters than those which provide for leaving it with the debtor on security given or sale by consent.

The officer attempted to make use of three modes of preserving his supposed lien by attachment, thereby so far abusing legal process and increasing the expense as to render him a trespasser, *ab initio*. *Bradley* v. *Davis*, 14 Maine, 44; *Six Carpenters' case*, 8 Coke, 146; *Ross* v. *Philbrick* 39 Maine, 29; *Blanchard* v. *Dow*, 32 Maine, 557; *Knight* v. *Herrin*, 48 Maine, 533; *Sawyer* v. *Wilson*, 61 Maine, 529.

When the officer left the hay in defendant's barn without a keeper or security given, and gave defendant the summons, he abandoned the attachment. *Gower* v. *Stevens*, 19 Maine, 92.

The absolutely fatal defect in defendant's proceedings is the misnomer of defendant, the present plaintiff in the writ, and particularly in the officer's return to the town clerk's office. *Flood* v. *Randall*, 72 Maine, 439; *Dutton* v. *Simmons*, 65 Maine, 583; *Moulton* v. *Chapin*, 28 Maine, 505; *Shaw* v. *O'Brion*, 69 Maine, 501; *Bessey* v. *Vose*, 73 Maine, 217; *Com.* v. *Hall*, 3 Pick. 262; *Com.* v. *Shearman*, 11 Cush. 546; *Com.* v. *McAvoy*, 16 Gray, 235; 1 Gray, 167; 4 Gray, 72.

C. A. Harrington, for the defendants, cited: *Darling* v. *Dodge*, 36 Maine, 370; *Reed* v. *Howard*, 2 Met. 36; *Cain* v. *Rockwell*, 132 Mass. 193; 28 Vt. 546; Drake on Att. § 290; *Carr* v. *Farley*, 12 Maine, 328; *Brownell* v. *Manchester*, 1 Pick. 232; *Bond* v. *Padelford*, 13 Mass. 393; 43 N. H. 115; *Hubbell* v. *Root*, 2 Allen, 185; Spaulding's Pr. 332; *Emerson* v. *Upton*, 9 Pick. 167.

FOSTER, J. The plaintiff claims that the defendants were trespassers in the attachment and removal of a quantity of hay,

of which he was the owner, in a suit wherein he was defendant, and Sawyer, one of the present defendants, was plaintiff. The question involved in this suit is whether the officer proceeded legally in the discharge of his duty in making said attachment, and in the subsequent removal and sale of the property on mesne process.

The case shows that on the 18th day of November, 1882, the defendant Sawyer sued out a writ of attachment against this plaintiff by the name of John A. Wentworth; that on the 20th of said month the writ was placed in the hands of the other defendant, a deputy sheriff, for service, and that on the same day he made service by attaching seven tons of hay then lying in the plaintiff's barn in Smithfield, filing a certificate of the attachment in the office of the town clerk as provided by R. S., c. 81, § 24, and leaving a summons at the defendant's place of last and usual abode. On the second day of the following month, ascertaining that the hay was diminishing in quantity, the officer, in company with the other defendant in this action, proceeded to remove it from the premises to a place of safety, and after due proceedings, before judgment in the suit, advertised and sold the same on the 20th day of April, 1883.

At the December term of court, being the term at which the action was entered, the writ on which the attachment had been made was amended by striking out the letter A in the defendant's name.

The plaintiff seeks to recover in this action on the ground that the proceedings of the officer were irregular in perfecting the attachment, and if any was made that the same was not preserved; that the misnomer, and amendment of the writ, dissolved any attachment if made; and lastly, that the officer did not leave the requisite amount of hay which the statute exempts to a debtor, and thereby he became a trespasser *ab initio*.

We will consider these objections in the order in which they are raised.

It is not denied that the officer was present at the place where the hay was situated at the time of the attachment, and that he took it into his possession so far as in reference to this descrip-

tion of property it could be conveniently done, and that his acts and dominion over the property were such as to justify him in making the return that it had been attached. The facts set forth in his return would be *prima facie* evidence, until the contrary were shown. *Bruce* v. *Holden*, 21 Pick. 189; *Darling* v. *Dodge*, 36 Maine, 370.

The nature of the property was such that the officer was justified in preserving the attachment by filing with the town clerk a copy of the return, and a certificate of other facts prescribed by statute. Before the enactment of the statute authorizing a copy of such return and certificate to be filed with the clerk of the town, the law required that in order to perfect and continue an attachment of personal property, the officer should retain possession and control of the same. *Nichols* v. *Patten*, 18 Maine, 238; *Gower* v. *Stevens*, 19 Maine, 94; *Heard* v. *Fairbanks*, 5 Met. 113. Difficulties afterwards arose as to the kind of possession and control necessary to satisfy the requirements of the law. To obviate these difficulties, and give a more complete notice, R. S., c. 81, § 24 provides that "when any personal property is attached, which by reason of its bulk or other special cause cannot be immediately removed, the officer may, within five days thereafter, file in the office of the clerk of the town, in which the attachment is made, an attested copy of so much of his return on the writ, as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable; and such attachment shall be as effectual and valid, as if the property had remained in his possession and custody." It will be seen by this provision that "no attempt is made to change the mode of making the attachment, but a new and easier method of preserving it is provided. Before this statute there was not so much difficulty in making as in preserving attachments" of this kind of property. *Scott* v. *Manchester Print Works*, 44 N. H. 508.

Nor are we satisfied that the officer, by filing with the town clerk the copy and certificate required by statute, deprived himself of the right to regain actual possession of the property

attached, and remove it whenever necessary for its preservation. The sheriff is the "mere minister of the law" to preserve for the creditor satisfaction of the debt, and it is therefore indispensably necessary that he should sustain such a relation to personal property which he has seized, as will enable him to hold it to answer the purpose for which it was attached. His relation to the property by virtue of the attachment, and the reduction of it into his possession and control, are such that he is vested with a special property in it which enables him to protect the rights he has acquired, and this special property continues so long as he remains liable for it, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner, upon the attachment being dissolved. Drake, Attach. § 290. "In the attachment of personal estate, the officer acquires a special property, and a 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. That special property the officer may release, so as to destroy any lien upon the property created by the attachment. He may permit the possession of the property to remain with the debtor, in which case it can be held by a subsequent attachment, or a subsequent purchaser, free from any lien or claim of the officer upon it. 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." *Braley* v. *French*, 28 Vt. 546. The statute has so far modified the common law in relation to attachments of property of this nature, that when the officer has complied with its provisions, "such attachment shall be as effectual and valid, as if the property had remained in his possession and custody." It is the statute mode of preserving the lien which otherwise could only have been retained by actual custody and possession of the property by the officer. *Woodman* v. *Trafton*, 7 Maine, 179; *Nichols* v. *Patten*, 18 Maine, 238; *Darling* v. *Dodge*, 36 Maine, 371; *Johnson* v.

Railway, 44 N. H. 627; *Scott* v. *Manchester Print Works*, 44 N. H. 508; *Polley* v. *Lenox Iron Works*, 15 Gray, 514.

The statute provision is one that also, to a certain extent, relieves the officer from the more stringent liabilities of the common law in relation to the property attached, but nevertheless his right to possession continues, and he may interfere "to protect the property, when, by a change of circumstances, its removal and reduction into the officer's possession become proper or necessary." *Hubbell* v. *Root*, 2 Allen, 186; *Carr* v. *Farley*, 12 Maine, 331; *Polley* v. *Lenox Iron Works*, 15 Gray, 515; *Same* v. *Same*, 4 Allen, 329.

The plaintiff further contends that by the amendment of the writ, the attachment was dissolved. This proposition is not tenable. It must be remembered that this suit is between the original parties, and no rights of third persons, claiming either by purchase or attachment, intervene. "The power of our courts," as remarked by MORTON, C. J., in *Cain* v. *Rockwell*, 132 Mass. 194, "to allow amendments, is very broad." In that case, the name of the plaintiff was amended by substituting "Ann" Cain for "Mary" Cain, thus correcting a mere clerical error or misnomer, as the court there say. The rights of third parties had there intervened by assignment of the funds attached on trustee process, but the court held that the amendment was rightly allowed, and that the attachment of the funds was not vacated so as to give the assignment to the claimant, made before the amendment, the preference over the attachment. "Amendments in form merely, will not dissolve an attachment so as to let in subsequently attaching creditors, or discharge bail. To have this effect, the amendment must be such as may let in some new demand, or new cause of action." *Haven* v. *Snow*, 14 Pick. 28; *Page* v. *Jewett*, 46 N. H. 444.

In the case before us, the misnomer of the defendant in that suit was purely clerical, and the amendment could not injuriously affect him. It was not introducing any new demand, or new cause of action. It came fairly within the power given by statute to correct circumstantial errors or defects, when the person and case can be rightly understood. It was between the

original parties, and the rights of third persons could in no way be affected by the amendment. In all the cases to which our attention has been called by the learned counsel for the plaintiff, as bearing upon the question of amendment, and where a more stringent rule has been applied with reference to the dissolution of attachments, it will be found that the rights of third parties have, in some way, intervened. In the case we are considering, the amendment having been properly allowed, "the amended writ is treated as it would have been, if so made, when the suit was commenced, as between the parties thereto." *Heath* v. *Whidden*, 29 Maine, 111; *Griffin* v. *Pinkham*, 60 Maine, 123; *Wight* v. *Hale*, 2 Cush. 486.

But there is another branch of the case on which the plaintiff must prevail. Having carefully examined the evidence in full, we are satisfied that the officer removed more hay under the attachment than he was warranted in doing, and that there was not a sufficient quantity left to this plaintiff. The stock which he owned at the time of the attachment, consisted of one yoke of oxen, a horse, cow, heifer and nine sheep. The plaintiff being the owner of more stock than he could legally claim exempt under the statute, and having waived no rights, as the evidence satisfies us, we must assume that he would be entitled to have left an amount of hay sufficient to keep such stock as was exempt — and most beneficial to himself — through the winter season. This was not done. The officer having removed a portion of the hay to which this plaintiff was by law entitled, thereby became a trespasser, and liable to the plaintiff in this action.

The question then becomes important whether the officer was a trespasser *ab initio* as to all the property taken, or only as to so much as was taken beyond what was authorized by law.

The authorities upon this point, both English and American, are that it is only for the excess that the officer would be liable. The distinction running through the more modern cases, — not at variance with those of earlier date, — is marked, that there may be an abuse of authority by an officer which will affect his acts, and render him liable as a trespasser, only in relation to a

portion of the property, especially when the same is capable of division, and where, in reference to that property, the acts done in excess may be distinguished from those done in pursuance of authority. *Wheeler* v. *Raymond*, 130 Mass. 247; *Cone* v. *Forest*, 126 Mass. 101. Where the act done is wrongful, but is so merely as to a part of the goods, no wrong being done as to the residue, the wrong-doer is a trespasser as to that part of the goods only in respect of which the wrongful act was done. As in the case of *Dod* v. *Monger*, 6 Modern, 215, where several barrels of beer were distrained for rent, and the distrainer drew beer out of one of them, Lord HOLT held, that it rendered him a trespasser *ab initio* only as to that single barrel. In *Harvey* v. *Pocock*, 11 M. & W. 744, it was decided that where a landlord distrained for rent, with other things, goods not distrainable, the distrainer was a trespasser only as to the goods which were not distrainable. Lord ABENGER, C. B., alluding to *Dod* v. *Monger*, 6 Modern, 215, and to the early case of *Six Carpenters*, 8 Coke, 146, says, "The case in 6 Modern is undoubtedly a very strong authority for the defendants. The *Six Carpenters' Case* leaves it an open question how far the party becomes a trespasser *ab initio* as to the whole distress by an excess as to part. It is very reasonable that he should not, but that his liability should be limited according to the doctrine laid down by Lord HOLT." The same views are held by the present Chief Justice of this court in *Seekins* v. *Goodale*, 61 Maine, 404, wherein he says: "We think a fair construction of the rule established in the *Six Carpenters' Case*, makes the defendant liable as a trespasser *ab initio* only for the sale of so much of the goods as were sold in excess, and not for those sold in pursuance of authority." The same doctrine is stated in 1 Smith's Leading Cases, * 219, as follows: "But if there be a seizure of several chattels, some of which are subsequently abused and the rest not, the seizure is, or becomes, illegal only as to the part which it was unlawful to seize, or which was subsequently abused, and the seizure of the rest continues legal."

Of the liability of both defendants there can be no question.

Coaks v. *Darby*, 2 N. Y. 517; *Woodbridge* v. *Conner*, 49 Maine, 353.

Judgment for plaintiff for $18.00 and interest thereon from December 2, 1882.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

FRANK LORD, petitioner, *vs.* CHARLES F. COLLINS.

Somerset. Opinion October 28, 1884.

Animals. Liens. Stats. 1872, c. 27; 1873, c. 125.

When animals have been sold by an officer on an execution issued upon a judgment rendered upon a petition to enforce the lien provided by statute for pasturing, feeding or sheltering animals, a second petition by the same party to enforce a lien for keeping the animals during the time intervening between the dates of the two petitions, commenced while the animals still remained in his possession, being prior to the time of seizure and sale by the officer, cannot be maintained, although there be a surplus arising from the proceeds of the sale after the satisfaction of the execution, which the officer had deposited with the clerk of courts in accordance with R. S., 1871, c. 91, § 45.

ON REPORT of the presiding justice.

The case and material facts are fully stated in the opinion.

Thomas H. B. Pierce, for the petitioner.

There was no appearance for the respondent.

FOSTER, J. This is a petition to enforce a lien for feeding and sheltering three colts from November 22, 1882, to April 18, 1883. The case discloses the following facts.

This petitioner, on the 16th day of October, 1880, verbally agreed with the respondent to feed and shelter three colts during the winter season then following for the specified sum of sixty dollars; the price was not paid, and the colts were not taken away, but remained in the petitioner's possession, and on the 22d day of November, 1882, he filed a petition returnable at the December term of this court for the county of Somerset, in which he claimed

a lien for feeding, sheltering and pasturing the said colts from the time they came into his possession to the date of the said petition, amounting to two hundred twenty-eight dollars and forty cents, with a credit of thirty dollars, leaving a balance of one hundred ninety-eight dollars and forty cents; notice thereon was duly ordered, and at the March term, 1883, the case was defaulted, judgment entered, and a decree for the lien "as prayed for, and for the sale of said colts by the sheriff of this county or either of his deputies for the payment thereof, and for costs." Execution issued April 12, 1883, and the officer in pursuance of the same, seized the colts on the 21st day of April, and thereafterwards sold the same in accordance with the provisions of the statute, receiving therefrom a surplus of one hundred sixteen dollars and thirty cents, above the amount necessary to satisfy the claim of the petitioner and the costs accruing thereon.

For the keeping and sheltering of said colts for twenty-one weeks, from the time of filing his first petition to the 18th day of April, three days prior to the time they were taken by the officer, amounting to ninety-five dollars, this second petition is brought substantially alleging the foregoing facts, and "for which sum as well as for his costs herein he claims a lien upon said animals by virtue of the provisions of chapter 125 of the laws of 1873, in addition to the judgment of lien in his behalf against said animals granted him as hereinbefore set forth."

The question is whether the statute authorizes a second petition, judgment, and order of court to enforce a lien upon the same animals in this form.

We think not. Liens are in derogation of the common law, and the court is not authorized to extend the law beyond the objects specifically provided for, or enforce a remedy provided by statute except in accordance with the terms thereof.

The petitioner claims the lien by virtue of the statute, public laws of 1872, c. 27, amended by the laws of 1873, c. 125, under which this process is brought to enforce it.

While we admit the doctrine that the remedy being granted by statute may be liberally construed, we must also hold that the remedy as one additional to the common law, if intended by the

legislature, should appear by express declaration or necessary implication. The proceedings are strictly *in rem*, and we are not called upon to determine the rights of these parties in any other process, or proceeding *in personam*.

The statute in force at the time of filing these petitions ran thus: "Whoever pastures, feeds or shelters animals by virtue of a contract with or by consent of the owner, has a lien thereon for the amount due for such pasturing, feeding or sheltering, to secure payment thereof with costs, to be enforced in the same manner as liens on goods and personal baggage by inn-holders or keepers of boarding-houses."

The remedy provided for inn-holders and keepers of boarding-houses, was, at that time, by petition to the court to enforce a sale of the goods and baggage of delinquent guests, as stated in R. S., 1871, c. 91, § 39, and sections following. Hence we are to look to those provisions of the statute for the measure and extent of any remedy sought by this petition. It will be noticed that the statute relating to the remedy of a party who pastures, feeds or shelters animals provides for a lien "thereon;" that by § 40, of the statutes relating to the remedy of inn-holders and keepers of boarding-houses, the petition is to set forth a "description of the article possessed," on which the lien is claimed; and by § 45, it is provided that "after trial and final adjudication in favor of the petitioner, the court may order any competent officer to sell the article on which the lien is claimed, as personal property is sold on execution, and out of the proceeds, after deducting his fees and the expenses of sale, to pay to the petitioner the amount and costs awarded him, and the balance to the person entitled to it, if they are known to the court, otherwise into court."

In accordance with the provisions of this section the same property described in this second petition, and on which this second lien is claimed, was ordered by the court to be sold, and the officer, by virtue of lawful authority, the judgment and order of court on the first petition, made sale of the same.

If this petition is to be sustained, where is the property that "the court may order any competent officer to sell the article on which the lien is claimed"?

This order of the court is not discretionary with the court. If judgment and decree for lien be granted on this petition, the court must necessarily order some competent officer to sell the property on which the lien is claimed, as no other mode is prescribed by the statute.

Provisions of a statute very similar to the one we are considering have received a construction that warrants us in this conclusion; and the court say: "But it was not the intention of the legislature, that it should be left to the discretion of the court whether an order should issue or not. All persons having established a lien are equally entitled to its enforcement and to an order of court for such enforcement. A lien being established, the order could not legally be withheld. . . .

"The order is one consequent upon the judgment and a necessary sequence thereof. It follows the judgment equally as the execution." *Low* v. *Dunham*, 61 Maine, 569.

If this petition is sustained there ought certainly to be something upon which a lien exists and upon which the order of the court can be excuted in accordance with the provisions of the statute, as a necessary sequence of the judgment; and this can lawfully be done only on such property as a lien exists.

In this case the animals whereon a lien is claimed in this petition were sold in April, 1883, as we have said, by virtue of lawful authority, and judgment and order of the court on a prior petition. The order of the court, therefore, in this case if granted would be useless, as under it there could be no sale of property the title to which had passed by an absolute sale under a similar process months before.

There is nothing in the statute we are considering which by express words or by necessary implication contemplates the enforcement of a lien upon anything other than the animals which have been furnished food or shelter. The petitioner claims to sustain this petition as against said animals in addition to the judgment of lien in his behalf before granted, and to have his claim satisfied "out of said property or the proceeds thereof." The statute does not go to that extent, where, by the petitioner's own motion, the property has been sold to satisfy a lien in favor

of the same party and originating from one and the same bailment. And if it be urged that this petititioner is without a convenient remedy unless the course he has pursued can be sustained, we can only say, as has oftentimes been remarked, that it is the duty of courts to expound and apply the law as it may be found and not to legislate.

Had the legislature ever contemplated to engraft a lien on the surplus arising from the sale of property after one lien claim had been satisfied by the modes provided in § 45, provision might have been made as in lien claims upon vessels—contained in the same chapter—R. S., 1871, c. 91, § § 19, 20, where successive liens are provided for, and on sale of the property there is the additional provision that the proceeds are to be paid out in satisfaction of the several judgments as they may be recovered against the vessel until all are satisfied. The similarity in the language and phraseology of the two statutes may be readily observed, as well as the additional provision in relation to the lien upon the surplus in the one case which is entirely wanting in the statute under consideration.

And so far as the statute speaks of the surplus or balance that the officer is to pay over to the person entitled to it, if known to the court, otherwise into court, to be paid over to the person legally entitled to it, on petition and order of the court; this relates rather to the ownership of the money than to any lien upon it by any other party. The same provision exists in the statute before alluded to in relation to liens upon vessels after all the claims have been satisfied, and which, like the statute before us, does not relate to the lien upon but to the ownership of such surplus.

Under the present form of proceedings we do not feel authorized to say that this court would be justified in granting relief in equity under c. 101, laws of 1876, which is invoked by the learned counsel for the petitioner in his able argument.

Petition dismissed with no costs for respondent.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

EBEN ALBEE and another, appellants,

vs.

CHARLES W. VOSE.

Washington. Opinion November 6, 1884.

Descent of property. R. S., c. 75, § 1.

When a minor dies never having been married, leaving no parents, brother or sister or the issue of any brother or sister, his property, though inherited from his father, descends to his surviving grandparents in equal shares.

ON REPORT.

Appeal from the decree of the probate court.

The facts are stated in the opinion.

John F. Lynch, for the appellants.

Charles Sargent, for the appellee, contended, that under the common law the only heir to the estate of Bessie E. Vose is Charles W. Vose because she acquired her estate by inheritance from her father who was a son of Charles W. Vose: that estates acquired by descent have different inheritable qualities from those acquired by purchase — the latter descending to the owner's blood in general, the former descending to the blood of the ancestor. Counsel cited: 1 Bl. Com. 242; 4 Kent, Com. (Holmes' Ed.) 405, *et seq*; *Nash* v. *Cutler*, 16 Pick. 499; *Benson* v. *Swan*, 60 Maine, 160; *Cables* v. *Prescott*, 67 Maine, 582; Smith's Prob. Law, c. 91, § 1; 2 Williams, Ex'rs, § 1336 *n*.

VIRGIN, J. Bessie E. Vose died under age, not having been married, with property for distribution inherited from her father. She left no parents, brother or sister, her next of kin being a paternal grandfather and a maternal grandfather and grandmother. The question submitted by the report is, who is entitled to the property? The paternal grandfather claims it all under the provision of R. S., c. 75, § 1, clause 6. On the

other hand, the maternal grandparents claim a portion of it as next of kin, under rule 5.

The fact that the property in controversy was inherited from the father is entirely immaterial, unless the facts bring the case within clause 6; and the case does not come within that clause for the fatal reason that the persons contemplated by it did not exist at the time of the decedent's decease. In other words, the decedent left neither brother or sister, nor the issue of any deceased brother or sister. See *Decoster* v. *Wing*,[1] wherein the same subject matter has been recently examined and decided and which is decisive of this branch of this case and need not be repeated here.

The case then falls within the express terms of rule 5. The next of kin are the three grandparents. Our statute, like that of 22 and 23, Charles 2, c. 10, gives no preference to male over female. As long ago as 1723, it was decided: "Where one died intestate, leaving a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, these shall take in equal moieties by the statute of distribution, as being in equal degree; for though the grandfather by the father's side, may in some respects, be more worthy of blood, yet here dignity of blood is not material." *Moore* v. *Barham*, cited in 1 Peere, Wms. 53.

Under the same rule (Mass. R. S., c. 61, § 1, clause 5) where the next of kin of a deceased intestate were the same as in the case at bar, the paternal grandfather claimed one-half of the property inasmuch as the maternal grandparents were husband and wife. But the court of that commonwealth, after an exhaustive opinion of Ch. J. SHAW, decided that each of the three grandparents was entitled to a distributive share of the personal estate. We fully concur in that case and it is therefore decisive of this. *Nash* v. *Cutler*, 16 Pick. 491.

Case remanded to probate court.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

[1] Next case.

MARTHA B. DECOSTER, appellant,

vs.

GEORGE C. WING, administrator.

Oxford. Opinion November 7, 1884.

Descent of property. R. S., c. 75, § 1.

When a minor dies never having been married, leaving no parents, brother or sister or the issue of any brother or sister, his property, though inherited from his father, descends to his surviving maternal grandmother, in preference to his uncles or aunts.

ON EXCEPTIONS.

Appeal from the decree of distribution of the probate court in the estate of defendant's intestate, Charles L. Bicknell.

The opinion states the material facts.

J. and F. H. Appleton, for the appellant.

The question presented is whether the estate descends to the maternal grandmother or to the uncles and aunts and their descendants on the paternal side. The estate came from the paternal side. It is clear, if Charles L. Bicknell, had died before his father, Charles Bicknell, that Nancy Loring, the maternal grandmother, would not have been the heir of the latter. The estate would have descended to the heirs of the latter — that is, to the heirs of Charles Bicknell, the father.

By R. S., c. 75, § 1, rule VI, "when a minor dies, unmarried, leaving property inherited from either of his parents, it descends to the other children of the same parent and the issue of the deceased, in equal shares, if they are of the same degree of kindred, otherwise according to the right of representation." The estate in question was inherited from the father. It should descend to the heirs of the father.

In commenting upon a similar statute in Massachusetts, Chief Justice SHAW says in *Nash* v. *Cutler*, 16 Pick. 499, "the effect is that when upon the descent of an estate to children, one of

them shall happen to die in infancy, that is, at any time before his arriving at the age, at which by law, he has the power of disposing of his estate, and before he has by marriage, contracted obligations and established new connections, which change his relative situation to others, his share of the inheritance, that is, his proportion of the intestate estate . . . shall go just in the same manner as if such child had died in the lifetime of the ancestor, or in other words to those who would have taken the same share if such child had not existed."

In discussing this subject KENT, J., in *Benson* v. *Swan*, 60 Maine, 160, says: "When a minor dies, never having married, the law intends that the specific inherited estate shall in effect go back to the parent's estate and become a part of it, as if the child had died before the parent." This applies precisely to the case at bar. Had Charles L. died before his father, there would be no question as to the result. Nobody would have pretended that Nancy Loring had the scintilla of a claim.

In *Cables* v. *Prescott*, 67 Maine, 583, the sixth rule was held not to apply because the minor had no estate inherited from either of his parents. The inference is unavoidable, that if the estate had been thus inherited, the decision would have been different and in accordance with the cases already cited.

The exceptions, we contend, must be sustained.

George C. and Charles E. Wing, for the appellee.

VIRGIN, J. The decedent died under age, not having been married, leaving property for distribution, some of which he inherited from his father and the remainder from his paternal grandfather. At the time of his decease, he left no parents, brother or sister, but did leave a maternal grandmother, three maternal uncles and one maternal aunt, two paternal aunts and two children of a deceased paternal aunt.

The judge of probate decreed that the maternal grandmother is entitled to the property as next of kin, under the provisions of R. S., c. 75, § 1, rule 5. The paternal aunts claimed that they and the children of their deceased sister should take the

property under clause 6, and appealed to the supreme court of probate.

Personal property being distributed by the same rules as regulate the descent of real estate, (subject to certain provisions not material to the decision of this case) the question is, under which rule of descent does the property in controversy fall.

It is common knowledge among the members of the profession that our statutes of descent were derived substantially (through the provincial statutes 4 Wm. and Ma. c. 2; 9 Ann, c. 2, and the early statutes of our mother commonwealth) from the English statues of distribution 22 and 23, Car. 2, c. 10, and 1 Jas. 2, and that they apply equally to personal and real estate. *Sheffield* v. *Lovering*, 12 Mass. 490; Reeve, Des. xxvi. What is now clause 6, under which the appellants claim the property, was, in the Stat. 4, Wm. and Ma. in the form of a proviso to the preceding rule, providing, "if any of the children happen to die before he or she come of age or be married, the portion of such children shall be equally divided among the survivors." An. Chart. 231. The mother took nothing. "This term 'survivors,'" (say the court in *Runey* v. *Edmunds*, 15 Mass. 292) "must have reference to the surviving children, as a distribution among children is the subject matter of the whole proviso."

These provisions remained the same until revised and substantially incorporated in Mass. St. 1783, c. 36. But the language having been somewhat changed and the meaning rendered less clear, "the obscurity in this and other particulars was supposed to have been one of the principal motives for the new statute on this subject, of 1806, c. 90. The chief object of the legislature in this statute (which is understood to have been prepared by the late Ch. J. Parsons) seems to have been, not to establish new rules of descent and distribution, but to adopt and confirm, in clear and explicit language, the legal construction which had been given to the preceding statutes, and which had been considered the law of the country for more than a century." *Sheffield* v. *Lovering*, 12 Mass. 490, 493.

The Mass. st. 1806, c. 90, provided *inter alia*: "If the intestate leave no issue, father, brother or sister then his estate

shall descend to his mother, if any; but if there be no mother, then to his next of kin in equal degree," etc: "Provided however, that when any child shall die under age, not having been married, his share of the inheritance that came from his father or mother, shall descend in equal shares to his father's or mother's other children then living respectively, and to the issue of such children as are then dead, if any, by right of representation."

Our St. 1821, c. 38, § 1, is a literal transcript of the foregoing; and it remained the same until the revision of 1841, when the legislature with the evident intention of rendering the meaning of the proviso more clear, used a few more words to express it, thereby making it read: "Provided however, that if any person shall die leaving several children, or leaving one child and the issue of one or more others, and any such surviving child shall die under age, not having been married, all the estate which came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of such other children who shall have died, by right of representation." R. S., (1841) c. 93, § 1, cl. 6.

"This proviso," said Ch. J. SHAW, speaking of the same clause in Mass. st. 1806, c. 90, § 1, hereinbefore quoted, "is an exception from the generality of the antecedent rule." *Nash* v. *Cutler*, 16 Pick. 498–9.

It is the only provision in the statute of descent which makes it necessary to inquire from what source an estate is derived in order to settle its descent or distribution. *Kelsey* v. *Hardy*, 20 N. H. 479. It relates solely to property inherited, *i. e.* coming to the decedent by operation of law, as contra distinguished from that acquired by any lawful act, including title by deed and by devise. It relates to the descent and distribution of the inherited property of a child who died under age, never having been married, among other children only, or among the issue of other deceased children, and makes no allusion to any ascending line of descent. Or to repeat the comprehensive language of C. J. PARKER, quoted *supra*, "a distribution among children is the subject matter of the whole proviso."

To bring property within this proviso, therefore, it must be inherited from one of the decedent's parents and not be derived by purchase or inheritance from any other source. *Nash* v. *Cutler*, 16 Pick. 491; *Sedgwick* v. *Minot*, 6 Allen, 171; *Cables* v. *Prescott*, 67 Maine, 583. And to bring a case within the terms of the proviso so far as persons are concerned, there must be (1) several children, one of whom died under age without having been married; or (2) one child who died as above and the issue of one or more others. In other words, if the minor whose estate is to be distributed left at his decease no brother or sister, nor the issue of any, then his estate does not fall within the terms of the proviso, but, although inherited, it must go by the general rule unaffected by the terms of the former.

This same proviso in substance and meaning was incorporated into the revision of 1857; although in attempting to condense it, "the language," said the late Judge KENT in *Benson* v. *Swan*, 60 Maine, 160, 163, "got a little mixed," so much so, that the counsel for the defense in the case last cited, contended that the terms of the clause made it applicable only to cases where there are grandchildren as well as children. But the learned judge, after stating the defendant's claim, said: "We do not perceive any intention on the part of the legislature to change or limit the provisions clearly set out in the original statute, by the change of phraseology. We should require the most positive and unmistakeable evidence of such intent, because such a construction as is contended for, would be clearly in contravention of the spirit and intent of the provision."

It is urged, however, that the effect of this proviso is to place the estate of a deceased unmarried minor in the same situation as if he had died before the parent, or had never existed. This was the remark of JACKSON, J., in *Sheffield* v. *Lovering*, *supra*. But the statement was based upon the assumption that there were one or more other children and was strictly correct. A like remark was also made by SHAW, C. J., in *Nash* v. *Cutler*, *supra*, and by KENT, J., in *Benson* v. *Swan*, *supra*, all based upon the fact that the deceased child left one or more brothers or sisters or the issue of one or more deceased brothers or

sisters and explanatory of the reason why this provision of the statute did not give any of the property of the minor to his mother. "General propositions of judges, however eminent, as rules of decisions," said the court in *Blanchard* v. *Russell*, "must be limited in their application to the facts, although they are not limited in their expression." 13 Mass. 7. "It is a general rule," said C. J. MARSHALL, "that the positive authority of a decision is co-extensive only with the facts on which it is made." *Ogden* v. *Saunders*, 12 Wheat. 333. And the same eminent judge also said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision." *Cohens* v. *Virginia*, 6 Wheat. 399.

An examination of the Massachusetts and Maine cases cited above shows that the remark mentioned was intended to be limited to the facts of the respective cases. Thus SHAW, C. J., in construing the proviso, said: "We think the effect is, that where upon the descent of an estate to *children*, *one* of *them* shall happen to die in infancy — that is at any time before arriving at the age, at which, by law, he has the power of disposing of his estate, and before he has by marriage contracted obligations and established new connexions which change his relative situation to others, his share of the inheritance, that is, his portion of the estate, for the descent of which this statute is now providing, shall go just in the same manner as if such child had died in the life-time of the ancestor, or in other words, to those who would have taken the same share if such child had not existed. It directs that, it shall go *to the other children* of the same parent from which it came, which it would have done, had the child so dying not been in existence, at the time of the decease of such parent." *Nash* v. *Cutler*, 16 Pick. 498–9. This last sentence makes certain the intended extent of the preceding statement.

So Judge KENT, in the case cited, *supra*, in settling the descent of the estate of a child which died at the age of twenty-four

days, leaving a sister of the half-blood, said: "When a minor dies, never having been married, the law intends that the specific inherited property shall, in effect, go back to the parent's estate and become a part of it, as if the child had died before the parent," and cites the Massachusetts' cases *supra*. This statement of the learned judge was made, with reference, and should be considered as limited in its application, to the fact that there was another child. And that it was so intended conclusively appears from the next succeeding sentences: "The distinction and the reason for it are both obvious. The child having died a minor, never having been married, and having received a portion of the estate of his parent, which he leaves, the law deems it just that his share of the parent's estate should *go to the other children* and grandchildren." *Benson* v. *Swan*, 60 Maine, 161–2. We therefore cite the Massachusetts cases *supra* and *Benson* v. *Swan*, as supporting the position that when there is only one child and he dies leaving property inherited from his parent, and such child leaves no issue of any brother or sister, its descent or distribution does not fall within the proviso of R. S., (1841) c. 93, clause 6, but it does come within the provisions of the antecedent rule 5.

When the clause was revised and condensed as before seen, its meaning was somewhat obscure, and it was unintentionally limited to property inherited from the father only. Consequently, the legislature of 1870, substituted therefor, almost *in totidem verbis*, the original provision of statute 1821, omitting the words, "provided however." But the meaning is the same as in R. S., 1841, and has been incorporated in the revisions of 1871 and 1883; R. S., c. 75, § 1, clause 6.

The rule applicable to this property then, for want of the persons specified in clause 6, is rule 5. It becomes immaterial therefore, as before seen, that it was inherited from the decedent's parent; and it must go to his "next of kin." Computed by the rules of the civil law (as required by R. S., c. 75, § 2) a maternal grandmother being of the second degree of kindred, and uncles and aunts of the third, the grandmother must take the property as this rule directs and not the uncles or aunts.

Blackborough v. *Davis*, 1 Peere, Wms. 41; Reeve. Desc. LVI; *Cables* v. *Prescott*, 67 Maine.

Exceptions overruled. Decree of judge of probate confirmed. Remanded to probate court.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

STATE OF MAINE *vs.* EBEN WOODBURY.

Penobscot. Opinion November 20, 1884.

Plantations. R. S., 1871, c. 3, § 50. Organization. Practice.

The record of a meeting for the organization of a plantation, reciting that the qualified voters of "said township Letter L, Range 2, or Cyr Plantation, met," etc. is a sufficient "written description of the limits of the plantation," within the provision of R. S., (1871) c. 3, § 50.

The return on the warrant calling a meeting to organize a plantation, reciting, "I attested and posted up two copies," is a compliance with the requirement to post an attested copy in two places.

The competency of testimony which comes before the law court on an agreed statement must first be raised at *nisi prius*.

ON REPORT on agreed statement of facts.

The action is to recover the sum of $1109.90 with interest from January 1, 1884, in the hands of the defendant for stumpage cut on the public lots in township L, range 2, W. E. L. S. during the winter of 1882–3.

The opinion states the material facts.

Charles Hamlin and *Jasper Hutchings*, for the plaintiff, cited: 1 Greenl. Ev. § 6; *Plantation No. 9* v. *Bean*, 40 Maine, 221; *State* v. *Wagner*, 61 Maine, 178; *U. S.* v. *Teschmaker*, 22 How. 392.

Powers and Powers, for the defendant.

The organization of the plantation is fatally defective because the clerk and assessors did not transmit to the secretary of state

"a written description of the limits of the plantation as required by R. S., 1871, c. 3, § 50.

"Without such a return to the office of secretary of state of certain and definite limits of the plantation, the organization is defective and of no validity." *Plantation No. 9* v. *Bean*, 40 Maine, 223.

In this case there was no mention in the return of any written description of the limits of the plantation.

The law requires all to be transmitted to the secretary that was transmitted in this case, "and *also* a written description of the limits of the plantation." The latter is an original paper, and is in addition to and distinct from the certified copy of the record and proceedings required.

There was no legal notice of the meeting. The warrant, itself, should require that notice be given by posting an attested copy of the warrant in two public and conspicuous places in the township. *State* v. *Shaw*, 64 Maine, 266.

It does not follow from the return of the person to whom the warrant was directed that either of the copies posted up was an attested copy.

VIRGIN, J. The state seeks to recover a certain sum received by the defendant for stumpage on timber cut, in the winter of 1882–3, from the public lots in Township L, Range 2, in the county of Aroostook. The "agreed statement" finds that the defendant had the "right to cut until the township should become organized for plantation purposes and no longer." But the state claims that his right ceased by reason of the organization of the township into a plantation, prior to the cutting, pursuant to the provisions of R. S., (1871) c. 3, § § 47, 49 and 50; and this is the issue.

1. The first objection interposed by the defendant is that the clerk and assessors did not comply with the requirement of § 50, by transmitting to the secretary of state, (along with the certified copy of all proceedings had, in effecting such organization, including the warrant issued therefor, and the return thereon, and the record of the meeting held in pursuance thereof) "a written description of the limits of the plantation." The only

"written description of the limits of the plantation" transmitted to the secretary is contained in the record certified by the clerk and assessors, and expressed as follows: "Pursuant to the warrant, which was returned to the meeting with the above return thereon, the qualified voters of said Township Letter L, Range 2, or Cyr Plantation, met," &c. We think this is sufficient. This description in a deed by the state would be ample to convey the title. The township has a well defined existence on the face of the earth, and has been expressly recognized by a public resolve of the legislature of 1873, c. 166, wherein it is resolved, "That Cyr Plantation, Aroostook county, is composed of L, Range 2, in said county." And it has ever since the time of the meeting in 1871 been exercising the functions of a municipal corporation. There is nothing inconsistent with this view contained in *Plantation No. 9* v. *Bean*, 40 Maine, 218, wherein is disclosed a great uncertainty in the description of the territory attempted to be organized.

It is further objected that the return does not show that the statutory notice of the meeting was given by "posting an attested copy of the warrant in two public and conspicuous places," &c. So much of the return as applies to the objection, made and subscribed by the person to whom it was addressed, is as follows: "I attested and posted up two copies," &c. We think the only fair construction of this language is, that the two copies posted were those attested, no others being mentioned as being attested. Any other construction would seem hypercritical.

It is also urged that there is no evidence that a certified copy of the warrant and return were transmitted by the clerk and assessors.

The case shows the record comprises the warrant and return thereon, followed by a recital of the proceedings under the warrant; and appended is the certificate of the clerk and assesors, that they "transmitted to the secretary of state a certified copy of this record and all the proceedings." This is a part of the "agreed statement" on which the case is brought before us. If the defendant would raise the question of the legitimacy of this testimony, he should have suggested it at *nisi prius*.

Being of the opinion that the plantation was legally organized, the plaintiff, in accordance with the stipulation of the parties, must have judgment.

Judgment for plaintiff for $1109.90, and interest from January 1, 1884 to date of judgment.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

INHABITANTS OF ORLAND, petitioners for *certiorari*,

vs.

COUNTY COMMISSIONERS.

Hancock. Opinion December 1, 1884.

Certiorari. Taxes. Lists. R. S.. c. 6, § 92.

The "true and perfect list" of taxable estate mentioned in R. S,, c. 6, § 92, comprises a true enumeration, description and specification only of property not exempt from taxation; no appraisement or estimation of its value being essential.

ON REPORT.

Petition for *certiorari* to quash the proceedings of the County Commissioners in abating, upon petition, a portion of the taxes of Mrs. John A. Buck, for the year 1883.

The list returned to the assessors was as follows:

"Orland, April 2, 1883.

"Assessors of the town of Orland:

"The following is a list of my taxable property: . . . also my wife owns a 'dog cart' nine years old, . . . J. A. Buck."

O. F. Fellows, for the plaintiffs, contended that Mrs. Buck had no appeal from the assessment, because she did not return to the assessors a list of her taxable property. *Winslow* v. *Co. Com'rs*, 37 Maine, 562.

What is meant by a list under R. S., c. 6, § § 92, 93? Is it sufficient to say, "also my wife owns a dog cart nine years old," and that sandwiched into a schedule of a husband's or a third party's taxable property? We think this is not what the legislature contemplated by those sections. They should be construed according to their obvious terms and meaning, that the burdens of taxation may fall equally upon all.

George P. Dutton, for the defendants.

VIRGIN, J. The "true and perfect list" of taxable estate, real and personal, which the provision of R. S., c. 6, § 92 requires a tax-payer to bring in to the assessors as a condition precedent to a right of appeal to the county commissioners for any abatement of tax, comprises a true enumeration, description and specification only of the property. No appraisement or estimation of the value is essential. *Newburyport* v. *Co. Com.* 12 Met. 211, 214.

The only taxable property which it is pretended that Mrs. Buck possessed was a wagon denominated a "dog cart." The assessors valued it at one hundred and fifty dollars, and the commissioners at fifty dollars.

The only error assigned by these petitioners, is that it "does not appear that Mrs. Buck did ever make and bring in to the assessors a true and perfect list of the amount and value of her estate . . or that she was unable to offer such a list at the time appointed by the assessors to receive them."

The answer is that the law does not require such a list as is assigned as error. R. S., c. 6, § § 92, 93. Either assessor may require a tax-payer "to answer all proper inquiries in writing, as to the nature, situation and *value* of his property liable to be taxed in the state," &c. but this is not the error assigned. No such requirement is pretended to have been made.

The record shows that Mrs. Buck did, by her husband, return a true specification and description of all her taxable property, and the assessors, instead of expressing a desire to

require answers to questions, said they had no questions to ask. Our opinion is that the error assigned is no error.

Petition dismissed.

PETERS, C. J., DANFORTH, FOSTER and HASKELL, JJ., concurred.

INHABITANTS OF ORLAND, petitioners,

vs.

COUNTY COMMISSIONERS.

SAME *vs.* SAME.

Hancock. Opinion December 1, 1884.

Taxes. Abatement by county commissioners. Certiorari. Practice.

The jurisdictional facts ought to be set out in the application of a tax-payer to the commissioners for abatement of taxes. If they are not the commissioners may entertain it, on proof of them without objection.

Certiorari will not be granted because the application does not set out on what property the applicant desired an abatement if the record discloses that a list setting out that fact was produced at the hearing.

ON REPORT.

Petition for *certiorari* to quash the proceedings of the county commissioners in abating a portion of the taxes of John A. Buck. There were two petitions; one each for the years 1882 and 1883. In the latter the causes of error assigned were as follows:

"1. Because the application to said board of county commissioners, praying for said abatement, did not set forth upon what property said John A. Buck desired said abatement.

"2. Because it does not appear in said county commissioners' records that said John A. Buck did make and bring in to the assessors of said town a true and perfect list of the amount and value of his estate, both real and personal, not by law exempt from taxation, which he was possessed of on the first day of

April, A. D. 1883, according to the notice given by said assessors in which he would receive the same. Nor does it appear that he was unable to offer such list at said time, nor did he offer to make oath to the same."

(Petition of John A. Buck, to county commissioners.)

"To the honorable county commissioners for the county of Hancock, respectfully represents your petitioner, John A. Buck, of Orland, in said county of Hancock, that on the seventh day of April, A. D. 1883, in accordance with a notification by the assessors of taxes of the town of Orland, for the year 1883, he made, subscribed and presented to said assessors a true and perfect list of his polls and all his estates, real and personal, not by law exempt from taxation of which he was possessed on the first day of April of said year of 1883, and then and there offered to make oath to the truth of the same. Yet the said assessors in making the assessment for the said year 1883, wholly disregarded and ignored the list aforesaid, and assessed your petitioner at a higher value than the property was worth at the said first day of April, A. D. 1883.

"Therefore, your petitioner having applied to said assessors for abatement of the taxes unlawfully assessed upon him, and the said assessors having refused to make the abatement asked for, your petitioner prays that you will make the said abatement and reimburse him the amount of same with incidental charges.

John A. Buck."

"Orland, August 18, 1883."

(Abatement.)

"Hancock ss: Court of county commissioners, January term, A. D. 1884.

"In the matter of the petition of John A. Buck, of Orland, for abatement of his taxes in said town of Orland for the year 1883, in accordance with notice duly given the assessors of said town of Orland and the petitioner, the commissioners met the parties in Orland on the 29th day of November, A. D. 1883, and after fully hearing their evidence and arguments upon the

matter under consideration, and after carefully considering the same, the commissioners are of the opinion, and so determine that the said petitioner, John A. Buck, was overrated by said assessors for the year 1883, in the sum of $1360 as follows: On his homestead, $200. On the Grindle house and lot, $150. On the store occupied by J. S. Condon & Co. $100. On the stable in the rear of Condon store, $100. On the store-house in the rear of Condon store, $100. On the store occupied by Sparrow Holt, $150. On his wharf and salt store, $225. On wood lot No. 81, $60. On wood lot No. 79, $175. On household furniture, $100, and that said John A. Buck is entitled to an abatement therefor in the sum of thirty-two dollars and thirty-seven cents ($32.37), as follows: On account of his state, county and town tax, $23.80, and upon his highway tax the sum of $8.57, for which amount the commissioners award that the said John A. Buck shall be reimbursed out of the town treasury of said town of Orland, with incidental charges taxed at $4.82.

John W. Somes,
Newell B. Coolidge,
James W. Blaisdell,
} County commissioners for Hancock county."

"A true copy. Attest: H. B. Saunders, clerk.

(Answer of county commissioners, showing amendment.)

"The answer of J. W. Somes, Newell B. Coolidge and James W. Blaisdell, county commissioners of Hancock county, in the matter of John A. Buck, abatement for year 1883, who say:

"That the copy attested by H. B. Saunders, Esq. attached to the petition in said cause, is a true copy of their record and they hereby certify the same, and they further, here in court, produce an amendment of said record, amended according to the facts and their rulings at the regular term of the court of said commissioners, held at Ellsworth, on the fourth Tuesday of January, A. D. 1884, and by adjournment on the 19th day of February and 25th day of March, which they hereby certify as true and correct, and they further for answer say: That they find as facts and so rule that the said John A. Buck, the petitioner

in said cause, was an inhabitant of Orland on said first day of April, A. D. 1883, and liable to taxation therein.

"That on said April 1, A. D. 1883, he owned property liable to taxation in said Orland.

"That before making their assessment of taxes, for A. D. 1883, the assessors gave such notice as is required by law to the inhabitants of said Orland, to make and bring into them true and perfect lists of their polls and all their estates, real and personal, not by law exempt from taxation, of which they were possessed on the first day of April, A. D. 1883.

"That at the time and place notified said Buck took into said assessors, a true and perfect list of his polls and estates according to the provisions of c. 6, § 92 of the R. S., of the state of Maine, as aforesaid.

"That said list was received by one of the assessors, William Roberts, who said that he did not wish to ask any questions relative thereto, and that no request was ever made of said Buck to answer questions in writing or otherwise, relative to said list, or to make oath to the same.

"That in the application to the assessors, requesting an abatement on said tax, is a list setting forth on what property he desired an abatement which is on file in said assessors' office, is a part of the records in this cause, and was produced at the hearing before us on notification of Mr. Buck.

"That said Buck for year A. D. 1883, was assessed and over valued, as appears in the records and reports in this cause.

"That the rate per cent of said taxation was 17 1-2 mills on each and every dollar and 6.3 mills on each dollar for highway tax.

"That said petitioner after said assessment, and before he applied to us, duly, and according to law, applied in writing to the said assessors for an abatement of said tax, stating the grounds therefor, within the time required by law to abate the said tax, and that they refused so to do, and that application was duly made to us at our next meeting, that our records and doings are not erroneous, nor illegal, and we here in court produce our

completed record, and pray that we may be hence discharged with costs.

John W. Somes,
Newell B. Coolidge,
James W. Blaisdell,
} County commissioners for Hancock county."

"A true copy. Attest: H. B. Saunders, clerk."

O. F. Fellows, for the plaintiffs.

As the county commissioners' court is a *quasi* court of record, keeping a record of its official proceedings, rendering judgments and issuing legal proceedings, the application to the court must be in writing. *Levant* v. *Co. Com'rs*, 67 Maine, 429. We maintain that in order to give county commissioners jurisdiction, under an application by a tax-payer for an abatement of his taxes, such application must contain an enumeration of the property, upon which he claimed to have been over-rated by the assessors; that the records of said county commissioners may disclose the facts upon which their jurisdiction was founded. *Plummer* v. *Waterville*, 32 Maine, 566; *Scarborough* v. *Co. Com'rs*, 41 Maine, 604.

Another reason why it should set forth in the application, the property upon which the applicant desired an abatement, is this: To give the town an opportunity of knowing fully on what it is called upon to act. *Guilford* v. *Co. Com'rs*, 40 Maine, 296.

George P. Dutton, for the defendants.

VIRGIN, J. After the precedent notice required of the assessors has been given, to entitle a tax-payer to successfully apply to the county commissioners for an abatement of any part of his tax, whether based on an over-valuation or on property not possessed on April 1, he must show:

1. That, in compliance with the assessors' notice, he seasonably presented a true and perfect list of his poll and all of his taxable estate possessed on April 1, and, if required, made oath to its truth, and answered in writing and subscribed the same, all proper inquiries as to the nature, situation and value of his property taxable in this state; or offers such list with his appli-

cation and satisfies the commissioners that he was unable to offer it at the time appointed. R. S., c. 6, § § 93, 94; *Gilpatrick* v. *Saco*, 57 Maine, 277; *Lambard* v. *Co. Com'rs*, 53 Maine, 505, 507; *Fairfield* v. *Co. Com'rs*, 66 Maine, 385, 387; *Freedom* v. *Co. Com'rs*, 66 Maine, 175; *Levant* v. *Co. Com'rs*, 67 Maine, 429.

2. That, on written application, stating the grounds therefor, within two years from the assessment, the assessors refused to make the abatement asked for. R. S., c. 6, § 95.

3. That his application was made to the commissioners at their next meeting. R. S., c. 6, § 96.

4. That he was overrated either on the value of his property, or for property which he did not possess on April 1.

While all of these jurisdictional facts ought to be set forth in the application, and the commissioners might properly decline to receive and order notice upon an application which did not contain all these allegations, still, if without objection all these facts be proved, the application might be entertained, for it is the whole record which is to be examined.

The original record of the commissioners was evidently defective; but they amended it according to the facts, as they had a right to do. *Levant* v. *Co. Com.* 67 Maine, 429, 435. And as amended, we perceive no error in it.

The only cause of error assigned and relied on in argument, is that the application did not set forth upon what property the applicant desired abatement. To be sure, the application is quite general in its terms, alleging that the assessors "assessed the petitioner at a higher value than the property was worth on the first day of April, 1883." Under this general allegation, the commissioners would probably order a specification, if requested. And it seems the reason for not making such a request, is disclosed by the following clause in their record, to wit, "That in the application to the assessors requesting an abatement, is a list setting forth on what property he desired an abatement, . . and was produced at the hearing before the county commissioners, on notification of Buck." So it seems

that the matter was specifically laid before them, and the town authorities could not have been injured.

Petition dismissed.

PETERS, C. J., DANFORTH, FOSTER and HASKELL, JJ., concurred.

EMERY, J., did not sit.

ALVIN B. GOODWIN, for the benefit of ELWELL, PICKARD AND COMPANY

vs.

BETHEL STEAM MILL COMPANY.

Oxford. Opinion December 2, 1884.

Order. Trustee process.

The defendants accepted an order "subject to a final settlement" between themselves and the drawer. *Held*: That they were entitled to deduct from the amount otherwise due, a sum which they were legally holden to pay upon an execution of a third party against the drawer as principal and themselves as trustees, the service upon them as trustees having been made when the order was accepted.

ON REPORT on agreed statement of facts.

Assumpsit on defendants' acceptance of an order of Charles W. Pierce, dated September 13, 1879, for fifty dollars and seven cents.

The opinion states the material facts.

S. F. Gibson, for the plaintiff.

A. E. Herrick, for the defendants.

PETERS, C. J. One C. W. Pierce drew an order on the defendants in favor of the plaintiff, saying, "Please pay the above order . . . . if that amount is due me from your company." The order was accepted in these words: "Accepted

subject to . . . final settlement between the Steam Mill Company and C. W. Pierce."

It turns out that there was, at the date of the acceptance, a trustee suit pending against Pierce in favor of some other party, in which suit the defendants had been already trusteed. They were regularly holden in the suit, and paid over upon execution, all that was in their hands.

The single question of the case is whether the defendants, in defense of a suit against them upon the acceptance, can bring into their account with Pierce, the amount thus paid at the requirement of the law. We have no doubt upon the question. The lien established by the attachment preceded the acceptance, and the acceptance became subordinated to it.

The plaintiff complains that he had no notice to appear at the disclosure as a claimant of the fund. His appearance would have availed nothing. The case admits that the defendants were properly charged. The defendants took the risk of making a correct disclosure, and of being legally held. Had the acceptance preceded the attachment, the plaintiff would have a cause for complaint. As it is, he has none.

Plaintiff nonsuit.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

JOHN VEHUE *vs.* SAMUEL F. MOSHER.

Franklin. Opinion December 2, 1884.

Trespass. Fixtures. Manure.

The plaintiff recovered judgment for a farm mortgaged to another, who assigned the mortgage to him. The mortgagor, during the sixty days before the conditional became a final judgment, sold manure, previously made upon the place in the usual course of husbandry, to the defendant, who during that period entered the premises and carried the manure away. *Held:* That the plaintiff can maintain an action of trespass *quare clausum fregit* against the defendant therefor.

ON EXCEPTIONS.

Trespass, *qu. cl.* The opinion states the facts.

E. O. Greenleaf, for the plaintiff.

H. L. Whitcomb, for the defendant.

PETERS, C. J. The plaintiff recovered a conditional judgment for the possession of certain mortgaged premises. During the sixty days allowed before the conditional judgment became final, the mortgagor sold to the defendant a quantity of manure made upon the premises in the usual course of husbandry, the defendant during that period entering and taking the manure away.

According to our decisions, the manure belonged to the farm; was a part of the estate. The outgoing mortgagor, or his vendee, had no right to remove it therefrom. *Chase* v. *Wingate*, 68 Maine, 204; *Norton* v. *Craig*, *Id.* 275.

The defendant contends that trespass *quare clausum* cannot be maintained against him for the act. The position is that the action does not lie against the mortgagor, and therefore not against one licensed by the mortgagor to enter the premises. We think the action lies against the defendant, and would lie against the mortgagor had he done the same act. There is no intimation that the assignee of the mortgagee was not entitled to an immediate possession, though he was for a time postponed in getting possession by legal process.

The action (*quare clausum fregit*) lies by mortgagee against mortgagor for strip and waste. The mortgagor is not liable in the action for using the premises, the possession of which is not taken by the mortgagee, but may be sued in *quare clausum* for abusing them in certain ways. A mortgagor in possession, before entry by the mortgagee, may lawfully cut and remove grass growing upon the land. *Hewes* v. *Bickford*, 49 Maine, 71. He may take the rents and profits. He may cut firewood for use upon the premises. *Hapgood* v. *Blood*, 11 Gray, 400. He cannot cut and remove trees fit for timber in the market. *Page* v. *Robinson*, 10 Cush. 99. He cannot remove a building. *Cole* v. *Stewart*, 11 Cush. 181. Nor remove fixtures from a building. *Smith* v. *Goodwin*, 2 Maine 173. He is liable in *quare clausum* for any act causing substantial and permanent injury.

Removing the manure in this case was of the same kind of injury and waste as removing trees or buildings or house-fixtures.

Manure, situated as this was, is itself a fixture.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

CHARLES F. LIBBY, special administrator, in equity,

vs.

JOHN C. COBB.

Cumberland. Opinion December 3, 1884.

Special administrator. Mortgages. Redemption.

A special administrator can maintain a bill in equity to redeem land of his intestate from a mortgage, where the right to redeem might be barred by foreclosure before a general administrator would be qualified.

ON REPORT.

Bill in equity by the special administrator on the estate of Francis Kane, late of Portland, deceased, to redeem from mortgage certain real estate of the deceased.

The defendant demurred to the bill. The presiding justice hearing the cause being of the opinion that the question of law involved was of sufficient importance reported the same to the law court, the parties agreeing thereto.

The material facts set out in the bill are stated in the opinion.

Charles F. Libby, for the plaintiff.

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

At common law, the holder of the legal estate is the only party entitled to redeem. *Dexter* v. *Arnold*, 1 Sumner, 111; Hilliard, Mortgages, 248, 247, 249.

On the death of the mortgagor, his heir, or assignee, alone can redeem. 1 Hilliard, Mortgages, 252; *Smith* v. *Manning*, 9 Mass. 422; *Elliot* v. *Patten*, 4 Yerg. 10; *Shaw* v. *Hoadley*, 8 Blackf. 165; Jones, Mortgages, § 1062.

A mortgage is collateral to the debt of the mortgagor. Payment of the debt discharges the mortgage. If the estate is solvent, and has sufficient personal, the administrator is bound to pay the debt and exonerate the land for the benefit of the heir. The title to the land being in the heir, payment of the debt relieves the estate for the benefit of the heir only, the administrator takes no title to it, and has no claim to be reimbursed from it. This right of the heir, will be enforced in equity, on bill brought by him. 1 Hilliard, Mortgages, 412; Story's Eq. § 571.

If the estate is insolvent, the administrator is not allowed to apply the personal estate to pay the mortgage debt, and redeem the mortgage. 9 Pick. 133; Hilliard, Mortgages, 425.

By our statutes, R. S., c. 90, § 26, which is the same as the R. S., of 1871, the executor, administrator, or the heirs or devisees may maintain a bill for redemption. But for this statute an administrator could not maintain such a bill. The complainant is not administrator. He is only a special administrator. While an administrator may pay debts of his intestate, and it is his duty to do so, a special administrator has no such power. He can only do the acts mentioned in R. S., c. 64, § 33. He is simply a custodian to collect the assets and debts, and hold them till an administrator is appointed, and then turn them over to him. Except a few specified claims and expenses, which do not include general debts, he has no authority to pay out money of the estate.

If the complainant in this case has the money of the estate in his hands sufficient to pay this mortgage debt, he has no authority to pay the debt from such funds. The law prohibits him from so doing. R. S., c. 64, § § 33, 34. If he had a decree allowing redemption, he has no authority to perform it, by making payment. The suit is in his official character. In that character he calls upon the defendant, and in that character he must

redeem, if at all, and from his intestate estate he must make payment if at all. He cannot call for redemption, and make payment of the debt from moneys coming from other sources than the estate he represents. Defendant is not bound to assign his mortgage. Redemption may be sought by the parties entitled, the heir or administrator, but not by a special administrator.

It must follow that this plaintiff cannot maintain this bill to redeem, when he is unauthorized to pay the mortgage debt, or perform a decree in his favor. So far as appears by the bill the estate is solvent. The heir could have at any time brought a bill.

EMERY, J. The single question is whether the court will entertain a bill by a special administrator, appointed pending an appeal as to the appointment of a general administrator, the bill being to redeem mortgaged real estate of the deceased, where the right to redeem would probably be foreclosed before the determination of the appeal.

Special administrators do not have the general powers of general administrators, but it is a fair construction of their powers, to say that they are commensurate with their duties. By R. S., chap. 64, § § 32 and 33, special administrators are to inventory, and "collect all the goods, chattels and debts of the deceased, control and cause to be improved all his real estate, collect the rents and profits thereof, and preserve them for the executor or administrators thereafter appointed." The words "preserve them" are not limited to rents and profits, but apply to all the assets real and personal. The special administrator is to collect the personal assets, control and improve the real estate, that he may preserve all. The very object of his appointment, is the preservation of all the assets, real as well as personal, for the realty may be the only fund for creditors. His powers should be construed as sufficient for such a purpose. The statute goes on to enact that "he may for that purpose maintain suits," for the purpose of preserving as well as of collecting, controlling and improving. We think where a suit is necessary for such preservation, it might be maintained,

without such statute provision, upon the principle above stated.

This bill alleges that land of the intestate worth $5000 was mortgaged to secure the suretyship of the respondent, on a recognizance for the intestate in a criminal prosecution. How much or whether anything is due is not known to the complainant. The right to redeem, should any sum however small, be found due, would expire January 13, 1884, probably before the appeal as to appointment of administrator could be determined. The special administrator should not permit such seemingly valuable property to be lost to the estate. He should preserve it for the general administrator. How could he preserve it except by demanding an account and if refused, filing a bill to redeem? No authority has been cited to the contrary, and in the absence of opposing authority, we think such action by the special administrator is fairly within the scope of his duties and powers imposed and conferred by statute.

The respondent urges that at common law a general administrator even could not maintain a bill for redemption, that he only has such power by express statute, that the statute only contemplates general administrators and should not be extended by construction to include a special administrator. The old common law rule that only the heir or devisee could maintain a bill to redeem, obtained when a deceased's real estate was not liable for his debts. There was no occasion for the administrator to interfere, though the heir might call upon him to pay the debt from the personalty. When all the deceased's real estate came to be subject to the payment of his debts, there arose a necessity that the administrator should have the right to redeem for the benefit of creditors, without a statute expressly authorizing it, it might have been held that an equity court could entertain such a bill. The statute made the right certain, and it may be fairly extended to include a necessary process by a special administrator.

The respondent also urges that the special administrator has no authority to pay any debts due from the estate, and therefore cannot use the estate's money to pay the respondent's claim. It is not a question of payment of a debt but of saving and pre-

serving property of the estate. While other creditors or the heirs might interpose to prevent an unwise redemption, the mortgagee certainly has no occasion to interpose.

Another ground for entertaining the bill can be suggested. The bill alleges, that the respondent was asked for an account by the general administrator immediately after his appointment by the probate court and that the respondent as creditor appealed from the appointment (thereby vacating it) for the fraudulent purpose of evading any account and delaying any proceeding to redeem until after the expiration of the right.

In *Saunders* v. *Frost*, 5 Pick. 267, which was a bill to redeem, though not like this case, Chief Justice PARKER, said: "So gross an injustice cannot be allowed, as that the mortgagee shall have it in his power to tie the hands of the mortgagor, and prevent him from redeeming the estate." In *Putnam* v. *Putnam*, 4 Pick. 139, the point was made that there was no statute authorizing the heirs to renew a bill to redeem begun by their ancestor. It was then too late to begin *de novo*. Chief Justice PARKER said in substance: "There is no necessity, because by the common law suits will be lost by the death of a party, that the same inconvenient rule should be applied to this process especially when as has been seen gross and palpable injustice may be the consequence. . . . . We think they (the heirs) may avail themselves of the proceedings in the former suit, without any infringement of principle, or injury to the rights and interests of the defendant; and we think without this privilege there is no remedy whatever for a grievous wrong."

The language quoted from the eminent jurist, seems to us applicable to this case. This court has broad equity powers and powers expressly conferred to relieve from fraud or forfeiture. We think the equity jurisdiction of the court is wide enough to afford relief against the grievous wrong that may be done, and to afford the relief prayed for in this bill.

Demurrer overruled. Bill sustained.

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

CHARLES PARSONS *vs.* SAMUEL CLARK.

York. Opinion December 3, 1884.

Trespass. Waters. Riparian owner. Ways. Bridges.

The owner of land upon tide water holds to low water mark subject to the public easement, as expressed in the colonial ordinance of 1641-7.

A stream subject to the tide, and of sufficient size to give passage for boats, is a navigable stream, and the public has the right to boat and fish there.

The leaving a boat in such stream below low water mark, is not a trespass upon the land of the riparian owner.

A bridge across such stream, built and maintained for public use, resting at each end upon the land of the riparian owner, within the limits of a highway, is not his property.

The fastening of a boat to such bridge is not a trespass upon the property of the riparian owner, or upon property of which he has possession or control.

A traveler as against the owner of the fee, has a right to turn from the beaten path of a highway and use any part of it to pass and repass upon.

A traveler has a right to approach a public water way from any part of the highway, without becoming a trespasser upon the owner of the fee.

ON EXCEPTIONS to the ruling of the court in ordering a nonsuit.

The opinion states the case and material facts.

Bourne and Son and *R. P. Tapley*, for the plaintiff.

The owner of the land adjoining each side of a way, owns the fee of the road subject to the easement of the public to travel over it. The soil of the road is as absolutely his property as is the lot adjoining it. And any other person who digs up the soil, cuts down a tree, or removes a rock, or even stands there an unreasonable time, without his consent, is a trespasser. *Muzzey* v. *Davis*, 54 Maine, 363; *Stinson* v. *Gardiner*, 42 Maine, 254; *Esty* v. *Baker*, 48 Maine, 495; *Stackpole* v. *Healy*, 16 Mass. 33; 2 Greenl. Ev. § 616; *Grove* v. *West*, 7 Taunt. 39; *Northampton* v. *Ward*, 1 Wilson, 107; *Dovaston* v. *Payne*, 2 H. Black. 527; 3 Starkie, Ev. 1106, n.

The plaintiff's land upon which the bridge is resting, can rightfully be used for no other purpose than holding up the bridge. Not even the town could confer the right to use it for other purposes. And to hold the bridge for the purposes of

travel only. The defendant gets no right to fasten his boat to the bridge by virtue of the laws taking the land for a highway. The public have only an easement, and the right to construct an easy and safe passage.

The land upon which the abutment stands, was as much the resisting point which held the boat as if a stake had been driven into the bank, and the boat fastened to that.

The stream is not a navigable stream. A boat at low water could not go up and down. See *Wadsworth* v. *Smith*, 2 Fairf. 281; *Com.* v. *Charlestown*, 1 Pick. 180; *Rowe* v. *The Granite Bridge Corp.* 21 Pick. 341.

But if it could be shown that the river is navigable, it would afford the defendent no justification. Whatever right he has to free fishing — if he has any — he must derive from c. 63, Colony Laws.

That act only gives the right of fishing in tide waters to an inhabitant "who is a householder." *Barrows* v. *McDermott*, 73 Maine, 451.

It is not alleged nor proved in this case that the defendant is a householder.

Counsel further cited: 2 Dane's Abr. 692; *Cortelyou* v. *Van Brundt*, 2 Johns. 357; *Coolidge* v. *Williams*, 4 Mass. 140; *Duncan* v. *Sylvester*, 24 Maine, 482.

A. E. Haley, for the defendant, cited: 2 Dane's Abr. 68; *Moulton* v. *Libbey*, 37 Maine, 485; 3 Kent's Com. 521; *Com.* v. *Alger*, 7 Cush. 67; Angell, Watercourses, c. 13, § § 542, 545, 535; 2 Wash. Real Prop. 679; 5 Wend. 423; 7 Conn. 186; 9 Conn. 40; *Berry* v. *Carle*, 3 Maine, 269; *Com.* v. *Chapin*, 5 Pick. 199; *Veazie* v. *Dwinel*, 50 Maine, 479; *Wadsworth* v. *Smith*, 2 Fairf. 278; 7 Maine, 273; 31 Maine, 9; 42 Maine, 150; *Treat* v. *Lord*, 42 Maine, 552; 1 Hilliard, Torts, c. 20, § 1; *Mahew* v. *Norton*, 17 Pick. 357; *O'Linda* v. *Lothrop*, 21 Pick. 292.

HASKELL, J. This is an action of trespass *q. c.* Defendant pleads the general issue, with a brief statement, justifying his acts as done in the exercise of the right to free fishing.

The plaintiff reads in evidence a quitclaim deed to himself of a farm, through which a small stream runs toward the sea. Into this stream the ordinary tide flows to a height of from five to six feet, and leaves at low water throughout the plaintiff's land, a depth of from one to two feet.

A highway crosses the farm and its bridge spans the stream, having abutments about twenty feet apart. These are not shown to rest upon the soil above low water. The stream is of sufficient size to afford passage for small boats from the bridge to the sea.

A small boat used by the defendant for fishing, was found under the bridge and fastened to it, by a rope or chain from each end, so that it lay in the water lengthwise of the stream. The leaving and fastening of this boat is the trespass sued for.

The plaintiff entered under his deed, and by it, he acquired title to the land and flats to low water mark upon the stream, subject to the rights of the public at common law, as expressed in the colonial ordinance of 1641–7. *Sparhawk and Wife* v. *Bullard*, 1 Met. 95; *Storer* v. *Freeman*, 6 Mass. 435; *Commonwealth* v. *Charlestown*, 1 Pick. 180; *Walker* v. *B. & M. R. R.* 3 Cush. 22; *Attorney General* v. *Boston Whf. Co.* 12 Gray, 553; *Duncan* v. *Sylvester*, 24 Maine, 482; *Winslow* v. *Patten*, 34 Maine, 25; *Partridge* v. *Luce*, 36 Maine, 16; *Montgomery* v. *Reed*, 69 Maine, 510.

The flux and reflux of the tide is strong evidence against the right of private property in such waters. *Miles* v. *Rose*, 5 Taunt. 706. The fact that the stream throughout the plaintiff's land is subject to the tide, and of sufficient size to give passage for boats, makes it a navigable stream and gives the public the right to boat and fish there. *Parker* v. *The Cutler Mill Dam Company*, 20 Maine, 353; *Moulton* v. *Libbey*, 37 Maine, 472; *Veazie* v. *Dwinel*, 50 Maine, 479; *Preble* v. *Brown*, 47 Maine, 284; *Commonwealth* v. *Chapin*, 5 Pick. 199; *Attorney General* v. *Woods*, 108 Mass. 436.

The leaving of the defendant's boat in the stream below low water mark, was not a trespass upon the plaintiff's land, because neither the water, nor the soil under water, belonged to him.

Whether that act was an unlawful obstruction to the stream, is foreign to this case. Nor does the case show that the boat was fastened to any part of the bridge above the plaintiff's soil, or to which he had title, or of which he held possession. The bridge was a structure, built and maintained for public use, resting at either end upon the soil of the plaintiff, over which the road passed. This structure did not become the property of the plaintiff by reason of its resting upon his own soil. It was put there by authority of law, and the structure did not thereby become a part of the freehold, any more than a chattel would, placed upon another's ground by permission of the owner of it. *Harrison* v. *Parker et al.* 6 East. 153. If the way should be discontinued and located across the same stream below the plaintiff's land, would not the public have a right to remove the bridge to the new location? If the structure had become the property of the plaintiff, surely this could not be done. If a stranger should have destroyed the rail to this bridge, upon what principle of law could the plaintiff have trespass for the act? Neither was he the owner of the rail, nor in possession of it. So it was with the timber to which the boat was fastened. It was not the plaintiff's property, nor in his possession. The defendant is not shown to have set foot upon the plaintiff's soil. If it is said that the defendant must have landed from his boat upon some part of the highway, it could make no difference, because the traveler, as against the owner of the fee, has the right to turn from the beaten path and use any part of the highway to pass and repass upon. *Dickey* v. *Maine Telegraph Co.* 46 Maine, 483. And the defendant would have a right to approach the stream, which is a public water way, from any part of the highway, without becoming a trespasser upon the plaintiff's close. In no aspect does the evidence warrant this suit. The nonsuit was properly ordered.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

STATE OF MAINE *vs.* JOSEPH A. WILLIAMS.

York. Opinion December 5, 1884.

Practice. Evidence. Adultery.

In a criminal trial the defendant has no right to require instructions to be given to the jury when the instructions already given are full and comprehensive.

Evidence tending to prove illicit intercourse by the defendant with the same person charged in the indictment, both before and after the day on which an adultery is laid, is competent to prove the relation and mutual disposition of the parties.

Evidence that the adultery was committed on any day within the period fixed by the statute of limitations is sufficient.

ON EXCEPTIONS.

Frank M. Higgins, county attorney, for the state.

Hamilton and Haley, for the defendant.

The case was not argued at law court.

HASKELL, J. Indictment for adultery. The defendant testified in his own behalf.

The defendant excepted to the refusal of the presiding justice, to give the jury several requested instructions.

(1.) That the jury are to believe the story of the respondent, if they can reconcile it with the facts of the case.

(2.) That the law presumes the honesty of the parties, and jurors are to seek to construe their testimony to be the truth.

Touching these questions the presiding justice did charge the jury; the facts "are all for you, exercising your good common sense, scanning the testimony carefully, taking the defendant's testimony as well as the testimony for the government, to weigh, and then say upon your oaths if you have any reasonable doubt that this defendant is guilty of the charge made against him. Because, if you have a reasonable doubt, it is your duty, and the defendant has a right to demand of you, to say under

your oaths that he is not guilty. If you have any reasonable doubt, then it is your bounden duty to say that he is not guilty." The instructions given are full and comprehensive upon the part of the case to which the exceptions relate. They gave the jury clearly to understand that it was their duty to weigh all the evidence and give the defendant the benefit of all reasonable doubt; no further or more explicit instruction was required. The defendant had no right to have an instruction given in such phraseology as he saw fit to ask, provided sufficient instruction was given, touching the matter requested, to clearly lay before the jury their duty in the premises. *Foye* v. *Southard*, 64 Maine, 389; *Hovey* v. *Hobson*, 55 Maine, 256.

(3.) That as there is only one charge in the indictment, no other evidence is to be taken into consideration of other acts to sustain the charge.

Evidence tending to show illicit intercourse by the defendant with the same person charged in the indictment, both before and after the day laid, is competent to prove the relation and mutual disposition of the parties. *State* v. *Witham*, 72 Maine, 531.

(4.) That the jury must be satisfied beyond a reasonable doubt that the respondent committed the crime upon the day alleged.

Evidence that the crime was committed on any day within the period fixed by the statute of limitations is sufficient. *Commonwealth* v. *Cobb et al.* 14 Gray, 57; *Commonwealth* v. *O'Connor*, 107 Mass. 219.

Exceptions overruled.

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

NELLIE BIRMINGHAM and others, in equity,

vs.

ALBERT A. LESAN.

Penobscot. Opinion December 9, 1884.

Will. Devise. Life-estate.

A testator devised real estate to his widow to hold "during her life for her maintenance, but not to sell the same, the said real estate to go to John Mehan at her death, if any remains." *Held:*

1. That the widow took a life-estate by express words of limitation, without any power of disposal annexed.

2. That the words, "if any remains," are by implication in opposition to the language of the testator, in the same clause by which the widow is expressly prohibited from making sale of the real estate, apparently inconsistent with every other expression in the will, and therefore can not be held to imply a right of disposal.

ON EXCEPTIONS.

Bill to redeem. The bill states that the plaintiffs are the heirs at law of James McDermott; that he was seized of the premises at the time of his death, and his will, which was duly probated, contained the devise recited in the opinion; that after his death his widow, Catherine McDermott, and John Mehan, named in the devise, executed a mortgage of the premises to the defendant, and that defendant had commenced proceedings to foreclose the mortgage; that John Mehan did not perform the conditions imposed upon him by the devise, but abandoned Catharine McDermott without providing for her maintenance from the proceeds of the land or otherwise; and that she died on the poor farm where she had been supported as a pauper.

The exceptions were to the ruling of the court in overruling a demurrer to the bill, and they contained the following agreement of counsel: "If exceptions are overruled, defendants to have right to answer, and action to stand for trial."

Barker, Vose and Barker, for the plaintiffs.

Charles P. Stetson, for the defendant.

FOSTER, J. The determination of the question raised by the demurrer in this case depends upon the construction to be given to the will of James McDermott.

The language used is not wholly free from ambiguity. The second clause in the will is the only one concerning which any doubt can arise as to the intention of the testator, and it reads thus: "I give and devise to my wife Catherine, all the real estate that I may die seized of, to hold the same during her life for her maintenance, but not to sell the same, the said real estate to go to John Mehan at her death, if any remains, providing the said Mehan maintains and provides for the said Catherine, decently, from the proceeds of the farm or otherwise; and providing the said Mehan fails to provide for the said Catherine, then the said Catherine is empowered to call on the selectmen to provide for her in her own house."

By the well settled rules of construction, as well as by the authorities, the devisee, Catherine McDermott, took a life-estate in the property devised by express words of limitation, and not by implication. *Stuart* v. *Walker*, 72 Maine, 152; *Leighton* v. *Leighton*, 58 Maine, 63.

The question then which is naturally presented by this case is, whether the widow of the testator took this estate with the power of disposal annexed to her life-estate.

In considering this proposition we resort, in the first instance, to the application of those elementary rules of construction, which provide that the intention of the testator is to have a controlling influence in the interpretation of the language used in his will, provided it be consistent with the rules of law; and that this intention is to be collected from the whole will taken together. *Shaw* v. *Hussey*, 41 Maine, 497.

The words of the devise are plain and distinct in the creation of a life-estate by express limitation: "I give and devise to my wife, Catherine, all the real estate that I may die seized of, to hold the same during her life for her maintenance, but not to sell the same," &c. Any other construction would do violence to the intention of the testator as expressed in apt and explicit words

of limitation, expressive of that intention. *Stuart* v. *Walker*, *supra*, 154; *Warren* v. *Webb*, 68 Maine, 135.

In the same clause in which the life-estate is set out to the devisee to be held during her life for her maintenance, there appear these words restrictive of the power of alienation, "but not to sell the same," and which, taken in connection with the language preceding, seem clearly to indicate the intention of the testator to limit the estate for life, with no power of disposal of the fee annexed.

No doubts would linger in the mind as to what was the manifest intention of the testator, were it not for the expression, "if any remains," which immediately follows in the same sentence when providing for the disposition of the estate at the death of his widow.

These words, by implication, are in opposition to the language of the testator in the same clause by which the devisee for life is prohibited from making sale of the real estate, and, apparently, inconsistent with every other expression in the will.

Now, taking the whole will together, from which to ascertain the intention of the testator, it will be seen that the real estate was to go to Mehan at the death of the widow, provided he should maintain and provide for her from the proceeds of the farm or otherwise, and if he should fail so to provide for her, then she was empowered to call on the selectmen to provide for her in her own house; or if Mehan should provide for her during her life, but neglect to put a head-stone at her grave, then the selectmen might do so from the proceeds of the estate.

Here, certainly, from this language can be gathered no intention that the widow was empowered to sell the estate, but rather, on the contrary, that she was to be supported from the "proceeds" of the farm, and that, by a further provision in the will, while she had a right to occupy one-half of the lower part of the house during her natural life, the other half was to be used by said Mehan. Furthermore, by the fourth item the testator expressly declares that said Mehan is to be allowed the use of the place for the purpose of maintaining himself and the widow of the testator by farming the same.

If the power of sale were to be implied from the use of the words, "if any remains," in the connection in which they stand, it would be not only in direct conflict with the previous language of the testator, in which he expressly denies the power of alienation to the devisee of the estate for life, but inconsistent with the right of the remainderman, whose right of occupancy during the lifetime of the widow was expressly provided for by the terms of the will, as well as depriving the selectmen of using the proceeds of the estate for furnishing a head-stone at her grave, and providing for her at her own house, in case the said Mehan should fail to provide for her.

We do not intend to hold that these words may not oftentimes imply a power to convey, in connection with the devise of a remainder of real estate after an estate for life; but upon an examination of the authorities we have been unable to find any case where, standing in connection with a life-estate by express limitation with a devise over, they have been construed as giving a power of disposal of the fee, unless they were in harmony with the spirit of the other parts of the will. Certainly not, when the power that might otherwise be implied by them is not only in conflict with the express language of the testator, but contrary to his manifest or apparent intent as collected from all the provisions of the will. *Leighton* v. *Leighton*, 58 Maine, 69, 70; *Warren* v. *Webb*, 68 Maine, 135, 136; *Paine* v. *Barnes*, 100 Mass. 471; *Taggart* v. *Murray*, 53 N. Y. 236.

It will be noticed that in many of the cases where such words as, "if any remains," "if any shall remain unexpended," and other similar expressions, are held to imply the right of disposal, the testator had, either expressly or impliedly, authorized the disposal of his estate by the use of other language, and with which these expressions were only in harmony in conveying the intent of the testator. *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Harris* v. *Knapp*, 21 Pick. 416; *Leighton* v. *Leighton*, 58 Maine, 69; *Scott* v. *Perkins*, 28 Maine, 35; *Burleigh* v. *Clough*, 52 N. H. 267. And our court, in referring to the case of *Harris* v. *Knapp*, *supra*, says: "The court gave great force and effect to the phrase, 'whatever shall remain at her death,'

deducing from it the conclusive implication that the devisee had the right to dispose of the property. The use of the word, 'disposal' in the will, however, undoubtedly contributed to the conclusion arrived at by the court." *Warren* v. *Webb*, *supra*.

From a careful examination of the provisions of this will, we are satisfied that it was the intention of the testator that his widow should take a life-estate with no power of conveying the fee; that the words, "if any remains," taken in the connection in which they are found, must yield to the more positive and unequivocal declaration of the testator, "but not to sell the same," and which is in harmony with the other provisions of the will.

Exceptions overruled. Defendants to have the right to answer, and action to stand for trial.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

EMULUS A. HILLS petitioner, *vs.* CARRIE E. HILLS.

Waldo. Opinion December 2, 1884.

Divorce. Practice. Alimony. Lien.

A petition by a libelee, not based upon newly discovered evidence or other statutory cause for review, which asks that a new trial be granted in a divorce case, once fully heard, because the testimony adduced by the libelant was false and the decision a wrong one, cannot be sustained.

Real estate cannot be sequestrated for the purpose of securing the payment of alimony or allowances, so as to establish a lien thereon, unless it be described by some definite terms that will give identification.

ON EXCEPTIONS to the ruling of the court in dismissing the petition on motion of the defendant.

The opinion states the case and material facts.

Jewett and Brown, for the plaintiff.

William H. Fogler, for the defendant.

PETERS, C. J. The parties to this petition were husband and wife. Upon her divorce from him, an allowance was granted for her support, and it was decreed that she should have the custody of their four children. The divorce was granted to her after a full hearing of the parties upon all the causes alleged. The present petition by the husband, asserts that all the allegations in the original bill were untrue. The husband "informs the court that the aforesaid libel is a tissue of fraudulent and false representations, and that not a single material allegation in said libel is true;" and, on that account, he asks that the case may be opened for a new trial. Some other immaterial matters are added by the petitioner which cannot affect the question before us.

The motion is not for a new trial for newly discovered evidence, but it asks to have the case tried again upon the same grounds as before, and perhaps upon the same evidence. It amounts to an appeal from one term of court to another term, or from one judge to another. One judge heard the case fully and decided it, and the petition asks that another judge may rehear the case and reverse the decision. And there would be the same propriety in repeating the process of petitioning for a new trial as constantly as refused. The petitioner asserts that the former was a wrong and that he wants a right decision. Such a demand is not based upon any statutory provision, and we know of no course of procedure allowing it.

The cases cited by the counsel for the petitioner do not apply. *Holmes* v. *Holmes*, 63 Maine, 420, and *Lord* v. *Lord*, 66 Maine, 265, were cases in which the court recognized the existence of a right, not to grant a new trial, but to wholly annul a decree for a fraud practiced upon the court in obtaining a jurisdiction for divorce. *Edson* v. *Edson*, 108 Mass. 590 was a case of the same kind. In those cases the question was whether certain proceedings of divorce were nullities or not.

We do not reject that portion of the petition which asks for a reduction of the alimony and a reversal of the decree of custody. Those are revisable matters. The ruling below had no relation to them. The petition may stand for those purposes, if desired.

In the decree passed in the original proceeding, it was ordered that the libelee's real estate be sequestrated for the purpose of securing payment of the allowances granted, unless otherwise secured, and a question was presented to us whether that had any binding effect without more particular and definite form. It did not create a lien. It was a notice of something to be done if circumstances required. The statute provides that the estate shall be "set out to her for life," upon which the lien shall fasten. The estate set out must be described in some terms that will give identification. *Sansom* v. *Sansom*, 4 Pro. & Div. 162 (32 Eng. Rep. Moak's); 2 Bish. Mar. & Div. § 498.

Exceptions overruled.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

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WILLIAM CASSIDY, administrator on the estate of

ALEXANDER CAMERON,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion December 2, 1884.

Negligence. Fellow-servants.

A person in charge of a railroad construction train ordered the plaintiff's intestate, an employee, to jump upon a car from a station platform, while the train was in motion. The intestate caught hold of a stake in a platform car, the stake not being at the time properly secured by the dog or pawl which serves to keep the stake in a firm and upright position, and thereby fell under the wheels of the cars and was injured. *Held:* That the conductor who gave the order, and the employee who neglected to put the pawl in place, were fellow-servants with the employee who was injured, in a common and associated service, and that the injured employee could not maintain an action against the railroad company for the injury.

ON REPORT.

An action of the case.

The defendant filed a general demurrer which was joined, whereupon the case was reported to the full court for decision. If the action was legally maintainable upon the facts alleged, the case was to stand for trial. Otherwise the plaintiff was to be nonsuited.

The facts are sufficiently stated in the opinion.

The case was ably argued by *H. L. Mitchell*, for the plaintiff, and *Wilson and Woodward*, for the defendant.

PETERS, C. J. This case falls within a doctrine well established in this state, and affirmed in the late case of *Doughty* v. *Log Driving Co. ante*, 143. There is no occasion to repeat at this time the reasons upon which the doctrine rests, or to restate the authorities in support of it.

Some exceptions to the general rule have been admitted in some of the late authorities, none of which can apply to or affect the present case.

The declaration, taking the counts together, clearly sets out and complains of two alleged wrongs. First: That a person in charge of a railroad construction train ordered the plaintiff's intestate, an employee, to jump upon a car from the station platform while the train was in motion. Second: That in order to get upon the train, the intestate was required to catch hold of a stake in a platform car, the stake not being at the time properly secured by a "dog or pawl" which serves to keep the stake in a firm and upright position. The intestate fell under the wheels of the cars and was thereby injured, and soon after died from the injuries received.

The conductor's order to jump upon a moving train, need not have been obeyed. The employee should decide the propriety of such an order for himself. But the principal answer to the causes in the declaration alleged is, that the conductor who gave the order, and the employee who neglected to put the dog or pawl in place, were fellow-servants with the employee who was injured, and that, for their neglects which may inflict injuries upon one another, the defendants, in whose common and

associated service they were, are not legally responsible. It is not pretended that the car and its appendages were not of proper construction, or that the company was guilty of a want of care in the selection of its servants and employees. The doctrine of the law that defeats the present action, does not seem harsh or inequitable. It is really adopted into the law from the common views of men and the common business of life. To sue a mechanic or a farmer because one man in his employment has accidentally injured another in the same employment, would be quite an unheard of thing.

Plaintiff nonsuit.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

MARSHALL W. SAWYER *vs.* CHARLES P. BROWN.

Penobscot. Opinion December 12, 1884.

Complaint for costs. Notice. Judgment.

Judgment may be rendered on a complaint for costs without notice to the plaintiff of the filing of the complaint when it is made to appear to the court, that the writ was duly served upon the defendant and the plaintiff had failed to enter his action.

When such a judgment has been rendered the court is presumed to have acted upon competent evidence, sufficient to establish the necessary facts.

ON REPORT on agreed statement of facts.

Audita Querela to vacate a judgment for costs, rendered upon a complaint for costs at the October term, 1871, and annul the execution issued thereon.

The facts are stated in the opinion.

Davis and Bailey, for the plaintiff.

C. P. Brown, for the defendant.

HASKELL, J. *Audita Querela* to vacate a judgment of this court for costs, and to annul an execution issued thereon.

The plaintiff sued out a writ returnable to a term of this court, and caused the defendant to be legally summoned to appear and answer to the suit. The plaintiff did not enter his action, and the defendant, during the term to which the writ was returnable, appeared and complained for costs, by reason of the non entry of the action. The court, without notice to the plaintiff, gave judgment for costs in the defendant's favor, and he had execution.

It is objected that the judgment is absolutely void for want of notice to the plaintiff. Undoubtedly this objection is well taken, unless the law implies notice from the proceedings in the case. *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456. When the writ was delivered into the hands of the officer, the law required him to obey its command, and have the same in court with a return of his doings thereon. The return of the writ by him would not be an entry of the action in court. That was a duty, which the plaintiff could perform, or omit, as he was pleased to do. He did not perform it; but the defendant as he was commanded, appeared and complained for costs. He had been summoned by a precept of the court, sued out at the instance of the plaintiff. Of the consequences arising from his own action, the plaintiff is bound to take notice. The complaint for costs was not a new action, nor in the nature of one. It simply called the attention of the court to its own executed precept, presumed to have been returned to its custody, and for want of the plaintiff's further prosecution of his action, asked that costs be awarded in defendant's favor. The only essential difference between this proceeding and a nonsuit is, that the latter is ordered on the failure of the plaintiff to prosecute, or sustain an action already entered in court, while the complaint for costs is grounded upon the plaintiff's failure to enter his action in court. The complaint is required as a substitute for the entry of the writ, that the court may have some proper record upon which it can enter judgment. Before the judgment can be awarded, the court must be satisfied that the defendant has been summoned on its precept, sued out at the instance of the plaintiff. A production of the summons may not be satisfactory evidence of the fact. The officer may be required to return his precept, if he has failed to do it. The law does not specify what

evidence shall be required. The court should act in its discretion, as it may do on all motions in the absence of a party by his own fault. From such action a showing of merits alone will relieve. The court is presumed to have acted upon competent evidence, sufficient to establish the necessary facts, as by inspection of the precept with the officer's return thereon. Such evidence is admitted to exist.

It is urged, that without notice on the complaint, the court cannot know but that the action may have been settled. The officer should return his precept into court, and ought not otherwise to dispose of it. The plaintiff on settlement of his cause of action has no power to take the writ from the officer. The action cannot be discontinued after service of the writ upon the defendant without his consent. True, the parties may compromise and settle their controversy, and that will work a discontinuance of the suit; but if the plaintiff fails to see that proper evidence of the settlement is returned with the writ to court, he omits that duty at his peril. When a writ has been sued out and served, the law requires that it shall be returned to court, and it becomes the plaintiff's duty to see to it, that the court is furnished with evidence that the action has been settled, and if he omits to do this, and is thereby injured, he has no one to blame but himself.

The defendant was legally summoned at the suit of the plaintiff. His action was notice to himself of the consequences liable to flow from it. He has no good cause of complaint, has shown no merit in his behalf, and ought not to prevail. *Bryant* v. *Johnson*, 24 Maine, 304.

According to agreement of the parties,

Judgment for defendant.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

REUEL W. ROBINSON in equity,

vs.

ELEAZER CLARK and PAULINA S. CLARK.

Somerset. Opinion December 13, 1884.

Practice. Fraudulent conveyances. Husband and Wife. Equity, decrees in.

It is not expected that the court will encumber its legal opinions, in cases mainly of fact, with much more than a statement of its conclusions from the facts, without detailing the facts themselves.

Conveyances of property from husband to wife are to be closely scanned when the rights of his creditors are involved, inasmuch are they (husband and wife) have unusual facilities for the perpetration of fraud upon creditors. His conveyances of property to her without consideration are void, as against existing creditors, although no fraud be actually intended thereby.

Equitable decrees may be adapted to any requirement of a case. There is no limit to their variety or application, as called for by the varying circumstances of each particular case.

BILL in equity; heard on bill, answer and proofs.

The opinion states the case, and the material facts as found by the court.

Walton and Walton, for the plaintiff.

A. G. Emery, for the defendant, Paulina S. Clark.

PETERS, C. J. The case comes up for a decision upon the facts, and the law and equity applicable thereto. In an examination of questions of fact, in cases at law or in equity, we do not feel at liberty to encumber legal opinions with much more than a statement of our conclusions from the facts, not detailing the facts themselves. The extended facts are not often useful as a precedent for any other case, and would occupy more space in a book of law cases than can be afforded to them.

The testimony shows the following statement to be true: The husband owned and possessed a homestead; deeded it to Folsom, taking from him an agreement to reconvey; Folsom, at his

request, conveyed it to the wife; she mortgaged it to Norton, he joining in the conveyance, Norton paying Folsom the sum due to him; the husband owed the complainant, the debt ante-dating the other transactions; the complainant obtained judgment against the husband, purchased his right to the homestead upon execution on the judgment, and now asks for a conveyance of the title from the wife.

The first defense set up to the bill, is, that the property became forfeited to Folsom and that the wife purchased it of him on her own and not upon her husband's account. Of course, such a thing might be, but it was not done in this case. She paid nothing. Norton paid Folsom in full, taking the wife's note and mortgage therefor. The act was merely a redemption from Folsom who held no more than an equitable mortgage on the estate. *Stinchfield* v. *Milliken*, 71 Maine, 567. Transactions of this kind between husband and wife are to be closely scanned. There are between them unusual facilities for fraud. The absorption by her of his property, against the right of existing creditors, is not allowed. Wait, Fraud. Con. § 30. *Seitz* v. *Mitchell*, 94 U. S. 580. The husband is insolvent, having no property besides his interest in this.

The next point in defense is that there was no intention to conceal or defraud. That is not a material fact, if it be so. She has his property without consideration. She cannot convey it without his consent; nor can she withhold it from his creditors whether fraud were intended or not. *Call* v. *Perkins*, 65 Maine, 439; *Hamlen* v. *McGillicuddy*, 62 Maine, 268; R. S., c. 60 § 1.

But the wife further contends that she has contributed of her own means to the improvement of the property, and that she has a lien upon the property to the extent of the amount contributed. She may have expended one hundred dollars upon it, and she has received more than that from the rents and profits of the property. She has been more than paid. It is said that money obtained from her exertions in raising and selling poultry upon the place has gone into its value, and that money received for her board at home while teaching school went in the same direction; and these pretensions are denied by the complainant.

But these earnings accrued when the husband and wife were living at their home, and belonged, not to her, but to him. *Sampson* v. *Alexander*, 66 Maine, 182; all of the alleged defenses to the bill fail.

The husband and wife do not now live together. He makes no defense. She should release all interest to the complainant.

There should be a decree establishing a lien upon the premises as the property of the complainant, making his claim complete.

And, in order to render the remedy beneficial, the clerk may issue to an officer a mandate, substantially like a writ of possession at law, requiring the complainant to be placed in possession of the *locus* on April 1, 1885, indulging her in the possession until then. And the decree should require a deed from both defendants, releasing all their title to the land, subject to the mortgage to Norton; the details for all of which may be set out in the decree to be filed.

We have no doubt that we may require these formalities and that they are equitable. Professor Pomeroy, in his excellent work (1 Eq. Juris. § 109,) says: "Equitable remedies are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."

Bill sustained against both defendants.
Costs against the wife only.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

CHARLES B. PLUMMER, administrator of the estate of

ABEL TRACY,

vs.

SIDNEY BOWIE and trustees.

Androscoggin. Opinion December 15, 1884.

Pleadings. Declaration. Rent. R. S., c. 94, § 10,

An omnibus count of general assumpsit is not vitiated by referring to an invalid count in the same writ for a bill of particulars.

A count which declares for the use and occupation of a "certain messuage and tenement of the plaintiff," without describing the premises, is good on demurrer.

A count upon an account annexed, thus, "For four months rent from December 15, 1883 to April 15, 1884, $25," is bad on demurrer.

ON EXCEPTIONS from the municipal court, Lewiston. Assumpsit. The writ was dated April 30, 1884. The exceptions were to the ruling of the judge in overruling the defendant's demurrer to the declaration.

The opinion states the material facts.

Newell and Judkins, for the plaintiff, cited: Stephen's Pl. (9th Am. ed.) 341, 269; 2 Chitty, Pl. (16th Am. ed.) 184, note G; *Walker* v. *Chase*, 53 Maine, 258; *Chase* v. *Bradley*, 26 Maine, 535; *Parker* v. *Thompson*, 3 Pick. 433; *Sturtevant* v. *Randall*, 53 Maine, 153; *Dorr* v. *McKenney*, 9 Allen, 361.

C. Record, for the defendant, cited: Gould, Pl. 30, 82, 153, c. 8, § 1; Chitty, Pl. (2d ed.) 171; *Currie* v. *Henry*, 2 Johns. 433.

PETERS, C. J. The three counts of the declaration are, severally, specially demurred to.

The second, an omnibus count of general assumpsit, is good; and it is not vitiated for referring to the first count for its bill of particulars. *Cape Elizabeth* v. *Lombard*, 70 Maine, 396;

Whitwell v. *Brigham*, 19 Pick. 117. Whether an amount due for rent can be proven under such a count, matters not here. The present is a question of pleading and not of evidence.

The third count declares for the use and occupation of "a certain other messuage and tenement of the plaintiff." The suit is brought by the plaintiff as an administrator. The defendant objects to this count for its generality, contending that a short description of the premises should be inserted in the declaration. The form is taken from Oliver's Precedents, and is approved in Chitty's Pleadings. It is drawn in general assumpsit. Although the usual practice is otherwise, it is not necessary to describe the premises or to state where they are situated. Lord ELLENBOROUGH in *King* v. *Frazer*, 6 East, 348, a leading authority upon the point, answers the objections to such brevity of pleading, and, among other things, says: "If this objection could prevail it would apply as well to counts for goods sold and delivered and for work and labor. The inconveniences alleged by defendant may be gotten rid of by calling for the particulars of the plaintiff's demand. If another action be brought, the defendant may by proper plea show that the plaintiff has before recovered the same rent for the same premises." In Lawes Pl. (ed. by Story, 1811, p. 493) it is said; "The plaintiff may, it seems, declare for the use and occupation of lands, tenements and hereditaments, generally, or of any particular lands, etc., describing them." *Thursby* v. *Plant*, 1 Saund. 238, note; Chitty, Pl. 17 Amer. ed. vol. 2, p. 184, notes.

The first count, upon an account annexed, presents more of a question. Our statutes (R. S., c. 94, § 10) allow sums due for rent to be recovered in assumpsit upon an account annexed, the account "specifying the items and amount claimed." Here the specification is, "To four months rent, from December 15, 1883 to April 15, 1884 —$25." The words, "messuage and tenement," contained in the third count, are omitted in this count. An accurate expression of the claim would be, "For use and occupation of messuage or tenement." The plaintiff contends that

the words, "For rent," are an equivalent expression, and that a claim for rent necessarily means a claim for the use and occupation of real estate. On the other hand, the defendant contends that the term no more implies the use of land than it does the use of personal property.

An answer to the plaintiff's argument is that the count does not indicate what kind of realty the rent has arisen from. Rent may come from two kinds of realty; that is, from corporeal and from incorporeal property. There are many incorporeal properties that may yield a rent. The use of a way, of a pew, of play grounds are among them. Pasturage, agistment of cattle, boomage, wharfage, buoyage and moorage are other illustrations; and there are many curious descriptions of incorporeal hereditaments in English history. Further, rents may issue out of tenements and personal property combined. For instance, from a dairy farm with the stock and utensils thereon. Bou. Law. Dic. Rent, and cases cited. And we know that it is a common occurrence to hire the use and occupation of furnished tenements. The term is also applied, in common parlance, to the use of personal property of a bulky nature. Mr. Chitty draws the distinction between a declaration for the use of a messuage and tenement and a declaration for the use of any property differing from and less than that, giving instances where the variation should be observed.

Brevity and conciseness are commendable in all written instruments. At the same time it is useless to vary from the usual and approved forms of pleading. As there may be rents issuing from different kinds of property, we incline to the opinion that the plaintiff's account-annexed falls short of the statutory requirement that the "items and amount claimed" be given.

The untenable point is advanced by the defendant that an administrator cannot maintain an action for rent of land. He may maintain the action in some cases. Rents accruing previous to an intestate's death, if a lessor, belong to his personal representative. There may be other instances where an administrator

may recover rents. *Stinson* v. *Stinson*, 38 Maine, 593; Schoul. Executors, § 216, and cases cited.

Demurrer to the first count sustained.

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

SAMUEL SYLVESTER *vs.* JOHN R. EDGECOMB, appellant.

Androscoggin. Opinion December 15, 1884.

Trader. Insolvent law. R. S., c. 70, § 44.

A person who, in the course of a few months, is engaged with another in purchasing one hundred cattle, and sells them to the proprietor of an establishment for "canning" beef, in pursuance of a previous contract with such proprietor, is a trader within the meaning of that term in the insolvency laws of this state.

ON EXCEPTIONS.

An appeal from the decree of the court of insolvency in refusing a discharge to John R. Edgecomb, as an insolvent debtor, on the ground that he was a trader and kept no cash book. The exceptions were to the ruling of the court in affirming the decree of the court of insolvency.

The opinion states the facts.

N. and J. A. Morrill, for the appellee.

Asa P. Moore, for the appellant, contended that the act of purchasing cattle under a contract with the canner, is an entirely separate and isolated transaction, and showed no intent on the part of the insolvent to set up the business or trade of cattle-dealer, and cited: *In re Rogers*, 3 B. R. 564; S. C. Lowell, 423; *Groves* v. *Kilgore*, 72 Maine 491; *In re Mark Banks*, 1 N. Y. Leg. Obs. 274, cited in Bump. p. 706.

PETERS, C. J. "In the fall of 1879, the insolvent, in company with another, purchased one hundred cattle for canning, in Harpswell, under contract with the canner, and sold

them to him." Was the insolvent a trader? We feel compelled by the decisions, to declare that he was. It is not an entirely clear and unquestionable case perhaps. It belongs to the class of cases that are found near the border line. The most difficult questions are where a party has other business, and his buying and selling is an occasional thing.

A butcher who kills only such cattle as he has reared himself, is not a trader; but if he buy them and kill and sell them, with a view to profit, he is a trader. A farmer who, in addition to his usual business, occasionally bought a horse to sell again for a profit, and continued the practice for one or two years, was held to be a trader. Another farmer, who bought a large quantity of potatoes, not to be used on his farm, but merely to sell again at a profit, was also declared to be a trader. Bou. Law Dic. (15th ed.) "Trader," and cases there collected. The extent or duration of the business is not the most material test.

Here there must have been many purchases — a business of purchasing. A good deal of time and capital, or credit, must have been involved. It is argued that there was legally but one sale. There may not have been but one contract of sale. But the inference would be that there were many sales, or, at least, many deliveries, one contract regulating the mode and manner of payment for all the deliveries. A person might, in the same manner, do a business of vast magnitude, requiring years for its prosecution.

The other transactions were not of so much significance. The same parties, in the year before and in the year after this transaction, purchased parcels of standing wood, and cut, hauled and sold the same. Here the value of the wood in the market, consisted much more in the labor of the parties than all else. A trader is one who sells goods substantially in the form in which they are bought. Still, it has been held that one engaged in the manufacture and sale of lumber may be a trader. Bou. Law Dic. We hardly think that the last named transactions, standing alone, would make the parties traders. But they serve to show that the insolvent made frequent departures from the business of farming, which he claims was his accustomed

occupation. In the case of *In re Cleland*, 2 Chan. App. Cas. 466, it was held that the lessee of a quarry, who digs rock and makes it into slate for sale, is not a trader within the meaning of the English bankrupt acts.

Any general definition of the word trader, would fail to suit all cases. Each case has its peculiarities. We are to look to the object to be attained by the requirement that the trader shall keep a cash book. We think such an extensive dealing in cattle, brings this case within the purpose of the insolvent act, which requires that books shall be kept. We think that persons who sold their cattle upon credit, would be entitled to see some recorded account of the transactions which probably produced the debtor's insolvency.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

CHARLES B. RUSSELL, administrator of EVELINA BELCHER,

vs.

HANNIBAL BELCHER.

Franklin. Opinion December 15, 1884.

Judge of probate. Executors and administrators.

A judge of probate appointed an administrator with the will annexed upon the estate of a testatrix whose deceased husband was the judge's uncle. *Held*, that the judge was legally competent to make the appointment, the relationship between him and the testatrix not rendering the appointment void.

ON REPORT.

The opinion states the case.

The report provided that if the relationship of the judge of probate with the testatrix rendered the administrator incompetent to act in such capacity, then the action should stand in court for further action of the probate court. Otherwise the defendant was to be defaulted.

S. Clifford Belcher, for the plaintiff.

Hannibal Belcher, for the defendant.

PETERS, C. J. The question is whether a judge of probate is competent to appoint an administrator (with the will annexed) upon the estate of a testatrix whose husband was the judge's uncle. The judge, a nephew of the husband of the testatrix, made such an appointment. The defendant is sued upon a note (given to the testatrix in her life-time) by the administrator, and, as a defense to the action, contends that the judge was not competent to act in the premises, and that the appointment was void.

Reliance is placed by the defendant upon the case of *Hall* v. *Thayer*, 105 Mass. 219, as an authority for the position taken. It was there held that a judge of probate was disqualified by personal interest to appoint his wife's brother an administrator of the estate of a deceased person. The judgment of the court seems to have been based upon that ground and the additional objection that the judge's wife's father was a principal creditor of the estate. The opinion is qualified in the case of *Aldrich, Appellant*, 110 Mass. 189, to the effect that the decision should stand upon the first named ground alone. The decision is an important one, very sweeping in its effect, and the extent to which we should be willing to accept its doctrine would be a questionable proposition whenever a proper occasion arises for its discussion. At all events, the case, though of a kindred character, differs from the present case. There a relative was appointed to a place of trust. Here it is not so. The judge is not related by blood or affinity to the administrator.

At the older common law, personal interest formed the only ground for challenging a judge. Bou. Law Dic. "Incompetency." It was not objectionable for a judge to sit in a cause to which a relative was a party. The public sense has become finer in that respect than formerly. According to Chancellor WALWORTH'S statement, Chancellor KENT sat in a cause where his brother-in-law was personally interested, and in another case where his own brother was the complainant. *In re Leefe*, 2 Barb. Ch. 39. He

presided probably because there was no other court that had jurisdiction of the cases. The historical phase of judicial disqualification is learnedly presented by FOLGER, J., in the case of *In re David R. Ryers*, 72 N. Y. 1.

The matter of judicial disqualification for any cause, is not regulated by any written law in this state, except that in our constitutional bill of rights it is established that "right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay." The principle is one of the common maxims and truths of the law.

But there must be some reasonable limit in the degree of relationship that disqualifies, and to the conditions under which such a disqualification applies. The degree of relationship would be determined by the general provision of our statutes, reading thus: "When a person is required to be disinterested or indifferent in a matter in which others are interested, a relationship by consanguinity or affinity within the sixth degree within the civil law, or within the degree of second cousins inclusive, except by written consent of the parties, will disqualify."

The more important question is, under what circumstances is a judge debarred from acting when a relative has an interest? The limit at which an absolute disability attaches should be clearly marked and easily defined. The common good requires it. It is generally allowed that the same interest which would debar a judge from sitting, if personal to himself, does not necessarily prevent his sitting where a relative has the interest. A judge cannot sit if he has any interest whatever. He may sit in some cases where a relative has an indirect interest. There are many instances where a judge may legally act when from motives of delicacy he would decline to do so.

The true test is, whether the relative has an interest *as a party* to the cause or proceeding before the judge, or stands in the condition of a party. In *Aldrich, appellant, supra*, it is said: "There is not the same reason that the remote or contingent interest of a relative or connection should exclude the judge from acting. It is only when the relative is a party or has a direct or apparent interest in the matter to be passed upon by the judge,

that the condition arises that works a disqualification." As said by RAPALLO, J., in the case of *In re Dodge & Stev. Mfg. Co.* 77 N. Y. 101: "Judgments and proceedings of courts against corporations would stand upon a very precarious foundation in these days, if they could be overturned on discovery that some judge who took part in them was related by blood or marriage to some stockholder of the corporation." It would be difficult for a judge to know when he could safely sit in cases where large corporations are parties.

To apply these principles to the facts, how does it appear that the judge did an improper act? Both heirs and creditors must have been interested in having some person take the administration of the estate. What pecuniary interest in the matter had any relative of the judge against any other person? It does not even appear that there were creditors. Who is the adversary party? Who opposed the appointment? If a person is interested as a party there must be another party concerned. There must be some actual or implied or apparent issue. *Non constat* that all interested persons did not consent to the appointment. Their interests may be identical rather than diverse. Even where the judge is disqualified to act from his own personal interest, it must be something more than a merely possible and theoretical interest. It must be an actual interest however small, direct or indirect. He can do merely formal acts when a relative is interested as a party. Cool. Con. Lim. § 413. The pecuniary interest of the judge's relatives was not whether A or B be appointed, but merely that a suitable person should be. Chancellor WALWORTH decided that it was not incompetent for a vice-chancellor to appoint his son upon a committee of lunacy, it being merely a ministerial service to be performed under the direction of the court. *In re Hopper*, 5 Paige, Ch. 489. See *Nettleton* v. *Nettleton*, 17 Conn. 542.

If a question arise upon the accounts of the administrator between him and the heirs, it may be that the judge could not properly decide the question. If the judge had made a relative the administrator, that would have been another question. Even in such a case we should be unwilling, unless grave consideration

should lead us to such a conclusion, to declare the appointment erroneous, or unless the appointment were made upon some issue, heard before the judge, between interested persons, the issue being whether the relative or some one else should be appointed. If all interested persons wanted the judge's relative, why not have him. If no one seasonably objects, may not the objection be considered as waived? That may present a question which we now have no occasion to consider.

In this connection, another phase of the general question may not be inappropriately adverted to, (although not necessary to the result reached in the case before us,) lest it might appear to have escaped the attention of the court in so important a discussion. And that is whether the proceedings before a judge, in cases where there is, at common law, an objection to him on account of relationship to parties, are void or merely voidable. It was held in learned and exhaustive opinions in New Hampshire that the proceedings are voidable and not void, except in the case of inferior tribunals where error or appeal does not lie, and that in that sense the court of probate is not an inferior tribunal. *Moses* v. *Julian*, 45 N. H, 52; *Stearns* v. *Wright*, 51 N. H. 600. The doctrine of the cases cited is that the proceedings before a judge where he is himself interested are void. He should know that he is interested. But proceedings before him, when not proper because his relatives have an interest as parties, are only voidable. In the first of the cases it was held that a judge of probate who had written a will, was disqualified to sit upon the probate of it, but that an appeal could be taken and the will be approved in the court above. We need not express any opinion for ourselves upon this question at this time.

Defendant defaulted.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

SAMUEL OTIS and another *vs.* THE INHABITANTS OF STOCKTON.

Waldo. Opinion December 15, 1884.

Towns. Money had and received. Ratification.

An action for money had and received does not lie against a town for money loaned to its officers upon the supposed credit of the town, but without its authority, although the money be applied to the debts and liabilities of the town, unless the town make the act valid by its subsequent sanction and consent.

There, ordinarily, must be something more than mere silence on the part of the town to create ratification. That fact connected with other facts may become material. The doctrine of assent by silence does not apply so strongly to municipal as to business corporations or to individuals.

ON REPORT.

Assumpsit for money had and received to recover the amount of three town orders of one thousand dollars each, dated November 17, 1877, signed by the selectmen of the town and accepted by the treasurer, upon which one year's interest had been paid. The orders were given to Isaac S. Staples for money loaned, and endorsed by Staples to the plaintiffs.

The plaintiffs admitted that the selectmen had no authority to hire the money, and that the town had not ratified the orders nor the payment of the interest thereon; but offered to prove that the money hired was appropriated to pay the legitimate debts of the town by the chairman of the selectmen.

The writ was dated September 17, 1881, and the plea was the general issue.

William H. Fogler, for the plaintiffs, cited: *Billings* v. *Monmouth*, 72 Maine, 174; *Belfast National Bank* v. *Stockton*, 72 Maine, 522.

In the former case the court say there is no reason to excuse a town from refunding money when it has actually been appropriated to the payment of the legal liabilities of the town. "It is," says the court, "the payment of the lawful debts of the town by

its own agents with the plaintiff's money which constitutes the cause of action." In that case the plaintiff, by showing such an appropriation of his money, was declared to be entitled to a verdict, although "the testimony tending to show authority and ratification was weighed and found wanting."

The only limitation of this doctrine in *Bank* v. *Stockton*, is that the rule applies to cases "where there was in fact and in law a payment of the debt of the town by the use of the money hired without authority when the debt was discharged not only in form but in effect."

In the case at bar the plaintiffs offered to prove that the money hired of Staples was appropriated by the chairman of the selectmen to the *payment* of the legitimate debts of the town. And the admission was that the town had not ratified the orders, not that the town had not ratified the payment of its debts by the money hired.

A. P. Gould and *Joseph Williamson*, for the defendants.

PETERS, C. J. Although the question was not so distinctly presented in some of the earlier of this class of cases, it is now well settled that an action for money had and received will not lie against a town for money loaned to its officers upon the supposed credit of the town, but without the authority of the town, although the money be applied to the payment of the debts and liabilities of the town, unless the town make the act valid by its subsequent sanction and consent. If there be no precedent authority for the action of the town officers, it must be affirmatively proved that the town has subsequently approved and ratified their acts. Any other doctrine fails to extend to municipal corporations the privileges and immunities that are accorded by the law to any and all other classes of contracting parties. It might be subversive of municipal prosperity and of all orderly administration in municipal affairs, if town officers had the power to transform the town's contracts of indebtedness, in the particulars of time and place of payment, rate of interest, and the persons to whom payable, as they pleased. It is not perceived why such a power might not be exercised, if at all, to

the extent of transforming an indebtedness upon a long term of years into an immediate liability. It is admitted that the town has not ratified the orders, and there being in the case no evidence of any ratification of the act of borrowing or of appropriating the money, the action cannot be maintained.

The learned counsel for the plaintiff contends that the town has ratified the claim of the lender as a claim for money had and received. But how? The case shows no act done directly or indirectly. Just the simple fact appears, (taking the offer to prove as proof), that the money was appropriated to the payment of the legitimate debts of the town. Stress is placed upon the word "payment," used in the offer. But that does not imply in this connection any act of the town. If the town had done anything affecting the question it would have been specifically shown. Payment here means an application or appropriation of the money, not by the town, but by the officers of the town, acting without authority. Their act is not the act of the town. There must be some act of the town. The mere acts of others do not bind the town.

The contention of the plaintiff is, virtually, that the town, by not expressly repudiating the unauthorized acts of its officers, thereby accepts their acts. That is to say, if the town takes no steps either to accept or deny, it accepts. Inaction is action. This position, if a correct one, would require a town meeting, every time an officer undertakes to impose an unauthorized liability upon the town, to enable the town to prevent ratification. There must be something more than mere silence upon the part of the town to create an estoppel. Of course, that fact in connection with other facts may become material. There may be occasions when a town should act or speak, or when it does speak by the force of circumstances. The doctrine of assent by silence does not apply so strongly to municipal corporations as to business corporations and individuals. The latter can act readily, while the former act upon formal occasions and in public meetings, in all unusual matters. It would be difficult to formulate any general rule or definition of corporate ratification. It must largely depend upon the facts peculiar to the individual

case. Here no circumstances or particulars are disclosed. There is no evidence of ratification. *Lincoln* v. *Stockton*, 75 Maine, 141; *Agawam Bank* v. *South Hadley*, 128 Mass. 503.

It becomes unnecessary to consider the other point presented by the case.

Plaintiff's nonsuit.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

JOHN PENDERGRASS, by his next friend, JOHN COLEMAN,

vs.

YORK MANUFACTURING COMPANY.

York. Opinion December 15, 1884.

Nonsuit. Practice.

A judgment of nonsuit is not a bar to a subsequent action for the same cause.

ON REPORT.

An action of the case to recover damages for injuries alleged to have been received by the plaintiff, through the breaking of the rope of an elevator in the defendant's mill, August 13, 1881.

The question presented by the report is stated in the opinion.

Benjamin F. Hamilton and *George F. Haley*, for the plaintiff, cited: *Sanford* v. *Emery*, 2 Maine, 5; *Perley* v. *Little*, 3 Maine, 97; *Mitchell* v. *New England Marine Ins. Co.* 6 Pick. 117; *Bragdon* v. *Appleton Mutual Fire Ins. Co.* 42 Maine, 259; *Safford* v. *Stevens*, 2 Wend. 158; *Scofield* v. *Hernandez*, 47 N. Y. 313.

Judgments of nonsuit is an exception to the general rule that where the pleadings, the court and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried. Freeman on Judgments, 228, and cases there cited; Murch on Arbitraments, 215; *Clapp* v. *Thomas*, 5 Allen, 159;

Morgan v. *Bliss*, 2 Mass. 111; *Jay* v. *Carthage*, 48 Maine, 359; *Bridge* v. *Sumner*, 1 Pick. 370; *Knox* v. *Waldoboro'*, 5 Greenl. 185; *Derby* v. *Jacques*, 1 Cliff. 425; *Wade* v. *Howard*, 8 Pick. 353; *Homer* v. *Brown*, 16 Howard, 363; *Wheeler* v. *Ruckman*, 7 Rob. 447; *Merritt* v. *Campbell*, 47 California, 542; 27 New York, 216; *Eaton* v. *George*, 40 N. H. 258.

Strout and Holmes and *R. P. Tapley*, for the defendant.

It is admitted that the general doctrine, at common law, was that a judgment of nonsuit is no bar to a subsequent action for the same cause. This arises from the fact that it was no determination of the merits of the cause, by either court or jury. The original judgment of nonsuit was upon the plaintiff's failure to appear when the jury returned to the bar, in which case no verdict was given. Bouvier's Law Dict. Title "Judgment of Nonsuit;" 2 Tidd's Practice, 867. So when he had commenced an action and did not prosecute it, or choose to discontinue, the judgment was "as in case of nonsuit," and had the same effect. *Ibid.* and Title "Nonsuit;" 2 Tidd's Practice, 762. "Nonsuit at common law was a mere default or neglect of the plaintiff, to pursue his remedy, and therefore he was allowed to begin his suit again, upon payment of costs." *Derby* v. *Jacques*, 1 Cliff. 425. So where an action was brought in assumpsit, where the plaintiff's remedy was in debt, a nonsuit was no bar to the proper suit, for that cause of action had not been heard. 1 Chitty's Pl. 198.

The limitation of the rule, that a former judgment shall be a bar to a new action, is to judgment on the merits, and a judgment, which was for the defendant on demurrer, does not bar a new action with a good declaration. *Wilbur* v. *Gilmore*, 21 Pick. 250. So where a former judgment was of nonsuit, it was successfully objected that the plea did not show it was upon the merits. *Wade* v. *Howard*, 8 Pick. 353. And where a judgment of nonsuit was pleaded, the plaintiff avoided it by showing that it was not on the merits. *Jay* v. *Carthage*, 48 Maine, 353. So where a motion for nonsuit was granted, and a complaint dismissed with an allowance to defendant, if there

should be further litigation, and the judgment was pleaded in bar, the court said: "A trial upon which nothing was determined, cannot support a plea of *res adjudicata*, or have any weight as evidence at another trial." *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121.

It is only when the point in issue has been determined that the judgment is a bar. *Lord* v. *Chadbourne* 42 Maine, 429; 1 Green. Ev. 529, 530. "Nor is there any foundation for the objection that the former nonsuit is a bar to another libel, it having been voluntary, and not a judgment of the court." *Jay* v. *Almy*, 1 W. & M. 262, 271.

"If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." *Hughes* v. *United States*, 4 Wall. 232.

Now in the case at bar, the judgment, though containing the word nonsuit, was not a "judgment of nonsuit" in its original technical sense, nor even in the enlarged sense of being an abandonment of the case or failure to prosecute. It was a judgment of the court upon the merits.

The plaintiff's evidence was all in and he had rested his case. No facts were in dispute upon the testimony as it stood. Upon undisputed facts, it is for the court to determine whether the parties were negligent or not. *Grows* v. *Me. Central R. Co.* 67 Maine, 100; *Brown* v. *European & N. A. R. Co.* 58 Maine, 384, 389.

It is granted that it is often a nice question whether the testimony be so clear and precise as to afford scope for this function of the court. But that question cannot arise in this case. That was one of the things presented by the former judgment. If the justice who then presided, erred in the conclusions of law which he reached upon the testimony, his ruling might have been reviewed in this court, in that case. That not having been done, it must be taken as concluded, that the testimony of the plaintiff with every inference that could be

drawn in his favor from it, warranted the judgment of the court. *Gavett* v. *M. & L. R. Co.* 16 Gray, 501; *Beaulieu* v. *Portland Co.* 48 Maine, 291.

HASKELL, J. To this action, the defendant pleaded a judgment in its favor, rendered by this court in a former suit upon the same cause of action, by the plaintiff against the defendant. In support of that plea, the defendant produced and read in evidence, the record of that judgment of the following tenor.

"The action comes on for trial on the twelfth day of the present term, and is opened to the jury duly impanneled and sworn to try the issue, and after the plaintiff had introduced his testimony and stopped, the presiding justice, after a careful review of the said testimony, considered that the plaintiff, at the time of receiving his said injury was not in the exercise of ordinary care, but that he with a full personal knowledge of the said defective condition of the defendant's machinery by which he was injured, voluntarily entered into the use thereof and that the said defective machinery existed solely through the default of a co-laborer of the plaintiff and not through that of the defendant. Therefore it is considered by the court that the plaintiff do not recover against the said defendant and thereupon ordered a nonsuit."

The case was then reported for the law court to determine whether the record of that judgment supported the defendant's plea, and would bar this action.

To the former suit for damages occasioned to the plaintiff's person by the negligence of the defendant, the general issue of not guilty was interposed, and the defendant as to the truth thereof "put itself upon the country," and the "plaintiff did the like." The cause was opened to the jury and the plaintiff's evidence was heard, whereupon the court determined that the evidence produced did not in law cast a liability upon the defendant, and therefore ordered, upon the defendant's motion, that the plaintiff become "nonsuit." This method of procedure, the court in the exercise of its discretion had a right to adopt, but in the exercise of that right, what did the court determine?

and what could it lawfully determine? could it determine the issue of fact as to the defendant's guilt? That issue had been submitted by the parties to the jury, to say after hearing all the evidence in the case what the fact was.

Defendant, instead of calling for a nonsuit, if it dared to risk the result, might have submitted the cause to the jury without producing any evidence in its favor, and the issue tendered would have been found by the jury, and judgment upon the verdict would have been a bar of any future action for the same cause. Defendant did not choose this course, but preferred to take the opinion of the court upon the legal effect of the plaintiff's evidence, without producing its own, that in case the ruling should be adverse, the whole evidence might be considered by the jury. This the defendant might lawfully do, but it should only reap those benefits naturally flowing from its chosen methods. The presiding justice considered the plaintiff's evidence insufficient in the original action to warrant him in submitting the cause to the jury, and directed the plaintiff to become nonsuit. It matters not why he ordered this result. His reasons, doubtless, were good and sufficient to justify his action; but it is entirely immaterial what they were, or whether they were properly inserted in the record. He determined no issue of fact, for that issue had been tendered to the jury. His decision upon questions of fact can only be an effectual bar, when submitted to him by both parties, and unless they agree to abide the decision of the court on such questions, the law requires that the jury alone shall determine them. In ordering a nonsuit on account of the insufficiency of the plaintiff's evidence, the court simply declares the law applicable thereto. It says the facts proved by the plaintiff fail to cast any legal liability upon the defendant; but it does not attempt to determine the actual facts of the case, nor can it do so, for the law has imposed that duty elsewhere, and as the facts of the case are not determined, it does not follow, that the plaintiff in some future suit may not be able to produce more and better evidence of his claim, which he is at liberty to do.

This view is in full accord with the cases adjudged by courts that proceed according to the course of the common law. *Morgan*

et al. v. *Bliss*, 2 Mass. 111. In *Knox* v. *Waldoboro'*, 5 Greenl. 185, it appeared that the parties in a former suit for the same cause of action signed an agreed statement of facts, and stipulated that, if the facts did not warrant the action, the plaintiff should become nonsuit, and the court held, that a judgment of nonsuit entered according to the stipulation was no bar to the action.

In that case the judgment of nonsuit was held to be no bar, because the facts touching the rights of the parties had not been adjudged by any tribunal. The court in the original suit simply determined the law applicable to the facts agreed. So in the action wherein a judgment of nonsuit was rendered, that is claimed to bar this suit, the undisputed facts were held insufficient in law to support the action, but were not adjudged, that is, decided in the defendant's favor. So too a nonsuit upon an agreed statement of facts was held to be no bar to a subsequent suit. *Homer* v. *Brown*, 16 How. 354. It has been said that a "nonsuit is but like blowing out a candle which a man at his own pleasure lights again." March on Arbitraments, 215; *Clapp* v. *Thomas*, 5 Allen, 158; *Bridge* v. *Sumner*, 1 Pick. 370; *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121; *Audubon, Ex.* v. *Excelsior Ins. Co.* 27 N. Y. 216; *Eaton* v. *George*, 40 N. H. 258; *Derby* v. *Jacques et al.* 1 Clifford, 425; *Jay* v. *Carthage*, 48 Maine, 353.

Action to stand for trial.

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

OLIVER GRANT

vs.

ELLIOT AND KITTERY MUTUAL FIRE INSURANCE COMPANY.

York. Opinion December 15, 1884.

Fire insurance. Insurable interest.

The plaintiff sues an insurance company for the loss of a house consumed by fire. Another person holds the plaintiff's bond to convey the property to him upon payment of a sum less than the amount of insurance.

Held: That the plaintiff can recover the full amount of the insurance, although the other person fraudulently caused the property to be destroyed, there being

no pretence that the plaintiff had any knowledge of or participation in the fraudulent act.

Grant v. *Insurance Co.* 75 Maine, 196, reaffirmed.

ON EXCEPTIONS and motion to set aside the verdict.

Assumpsit on a policy of fire insurance, covering two thousand dollars on certain farm buildings of the plaintiff, which were destroyed by fire. The verdict was for two thousand one hundred fifty-six dollars and fifty cents.

The case has been once before considered by the law court and is reported in 75 Maine, 196.

William J. Copeland, for the plaintiff.

R. P. Tapley, for the defendant.

The insurance was really for the benefit of Higgins. His position was that of mortgagor. On payment of sixteen hundred dollars to Grant the property was his. Grant must account to him for the insurance he receives. All the defence which the company could make against Higgins, they can make against Grant. This should certainly be so as to the excess over the sixteen hundred dollars due Grant. If Higgins caused the premises to be burned and is to receive so much of the verdict as exceeds the sixteen hundred dollars due Grant he accomplishes his wicked and fraudulent purpose.

See Wood on Fire Ins. § 134; *Waring* v. *Loder*, 53 N. Y. 581; *Holbrook* v. *Insurance Co.* 1 Curtis, 193; *Buffalo Steam Engine Works* v. *Insurance Co.* 17 N. Y. 406; *Clinton* v. *Insurance Co.* 45 N. Y. 467; *Insurance Co.* v. *Woodbury*, 45 Maine, 447; *Lander* v. *Arno*, 65 Maine, 30.

PETERS, C. J. The counsel for the defense learnedly and elaborately argues the point in this case that was determined in *Grant* v. *Insurance Co.* 75 Maine, 196. We see no reason for the renunciation or qualification of any thing that was there held. In fact, a re-examination of the case most strongly impresses us with both the correctness and justice of former conclusions.

Another proposition of law, that did not arise at the previous presentation of the case, is earnestly pressed by the defendants' counsel. When the plaintiff purchased the property in question

he paid sixteen hundred dollars of the price to be paid, and Charles F. Higgins paid five hundred dollars towards the same, the plaintiff at the time giving a bond to Higgins, to convey the title to him upon the payment of the sixteen hundred dollars within certain times, and according to the tenor of certain notes given therefor. The defendant contended that, if Higgins, without the complicity of the plaintiff, set fire to and destroyed the buildings, in order that the insurance might be obtained, the plaintiff could only recover from the insurance company the sum that was equitably due to him by the terms of the bond, the whole insurance being more than such sum. The ruling was that the plaintiff, himself an innocent party, could recover the whole amount of insurance promised by the policy.

We think the ruling was right, although the position of the defense is a plausible one. The case does not distinctly disclose that the relations between Grant and Higgins were such as to give Higgins an equitable interest in the insurance, but that may be assumed for this discussion, as the course of the trial seems to indicate such to be the fact.

The plaintiff was the legal owner. He was entitled to the whole property until wholly paid for. The bond had not expired when the buildings were burned. His rights would be likely to be prejudiced by the admission into his case of a question in which another might have more interest than he. His litigation would be more expensive to him. The other party was not in the case to defend himself. Of course, the truth of the charge was not admitted. Higgins was in no sense a party to the record, nor could he be compelled to come in and be made one. We think the remedy of the defendants would not be in this action, but might be in some other action at law, or by some suit in equity. See *Brown* v. *Haynes*, 52 Maine, 578.

Although the damages recovered may be more than we should have estimated them, we think the verdict should not be disturbed on that account.

Exceptions and motion overruled.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

KATE H. DOCKRAY *vs.* CHARLES R. MILLIKEN.

Cumberland. Opinion December 15, 1884.

Dower. Improvements. Appraisers. Practice. Writ of seizin.

The demandant's husband, in 1868, shortly before his death, gave her a deed of warranty of a homestead; as his executrix she did not inventory it with his estate; she remained in possession until 1878, renting the property, when she was ousted by the defendant, claiming under mortgages from the husband, of an earlier date than her deed; during her possession she made some payments upon the mortgages. *Held:* That the demandant is entitled to dower in the premises; that the facts do not constitute a waiver or an estoppel to prevent it.

The owner should be allowed for improvements properly added to the premises. An ell, containing a dining room and kitchen, annexed to the house, and erected to make the premises more tenantable, is to be regarded as an improvement.

When improvements are to be considered, the writ of seizin to the officer should notice the fact. If the appraisers commit mistakes they can be corrected before an acceptance of the return of the officer. And the court may give instructions in advance for the guidance of the appraisers, if the pleadings and evidence enable it to do so.

In the calculations for division, the defendant should be allowed the actual value which the permanent additions or improvements contribute to the value of the whole estate; that may be more or less than the cost, although the cost would be, *prima facie*, a fair criterion.

The damages for detention of dower are to be assessed by the jury, unless the parties agree to allow the appraisers to make the assessment, or dispose of the question in some other way; they are usually assessed before the writ of seizin issues, but may be afterwards; the forms are adaptable to circumstances.

ON REPORT.

Action of dower in certain premises in Portland, corner of Brackett and Danforth streets.

H. D. Hadlock, for the plaintiff, cited: Coke on Litt. 32; 2 Blackstone, 130; *Perkins* v. *Little*, 1 Maine, 151; *Bolster* v. *Cushman*, 34 Maine, 428; *Littlefield* v. *Paul*, 69 Maine, 527; *Richardson* v. *Wyman*, 62 Maine, 280; *Mallory* v. *Horan*, 12 Abbot, N. Y. Pr. R. 289; R. S., c. 103, § 11; *Hastings* v. *Clifford*, 32 Maine, 134; *McLeery* v. *McLeery*, 65 Maine, 175;

Walsh v. *Wilson*, 131 Mass. 535; *Powell* v. *M. & B. M'f'g. Co.* 3 Mason, 368.

William L. Putnam, for the defendant.

We ask the court to determine the deduction by reason of the improvements, so the same may be expressed in the warrant to the commissioners. *Walsh* v. *Wilson*, 131 Mass. 535; *Carter* v. *Parker*, 28 Maine, 509, 510.

The demandant having elected, with the knowledge of the existence of the mortgages, to hold under the warranty deed of her husband, and having actually held under it and derived the benefits of such holding, cannot now claim dower.

Whether upon the whole she is a gainer or a loser by the course which she pursued, is not shown in the case, and cannot be computed, because she may die to-morrow and may live for years; and probably is of no importance inasmuch as she exercised her option to retain the freehold, instead of asking for an assignment of her dower, with a full knowledge of the condition of the title.

R. S., c. 103, § 11, providing that in certain cases the widow shall be endowed anew, does not reach this case. The words contained in it referring to the provision made for her "by will or otherwise" are explained by the text in juxtaposition, and the words "or otherwise" refer to the pecuniary provision provided for in section 8.

In *French* v. *Pratt*, 27 Maine, 381, it was held that neither the common law, giving the right to be endowed anew, nor this provision of the statute availed anything where the widow was endowed against common right by her consent.

This shows that this provision of statute is to be strictly construed; and indeed on p. 393 the court approves the position that this provision of statute is in affirmance of the common law, rather than an introduction of a principle entirely new.

The same chapter of the R. S., (c. 103, § 6,) provides that "a married woman of any age may bar her right of dower in an estate conveyed by her husband by joining in the same, or a subsequent deed."

The demandant certainly joined in this deed from her husband, so that the letter of this statute is complied with. She joined in it, and accepted it, and maintained her position under it after his death, with a knowledge of all the circumstances; and the question is whether this, in reference to the present statutes of Maine giving married women full rights of contract, complies with the principles of construction of the statute as well as with its letter, or interposes any principle of law which cuts off dower as against tenant.

Counsel further cited: *Windham* v. *Portland*, 4 Mass. 388; and *McLeery* v. *McLeery*, 65 Maine, p. 173; Greenleaf's Cruise, vol. 1, p. 163, note 2; *French* v. *Lord*, 69 Maine, 537; *Barbour* v. *Barbour*, 46 Maine, 9; *Learned* v. *Cutler*, 18 Pick. 11; *Fowler* v. *Shearer*, 7 Mass. 25; *Stevens* v. *Owen*, 25 Maine, 94; *French* v. *Peters*, 33 Maine, 396.

PETERS, C. J. The question presented is, whether dower can be recovered by the plaintiff upon the following facts: The plaintiff's husband gave her a deed of the *locus*, with covenants of warranty, dated in 1855, delivered in 1868, shortly before his death. As his executrix she returned no inventory of this real estate. The defendant holds under foreclosed mortgages given by the husband in 1863 and 1867. The widow remained in possession of the premises from the death of her husband in 1868 until 1878, being then ousted by the defendant. During the decade of possession by her she made some payments upon the mortgage notes. In 1883 she demanded her dower.

We are of the opinion that the action is maintainable upon the principle of the case of *McLeery* v. *McLeery*, 65 Maine, 172. The learned counsel for the defendant asks our consideration of an apparent distinction between that case and this. There the widow accepted a warranty deed of the fee after the husband's death, when her claim for dower had become a vested interest. Here she accepted the deed before the death of her husband, while her right was inchoate merely and not vested. The difference does not seem to us to be an essential one.

The point most relied upon by the defendant evidently is, that the plaintiff, if not estopped from dower, merely by the acceptance of the deed from her husband, is estopped by her conduct towards other interests and parties. We cannot concur with the views advanced by the defense upon this proposition.

What acts has she done to create an estoppel? She remained in possession. But she did not resort to any active means to keep the defendant out of possession. He ousted her when it pleased him to resort to a remedy. She paid portions of the mortgage debts from time to time. That was, presumably, a compensation or of the nature of compensation for the retention of the use and occupation of the premises. She endeavored to make the husband's deed efficacious and valuable to her. Failing to do so, she abandons it, and proceeds for another right. She made no promises or representations in order to obtain the defendant's indulgence. She has received from him no consideration for a waiver. His mortgages were taken subject to her right of dower, and he has now the same legal rights that he ever had. The old theory of merger by estoppel has no living principle left in it that can apply.

Another question is whether the defendant has erected improvements which should be excluded from the premises out of which the dower may be assigned. Repairs merely are not deductible; while improvements in the form of additions or annexations are. The defendant added an ell containing a kitchen and dining room. That was evidently an improvment and a permanent addition to the estate. The defendant, in the calculations for division, must be allowed the actual value which the new ell contributes to the value of the whole estate. *Reed* v. *Reed*, 68 Maine, 568. That may be more or less than the cost, although the cost would, *prima facie*, be a fair criterion.

The assignment of proportions is for the appraisers or commissioners. If improvements are to be considered, the writ to be issued should require a calculation of them. If there should be omissions or imperfections in the work of the appraisers, a correction can be required before their report is accepted. The court may also act in advance in presenting rules, tests and

theories for the instruction of the appraisers, whenever the pleadings and evidence enable it to do so.

The damages for the detention of the dower are usually to be assessed by the jury, although that question is sometimes also referred to the appraisers. They are usually ascertained in advance of the writ of seizin issuable. But we see no impropriety in its being done afterwards. The forms are easily changed for such purpose, and are adaptable to circumstances.

Upon the facts reported, a writ of seizin should issue to assign and set out dower, allowing for defendant's improvements; the parties to arrange how the damages recoverable may be ascertained.

Defendant defaulted.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

STEPHEN P. LANE *vs.* MARY F. S. LANE.

York. Opinion December 15, 1884.

Husband and wife. Gift. Equity. Divorce.

A husband conveyed real estate to his wife upon an oral understanding that she was to hold it for their joint benefit. The husband, after a divorce between them, sues the wife for rents accruing from the property before and after the divorce. The remedy, if any, is in equity and not at law.

During coverture the wife was accustomed to draw money on the husband's account from his employer, using it partly in family expenses, and investing the balance in personal securities kept in her possession, without any knowledge by the husband of the details of the transaction. There was no declaration of a gift from husband to wife. In such case an action lies, after divorce, by the husband against the wife for any of his money or chattels remaining in her hands at the date of the divorce or acquired by her since that time,—the same principles applying as between other principals and agents for the recovery of property.

Where a husband or wife sets up a gift of personal property from the other, the burden is upon the claimant to show the intention to give and the execution of such intention by actual delivery, by clear and incontrovertible evidence. The mere possession of the property of the one by the other is not proof of gift. There must be some distinct and expressive act to transfer the property of the one to the other.

ON EXCEPTIONS,

Assumpsit on an account annexed and for money had and received.

The action was referred, and the referee reported (after stating the facts): "I therefore decide as matter of law, that the plaintiff is entitled to recover nothing in this action, subject, however, to the opinion of the court as to the correctness of the decision aforesaid in law, if the plaintiff desires the ruling of the court thereon."

On application of the plaintiff the court considered the questions of law reported by the referee, and a ruling was made affirming the decision of the referee upon the question of law, and the report was accepted. To this ruling the plaintiff alleged exceptions.

The opinion states the material facts reported by the referee.

E. P. and W. M. Payson, for the plaintiff, cited: *Calais* v. *Whidden*, 64 Maine, 249; *Sanborn* v. *Paul*, 60 Maine, 325; 2 Story's Eq. § § 1368, 24; 2 Bishop, Mar. & Div. § 710; *Blake* v. *Blake*, 64 Maine, 182; *Abbott* v. *Abbott*, 67 Maine, 304; *Hanson* v. *Millett*, 55 Maine, 190; *Walter* v. *Hodge*, 2 Swan. 107; *Sampson* v. *Alexander*, 66 Maine, 184; 42 Md. 70; Wilson, 455; *Lloyd* v. *Pughe*, L. R. 8 Ch. App. 88; *Neufville* v. *Thomson*, 3 Edw. Ch. 92; 20 Ohio, 522; *Washburn* v. *Hale*, 10 Pick. 433; *Kane* v. *Bloodgood*, 7 Johns. Ch. 111; *Hunnewell* v. *Lane*, 11 Met. 163; *Jackson* v. *Matsdorf*, 11 Johns. 96; *Wetlon* v. *Divine*, 20 Barb. 9; Perry, Trusts, § § 2, 6, 137–143, 166; Washb. 2d, book II, ch. II, 2, and ch. III, 15; *Marshal* v. *Crutwell*, 20 L. R. Eq. 328; *McGovern* v. *Knox*, 21 Ohio, 552; *Edgerly* v. *id.* 112 Mass. 175; *Cormerais* v. *Wesselhoeft*, 114 Mass. 550; *Stevens* v. *Stevens*, 70 Maine, 92; Smith, Manuel of Eq. § 3113; *Dwinel* v. *Veazie*, 36 Maine, 512; *Rowell* v. *Freese*, 23 Maine, 184; *Brown* v. *Dwelley*, 45 Maine, 53; *Tate* v. *Williamson*, L. R. 2 Ch. App. 61; Kerr, Fraud & Mis. 150; *Proctor* v. *Robinson*, 35 Beaven, 329; 2 Wash. 178, § 23; *Hoge* v. *Hoge*, 1 Watts, 163; *Rhodes* v. *Bate*, L. R. 1 Ch. App. 258.

Wilbur F. Lunt and *Willis T. Emmons*, for the defendant, claimed that the relation of the parties negatived any implication of law, of a contract between the husband and wife, from the circumstances disclosed in this case.

In *Hertzog* v. *Hertzog*, 29 Pa. St. 465, the court held that "an implied contract is one arising under circumstances which, in the ordinary course of dealing and the common understanding of men, shows a mutual intention to contract."

Such conditions are utterly wanting in this case, and that the plaintiff cannot recover on this branch of the case is too plain for argument.

Upon the other question in the case counsel cited: *Philbrook* v. *Delano*, 29 Maine, 410; *Bassett* v. *Bassett*, 55 Maine, 127; *Goodspeed* v. *Fuller*, 46 Maine, 141; *Farrar* v. *Smith*, 64 Maine, 74; *Ins. Co.* v. *Grant*, 68 Maine, 229; *Graves* v. *Graves*, 29 N. H. 129; *Walker* v. *Locke*, 5 Cush. 90; 12 Mass. 110, 377; 2 Cush. 226; *Gould* v. *Lynde*, 114 Mass. 366; *Edgerly* v. *Edgerly*, 112 Mass. 175; *Titcomb* v. *Morrill*, 10 Allen, 15; *Cormerais* v. *Wesselhoeft*, 114 Mass. 550.

PETERS, C. J. The parties, formerly husband and wife, were divorced. During coverture he procured to be made to her a conveyance of certain real estate belonging to him, the purpose and object of the transaction being, although not evidenced by any writing, that she should hold the property "for their mutual and joint benefit." The husband, after divorce, sues her for the rents. We do not see how an action at law can be maintained to recover any of the income of the real estate. She has at all events the proprietary interest, even if she and her husband were to be the beneficiaries. Any remedy which the husband has must be in equity, where all the circumstances affecting the condition and situation of the parties may be fully considered. The action for money received, although an equitable action, is not far reaching enough to compass the end.

Whether the defendant should acknowledge a trust, and, if so, whether more than a discretionary trust, and how the trust, if one be declared, shall be executed, taking in view the present

relation of the parties, or, whether anything more than a social or moral obligation be imposed upon the defendant by the facts found by the referee, are novel and interesting questions for equity and not for the law to decide, upon which in this discussion we do not express an opinion.

We are of opinion that the action may be maintained for money in the defendant's hands coming from the plaintiff's personal property. These facts appear: For a long period during coverture, the wife was accustomed to draw money on the husband's account from his employer, using it partly in family expenses, partly for her own expenses, and investing the balance in securities kept in her own possession. The husband knew that the money was so drawn and expended by the wife, but had not kept himself informed as to the extent or details of the transaction. In other words, she has collected and now has some of his personal earnings. They were not given to her. They were merely entrusted to her. What was expended on family account, or for the wife's support, was properly used, as far as we know, but what was unexpended for any such purposes, and is now in her hands, remains his property. In procuring and appropriating the money she acted as his agent. It is none the less his because he trusted her with its collection and management. His earnings are not her property. On the other hand her earnings were his, excepting as otherwise provided by statute. *Sampson* v. *Alexander*, 66 Maine, 182. Of course, the earnings and profits of her property, if she had any of her own, would not come within this remark. If her personal earnings, save wages earned as described in the statute (R. S., c. 61, § 3), would be his, *a fortiori*, would her savings from his earnings be his? If she had saved the funds in controversy from allowances granted to her for her own use, given to her "out and out" by the husband, then the funds would be hers. But the referee does not so find the fact.

The defendant contends that the savings were received by her as a gift from her husband. The burden is upon her to establish the fact by clear and incontrovertible evidence. The marital relation often affords temptation and opportunity for fraud in

such matters. A strong instinctive passion for property often leads a husband or wife into schemes for the absorption and conversion of the other's possessions. And equity is watchful to defeat all such wrongful appropriations. It requires that the donor's intention to divest himself or herself of the property, and the execution of that intention by an act of delivery, shall be clearly proved by the donee. *Carleton* v. *Lovejoy*, 54 Maine, 445; *Wing* v. *Merchant*, 57 Maine, 383; *Neufville* v. *Thomson*, 3 Edw. Ch. 92; *Jennings* v. *Davis*, 31 Conn. 134; *Mews* v. *Mews*, 15 Beav. 529; *McLean* v. *Longlands*, 5 Ves. 71; *Lloyd* v. *Pughe*, L. R. 8 Ch. 88; *In re Breton's Estate*, 17 Ch. Div. 416; 2 Stor. Eq. Jur. § 1375; 23 Am. Law Reg. (N. S.) 630, and cases there collated.

The evidence relied upon to prove a gift is that the defendant for a long time has had the funds in her possession, dealing with them with her husband's approbation. How much importance shall attach to the fact that she was virtually allowed to have the care and management of her husband's purse? Considering the confidential relations of husband and wife, the mere receipt of the funds of the one by the other from a third party, the naked fact being unsupported by other evidence, is not any proof whatever of a gift. A possession which is as consistent with agency as with gift must indicate agency instead of gift. Between husband and wife, his possession of her property is her possession, and her possession of his property is presumed to be his possession. Either may be the agent of the other, and the same principles apply where husband and wife are principal and agent as are applied to other principals and agents. 2 Per. Tr. (3rd ed.) § 678, and cases cited; *McNally* v. *Weld*, 30 Minn. 209; *Hileman* v. *Hileman*, 85 Ind. 1. The presumption of law is that the property of the one remains his or her property, although taken into the possession of the other, until the contrary be clearly proved. There must be some clear and distinct act to transfer the title. See, besides cases *supra*, *Hanson* v. *Millett*, 55 Maine, 184.

Of course, the possession of the funds by the wife may become an important element of fact in combination with other evidence.

The other facts here do not amount to much. It is not pretended that the husband ever formally gave the funds to his wife, or declared them to be her property. He allowed her to take the money to be expended for the family support. There being an excess, it was his. "Savings out of money given by the husband to the wife for household and personal purposes belong to the husband." 2 Per. Tr. 3 ed. § 664, and cases cited. The case at bar somewhat resembles the case of *Marshal* v. *Crutwell*, L. R. 20 Eq. 328. There a fund was placed in bank in the name of husband and wife jointly, with a provision for either to draw from it, she drawing for household and other expenses, with the right to draw the balance remaining at his decease. It was held to be not a gift of the balance to the wife, but merely a mode for her to conveniently manage her husband's affairs. So in *Lloyd* v. *Pughe*, *supra*, where the wife was in the habit of drawing the husband's funds, it was styled by the court "a mere agency account by the husband without any contract which could give the wife any interest in the funds." In one of the cases above cited a wife claimed furniture because it was called hers and purchased for her; in another a wife claimed furniture because it was purchased and receipted for in her name; and in another a wife claimed silver-ware to be hers because purchased by her husband on her account and marked with her name; but all of the claims were overruled upon the ground that the evidence presented an illustration more of familiar talk and kindness and compliment than of actual gift.

The defendant further contends that there is no implied promise upon which an action of assumpsit can be founded. That depends upon whether she now has, or since the divorce has had, any money in her possession arising out of investments made of his property. There was no promise during coverture, but, as soon as that relation terminated, if she then had his money, there was an implied promise upon her part to pay it to him. If since divorce she has derived money from his property, she is presumed to promise to pay such money to him. We think this conclusion reasonably results from doctrines already well settled in this

state. *Webster* v. *Webster*, 58 Maine, 139; *Carlton* v. *Carlton*, 72 Maine, 115; *Blake* v. *Blake*, 64 Maine, 177.

We do not mean to imply that an action for money had and received, lies for the money which was in her hands during coverture, but which has not been in her hands since the parties were divorced. If, during coverture, she invested his money in securities, then the securities, if now in her possession, would be recoverable. The divorce terminated her agency of his affairs. She should surrender to him his money and chattels in her hands. If she has refused to do so, the same remedies may be taken that would apply between principals and agents in cases generally. Equity could have been appealed to by the plaintiff for the protection of his property against the wrongs of his wife, even while he was in *vinculis matrimonii*. And since those bonds are sundered, he can go to a court of equity to obtain repossession of his property, or may rely upon legal remedies so far as applicable.

Perhaps a bill in equity, covering all the grounds of the plaintiff's claim, would have been the better remedy; and, with the consent of parties, the referee might be authorized to hear and determine all questions between them upon equitable as well as legal principles, and thus terminate all disputes in a single controversy.

Exceptions sustained.

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

ALICE M. TURNER and others

vs.

HALLOWELL SAVINGS INSTITUTION.

Kennebec. Opinion December 15, 1884.

Devise. Alienation. Evidence. Declarations of testator.

An attempted restraint of the alienation of an estate, devised in fee, is void as against public policy.

The declarations of a testator, made shortly before and shortly after the execution of his will, are incompetent to control the language of a devise.

ON REPORT.

Real action to obtain possession of certain premises in Winthrop.

The plaintiffs claim title as heirs of John O. Wing, (who died prior to the commencement of the action) under the will of Ichabod Wing. The defendant claims title by conveyance from John O. Wing.

The opinion states the facts.

John H. Potter, for the plaintiffs, contended that John O. Wing took but a life-estate in the premises with remainder to his heirs; that the devise in the will of Ichabod Wing should be construed as a whole, and thus construed, it clearly showed the intention of the testator to give his son, John, a life-estate; that the clause of the devise, "to him and his heirs forever," in its technical sense, conflicted with a later clause, "nor shall my son sell or dispose of the same . . . but it shall descend to his legal heirs," and it should be expunged because it least effectuates the testator's general intention, and because the latter clause in a will, when in conflict with a preceding one must prevail.

Counsel cited: R. S., c. 73, § 6; 1 Greenl. Ev. § 287; *Crocker* v. *Crocker*, 11 Pick. 252; *Lamb* v. *Lamb*, 11 Pick. 370; Hawkins, Wills, 6, 3, 4; O'Hara, Wills, 28, 39, 40, 32, 30; *Gray* v. *Pearson*, 6 H. L. C. 61; *Towns* v. *Wentworth*, 11 Moo. P. C. C. 526; *Buck* v. *Paine*, 75 Maine, 582; *DeKay* v. *Irving*, 5 Denio, 646; Wigram, Wills, 32; 6 Waits, Acts. & Def. 382; *Braman* v. *Stiles*, 2 Pick. 460.

Baker, Baker and Cornish, for the defendant, cited: *Underhill* v. *Saratoga R. R.* 20 Barb. 455; *Osgood* v. *Abbott*, 58 Maine, 73; *Bell Co.* v. *Alexander*, 22 Texas, 350; *B. & B. R. R. Co.* v. *Brewer*, 67 Maine, 300; *Cutting* v. *Carter*, 4 Munf. (Va.) 223; *Parker* v. *Parker*, 123 Mass. 584; *Hayden* v. *Stoughton*, 5 Pick. 528; *Bradstreet* v. *Clark*, 21 Pick. 389; *Merrill* v. *Emery*, 10 Pick. 507; *Bradford* v. *Perkins*, 23 Pick. 183; *Green* v. *Thomas*, 11 Maine, 318; *Stark* v.

Smiley, 25 Maine, 201; *Marwick* v. *Andrews*, 25 Maine, 525; *Fisk* v. *Chandler*, 30 Maine, 79; 1 Wash. R. Prop. *449, *448, *54; *Jones* v. *Habersham*, 3 Woods, C. C. 443; *Mead* v. *Ballard*, 7 Wall. 290; *Finlay* v. *King's Lessee*, 3 Pet. 346; *Jones* v. *Leeman*, 69 Maine, 489; *Moore* v. *Heaseman*, Willes, 140; *Doe* v. *Holmes*, 8 D. & E. 1; *Goodlittle* v. *Madden*, 4 East, 496; Bac. Abr. "Condition" (L.) *647; Co. Litt. 223 *a*; Com. Dig. "Condition" (D. 4); 2 Redf. Wills, 666; 2 Cruise, Dig. *8; *Hall* v. *Tufts*, 18 Pick. 455; *Bank* v. *Davis*, 21 Pick. 42; *Gleason* v. *Fayerweather*, 4 Gray, 348; *Lane* v. *Lane*, 8 Allen, 350; *Sears* v. *Putnam*, 102 Mass. 5; *Deering* v. *Tucker*, 55 Maine, 289; *Stuart* v. *Walker*, 72 Maine, 146; *Moore* v. *Sanders*, 15 S. C. 440, (40 Am. R. 703); *Hobbs* v. *Smith*, 15 Ohio St. 419; *Anderson* v. *Cary*, 36 Ohio St. 506 (38 Am. R. 602); *Mandlebaum* v. *McDonnell*, 29 Mich. 78 (18 Am. R. 61); *Walker* v. *Vincent*, 19 Pa. St. 369; *Naglee's Appeal*, 33 Pa. St. 89; *Kepple's Appeal*, 53 Pa. St. 211; *Barnard* v. *Bailey*, 2 Harr. (Del.) 56; *Norris* v. *Hensley*, 27 Cal. 439; *Schermerhorn* v. *Negus*, 1 Denio, 448; *Newkerk* v. *Newkerk*, 2 Caines, 345; 30 Alb. Law J. 4; *Cotton* v. *Smithwick*, 66 Maine, 360; *Miller* v. *Travers*, 8 Bing. 244; *Hiscocks* v. *Hiscocks*, 5 M. & W. 363; *Brown* v. *Saltonstall*, 3 Met. 423; *Tucker* v. *Seaman's Aid Soc.* 7 Met. 188; *Howard* v. *Am. Peace Soc.* 49 Maine, 288; *Madden* v. *Tucker*, 46 Maine, 367.

HASKELL, J. Ichabod Wing, being seized of certain real estate, devised the same as follows:

"I give and bequeath unto my son, John O. Wing, the following real estate with the buildings thereon, to him and his heirs forever, provided he pays all my debts, and gives me a decent burial, and pays out legacies as herein ordered and expressed, [here follows a description of the real estate] all the above subject to my wife's life estate in the same, nor shall my son sell or dispose of the same or any part thereof, but it shall descend to his legal heirs."

By apt and appropriate words, the testator devised an estate to his son to be held in fee, subject to his widow's dower, and charged with the payment of debts and legacies; but, anxious that it should be retained by the son for a homestead during his life, the testator attempted to restrain its alienation by the son, and directed that it should descend to the son's legal heirs. This he could not do, for alienation is incident to the enjoyment of property, whether held in fee, or for life. If the devise could be construed to give the son a life-estate only, then the devise of the testator, that the son should retain it during life, might be thwarted, for one ingredient in the legal right to a life-estate is the right to dispose of it. *Blackstone Bank* v. *Davis*, 21 Pick. 42; *Gleason* v. *Fairweather*, 4 Gray, 348. That the testator intended to give the son the estate in fee is made clear from the expression in the devise, that it should descend to the son's legal heirs, for if he had intended that the son should take a life-estate only, the remainder could not descend from the son, and his heirs, if they took any estate under the devise, must take it directly from the testator. But the devise contains no words showing such an intent. On the contrary, the estate is expressly devised to the son and to his heirs forever.

Public policy requires that no man should be deprived of the right to dispose of property, to which he has an absolute and indefeasible title, in any lawful way that may suit his pleasure. *Piercy* v. *Roberts*, 1 Myl. & K. 4; *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vaultier*, 4 Beav. 115; *Recke* v. *Rocke*, 9 Beav. 66; *Re Young's Settlement*, 18 Beav. 199; *Gosling* v. *Gosling*, H. R. V. Johns. 265; *Magrath* v. *Morehead*, L. R. 12 Eq. 491; *Mandlebaum* v. *McDonnell* 29 Mich. 78; *Surley* v. *Massengill*, 7 Lea. 383; *Lane* v. *Lane*, 8 Allen, 350; *Sears* v. *Putnam*, 102 Mass. 5; *Deering* v. *Tucker*, 55 Maine, 289.

The declarations of the testator, shown to have been made shortly before, and shortly after the execution of the will, if offered for the purpose of controlling the language of the devise, by showing what estate the testator intended that John should take, are incompetent and inadmissible for the purpose. True,

the intent of the testator must govern, but, it is that intent expressed by the will. Such evidence may be resorted to from necessity, in cases of latent ambiguity, to prevent a devise from being declared void. *Cotton* v. *Smithwick*, 66 Maine, 360. But no case has been cited at the bar to warrant its admission in the present case. Nor is it apparent upon what principle its admissibility can be maintained.

Judgment for the tenant.

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

ALPHONSE O. FRAZER *vs.* INHABITANTS of LEWISTON.

Androscoggin. Opinion December 18, 1884.

Ways. Defects. Action for damages.

Towns and cities are liable for damages suffered from defective public ways only when an action is given by statute.

An action for such injury is not given to the father of a child whose life is lost by reason of a defective way. Nor does such action accrue or survive to the father, either at common law or by statute.

EXCEPTIONS to the ruling of the court in overruling a demurrer to the declaration.

The opinion states the case.

The plaintiff submitted without argument.

D. J. Callahan, for the defendants.

HASKELL, J. This is an action on the case against Lewiston, brought by the father to recover damages for the loss of the life of his minor son, caused by a defective and unsafe street.

Towns are liable for damages suffered from defective public ways, only, when an action is given by statute. *Mitchell* v. *The City of Rockland*, 52 Maine, 118; *Mower* v. *Leicester*, 9 Mass. 247; *Sawyer* v. *Inhbts. of Northfield*, 7 Cush. 490.

R. S., c. 18, sec. 80, gives such action to the executor or administrator of the person whose life has been lost through such defect, but does not give the father such remedy, nor does the action accrue or survive to him, either at common law, or by statute.

Exceptions sustained.
Declaration adjudged bad.

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

WARREN CRESSEY *vs.* JOSEPH PARKS.

Penobscot. Opinion December 19, 1884.

Taxes. Distraint. Trespass. Damages.

Where goods were properly seized by a collector for non-payment of taxes, and the distress became void for an irregularity afterwards occuring in the officer's proceedings, the measure of damages, in an action of trespass for the goods by the owner against the officer, is the value of the property less the amount applied to the payment of the tax.

An action may be maintained to recover a tax upon real estate, where it is assessed as a fixed number of acres in a town, without other identity or description.

ON REPORT.

The opinion states the case.

Davis and Bailey, for the plaintiff.

Without reviewing the cases where similar questions have been affirmatively decided we think in the case, *Carpenter* v. *Dresser*, 72 Maine, 380, PETERS, J., states the principle fairly upon which this claim is made, and with sufficient fullness for the purposes of this argument. He says: "It has been held that an officer, liable as a trespasser for irregularly distraining goods for taxes may be entitled to have the amount of the taxes deducted from the damages recoverable against him, the taxes being regarded as cancelled and paid. It is for the owner's benefit in such cases that the tax be regarded as paid, and other cases founded upon

the same principle may be found. But in all of them the doctrine is founded upon the idea that the deduction or mitigation is allowed with the implied assent of the owner."

It is difficult to perceive of any logical argument in support of this theory. It seems to be rather an equitable presumption to modify the rigor of an application of strict legal principles.

As directly opposed to this and more analogous to legal cause and effect is the position of the Vermont court upon the same question.

The case of *Hall* v. *Ray*, 40 Vt. 576, was that of an officer proceeding irregularly in the sale of chattels on execution whereby he became a trespasser, and having applied the proceeds on the execution claimed to have the amount allowed him in reduction of the damages. He was however charged with the *full* value of the goods taken, and the court say, pp. 579-80: "In order to entitle him to apply the property in payment of that judgment, it was necessary for him to make a legal sale of it. He was not the plaintiff's agent. He was the agent and officer of the law proceeding *in invitum* against the plaintiffs' right to hold and dispose of his own. He could only affect and bind the plaintiff by disposing and applying the proceeds of the property by pursuing the course presented by the law. Except so far as the law assumes to sell and apply one's property in payment of his debts, it is his own right to exercise his own judgment and act upon his own preferences and adopt his own modes in that respect."

But in any event to avail defendant, we think it should appear that he has paid the money to the town, and has it no longer under his control, that the tax has been paid to the town in fact. The report is silent on this point.

An examination of the copy of assessments on page three of the report shows no valid assessments of the taxes in controversy. There is no tax on real estate because no real estate is described. *Harpswell* v. *Orr*, 69 Maine, 333; *Vassalboro* v. *Nowell*, 75 Maine 242.

Barker, Vose and Barker, and *A. L. Simpson*, for the defendant.

PETERS, C. J. The defendant, a collector, seized the plaintiff's hay for non-payment of taxes and sold it at auction. All of the proceedings were regular excepting that the collector held the hay one day too long before selling. For this mistake, the plaintiff is to recover against him the full value of the hay in the present action of trespass.

The question arises, whether, in making up the amount to be recovered, the tax, for the collection of which the hay was irregularly sold, may be deducted from the amount in mitigation of damages. We think it just and equitable to make the deduction. The hay was lawfully seized, and all, but one, of the subsequent steps taken were regular. For the error, the plaintiff gets the full value of his hay instead of the price it sold for at auction. He should be satisfied to pay his taxes by such appropriation. Enough damages remain to give him the full costs of the litigation. A case is cited as opposed to such a rule. *Hall* v. *Ray*, 40 Vt. 576. In Massachusetts the practice has been to allow the deduction. *Pierce* v. *Benjamin*, 14 Pick. 356. And our own cases approve the rule as far as they touch the question. *Seekings* v. *Goodale*, 61 Maine, 400; *Carpenter* v. *Dresser*, 72 Maine, 380.

The plaintiff, however, contends that the tax cannot be thus paid because, he says, the tax is illegally assessed. The alleged illegality consists in the assessors taxing the property in a list which gives merely the number of acres of real estate without further identity or description. In our judgment, the objection is not well founded. The description is good enough for the purpose of enforcing the collection of taxes by suit. If a whole property might thereby be forfeited for an ordinary assessment, the rule would be otherwise. To prevent forfeitures strict constructions are not unreasonable. But where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally. Personal property is usually assessed by a general and numerical description. And "acres," "houses," "mills," belonging to A B, situated in Glenburn, is as good a description as to call personal property, "oxen," "cows" and "horses." If the tax-payer desires more definiteness, he can

assist in producing it by submitting to the assessors a list accurately describing his property. Judgment should be entered up for the value of the hay, less the amount of taxes.

Judgment accordingly.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

ELVIRA G. GREGORY *vs.* MELVILLE J. GREGORY.

Penobscot. Opinion December 20, 1884.

Divorce. Dower. R. S., c. 60, § 10.

R. S., c. 60, § 10, is an affirmation of a general principle of law and is not applicable to persons who abandon their residence in this state and *bona fide* establish their domicil in another state where they afterward obtain a divorce.

ON EXCEPTIONS.

The opinion states the case.

Barker, Vose and Barker and *A. L. Simpson*, for the plaintiff, cited: Story, Constitution, § 1313; *Res Adjudicata & Stare Decisis*, (Wells), § § 537, 542, 543, 550–552; *Bissell* v. *Briggs*, 9 Mass. 467; *Rathbone* v. *Terry*, 1 R. I. 73; *Kerr* v. *Kerr*, 41 N. Y. 275; *Carleton* v. *Bickford*, 13 Gray, 591; *McGiffert* v. *McGiffert*, 31 Barb. 69; S. C. 17 How. 18; *Todd* v. *Kerr*, 42 Barb. 317; *Hanover* v. *Turner*, 14 Mass. 229; *Lyon* v. *Lyon*, 2 Gray, 367; *Shannon* v. *Shannon*, 4 Allen, 134; *Smith* v. *Smith*, 13 Gray, 209; *Sewall* v. *Sewall*, 122 Mass. 156; Story, Conflict of Laws, 543; *Borden* v. *Fitch*, 15 Johns. 145; *Jackson* v. *Jackson*, 1 John. 432; 1 Bishop, Mar. & Div. (4th ed) § 87; *Bank* v. *Butman*, 29 Maine, 19; 2 Kent's Com. 108; *Garner* v. *Garner*, 56 Md. 127 (21 Am. L. Reg. 346); *Roth* v. *Ehman*, 21 Am. L. Reg. 589: *Briggs* v. *Briggs*, L. R. 5 Prob. Div. (19 American Law Reg. 586); *Niboyet* v. *Niboyet*, 18 American Law Reg. 539;

16 American Law Reg. 65, 193; *Barber* v. *Root*, 10 Mass. 260; 227; *Calef* v. *Calef*, 54 Maine, 365; *Hood* v. *Hood*, 11 Allen. 196; *Brett* v. *Brett*, 5 Met. 233; *Harteau* v. *Harteau*, 14 Pick. 181.

Josiah Crosby, for the defendant.

VIRGIN, J. Action of dower against the grantee of the demandant's late husband.

To the *prima facie* case in behalf of the demandant, the defendant interposed an alleged divorce *a vinculo* decreed to her husband by the Recorder's Court in Chicago. If sustained her right of dower is thereby cut off. *Stilphen* v. *Houdlette*, 60 Maine, 447.

The presiding justice ruled that the divorce was presumed to be legal under the evidence offered, until the contrary appeared.

Thereupon the demandant interposed the provisions of R. S., c. 60, § 10, which provides: "When residents of this state go out of it for the purpose of obtaining a divorce for causes which occurred while the parties lived here, or which do not authorize a divorce here, and a divorce is obtained, it shall be void in this state;" and introduced evidence which her counsel contended tended to bring the case within its provisions.

The defendant contended that these provisions were not applicable to a resident of this state who had *bona fide* abandoned his residence here, with no intention of returning, and had *bona fide*, established his residence in Illinois for one year (as provided by the statute of that state) prior to his application for divorce and did not return to this state. The presiding judge for the purposes of the trial, ruled otherwise, and submitted the case to the jury with the instruction (among others), that if they were satisfied that the demandant's husband went out of the state for the purpose of obtaining a divorce from the demandant, for some cause alleged in this state and that he did obtain, for some cause alleged in this state, a divorce there, then they should return a verdict for the demandant; which they did.

Was this interpretation correct?

We borrowed this statutory provision, as we have many others, from Massachusetts, and adopted it in our revision of 1841.

In 1817, the court in that commonwealth held that if a citizen of that state removed into another state for the purpose of obtaining a divorce for a cause occurring in the former, the decree would be void there. *Hanover* v. *Turner*, 14 Mass. 227. This case was approved by our court in *Harding* v. *Alden*, 9 Maine, 140, 151.

In revising the statutes of Massachusetts in 1836, the commissioners proposed and the legislature affirmed the principle by a statute in the following language: "When any inhabitant of this state shall go into any other state or country, in order to obtain a divorce for any cause which had occurred here and while the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state." R. S., (Mass.) c. 76, § 39.

In construing this statute, SHAW, C. J., said: "The object of this statute obviously was to prevent a species of abuse which had been practiced, by obtaining divorces in other states where the parties had no domicil, and where no cause of divorce had occurred. *Hanover* v. *Turner*, 14 Mass. 227. But it is confined to persons, inhabitants of this state, who go into other states for the purpose of obtaining clandestine and unauthorized divorces." *Clark* v. *Clark*, 8 Cush. 385.

So where a wife left her husband's house in Massachusetts, went to Rhode Island, and in a few months thereafter, on notice to her husband, obtained a divorce for his alleged cruelty, the same eminent jurist, speaking for the court, said: "Even before the revised statutes, upon general principles of justice and policy, such a divorce would have been void, partly on the ground that it was a proceeding in fraud of our law and partly because the court of the foreign state could have no jurisdiction of the subject matter and of the parties." *Lyon* v. *Lyon*, 2 Gray, 367. The court also discusses the evidence of the purpose in going to Rhode Island. See also *Chase* v. *Chase*, 6

Gray, 157, 161; *Smith* v. *Smith*, 13 Gray, 210; *Shannon* v. *Shannon*, 4 Allen, 134.

So in a recent case, GRAY, C. J., said; "When a person domiciled in this state goes, in evasion and fraud of the laws of his domicil, into another state, in order to obtain a divorce there, for a cause which had occurred here while the parties reside here, or for a cause which would not authorize a divorce by our law, it is within the power of the state, by its courts or its legislature, to declare or enact that a divorce, so obtained before acquiring a domicil in the other state, is or shall be of no force or effect in this state. This application of the general principle has been long recognized by this court and has been repeatedly affirmed by statute," citing cases and the various revisions, and *Ditson* v. *Ditson*, 4 R. I. 87, 93; *Sewall* v. *Sewall*, 122 Mass. 156, 161.

It seems therefore that the statute is but an affirmation of the general principle of law which makes the domicil of one of the parties at least the test of jurisdiction; and the statute is predicated upon the assumption that the party leaving the state for the purpose of getting a divorce has not acquired a domicil in the other state. That such is the opinion of C. J. GRAY, is made evident from the clause "before acquiring a domicil in the other state," in the foregoing quotation, thereby implying that if he does acquire "a domicil in the other state," the statute does not apply to him.

So Mr. Cooley says: "But if a party goes to a jurisdiction other than that of his domicil, for the purpose of procuring a divorce, and has residence there for that purpose only such residence is not *bona fide*, and does not confer upon the courts of that state or country jurisdiction over the marriage relation; and any decree they may assume to make would be void as to the other party." Cooley, Const. Lim. (5th ed) 496.

Mr. Wharton also says: "So far as this country is concerned, it is generally settled that residence without domicil will not entitle a party to sue for divorce that will bind extra-territorially. There must be a real domicil; that is to say, the domicil must be adopted as a permanency; though the fact that the object

was to acquire the benefit of a more favorable type of jurisprudence does not prevent a domicil from vesting." Whar. Conf. Law. (2d ed.) § 223.

We think the terms "residents" and "go out of the state for the purpose" show that the statute was intended simply to affirm the principle of the general law and is predicated upon the idea of the domicil remaining unchanged. A resident of any state has the undoubted right to change his domicil at will when he acts in good faith. And if his purpose be to seek the jurisdiction of his new domicil in order that he may obtain a divorce according to the laws thereof, we know of no principle of law to prevent. "Should it (the statute) be construed to be broader than the unwritten law, there is firm ground of principle for holding it to be in contravention of the constitution of the United States." 2 Bish. Mar. & Div. § § 199, c. 214; *Ditson* v. *Ditson*, 4 R. I. 87, 107; *Harding* v. *Alden*, *supra*.

The question in such cases, is one of jurisdiction, and jurisdiction depends upon domicil. Jurisdiction of a foreign court is open whatever may be the recitals relating thereto in the judgment. *Thompson* v. *Whitman*, 18 Wall. 457; *Knowles* v. *G. L. & C. Co.* 19 Wall. 58; *Sewall* v. *Sewall*, 122 Mass. 161.

We are of the opinion that the ruling was erroneous. And as this view gives a new trial, we have no occasion to examine other points.

Exceptions sustained.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

CHARLES H. ATWATER *vs.* CHARLES SAWYER.

MENZIES F. HERRING *vs.* SAME.

Penobscot. Opinion December 27, 1884.

Inn-keeper. License. Food.

Mere apprehension of insult is no excuse for an inn-keeper's refusal to receive a person as guest without circumstances and facts justifying such apprehension.

Want of food is no excuse for an inn-keeper's failure to provide entertainment for a traveler without good reason for such want.

A person in the business of keeping an inn, though not licensed as required by R. S., c. 23, is yet subject to all the common law and statute obligations of an inn-keeper and is liable for a breach of any of them.

ON EXCEPTIONS.

Appeals from the decision of a magistrate. Each case is to recover damages from the defendant, an unlicensed inn-keeper at Newport, for refusing the plaintiff entertainment at his house August 27, 1883. The verdict in each case was for eight dollars. In justification for his refusal the defendant offered to prove "that eighty or a hundred men dressed in a certain uniform arrived in Newport, and that more or less of those men proceeded to Mr. Sawyer's house, intoxicated and behaved in a disorderly manner, threatening to turn him and his house into the street; and after that insult had taken place, Sawyer, the defendant, announced that no man in uniform should have dinner at his house, being unable to discriminate between them, taking them all as parties coming there to create disturbance in his house;" which testimony the presiding judge excluded.

Other material facts stated in the opinion.

Josiah Crosby, for the plaintiffs.

Humphrey and Appleton, for the defendant, cited: 5 Bac. Abr. 232; Dyer, 158; Roll. Abr. 3; *Rex* v. *Rymer*, 2 L. R. Q. B. (C. C. R.) 136; Hawk. 451; *Markham* v. *Brown*, 8 N. H. 523; and contended that the facts offered to be proved furnished a reasonable excuse for the defendant in not receiving the plaintiffs as guests at that time.

A landlord must necessarily be invested with some discretionary power. The law directs him to keep an orderly house at the peril of indictment. It also says that he cannot refuse to entertain a traveler without a reasonable excuse. It follows then that the refusal of a disorderly person would be a reasonable excuse. If the testimony offered and excluded would satisfy a jury that the defendant believed and had reason to believe either that the plaintiffs were participators in the disorder itself, or if not, that if he gave dinner to them and none to the others it

would precipitate a disturbance in his house, could it be said that his refusal was without reasonable excuse?

EMERY, J. I. Was the offered testimony as to the conduct of third parties in the defendant's inn, just before the entry of the plaintiffs, and as to the effect of such conduct on the defendant's mind, admissible? An inn-keeper's right to exclude from his inn all disorderly persons; all persons who come with an intent to make an assault, or to insult him or his customers, and the right to exclude such without waiting until the assault was made, or the affray begun, or the insult perpetrated, may be admitted. *Markham* v. *Brown*, 8 N. H. 523. The defendant further claims, however, that when he has reasonable cause to believe such conduct is intended, he may exclude though no such intent may have, in fact, existed. No authority is cited for this last proposition, nor is its applicability clearly manifest. These actions are not for an exclusion from the inn. The exceptions do not show any attempt to exclude the plaintiffs from the house. They were admitted to, and allowed to remain in the house without objection. The only act complained of, was the refusal to furnish dinner.

If, however, the proposition be correct and applicable, the offered testimony would not be admissible unless it logically tended to prove a reasonable cause for such belief. The bill of exceptions states, that some eighty or a hundred men, members of two militia companies, and clad in the uniform of the Maine militia arrived in town on the day named; that "more or less" of them (how many is not stated) went to the defendant's inn, and there behaved in a disorderly and insulting manner. These plaintiffs though members of the militia companies, were not of this disorderly party, nor with them. It is not claimed that the plaintiffs were otherwise than sober, orderly and respectable. The only connection shown between them and the disorderly ones was their membership of the same militia companies. It is not even shown they were of the same company. The only similarity in appearance was in the uniform. Such membership was honorable, and there was not in that any reasonable cause to believe the plaintiffs intended insult. The uniform was honorable

and the rightful wearing it by the plaintiffs was no reasonable cause for apprehension of insult. We do not know how many of the organization had misbehaved. We have no right to assume the number was large. We ought rather to assume the number was small. It would be illogical and unjust to say, there was reasonable cause to believe that every member of those companies meditated misconduct because a small number of them had already misconducted. Yet if there was reasonable cause to fear insult from the plaintiffs, there was equal cause to fear it from every member.

The defendant's claim that he could not distinguish between the plaintiffs and the others, cannot be admitted against the plaintiffs' right to entertainment. The plaintiffs were not with the others. Their rights cannot be abridged by the similarity in appearance to other persons not present. It was the defendant's duty to discriminate.

We think the offered testimony, taken in connection with the facts shown by the exceptions, falls short of a logical tendency to prove a reasonable cause for the defendant's alleged apprehensions.

II. The obligations of an inn-keeper to be provided with food for guests, are sufficiently declared in R. S., c. 27, § 5. "Every inn-holder shall at all times be furnished with suitable provisions and lodging for strangers and travelers, . . . and he shall grant such reasonable accommodations as occasion requires to strangers, travelers and others." Do the defendant's exceptions show such a case as entitled him to the requested instruction; "that an inn-keeper is obliged to be provided with reasonable amount of food sufficient to meet the demands of ordinary travel and no more?" If the proposition involved in the request, be correct in the abstract, the case does not show that the defendant did have "a reasonable amount of food sufficient for the demands of ordinary travel," nor does it show that "the demands of ordinary travel" had exhausted his larder. It does not appear that dinner had been furnished a single person that day. The exceptions do not disclose any evidence to which the requested instruction would be applicable, and it was properly withheld.

The defendant excepts to the instruction that was given, to wit: "I say as a matter of law, he was bound to have food, and if he did not have food, he thereby broke his obligation, and the plaintiffs would be just as much entitled to recover, as though he did have food and refused them. I say to you, that the want of food is no defence in this case, . . I rule out the defence of want of food." This instruction should evidently not be regarded as a statement of an abstract proposition, applicable to all cases. It was closely limited by the judge to the particular case on trial. The defendant kept an inn in Newport, a large village. The two plaintiffs applied for dinner soon after noon. They offered to wait two or three hours for a dinner to be prepared, and to take bread and milk. So far as the case shows there had been no draft on the defendant's provisions up to that time. No reason nor excuse is shown for the alleged lack of food. The defendant, so far as appears by the exceptions, did not offer any evidence of any excuse, but only evidence of the lack itself. Certainly mere lack of food, without any evidence justifying such lack, cannot relieve an inn-keeper from his obligation to "be at all times furnished with suitable provisions." We think it was correct to say upon these facts as matter of law that the defendant was bound to have food enough for these two plaintiffs, and that if he did not have food enough of some kind for two persons only, he broke his obligation. The defendant's evidence not tending to show any excuse for the want of food, we think the mere "want of food was no excuse *in this case*." If the defendant wished to have this defence left to the jury, he should have offered some evidence justifying the want of food.

III. The common law and the statute already cited imposed on the defendant as an inn-keeper, certain obligations toward travelers and strangers. The statute (R. S., c. 27, § 13,) also imposed another and independent obligation, that of procuring a license from the municipal officers. The violation of one statute can be no legal excuse for violating the other. The defendant does not need to break the one to keep the other. He can and should obey both. *Norcross* v. *Norcross*, 53 Maine, 163. It is admitted that the defendant was an inn-keeper, and there was

no question as to whether "the relation of host and guest had attached." That could only become a question when the inn-keeper is sued for the loss of goods of an alleged guest. It is immaterial here, where the only complaint is that the inn-keeper would not receive the plaintiffs as guests. The requested instruction on this point was rightfully withheld.

Exceptions in both cases overruled.

PETERS, C. J., DANFORTH, VIRGIN and FOSTER concurred. HASKELL, J., concurred in the result for the following reasons:

HASKELL, J. The plaintiffs applied for dinner at the defendant's inn and were refused it. For damages suffered thereby this action is brought. Soldiers in uniform came to the defendant's inn, and behaved in a disorderly manner, and threatened to turn him and his house into the street.

Defendant offered to prove that the plaintiffs were refused entertainment, because they wore the same uniform, indicating that they belonged to the same band, and claimed that he could not discriminate between them and the disorderly soldiers. The evidence was excluded.

The defendant was not required by law to furnish entertainment for intoxicated, or disorderly persons. If he had reason to suppose that the plaintiffs belonged to the same band of disorderly soldiers, who had threatened to despoil his house, and that they were evil disposed towards him, or had conspired with the disorderly soldiers to harm his house, or guests, or if they were intoxicated, or disorderly persons, then he would have been justified in refusing them entertainment, and the question should have been submitted to the jury; but the evidence excluded falls short of what would be a justification in the premises, and for that reason was properly excluded.

The requested instruction that the defendant was bound to provide food, sufficient for the demands of ordinary travel and no more, was rightly withheld, because the evidence does not tend to prove a compliance with that rule. It goes so far only as to show the want of food, without sufficient reason or excuse. The

instructions of the presiding justice taken together hold, that the evidence of lack of food, is not sufficient in this case to excuse the defendant, as surely it is not. Nor was the evidence excluded sufficient even to tend to prove a legal excuse for the want of food to furnish entertainment to the plaintiffs.

The defendant kept an inn. His failure to procure the license required by law does not relieve him from his obligation to travelers. *Norcross* v. *Norcross*, 53 Maine, 163.

The facts of this case do not require that the rules of law so strenuously contended for by the learned counsellors for the defendant should be applied.

GEORGE N. COLBY *vs.* JOSEPH W. SAWYER, appellant.

Washington. Opinion December 27, 1884.

Appeals. Recognizance.

No recognizance, with or without sureties, need be made by an appellant from the decision of a trial justice, or of the municipal court of Calais, unless it be required by the adverse party.

Dolloff v. *Hartwell*, 38 Maine, 54, overruled.

AN appeal from the municipal court of Calais.

On motion of the appellee to dismiss, the presiding justice ruled that the court had no jurisdiction of the case, on the ground that the record does not show that the appeal was perfected, inasmuch as there was no recognizance. To this ruling, the appellant alleged exceptions.

R. J. McGarrigle, for the plaintiff.

John F. Lynch, for the defendant.

EMERY, J. By section 32, of chapter 325, of special laws of 1883, the act establishing the Calais municipal court, appeals are to be taken from that court in the same manner as from trial justices. "Before such appeal (from trial justices) is allowed, the appellant shall recognize with sufficient surety or sureties to the adverse party if required by him," &c. R. S.,

c. 83, § 19. The question in this case is whether the proviso, "if required by him," in the statute, applies to the matter of surety only, or applies to the recognizance itself.

Grammatically, the proviso clearly applies to, and modifies the entire preceding clause. If any part is to be selected as alone modified by the proviso, why should it not be the adjunct "to the adverse party?" This adjunct is nearer the proviso, while the adjunct "with sufficient surety or sureties," is in the middle of the clause. With such a grammatical construction, the meaning would be that a recognizance must be made, but it need not be to the adverse party, unless required by him. Such a construction would be absurd, yet there is as much reason for it, as for such a construction as would limit the proviso to the other adjunct.

A recognizance without a surety would be utterly useless. It would not afford the slightest additional security, since the appellee's execution would be a sharper and more effectual remedy, than a right of action on a mere personal recognizance. The pith and value of the recognizance are in the sureties. In *Vallance* v. *Sawyer*, 4 Maine, 62, the doctrine is recognized, that a statute requiring a recognizance *with* sureties, may be satisfied with a recognizance *by* sureties alone, without any personal recognizance by the party. Chief Justice MELLEN cited several English cases, construing the statute 3 Jac. 1, cap. 8, as to recognizances, and then said, "This construction is in perfect compatibility with the design of the law. The object in that case, and in the provision of our statute on the subject, is to furnish security for the benefit of the other party. The plaintiff in error in one case, and the appellant in the other, is himself liable without a recognizance. The object was to furnish additional security by the liability of the sureties; if sureties recognize, that object is attained."

Precisely the same question was before the court in Massachusetts, in *McKeag* v. *O'Donnell*, 10 Allen, 543, the language of the Massachusetts statute being identical. In strong language, the court declared that the statute admitted of no other construction than that the proviso applied to the whole matter of recognizance, and that none need be given, if not required.

The appellee's counsel, however, cites some former decisions of this court, which we must consider. *Hilton* v. *Longley*, 30 Maine, 220, was a case of an appeal from the district court, where the statute contained no proviso. Hence that case is not in point. *Bennett* v. *Green*, 46 Maine, 499, presented a question of costs only. No exceptions were taken to the ruling dismissing the appeal, hence there was no decision of the law court on that question. In *Dolloff* v. *Hartwell*, 38 Maine, 54, it is not quite clear whether the exceptions were to the exclusion of the evidence offered to impeach the record, or to the ruling dismissing the appeal. Assuming the exceptions to have been to both, as would be reasonable, the case seems to be in point, and must be met. The opinion is brief, and the report meagre, without any statement of the points made by counsel, but it seems to us that the main contention was upon the admissibility of the impeaching evidence, and that the necessity of a recognizance was not much contested. The case of *Vallance* v. *Sawyer* does not seem to have been brought to the attention of the court. The case of *Dolloff* v. *Hartwell*, was also considered by Judge DAVIS in an additional opinion in *Stetson* v. *Corinna*, 44 Maine, 43, and there said not to be a binding authority.

We fully appreciate the importance of the doctrine of *stare decisis*. It is the decision in *Dolloff* v. *Hartwell* that has caused us to consider this case at so much length. We do not think, however, one such decision should prevail against what seems to us the clear, rational, unquestionable meaning of the statute. Plainly and directly read, the language of the statute means that there is to be a certain kind of recognizance, if the adverse party requires it. The nature of the recognizance, whether with or without surety, is fixed by the statute. The appellee cannot require any other. If he does not require the recognizance provided in the statute, it need not be made.

Exceptions sustained. Order of dismissal reversed.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

LEMUEL COUNCE *vs.* PERSONS UNKNOWN.

Knox. Opinion December 26, 1884.

Petition for partition. Costs. R. S., c. 82, § 117; c. 88, § 10.

A petition for partition is not an action within the meaning of the statute which provides that in all actions the prevailing party shall recover costs.

Costs are allowable only as provided in the statute regulating the proceedings in partition.

Where no issue is raised as to the title of the petitioner, and judgment for partition is entered, the respondent cannot recover costs as matter of right. It is only when an issue is joined and tried as to the right of the petitioner to partition that the prevailing party recovers costs, and then only up to the time when judgment for partition is rendered.

PETITION FOR PARTITION.

The opinion states the material facts.

A. P. Gould, for the plaintiff.

J. H. H. Hewett and C. E. Littlefield, for defendants.

LIBBEY, J. This is a petition for partition against persons unknown, entered at the September term, 1880. At the December term, 1880, the respondent, J. R. Studley, appeared, and without objection, judgment was entered for partition as prayed for, and commissioners were appointed. At a subsequent term the report of the commissioners was presented and objections filed to its acceptance, but the report was accepted and exceptions taken. The exceptions were sustained by the law court, and thereupon the petitioner moved to have his petition dismissed, and his motion was allowed.

The only question presented here is whether upon these facts, the respondent is entitled to costs as matter of law. We think it clear that he is not. A petition for partition is not an action within the meaning of the statute which provides that, in all actions the prevailing party shall recover costs. *Moore* v. *Mann*, 29 Maine, 560. Costs are allowable only as provided in the statute regulating the proceedings in partition. Where no

issue is raised as to the title of the petitioner, and judgment for partition is entered, the respondent cannot recover costs as matter of right. It is only when an issue is joined and tried as to the right of the petitioner to partition that the prevailing party recovers costs as matter of right. R. S., c. 88, § 10. And then only up to the time when judgment for partition is rendered. *Ham* v. *Ham*, 43 Maine, 285.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

INHABITANTS OF FAIRFIELD *vs.* LIZZIE WOODMAN.

Somerset. Opinion December 26, 1884.

Tax, action for. Executors and administrators.

A tax on the real and personal estate of a deceased intestate, assessed to the "estate" of the deceased after the appointment and qualification of an administrator, is not assessed in conformity with law, and no action therefor, by the town against the administrator, can be maintained.

ON REPORT.

An action of debt to collect the taxes assessed to the estate of Orrin Woodman, in 1883.

The opinion states the material facts.

E. W. and F. E. McFadden, for the plaintiffs.

The assessors gave the notice required by the statute, and neither the defendant nor any other person brought in a list of the property taxed to the "Estate of Orrin Woodman." What were the assessors to do? It had been their custom to tax estates of deceased persons in this manner, and, in fact, we believe it to be the custom in many towns so to assess and tax them. Now then, if this assessment is pronounced illegal, it follows that all taxes thus assessed are illegal. We contend that taxing the estate, in this case, was, in effect, taxing it to

the administratrix, and, therefore, was a virtual compliance with the statute.

In the language of Chief Justice APPLETON, in drawing the opinion of *Littlefield* v. *Brooks*, 50 Maine, 475, "By these provisions of the statute, it is unmistakably apparent that it was the legislative intention that every male inhabitant of this state, and that all personal property within the same, with certain exceptions not affecting this case, should be taxed. No person is to be exempt, no one should be. No property is exempt, none should be. The payment of taxes is the price paid the state for the security the government gives to persons and to property. The state affords security to all persons and protects all property. The burden of maintaining government should be co-extensive with the benefits it confers."

D. D. Stewart, for the defendant, cited: *Elliot* v. *Spinney*, 69 Maine, 31; *Smith* v. *Northampton Bank*, 4 Cush. 1; *Hardy* v. *Yarmouth*, 6 Allen, 277; *Wood* v. *Torrey*, 97 Mass. 321.

LIBBEY, J. This action is brought to recover of the defendant, taxes assesssed by the plaintiff town for the year 1883, to the "estate of Orrin Woodman." Orrin Woodman was an inhabitant of Fairfield, and died January 5, 1882, and the defendant was duly appointed administratrix on his estate February 7, 1882. The taxes sued for were assessed on both real and personal property.

An action in the name of the town, for the collection of a tax, may be maintained against the person liable therefor. R. S., c. 6, § 175. To sustain the action, it must be shown that the tax was so assessed as to make the defendant personally liable for its payment.

By R. S. of 1871, c. 6, § 14, clause seventh, in force when the taxes were assessed, "the personal property of deceased persons, in the hands of their executors or administrators, shall be assessed to the executor or administrator, in the town where the deceased last dwelt."

By section 26 of the same chapter, it is provided that "the undivided real estate of any deceased person, may be assessed to his heirs or devisees until they give notice to the assessors of the division of the estate; or such real estate may be assessed to the executor or administrator of the deceased, and such assessment shall be collected of them as taxes assessed against them in their private capacity, and shall be a charge against the estate and allowed by the judge of probate."

Taxes assessed in conformity with these statutory provisions are a personal charge against the persons assessed; but to render the defendant liable, the tax must be assessed to her. Taxes can be legally assessed only by authority of the statute. There was no statute authorizing the assessment of the taxes in this case to the "estate of" the deceased.

The taxes not having been legally assessed to the defendant, no personal liability was created against her, and the action cannot be maintained. *Inh's of Elliot* v. *Spinney et al.* 69 Maine, 31; *Wood* v. *Torrey*, 97 Mass. 321.

Plaintiffs nonsuit.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

HENRY H. PUTNAM *vs.* CHARLES M. WHITE and another.

Penobscot. Opinion December 30, 1884.

Lumbering permits. Assignment. Mortgage. Judicial notice.

A written permit, to cut and remove timber from land, running to two permittees, may be wholly assigned by one of them, if he is authorized to act and does act for both, although he signs the assignment by his own individual name, and the assignment does not itself disclose that he is acting for or upon the authority of the other permittee. The authority of the one to act for both may be shown by oral evidence.

An assignment, in a mortgage form, of a permit to cut and remove timber, need not be recorded as a chattel mortgage, as far as cuttings are concerned which are made after the assignment; *aliter*, as to cuttings made before the assignment.

The same rule applies, where the permit extends to hemlock trees that have been already cut down and left, with the bark peeled therefrom, promiscuously upon the land.

The statutory requirement that chattel mortgages shall be recorded, applies to equitable as well as to legal mortgages.

The court will take judicial notice of the fact that the three customary surveys of logs upon the waters of the Penobscot river, namely, the woods-scale, boom-scale, and sale-scale below the boom, widely differ from one another.

ON MOTION to set aside the verdict, and on exceptions.

Trover for certain mill logs. The plea was the general issue and tender of one hundred and fifty dollars. The verdict was for three hundred thirty-two dollars and thirty-one cents.

A. McNichol, for the plaintiff.

Davis and Bailey, for the defendants upon the questions presented by the exceptions and considered in the opinion, contended that the assignment of the permit constituted a chattel mortgage within the meaning of the recording act. R. S., c. 91, § 1. Any instrument intended to operate as a mortgage in law or in equity is within the recording act. *Shaw* v. *Wilshire*, 65 Maine, 485.

If a transaction resolve itself into a security whatever may be its form and whatever name the parties may choose to give it, it is in equity a mortgage. *Flagg* v. *Mann*, 2 Sum. 533; *Stinchfield* v. *Milliken*, 71 Maine, 570; Jones, Chattel Mort. § 17; *Parks* v. *Hall*, 2 Pick. 206; *Smith* v. *Beattie*, 31 N. Y. 542; *Leitch* v. *Hollister*, 4 Comst. 211; *Eaton* v. *Whiting*, 3 Pick. 490; *McClelland* v. *Remsen*, 36 Barb. 622; *Garland* v. *Plummer*, 72 Maine, 397.

By R. S., c. 73, § 1, all peeled logs lying where cut down are personal property. The permit, therefore, as to them operated as a grant. *Wood* v. *Leadbitter*, 13 M. & W. 843; and the assignment to the plaintiff was as to such logs, at least, a mortgage, and as to such was of no effect against the defendants for want of record. And why the after-cut lumber would not come within its terms as fast as severed from the soil is not altogether clear reasoning from the analogies of the law, or even looking at the adjudged cases. See *Claflin* v. *Carpenter*, 4 Met.

580; *Douglas* v. *Shumway*, 13 Gray, 498; *Sheldon* v. *Conner*, 48 Maine, 584; *Sawyer* v. *Gerrish*, 70 Maine, 254.

This permit was given to two persons. They were joint owners. The assignment was evidently written for both to sign, but only one did sign. It carried at most only his interest and the assignee thereupon became part owner with the other original permittee. Where only one joint owner of chattels sues for their conversion, he can recover as damages only the value of his interest. 1 Chitty, Pl. (16th ed.) 75; *Putney* v. *Lapham*, 10 Cush. 234.

Nor should a subsequent agreement that it should be considered the act of both, change the character of the transaction. Such an agreement could only be of use as an estoppel, the title would continue as before. *Keables* v. *Christie*, 47 Mich. 594; *Clark* v. *Houghton*, 12 Gray, 38; *Patch* v. *Wheatland*, 8 Allen, 102.

The books maintain a wide difference between what are termed commercial partnerships and ordinary partnerships, such as are formed for mining, farming, logging and the like. And one who relies upon a contract made by one member only of a non-commercial partnership, must show affirmatively that such partner had power to contract for his associates. Such power is implied in the case of commercial partnerships only. Parsons, Part. * 99 and cases cited.

PETERS, C. J. A written permit was granted by proprietors of land to John C. Foss and B. Colbath, for a lumbering operation. The permit was assigned to the plaintiff in the following words:

"For and in consideration of supplies furnished and to be furnished by H. H. Putnam to carry on the lumbering business under the within permit, we hereby assign and deliver to the said Putnam all our right, title and interest to the within permit, and our interest to the logs that may be cut under the said permit to the said Putnam, but after the said Putnam shall sell the logs or lumber aforesaid and take out his supply bill and paid the stumpage, driving and other lien claims, he shall pay the balance to us in cash. John C. Foss."

"Dated at Danforth, this Dec. 10, 1881."

The defendants claim to have purchased the logs cut under the permit of Foss and Colbath, and, converting them to their use, the plaintiff, the assignee, sues for the logs.

The defendants contend that if the assignment prevails against their claim, it can be for only an undivided half, because Colbath, a half owner, did not sign the assignment. The assignment is in the plural number. The words "we assign," "our right," "balance to us," are contained in it. *Prima facie*, or literally construed, the assignment transfers only an undivided half of the permit. The supposition would be that it was drawn for two to sign, and that one refused or neglected to sign.

The plaintiff, however, undertook to supply the apparent insufficiency of the assignment by oral evidence, upon which the judge ruled that, if one signed for both and was authorized to do so, the assignment would have the same effect as if signed by both. This is in accordance with the modern doctrine, applicable to business papers generally, not including sealed instruments or negotiable bills and notes. The law, in many cases, admits evidence to show the real and actual capacity in which persons have set their names to written contracts. Had the words, "For self and Colbath," been added to Foss' name, the assignment would have been complete. They may be supplied by oral proof. *Higgins* v. *Senior*, 8 M. & W. 834; *Huntington* v. *Knox*, 7 Cush. 371. It is competent to show that contracting parties were agents of other persons, so as to give the benefit of the contract to, or charge its liabilities upon, the unnamed principal. An undisclosed principal may be shown to be the real party in a transaction in which the agent is the only ostensible person. 1 Whar. Con. § 202, and numerous cases in note. *Lerned* v. *Johns*, 9 Allen, 419; *Lamson* v. *Russell*, 112 Mass. 387; *Cushing* v. *Rice*, 46 Maine, 303; *Coleman* v. *Bank*, 53 N. Y. 393; *Hutton* v. *Bullock*, L. R. 9 Q. B. 572. We think the present case falls within the circle of the doctrine marked out by the authorities. It must be borne in mind that this is not a case where a third party has been misled by the form of assignment. There is no estoppel. The defendants did not purchase the logs on account of the

manner of executing the assignment. The case of *Beckman* v. *Drake*, 9 M. & W. 79, is almost this case. There A and B and C were partners. An agreement with D, relative to partnership matters, was signed by A and B in their individual names. It was held that, upon the principles of agency, A and B signed for themselves and C.

The defendants contended that the assignment is not valid against them, because it is a chattel mortgage and not recorded. This proposition is divisible into two parts or questions. First, should an assignment (of a permit) in a conditional or mortgage form, be recorded, when the cuttings under the permit are made after the assignment; and, secondly, should such an assignment be recorded when the cuttings have been in part before the assignment. In this case some logs were cut and hauled before and some after the assignment.

Where assignments are made before the operation they need not be recorded. In other words, so far as logs are concerned which are cut under a permit after its assignment, such assignment, though in mortgage form, need not be recorded. The general practice has been not to record them. It would entail a burden if required. The common form of a lumbering permit, with an assignment, (and both should be recorded if either,) would make a very extended record. Surely, a conditional assignment of a chose in action need not be recorded. It would seem strange indeed, to see upon the registry of chattel mortgages a transfer of a writ, or of an execution, or of an account or note, or of any mere contract. But a permit to operate on land is nothing but a contract. It conveys no property while it is merely executory. It is no more than a license. It cannot be attached. It cannot be assigned even without an express or implied consent of the permitter. *Emerson* v. *Fisk*, 6 Maine, 200. It is a matter of personal trust and confidence. It confers authority to do certain acts upon land, but it passes no interest in the land itself. The trees to be cut are a part of the land until severed. It certainly is an unwarrantable stretch of legal principles to say that an assignment of such an instrument conveys any personal chattels. We express our views

emphatically, inasmuch as the question is one of such practical importance in this state that there should not be a spot of doubt upon it. Nor do we see any need of such a requirement as recording an assignment of a license. Lumbering operations are bulky in their nature — cannot be concealed — and it is easy to see who are conducting them.

The counsel for the defendants in his able brief, admits the law to be as viewed by us, but thinks there may be a lingering doubt about it, inasmuch as the case of *Sheldon* v. *Conner*, 48 Maine, 584, was decided in that way by a divided court. That case had its peculiarities which carried the attention of the court away from the precise question which we now have in hand. The court got into a discussion over the issue whether a right to cut timber under a permit may be sufficient to uphold a mortgage of timber before it is cut, the opinions delivered going into the old refinements as to what extent a person may sell or mortgage property having no or only a potential existence. The easier solution of the facts there presented might have been to decide whether under the evidence adduced the mortgage was or not an assignment of the permit. It did not in terms undertake to assign it. There are other cases, however, in accord with the doctrine of the present opinion, quite directly sustaining the same view. *Fiske* v. *Small*, 25 Maine, 453; *Sawyer* v. *Wilson*, 61 Maine, 529.

The second branch of the question is whether an assignment, which is not a sale, but a mortgage, of logs already cut and hauled, need be recorded as against the creditors of the assignor or his subsequent vendees. We think it should be, unless possession is taken and kept by the mortgagee. If during a lumbering operation a permittee mortgages his permit, by assignment, and a portion of the timber has been then cut and hauled, as to that portion, the mortgage needs to be recorded, in order to be effectual against third parties; while as to the lumber afterwards cut, a registration of the mortgage is not necessary. As to the timber already cut and hauled the license is executed, while as to that to be cut it continues to be executory. Past cuttings are personal property. Future cuttings may become personal

property. To this extent does the decision go in the case of *Garland* v. *Plummer*, 72 Maine, 397. In that case the lumber had apparently been cut and hauled when the permit was mortgaged.

It may not be amiss to say that when a permit is to be mortgaged after a lumbering operation has been partially completed, it can be better executed in two parts then in any other way. The logs already cut may be separately mortgaged, in which case the permit need not be placed upon the record, and the permit can also be conditionally assigned; the mortgage to be recorded, and the assignment not to be.

Among the complications of this case another question arises: The permittees were required to cut into logs and haul away a quantity of hemlock trees which had been previously cut down and left upon the ground after the bark was peeled therefrom. The defendants contend that as to this lumber the assignment should be recorded, although the trees were cut into logs and removed after the assignment. We do not think so. The same principle applies to the fallen as to the standing timber. The same right is extended and the same conditions annexed. The permittees did not cut down the hemlock trees — nor were they their property until the license to operate upon them became executed.

Another question will have to be met at another trial: The plaintiff contends that the assignment is not a mortgage but a sale. In a legal view, the distinction may be a nice one. But we think in view of the facts disclosed by the evidence, if not a legal, it is an equitable, mortgage. Must an equitable mortgage be recorded, or does the statutory requirement apply only to legal mortgages, is the question. We think it should be regarded as applying to both classes of mortgages. Such was, no doubt the idea of the court in *Shaw* v. *Wilshire*, 65 Maine, 485. BARROWS, J., there says: "We see no reason to discriminate between an equitable mortgage and one in which the condition is more fully expressed." If equitable mortgages are not to have the privilege of a registration, we do not see how such mortgages can be very available or even valid, unless a delivery is

taken and kept. It may be said that a mortgage in the form of absolute sale gives no indication of the nature of the condition annexed. But many legal mortgages do not upon their face fully disclose the facts. The very fact however, that an instrument in the form of absolute sale is recorded, is a notice that some condition is annexed. What the condition is may be ascertained under the statutory modes provided for the purpose. A sale and a separate written defeasance given back constitute even a legal mortgage. But in such case the vendee has no means of requiring the separate defeasance to be recorded. We make no distinction of the kind, set up by the plaintiff, in the matter of the registration of deeds of real estate when regarded as equitable mortgages.

We think the damages recovered were excessive. We need not go into particulars. Suffice it to say, that the evidence is convincing that either the plaintiff should not recover at all, or that he should recover less than the amount of the verdict rendered. It is clearly proved by competent witnesses that the three customary surveys upon the Penobscot waters are widely different things. The same is common knowledge as well. RICE, J.; in *Cushman* v. *Holyoke*, 34 Maine, at p. 292. There is wide difference between selling logs at the "woods-scale," or "boom-scale," or upon a "scale below the boom," that is, after the logs have been driven to market. The most trustworthy scale is the latter. The other scales have their uses. The jury evidently heeded not the differences, when they could and should have.

Motion sustained.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

WILLIAM W. BURGESS, in equity, *vs.* CHARLES O. STEVENS.

Penobscot. Opinion December 30, 1884.

Mortgage. Foreclosure. Attorney.

A mortgagee employed an attorney to foreclose his mortgage and left with him the mortgage and note, and it was understood between them that the foreclosure should be by publication. The attorney followed this method, but fearing that might prove ineffectual he, in the absence and without the knowledge of the mortgagee, brought suit on the mortgage, took conditional judgment, &c. On a bill to redeem, brought by the mortgagor more than three years after the publication, but within three years from the time of entry under the writ of possession, *Held:*

1. That the second foreclosure by suit operated as a waiver of the first attempted foreclosure by publication.

2. That the attorney in bringing the foreclosure suit acted within the scope of his authority, and the mortgagee was estopped from repudiating that suit to the injury of the mortgagor.

ON REPORT.

Bill to redeem, heard on bill, answer and proof. The opinion states the facts.

James H. Burgess, for the plaintiff, cited: *Chase* v. *McLellan*, 49 Maine, 375; *Dela* v. *Stanwood*, 61 Maine, 51; *Smith* v. *Kelley*, 27 Maine, 237; *Tufts* v. *Maines*, 51 Maine, 393; *Stewart* v. *Davis*, 63 Maine, 539; *Fay* v. *Valentine*, 5 Pick. 418; *Fletcher* v. *Cary*, 103 Mass. 475; *Treat* v. *Pierce*, 53 Maine, 71; *Moulton* v. *Bowker*, 115 Mass. 36.

Davis and Bailey, for the defendant, contended that the attorney had no authority to bring suit and that the suit did not operate as a waiver of foreclosure by publication.

The authority of the attorney was as limited as it would be possible to make it. He was employed to do a particular thing in a particular way. He was, as to this matter, an attorney in fact. The relation of the parties was principal and agent, not attorney and client. The attorney was not at liberty to foreclose in any other way. 1 Livermore, Agency, 103–4.

The most he could do was to make and publish a new notice if he regarded the first insufficient.

The fact that the note and mortgage remained with the attorney did not extend the powers expressly limited. The utmost that can be inferred from that was authority to receive the pay on them, and the attorney testifies that that was the expressed object of leaving them.

Counsel further contended that the second foreclosure by suit at law was not inconsistent with, nor waiver of the first foreclosure, because no actual possession was ever obtained under the writ of possession. The attorney testified, "I simply went down and took formal possession of the property, making no arrangement to continue possession." *Stewart* v. *Davis*, 63 Maine, 544; *Chase* v. *Marston*, 66 Maine, 271; *Smith* v. *Larrabee*, 58 Maine, 374; 2 Jones, Mortgages, § 1273; *Fay* v. *Valentine*, 5 Pick. 418.

HASKELL, J. The orator, being seized of a parcel of real estate, situated in Oldtown, in the county of Penobscot, mortgaged the same to the respondent to secure the payment within five years, of six hundred dollars with interest at nine per cent per annum. Prior to the expiration of the five years, respondent employed an attorney to foreclose the mortgage as soon as that time should expire. When the time had expired, the attorney caused notice, that a foreclosure of the mortgage was claimed, to be duly published and recorded; but fearing that the notice was insufficient, sued out a writ of entry from this court, in the name of the respondent, caused the same to be duly served upon the orator, entered it in court, and had judgment thereon as of mortgage, sued out a writ of possession and caused the same to be served and returned to court with a return of the proper officer thereon, that he had caused the respondent to have possession of the mortgaged premises. A sufficient abstract of the proceedings was seasonably recorded in the registry of deeds for the county of Penobscot.

The orator demanded of the respondent an account of the sum due on the mortgage, and that being refused him, brought this

bill to redeem within three years from the day the respondent had possession under his writ, but not until that period had elapsed after the publication of the foreclosure notice.

The respondent asserts, that the orator's right to redeem had become foreclosed by the lapse of three years after the first publication of the foreclosure notice, before an account was demanded and this bill was filed.

The orator insists, that the foreclosure by suit at law was a waiver of the foreclosure by publication.

After the writ of entry had been sued out, and before judgment thereon, respondent entered into and took possession of the mortgaged premises, and thereafterwards the orator attorned to him. The respondent might lawfully enter, for the legal estate and the right of possession were in him. He then became a mortgagee in possession. It is well settled in this state, that a mortgagee may enter into possession of the mortgaged premises after suit for foreclosure, without waiving it, or thereby barring his action. *Tufts* v. *Maines*, 51 Maine, 393. So he may maintain an action for possession merely, without waiving a foreclosure by publication. *Stewart* v. *Davis*, 63 Maine, 539.

A mortgagee, after the condition of his mortgage is broken, may have a foreclosure of his mortgage in any of the modes provided by statute: but he cannot avail himself of more than one method of foreclosing the same mortgage at the same time. It is sound law, that the prosecuting of an action for the foreclosure of a mortgage to final judgment and execution will operate as a waiver of other proceedings to foreclose the same mortgage previously begun. A mortgagor should not be harrassed with various foreclosure proceedings at the same time, and be compelled to elect at his peril, which one he shall regard, and perchance be misled, as the orator has been in this cause, by supposing the last was intended, until it was too late to redeem from an earlier proceeding. *Smith* v. *Kelley*, 27 Maine, 237; *Tufts* v. *Maines*, *supra*; *Fay* v. *Valentine*, 5 Pick. 418.

But the respondent claims that the suit upon his mortgage was unauthorized by him, and that he is not bound by any of the proceedings touching it, and that, as it was not his act, he did

not thereby waive his foreclosure by publication. Prior to the time when his mortgage debt fell due, the respondent, expecting to be absent from the state for some considerable period, called upon an attorney and counsellor of this court, handed him the mortgage and note, and directed that, when his debt should fall due, the mortgage should be foreclosed. It was then agreed between the respondent and his attorney, that the most desirable way to foreclose the mortgage would be by publication, and a notice for that purpose was prepared and signed by the respondent, and left with the attorney for future use. No other instruction was given the attorney by the respondent as to the method of foreclosure, and he soon afterwards left the state, and did not return until three years and seven months had elapsed since the first publication of the foreclosure notice, when he first learned of the foreclosure suit, and that the orator designed to redeem his land. The respondent, after taking counsel, refused to accept the amount of his mortgage debt, and the orator brought this bill for relief.

The respondent employed an attorney and counsellor of this court to foreclose his mortgage, and although one method was considered and settled upon between them, yet the employment was to accomplish the foreclosure, and any method, adopted by the attorney to do it, would be within the scope of his employment and authority. He may have departed in the accomplishment of his purpose from a particular method directed by the respondent, but to him had been intrusted the mortgage and note, and these he produced in court, that the conditional judgment might be awarded upon them. He informed the orator that his right to redeem would expire in three years from the respondent's entry under his *hab. fac.* The orator, relying upon this information, allowed the three years following the publication of the foreclosure notice to expire without redeeming his land. This information amounted to what the public records disclosed, and the orator had a right to rely upon their legal effect touching his interest in the mortgaged estate. The respondent has not caused his judgment to be vacated or annulled, nor has he taken any measures to that end. He gave the orator good cause to

believe that the attorney was clothed with full authority to accomplish the foreclosure by suit at law. The orator, relying upon the attorney's apparent authority, coupled with his express declaration in substance, that the former foreclosure proceeding had been waived, refrained from seasonably redeeming his land. The respondent cannot repudiate the act of his attorney to the injury of the orator, who appears to have acted innocently and honestly throughout. He must be held to have waived his first attempted foreclosure, and must abide the legal effect of his conditional judgment, for two reasons:

First, because the employment of his attorney was general, to foreclose his mortgage and take possession of the premises, and the attorney acted within the scope of his authority. *Jenney* v. *Delesdernier*, 20 Maine, 183.

Second, because he is estopped from repudiating the foreclosure suit to the injury of the orator, since he gave the orator reason to believe that he authorized the suit, and the orator acted upon that belief to his prejudice, if the suit should be held unauthorized. *Stanwood* v. *McLellan*, 48 Maine, 275; *Piper* v. *Gilmore*, 49 Maine, 149; *Wood* v. *Pennell*, 51 Maine, 82.

Bill sustained with costs. Decree to be entered at nisi prius.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

WILLIAM L. GREEN, in equity,

vs.

THOMAS A. JONES, administrator, and others.

Penobscot. Opinion January 1, 1885.

Equity. Specific performance. Statute of frauds.

Specific performance of an oral contract for the conveyance of real estate, may be decreed by a court possessing full equity jurisdiction, where there have been such acts of part performance by the party seeking relief, as will be considered sufficient in equity to take the case out of the operation of the statute of frauds.

In April, 1862, G made an oral agreement for the purchase of real estate of his brother-in-law, S, who agreed to convey the premises free from all incumbrances, when paid for. G paid part of the purchase money down and entered into the possession of the premises and thereafter retained the possession. He made payments towards the balance of the purchase money at different times, completing the payments in 1869. At the time of the agreement, the premises were encumbered by mortgage, and so remained encumbered until about August, 1882. In September, 1882, S died, intestate. *Held*, upon a bill in equity by G against the administrator and heirs of S, that he was entitled to specific performance of the ageement to convey.

ON REPORT.

Bill in equity to which a general demurrer was filed and joined. The case was then, by consent, reported to the law court, upon the facts alleged, to make such decision and order such decree as the rights of the parties required.

The material facts are stated in the head note and opinion.

Charles Hamlin and Jasper Hutchings, for the plaintiff.

H. L. Mitchell, for the defendants.

FOSTER, J. The object of this bill is a specific performance of an oral agreement for the conveyance of real estate. This necessarily presupposes an agreement, and the bill must, as in all cases of this description, set out what that agreement was.

Upon inspection of the bill, it will be found to be a parol contract for the sale of real estate, and therefore void by the statute of frauds. An action at law could not be sustained on this agreement. The statute for the prevention of frauds would be a barrier to the maintaining of an action upon it.

The power of this court, as a court of equity, then, must rest on other grounds, for the specific execution of parol agreements is decreed in equity for the purpose of preventing fraud.

Heretofore, on account of limited equity powers, this court has declined to enforce specific performance of oral contracts relating to real estate, and it was not until February 28, 1874, that "full equity jurisdiction, according to the usage and practice of courts of equity in all cases where there is not a plain, adequate and complete remedy at law," was conferred upon it,

with power of decreeing specific performance in cases of this kind. St. 1874, c. 175; *Stearns* v. *Hubbard*, 8 Maine, 320; *Wilton* v. *Harwood*, 23 Maine, 131; *Pulsifer* v. *Waterman*, 73 Maine, 244.

Nor will a court of equity lend its aid in the enforcement of oral contracts, unless there shall have been such acts of part performance by the party seeking relief, as will be considered sufficient in equity to take the case out of the operation of the statute, and authorize a court of general equity powers, in the exercise of a sound discretion, to decree specific performance.

And it is well settled that the ground upon which courts of equity consider part performance of such contract as creating an equity to have the agreement specifically executed, is that it would be a fraud upon the party if the transaction were not completed. *Parkhurst* v. *Van Cortland*, 14 Johns. 15; *Newton* v. *Swazey*, 8 N. H. 13; *Tilton* v. *Tilton*, 9 N. H. 391; *Malins* v. *Brown*, 4 Comst. 410; *Pulsifer* v. *Waterman*, 73 Maine, 244; *Kidder* v. *Barr*, 35 N. H. 255.

Where there has been part performance, the refusal to complete it is in the nature of a fraud, and the defendant is estopped to set up the statute of frauds in defence. *Potter* v. *Jacobs*, 111 Mass. 37; Fry on Spec. Perf. § 384; Adams, Eq. *86; 3 Pom. Eq. Jur. § 1409.

We must in this case, then, examine and ascertain what the contract was in fact, the extent of its execution by the party seeking aid, and in what the injury, hardship or fraud would consist, if a performance were denied.

The contract set forth in the bill, and admitted by the demurrer, was, that the complainant was to pay Jeremiah G. Spaulding, now deceased, the sum of four hundred dollars, one hundred of which was to be paid down, and the balance "to be paid in such sums, at such times, and in such manner as might thereafter be convenient for the complainant," and at the completion of said payments, the complainant was to have a warrantee deed of the premises free of all incumbrance.

It further appears that in pursuance of said agreement, the complainant entered into the possession and use of the premises

the next day (April 12, 1862), and has ever since, during a period of more than twenty-one years, with the full knowledge and consent of the respondents' intestate, continued in the possession and use of the same; that payment in full was completed about seven years after the contract was made, and that said Spaulding died in September, 1882, without ever having executed and delivered the deed of the premises in accordance with said contract.

The authorities are numerous that a respondent cannot avail himself of the statute of frauds, on demurrer, when a bill in equity is brought to enforce specific performance of an oral contract, although the bill admits the contract to be by parol, if such bill, in addition to the contract, alleges matter avoiding the bar created by the statute, such as part performance. *Harris* v. *Knickerbacker*, 5 Wend. 638.

In the case at bar, to take the same out of the operation of the statute of frauds, the complainant relies on certain facts alleged in the bill, additional to the fact that the contract was oral, as amounting to such part performance as to give a court of equity jurisdiction to enforce specific performance of the contract.

What are these facts? The admission into possession of the premises under and in pursuance of the contract, immediately thereafter, and the open, exclusive and long continued occupation of the same, not only during the time in which the payments were being made, but ever afterwards for a period of more than thirteen years, together with full payment of the consideration, or price agreed upon between the parties to the contract.

Possession of land taken by the vendee and continued from the time of the contract to the time of bringing the bill, such possession being in pursuance of the contract, is an act of part performance, taking the case out of the operation of the statute of frauds. *Harris* v. *Knickerbacker*, *supra*. And in this case, where the possession had been for eight years, the court says: "The possession is, in my judgment, to be considered as taken on account of the contract and pursuant to it; and being thus taken by the appellant and continued so long, it would be a fraud

in him now to repudiate the contract. The respondent may, therefore, allege this possession and its continuance by his permission, as a part performance available to avoid the operation of the statute of frauds."

Admission into possession, having unequivocal reference to the contract, has always been considered an act of part performance. *Lester* v. *Foxcroft*, 1 Cole's Parl. Cas. 108; Leading Cas. in Eq. 774 *; *Marphet* v. *Jones*, 1 Swanst. 181; 4 Kent's Com. 451 *; Waterman, Spec. Perf. § 270.

Although it was formerly held otherwise, the authorities now all agree that mere payment of the consideration alone will not take it out of the statute. *Webster* v. *Blodgett*, 59 N. H. 120; *Glass* v. *Hulbert*, 102 Mass. 28. Nevertheless, possession together with payment is sufficient part performance; and this act is greatly strengthened where improvements have been made, serving to explain and define one act of part performance "to which it is itself a superadded and contributory act." Brown, St. Frauds, § 487; *Tilton* v. *Tilton*, 9 N. H. 390; *Wetmore* v. *White*, 2 Caines' Cas. Err. 109; Story, Eq. Jur. § 763; *Stark* v. *Wilder*, 36 Vt. 755; Waterman, Spec. Perf. § § 270, 280.

The law is thus correctly stated by the supreme court of Vermont: "It is equally well settled that where the purchaser pays the whole or a part of the purchase money, and enters into possession of the premises, or does acts relying upon the agreement, that places him in such a position that the refusal by the seller to execute the contract on his part, will operate to his prejudice and injury, beyond the payment of the money, so that the repayment of the money, or the recovery of it, will not be an adequate remedy, then such acts will take the case out of the statute, and warrant a court of equity in decreeing a specific performance of the contract. A refusal under such circumstances to execute the contract, it is sometimes said in the books, operates as a fraud on the purchaser." *Stark* v. *Wilder*, 36 Vt. 755.

The defence here claimed by the respondents in relation to the statute of frauds, cannot prevail. The facts alleged, and

admitted by the pleadings, are sufficient to constitute part performance on the part of the complainant, thereby taking the case out of the statute and entitling him to a decree for specific performance, unless by his delay in asking relief, he has slept upon his rights, and been guilty of such laches as would deprive him of that right.

By the terms of the contract the complainant was entitled to a deed at the time when he completed his payments for the land, which was something more than twelve years prior to the death of Spaulding. It can not be claimed that until after the payments were completed the complainant was in fault by reason of any delay.

Where a vendee of land had paid a large part of the purchase money and a judgment was rendered for the balance, it was held that a delay of eighteen years to enforce the contract was not a bar to a suit for specific performance. *McLaughlin* v. *Shields*, 12 Pa. St. 283.

In considering this branch of the case we are permitted to regard the situation of the parties, their relation to each other, and the circumstances of the case as gathered from the facts alleged.

The parties were near relatives, and the trust and confidence in each other, whether well founded or otherwise, seems to have been reciprocal. The complainant was to have a warrantee deed "free and clear of all incumbrances;" but it appears that, at the time of the contract, these premises, together with other lands of said Spaulding, were encumbered by mortgage, and remained thus encumbered till about a month prior to his death. He had many times acknowledged payment to different parties, promised to give complainant a deed, and, as it is alleged, would have done so had he not died.

With whom are the equities in this case? Would a decree for specific performance be doing injustice, or would a denial of it be inequitable?

The respondents represent the deceased, and there is nothing that shows any change in the situation of the parties, or the property, or any new interests intervening, that would render a

decree inequitable. The death of either party to such a contract does not impair its obligation, and forms no objection to the maintaining of a bill for specific performance, in a case where such performance might have been enforced had the party lived. *Newton* v. *Swazey*, 8 N. H. 14; *Kidder* v. *Barr*, 35 N. H. 253. Here had been full execution of the contract on the part of the complainant, and full payment by him. If the contract were executory on his part, and none or a part only of the consideration had been paid, the equities between the parties would stand in a different light. The court remarks in *King* v. *Hamilton*, 4 Pet. 328, that "when a party comes into a court of equity seeking equity, he is bound to do justice, and not to ask the court to become the instrument of iniquity."

In cases where the contract is not fully executed on the part of the complainant seeking for a decree of specific performance, even where time is not of the essence of the contract, courts of equity will not interfere where there has been long delay and laches on the part of the party seeking specific performance.

Especially is this true where there has in the mean time been a great change in the circumstances, as in the value of the land, and new interests have intervened. In such cases the refusal is upon the plain ground that it would be inequitable and unjust. *Holt* v. *Rogers*, 8 Pet. 433; *Bernard* v. *Lee*, 97 Mass. 93. "Inexcusable laches and delay," says FOLGER, J., in *Merchant's Bank* v. *Thompson*, 55 N. Y. 12, "will debar a party from the relief which, they being absent, he might have by a judgment for specific performance." But whenever the delay is attributable to the party resisting performance, he will not be allowed it as a defence. *Munro* v. *Taylor*, 3 Mc. N. & G. 723; *Morse* v. *Merest*, 6 Madd. 26; *Spurrier* v. *Hancock*, 4 Ves. 667.

In *Lloyd* v. *Collett*, 4 Bro. Ch. Cas. 469, Lord LOUGHBOROUGH said the conduct of the parties, inevitable accident, &c. might induce the court to relieve, notwithstanding the lapse of time. And in *Waters* v. *Travis*, 9 Johns. 450, the court held that mere lapse of time is not, in all cases, an objection to decreeing specific performance; and in that case where an agreement for the sale of land was suffered to remain unexecuted for fourteen years,

the vendee having continued in possession, the court under the circumstances of the case decreed specific performance of the contract. It was stated by SPENCER, J., that the continuance of the possession by the tacit consent of the respondent, was a constant and continued affirmance on his part that the holding was under the agreement, and that this was irresistible evidence that the agreement was not abandoned by the parties, and their conduct was such as to leave no doubt that they both looked to the future performance of it, and brought it within the principle laid down by Lord LOUGHBOROUGH. These views are supported by *Bernard* v. *Lee*, 97 Mass. 93, and cases there cited; *Ahl* v. *Johnson*, 20 How. 521; *Taylor* v. *Longworth*, 14 Pet. 175; *Hubbell* v. *Von Schoening*, 49 N. Y. 330; *Eyre* v. *Eyre*, 19 N. J. Eq. 102. In the case last cited, there had been a delay for fifteen years in calling for specific performance for the conveyance of land under a parol contract, and without any attempt to enforce it in the lifetime of the vendor.

Mr. Justice CLIFFORD, in the opinion of the court announced by him in *Ahl* v. *Johnson*, *supra*, says "that courts of equity, as a general rule have always claimed and exercised the right to decree specific performance of agreements in respect to the purchase and sale of real property, in their discretion, and usually to a more liberal extent in favor of purchasers than those who contract to sell such properties."

The court expects the party to show that the relief which he is seeking is, under all the circumstances of the case, equitable, and to account in a reasonable manner for his delay. *Taylor* v. *Longworth*, 14 Pet. 175. This is more often the case where the contract is executory on the part of the complainant, than when it has been executed by him. *Bernard* v. *Lee*, 97 Mass. 95; Waterman, Spec. Perf. § 480.

In this case the equities seem to be with the complainant. True, there has been delay in seeking his equitable relief, but, under the circumstances of this case, not such gross negligence as will necessarily defeat his right. He was admitted into possession of the premises and has lived there all the time under the agreement, paying the taxes and treating the property as his

own, paying in full the consideration in accordance with that agreement, without objection from the respondents' intestate, Spaulding. Such occupancy, taken in connection with the relation and situation of the parties, the length of time it has continued, the fact of its incumbrance by mortgage, the admission of payment and of promise to convey, indicates that the delay in completing the contract by executing and delivering a deed is certainly as much, if not more, attributable to the deceased, as to the complainant. And it is as evident that this delay has been acquiesced in by the deceased as well as by the complainant. It goes to show that the contract was not considered by either party as abandoned, but that there was a "constant and continued affirmance," that the holding was under the agreement, and now when the complainant can not be made whole in any other way, it is his right to ask that the agreement should be performed by the party whose delay and death has compelled him to seek the intervention of a court of equity.

Nor do we think the statute of limitations should apply in this case for the reasons before stated. The language of Mr. Justice BARROWS, in *Lawrence* v. *Rokes*, 61 Maine, 43, may not be inappropriate in this connection, that " where it appears beyond question or dispute that lapse of time has not, in fact, changed the condition and position of the parties in any important particular, and there are any peculiar circumstances entitled to consideration as excusing the delay, they (the court) will not refuse the appropriate relief, although a strict and unqualified application of limitation rules might seem to require it. . . . He does not plead the statute of limitations, and although under rule VI, he may have the benefit of a plea in bar by inserting its substance in his answer, in the absence of any intimation in the answer that he claims exemption on the score of lapse of time, the court will not interfere to set up the bar, but will consider the respondent as waiving it, even though the facts alleged were such as to make it appear that it might be successfully interposed."

Neither will courts of equity allow such a bar to prevail " to suits in equity, where it would be in the furtherance of a manifest injustice." Story's Eq. Jur. § 1521.

Under all the circumstances, and upon the case as set forth in the bill, we are of the opinion that the complainant is entitled to the specific performance for which he prays, and, in accordance with the stipulation of the parties, the entry should be,

Demurrer overruled. Bill sustained, with no costs for complainant. Decree for specific performance as prayed for in said bill.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

INHABITANTS of ISLESBOROUGH

vs.

INHABITANTS of LINCOLNVILLE.

Waldo. Opinion January 1, 1885.

Pauper. Settlement. Supplies to a person, non compos.

A person, *non compos mentis*, who continues to reside with and be dependent upon his father for guidance and support by reason of mental imbecility, after he arrives at full age, and the conditions of filial subjection, dependence, parental control and support continue to subsist as before, is not thereby emancipated.

Such person, not emancipated, cannot acquire an independent settlement by residence in a town for five successive years, but will follow the settlement of the father.

Necessary supplies furnished by a town to such person will be deemed supplies furnished indirectly to the father, and will operate to prevent his gaining a settlement.

ON REPORT.

Assumpsit for pauper supplies, furnished Georgiana Ryder.

The opinion states the facts.

Joseph Williamson, for the plaintiffs.

In the cases which hold that supplies furnished a *non compos* child prevents the father from gaining a settlement it appears that the supplies were furnished with the knowledge of the father. See *Dixmont* v. *Biddeford*, 3 Maine, 205; *Garland* v. *Dover*, 19 Maine, 441; *Clinton* v. *York*, 26 Maine, 167; *Bangor* v.

Readfield, 32 Maine, 60; *Tremont* v. *Mt. Desert*, 36 Maine, 390; *Eastport* v. *Lubec*, 64 Maine, 247; *Berkeley* v. *Taunton*, 19 Pick. 480; *Taunton* v. *Middleborough*, 12 Met. 35; *Charlestown* v. *Groveland*, 15 Gray, 15; *Woodward* v. *Worcester*, 15 Gray, 19; *Wareham* v. *Milford*, 105 Mass. 293.

In this case there is not sufficient evidence of knowledge by the father that his daughter was supported by the town after her removal to Islesborough in 1875. He had seen her but three times. True, he said that he understood all the time since she left his house, that she was being supported by the town. But there is a wide difference between one's knowledge of a thing, and what he understood it to be. Knowledge as defined by Webster "is a clear and certain perception of that which exists;" while to understand "is to have just and adequate ideas of; to comprehend; to know; to know by experience; by instinct; to learn; to be informed. "Understanding," says Mr. Crabbe, "is employed soley on external objects; we understand that which actually exists before us, and presents itself to our observation."

The father knew or he did not know. He was a witness. If he did know, why did he not definitely say so? The presumption is that he did not have any such knowledge as is required, or the question would have been clearly asked and unequivocally answered.

William H. Fogler, for the defendants.

FOSTER, J. The only question involved in this case relates to the settlement of Georgianna Ryder, and to recover pay for the amount of supplies furnished for her support in the plaintiff town, this action is brought.

The pauper was born May 16, 1842, is *non compos mentis*, and the legitimate child of Thomas Ryder, whose settlement was in Islesborough, where he lived until April 15, 1864, when he moved to Lincolnville, and has resided there since that time. Up to the time of his removal from Islesborough, he had never received any aid as a pauper for himself or any member of his family. This daughter had always lived in his family, and when he moved to Lincolnville, he took her with him. In 1864, shortly after the

removal to Lincolnville, the step-mother of the daughter, with the knowledge and consent of said Thomas Ryder, called for aid for the support of the alleged pauper, which was furnished by Islesborough continuously from that time till May 7, 1875, the daughter continuing to live in the family, at which time she was removed to said town of Islesborough, and has there been supported by that town ever since.

The pauper became of age May 16, 1863, and she then had the settlement of her father, which was in the plaintiff town. Has she, since she became of age, acquired a settlement in the defendant town?

We think not.

The plaintiffs contend that the pauper, being *non compos mentis*, takes the settlement of her father, and that he has gained a settlement in the defendant town by having his home therein for five successive years, notwithstanding the support furnished by the plaintiffs as pauper supplies to this daughter for more than eighteen years.

In support of this proposition it is not claimed on the part of the plaintiffs that the pauper has ever been emancipated, but that the supplies furnished the pauper have been so furnished as not to affect, directly or indirectly, the settlement of the father, they not being, in contemplation of law, supplies furnished to him.

This proposition does not depend merely upon the statement of it for its soundness, but rather upon the legal as well as social relations which the father and child respectively bore towards each other, and the knowledge on his part of the necessity and furnishing of those supplies.

It has long been the settled law in this state that the furnishing of supplies to a minor child, not a member of the father's family, and not under his care and protection, whether this absence and lack of care be on account of the child's own fault or the neglect of the father and without his knowledge or consent, by a distant town where the child may happen to fall into distress, while the father has sufficient means and is willing to support the child in his own house, is not such furnishing of supplies to him as would prevent him from acquiring a settlement to which he would

otherwise be entitled. *Eastport* v. *Lubec*, 64 Maine, 246; *Bangor* v. *Readfield*, 32 Maine, 60.

In the case before us the pauper, though more than twenty-one years of age, was *non compos mentis*, and, in her legal relations pertaining to pauper settlements, would stand upon the same footing as if she had been a minor. *Wiscasset* v. *Waldoborough*, 3 Maine, 388; *Croydon* v. *Sullivan*, 47 N. H. 184; *Tremont* v. *Mt. Desert*, 36 Maine, 393; *Monroe* v. *Jackson*, 55 Maine, 58.

It therefore becomes necessary to understand the *status* of this *non compos* daughter in her relations to her father before and at the time the supplies were furnished to her.

She had continued to reside in her father's family, after arriving at the age of twenty-one years, up to May 7, 1875, receiving support from the plaintiff town the eleven years prior to that time and while living with her father, and was then taken to the plaintiff town, as the evidence shows, that she might be supported at less expense and trouble to the town. It was with the father's knowledge and consent that the supplies were called for in the first instance. He states that he called for assistance from the town because he was not able to support her, and understood at the time she was removed, that she was to be supported by the town. It can not, therefore, be reasonably said that the father was ignorant of the fact that the supplies were furnished to his daughter during the time she was residing in his family, and that, after her removal, she was being supported as a pauper in Islesborough.

Hence, we say that the supplies in this case cannot be considered as having been furnished without the knowledge of the father; and the removal of the pauper by the town officers and her maintenance in the town of her lawful settlement, on account of his inability to support her, can not be regarded as an abandonment by him of his child, who, by reason of mental imbecility, is compelled to remain dependent upon him for her guidance and support. She was taken from him by operation of law, and not because he had abandoned her or she had abandoned him. "The parental and filial relations were not broken up, but suspended during the subjection of the children to the care of the overseers

of the poor for their support." *Sanford* v. *Lebanon*, 31 Maine, 128; *Garland* v. *Dover*, 19 Maine, 446; *Tremont* v. *Mt. Desert*, 36 Maine, 393. These relations did not cease to subsist by reason of the mental weakness of the child or of the poverty of the father. Had he been of sufficient ability he might have been compelled to provide support to this dependent child, or to pay the expenses incurred for her support. Even in cases of extreme destitution resulting in absolute pauperism of the parent and the binding out of the child to service by the overseers of the poor of the town where such child has a lawful settlement until it arrives at the age of twenty-one years, does not emancipate the child, nor necessarily break up those relations, though they are suspended during the continuance of such service. Should the child be discharged from its indenture and the parent become of sufficient ability to furnish support to the child during its minority, the filial and parental relations would be reinstated and subsist as fully as if they had never been interrupted through poverty. *Oldtown* v. *Falmouth*, 40 Maine, 108; *Hampden* v. *Troy*, 70 Maine, 493.

Nor does it appear that the father ever intended to abandon this child, or consent to her emancipation. And without such consent, either express or implied, there can be no emancipation. On the contrary, although his visits may not have been so frequent as to imply the deepest affection for his unfortunate child, yet the fact that they were made, however prolonged may have been the length of time between them, is corroborative of that which is claimed by the defense — that there had never been any emancipation or abandonment of her by the father, and that the supplies thus furnished the daughter were supplies furnished indirectly to the father, and which prevented him from gaining a settlement in Lincolnville.

Consequently the result must be the same in law as if the daughter had continued to reside in the family of the father, dependent upon him for her support, and in such case the authorities hold that "where the parental and filial relation continues to subsist, and there has been no emancipation or abandonment, and the circumstances are such as to make it

evident that the father has knowledge of the necessities of the child, and he fails to supply those necessities, and they are supplied by the town officers, acting in good faith to relieve a case of actual want and distress, the supplies thus furnished will be deemed supplies furnished indirectly to the father, and will operate to prevent his gaining a settlement." *Eastport* v. *Lubec*, 64 Maine, 247; *Tremont* v. *Mt. Desert*, 36 Maine, 393.

Nor would the plaintiffs' case stand in any better light were we to regard the daughter as *emancipated*, and thereby capable gaining a settlement in her own right. The settlement of the father, as well as that of the daughter, was in the plaintiff town at the time of their removal therefrom in 1864. From that time forward, with the exception of about two months, the plaintiffs have furnished support to Georgianna, not only during the eleven years that she lived in the defendant town, but since that time while living in Islesborough. She could not, therefore, have gained a settlement in Lincolnville while being thus supported as a pauper by Islesborough.

Upon a careful examination of the authorities to which our attention has been called by the counsel for the plaintiffs, it will be found that they do not conflict with the principles here laid down.

Judgment for the defendants.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

BRUNSWICK SAVINGS INSTITUTION

vs.

MARY W. CROSSMAN and others.

Androscoggin. Opinion January 2, 1885.

Real actions. R. S., c. 104, § 16. Deed.

Where, pending a real action, the tenant dies and his heirs are summoned in under R. S., c. 104, § 16, the heirs are not restricted in their defence to the title of their ancestor, but may set up any title they have from any other source.

A particular description in a deed is not necessarily enlarged by a succeeding general description by way of reference to and adoption of the description of a former deed, even where the language is, that the grantor "intended to convey the same and identical real estate, conveyed by said" former deed. The real intent is to be gathered from the whole description, particular as well as general.

ON REPORT.

Real action. The opinion states the case and material facts.

Weston Thompson, for the plaintiff.

This action was brought against the mother and such of her children as were on the land at the time. She died pending the suit and the six other defendants thereupon, became parties. One of these has been defaulted. How does the case stand as to the other five?

If they had any title not derived by inheritance from their mother, they had no occasion or right to come into this suit to defend it.

No judgment obtained by us in this case would have barred such claims if they had not appeared.

Judgments conclude nobody except the parties and those in privity with them. There would be no privity in a case where no right is claimed under a party to the judgment. Consanguinity is not privity. I do not lose my land because a man has judgment for it against my father, who never owned it.

These five came into the case of their own will and not by compulsion. They were entitled to come in because they were heirs of their mother and as such heirs, and not otherwise. Their mother's death did not abate the old suit or make a new one, or bring any new title or interest or claim to the former.

These five defendants can claim nothing in this suit except by inheritance, as heirs of their mother; and they are subject to the same rules of estoppel that bound her. They are in privity with her.

It would be intolerable, if, after much litigation and accumulation of cost in a real action wherein the demandant had and could show the better title, the tenant's death should let in parties to set up a new and never-questioned title, and throw all the cost

back on the plaintiff who had not contended against law, nor unrightously.

So if a new party, coming in as heir but denying that his ancestor ever had a title, might claim some other title, and thereby gain the advantage of possession with which he could win, and without which, he could not.

It is the claim of these defendants that their mother never had any heritable title, except the minute interests that she acquired from the two daughters whom she survived; and it cannot be denied that those interests passed by the deeds to us irrespective of estoppels.

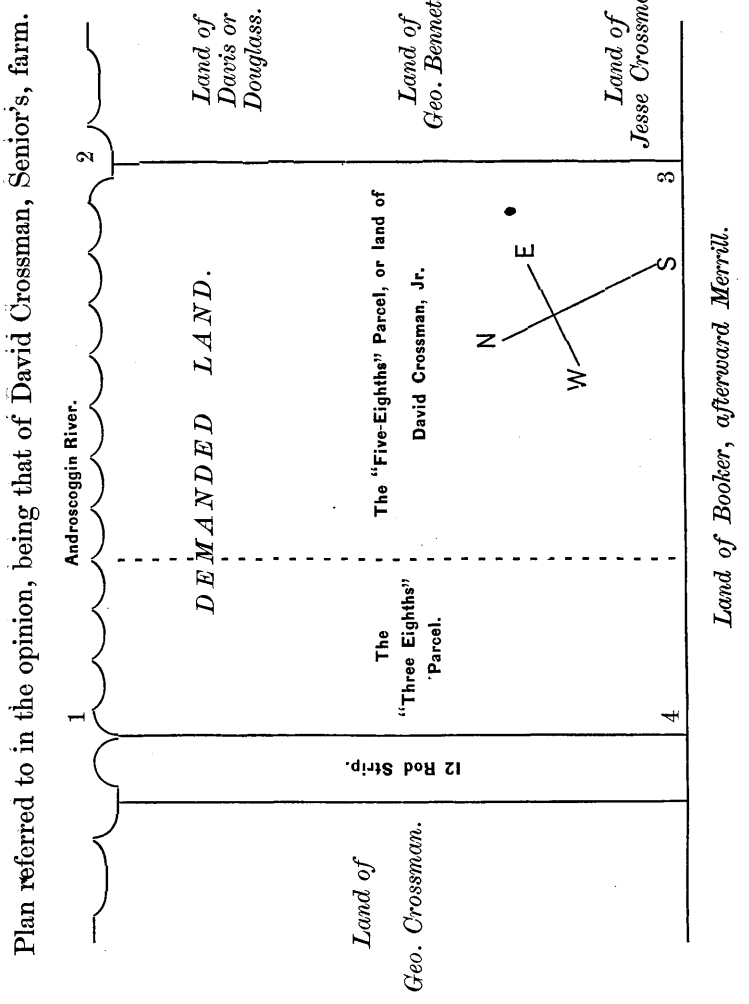
The doctrine for which we contend, hurts nobody; and without it, as shown above, "offences must needs come."

This is a proper case for the operation of rules of estoppel. It is a struggle between a demandant who has paid for the land, against tenants who have given nothing for it, and who rely on a denial of testacy which they never made till some of them had got the value of the farm, and until loss of evidence seemed to invite and offer impunity to their assertion of the new idea.

N. and J. A. Morrill and *A. R. Savage*, for the defendants.

EMERY, J. This real action was originally brought against the widow and three of the children of David Crossman, junior, deceased. The widow died and her other six children and heirs being also the children and heirs of David, were cited and appeared in defence. The action therefore is now against the children and heirs of said David Crossman, junior, nine in number. The land demanded was formerly a part of the farm of David Crossman, senior, in Durham, which farm was at some time, as both sides seem to admit, divided into two unequal parts, the eastern five-eighths parcel passing to David Crossman, junior, the western three-eighths parcel passing elsewhere. The demand includes all of the "five-eighths" parcel, and part of the "three-eighths" parcel. The accompanying sketch will show the situation of the land and adjoining lands, as mentioned and referred to in the deeds. The sketch made by each counsel is similar. The corners of the

demanded land are marked 1, 2, 3, 4. The 12 rod strip was a part of the "three-eighths" parcel but is not demanded.



There is no controversy over the demandant's title, as against these defendants, to what he demands of the "three-eighths"

parcel, as all the defendants who are not defaulted have expressly disclaimed that, and all outside of the "five-eighths" parcel. We have need therefore, to examine only the title to the "five-eighths" parcel.

Ignoring for the present the demandant's claim of title, we will consider what is the interest of each defendant. Each one's title is as heir of David Crossman, jr., who died March 5, 1852, and intestate as claimed by the defendants. David left a widow and eleven children. Each child therefore inherited one-eleventh. Afterward one of the sisters died of age, unmarried, and intestate. As the mother and widow was co-heir of this deceased's interest, with the surviving brothers and sisters, there were still eleven heirs to this eleventh, and each of the children acquired $\frac{1}{11}$ of $\frac{1}{11}$ of the parcel, in addition to his original $\frac{1}{11}$. Another sister died later, of age, unmarried and intestate. There were then ten heirs to this deceased child's interest, and each of the nine surviving children acquired of the original estate through this child two fractions, $\frac{1}{10}$ of $\frac{1}{11}$ and also $\frac{1}{01}$ of $\frac{1}{11}$ of $\frac{1}{11}$, this last fraction having been inherited by the sister last deceased from the sister first deceased. The mother and widow conveyed her interest to Aaron in her life-time so that at her death nothing was inherited from her. The nine surviving children, the present nine defendants, therefore, acquired each an interest in the "five-eighths" parcel by inheritance from their father and two sisters deceased. The interest of each is as follows:

From the father, one fraction, . . .	$\frac{1}{11}$
From the sister first deceased, one fraction,	$\frac{1}{11}$ of $\frac{1}{11}$
From the sister last deceased, two fractions,	$\frac{1}{10}$ of $\frac{1}{11}$
And	$\frac{1}{10}$ of $\frac{1}{11}$ of $\frac{1}{11}$

The sum of these various fractions is six fifty-fifths, so that at the time this case is presented to the court, each defendant *prima facie* had six fifty-fifths undivided of the "five-eighths" parcel in controversy.

What does the demandant show for a better title?

The demandant puts in two deeds as follows: 1, from Mary W. Crossman, (the widow of David, junior,) to Aaron T. Cross-

man, dated May 12, 1869. 2, from Aaron T. Crossman, to the demandant, dated March 2, 1872. Both these deeds include the "five-eighths" parcel. If Mary W. Crossman, the widow had a title, then by these deeds the demandant acquired the title. The demandant makes several claims of title under these deeds.

1. The demandant claims that Mary had title by devise under a last will of her husband, David Crossman, junior. The probate records of Cumberland county, where said will, if any, should have been proved, have been destroyed by fire since the death of David, junior. The only testimony offered as tending to prove that such a will was made and probated, was that of two of the children, Martha and Andrew, but their testimony only goes to the extent of their having heard some talk about the making of will. There is no evidence that ever David spoke of having made a will — or that ever any one saw such a will — or what its terms were. The fact that the widow lived on the farm after husband's death has little or no probative force, as to the making of a will in her favor. The evidence produced is too faint to authorize the court to assume the making and probating a will.

2. The demandant claims that a title has been acquired by twenty years adverse possession by Mary and her grantees. The only testimony offered is that of the same two children, from which it appears that the widow lived on the place after her husband's death, up to the time of her conveyance and that some of the children usually lived with her. Aaron lived there after the conveyance up to beginning of this suit. Andrew testified that when he went there the other heirs promised to sign off to him if he would go there and take care of their mother. There is no evidence that the widow denied the title of the children until 1869, and then only so far as may be inferred from her giving a warranty deed. When told by Andrew that she had no right to give such a deed, she did not then claim such a right nor deny the title of the heirs. There is nothing in the mere fact of the widow's continuing to live on her husband's farm to raise a presumption that her possession is adverse. There is not sufficient evidence in this case of adverse possession.

3. The demandant claims that the heirs are estopped from now asserting title against the widow's grantee, on the ground that they permitted the conveyance to be made without objection. The answer is that none of the heirs, except the grantee, appear to have known such a deed was intended. The first knowledge they had of the deed was after the fact, hence there was no estoppel.

4. The demandant claims that the six heirs who were cited in after the death of their mother, cannot set up their own title, but can defend only on their mother's title. By the common law, the death of the mother would have abated the demandant's action, so far as she was concerned, and he would have been obliged to begin a new action against the heirs, if he wished to recover a valid judgment. In such new action the question would have been, which had the better title, the demandant or the new defendants? The new defendants in such new action could have asserted every title they possessed. The statute authorizes the demandant to save his former suit by changing it into a suit against new defendants, but the statute does not abridge the rights of the new defendants. They have all the rights they would have had if sued in the first instance. Their plea is that they did not disseize, not that their mother did not disseize. That plea the demandant has joined, and in support of it the defendants must be allowed to set up any title they have.

The demandant, however, claims that, whatever may be the result of his claim above made, he has acquired under his deed from Aaron, the share of Gustavus, or six fifty-fifths, Gustavus being one of the nine defendants. To show this the demandant puts in a warranty deed from Gustavus to Andrew, dated October 3, 1867, and recorded in the Androscoggin registry, in vol. 49, folio 391, and a warranty deed from Andrew to Aaron (the demandant's immediate grantor) dated July 10, 1869, and recorded vol. 59, folio 3. The description in the deed from Gustavus to Andrew is as follows: "Three undivided eighths of the real estate formerly owned by David Crossman, senior, late of Durham, and bounded as follows, viz: Easterly by land now in possession of Joshua L. Douglass, Gustavus C. Crossman

and Jesse Crossman, second; southwesterly by James Booker; northwesterly by Jesse Crossman; northeasterly by the Androscoggin river, containing one hundred acres, more or less." This description the demandant contends, is not of the western "three-eighths" parcel, but includes three-eighths undivided of the entire original farm, and hence includes three-eighths of the "five-eighths" parcel in controversy, and that the deed therefore vested in Andrew all the interest of Gustavus in the "five-eighths" parcel, not exceeding three-eighths. If that be so, and if Andrew conveyed the same interest to Aaron, in his deed, then by the deed from Aaron before cited, the demandant would acquire Gustavus' interest.

Waiving for the present the construction of the deed from Gustavus to Andrew, we will consider the description in the deed from Andrew to Aaron, July 10, 1869. That description is as follows: "A certain parcel of land situated," &c. and bounded and described as follows: "Beginning at the Androscoggin river, at the northeast corner of the land of Aaron T. Crossman; thence southerly on the land of Aaron T. Crossman, aforesaid, to the land of Merrill; thence westerly on the line of said Merrill's land to land of George Crossman; thence northerly to the Androscoggin river, and from thence to the place begun at. Intending to convey the same and identical real estate conveyed to me by one Gustavus C. Crossman by his deed of warranty, dated October 3, 1867, and recorded in the Androscoggin registry of deeds in book 49, page 391. Excepting a strip twelve rods in width and the entire on the westerly side conveyed by me to George Crossman."

Comparing the description with the plan it will be seen that the call for "the north-*east* corner of land of Aaron T. Crossman" is inconsistent with the other calls. It will be remembered that Aaron previously had a deed from Mary of the "five-eighths parcel." The case also shows that George had a deed of the twelve rod strip. Rejecting this inconsistent call, enough remains to make a clear, consistent, and complete description. "Beginning at the Androscoggin river; thence southerly on the land of Aaron T. Crossman," etc. The first specific description by metes and bounds

and by courses, evidently does not include any part of the "five-eighths" parcel. It only includes a strip in severalty between the land of George Crossman and land of Aaron T. Crossman. The general description, however, inserted immediately afterward, expressly refers to the real estate conveyed to Andrew by Gustavus, as the land intended to be conveyed in the deed from Andrew. It is not contended that two parcels were intended to be conveyed. The whole description only applies to one parcel. The demandant claims that the general description controls the specific, and that hence the deed conveys *all* that was conveyed by the deed referred to.

There are cases in which such general references to a prior deed have been held to limit, a prior specific description. No case has been cited to us, in which such general reference to a prior deed has been held to enlarge a prior specific description. We do not think such a general reference to a prior deed whether as indicating the source of title, or as matter of description, necessarily controls a prior specific description by metes and bounds. *Lovejoy* v. *Lovett*, 124 Mass. 270. Much less do we think the effect is to enlarge such a description. After all, the simple question is, what does the whole description show was actually intended to be conveyed? After reading the deed and looking at the plan and the circumstances, what is the impression left on the mind as to the grantor's intention? If he intended to convey three-eighths undivided of the "five-eighths parcel," why did he so carefully describe a strip in severalty which was no part of the "five-eighths parcel?" Again he excludes out of his general description, which is claimed to be an undivided interest, a strip *in severalty*, twelve rods wide on the western side. He may not have thought his deed from Gustavus was capable of the construction contended for, by demandant. Upon the whole, we think that Andrew only intended to convey to Aaron, a strip in severalty lying between the land of George Crossman, and the land conveyed by Mary to Aaron. Aaron, therefore, took none of the "five-eighths parcel" under this deed, and the demandant took none. It does not matter whether Gustavus conveyed away any of his interest in the "five-eighths parcel," if that interest did not pass to the

demandant. The demandant must recover on the strength of his own title, and not on the weakness of the defendant's title.

The conclusion is, that the demandant has acquired all the interest of the widow, Mary, now deceased, and of the defendant, Aaron, who is defaulted, and the demandant is entitled to judgment against Aaron for the demanded premises. But the demandant has not acquired any part of the six fifty-fifths of either of the other defendants. The eight defendants have each seasonably and properly disclaimed all of the demanded premises out of his six fifty-fifths of the "five-eighths parcel." It appears that at the commencement of the action none of these eight were in possession, or claiming any part of the premises so disclaimed.

Judgment for demandant for the "three-eighths parcel," and for seven fifty-fifths undivided of the "five-eighths parcel;" and additional judgment for demandant against Aaron T. Crossman for costs.

Judgment for the other eight defendants against demandant for costs.

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

ABIJAH BUCK *vs.* PHŒNIX INSURANCE COMPANY.

Oxford. Opinion January 2, 1885.

Fire Insurance. Insurable interest. Misrepresentation.

An applicant's verbal statement, "I have some buildings which I would like to have insured," made to the agent of the underwriters, without disclosing, or being interrogated in relation to, his particular interest in the property insured, is not a misrepresentation of title, although he had previously given two mortgages thereon, conveyed his equity of redemption and taken back a mortgage to secure the support of himself and wife.

Neither is the release, by the grantee of the plaintiff's equity of redemption, to the wife of the plaintiff, a change of plaintiff's title within the condition of the policy.

The value of a mortgagor's redeemable interest in the property insured is not material; for he is entitled to recover the whole amount of damage, not exceeding the sum insured.

Assumpsit on a policy of fire insurance for six hundred dollars on a dwelling house, and two hundred dollars on a barn, the dwelling house having been destroyed by fire, September 25, 1881.

The opinion states the material facts.

George D. Bisbee and Oscar H. Hersey, for the plaintiff.

Enoch Foster and Addison E. Herrick, for the defendant, contended that there was a misrepresentation by the plaintiff, of his title in the property insured.

In this case, we say the court stands in the place of a jury, under the last clause of § 20, c. 49, R. S., and may, from the report of the evidence and the facts as presented, say that the misrepresentations as to the plaintiff's title or interest were material, or that they were fraudulent. In either case, it would avoid the policy.

The counsel further claimed that the conditions of the policy had been violated. They were a part of the contract. *Waterhouse* v. *Ins. Co.* 69 Maine, 410; *Richardson* v. *Ins. Co.* 46 Maine, 398; *Day* v. *Ins. Co.* 51 Maine, 100; *Emery* v. *Ins. Co.* 52 Maine, 325.

The policy contained this condition: "Or if the property be sold or transferred, or any change take place in title or possession, whether by legal proceedings, judicial decree, voluntary transfer or conveyance . . . this policy shall be void." The conveyance by the son to his mother violated this provision of the policy, and by its terms rendered it void. Counsel further cited: *Battles* v. *Ins. Co.* 41 Maine, 208; *Brunswick* v. *Ins. Co.* 68 Maine, 314; Wood on Insurance, § 257.

VIRGIN, J. Prior to the date of the policy sued on, the plaintiff gave two successive mortgages of his farm and also a deed of warranty thereof, subject to the mortgages, taking back at the same time a mortgage for the support of himself and wife

during their respective lives. So that, when he effected the insurance, he was mortgagee of a third mortgage, or mortgagee of the equity of redeeming the first two mortgages.

The plaintiff neither made nor attempted to make any written application, nor was he requested to make one by the defendant's agent, but simply said to him, "I have some buildings which I would like to have insured," naming them. He made no further mention of the nature of his interest and was not interrogated in relation thereto.

The first objection urged against the plaintiff's right of recovery, is an alleged misrepresentation of title; the defendant claiming that the above remark constitutes one, and that it was "material" within the intent of R. S., c. 49, § 20.

We do not understand that to be a misrepresentation. A mortgagee may insure as general owner without disclosing his particular interest, unless it is inquired about. 1 Jones, Mort. 397; *Norwich F. Ins. Co.* v. *Boomer*, 52 Ill. 442. "Neither reason, authority, nor the contract of insurance," say the court in the case cited, "requires a mortgagee, unless interrogated, to state the nature of his interest in the property."

The plaintiff is not only mortgagee, and therefore holds the legal title of the equity of redeeming the two mortgages, but he is the mortgagor of them. They were given by him to secure notes signed by him. The holders of those mortgages and notes are not obliged to resort to the land mortgaged for the purpose of obtaining payment; they may bring a personal action on the notes and levy upon any other property of this plaintiff. (*Lord* v. *Crowell*, 75 Maine, 399); or they might enforce their statutory lien upon the insurance money due on this policy. R. S., c. 49, § § 52, 53. And the mere speaking of the buildings as his, was not, in the absence of any inquiry into his particular interest, a misrepresentation of his title. *Strong* v. *Manf. Ins. Co.* 10 Pick. 40, 44; *Curry* v. *Com. Ins. Co.* 10 Pick. 535, 542. If the defendant deemed incumbrances material, its agent should have made inquiries in relation thereto. Same cases. For when such inquiry is made, or when the applicant undertakes to disclose the particular nature of his interest, his

representations must be substantially correct, or the policy will be void. *Richardson* v. *Maine Ins. Co.* 46 Maine, 394; *Campbell* v. *N. E. Mut. L. Ins. Co.* 98 Mass. 381, 403; *Williams* v. *Rog. W. Ins. Co.* 107 Mass. 379.

Even after the plaintiff conveyed his equity of redemption, he retained an insurable interest, because of his liability on the mortgage notes and his consequent interest in the preservation of the property charged with the payment of them. *Strong* v. *Manf. Ins. Co. supra; Waring* v. *Loden*, 53 N. Y. 581.

The next objection is that a change took place in the title, within the meaning of one of the conditions of the policy. The alleged change is the release by the son and mortgagor of the equity of redeeming the first two mortgages, to his mother, the plaintiff's wife. If such a change would operate as a breach of the conditions, then every mortgagor could render void his mortgagee's policy of insurance. The law is not open to such a reproach. We do not understand that that release operated at all upon the plaintiff's title; and the authorities cited by the defendant have no applicability to this case.

These objections proving unavailable, the defendant claims that the insurable interest of the plaintiff cannot exceed the value of the equity of redemption of the mortgages. But this proposition is not tenable. In speaking of the interest of a mortgagor, WILDE, J., said: "The value of his redeemable interest in the property is not material. If he had an insurable interest at the time the policy was effected, and also at the time of the loss, he is entitled to recover the whole amount of damage to the property, not exceeding the sum insured." *Strong* v. *Manf. Ins. Co.* 10 Pick. 44.

The sum insured on the property destroyed, was six hundred dollars. As to the amount of damage to the property, there is some difference among the witnesses. The plaintiff sold the farm after the fire for a little over seven hundred dollars; and the witnesses estimate the value of the farm, including the buildings, before the fire, at from one thousand to one thousand two hundred or one thousand three hundred dollars. We think,

considering the age, condition and size of the house, ell and woodshed destroyed, that the entry must be,

Judgment for plaintiff for $450 and interest from November 25, 1881.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

ALFRED ROBERTS *vs.* JOHN W. NOYES.

Cumberland. Opinion January 2, 1885.

Bailments.

A bailee is not permitted to dispute the title of his bailor, but he may show that the bailor has assigned his title to another, since the property was entrusted to him. If legally assigned, and the bailee has notice of the fact, the bailee must account to the assignee. The rule that a bailee should not attorn to a stranger, does not apply; the assignee is not a stranger.

ON REPORT from the superior court.

Assumpsit. The opinion states the facts.

M. P. Frank, for the plaintiff, cited: *Vermont Mining Co.* v. *Windham Co. Bank*, 44 Vt. 489; *McLouth* v. *Rathbone*, 19 Ohio, 21; N. H. R. S., c. 130, § 4; *Hastings* v. *Cutler*, 24 N. H. 481; *Robbins* v. *Bacon*, 3 Maine, 346; *Legro* v. *Staples*, 16 Maine, 252; *Wheeler* v. *Evans*, 26 Maine, 133; *Adams* v. *Robinson*, 1 Pick. 461; *Bourne* v. *Cabot*, 3 Met. 305; Metc. Contracts, 170.

Motley and Briggs, for the defendant.

The defendant was the agent of Mrs. Rounds. He was bound to pay over the funds to her, and had no right to withhold the same from her by the mere receipt of the notices. Story, Agency, (8th ed.) c. 7, § 217; Story, Bailments, § § 102, 103, 110; 2 Story, Eq. Jur. § § 816, 817.

The assignment ante-dates the letter of attorney five months. Roberts does not appear in the letter of attorney, as assignee of

Mrs. Rounds' interest. Her interest at the time of the assignment, was real estate. If it was a valid assignment, then the plaintiff was the owner and he should have signed the letter of attorney. The conduct of the parties shows that neither the plaintiff nor Mrs. Rounds considered the assignment valid.

Whether or not from the notices received, Mrs. Rounds had any color of right to the money, was a matter for Noyes, as the agent, to decide. And if she had, in his judgment, such a color of right, this action cannot be maintained. 3 Add. Contracts, (3 Am. ed.) § 1413; 1 Parsons, Contracts, (5th ed.) 79, 80.

PETERS, C. J. The evidence is reported, upon which we are to render judgment according to the law and fact. The facts, stated in the order of occurrence, we have no difficulty in finding to be these: The plaintiff's wife and a Mrs. Rounds, sisters, were, with other heirs, owners of a farm in New Hampshire, which descended to them from their father, deceased. On the 19th of October, 1878, Mrs. Rounds sold and assigned her interest in the estate, making an informal deed thereof, to the plaintiff. On March 10, 1879, the heirs, their wives and husbands, and the widow joined in a power of attorney to the defendant to sell the property. On July 11, 1879, the plaintiff wrote to the defendant, informing him in general terms of the assignment, and requiring that Mrs. Rounds' share of the proceeds of sale be paid to him. On July 21, 1879, the defendant wrote to the plaintiff, acknowledging the receipt of the plaintiff's letter, and stating, among other things, that he would like to have Mrs. Rounds write him directing the money to be paid to the plaintiff, adding, "I will then do so." He enclosed a receipt for Mrs. Ronnds and the plaintiff to sign. The plaintiff procured an execution of the receipt, also an order from Mrs. Rounds as requested, and sent them to the defendant on July 25, 1879. The defendant, on July 30, 1879, acknowledged by letter receiving plaintiff's last letter, and said all were paid, "except Mrs. Rounds, which I will send the first of next week." On August 6, 1879, the plaintiff wrote warning the defendant not to pay to Mrs. Rounds. In defiance of all

this evidence of assignment and transfer, the defendant, on August 6, 1879, paid the money to Mrs. Rounds.

The defendant, as a witness, undertakes to convey the impression that he had not received the acquittance, sent by the plaintiff, when he paid the money to Mrs. Rounds. It cannot be so. It was inclosed in the plaintiff's letter of the 25th of July. That letter states that it is inclosed therein. The defendant received that letter. In his reply he does not say that the acquittance was missing. On the contrary, he says, "I have received the letter of the 25th instant, inclosing Mrs. Rounds' order, &c." What did the "&c." refer to if not the receipt? Why did he say he would send that share the next week? He produces the receipt at the trial. How and where did he get it? It must have been by some letter, and no other letter than those named is produced or suggested. The "lame and impotent" excuse is apparent indeed.

Upon these facts, it is contended that the defendant was not under obligation to account to the plaintiff as an assignee of the claim.

In the first place, it is said that the papers are not appropriate to constitute an assignment. We think otherwise. And there is a good deal of ground for the position that the defendant did not even act in behalf of Mrs. Rounds, she being a nominal and the plaintiff being the real party in selling the farm.

The defendant invokes the rule of law, that an agent in possession of his principal's property, is not permitted to dispute the principal's title thereto; that he cannot be converted into a trustee for a third person by a mere notice of his claim; that he cannot affect the principal's rights by an attornment to a stranger; and that an action of money had and received cannot lie in such case by a third party. All of which is true but misapplied. The plaintiff does not set up an independent and hostile claim as a stranger or third party. He claims under Mrs. Rounds, and not adversely to her original right. He claims that her right has become his; that thereby her trustee has become his trustee; and that the privity between her and her agent has been transferred to him. The plaintiff could not dispute Mrs. Rounds'

original title, but he can show that it was assigned to him. It is clear from all the authorities that while a bailee cannot dispute the title of his employer, he can show that since the bailment it has been assigned to another. The allegiance of the vassal was to defend the castle of his lord against outside foes, and not against itself. The present is only the common case of the assignment of a fund or claim in the hands of the agent or attorney of the assignor. A question arising between the assignor and assignee, each making a demand upon the trustee or stakeholder, the defendant could have saved himself of all risk, and from costs, by sending the contestants into equity upon a suit of interpleader. Having espoused the side of the assignor he took the consequences attached. No sufficient defense has been established against the claim of the assignee. *Marvin* v. *Ellwood*, 11 Paige, 365; *Smith* v. *Hammond*, 6 Sim. 10; 3 Pom. Eq. Jur. § 1327, and cases in note; 2 Stor. Eq. Jur. § 817; *Exchange Bank* v. *McLoon*, 73 Maine, 498.

Defendant defaulted.

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

INHABITANTS OF ST. GEORGE *vs.* CITY OF BIDDEFORD.

Knox. Opinion January 2, 1885.

Paupers. Insanity. Marriage. Evidence. Expert.

The law recognizes all the grades and varieties of mental imbecility under the general head of insanity, without troubling itself much about classifications or exact definitions. In a legal sense, mental unsoundness is insanity, and mental soundness is sanity.

In questions involving insanity, the law applies different rules and tests according to circumstances; it tries to ascertain whether a person, alleged insane, is such in respect to the particular matter which is being investigated.

A marriage is void, if, at the time it took place, the husband had not sufficient mental capacity to enable him to understand the nature of the marriage contract and of the marital relation, and to understand that he took upon himself the duties, obligations and responsibilities of that relation. The

rule of competency would not require that he should understand all the marital duties and obligations, but requires that he should understand that he assumes them whatever they may be.

It is not erroneous to rule to a jury, as a further illustration of the test of competency, that a man would be considered incompetent to make the marriage contract, if he had not mental capacity enough to be able to provide a support for a family, when he is possessed of means sufficient for the purpose.

Upon the question of the insanity of a person, the entire conduct of the individual through life may be taken into account, in order to judge how far it betokens mental deficiency.

It is not erroneous for a judge to allow an expert to testify to his opinion that an alleged imbecile was not capable of understanding his duties towards his wife arising out of the matrimonial union, the issue being whether such imbecile had mental capacity sufficient to render his marriage a valid act.

ON EXCEPTIONS and motion to set aside the verdict.

Assumpsit for pauper supplies furnished to Elizabeth Montgomery, whose maiden name was Elizabeth Waterhouse, and her three children. It was admitted that the settlement of the mother was in Biddeford, unless it was changed by her marriage with John Montgomery, whose settlement was admitted to be in St. George.

The plaintiffs contended that, at the time of his alleged marriage, John Montgomery was not of sound mind and because of that did not have the legal capacity to contract marriage.

The jury rendered a verdict for the plaintiffs for four hundred and eighty-six dollars and found specially that John Montgomery at the time of his marriage with Elizabeth Waterhouse did not have capacity to contract such marriage.

The defendant moved to set the verdict aside, and alleged exceptions to certain of the rulings and instructions of the presiding justice, which are sufficiently stated in the opinion.

A. P. Gould, for the plaintiffs, cited: 2 Kent's Com. 76; *Atkinson* v. *Medford*, 46 Maine, 510; *Middleborough* v. *Rochester*, 12 Mass. 363; *Anonymous*, 4 Pick. 32; 1 Bish. Mar. & Div. (4th ed.) § 127 and cases, and § 134; 1 Black. Com. 438; Ray's Med. Jur. of Insanity, § § 85, 86, 87; *Portsmouth* v. *Portsmouth*, 1 Haggard, 355; *Strong* v. *Farmington*, 74 Maine, 46; *Farmington* v. *Somersworth*, 44 N. H. 589; 2

Greenl. Ev. § 464; *Wightman* v. *Wightman*, 4 Johns. Ch. 347; *Sullivan* v. *Sullivan*, 2 Haggard, 238.

R. P. Tapley, for the defendant, cited: Schouler, Dom. Rel. § § 14, 18; 4 Pick. 22; 11 Wheat. 103; 10 R. I. 165; 47 Iowa, 121; Bishop, Mar. & Div. § § 69, 177; *Ward* v. *Dulaney*, 23 Miss. 410; *Hovey* v. *Chase*, 52 Maine, 317; *Moffitt* v. *Witherspoon*, 10 Iredell, 185.

PETERS, C. J. R. S., c. 59, § 2, provides, that no insane person or idiot shall be considered capable of contracting marriage. It has been recently decided in this state that it may be proved in any collateral proceeding, where the question legitimately arises, that a marriage is void because of the insanity of one of the parties thereto. *Unity* v. *Belgrade*, *ante*, 419. The defendants contend that, while this rule applies in cases of insanity or idiocy, as those terms were primarily understood, it does not apply to a case of mere weakness or unsoundness of mind.

The statute of construction and interpretation, R. S., c. 1, § 6, div. 8, declares that the words "insane person" may include an idiotic, *non-compos*, lunatic, or distracted person. But, if there were no statutory guide in the matter, the rule would be the same. The old idea of but two sorts of mental derangement, idiocy and lunacy, has long been repudiated. It is now about universally considered that there are many degrees and varieties of mental derangement which come under the generic head of insanity. The law does not trouble itself much about classifications and exact definitions, but contents itself with a practical and general view. Insanity, in a legal sense, embraces all the groups and conditions. It is said in 1 Beck's Med. Jur. 12th ed. p. 744: "The division of insanity into numerous varieties, though convenient for purposes of description, and also, to a certain extent, in accordance with nature, is still most arbitrary and theoretical. The law does not recognize these divisions." It is said in Bou. Law Dic. Title, Imbecility, "The various grades of imbecility, however interesting in a philoso-

phical point of view, are not very closely considered by courts." In a legal sense, unsoundness of mind is synonymous with insanity. Upon questions of insanity the law attempts to ascertain whether a party is or not possessed of such soundness of mind as renders him competent to do, or relieves him from the responsibility for doing, certain acts. In a legal and general sense, mental soundness is sanity — mental unsoundness is insanity.

The trouble is to define mental unsoundness or insanity. Prof. Maudsley, in "Responsibility in Mental Disease" says: "It would certainly be vastly convenient, and would save a world of trouble, if it were possible to draw a hard and fast line, and to declare that all persons who were on one side of it must be sane and all persons on the other side of it must be insane. But a very little consideration will show how vain it is to attempt to make such a division. That nature makes no leaps, but passes from one complexion to its opposite by graduations so gentle that one shades imperceptibly into the other, and no one can fix positively the point of transition, is a sufficiently trite observation." All writers concur upon this point.

To avoid this difficulty as far as is practicably possible, and in accordance with a common sense view of the matter, the law applies different rules or tests under different circumstances. It tries to ascertain whether a person, alleged insane, is such in respect to the particular question which is being investigated. A man may be of unsound mind in one respect, and not in all respects. He may have mental competency to make one contract and not another. And an insane man may make certain contracts beneficial to himself.

The question, therefore, in the case at bar, was whether the alleged imbecile had mental capacity enough to make the contract of marriage. Had he mental soundness sufficient to make that kind of contract? Although marriage be "a status," or "a relation," or "an institution," it requires the intelligent consent of two persons to make the contract that produces it.

The judge prescribed this rule for the jury: The marriage was void if, at the time it was contracted and solemnized, John

had not sufficient mental capacity to understand the nature of the marriage contract, and that by it he became the husband of Elizabeth and assumed all the duties, obligations and responsibilities and all the rights growing out of the relation. He need not have understood all the duties, obligations and responsibilities which the marriage relation imposed upon him, because that rule would probably render void many marriages in this state. . . But he should have had at the time sufficient mental capacity to enable him to understand the nature of the marriage relation, the nature of the marriage contract, and to understand that upon himself he took with it all the duties, obligations and responsibilities which the law would impose upon him as a result of that contract on his part, whatever they were. We have omitted a few paragraphs of the charge on this point, for brevity's sake, not in the least thereby altering the sense. So far, we do not understand that any objection is urged to the rule given.

One of the parties requested an illustration or amplification of the rule thus given, in response to which this further instruction was given to the jury: "The husband was incapable of contracting a valid marriage if from mental imbecility he was incompetent to contract for 'and provide' the ordinary means of support for his wife, himself and family. And here it is proper I should remark to you again that I do not mean that he should have had the financial ability to provide for the support of his wife, himself and family, because a man having no property, no financial ability to any degree, still if he has mental capacity may contract marriage and it will be a valid contract, but what I intend to say is that if he had not from mental imbecility capacity to make the ordinary contract which would be required from time to time to provide for the support of his wife, himself and his family, whatever it might be, then he has not sufficient capacity to enter into the contract."

The defendants think it erroneous to say that the husband should be required to have the capacity "to provide" for the family. But the judge made it clear that he did not mean that the husband must necessarily succeed in earning a livelihood. The idea was that, if the husband had means of his own or means

furnished by others, he should have capacity enough, thus situated, to contract for and provide some kind of an ordinary support for his family. If the husband did not have mind enough to know that it was necessary to have shelter, food and raiment, and capacity enough to procure them, when a want of means did not prevent, he must be an imbecile indeed. A much quoted rule in the case of *Browning* v. *Reane*, 2 Phillim. 70, was this: "If the incapacity be such that the party is incapable of understanding the nature of the contract itself, and incapable, *from mental imbecility*, of taking care of his or her own person or property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract."

Nor is the charge amenable to the criticism, made upon it, that the party was required to have common capacity to make contracts generally. The judge, in a part of the charge not quoted by us, merely by way of illustrating and enforcing the theory presented, substantially said that the same rule would apply to this man making this contract of marriage, that would apply to other men making other contracts. That was not erroneous.

Objection is made that testimony as to the condition and conduct of the husband years before and years after the marriage, was allowed to be introduced. It was all admissible in a case of this kind. The law in many cases allows the search to extend back even to the ancestors of the person under inquisition, to see what their mental predisposition may have been. Professor Maudsley says, "Each case must be considered on its merits, the entire conduct of the individual through life being taken into account, in order to judge how far it betokens mental deficiency."

Dr. Levensaler was allowed to testify that the alleged imbecile was not capable of understanding his duties towards his wife arising out of the matrimonial union. The doctor was permitted to testify, not merely because he was a doctor, but because an expert. It was within the discretion of the presiding judge to allow the question. The question answered merely in the negative might not carry any very definite idea to the minds of

the jury, but cross examination should regulate it. A good deal of discretion must be allowed to a trial judge in such matters.

We do not think we can fairly disturb the verdict, upon the motion for a new trial. The case was an uncertain one, and not without strong points upon either side.

Motion and exceptions overruled.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

R. W. GILMORE

vs.

JOSIAH CROSBY AND S. PERCY CROSBY.

Penobscot. Opinion January 3, 1885.

Attorneys at law. Writs, endorsement of.

Attorneys, signing their names upon a writ under a direction to the officer as follows: "Mr. officer, attach hay," do not thereby become indorsers of the writ and liable for costs.

Nor do they become indorsers of the writ by erasing the word "hay" and allowing their signatures to remain after giving verbal directions to the officer how to serve it.

ON REPORT. The opinion states the case and material facts.

Thomas H. B. Pierce, for the plaintiff.

Josiah Crosby, for the defendants.

HASKELL, J. This is an action on the case, to recover of defendants as indorsers of a writ, the amount of a judgment for costs.

The indorsement was: "Mr. officer, attach hay, J. and S. P. Crosby, plaintiff's attorneys". After it had been made, the word "hay" was erased with a pen, and the officer made service by nominal attachment and summons.

Are the defendants indorsers of the writ, from writing their names across it in the connection named?

It is plain that they did not intend such result. They gave written directions to the officer to make a specific attachment, and signed it as attorneys. Afterwards, they changed the phraseology of their directions, by drawing a pen through the word "hay," and verbally directed what service should be made. In doing this, they did not intend to change their relations to the writ by indorsing it, nor could the plaintiff have supposed that indorsement was intended. If in doubt, he could easily have ascertained what was intended, by moving to dismiss the writ for want of an indorser, but this he did not do. It cannot be said that he was misled in the matter, for he did not take the trouble even to inquire, if an indorsement was intended, but on the contrary, chose to lie by, and after judgment in his favor, take his chances of holding the defendants liable as indorsers.

The language of the supposed indorsement negatives the construction contended for, and the plaintiff is not entitled to insist upon so unnatural a construction of language as to work that result. The cases have gone to the very verge of propriety in holding persons, whose names chance to be upon a writ, liable as indorsers. Neither authority nor justice requires the defendants to be held liable. The authorities relied upon do not sustain the plaintiff's case. *Jacobs* v. *Benson*, 39 Maine, 132; *Richards* v. *McKenney*, 43 Maine, 177; *Sawtelle* v. *Wardwell*, 56 Maine, 146.

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

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ALIMONY.

AMENDMENT.

1. Where the facts of the case are stated in the declaration, the court at *nisi prius* has the power to allow an amendment, by adding a new count for the same cause even after the plaintiff has closed his case and the defendant moved for a nonsuit. *Kelly* v. *Bragg*, 207.

2. In an action under the civil damage act, one count in the writ was as follows: "And the plaintiff further alleges that on the third day of October, 1880, and on divers other days in the month of said October, her said husband bought of said defendants at their said store in Gardiner, one pint of intoxicating liquors, though they were forbidden by plaintiff so to sell, which her said husband then and there drank, and thereby became intoxicated, and in consequence thereof incapacitated to attend to business, and failed to provide plaintiff with means of support for a long time, to wit, one month, to plaintiff's great injury, and plaintiff was otherwise injured thereby." Before proceeding to trial the plaintiff was permitted to amend by adding the following specification: "And the plaintiff alleges that her said husband while so intoxicated, October 3, 1880, threw at her a cup, and hit, and beat, and bruised her with it; whereby plaintiff suffered great bodily harm and was put to great bodily and mental pain." *Held*, that the amendment did not introduce a new cause of action and was allowable.
Chase v. *Kenniston*, 209.

3. In an action for injury received because of a defect in a way, amendments which are merely additional to the description of the alleged defect and the manner in which the accident happened do not introduce a new cause of action and are within the discretion of the presiding justice.
Chapman v. *Nobleboro*, 427.

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No recognizance, with or without sureties, need be made by an appellant from the decision of a trial justice, or of the municipal court of Calais, unless it be required by the adverse party.
Colby v. *Sawyer*, 545.

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1. *Ingalls* v. *Dennett*, 6 Maine, 79, commented upon.
Donnell v. *P. & O. R. R. Co.* 33.
2. *Simpson* v. *Garland*, 72 Maine, 40, affirmed. *Simpson* v. *Garland*, 203.
3. *Grant* v. *Insurance Co.* 75 Maine, 196, reaffirmed.
Grant v. *E. & K. M. F. Ins. Co.* 514.
4. *Dolloff* v. *Hartwell*, 38 Maine, 54, overruled. *Colby* v. *Sawyer*, 545.

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See SHIPPING, 1–3.

CITATION.

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CIVIL DAMAGE ACT.

1. In an action under the civil damage act, one count in the writ was as follows: "And the plaintiff further alleges that on the third day of October, 1880, and on divers other days in the month of said October, her said husband bought of said defendants at their said store in Gardiner, one pint of intoxicating liquors, though they were forbidden by plaintiff so to sell, which her said husband then and there drank, and thereby became intoxicated, and in consequence thereof incapacitated to attend to business, and failed to provide plaintiff with means of support for a long time, to wit: one month, to plaintiff's great injury, and plaintiff was otherwise injured thereby." Before proceeding to trial the plaintiff was permitted to amend by adding the following specification: "And the plaintiff alleges that her said husband while so intoxicated, October 3, 1880, threw at her a cup, and hit, and beat, and bruised her with it; whereby plaintiff suffered great bodily harm and was put to great bodily and mental pain." *Held*, that the amendment did not introduce a new cause of action and was allowable.
Chase v. *Kenniston*, 209.
2. A fair and correct construction of stat. 1872, c. 63, § 4, requires the plaintiff in an action based upon that statute to prove to the satisfaction of the jury by a preponderance of evidence, that the defendant caused or contributed to the intoxication of her husband in the manner stated in the statute, in some appreciable or essential degree. *Ib.*

DISTRIBUTION.

See PEDIGREE. WILLS, 2.

DIVORCE.

1. Cross libels for divorce pending between a husband and wife were heard together; the court first decreed a divorce on the husband's libel for the fault of the wife and the next day decreed a divorce on the wife's libel for the fault of the husband, and decreed to her a certain sum in lieu of alimony. Eight months afterwards the husband died and the wife then brought an action against his heirs to recover her dower. *Held*, that she was not endowable. *Moulton* v. *Moulton*, 85.

2. A petition by a libelee, not based upon newly discovered evidence or other statutory cause for review, which asks that a new trial be granted in a divorce case, once fully heard, because the testimony adduced by the libelant was false and the decision a wrong one, cannot be sustained. *Hills* v. *Hills*, 486.

3. Real estate cannot be sequestrated for the purpose of securing the payment of alimony or allowances, so as to establish a lien thereon, unless it be described by some definite terms that will give identification. *Ib.*

4. R. S., c. 60, § 10, is an affirmation of a general principle of law and is not applicable to persons who abandon their residence in this state and *bona fide* establish their domicil in another state where they afterward obtain a divorce. *Gregory* v. *Gregory*, 535.

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DOWER.

1. Cross libels for divorce pending between a husband and wife were heard together; the court first decreed a divorce on the husband's libel for the fault of the wife and the next day decreed a divorce on the wife's libel for the fault of the husband, and decreed to her a certain sum in lieu of alimony. Eight months afterwards the husband died and the wife then brought an action against his heirs to recover her dower; *Held*, that she was not endowable. *Moulton* v. *Moulton*, 85.

2. The demandant's husband, in 1868, shortly before his death, gave her a deed of warranty of a homestead; as his executrix she did not inventory it with his estate; she remained in possession until 1878, renting the property, when she was ousted by the defendant, claiming under mortgages from the husband, of an earlier date than her deed; during her possession she made some payments upon the mortgages. *Held:* That the demandant is entitled to dower in the premises; that the facts do not constitute a waiver or an estoppel to prevent it. *Dockray* v. *Milliken*, 517.

3. The owner should be allowed for improvements properly added to the premises. An ell, containing a dining room and kitchen, annexed to the house, and erected to make the premises more tenantable, is to be regarded as an improvement. *Ib.*

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PRINCIPAL AND SURETY.

A judgment creditor in a judgment against two or more debtors rendered upon a promissory note given in New Hampshire, upon which note one of the debtors was surety, levied his execution upon real estate of the principal and surety in this state, subject to a prior attachment, and on account of prior incumbrances and defects in the levy, the creditor took nothing by the levy. *Held* in *scire facias* to revive the execution, that the proceedings under the prior execution did not discharge the surety.
Somersworth Sav. Bank. v. *Worcester*, 327.

PROBABLE CAUSE.

PROBATE COURT.

1. Such minor cannot acquire a residence in another county from that in which the guardian was appointed that will oust the judge of probate, who appointed such guardian, of jurisdiction over the minor and his estate, and the appointment of a new guardian by the judge of probate in another county, while the first guardianship continues, is void.
Dorr v. *Davis*, 301.

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REMOVAL OF CAUSES.

1. Suits in equity, not related in any way to the provisions of the bankrupt law, in which the only effective relief sought is an injunction to stay proceedings in an action pending in the state court and prevent the levying of an execution issuing therefrom, are not removable to the circuit court of the United States on petition of the plaintiff in the action at law before injunction issued. *Edwards Man'f. Co.* v. *Sprague*, 53.

2. Exceptions allowed by the presiding justice, to his orders refusing a petition for removal of a suit into the circuit court of the United States, are to be considered and the questions of law raised determined by the law court. *Ib.*

RENT.

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RENTS AND PROFITS.

A contract was made between two persons for the sale by one to the other of a lot of land. The purchaser made a part payment and went into the possession and occupation of the premises. Afterwards the contract was rescinded and the purchaser brought an action for what he had paid towards the land and recovered without any deduction for the use of the premises. *Held*, in a writ of entry by the seller, that he was entitled to recover with the land the value of the rents and profits. *Harkness* v. *McIntire*, 201.

See TRUSTS, 6.

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See TRUSTS, 6, 7.

REPLEVIN.

See CONTRACT, 1.

RESCISSION.

1. To rescind a contract of sale of merchandise, which has been delivered, on the ground of fraudulent representations of the seller, the buyer must restore the goods to the seller, if they are of any value, or offer to restore

SCALE OF LOGS.

See JUDICIAL NOTICE.

SCHOOL AGENT.

1. A school agent's mere election and performance of official duties, raise no implied promise on the part of the town to pay him for such services.
Talbot v. *East Machias*, 415.

2. In the absence of any implied contract or statutory provision entitling him to pay for official duties rendered, a school agent can maintain no action therefor against his town. *Ib.*

SCIRE FACIAS.

A judgment creditor in a judgment against two or more debtors rendered upon a promissory note given in New Hampshire, upon which note one of the debtors was surety, levied his execution upon real estate of the principal and surety in this state, subject to a prior attachment, and on account of prior incumbrances and defects in the levy, the creditor took nothing by the levy. *Held* in *scire facias* to revive the execution, that the proceedings under the prior execution did not discharge the surety.
Somersworth Sav. Bank v. *Worcester*, 327.

See BOND, 2, 3.

SEIZURE ON EXECUTION.

See OFFICER, 3, 4.

SELECTMEN.

1. By a statute of the state, selectmen are not liable for refusing to receive the vote of a qualified voter, unless their action is "*unreasonable*, corrupt or wilfully oppressive"; if corrupt or wilfully oppressive, it must be unreasonable; if not unreasonable, no liability attaches. *Sanders* v. *Getchell*, 158.

2. Their action cannot be deemed unreasonable, when the question decided by them is so doubtful that reasonable and intelligent men, unaffected by bias or prejudice, might naturally differ in their views about it, if the question is such that there is room for two honest and apparently reasonable conclusions to be reached. Reasonable mistakes are excused; unreasonable mistakes bring liability. *Ib.*

3. The question is not whether their acts appear to the officers themselves to be reasonable, but whether reasonable in fact; ignorance is not an excuse. When a person accepts a town office, he vouches for his competency to perform its duties at least ordinarily well. *Ib.*

SEQUESTRATION.

See DIVORCE, 3.

SERVANT.

See MASTER AND SERVANT.

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SPECIAL ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR, 7.

SPECIFIC PERFORMANCE.

1. Specific performance of an oral contract for the conveyance of real estate, may be decreed by a court possessing full equity jurisdiction, where there have been such acts of part performance by the party seeking relief, as will be considered sufficient in equity to take the case out of the operation of the statute of frauds. *Green* v. *Jones*, 563.

2. In April, 1862, G made an oral agreement for the purchase of real estate of his brother-in-law, S, who agreed to convey the premises free from all incumbrances, when paid for. G paid part of the purchase money down and entered into the possession of the premises and thereafter retained the possession. He made payments towards the balance of the purchase money at different times, completing the payments in 1869. At the time of the agreement, the premises were encumbered by mortgage, and so remained encumbered until about August, 1882. In September, 1882, S died, intestate. *Held*, upon a bill in equity by G against the administrator and heirs of S, that he was entitled to specific performance of the ageement to convey. *Ib.*

STATE LANDS.

In 1864, in pursuance of a resolve of the legislature, 23,040 acres of township No. 11, Range 17, W. E. L. S., in Aroostook county, were by the state conveyed to four academies, and by subsequent conveyances to the Bangor Savings Bank. In 1875, the remainder of the township, except 230 acres reserved for public uses, were conveyed by the state to the plaintiffs, and also the right to cut and carry away the timber and grass on the lands reserved for public uses. In 1881, the bank permitted timber to be cut from that part of the township owned by it, and received pay therefor. In assumpsit for money had and received against the bank to recover a ratable proportion of the amount received for the stumpage, on the ground that one thousand acres ought to have been reserved for public uses from that portion of the township held by the bank. *Held*,

1. That the action could not be maintained.

2. That the plaintiffs' license to cut the timber and grass on the public lots only applied to the public lots reserved from that portion of the township conveyed to them.

3. That if public lots must be regarded as reserved upon this township, they must be located upon the portion last conveyed by the state.

Blake v. *Bangor Sav. Bank*, 377.

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Public Laws of Maine.

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See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

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See NUISANCE, 1.

STUDENTS.

1. The constitution of the state provides that the residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated. This does not prevent a student gaining a voting residence in such place if other necessary conditions exist. He does not acquire a residence because a student, but may acquire one notwithstanding that fact. *Sanders* v. *Getchell*, 158.

TOWNS.

TRADER.

TRESPASS.

TRIAL JUSTICE.

TRUSTEE PROCESS.

See HUSBAND AND WIFE, 2, 3. PROMISSORY NOTES, 4.

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WAYS.

WILLS.